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Report of Working Group V (Insolvency Law) on the work of its sixty-second session (New York, 17–20 April 2023)

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I. Introduction

1. At its sixty-second session, the Working Group continued deliberations on the two topics referred to it by the Commission (civil asset tracing and recovery and applicable law in insolvency proceedings). Background information on those topics may be found in the annotated provisional agenda of the session (A/CN.9/WG.V/WP.185).

II. Organization of the session

2. Working Group V, which was composed of all States members of the Commission, held its sixty-second session in New York, from 17 to 20 April 2023. In accordance with the decision taken by the Commission at its fifty-fifth session,[1] the Secretariat provided a live webcast of meetings in the six languages of the United Nations to allow delegates and observers wishing to follow the session remotely to listen to the deliberations.

3. The session was attended by representatives of the following States members of the Working Group: Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Canada, Chile, China, Croatia, Czechia, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, India, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Malaysia, Mauritius, Morocco, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam and Zimbabwe.

4. The session was attended by observers from the following States: Lesotho, Madagascar, Myanmar, Nepal, Netherlands (Kingdom of the), Pakistan, Paraguay, Philippines, Romania, Slovakia, Slovenia, Sri Lanka and Sweden.

5. The session was also attended by observers from the Holy See and the European Union (EU).

6. The session was also attended by observers from the following international organizations:

(a) *Organizations of the United Nations system*: International Monetary Fund and the World Bank Group;

(b) *Invited international governmental organizations*: Andean Community (CAN), Gulf Cooperation Council (GCC), Hague Conference on Private International Law (HCCH), International Association of Insolvency Regulators (IAIR) and International Institute for the Unification of Private Law (UNIDROIT);

(c) *Invited international non-governmental organizations*: Allerhand Institute, American Bar Association (ABA), Center for International Legal Studies (CILS), China Council for the Promotion of International Trade (CCPIT), Conseil National des Administrateurs Judiciaires et Mandataires Judiciaires (CNAJMJ), European Law Institute (ELI), Fondation pour le Droit Continental (FDC), Groupe de Réflexion sur l'Insolvabilité et sa Prévention (G.R.I.P. 21), INSOL Europe, INSOL International, Instituto Iberoamericano de Derecho Concursal (IIDC), Inter-American Bar Association (IABA), International Association of Young Lawyers (AIJA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), Law Association for Asia and the Pacific (LAWASIA), New York City Bar (NYCBAR), New York State Bar Association (NYSBA), P.R.I.M.E. Finance and Union Internationale des Avocats (UIA).

[1] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 237.

7. The Working Group elected the following officers:

Chairman: Mr. Xian Yong Harold Foo (Singapore)

Rapporteur: Ms. Jasnica Garašić (Croatia)

8. The Working Group had before it the following documents:

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.185);

(b) Note by the Secretariat: civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.186); and

(c) Note by the Secretariat: applicable law in insolvency proceedings (A/CN.9/WG.V/WP.187).

9. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of insolvency topics:
   (a) Legal issues arising from civil asset tracing and recovery in insolvency proceedings; and
   (b) Applicable law in insolvency proceedings.
5. Other business.
6. Adoption of the report.

III. Deliberations

10. Under agenda item 4, the Working Group continued deliberations of legal issues arising from civil asset tracing and recovery in insolvency proceedings and applicable law in insolvency proceedings on the basis of documents A/CN.9/WG.V/WP.186 and A/CN.9/WG.V/WP.187, respectively. The summary of deliberations of the Working Group on the topic of civil asset tracing and recovery in insolvency proceedings (ATR) may be found in chapter IV below. The summary of deliberations of the Working Group on the topic of applicable law in insolvency proceedings (APL) may be found in chapter V below.

IV. Consideration of legal issues arising from civil asset tracing and recovery in insolvency proceedings (A/CN.9/WG.V/WP.186)

A. Comments on an annex in document A/CN.9/WG.V/WP.186

11. The Working Group commenced consideration of agenda item 4 (a) with the reading of the first draft of a descriptive, informational and educational draft text on civil asset tracing and recovery in insolvency proceedings found in an annex in document A/CN.9/WG.V/WP.186 (the draft ATR text). It considered the draft ATR text together with a submission by Poland, noting also relevant developments in the HccH and UNIDROIT.

12. The submission by Poland summarized provisions of domestic legislation that addressed the insolvency representative's access to ATR-relevant registers available in that jurisdiction. It was noted that the insolvency representative's direct access to some of those registers was not possible. Where the domestic legislation allowed only a limited group of persons to search registers, including for reasons of protection of personal information, and that group excluded the insolvency representative, the

insolvency representative had to involve competent authorities in the registry search but no sanctions for non-compliance with the insolvency representative's requests were envisaged. The submission referred to various insolvency representative's powers and obligations, including as regards invalidation of the debtor acts, involvement of the insolvency court in ATR and commencement of evidentiary proceedings.

13. The following suggestions were made as regards the draft ATR text:

(a) With reference to the definition of insolvency proceedings, to expand it with references to out-of-court restructuring and hybrid proceedings that provide for a temporary stay of proceedings. This suggestion did not receive support;

(b) To clarify the difference between "favouritism" and "preferences" in paragraph 27, the former encompassing transfers or transactions at undervalue where the debtor wished to advantage certain creditors at the expense of the others;

(c) To delete the reference to the appointment of an insolvency representative as a provisional or interim measure (the provisional insolvency representative) because that measure could produce a bias towards the commencement of insolvency proceedings. The prevailing view was to retain that reference. The Working Group was informed about different practices with the use of that measure across jurisdictions, including that it was common to apply it between application and commencement of insolvency proceedings in jurisdictions where application did not trigger automatic commencement of insolvency proceedings. It was explained that, unlike the insolvency representative appointed after commencement of the insolvency proceeding, the provisional insolvency representative might be appointed for limited purposes, depending on the needs at hand. The Working Group recalled recommendations 39 and 41 of the UNCITRAL Legislative Guide on Insolvency Law (the Guide)[2] and the UNCITRAL definition of the foreign representative that referred to that measure. The measure was considered necessary in cases where the need for displacement of the debtor from operation of business was evident from the outset. The requirement for involvement of creditors in the appointment of the insolvency representative was not considered impossible to fulfil for the appointment of the provisional insolvency representative. It was considered that justifications for appointing the provisional insolvency representative would inform the decision on cross-border recognition of that measure;

(d) To emphasize throughout the text, including in paragraph 124, the need for expeditious proceedings to ensure effectiveness of ATR, especially in cases where it was suspected that there was no business, just fraud;

(e) Not to prejudice flexibility in devising appropriate ATR measures, subject to appropriate safeguards;

(f) To update a reference to the relevant standards of the Financial Action Task Force (the Guidance on Beneficial Ownership of Legal Persons (Recommendation 24));[3]

(g) In the section comprising paragraphs 69–71, to cross-refer to paragraph 80 (ii) of the draft ATR text that set out the obligations of the debtor to provide accurate, reliable and complete information relating to its financial position and business affairs;

(h) To revise the last sentence in paragraph 76 by replacing the reference to Ponzi schemes with a broader reference to illegal and inappropriate activities of the debtor;

[2] Available at: UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law.

[3] Available at www.fatf-gafi.org/en/publications/Fatfrecommendations/Guidance-Beneficial-Ownership-Legal-Persons.html.

(i) To add explanations in paragraph 77 (point v) of reasons for subjecting transactions with related persons to scrutiny, such as in order to prevent fraud and collusion;

(j) To rephrase the opening of paragraph 80, while maintaining its descriptive character, by conveying that the debtor would generally be required to fulfil the steps listed in that paragraph, except for very limited circumstances;

(k) To explain that the court could compel third parties to fulfil their legal obligations listed in paragraph 85. Issues with professional and bank secrecy were noted in that context as well as in relation to investigative powers of the insolvency representative;

(l) With reference to paragraphs 88–94, to reflect that in some jurisdictions, it would be up to the court to confer any investigative powers to the insolvency representative;

(m) To reflect in paragraph 90 (b) that the insolvency representative might request the debtor to verify accuracy of information compiled by the insolvency representative;

(n) To reflect throughout the text that in some jurisdictions, except for complex cases requiring the appointment of the insolvency representative, the competent State authority might be in charge of administering insolvency proceedings, with the result that no insolvency representative would be appointed and hence the issue of personal liability of the insolvency representative, as opposed to the State liability for actions of the relevant competent authority, would not arise;

(o) To reflect in paragraph 101 that, in some jurisdictions, the suspect period might run from the discovery of the concealed transaction;

(p) To reflect considerations relevant to avoidance in reorganization, including solvency of the debtor, specifics of the debtor-in-possession (DIP) reorganization regime (e.g. conflicts of interest) as compared to reorganizations handled by the insolvency representative, transactions that would usually be subject to avoidance in reorganization (e.g. insider dealings, transfers of assets to related persons) and creditor committee's prerogatives as regards avoidance actions. The need to preserve flexibility in regulating avoidance in reorganization was emphasized, noting that different approaches might be taken across jurisdictions and on a case-by-case basis depending on the impact that avoidance actions were expected to produce on creditors and on perspectives of timely and successful reorganization. Different mechanisms used for avoidance in reorganization were noted, including assignment of avoidance actions to a trust for it to pursue avoidance actions for the benefit of unsecured creditors. The role of those mechanisms for acceptance of a reorganization plan by unsecured creditors, non-uniform treatment of avoidance actions initiated by creditors before reorganization proceedings and different approaches towards the upward valuation of avoided transactions were noted;

(q) To delete reference to employee poaching and illegal phoenixing activity;

(r) To focus on actions against directors that would appropriately fall within the scope of the project (e.g. misappropriation of funds), providing their examples, stressing considerations that usually informed desirability of taking actions against directors (e.g. costs, time and the likelihood of success) and specifying possible alternative sources for funding such actions (e.g. contingency fees and litigation funding);

(s) To replace "and" with "or" in paragraph 120 before item (ii), to align that part with recommendation 220 of the Guide;

(t) To stress the need for cross-border judicial cooperation with respect to ATR, including in the absence of opened insolvency proceedings and also with respect to assets of the debtor located abroad where the debtor did not have any establishment;

(u) To add references to other relevant registers in paragraphs 151–154, including those mentioned in the submission by Poland;

(v) With reference to the suggested additional aspects listed after paragraph 189, to add references only to distinct ATR legal regimes that might be applicable to certain assets. Reservations with respect to including references to carbon and biodiversity credits in the ATR text, the need for further research on ATR of those assets and the plans for holding an UNCITRAL colloquium on climate change in conjunction with the fifty-sixth session of UNCITRAL in July 2023 were noted;

(w) To elaborate on gag and seal orders in paragraphs 190–191, with examples of how they operated in practice;

(x) To narrow the fourth and last sentences in paragraph 192, in particular by clarifying that the failure to apply for the commencement of insolvency proceedings would (not) be (alone) a criminal offence in some jurisdictions, and that the failure to report suspected criminal activity, such as fraud and dissipation of assets in companies, by accountants, tax inspectors and certain other persons identified in the law might lead to their criminal liability in some jurisdictions;

(y) To elaborate on the interaction of insolvency proceedings with criminal proceedings in paragraph 194. The addition of a reference to the relevant case law (money-laundering and the like) was considered useful.

14. With reference to the issues identified for elaboration in a proposed chapter on digital aspects, it was noted that some of them, such as those related to regulatory regimes, double counting, the use of non-fungible tokens (NFTs) as airdrops, artificial intelligence (AI), Internet of Things (IoT) and fraud prevention aspects, would need to be clarified and considered by the Working Group in due course. Desirability of including a detailed chapter on digital aspects of ATR in the ATR text was questioned. Work ongoing in other forums on related matters was recalled. It was noted that, to avoid duplication of efforts and inconsistent results, the Working Group would be compelled to wait for the results of that work, which might delay the completion of work on ATR. Another view was that the results of that other work could be brought to the attention of the Working Group so that it could benefit therefrom.

15. Standards applicable to admissibility of data as evidence, including as they affected the stages of generation, collection, transmission, storage and use of data, were recalled. The possibility of verification of authenticity and integrity of data and the requirement of not using doubtful data on the standalone basis for ascertaining the facts were also recalled. It was considered a good practice to engage professionals as regards those matters sufficiently in advance in the light of the substantial impact that inadmissibility of data as evidence might produce on the entire ATR efforts. The importance of preserving the debtor data stored on servers of third parties and ensuring the insolvency representative's access thereto, which might entail bearing costs of maintenance of such data, was noted.

16. The Working Group completed the first reading of the draft ATR text endorsing the secretariat's plans for further consultations on open issues, including as regards digital assets. The work of both UNIDROIT Working Groups, on Digital Assets and Private Law (DAPL) and on Best Practices for Effective Enforcement (BPEE), was considered relevant in that respect.

B. Next steps

17. With reference to paragraph 3 of document A/CN.9/WG.V/WP.186, the Working Group received a proposal from Canada (see an annex to this report) that listed common objectives, features and safeguards with respect to three groups of ATR tools: tools aimed at obtaining information; tools aimed at freezing assets; and tools aimed at recovering assets (the proposal). That list was suggested to form part of a toolkit that would support requests for cross-border recognition and relief under the UNCITRAL insolvency model laws. It was explained that the principles that

underpinned those key tools were the court's consideration of whether the relief sought was fair, effective, timely and necessary to the integrity of the process and whether it assisted in preserving and maximizing the value of the insolvency estate for the benefit of creditors and other stakeholders.

18. It was submitted that the proposal did not suggest replacing the draft ATR text and was not far removed from what was already provided in UNCITRAL insolvency texts. At the same time, the need for identifying any possible gap in the current cross-border insolvency structure as regards ATR was acknowledged.

19. While the proposal was generally considered to be a good contribution to the discussion on how to make the text on ATR more focused, streamlined, user-friendly and helpful for intended purposes, reservations were expressed with respect to some tools listed in the proposal, which were considered foreign to some jurisdictions. The Working Group agreed that the ATR text should be informative. Nevertheless, the idea of identifying common features across a great variety of existing ATR tools and working towards expedited proceedings that would facilitate ATR, including across borders, was welcomed.

20. The Working Group was informed about case law that demonstrated the importance of, and the need for, expeditious actions in ATR. In response, it was observed that, in civil law jurisdictions, in cases involving fraud or other criminal offences, such as those presented during the session, tools employed for tracing and recovering assets on an expedited basis were different from those employed in civil proceedings. It was recalled that the Working Group, when it discussed the relevant parts of the draft ATR text (see para. 13 (y) above), noted the need to elaborate on the complementarity between civil and criminal proceedings and on the importance of appropriate safeguards while achieving the right balance among different considerations and interests. Those issues were considered valid in the context of the proposal.

21. In ensuing discussion, delegations reiterated their views expressed at the previous session[4] that a revised text, whether prepared in the form of, or accompanied by, a toolkit, a toolbox, a checklist or a list of best practices, should not be prescriptive.

V. Consideration of the topic of applicable law in insolvency proceedings (A/CN.9/WG.V/WP.187)

A. General

1. UNIDROIT definition of insolvency proceedings

22. The Working Group discussed the interaction of the project with the work of the UNIDROIT Working Group on DAPL and expressed its appreciation to the Secretariat for bringing to its attention possible issues of concern in accordance with the latter's mandate from the Commission in relation to coordination and cooperation with other organizations. The Working Group discussed a possible inconsistency between UNCITRAL's definition of insolvency proceedings (with the related cumulative list of requisites that a proceeding must meet in order to be considered an insolvency proceeding) and UNIDROIT's draft Principle 2 (6) and accompanying commentary in the draft DAPL text that was before the UNIDROIT Working Group on DAPL at its sessions in March and April 2023.

23. Some delegations were of the view that the definition of insolvency proceedings found in UNIDROIT's draft, although broader, was not inconsistent with the definition found in UNCITRAL insolvency texts.

[4] A/CN.9/1126, para. 34.

24. Concern was expressed about a possibility of confusion and fragmentation arising from the adoption of a different definition of such a key concept as insolvency proceedings in different international forums. The role of UNCITRAL in setting global insolvency law standards was recalled. While different views were expressed as to the extent of that risk, the Working Group agreed on the importance of avoiding unnecessary inconsistencies.

25. Other delegations noted that the boundaries of insolvency law and insolvency proceedings were constantly tested and were of the view that UNCITRAL's definition of insolvency proceedings might need to be modified. Despite that view, it was not considered desirable or necessary to introduce changes to UNCITRAL's definition of insolvency proceedings since it enabled solutions to be found in the cross-border insolvency context.

26. The Working Group noted the role of member States of UNCITRAL and UNIDROIT in relation to the work of each organisation. It also noted that coordination and cooperation between UNCITRAL and UNIDROIT was a matter for the Commission to consider.

2. Cross-border recognition aspects

27. The Working Group heard proposals that the draft text on applicable law in insolvency proceedings found in document A/CN.9/WG.V/WP.187 (the draft APL text) should be revised to ensure that it comprehensively addressed the governing law also in the context of cross-border recognition under the UNCITRAL insolvency model laws. The need for consequential amendments throughout the draft APL text was noted.

28. Noting that the Working Group had not yet discussed the governing law in concurrent and enterprise group proceedings, a view was expressed that provisions throughout the text referring to those matters should appear in square brackets. It was questioned whether the project should be extended to enterprise group insolvency. The decision taken by the Working Group at its fifty-ninth session as regards the scope of the intended work and the step-by-step approach to handling it was recalled.[5]

B. Comments on specific provisions

1. Comments on the draft provisions preceding the draft provisions on avoidance

29. The following suggestions were made:

(a) To clarify paragraphs 4 and 9 of the draft commentary to the preamble;

(b) To replace abusive forum shopping with prejudicial forum shopping;

(c) To list entities excluded from the scope of application of the legislative provisions either in the scope provision itself or in the accompanying commentary (referring, among others, to insurance, reinsurance, banking institutions and entities operating under public law);

(d) To replace the last sentence in paragraph 2 of the draft provision on the scope of application of the legislative provisions with the last sentence of paragraph 8 of the accompanying commentary. That suggestion was not taken up;

(e) To specifically mention "pre-packs" in paragraph 2 of the draft commentary to the draft provision on the scope of application of the legislative provisions, explaining that term and stressing that only pre-packs that met the cumulative list of requisites would be considered insolvency proceedings;

(f) Recalling the discussion of the UNIDROIT definition of insolvency proceedings (see paras. 22–26 above), to consider whether the envisaged APL framework was intended to apply also to pre-commencement restructuring

[5] A/CN.9/1088, para. 58.

proceedings and if so, to expand paragraph 2 of the draft commentary to the draft provision on the scope of application of the legislative provisions with references to those proceedings;

(g) To delete the draft commentary under definitions. No support was expressed for that suggestion. Subsequently, a suggestion was made to delete examples (d), (e) and (f) in that draft commentary;

(h) To reconsider the need to use Latin terms, which, for example, were no longer used in the HccH and no longer to be used under plain and more accessible legal writing standards. The views expressed on the same matter at the previous sessions were reiterated,[6] and the view prevailed again to continue using Latin terms in the light of their well-known and understood meaning. Doubts were expressed about that assertion since the draft APL text noted the different meanings of, for example, lex societatis. The need for inclusion of definitions of Latin terms, as envisaged in the draft APL text, if those terms were well known and understood, was also questioned;

(i) To replace in paragraph 6 reference to international agreements with reference to other international instruments, as in the UNCITRAL insolvency model laws, to ensure that EU insolvency regulations would be covered;

(j) To consider the need for adding a public policy exception in the cross-border recognition context and including reference to fundamental principles of procedural fairness there (like was done in the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments[7]). The relevance of an adequate protection safeguard was recalled in that context. In response to suggestions to delete the word “only” in the draft provision on public policy exception, an alternative suggestion was to retain that word, or the draft provision in its entirety, in square brackets for further consideration. Doubts were expressed that the establishment of two sets of standards of different levels of rigidity for a public policy exception in the domestic and cross-border insolvency recognition contexts would be justified;

(k) To explain in the commentary to the public policy exception that various scenarios might ensue as a result of the displacement of the originally applicable law, and that issue would most likely be already addressed in the domestic law;

(l) To convey in paragraphs 10 and 11 of the draft commentary to the lex fori concursus list that case law had evolved towards deferral to the law of the foreign main proceeding, and such deferral was a norm in the EU member States;

(m) To reconsider references to non-insolvency law throughout the draft APL text, instead conveying more clearly that the law other than the insolvency law may apply as part of the lex fori concursus, and illustrate such laws.

2. Avoidance

30. It was suggested that item (g) on the lex fori concursus list should refer also to voidness of acts.

31. In response to queries regarding the first sentence of paragraph 20 of the draft commentary to the lex fori concursus list, recalling that workers’ claims in many jurisdictions enjoyed the privileged status, some delegations suggested that the sentence should be deleted since it referred to very rare cases of avoidance in relation to labour contracts and relationships. The prevailing view was to retain the sentence with examples of when such avoidance might happen, and with explanation of how the lex fori concursus could interact with lex causae, lex laboris and the overriding provisions of labour law in those cases. Inclusion of such explanation was considered necessary in the light of the exception to the application of the lex fori concursus

[6] A/CN.9/1126, para. 65.

[7] United Nations publication, Sales No. E.19.V.8. Available at: UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment.

envisaged in the draft APL text for labour contracts and relationships. Recalling the relevant deliberations at the Working Group's previous sessions,[8] the Working Group requested the secretariat to amend the draft commentary accordingly.

32. The Working Group heard different views with respect to a draft variant on avoidance found after paragraph 20 of the draft commentary to the lex fori concursus list. Some delegations considered the variant unnecessary because it undermined legal certainty, encouraged law shopping, was cumbersome to implement, benefited parties with stronger bargaining powers and encouraged further exceptions to the lex fori concursus. It was also considered that the public policy exception had already provided a sufficient protection to creditors, and creditor protections would also be found in the domestic insolvency law framework. Envisaging additional protection for creditors in the APL text was therefore considered unnecessary.

33. An alternative suggestion was to retain the variant as an option for States to consider. Other delegations were flexible as regards the deletion of the variant or its retention with amendments proposed at the session. Another suggested approach was to emphasize in the APL text that any exception to the lex fori concursus with respect to avoidance would work only across jurisdictions that had harmonized avoidance frameworks.

34. The prevailing view was to retain the draft variant with several amendments. It was agreed to delete the phrase commencing with "and that applying that law to the transaction …" in the second paragraph. Some considered the rest of that paragraph also unnecessary. Others considered that it contained essential safeguards, such as against law shopping, and could be merged with the first paragraph in a way that would make it clear that the default law applicable to avoidance was the lex fori concursus and that there were only very limited exceptions to that rule, as they would be listed in the provision. It was stressed that, as a result of that reshuffling of the provisions, the allocation of the burden of proof should not inadvertently be shifted to the wrong person. In particular, it was considered justified to require that elements listed in the first paragraph, which were difficult to prove, would have to be proved by the defendant, unlike elements listed in paragraph 2 that would have to be proved by the counterparty (the insolvency representative or otherwise).

35. In respect of the first paragraph, the suggestion was to delete the end of the sentence starting with "and that other law…", which was considered to be outside the scope of choice-of-law provisions. An alternative proposal was to redraft the provisions to convey that the lex fori concursus was the default law applicable to avoidance unless parties to the transaction had no reasonable basis to know that that law would apply to avoidance of their transaction in case of insolvency of one of them. Difficulties that judges might face with applying that proposed provision were noted.

36. It was suggested that the provision might be placed separately from the lex fori concursus list, as was done in Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (EIR recast).

3. Secured transactions

37. The Working Group recalled previous deliberations on whether it would be the lex fori concursus or the lex rei sitae that would govern effects of insolvency proceedings on the treatment of rights in rem, in particular secured creditors. While some delegations reiterated their position on the matter, some favouring the lex fori concursus while the others favouring the lex rei sitae,[9] new ideas for bridging differences emerged during the session.

38. Recalling the content of article 8 of the EIR recast, directly applicable and binding in the EU member States, and noting that that article contained not a

[8] A/CN.9/1126, paras. 75–79 and A/CN.9/1094, para. 89.
[9] A/CN.9/1126, paras. 45–46.

choice-of-law but a substantive rule on the treatment of rights in rem in insolvency proceedings, and that that rule was conceived before the adoption and transposition of the EU Directive on restructuring and insolvency,[10] some delegations suggested ways of reflecting the gist of that article in the APL text in the form of choice-of-law rules. In that context, the cross-border insolvency recognition and relief framework with its safeguards, such as a public policy exception and adequate protection of creditors, and rules governing a stay of proceedings and relief from the stay were considered relevant.

39. It was suggested that the default law on the matter, for example, the lex fori concursus, might need to be similarly accompanied by safeguards and exceptions. Those safeguards and exceptions were considered necessary to ensure that: (a) the validity and effectiveness of rights in rem and legitimate expectations and interests of secured creditors would be recognized and adequately protected, including from diminution of the value of an encumbered asset, in the State of the opening of insolvency proceedings and in other States upon recognition of the effects of the commenced insolvency proceedings; and (b) the effects of the commenced insolvency proceedings on enforcement of those rights would be recognized and enforced across borders when necessary.

40. It was explained that the circumstances of the case would dictate the need for particular exceptions and safeguards from those that the APL text might provide. Reference was made to the following relevant circumstances: whether the case involved a piecemeal sale or preservation of the value of the business as a going concern; the nature of a given right in rem; and the importance of an asset concerned for insolvency proceedings.

41. The Working Group welcomed those ideas and encouraged further consultations among interested delegations. The need to assess implications of suggested approaches and to consider ways of incorporating them in the APL text was noted. For further consideration of the matter, it was considered helpful to: (a) have those ideas in writing; (b) clarify the meaning of the “treatment of secured creditors”; and (c) assess whether possible solutions would depend on whether the right in rem was in a movable or immovable property.

4. Other drafting suggestions

42. The following other drafting suggestions were made with respect to the draft commentary to the lex fori concursus list:

(a) To provide a variant for the treatment of contracts with immovable property. A point was made that the provisions of the EIR recast on that subject were complex, and it remained to be clarified how that variant could be drafted;

(b) To consider moving reference to avoidance of pre-commencement set-off from the draft commentary to item (i) to the commentary to item (g);

(c) To delete the first sentence in paragraph 25 or explain the meaning of equitable set-off and bank set-off in a footnote or in the text;

(d) To delete notes in square brackets under items (k) and (l), clarifying, if necessary, in the text that the law of the recognizing State would prevail in case of conflict in addressing powers of the insolvency representative to represent the insolvency estate in the recognizing State. The same was considered to apply for rights and obligations of the debtor;

(e) In paragraph 37 and other parts of the commentary to the lex fori concursus list, to explain how perspectives of cross-border recognition of the effects of the lex fori concursus might impact the treatment of secured creditors and ranking of their

[10] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

claims under the lex fori concursus. The link of those issues with unfinished consideration of the law governing effects of insolvency proceedings on the treatment of rights in rem (see paras. 37–41 above) was noted;

(f) With reference to the notes in square brackets under paragraph 40, to transpose paragraph 84 of the commentary to recommendations 30–34 of the Guide expanding it with an indicative list of criteria usually used to assess functional equivalence of claims (e.g. source of the obligation, nature of creditors and underlying interest that justify the preferential treatment of the claim) as well as practical examples of establishing equivalence in labour claims (it was considered difficult to illustrate establishing equivalence with reference to other claims, in particular public claims);

(g) To elaborate in the commentary to item (o) on non-discrimination of foreign public claims, with reference to some instruments.[11] It was considered desirable to achieve harmonization at the global level of the treatment of foreign public claims, taking into account that practices on that matter differed, with no recognition to foreign public claims usually granted in the absence of international treaties. The Working Group did not take up that suggestion in the light of the views expressed that the commentary, with a cross reference to article 13(2) of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI),[12] had already sufficiently addressed that point, and that including any additional details would be outside the scope of the project. In response to the view that the treatment of foreign public claims should be addressed in the commentary to item (n) rather than item (o), it was considered that it belonged to both items;

(h) In paragraph 43, to replace the word “establishes” with “determines”;

(i) To delete paragraph 47;

(j) To replace the words “very limited” with “specific” in paragraph 49.

5. Payment and settlement systems and regulated financial markets

43. A view was expressed that the scope of the provisions should be reconsidered by including references to close-out netting arrangements, both bilateral and multilateral, and also to clearing systems, such as those envisaged in the EU market infrastructure regulation.[13] While it was considered sufficient to address matters related to clearing systems in the commentary (and adding there also references to multilateral facilities), inclusion of an exception to the lex fori concursus for close-out netting arrangements in the legislative provisions themselves was considered necessary. It was explained that close-out netting arrangements raised the same issues and required the same exception even if they did not have the same characteristics as payment and settlement systems, clearing arrangements or regulated financial markets. It was considered that an exception for close-out netting arrangements might appear in the same exception as for payment and settlement systems and regulated financial markets or in a separate one.

44. Another view was that the exception as drafted was too broad and should be limited to only those matters that fall outside the lex fori concursus. According to that view, some matters pertaining to payment and settlement systems and regulated financial markets, such as treatment of ipso facto clauses, would fall under the lex fori concursus. Reference was made to the World Bank Principle C.10 and an accompanying footnote 9 that deferred some matters related to financial contracts to the lex fori concursus.

[11] See e.g. article 2 (12) of the EIR recast.

[12] United Nations publication, Sales No. E.14.V.2. Available at: UNCITRAL Model Law on Cross-Border Insolvency (1997) | United Nations Commission On International Trade Law.

[13] Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories.

45. In ensuing deliberations, views differed on those matters, in particular whether the scope of the exception should be narrowed or expanded. Support was expressed for addition of derivative clearing systems in the exception but not close-out netting arrangements, in particular bilateral ones. It was noted that bilateral close-out netting arrangements would appropriately be subsumed by set-off provisions found on the lex fori concursus list. It was thus considered that the exception, as drafted, rightly focused on multilateral systems. It was noted that with or without those amendments, the exception should be construed very narrowly.

46. The Working Group requested the secretariat to perform additional research on those issues, including on any emerging trends in regulation of digital asset platform operators. It was noted that those platforms shared similarities with systems and markets intended to be covered by the exception and, for that reason, might need to be made subject to the same exception. The secretariat announced its plans to hold further expert consultations on those issues. Delegates and observers to the Working Group were requested to communicate to the secretariat the names of relevant experts and also legislative and other materials that could facilitate the secretariat's task, noting that the issues were complex and not settled yet in legislation and regulations.

6. Ongoing or pending arbitral proceedings and litigation

47. Views differed on the need to have an exception for ongoing or pending arbitral proceedings. In support of retaining it, the arguments of legal certainty, predictability and promotion of commercial arbitration, freedom of contract, party autonomy and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)[14] were advanced. It was also noted that allowing arbitral proceedings to continue under a foreign lex arbitri did not amount to enforcing an award against the estate under the lex fori concursus. Arguments against inclusion of that exception included that the exception was undermining the objectives of the insolvency law, in particular the equal treatment of similarly situated creditors in insolvency proceedings, and that there were no principled reasons for distinguishing treatment of arbitration under the lex fori concursus from litigation.

48. Other concerns with the exception were that deferral to the lex arbitri was not practicable since the insolvency estate would lose control over matters such as costs, expenses and time needed for the insolvency representative's intervention in a foreign arbitral proceeding. Issues addressed in the exception were thus considered closely linked to the items on the lex fori concursus, such as on a stay of proceedings and costs. It was also considered necessary to assess practical implications of the exception, in particular enforceability of the results of the arbitral proceedings if they were allowed to proceed under the lex arbitri in violation of a stay under the lex fori concursus.

49. If that exception were to be retained, some delegations considered that it should be drafted very narrowly, only with reference to the law that would govern insolvency law effects on arbitral proceedings, in particular whether arbitral proceedings would be stayed as the result of the commencement of insolvency proceedings. They considered that determination of the law governing purely arbitration law matters, such as arbitrability and arbitration rules, was outside the scope of the project. In addition, matters such as the law that would determine which forum should adjudicate disputes as well as validity of arbitration agreements, should also be excluded from the exception. For those reasons, they found the scope of the draft legislative provision unduly broad and the reference to the lex arbitri unclear, in particular whether it referred to the law of the State where arbitration proceedings took place or the law of arbitration. It was suggested that the drafting should be refined and be more nuanced, and the commentary to be added should explain numerous issues arising

[14] United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3. Also available at: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the "New York Convention") | United Nations Commission On International Trade Law.

from that exception in different scenarios, for example when the lex arbitri and the lex fori concursus were the same and when that was not the case.

50. The other view was that the exception, in addition to a stay, should cover issues such as the capacity to arbitrate and formalities that the insolvency representative ought to fulfil in order to be able to join ongoing or pending arbitral proceedings. It was also queried why effects of insolvency proceedings on the validity of an arbitration agreement would not be covered by an exception to the lex fori concursus as well.

51. While calls were made to differentiate procedural from substantive matters, and extend the exception only to the procedural matters, ensuing discussion demonstrated that drawing the line between the two was not easy. For example, automatic stay was considered by some a procedural matter while for others it was a substantive matter.

52. The Working Group discussed whether there should be an exception for ongoing or pending litigations similar to the one drafted for ongoing or pending arbitral proceedings, in particular as regards a stay. It was recalled that article 18 of the EIR recast covered both matters, and it was considered that both matters raised the same issues and considerations, for example the need to seek approval of the creditor committee for participation in litigation or arbitral proceedings and to cover expenses in connection with such participation. A view was expressed that a main reason for the stay that followed an application for commencement of an insolvency proceeding under the lex fori concursus was to give the debtor a respite from ongoing litigation with which the debtor was often burdened.

53. Noting preferences of some delegations for the removal of the exception and preferences of some others for retaining it, the Working Group agreed that further assessment of implications of different options, beyond implications on a stay of proceedings, would be required. It was considered necessary to explore the scope of a possible exception to the lex fori concursus (the lex arbitri) with reference to both procedural and substantive aspects and relief provisions of MLCBI before the need to change the approach explained in paragraph 180 of the Guide to Enactment and Interpretation of the MLCBI towards arbitration could be assessed. The need to consider ongoing or pending arbitral proceedings together with litigation aspects, as was done in article 18 of the EIR recast, was acknowledged.

VI. Other business

54. The Working Group took note of the tentative dates of its sixty-third session (11–15 December 2023), and that the dates of that session would be confirmed by the Commission at its fifty-sixth session in July 2023.

55. In response to queries regarding expert groups meetings that might be convened by the Secretariat and intersessional informal consultations that might be held by interested delegations, the secretariat referred the Working Group to the UNCITRAL reports that addressed those issues.[15]

56. Some delegations welcomed organization by the secretariat of intersessional informal consultations among interested delegations while others expressed concerns about holding them. Those delegations that welcomed holding intersessional informal consultations considered them essential and helpful for making progress on complex matters faced by the Working Group. Those delegations that expressed concerns about holding them considered that excessive recourse to such consultations could be detrimental to transparency and inclusiveness in the work on the projects entrusted by the Commission to the Working Group, in particular because some States would not have resources to follow those informal consultations and would also face language and time difference constraints.

[15] A/65/17, annex III, paras. 11–14 and A/77/17, para. 238.

57. While noting that issues related to work methods of UNCITRAL and its working groups were matters for the Commission to consider, a view was expressed that it was for the Working Group to decide on the need to hold intersessional informal consultations and to consider also possible alternatives.

58. Some delegations expressed support for holding intersessional informal consultations before the next session of the Working Group. While no objection was expressed to holding them, a view was expressed that recourse to them should be exceptional. A request was made to avoid open-ended consultations without any agenda, minutes and summaries. In response, it was noted that those issues were to be discussed and agreed upon by participating delegations. The Working Group took note of suggested dates for holding intersessional informal consultations online before its next session, in addition to those scheduled to take place immediately after the session on 21 April (6–7 June 2023 or 6–7 September 2023 or both, during early afternoon hours (Vienna time) to accommodate participation from as many time zones as possible).

59. Having taken note of developments in the work of UNIDROIT on DAPL and BPEE of relevance to ATR and APL, the Working Group reiterated the importance of cooperation and coordination with UNIDROIT, as mandated by the Commission.[16]

[16] *Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 17* (A/77/17), para. 190.

Annex

Contribution of the delegation of Canada on asset tracing and recovery – considerations for further work[17]

1. The identification, tracing, and recovery of a debtor's assets for the benefit of stakeholders with legal claims against those assets have become highly challenging in the digital age, due to the ease of movement of assets between jurisdictions. While many countries have tools to enable asset tracing and recovery (ATR), these tools differ from jurisdiction to jurisdiction and often are not recognized across borders in a manner that keeps pace with the need for rapid ATR during insolvency. While the names differ, it is possible to discern three key ATR tools that have common objectives, features, and safeguards. We can refer to these tools generically as orders or measures to obtain information, "temporarily freeze" assets, and for recovery and realization, recognizing that common law jurisdictions often refer to this relief as "orders" and civil law jurisdictions as "measures" or "provisions".[18]

2. Applications for ATR to a foreign court are aided by the UNCITRAL Model Law on Cross-border Insolvency (MLCBI), the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI), and UNCITRAL's other model laws and guidance. Under the MLCBI, once an "in-bound court" (court receiving a request for relief) recognizes a foreign main proceeding, the right to transfer or otherwise dispose of any assets of the debtor within the in-bound jurisdiction is suspended and a mandatory stay is imposed (MLCBI article 20). Upon recognition of either foreign main or non-main proceedings, an in-bound court may issue orders or measures that support ATR, including measures necessary to protect the assets of the debtor or the interests of creditors; providing for examination of witnesses, or delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities; and entrusting the realization of all or part of the debtor's assets located in the state of the in-bound court to the foreign representative or another person designated by the court (MLCBI, article 21).[19]

3. Despite these measures that support ATR and prevent fraud, there are gaps and uncertainties, particularly where States have not adopted the MLCBI or analogous legislation to effectively trace and recover assets; where discretionary relief is defined in broad terms or provisions may be interpreted in different ways by courts; or where there is uncertainty regarding applicable law. Such uncertainties can result in losses to stakeholders affected by insolvencies of different businesses sizes, and can be particularly detrimental in small and medium enterprise (SME) cross-border insolvencies that typically have limited resources.

4. Further to its mandate to offer guidance to States to facilitate use of ATR mechanisms, including in the cross-border context,[20] Working Group V has completed consideration of a colloquium report, an inventory, and a consolidated text describing ATR in different States.[21] As part of its consideration of next steps to be taken,[22] this paper proposes that the Working Group is now well-positioned to consider ATR tools that have common objectives, features, and safeguards across different jurisdictions that can form part of a toolkit that supports requests for cross-border recognition and

[17] This paper draws heavily on a forthcoming article titled "Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency" by Janis Sarra, Stephan Madaus, and Irit Mevorach.

[18] While the term "order" is used in common law jurisdictions, "measures" could be considered a jurisdiction-invariant term that covers all sorts of legal and formal configurations that these measures may have.

[19] Civil law jurisdictions that have not enacted the MLCBI may have a more defined set of ATR tools.

[20] A/CN.9/1088, para. 28; A/CN.9/WG.V/WP.185, part III; *Official Records of the General Assembly, Seventy-fifth Session, Supplement No 17* (A/75/17).

[21] A/CN.9/WG.V/WP.185, part III; A/CN.9/WG.V/WP.182; and A/CN.9/WG.V/WP.186.

[22] A/CN.9/WG.V/WP.186, para. 3.

relief under the Model Laws and analogous legislation. The principles that underpin these key tools are the court's consideration of whether the relief sought is fair, effective, timely, and necessary to the integrity of the process; and whether the relief assists in preserving and maximizing the value of the insolvency estate for the benefit of creditors and other stakeholders. Identifying the commonalities in ATR tools will enhance the ability of States to grant cross-border recognition and relief.

1. Orders or Measures to Obtain Information

Objective: Orders or measures recognizing foreign orders/measures to disclose information on assets located in the in-bound jurisdiction, including the examination of witnesses, the taking of evidence, and the delivery of information. In cases of fraud, poor record keeping, or concealment of assets in the in-bound jurisdiction, the information order/measure can facilitate identifying missing assets that should be in the insolvency estate.

Features

- Information orders/measures sought in the in-bound court can include court-mandated disclosure of information concerning the debtor's assets, production of records, and examination of the debtor and any third party that has had dealings with the debtor relevant to tracing assets, in order to obtain information concerning the value and location of the assets in the foreign jurisdiction and information on past transactions that may be needed for the purpose of avoidance actions or actions against directors for misconduct in their dealing with the assets (MLCBI articles 7, 19, 20 and 21).
- Requests to obtain information about the location of assets before they dissipate must be treated with urgency in order to be useful and effective.
- The in-bound court may require evidence that the debtor (individual or entity) and its principals (directors, officers, owners) are failing to meet their obligations pursuant to insolvency or related law in the home jurisdiction to provide accurate, reliable, and complete information regarding the debtor's assets, or are failing to cooperate in the recovery of those assets, wherever located.
- Often there is need for information concerning location of assets prior to commencement of insolvency proceedings to ensure that the value is preserved and not diminished by the actions of the debtor, creditors, or third parties before commencement of proceedings.
- Subject to safeguards, the insolvency professional can request orders *ex parte* (without notice), with a sealing order or injunction on disclosing the information order/measure until it is executed in the in-bound jurisdiction.
- Subject to safeguards, orders/measures requiring information from banks, Internet service providers, or other third parties that may confirm account or asset transfers.
- The court can require that the debtor(s), including its directors and officers, file a complete and detailed list of assets and liabilities and a list of any assets transferred in the year prior (or other specified lookback period) to the filing of the insolvency proceeding, and the in-bound court can impose sanctions on them for failure to comply.

Safeguards

- Provisional and discretionary relief is subject to public policy and adequate protection safeguards (MLCBI articles 6, 7, 20 and 22).
- The in-bound court may recognize an order/measure from the originating court, or approve an order/measure in secondary proceedings, on the basis that

creditors are likely to suffer irreparable harm if access to the information is not granted.

- If an *ex parte* order/measure for recognition of a foreign order/measure for information and/or temporary sealing of the information order is sought, the in-bound court may require the applicant to indemnify affected parties or post security with the court that will cover damages in the event that the order/measure is wrongfully ordered or executed.
- An order/measure obligating a third party to disclose information must relate to information that reasonably appears to be within that person's control; and the in-bound court can order that a third party be indemnified for costs for which it may be exposed because of the required disclosure.
- The rights of the debtor and relevant third parties would be respected by allowing for prompt judicial review of the order/measure *ex post* where a party disputes the decision.

2. Temporarily Freezing Assets

Objective: Orders or measures protecting value by temporarily restraining the transfer, sale, or disposition of assets in the in-bound jurisdiction where they are at risk of being hidden, transferred, or dissipated.

Features

- Provisional freezing relief can include stays preventing transfer, sale, or disposition of the debtor's assets (MLCBI articles 7, 19, 20 and 21).
- Such temporary relief on an urgent basis retains the *status quo* in terms of location of the assets, preventing further interjurisdictional transfer or dissipation of assets until issues in respect of who has rights to the value of the assets are resolved, usually in the home (originating) jurisdiction.
- The applicant has satisfied the originating court that it has a *prima facie* case that the defendant has assets in the foreign jurisdiction and there is a serious risk that the defendant will remove, transfer, or dissipate assets before judgment in order to thwart tracing, and the in-bound court recognizes that order/measure.
- A sealing order or injunction preventing disclosure of the freezing order/measure until it has been executed in the in-bound jurisdiction may be critically important to being able to prevent further dissipation or transfer of assets.
- To the extent the insolvency representative discovers assets not listed by the debtor(s), an *ex parte* order can be issued under seal without any further evidentiary requirements.

Safeguards

- Provisional and discretionary relief is subject to public policy and adequate protection safeguards (MLCBI articles 6, 7, 20 and 22).
- The in-bound court may recognize an order/measure from the originating court, or issue an order/measure in secondary proceedings, on the basis that creditors are likely to suffer irreparable harm if the injunction or other relief preserving value is not granted.
- Only a high degree of urgency would justify immediate relief without a prior hearing or notice to affected parties. If an *ex parte* order for recognition of a foreign temporary freezing order/measure or a temporary sealing or injunction of the freezing order/measure is sought until that measure is executed, the in-bound court may require the applicant to indemnify affected parties or post security with the court that will cover damages in the event that the order/measure is wrongfully ordered or executed.

- The rights of the debtor and relevant third parties would be respected by allowing for prompt judicial review of the order/measure *ex post* where a party disputes the decision, including the ability to seek orders lifting or adjusting the relief, or, in the appropriate case, damages.[23]

3. Recovery and Realization

Objective: Orders or measures that allow recovery of illegal transfers or transfers that seek to hide assets or defraud creditors. The objective is to recover assets inappropriately disposed of or transferred to persons involved in the transactions, subject to some evidentiary requirements and defences.

Features

- The right of an insolvency representative to recover or realize assets may only be enforceable after a final decision on the merits in a court of law (originating court or court of an in-bound jurisdiction), if disputed.
- Recovery and realization of assets where insolvency proceedings have commenced in a jurisdiction that can be recognized by an in-bound court as foreign main (or non-main) proceedings pursuant to any established cross-border insolvency framework (MLCBI, article 21).
- The transfer of assets to third parties may be evaluated *ex post,* under the relevant avoidance rules, in order to facilitate the recovery of assets. Avoidable transactions include those transactions intended to defeat, delay, or hinder the ability of creditors to realize on the value of assets to meet their claims (UNCITRAL Legislative Guide, rec. 87).
- In a cross-border insolvency case, such transactions may be avoided by the main proceeding's court under the law of the forum and may be recognized and enforced abroad (MLCBI article 21, MLIJ[24]), or avoidance may be initiated by the foreign representative in the in-bound court (MLCBI article 23).
- For avoidable transactions in the enterprise group context, an original order/measure may be issued in the proceeding of the parent entity that is applicable to a group entity in another jurisdiction; and the in-bound court may have regard to the circumstances in which a transaction took place, including the relationship between the parties to the transaction, whether the transaction contributed to the operations of the group as a whole, the purpose of the transaction, and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties (UNCITRAL Legislative Guide, Treatment of enterprise groups in insolvency, rec. 217).

Safeguards

- Discretionary relief is subject to public policy and adequate protection safeguards (MLCBI articles 6 and 22).

[23] For example, "EU Regulation No 655/2014, establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters" allows for speedy *ex parte* preservation of funds held in bank accounts in cross-border cases among member States. It safeguards a debtor's right to a fair trial after issue of an *ex parte* European Account Preservation Order by enabling the debtor to contest the order or its enforcement after the order is implemented. No preservation order can be issued against a debtor once insolvency proceedings as defined in Council Regulation (EC) No. 1346/2000 (1) have been opened, but they can be used to secure the recovery of detrimental payments made by such a debtor to third parties (avoidance actions).

[24] Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ), referencing the entire Model Law, including Article X.

- Final recovery and realization orders/measures are not made absent a final judgment on ownership and claims to the assets, and such judgments are to be rendered only after a hearing with notice.
- For avoidance actions, on the in-bound court's recognition of a foreign proceeding, the foreign representative has standing to initiate avoidance actions, and when the foreign proceeding is a foreign non-main proceeding, the in-bound court must be satisfied that the action relates to assets that, under its laws, should be administered in the foreign non-main proceeding (MLCBI article 23).