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## Civil asset tracing and recovery in insolvency proceedings

Note by the Secretariat

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## I. Introduction

1. The background information about the project on civil asset tracing and recovery in insolvency proceedings referred to the Working Group by the Commission at its fifty-fourth session<sup>1</sup> may be found in the provisional agenda of the sixtieth session of the Working Group (A/CN.9/WG.V/WP.177, paras. 4–9). As requested by the Working Group, this note compiles provisions from UNCITRAL insolvency texts related to asset tracing and recovery in insolvency proceedings (ATR and the ATR-related provisions). The resulting compilation was considered necessary for identification by the Working Group of any missing provisions in the best practice guidance already provided by UNCITRAL.<sup>2</sup> In addition, this note refers to broad categories of ATR tools linked to the ATR-related provisions (the ATR tools) and, without prejudice to the Working Group's decision on the form of a future text on the topic, suggests some terms that may be helpful in the context of the project (the ATR terms).

2. The tabular form was chosen for presenting the ATR terms, the ATR-related provisions and the ATR tools. If a future text on the topic takes the form of an educational and informational toolbox as was suggested at the fifty-ninth session of the Working Group,<sup>3</sup> the chosen form would allow converting materials to an online toolbox more easily if it is so decided.

## II. ATR terms

3. Table 1 annexed to this note compiles the ATR terms. The list is preliminary, and adjustments would be unavoidable during the project. In particular, depending on the evolution of the project, other terms may need to be added, for example those explaining various tracing rules and methods,<sup>4</sup> especially if the project would not be limited to legislative aspects of ATR. The Working Group may wish to clarify that.

4. In compiling the ATR terms, the secretariat used as the starting point the Glossary terms found in the Introduction to the UNCITRAL Legislative Guide on Insolvency Law (the Guide), unless otherwise noted. Those terms were updated to align them with definitions of the same terms found in other UNCITRAL insolvency texts (the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI), the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments (MLIJ) and the UNCITRAL Model Law on Enterprise Group Insolvency (MLEGI)). Full alignment was not considered necessary since some differences in description or definition of those terms across UNCITRAL insolvency texts are context-specific and are not significant for the purposes of this project.

5. The Working Group may wish to consider the ATR terms listed in table 1 together with specific issues brought to the attention of the Working Group in square brackets in that table.

## III. ATR-related provisions

6. Table 2 annexed to this note groups the ATR-related provisions under relevant categories, pointing to their relevance to the project. As was envisaged at its fifty-ninth session (see para. 1 above), the Working Group may wish to use that table

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

<sup>2</sup> [A/CN.9/1088](#), para. 31.

<sup>3</sup> [A/CN.9/1088](#), para. 23.

<sup>4</sup> Surveyed texts refer, for example, to the lowest intermediate balance test (LIBT), the first-in, first out (FIFO), last-in, first-out (LIFO) as well as different types of trusts. Provisions of UNCITRAL secured transactions texts on proceeds, tangible assets comingled in a mass or transformed into a product may be of relevance in that respect.

for identifying any gaps that may need to be filled in during the project. In that context, the secretariat draws the attention of the Working Group (in square brackets in the table) to the points made during the fifty-ninth session of the Working Group or additionally identified by the secretariat during its preparatory work.

#### IV. Illustrative list of ATR tools

7. Table 3 annexed to this note refers to broad categories of ATR tools linking them with the relevant ATR-related provisions. It is illustrative and is expected to be expanded with description of more specific tools that in turn could be divided into different groups.<sup>5</sup> Tools that do not require court orders are not covered in that table at this stage (e.g. search of registries and other open sources for identification of property ownership, security interests, etc.).

8. As was noted at the fifty-ninth session of the Working Group,<sup>6</sup> some ATR tools may be of general application. Conditions for their use and accompanying safeguards for affected persons may need to be adjusted to specifics of insolvency proceedings as collective enforcement proceedings and to duties and powers of the insolvency representative. In particular, differences may arise in the application of ATR tools depending on who uses them and in which context of ATR. For example, executive officers of the court who perform the role of official receivers may have broad administrative and investigative powers in ATR. Insolvency representatives generally may be empowered with appropriate statutory tools to fulfil their functions, such as taking control of insolvency estate assets and business records, or obtaining information concerning the debtor, its assets, liabilities, past transactions and business records. Other persons who may end up performing certain ATR actions with the agreement of the insolvency representative or the competent authority or with leave of court will not have such powers. Those powers will also not exist when insolvency representatives act as parties in commercial litigation, arbitral proceedings or administrative proceedings concerning the debtor or the insolvency estate. In some jurisdictions, those persons may still have broader rights than other parties in some proceedings, including criminal ones.

9. In that context, the Working Group may wish to clarify the desirable level of detail in provisions for each possible ATR tool. It may also wish to consider whether one of the objectives of the project should be to empower courts and insolvency representatives to tailor tools to the given needs and circumstances, including by combining and adjusting them in real time in response to evolving conditions, subject to appropriate safeguards. Such flexibility should purport to respond in particular to modern challenges of ATR in the digital world.

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<sup>5</sup> See [A/CN.9/1088](#), paras. 31, 32 and 51 and paragraph 29 of [A/CN.9/WG.V/WP.175](#) for categories considered so far, including tools that are used for tracing tangible as opposed to intangible assets or movable as opposed to immovable property; tools that are used at different stages of insolvency proceedings (before, during or after); and tools directed to the debtor as opposed to those addressed to third parties. They may be different in nature: *ad personam* and *in rem*; and prohibitory or mandatory.

<sup>6</sup> [A/CN.9/1088](#), para. 33.

## Annexes

Table 1  
ATR terms

<i>Term</i>	<i>Glossary of the Guide</i>	<i>Definitions in MLCBI/MLIJ/MLEGI</i>	<i>Definition or explanation</i>
“Assets of the debtor”	term (b)	-	Property, rights and interests of the debtor, including rights and interests in property, whether or not in the possession of the debtor, tangible or intangible, movable or immovable, including the debtor’s interests in encumbered assets or in third party-owned asset;
“Asset tracing”	-	-	Process of identifying and locating the assets of the debtor; <sup>7</sup>  [ <i>The Working Group may wish to consider whether the suggested explanation of this term is sufficiently broad to encompass both the process of following assets and the process of tracing assets.</i> <sup>8</sup> <i>If addition of reference to “proceeds” is considered necessary in this and other terms, despite the term “avoidance (provisions)” below, the Working Group may wish to consider explaining that term in the table, e.g. “whatever is received in respect of the assets of the debtor, including as a result of their sale or other transfer, and proceeds of proceeds”.</i> <sup>9</sup> ]
“Asset recovery”	-	-	Process that follows the asset tracing in order to recover and return the assets of the debtor to the insolvency estate; <sup>10</sup>
“Avoidance (provisions)”	term (c); part five, term (a)	-	Provisions of the insolvency law that permit transactions for the transfer of assets or the undertaking of obligations prior to insolvency proceedings to be cancelled or otherwise rendered ineffective and any assets transferred, or their value, to be recovered in the collective interest of creditors. The term “avoidance” is used in part five, which intends to refer to steps taken in implementation of eh avoidance provisions;
“Cash proceeds”	term (e)	-	Proceeds of the sale of encumbered assets to the extent that the proceeds are subject to a security interest;
“Centre of main interests (COMI)”	term (f)	article 16 (3) MLCBI <sup>11</sup>	The place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties;

<sup>7</sup> See the report of the Colloquium on the topic (A/CN.9/1008), para. 6.

<sup>8</sup> The difference between the two is explained e.g. in *Foskett v. McKeown* [2000] UKHL 29 as follows: “Following is the process of following the same asset as its moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset in the hands of the new owner or to trace its value into the new asset in the hands of the same owner.”

<sup>9</sup> See e.g. definitions of “proceeds” in the UNCITRAL Model Law on Secured Transactions and the UNCITRAL Legislative Guide on Secured Transactions.

<sup>10</sup> See the report of the Colloquium on the topic (A/CN.9/1008), para. 6.

<sup>11</sup> See also paras. 141–149 of the Guide to Enactment and Interpretation of MLCBI.

<i>Term</i>	<i>Glossary of the Guide</i>	<i>Definitions in MLCBI/MLIJ/MLEGI</i>	<i>Definition or explanation</i>
“Claim”	term (g)	-	A right to payment from [the estate of the debtor] [the insolvency estate], whether arising from a debt, a contract or other type of legal obligation, whether liquidated or unliquidated, matured or unmatured, disputed or undisputed, secured or unsecured, fixed or contingent;
“Commencement of proceedings”	term (h)	-	The effective date of insolvency proceedings whether established by statute or a judicial decision;
“Control”	part three, term (c)	article 2 (c) MLEGI	The capacity to determine, directly or indirectly, the operating and financial policies of an enterprise;
“Controlled enterprise group member”	part three, para. 5	-	Those enterprise group members controlled by the parent, irrespective of their legal structure; <sup>12</sup>
“Court” or “Competent authority”	term (i), part five, term (b)	definition of “foreign court” in article 2 (e) MLCBI is substantively the same as the explanation of the term “court”	A judicial or other authority competent to control or supervise an insolvency proceeding. An administrative or judicial authority that is responsible for conduct or oversight of simplified insolvency proceedings or both;
“Creditor”	term (j) and para. 10	-	A natural or legal person that has a claim against the debtor that arose on or before the commencement of the insolvency proceedings. As a general rule, the term includes the creditors in the forum State and foreign creditors;
“Debtor-in-possession”	term (l)	-	A debtor in reorganization proceedings, which retains full control over the business, with the consequence that the court does not appoint an insolvency representative;
“Discharge”	term (m); part five, term (c)	-	Release of a debtor from claims that were, or could have been, addressed in the insolvency proceedings;
“Disposal”	term (n)	-	Every means of transferring or parting with an asset or an interest in an asset, whether in whole or in part;
“Encumbered asset”	term (o)	-	An asset in respect of which a creditor has a security interest;
“Enterprise”	part three, term (b)	article 2 (a) MLEGI	Any entity, regardless of its legal form, that is engaged in economic activities and may be governed by the insolvency law;
“Enterprise group”	part three, term (a)	article 2 (b) MLEGI	Two or more enterprises that are interconnected by control or significant ownership;

<sup>12</sup> Amended in the light of the term “enterprise group member” introduced in MLEGI.

<i>Term</i>	<i>Glossary of the Guide</i>	<i>Definitions in MLCBI/MLIJ/MLEGI</i>	<i>Definition or explanation</i>
“Enterprise group member” <sup>13</sup>	part four, section two, term (a));	article 2 (d) MLEGI	An enterprise that forms part of an enterprise group;
“Equity holder”	term (p)	-	The holder of issued stock or a similar interest that represents an ownership claim to a proportion of the capital of a corporation or other enterprise. In the simplified insolvency context, the term “owner” is used instead;
“Establishment”	term (q)	article 2 (f) MLCBI; article 2 (l) MLEGI	Any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services;
“Judgment”	-	article 2 (c) MLIJ	Any decision, whatever it may be called, issued by a court or administrative authority, provided an administrative decision has the same effect as a court decision. For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses[. An interim measure of protection is not to be considered a judgment for the purposes of this Law];
“Insolvency estate”	term (t)	-	Assets of the debtor that are subject to the insolvency proceedings;  <i>[The Working Group may wish to expand this term with references to assets acquired after commencement of the insolvency proceeding, assets recovered through avoidance and other actions and undisclosed or concealed assets, to align the explanation of this term with recommendations 35 and 314 of the Guide.]</i>
“Insolvency proceeding”	term (u)	article 2 (a) MLIJ and article 2 (h) MLEGI; the definition of “foreign proceeding” in article 2 (a) MLCBI is substantively the same	A collective judicial or administrative proceeding, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of a debtor are or were subject to control or supervision by a court or other competent authority for the purpose of reorganization or liquidation;
“Insolvency-related judgment”	-	article 2 (d) MLIJ	A judgment that arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency proceeding has closed and [b. was issued on or after the commencement of that insolvency proceeding; and (ii) does not include a judgment commencing an insolvency proceeding];
“Insolvency representative”	term (v)	article 2 (b) MLIJ and article 2 (h) MLEGI; the definition of “foreign representative” in	A person or body, including one appointed on an interim basis, authorized in an insolvency proceeding to administer the reorganization or the liquidation of the debtor’s assets or affairs or to act as a representative of the insolvency proceeding. In the simplified insolvency context, a broader term “Independent professional” is used and it is explained as an individual or entity of appropriate qualifications, independent from the debtor, creditors and other parties in interest, appointed by the competent authority to perform one or more tasks related to a simplified

<sup>13</sup> The term “group member” found in part three, para. 5, of the Guide is not reproduced in this list.

<i>Term</i>	<i>Glossary of the Guide</i>	<i>Definitions in MLCBI/MLIJ/MLEGI</i>	<i>Definition or explanation</i>
		article 2 (d) MLCBI is substantively the same	insolvency proceeding, subject to appropriate clearances as regards ethical, professional and other requirements and the absence of conflicts of interest. In the performance of any tasks assigned to it by the competent authority, the independent professional(s) remains accountable to the competent authority and is expected to adhere to any applicable instructions or guidance that may be issued by the competent authority with respect to a task assigned to the independent professional (part five, term (d));
“Liquidation”	term (w)	-	Proceedings to sell and dispose of assets for distribution to creditors in accordance with the insolvency law;
“Main proceeding”	part four, section two, term (d)	article 2 (j) MLEGI; the definition of “foreign main proceeding” in article 2 (b) MLCBI is substantively the same	An insolvency proceeding taking place in the State where the debtor has COMI;
“Non-main proceeding”	-	article 2 (k) MLEGI; the definition of “foreign non-main proceeding” in article 2 (c) MLCBI is substantively the same	An insolvency proceeding, other than a main proceeding, taking place in a State where the debtor has an establishment within the meaning of that term above;
“Ordinary course of business”	term (bb)	-	Transactions consistent with both: (i) the operation of the debtor’s business prior to insolvency proceedings; and (ii) ordinary business terms;
“Parent”	-	part three, para. 5	The entity that controls enterprise group members; <sup>14</sup>
“Party in interest”	term (dd); part five, term (h)	-	Any party whose rights, obligations or interests are affected by insolvency proceedings or particular matters in the insolvency proceedings, including the debtor, an independent professional, including the insolvency representative, a creditor, an equity holder, a creditor committee, a government authority, employees or any other person so affected. It is not intended that persons with remote or diffuse interests affected by the insolvency proceedings would be considered to be a party in interest;
“Preference”	term (ff)	-	A transaction which results in a creditor obtaining an advantage or irregular payment;
“Procedural coordination”	part three, term (d)	-	Coordination of the administration of two or more insolvency proceedings in respect of enterprise group members. Each of those members, including its assets and liabilities, remains separate and distinct;

<sup>14</sup> Amended in the light of the term “enterprise group member” introduced in MLEGI.

<i>Term</i>	<i>Glossary of the Guide</i>	<i>Definitions in MLCB/MLIJ/MLEGI</i>	<i>Definition or explanation</i>
“Protection of value”	term (ii)	-	Measures directed at maintaining the economic value of encumbered assets and third party owned assets during the insolvency proceedings (in some jurisdictions referred to as “adequate protection”). Protection may be provided by way of cash payments, provision of security interests over alternative or additional assets or by other means as determined by a court to provide the necessary protection
“Related person”	term (jj); part five, term (i)	-	As to a debtor that is a legal entity, a related person would include: (i) a person who is or has been in a position of control of the debtor; and (ii) a parent, subsidiary, partner or affiliate of the debtor. As to a debtor that is a natural person, a related person would include persons who are related to the debtor by consanguinity or affinity; [At the fifty-ninth session of the Working Group, a point was made that jurisprudence with respect to the treatment of related persons in insolvency indicated the desirability of an open-ended definition of related persons. <sup>15</sup> The Working Group may wish to consider whether the existing explanation of the term sufficiently addresses that point.]
“Reorganization”	term (kk)	-	The process by which the financial well-being and viability of a debtor’s business can be restored and the business continue to operate, using various means possibly including debt forgiveness, debt rescheduling, debt-equity conversions and sale of the business (or parts of it) as a going concern;
“Security interest”	term (pp)	-	A right in an asset to secure payment or other performance of one or more obligations;
“Stay of proceedings”	term (rr); part five, term (k)	-	A measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor’s assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate;
“Substantive consolidation”	part three, term (e)	-	The treatment of the assets and liabilities of two or more enterprise group members as if they were part of a single insolvency estate;
“Suspect period”	term (ss)	-	The period of time by reference to which certain transactions may be subject to avoidance. The period is generally calculated retroactively from the date of the application for commencement of insolvency proceedings or from the date of commencement.

<sup>15</sup> A/CN.9/1088, para. 52 (a).



Table 2  
ATR-related provisions

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Key objectives	1, 5, 7 and 271	Preambles in MLCBI, MLIJ and MLEGI	<p>Among numerous objectives listed in UNCITRAL insolvency texts, those listed here seems to be most relevant to ATR: (a) preserve, protect and maximize the value of the insolvency estate; (b) protect the interests of all parties in interest; (c) ensure a transparent and predictable insolvency law that inter alia (i) contains incentives for gathering and dispensing information, (ii) defines the debtor, its rights and obligations as well as duties and functions of the insolvency representative, (iii) envisages options for the appropriate regime for retaining control over the debtor's business, (iv) provides rules for identification of the debtor's insolvency estate assets, their use or disposal, and (v) provides for appropriate avoidance and effective sanctions regimes to prevent abuse or improper use of the insolvency regime and to impose appropriate penalties for misconduct; and (d) provide for a modern, harmonized and fair framework to address effectively instances of cross-border insolvency, in particular through cooperation between courts and insolvency representatives.</p> <p><i>[The Working Group may wish to consider whether, regardless of the eventual form of a future text on the topic, the objectives already found in UNCITRAL insolvency texts could be supplemented by additional objectives specific to ATR, such as the objective of providing for modern, effective and efficient ATR tools that would deter dissipation of insolvency estate assets and facilitate and streamline ATR, including in the cross-border context.]</i></p>
Eligibility and jurisdiction	8–13, 272, 275, 292	Articles 2, 4, 5, 10, 16, 28 of MLCBI; articles 4 and 5 of MLIJ; articles 4, 5 of MLEGI	The provisions intend to establish only limited exclusions from the application of the insolvency law and specify competent courts with the jurisdiction over insolvency proceedings and connecting factors for establishing jurisdiction over the debtor, which should include COMI or establishment and may include presence of assets. They thus ensure discipline of the law for all engaged in economic activities and clarity as regards a jurisdiction where the debtor and its assets would be treated and where any required relief should be sought.
Preventive measures	256, 372	-	The provisions impose obligations on persons exercising control over the debtor in the period approaching insolvency to have due regard to the interests of creditors and other stakeholders and to take reasonable steps to avoid insolvency and, where it is unavoidable, to minimize the extent of insolvency. Reasonable steps include ensuring that proper accounts are being maintained and that they are up to date; not committing the business to the types of transaction that might be subject to avoidance unless there is an appropriate business justification; protecting the assets so as to maximize their value and avoid loss of key assets; and ensuring that management practices take into account the interests of creditors and other stakeholders. Those preventive measures can significantly simplify the tasks of the insolvency representative and ensure smooth ATR and insolvency proceedings generally. (See further below under Actions against directors).

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Commencement	14–29; 293–309	Article 31 (presumption of insolvency)	<p>The purposes of provisions on commencement include to facilitate access for debtors and creditors to remedies provided by the law and to enable speedy, efficient and cost-effective procedures for processing of applications and commencement, subject to safeguards against improper use of the insolvency law. The provisions identify persons permitted to apply, including the debtor and any of its creditors and commencement criteria and standards, giving priority to the cessation of payment test (other than in the simplified insolvency context where the debtor can apply at an early stage of financial distress without the need to prove insolvency). They establish the presumption of insolvency and commencement notification requirements. Prioritizing the cessation of payment test puts the defining factors within the reach of creditors and is designed to activate insolvency proceedings sufficiently early in the period of the debtor's financial distress to minimize dissipation of assets and avoid a race by creditors to grab assets. Allowing commencement of proceedings to take place only when the debtor can demonstrate balance sheet insolvency may diminish recoveries.</p> <p>Provisions on presumption of insolvency are designed to streamline the assessment to be made for commencement of insolvency proceedings. If such assessment is complex, delay between application and commencement is longer, which may lead to dissipation of assets by the actions of both the debtor and creditors. Article 31 MLCBI establishing a presumption of insolvency based on recognition of a foreign main proceeding is significant in that respect in the cross-border insolvency context when commencement of a local insolvency proceeding in the recognizing State may be urgently needed for access by the foreign representative to local remedies.</p>
Provisional measures/relief, including <i>ex parte</i>	39–45	Article 19 of MLCBI; article 12 MLIJ; articles 20 and 22 of MLEGI	<p>Even where the commencement or recognition decision is made quickly, there is a risk of dissipation of the debtor's assets in the period between application and commencement or recognition - the debtor may be tempted to transfer assets out of the business and creditors, on learning of the application, may take remedial action against the debtor to pre-empt the effect of any stay that may be imposed upon commencement or recognition of the proceedings. The unavailability of provisional measures in such circumstances could frustrate the objectives of the insolvency proceedings and recognition. UNCITRAL insolvency texts provide for non-exhaustive lists of provisional relief explicitly referring to: staying execution against the assets of the debtor; entrusting the administration or supervision of the debtor's business or the realization of all or parts of the debtor assets to a person designated by the court; suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor; and providing for the examination of witnesses, the taking of evidence and the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities. (See further table 3 below, under Provisional measures).</p> <p><i>[The Working Group may wish to recall that, at its fifty-ninth session, a number of issues were raised as regards provisional measures, including the possibility of appointing an interim insolvency representative]</i></p>

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
			<i>before an application for commencement of insolvency proceedings;<sup>16</sup> powers of interim insolvency representatives as regards cross-border ATR;<sup>17</sup> cross-border cooperation and coordination between courts and insolvency practitioners in the specific context of provisional measures and generally at the stages preceding the commencement of an insolvency proceeding and at the stages following the closure of an insolvency proceeding;<sup>18</sup> and safeguards for provisional measures, in particular ex parte provisional measures, in addition to those already found in recommendations 39–45 of the Guide, such as explicitly limiting their duration.<sup>19</sup> The Working Group may wish to consider them at this juncture.]</i>
Measures on commencement or recognition	46–51, 112, 120, 284–286, 317	Articles 20–21 of MLCBI; article 24 of MLEGI	Such measures include: stay of proceedings; and appointment of an independent professional, including the insolvency representative who may displace the debtor, in full or in part, from the day-to-day operation of the business.
Identification of insolvency estate assets	35–38, 87–99, 217 and 313–316	Articles 21.2 and 3, 23.2, 28 and 29 (c) of MLCBI	The estate includes all assets of the debtor, assets acquired after commencement of the insolvency proceedings and assets recovered through avoidance and other actions. Any undisclosed or concealed assets form part of the insolvency estate. Any unauthorized transactions are treated as invalid and unenforceable as against the insolvency estate. Assets transferred can be reclaimed, except in some cases where the counterparty gave value or can prove that the transaction did not impair creditors' rights. Assets excluded from the insolvency estate by law would not be recoverable. Some provisions of MLCBI envisage that certain assets could be reserved for administration in a particular proceeding (main, non-main or in the State of the location of assets).  The date from which the estate is to be constituted could be the date of application for, or the effective date of, commencement of an insolvency proceedings (for a simplified insolvency regime, it is recommended to refer for such purpose to the effective date of commencement of the proceeding).
Use and disposal of insolvency estate assets	52–62	-	The provisions permit the use and disposal of insolvency estate assets (including encumbered assets) in the ordinary course of business, except for cash proceeds which is subject to a special regime designed to protect secured creditors' interests in those cash proceeds. The use and disposal of insolvency estate assets outside the ordinary course of business may occur only with a notice to creditors, except for urgent sales. Creditors should have the opportunity to be heard by the court. Methods of sale should ensure maximization of the price obtained for the assets being sold. Special protection, including protection of value, is accorded to third-party owners of an asset in possession of the debtor as well as to secured creditors and holders of other interest in an asset in case of the sale of that assets free and clear of that encumbrance and other

<sup>16</sup> A/CN.9/1088, para. 43. Such an option would exist, for example, under recs. 275–279 and their accompanying commentary in the context of a simplified insolvency regime where it is envisaged that the competent authority may appoint an independent professional at the very early stages, even before the application for commencement of a simplified insolvency proceeding is made either by the debtor or creditor(s).

<sup>17</sup> A/CN.9/1088, para. 41.

<sup>18</sup> A/CN.9/1088, paras. 39–42.

<sup>19</sup> A/CN.9/1088, paras. 36–43.

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Debtor's obligations	110, 111, and 290	-	<p>interest. Disposal of assets to related persons is subject to scrutiny before it is allowed to proceed. Relinquishing burdensome assets is permitted subject to notice to creditors and the opportunity for them to object except for the encumbered asset whose value is lower than the value of a secured claim and the asset is not required for reorganization.</p> <p>Obligations of the debtor include: (a) to provide accurate, reliable and complete information relating to its financial position and business affairs, including lists of (i) transactions occurring prior to commencement that involved the debtor or its assets, (ii) ongoing court, arbitration or administrative proceedings, including enforcement proceedings, (iii) assets, liabilities, income and disbursements, (iv) debtors and their obligations and (v) creditors and their claims; (b) to cooperate with the insolvency representative or the competent authority, as the case may be, to enable it to take effective control of business records and of the estate; and (c) to facilitate or cooperate in the recovery of the assets, or control of the assets of the estate, where located. (See further table 3 below);</p> <p><i>[In the light of points raised during the fifty-ninth session of the Working Group,<sup>20</sup> the extent of disclosure by the debtor under recommendation 110 (b) of the Guide and aspects of examination of the debtor may need to be further elaborated].</i></p>
Additional obligations and measures on the debtor-in-possession	284–286 and 290	-	<p>Recognizing risks that the debtor may act irresponsibly and even fraudulently during the period of control of business, which may lead to dissipation of assets, the provisions impose additional obligations on the debtor-in-possession and envisage the possibility of: (a) restricting the ability of the debtor-in-possession to dispose of certain assets and to enter into certain transactions; (b) supervising other aspects of the day-to-day operation of business by the debtor-in-possession, including with respect to post-commencement finance and treatment of contracts; and (c) appointing an independent professional for certain functions, such as avoidance. Displacement of the debtor-in-possession by the insolvency representative and conversion of reorganization to liquidation are envisaged as sanctions for violation by the debtor-in-possession of its obligations.</p>
Powers of the insolvency representative	120	Articles 5, 9, 11, 12, 15, 19, 21–24, 26 of MLCBI	<p>The provisions envisage the general obligation of the insolvency representative to protect and preserve the assets of the estate. Specific duties and functions, including as regards preservation and protection of the estate, are to be specified in the insolvency law. The commentary to recommendation 120 refers to such duties and functions: (a) taking immediate control of the insolvency estate assets and the debtor's business records and taking all steps necessary to protect and preserve those assets, records and the debtor's business, including preventing unauthorized disposal of those assets and exercising avoidance powers; (b) obtaining information concerning the debtor, its assets, liabilities and past transactions; (c) representing the insolvency estate, including in commercial litigation, arbitral, administrative and other proceedings; (d) registering rights of the estate; and (e) appointing and remunerating accountants, attorneys and other professionals that may be necessary to assist the insolvency representative in performing its functions.</p>

<sup>20</sup> A/CN.9/1088, para. 35.

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Treatment of creditor claims	169–184 and 319–325	-	<p>[The Working Group may wish to recall that, at its fifty-ninth session, a point was made that it might be desirable to empower insolvency practitioners to have direct access to confidential or otherwise classified information although that might not be possible in some jurisdictions for data protection and other reasons.<sup>21</sup> The Working Group may wish to consider that point at this juncture.]</p> <p>The provisions establish a mechanism for verification and admission of claims, which are of relevance to identification of non-existent creditors, fraudulent claims, falsification and similar acts. They also address treatment of disputed claims and provide for scrutiny and possibly special treatment of claims by related persons, which may be subordinated or their amounts may be reduced.</p>
Substantive consolidation	219–231	MLEGI	<p>Because of various pros and cons involved in substantive consolidation, the provisions allow for only limited circumstances when the court may order substantive consolidation with respect to two or more enterprise group members. One of them includes where the court is satisfied that the enterprise group members are engaged in a fraudulent scheme or activity with no legitimate business purpose and that substantive consolidation is essential to rectify that scheme or activity. An enterprise group member and a creditor or the insolvency representative of any such enterprise group member may be permitted to make an application for substantive consolidation. Under an order for substantive consolidation, the assets and liabilities of the substantively consolidated group members are treated as if they were part of a single insolvency estate, claims and debts between group members, including the secured indebtedness, included in the order are extinguished, and claims against group members included in the order are treated as if they were claims against the single insolvency estate.</p>
Avoidance	87–99; 217–218, 228 and 316	Article 23 of MLCBI	<p>One of the listed purposes of avoidance is to facilitate the recovery of money or assets from persons involved in transactions that have been avoided. Avoidable transactions, which encompass secured transactions, include those intended to defeat, delay or hinder the ability of creditors to collect claims as well as undervalued and preferential transactions, subject to certain exceptions, defences, presumptions and allocation of the burden of proof. In the enterprise group context in particular, the court may have regard to the circumstances in which the transaction took place, including the relationship between the parties to the transaction, the degree of integration between enterprise group members that are parties to the transaction, the purpose of the transaction, whether the transaction contributed to the operations of the group as a whole and whether the transaction granted advantages to enterprise group members or other related persons that would not normally be granted between unrelated parties.</p> <p>Suspect periods may be different for different types of transactions but should be longer for transactions with related persons. Special rules apply for calculating the suspect period retrospectively in case of substantive consolidation in the enterprise group insolvency context.</p> <p>The insolvency representative has the principal responsibility to commence avoidance proceedings; creditors, including shareholders, may pursue avoidance only with the agreement of the insolvency</p>

<sup>21</sup> A/CN.9/1088, para. 52 (b).

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Actions against directors - 262–266, 372			<p>representative or if it does not agree, with leave of the court. The costs of avoidance proceedings are paid as administrative expenses but alternative approaches to address the pursuit and funding of avoidance proceedings may also exist. Time limits could be imposed for commencement of avoidance, which usually start running from the commencement of the insolvency proceedings except in the case of concealed transactions that the insolvency representative could not be expected to discover, in which case the time limit may run from the time of discovery. The counterparty to a transaction that has been avoided must return to the estate the assets obtained or if the court so orders, make a cash payment to the estate for the value of the transaction; the counterparty may have an ordinary unsecured claim against the estate unless it does not comply with the court order, in which case the claim may be disallowed.</p> <p>See Preventive measures above for obligations imposed on persons exercising factual control over the debtor’s business, which may include shareholders. An action against those persons for breach of their obligations can be a significant asset of the insolvency estate and increase returns to creditors. In contrast to avoidance, what is being sought is not the recovery of assets of the company but a contribution from the person in breach to remedy the damage suffered by creditors. The court may order that person to pay to the insolvency estate in full any damages assessed by the court. Additional remedies may include disqualification from being a director or from taking part in the running and management of a company as well as deferral of payments owed to the person by the debtor or subordination of the person’s claims. The person may be required to account for any property acquired or appropriated from the company or for any benefit obtained in the breach of the obligations. Other sanctions may be imposed, including criminal ones.</p> <p>The cause of action belongs to the insolvency estate and the insolvency representative has the principal responsibility for pursuing an action for breach of those obligations. Creditors or any other party in interest, including shareholders, may commence such an action with the agreement of the insolvency representative or if it does not agree, with leave of the court. The costs of an action are paid as administrative expenses but alternative approaches to address the pursuit and funding of such actions may also exist.</p> <p><i>[The Working Group may wish to recall that, at its fifty-ninth session, a number of points were made related to ATR generally, including the need for: (a) safeguards against unjustified commencement of ATR actions and against possible abuses during ATR;<sup>22</sup> (b) incentives for ATR, especially in the absence of sufficient funding in the insolvency estate to cover ATR costs;<sup>23</sup> and (c) solutions to mitigate risks of delays that ATR may cause to insolvency proceedings in the light of the expected close interaction of ATR actions with proceedings outside insolvency law, including criminal ones.<sup>24</sup></i></p>

<sup>22</sup> A/CN.9/1088, paras. 34 and 47.

<sup>23</sup> A/CN.9/1088, paras. 45–48 and 53.

<sup>24</sup> A/CN.9/1088, para. 97.

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Application for - recognition of an insolvency proceeding or recognition and enforcement of an insolvency-related judgment in a foreign State	Article 15 MLCBI; articles 11 and 14 MLIJ	<i>Since those points are relevant also to avoidance and pursuit of actions against directors, the Working Group may wish to consider them at this juncture, noting varying levels of detail on those points found in the commentary in the Guide.]</i>	<p>The foreign representative’s ability to obtain early recognition (and the consequential ability to invoke in particular arts. 20, 21, 23 and 24 that provide for local relief) is often essential for the effective protection of the assets of the debtor from dissipation and concealment. Recognizing that applications for recognition of foreign proceedings require expeditious treatment (as they are often submitted in circumstances of imminent danger of dissipation or concealment of the assets), UNCITRAL insolvency texts obligate the court to decide on the application for recognition “at the earliest possible time” and provide for a simple and expeditious structure to enable courts in practice to conclude the recognition process within a short period of time. In particular, they alleviate the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications (e.g. legalization).</p> <p>While MLCBI is limited to recognition of main and non-main proceedings, the exception found in article 14 (h) MLIJ permits recognition of a judgment, notwithstanding its origin in a State whose insolvency proceeding is or would not be recognizable under the MLCBI, which facilitates the recovery of additional assets for the insolvency estate, as well as the resolution of disputes relating to those assets.<sup>25</sup></p>
Application for - commencement of insolvency proceedings in a foreign State	Article 11 MLCBI	The foreign representative may obtain access to ATR tools in a foreign State through commencement of local proceedings, which could be insolvency or other proceedings. Under article 11 MLCBI, the foreign representative (of both main and non-main insolvency proceedings) has standing to request commencement of an insolvency proceeding in a foreign State without prior recognition of the foreign proceeding by that State. The commencement of an insolvency proceeding might be crucial in cases of urgent need for preserving the assets of the debtor.	
Participation in - insolvency proceedings in a foreign State involving the debtor	Article 12 MLCBI	As an effect of the recognition of the foreign proceeding, the foreign representative (of both main and non-main insolvency proceedings) is given standing to make petitions, requests or submissions in an insolvency proceeding concerning the debtor in the recognizing State. Such submissions may concern issues of protection of assets.	
Intervention in - proceedings	Article 24 MLCBI	As an effect of the recognition of the foreign proceeding, the foreign representative (of both main and non-main insolvency proceedings) is given standing to intervene in any proceedings in the recognizing State in which the debtor is a party. Unlike article 12 MLCBI, proceedings intend thus to encompass individual actions by the debtor or against the debtor that have not been stayed in the recognizing State as a result of recognition of the foreign proceeding.	

<sup>25</sup> See paras. 118–120 of the Guide to Enactment of MLIJ.

Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Access of foreign creditors to insolvency proceedings in a foreign State	-	Article 13 MLCBI	<p>The provisions embody the principle of non-discrimination between local and foreign creditors except for ranking of claims. In particular, foreign creditors can apply to commence an insolvency proceeding in the foreign State or file claims in such a proceeding.</p> <p><i>[The Working Group may wish to recall a point raised at its fifty-ninth session that viable alternatives should be provided to seeking foreign recognition and enforcement of domestic relief granted to domestic companies (e.g. by providing access by shareholders of foreign companies to local remedies as civil parties).<sup>26</sup> The Working Group may wish to consider whether this point is sufficiently captured in article 13 MLCBI.]</i></p>
Right of direct access to courts by a foreign representative	-	Articles 7 and 9	<p>The provisions free the representative from having to meet formal requirements such as licenses or consular action in order to gain access to foreign courts, which may be required for various purposes including those for effective ATR.</p>
Cooperation and coordination	-	Articles 25–30 of the MLCBI and 9–15 of the MLEGI	<p>The General Assembly, when noting the adoption of MLCBI and MLIJ by the Commission, acknowledged that inadequate coordination and cooperation in cases of cross-border insolvency make it more likely that the debtor's assets would be concealed or dissipated.<sup>27</sup> Direct communication, cooperation and coordination among courts and insolvency representatives from concerned jurisdictions are often the only realistic way to prevent dissipation of assets. The provisions in UNCITRAL insolvency texts expressly empower them to do so, not linking these abilities to the fact of recognition (i.e. coordination and cooperation may thus occur at an early stage and before an application for recognition) or types of insolvency proceedings (main, non-main or proceedings commenced on the basis of the presence of assets). Courts are, in particular, entitled to directly communicate with, or to request information or assistance directly from, foreign courts or foreign representatives. Insolvency representatives have the same abilities in exercise of their functions and subject to the supervision of the court. These abilities are critical when the courts or insolvency representatives consider that they should act with urgency. They eliminate the need for time-consuming procedures traditionally in use (e.g. communication via higher courts or diplomatic or consular channels, e.g. letters rogatory). Cooperation may take the form of appointment of a person or body to act at the direction of the court, communication of information by any means considered appropriate by the court, coordination of the administration and supervision of the debtor's assets and affairs, approval or implementation by courts of agreements concerning the coordination of proceedings and coordination of concurrent proceedings regarding the same debtor.</p>

<sup>26</sup> A/CN.9/1088, para. 53.

<sup>27</sup> General Assembly resolutions 52/158, the fourth preambular paragraph, and 73/200, the fifth preambular paragraph.



Topic	Legislative recommendations (including the text preceding them)	MLCBI/MLIJ/MLEGI provisions	Summary of the most pertinent provisions
Sanctions	20, 28, 40, 114, 271, 301, 309 and 371	-	<p>Legislative recommendations on sanctions generally are found in part five of the Guide. In other parts of the Guide, legislative provisions on sanctions appear only in a few specific contexts, such as abusive application for provisional measures or for commencement of insolvency proceedings and violation of debtor's obligations. In addition to noting that sanctions vary across jurisdictions and might include criminal sanctions, the commentary throughout the Guide discusses some specific, for example disqualification of directors. The commentary to article 20 MLCBI, while noting that MLCBI does not deal with sanctions that might apply to acts performed in defiance of stay, stresses that, from the viewpoint of creditors, the main purpose of sanctions is to facilitate recovery of the insolvency estate assets improperly transferred by the debtor and, for that purpose, the setting aside of such transfers is preferable to the imposition of criminal or administrative sanctions on the debtor. [<i>The Working Group may wish to recall that, at its fifty-ninth session, a point was made that, where there were violations of provisional measures or stay of proceedings upon commencement, effective sanctions, their enforcement and extra-territorial effect, played an important role, although some jurisdictions did not provide for such sanctions.</i><sup>28</sup> <i>The Working Group may wish to consider whether the existing legislative provisions in UNCITRAL insolvency texts addressing sanctions may need to be strengthened, including with specific reference to persons responsible for dissipation of assets or violation of provisional measures or stay of proceedings and persons non cooperating in, or otherwise hindering, ATR.</i>]</p>

<sup>28</sup> [A/CN.9/1088](#), para. 52 (c).

Table 3  
**Illustrative list of ATR tools**

<i>Description</i>	<i>Purpose</i>	<i>Conditions for granting the measure</i>	<i>Safeguards</i>
<p><b>Provisional measures</b>            (they take different forms including those listed below)</p>	<p>To ensure that the value of the estate is not diminished by the actions of the debtor, creditors or third parties before the commencement of insolvency proceedings</p>	<p>The need for measures must be urgent and must outweigh any potential harm resulting from such measures. The law may require the court to be satisfied that there is some likelihood that the debtor will satisfy the commencement requirements. Where a party other than the debtor applies for the measure, the applicant may be required by the court to provide evidence that the measure is necessary to preserve the value or avoid dissipation of the debtor's assets. Other conditions depend on a particular measure ordered.</p>	<p>A notice to affected parties is required, unless a without notice (ex parte) measure is justified (e.g. in case of urgency or where an element of surprise is needed). Other safeguards include: the right to be heard; the right to a review; indemnification for damages, costs and fees; periodic review of measures; and their timely termination. Without notice measures are often accompanied by ancillary measures that direct the relevant court staff to prohibit public access to the court file and prohibit anyone that become aware of that file or any information contained therein to disclose it ("gag and seal orders"). Sanctions are imposed for non-compliance.</p>
<p><b>Disclosure orders</b>            (they take different forms and names, including examination of the debtor and any third party having had dealings with the debtor, Norwich Pharmacal, Bankers Trust, and are often used in combination with proprietary and freezing orders (see below))</p>	<p>To obtain information concerning the debtor, its assets, liabilities and past transactions that may be required for avoidance, pursuit of actions against directors and other needs of insolvency proceedings</p>	<p>Conditions depend on the measure, requesting party and context of ATR. They may vary across jurisdictions. Examination, for example, may take place orally or in writing, publicly or privately, on oath, before the court or otherwise. It would be ordered if in the interests of the insolvency process but not for gaining an unfair advantage in litigation.</p>	<p>Safeguards would depend on the measure, who will use it, against whom and in which context of ATR. The measure should not be oppressive or unfair. No right to silence and no protection against self-incrimination and other privileges, including on confidentiality grounds, may exist, although statements cannot be used in later criminal proceedings. In case of no cooperation, application to court may be made to obtain cooperation. For such purpose, a warrant for arrest or orders for seizure and other coercive measures may be issued.</p>
<p><b>Orders securing access to information and evidence, and evidence preservation orders</b>            (they take different forms and names, including production orders and search and seizure orders (e.g. Anton Piller))</p>	<p>To take immediate control of the insolvency estate assets and the debtor's business records and take all steps necessary to protect and preserve those assets, records and the debtor's business, including preventing unauthorized disposal of those assets and</p>	<p>Conditions depend on the measure, requesting party and context of ATR.</p>	<p>Safeguards would depend on the measure, who will use it, against whom, in which context of ATR and other circumstances of the case. The measure may be made subject to such safeguards as the court considers just. Since these orders are often granted without notice, additional safeguards usually apply. Measures may be imposed also for protection of confidential information, including commercially sensitive, private, etc. as well as compensation for costs of producing evidence by third parties. Protection from self-incrimination and other privileges may not apply in all cases or may apply with</p>

<i>Description</i>	<i>Purpose</i>	<i>Conditions for granting the measure</i>	<i>Safeguards</i>
	records and exercising avoidance powers.		limits. Sanctions may be imposed on persons who fail to produce evidence that reasonably appears to be within that person's control or access or for a person's failure to cooperate in production of evidence as well as for abuse of the measure.
<b>Proprietary or freezing orders/injunctions</b> (they take different forms and names, including attachment orders, asset restraining orders, Mareva, worldwide freeze orders.)	As above.	Conditions depend on the measure, requesting party and context of ATR. They usually include the need to demonstrate the right to the asset or proceeds. Some tools may be used only for movables.	Safeguards would depend on the measure, who will use it, against whom, in which context of ATR and other circumstances of the case. The measure may be made subject to such safeguards as the court considers just. Since these orders are often granted without notice, additional safeguards usually apply. Sanctions may be imposed for abuse of the measure and non-compliance.