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Chasing assets abroad: Ideas for more effective asset tracing and recovery in cross-border insolvency

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Abstract

Asset tracing and recovery (ATR) has become highly challenging in the digital age, where, with the touch of computer keys, assets can be shifted through multiple jurisdictions within minutes, creating significant challenges for recovering value. While many countries have tools to enable 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, particularly during insolvency. This article takes stock of the myriad ATR tools available in domestic systems to discern parameters of key ATR tools that have common objectives, features, and safeguards, and that can form the basis of more standardized understanding and application of such tools. It also explores the extent to which cross-border ATR is aided by the leading frameworks for global, cross-border insolvency—the UNCITRAL Model Laws on Cross-Border Insolvency, insolvency-related judgments, and enterprise groups—in the process, revealing gaps and uncertainties. Such uncertainties can result in losses to stakeholders affected by insolvencies of different business sizes but can be particularly detrimental in small and medium enterprise (SME) cross-border insolvencies where there are

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typically more limited resources to chase assets. Against this backdrop, this article proposes ideas for the enhancement of the cross-border insolvency framework, to allow for effective cross-border access to information held abroad, the freezing of assets in cross-border cases, and the cross-border recovery of assets.

1 | INTRODUCTION

The identification, tracing, and recovery of assets for the benefit of stakeholders with legal claims against such assets have become highly challenging in the electronic age, due to the relative ease of the 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. The problem of ATR is especially acute when debtors are experiencing financial distress and their liabilities exceed the value of available assets. If the company or enterprise group is international, it has greater opportunities to transfer assets, and generally, in cross-border insolvencies, ATR is complicated where multiple countries, authorities, and legal systems are involved, creating conflicts and potential inefficiencies.

The United Nations Commission on International Trade Law (UNCITRAL) has developed a series of Model Laws related to cross-border insolvency, which, although not expressly focused on ATR, are, in our view, highly conducive to ATR. UNCITRAL is also deliberating on an international instrument dedicated to ATR, though its Working Group has not yet reached consensus on its form, focus, and connection to the general cross-border insolvency framework.

This article endeavors to show that the UNCITRAL Model Law on Cross-Border Insolvency 1997 (MLCBI),[1] in particular, has been used in practice and has proven quite effective for enabling ATR in cross-border insolvencies. However, the MLCBI and the Model Law system generally still have gaps and weaknesses, and it is also not yet adopted by all countries (or in the case of the complementary model laws on judgments and enterprise groups,[2] not adopted by any country yet). Gaps and uncertainties can be particularly problematic when it is necessary to effectuate expeditious ATR across borders, including before an insolvency process has commenced. Often, there is need for information concerning the location and/or preservation of assets prior to the commencement of insolvency proceedings to ensure that the value of the estate is not diminished by the actions of the debtor, creditors, or third parties before proceedings commence.

Gaps and uncertainties are especially challenging for smaller entities. Although cross-border insolvency cases typically involve large businesses operating as companies or as enterprise groups that have the resources and incentives to operate abroad, smaller businesses too may have international elements, such as assets, creditors, or even a branch abroad. Smaller entities may also operate through group structures with some affiliates in other countries. Furthermore, even where micro, small, or medium sized enterprises (MSMEs) may have not operated internationally in the course of their business and perhaps have operated through sole trader or other nonincorporated structures, their insolvency may be international nonetheless if assets are located abroad, requiring ATR across borders, particularly if the MSME entrepreneurs have

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hidden assets in other jurisdictions or they themselves have fled the country where their business was operating. With the rise of crypto assets,[3] which are difficult to locate in a particular jurisdiction, many insolvency cases now have a prominent cross-border ATR component.[4]

The challenge of tracing and recovering assets in such cases may then be even greater compared with cases of larger insolvencies, as typically, in smaller insolvencies, there is a smaller estate and limited resources. There might not be enough property and financing within the business to allow investigation, search for, and recovery of assets located in foreign countries, for the benefit of the general body of creditors. Generally, smaller enterprises will struggle more to handle a cross-border case efficiently, especially in the absence of concrete frameworks.[5] Bebchuk and Guzman observed in the early 1990s that many smaller bankruptcies are resolved:

> "in the shadow of the current system of poorly conceived and inconsistently administered rules for transnational bankruptcies";

They note in this respect that:

> "These cases face difficulties similar to those of the largest bankruptcies but typically cannot rely on *ad hoc* solutions to these problems."[6]

In the book *Micro, Small, and Medium Sized Enterprises Insolvency, A Modular Approach*,[7] Davis et al have argued that more attention should be given to meeting the challenges of and effectively regulating MSME insolvencies. MSMEs represent the vast majority of businesses around the world. They are the backbone of the economy,[8] and they are also the most vulnerable and the least resilient.[9] Notwithstanding their prominence and importance to the economy of every country, the focus of domestic laws and international initiatives concerning insolvency has typically been on the larger entities because they are more visible, more reported, create the precedents and the experience, and thus, in turn, influence legislation more.

There has been some shift in that approach, though, especially during and in the aftermath of the COVID-19 pandemic where, increasingly, legal systems have created new regimes for MSMEs.[10] Internationally, the World Bank and UNCITRAL have developed new bespoke principles and recommendations to guide policy makers and legislators in creating simplified regimes for micro and small enterprises.[11] However, the focus of these initiatives has been only on the domestic procedures for MSME insolvencies, not on cross-border aspects. Furthermore, just as with regard to large entities, in the context of MSMEs, the international standards thus far (i.e., the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and the UNCITRAL Legislative Guide on Insolvency Law[12]) have not focused distinctly on ATR tools, although many rules relevant to ATR are scattered throughout these guides, for example, the recommendations concerning the automatic stay and voidable transactions.[13] Beyond these mechanisms, ATR relies on the availability of domestic tools, and the effectiveness of such tools across borders relies on the existence of a coherent and effective cross-border insolvency system.

Convergence of specific ATR tools is unlikely in the immediate future, given the diversity of approaches across various jurisdictions; however, the need to enhance the framework for tracing and recovery of assets is urgent. This article addresses a critically important aspect of ATR prior to the commencement of and during insolvency proceedings, specifically, how to enhance cross-border recognition and support for measures that protect the value of the debtor's estate with a view to maximizing return to creditors and other stakeholders.

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Our view is that the myriad tools available in different countries have three key features in common: facilitating access to information to locate assets; protection of value by temporarily freezing transfer or disposition of assets where they are at risk of being hidden or dissipated; and actions to recover illegal transfers, transfers that should be avoided because they unduly harm the general body of creditors or that seek to hide the assets or defraud creditors, and to realize on the value of those assets. We recognize that common law jurisdictions often refer to this relief as "orders" and civil law jurisdictions as "measures" or "provisions." The tools are also underpinned by several important principles that courts or relevant competent authorities (collectively referred to here as "in-bound courts") apply when receiving requests for assistance in protecting the value of assets pending their realization and distribution to creditors. These principles include the consideration of whether the relief sought is fair, effective, timely, and necessary to the integrity of the process. These features and principles should be properly connected to and interpreted in the context of the cross-border insolvency model law system, with the objectives of preserving and maximizing the value of the insolvency estate; enhancing comity and cooperation across borders between courts, competent authorities, and insolvency representatives; and providing effective avoidance tools to preserve value and impose appropriate penalties for misconduct.[14]

Relatedly, we argue in this article that wide adoption of the Model Laws is key for meeting the challenges of ATR across borders, but that there is also room for strengthening the system in regard to its application to ATR cases. Common language concerning ATR tools and clarity of application of key provisions in the Model Laws in such cases can facilitate ATR, generally, and in particular, in the smaller cases where smooth operation of the cross-border framework can reduce costs and enable ATR when resources are limited.

This article is structured as follows. Part 2 identifies the challenges of asset tracing and recovery across borders, using illustrative examples from different jurisdictions. Parts 3 and 4 then discuss the basic principles and tools that should inform a global system of recognition and recovery that is based on fundamental notions of fairness and "modified universalism" as an objective. Part 3 explains modified universalism and underscores its connection to ATR. Part 4 explores the benefits and limitations of the current UNCITRAL Model Laws, which are premised on the norm of modified universalism. It points to the specific mechanisms in this international framework that are particularly conducive to ATR, including recognition of ATR proceedings, relevant remedies, and relief; assistance, cooperation, and access to proceedings as mechanisms to amplify access; best practice use of the Model Law on Cross-Border Insolvency for ATR purposes, including in enterprise group insolvency; the need for recognition and enforcement of ATR-related judgments; and gaps and challenges that need addressing. Based on the foregoing analysis, Part 5 then offers concrete insights on strengthening the framework for cross-border asset tracing and recovery in insolvency. Part 6 concludes.

2 | THE PROBLEM OF ASSET TRACING AND RECOVERY ACROSS BORDERS

Asset tracing across borders has become one of the most challenging aspects of realization and distribution of the estate of insolvent debtors, whether they are individuals or corporate or other legal entities. At the touch of computer keys, assets can be shifted through multiple jurisdictions within minutes, creating significant challenges for insolvency professionals and creditors to trace and recover the value for creditors of the insolvent debtor. By the time an insolvency

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professional can get an order from the in-bound court to locate or freeze assets in that foreign jurisdiction, the debtor or a related party can transfer the assets once again to another jurisdiction. Each country has its own tests for disclosure or preservation orders, increasing costs and delay in ATR.

Globally, these challenges are now being recognized. As noted above, UNCITRAL, through its Working Group that focuses on insolvency reform, is taking stock of mechanisms used in many jurisdictions and is identifying problems with ATR across borders. UNIDROIT (the Institute for the Unification of Private Laws) has developed Draft Principles and Commentary on Digital Assets and Private Law, aimed at providing greater predictability in cross-border digital transactions.[15]

The key cross-border issues for ATR are access to information, obtaining orders temporarily restraining asset disposition or transfers, and measures to recover assets that have been transferred out of the insolvency estate and into another jurisdiction. These issues are dealt with in order. A primary difficulty is the adjustment of timing and efficiency with fairness concerns. ATR works best when orders are available without delay, in order to hinder the debtor from hiding assets in times of financial distress. Hence, it may well occur that the requests for these orders are made where a debtor is in default on its loans, even prior to the debtor being formally declared insolvent. The problem is, however, whether and under what circumstances this interference with the debtor's use of its property can be justified and recognized pursuant to the relevant applicable laws.

2.1 | Access to information

Disclosure orders sought before the in-bound court can include ordering production of records or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities[16]; and examination of the debtor and any third party having had dealings with the debtor, which are relevant to tracing assets,[17] in order to obtain information concerning the value and location of the debtor's assets, liabilities, and past transactions that may be needed for the purpose of avoidance or to pursue actions against directors for misconduct in their dealing with the assets. Conditions for granting such orders vary across jurisdictions, and once granted, failure to comply can result in contempt proceedings, seizure orders, or even imprisonment in some instances.

2.1.1 | Held by the debtor

Access to information is often less of an issue if the debtor is meeting its obligations pursuant to domestic insolvency law to provide accurate, reliable, and complete information relating to its financial position, including assets, liabilities, income, and disbursements, and is cooperating in the recovery of the assets, wherever located. However, in cases of fraud, poor record keeping, or concealment of assets in other jurisdictions, there is need for effective mechanisms to evaluate the debtor's records and identify missing assets for the benefit of creditors. Current measures to preserve the ability of the appointed insolvency professional to obtain all information held by the debtor can be highly effective within a jurisdiction. For example, in Germany, the law grants access to all books, files, and accounts of the debtor to the preliminary insolvency officeholder in interim insolvency proceedings.[18]

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2.1.2 | Held by third parties

Relevant information about the existence and location of assets is often also in the hands, records, and/or knowledge of third parties. The rights to access these sources of information vary amongst jurisdictions. In Germany, only the debtor company's directors and employees are obligated to disclose relevant information.[19] In the United Kingdom (UK), an order can be sought at an early stage to obtain disclosure and information from banks, accountants, and financial advisers,[20] typically where parties have become mixed up in wrongdoing and their involvement goes beyond that of a mere witness. The orders may include information about the identity of the wrongdoers or making a respondent subject to UK jurisdiction to assist proceedings taking place abroad.[21] By contrast, these orders cannot be used on respondents in foreign jurisdictions to assist UK proceedings.[22] However, failure of in-bound courts to recognize and grant relief to foreign orders in a timely manner can frustrate the objectives of cross-border insolvency proceedings.

In Canada, orders may be granted by the courts to obtain information held by third parties such as financial institutions in order to determine where transfers of funds went and the extent of any impugned conduct; "a Norwich order is equitable in nature and provides for discovery of third parties who, through no fault of their own, have been mixed up in the tortious acts of others and who may have information concerning those tortious acts."[23] In deciding whether to grant an order, the court will consider whether the moving party has provided evidence sufficient to raise a valid, bona fide, or reasonable claim and established that the third party is somehow involved in the acts complained of and the third party from whom the information is sought is the only practicable source of the information; whether the third party can be indemnified for costs for which it may be exposed because of the required disclosure; and whether the interests of justice favor the obtaining of the disclosure sought.[24]

In some countries, an insolvency professional is able to seek an order *ex parte* that essentially is a civil search warrant where there is a risk that evidence would be concealed or destroyed by the debtor or another party implicated in the insolvency.[25] Such orders are often accompanied by a sealing order or "gag order" until the search is completed.[26] For example, in the United States (US), the court has authority to approve a request by a foreign representative for information regarding assets located in the jurisdiction, including any assets that have "flowed through" the jurisdiction in a specified period prior to insolvency.[27]

We note that many countries use criteria that protect the interests of the debtor as well as creditors, for example, the court may require evidence that the alleged misconduct is very serious; there is clear evidence that the defendant has incriminating documents in their possession; and there is a real possibility that the defendant may destroy the documents.[28] Courts may also limit the scope of the order to only what is necessary and may protect the evidence from being used in other proceedings, such as criminal proceedings.

2.1.3 | Held abroad

In-bound courts may require that the applicant offers some sort of undertaking or post security with the court that will cover damages in the event that the order is wrongfully executed. The courts apply a heavy onus on the party seeking such *ex parte* orders to make full and frank disclosure because of the request to bypass notice provisions. Such orders often offer a safeguard of the respondent's right to a hearing *ex post*, and the in-bound court may issue an order sealing

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the information received pursuant to the order pending a full hearing. While these safeguards are important for the legal system, valuable time can be lost in identifying and preserving value of the assets, particularly digital assets, and if these issues have already been canvassed in the originating court, repeating these steps in other in-bound courts expends resources in duplication and increases the risks arising from the attendant delay.

Where there is not yet an insolvency proceeding, foreign orders may not be recognized by in-bound courts without a full hearing on the relief sought under domestic law; and such proceedings may or may not include notice to the debtor or other parties that have allegedly perpetrated the fraud. A hearing before the in-bound court may be unduly duplicative of resources and the process in the originating court. A hearing on notice is likely to frustrate the goal of a timely, effective remedy for the issues that led to the original order.

A number of jurisdictions also authorize in-bound courts to approve orders in respect of third parties that have information, for example, internet service providers that may be able to confirm or trace account transfers or to track the defendant's online actions.[29] Some of the same tests are applied in terms of establishing the need for access to information.

The European Union (EU) Insolvency Regulation[30] (EIR) aims at avoiding most of these inefficiencies by authorizing the administrator appointed in the EU main (interim) insolvency proceeding to request any ATR measures available under the law of their main proceedings unless secondary proceedings have commenced in the target jurisdiction.[31]

2.2 | Freezing orders and other measures restraining asset disposition or transfers

Key to asset tracing and recovery is the ability to obtain temporary restraint on the transfer, sale, or disposition of assets in a foreign jurisdiction, generally categorized as "freezing orders." Orders that prohibit transfer, sale, or disposition of assets for a period of time are called different names in different jurisdictions, including attachment orders, asset restraining orders, "Mareva orders" (originated in UK jurisprudence but now commonplace in most commonwealth countries),[32] preservation orders,[33] freezing orders, and injunctions. In some countries, such orders may only apply to movables, whereas in other jurisdictions, the scope can be broader.

2.2.1 | To support commenced insolvency proceedings

Where an in-bound court recognizes a foreign main insolvency proceeding,[34] freezing orders can be straight forward to obtain, as the in-bound court has already recognized the authority of the court in the main jurisdiction and there is a significant body of case law internationally that guides such decisions.[35]

Canadian courts have recognized the freezing orders of foreign courts, specifically noting that the foreign legislation authorizing such orders need not be consistent with Canadian insolvency legislation in order to grant the relief sought, appellate courts approving recognition of the foreign freezing order as a reasonable exercise of the in-bound court's discretion pursuant to its statutory authority.[36] In the EU, Articles 19(1) and 20(1) EIR secure the automatic application of an EU-wide stay if this stay has become effective due to the commencement of main insolvency proceedings in a Member State.

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2.2.2 | Provisional relief

Provisional freezing relief can include stays that suspend the right to transfer, encumber, or otherwise dispose of any assets of the debtor. There is especially a risk of dissipation of the debtor's assets in the period between application and commencement or recognition of a foreign main proceeding under the Model Law framework. In some jurisdictions, a debtor can transfer assets out of the business or creditors may commence a race to the assets using strategies to pre-empt the effect of any stay that may be imposed on the recognition of proceedings. Provisional freezing relief therefore retains the *status quo* in terms of the location of the assets, preventing further interjurisdictional transfer until issues in respect of who has the rights to the value of the assets are resolved in the home jurisdiction. A sealing order preventing disclosure of the freezing order until it has been executed in the in-bound jurisdiction may be critically important to be able to actually freeze the assets from further dissipation or transfer.

Under EU law, Article 52 EIR authorizes the temporary administrator appointed in the EU main (interim) insolvency proceeding to request any measures available under the law of the EU Member State where the debtor's assets are situated to secure and preserve the assets, including, in some cases, the ability of a foreign representative to apply for provisional measures *ex parte*.[37]

2.2.3 | To support future insolvency proceedings

It may still be more difficult, though, to get the recognition of a temporary freezing order issued in a foreign jurisdiction before the commencement of insolvency proceedings, as these orders are not final orders of the court and the in-bound court may require a full hearing, with notice, prior to sanctioning the drastic action of freezing a debtor's ability to transfer, sell, or dispose of its assets. It should be noted that to obtain the original order outside of an insolvency proceeding, a party must have standing before the court, for example, it must have a cognizable interest in the debtor's assets, as well as establishing that there is a case that the debtor will thwart tracing of those assets if not restrained by such an order.

One important use of freezing orders and the temporary sealing orders that prevent the debtor from having notice of the freezing order until it is executed is to prevent the further transfer of assets, often where there is imminent danger of dissipation or concealment of the assets. The applicant typically must satisfy 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 property or dissipate assets before judgment in order to thwart tracing.[38] Often the originating court will assess whether the creditors will suffer irreparable harm if the injunction or other order preserving value is not granted. For example, Canadian courts have granted "worldwide *Mareva* injunctions," recognizing the global nature of having to trace and recover assets.[39] Serious risk of dissipation may be satisfied based on an inference from the deceitfulness involved in the fraud.[40] However, such worldwide orders may not be recognized by a foreign in-bound court.

In Germany, a freezing order is available outside of insolvency law for specific assets, common in cases where the debtor is believed to be hiding or transferring remaining assets abroad. The creditor must demonstrate that such a freeze is indispensable for the enforcement of their claim against the debtor,[41] and a title of execution is principally required but may also be litigated immediately afterwards.[42]

Accounts of the debtor in any EU Member State (with the exception of Denmark) may be subject to a European Account Preservation Order (EAPO) that is also available *ex parte*.[43]

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The cross-border circulation of such orders is secured by Article 22 EAPO. The circulation of other freezing orders within the EU outside of insolvency proceedings is principally guaranteed by the EU Judgment Regulation.[44] Article 2(a) explicitly includes interim decisions such as freezing order—with the notable exception of *ex parte* orders in its subparagraph 2. The recognition of such order would need to find its legal basis in the law of the state where assets are situated. German law, for instance, offers no such basis to foreign temporary freezing orders (outside of insolvency law).[45]

2.3 | Recovery and realization of assets

Absent a court order freezing assets preinsolvency, nothing prevents the debtor from dealing with its assets as it wishes. The debtor has the power to transfer assets, including titles, to third parties. The debtor may also move parts of the assets or transform them into different types of assets, such as movables or cash into crypto, without transferring ownership or propriety rights to third parties.

2.3.1 | In insolvency proceedings

Insolvency legislation offers some remedies to deal with transactions of the debtor prior to the commencement of insolvency proceedings *ex post* (i.e., in the course of the proceedings). Assets that are still owned by the debtor are part of the estate and must be turned over to the insolvency administrator appointed to administer the estate. The insolvency administrator recovers and realizes the value of the assets for distribution to creditors as per the hierarchy pursuant to the applicable insolvency law.

The transfer of assets to third parties may be evaluated *ex post* as well, most prominently under "avoidance" rules. One of the listed purposes of avoidance is to facilitate the recovery of money or other 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.[46] In different jurisdictions, avoidance actions may be called avoidance, transfers at undervalue, reviewable transactions, proprietary orders, and/or preferences. The objective of such orders is to recover assets inappropriately disposed of or transferred to persons involved in transactions, subject to some evidentiary requirements and defences, which differ in different jurisdictions. Suspect periods may be different for different types of transactions and there are frequently longer "clawback" periods for transactions with related persons, often calculated retroactively from the date of commencement of insolvency proceedings or the date that the insolvency professional became aware of the existence of the assets.

For example, in the US, pursuant to § 548 of the Bankruptcy Code, the trustee may avoid any transfer of an interest of the debtor in property[47] that was made or incurred on or within 2 years before the date of filing the bankruptcy petition, if the debtor made such transfer with actual intent to hinder, delay, or defraud; or received less than a reasonably equivalent value in exchange for such transfer or obligation and was insolvent on the date that such transfer was made or obligation was incurred, or became insolvent as a result of such transfer or obligation, etc.[48] The trustee may avoid any transfer of an interest of the debtor in property that was made on or within 10 years before the petition filing date, if the debtor made the transfer to a self-settled trust, the debtor is a beneficiary, and the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was indebted.[49]

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For avoidable transactions in the enterprise group context, an original order may be issued in the proceeding of the parent entity that is applicable to a group entity in another jurisdiction. In that case, 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.[50] In some jurisdictions, special rules apply for calculating the suspect period retrospectively in case of substantive consolidation in the enterprise group insolvency context.[51] In many cases, if not most, recovery orders are not likely to be made absent a final judgment on ownership and claims to the assets, and such judgments are rendered only after there has been a hearing with notice.

2.3.2 | Across borders

Recovery and realization of assets is easier where insolvency proceedings have commenced in a jurisdiction that can be recognized by an in-bound foreign court as foreign main proceedings pursuant to any established cross-border insolvency framework. Within the European Union, the cross-border recognition of judgments in civil and commercial matters is supported by the EU Judgment Regulation. Orders relating to insolvency proceedings are covered by the EIR.[52] Under Article 21(1) of the EIR, the insolvency practitioner of the EU main insolvency proceedings is able to remove the debtor's assets from the territory of the Member State in which they are situated back to the Member State of the main proceedings without any supporting court order. Judgments ordering the return of assets based on avoidance claims are automatically enforceable in another EU Member State pursuant to Article 32(1).

Outside of the territorial scope of the EIR, similar effects are available in countries that have adopted the Model Law system, as discussed further in Part 4. Here, the insolvency representative has the principal responsibility to commence avoidance or other recovery proceedings, and costs of such proceedings are typically paid as administrative expenses. Creditors may pursue avoidance only with the agreement of the insolvency representative or, if it does not consent, with leave of the court, often with an undertaking to fund the proceedings. Once a recovery order is issued that requires enforcement abroad, the in-bound court would grant the relief sought under the Model Laws and the counterparty to a transaction 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. In such cases, 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.

Support may also be available outside the scope of prominent cross-border frameworks. In Germany, for instance, the cross-border insolvency law for cases outside the scope of the EIR is specifically regulated in §§ 335–358 InsO.[53] Under this special regime, German insolvency law would recognize foreign main insolvency proceedings and the legal power of their insolvency officeholder under the law of the forum (*lex fori concursus*), including any automatic stay or the right to obtain a stay of any action regarding the assets of the debtor located in Germany and any right of the foreign administrator to move assets of the debtor back home.[54] Foreign avoidance judgments, however, are treated as annex judgments that are held to be outside the privilege of automatic recognition pursuant to §§ 343(2), 353 InsO. These judgments would need to seek recognition as civil judgments under the rules for civil procedures (§ 328 ZPO).[55]

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2.4 | The special case of digital asset ATR

The efficient cross-border use of ATR tools is particularly relevant in the insolvency of crypto exchanges and crypto hedge funds. The recent insolvency proceedings in this area, especially Celsius Network, FTX, and Three Arrows Capital Ltd (3 AC), illustrate the general complexity of administrating such cases, including the administration of assets and the use of ATR tools. Such entities are often registered in an offshore jurisdiction with headquarters elsewhere and customers all over the world. In case of alleged fraud, former founders or officers may be hiding in an unknown location. In the case of 3 AC, for instance, the company was registered in the British Virgin Islands (BVI) and liquidated there. With headquarters in Singapore and assets as well as founders living in the US, insolvency proceedings commenced in all of these jurisdictions and subpoenas against the founders and managers to provide information were issued both in the US and the BVI,[56] as discussed further in Part 4.3.

The tracing, freezing, and recovery of digital assets present another set of challenges. When most of the assets of the insolvency estate are digital assets (cryptocurrencies and nonfungible tokens), the administration of these assets is suffering from a significant lack of legal certainty given that there are not commonly understood legal concepts of such assets, including how control and ownership are defined, preserved, or transferred. UNIDROIT's draft principles on digital assets and private law are intended to address this regulatory gap and facilitate the legal treatment of digital assets in all jurisdictions, including common law and civil law systems, by developing a common understanding of terms critically important to the tracing and recovery of digital assets.[57]

An additional issue with respect to digital assets is the possibility that a person who has no proprietary rights might acquire control without the consent of the rightful control person, such as by the discovery of relevant private keys through "hacking," finding, or stealing a device or other record on which the keys are stored; thus, the distinction between a change in control and a transfer of proprietary rights is critically important.

Finally, even if digital assets are identified and controlled by the insolvency estate, the allocation of such assets and the value realized may become disputed amongst the different insolvency proceedings that are typically involved. Traditionally, assets need to be allocated territorially. Such an allocation is intrinsically difficult for digital assets because they may have no significant connection with any state.[58] UNIDROIT is suggesting a waterfall of factors that could inform an inbound court's consideration of requests for relief, including ATR-related orders.[59]

There may be need to involve intermediaries in ATR of digital assets, for example, digital platform operators, cryptocurrency exchanges, and cloud service providers may be in possession of digital assets being traced or the data necessary to gain access and control over the digital assets, such as passwords or control codes.[60] UNCITRAL notes that it has become possible in some jurisdictions to order measures against "unknown persons" to order the freezing of known digital assets whose owner remains, as of yet, unknown.[61]

3 | MODIFIED UNIVERSALISM, FAIRNESS, AND ATR

We turn to the global governance of cross-border insolvency, and we start with its underlying norm—"modified universalism."[62] There is growing recognition in the scholarship and in policy making that a global approach to multinational default in the form of modified universalism is the desired norm for the governance of cross-border insolvency.[63] Modified universalism derives from the theory of universalism, which envisions a fully-centralized insolvency process.

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Yet, it transforms this model to a realistic legal regime that fits different insolvency scenarios and business structures and allows countries to retain a residual level of control to consider whether deference to foreign proceedings would result in breaching fundamental public policies and ensure that creditors are adequately protected. Under modified universalism, deference demanded of ancillary courts flows more specifically from the designation of a main proceeding, which should encompass all the business' assets and all its stakeholders, depending on what is most efficient in the circumstances.

Modified universalism aims to promote fairness and efficiency through optimal levels of centralization that can lead to global solutions, which benefit stakeholders wherever they are located. It can increase returns to creditors, as well as the likelihood of saving viable debtors. If a business spans across more than one country, it and its stakeholders in any country would benefit from an approach that minimizes the costs of multiple proceedings. Centralization of the process can keep the business together and prevent its breakup in proceedings in multiple forums, and it allows the conceiving of solutions that maximize the business and its assets' potential.[64]

Modified universalism is reflected in the global system for insolvency, primarily the UNCITRAL instruments (discussed in the next Part), and thus, it is quite widely recognized. We have also suggested elsewhere that modified universalism has the potential to become customary international law in the field of cross-border insolvency if it is understood as the main objective, not just an interim compromise.[65] We argue here that it is also important to underscore the connection between modified universalism and ATR, namely, how following the norm of modified universalism is key in facilitating ATR. Here, what should be stressed is that the idea of maximum cooperation and efficient centralization in international insolvencies supports the ultimate objective of handling insolvency proceedings fairly, respecting and adequately protecting all relevant stakeholders' interests affected by the process, wherever located.

The opposite option, territorialism, is to handle the proceedings separately in each State where the debtor has been operating or where it has assets. This approach may seem attractive where creditors arguably expect that their debtor's insolvency will be handled locally, and where countries are inclined to control and govern legal issues linked to their jurisdiction and affecting local stakeholders. But in addition to other deficiencies of this approach,[66] territorialism facilitates and might even incentivize fraud, including the *ex ante* (before the start of the process) transfers of assets, as under such a system, debtors, and related parties know that it will be more difficult to track cross-border transfers and recover assets, in the absence of mechanisms for cooperation and cross-border assistance.

A framework based on modified universalism, on the contrary, takes a collective view over the entire estate—the debtor's assets wherever located or transferred to—and avoids the unfair consequence of creditors recovering their debts based on the random location of assets that might have been moved across borders prior to the insolvency. Modified universalism also minimizes waste of resources by focusing the effort of ATR through the centralization of proceedings.[67] Under modified universalism, tracing and recovery of assets is a global, efficient, collective endeavor, supporting the principle of fairness.

4 | THE UNCITRAL MODEL LAWS: OPTIONS AND CHALLENGES FOR ATR

The MLCBI is the main framework for cooperation in cross-border insolvency cases; it was adopted by UNCITRAL in 1997,[68] and since then, and thus far, has been enacted in the laws of

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53 countries. In principle, the MLCBI provisions can be invoked by parties from any country, including from countries that have not yet enacted the MLCBI in their legal systems. Therefore, the MLCBI's reach and influence is broad, and it is not confined to the countries that enacted its provisions (though some countries have included reciprocity requirements).[69] The MLCBI is premised on the norm of modified universalism where it promotes global solutions to multinational default.[70] Thus, the MLCBI requires that courts and insolvency representatives cooperate to the maximum extent possible[71] that they recognize foreign proceedings as the main proceeding if they were opened in the debtor's home country (the center of main interests [COMI]),[72] which will result in certain automatic relief,[73] or as nonmain proceedings if they were opened in a forum where the debtor has an "establishment,"[74] and grant further relevant relief to the foreign proceedings,[75] subject to safeguards.[76]

The MLCBI has gaps, however, and newer model laws have been designed to complement it with regard to the enforcement of judgments and the insolvency of enterprise groups. Further deliberations are also ongoing concerning applicable law in insolvency proceedings. We highlight below the relevance of this model law system, predicated on modified universalism, to ATR.

4.1 | Recognition of proceedings and ATR-related remedies and relief

Although the MLCBI does not include a chapter dedicated to ATR, mechanisms relevant to ATR are embedded within its framework. If a debtor, which could be an individual or an entity of any size or legal form, has assets abroad, or it is suspected that assets have been or will be transferred to other jurisdictions, the MLCBI can be invoked in those countries, if they have enacted the MLCBI, to seek assistance and cooperation there, the recognition of the insolvency proceeding, and the granting of relevant relief to try trace and recover the assets.

When filing an application for recognition of the proceeding as foreign proceeding (main or non-main), the foreign representative may promptly seek relief of a provisional nature if it is "urgently needed to protect the assets of the debtor or the interests of the creditors."[77] Such interim relief may include staying execution against the debtor's assets,[78] entrusting the administration or realization of all or part of the debtor's assets located in the recognizing state to the foreign representative or another person designated by the court, in order to protect and preserve the value of assets that, by their nature or because of other circumstances, are perishable, susceptible to devaluation, or otherwise in jeopardy[79]; suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor[80]; providing for the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities[81]; or granting any additional relief that may be available to insolvency representatives under the laws of the in-bound court.[82] Article 19 deals with urgently needed relief that may be ordered at the discretion of the court and is available as of the moment of the application for recognition. The insolvency representative seeking the relief may be one appointed on an interim basis.[83] This relief is, in principle, terminated when the application for recognition is decided, unless the relief is extended.[84]

Especially if the foreign proceeding is the main proceeding, assets can be further and effectively protected.[85] The MLCBI requires that recognition is swift, specifically, the application for recognition "shall be decided upon at the earliest possible time."[86] Further, if the foreign proceeding is recognized as a foreign main proceeding, relief in the form of a stay applies automatically, which means that commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed,[87] execution

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against the debtor's assets is stayed,[88] and the right to transfer, encumber, or otherwise dispose of any assets of the debtor is suspended.[89] The only exception is one of the public policy, where nothing in the law enacting the MLCBI prevents the court from refusing to take action if it would be manifestly contrary to public policy of the in-bound court.[90]

Subsequently, the insolvency representative may seek additional relief and the in-bound court may grant such relief if it satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.[91] This relief could support ATR. It is discretionary as it may or may not be required in the relevant circumstances, but where needed, the court may provide for the examination of witnesses; the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities[92]; entrust the administration or realization of all or part of the debtor's assets located in the in-bound state to the foreign representative or another person designated by the court[93]; extend interim relief[94]; or grant any additional relief that may be available to a representative under the law governing the in-bound court. Upon recognition, the foreign representative also has standing to initiate avoidance actions in the enacting State.[95]

4.2 | Assistance, access to proceedings, and cooperation, bolstering ATR

This framework prescribed in the MLCBI, based on applying for recognition and relief and supporting foreign proceedings, primarily a main proceeding, is buttressed by additional provisions on access, assistance, and cooperation. Thus, foreign insolvency representatives have a right of direct access and can apply to the courts in enacting States without the need to meet formal requirements or seek prior recognition.[96] They can also apply to commence insolvency-related proceedings, or upon recognition of the foreign proceeding, participate in proceedings regarding the debtor taking place in such states, or intervene in proceedings in which the debtor is a party.[97] These provisions are gateways for insolvency representatives, where needed, to make petitions, submit requests, and/or take actions, including actions related to ATR.

Assistance to foreign representatives is also permissible under the MLCBI framework and is independent from the provisions on recognition and relief.[98] Thus, courts or other relevant persons or bodies could assist the foreign representative regarding ATR at any time and through the application of other laws of the enacting State. The MLCBI also includes elaborated provisions on cooperation,[99] which are again independent from the process of recognition and relief. Effective means of cooperation, such as direct communication between courts and insolvency representatives, can facilitate ATR, including through the communication and provision of relevant information.

4.3 | Use of the model law on cross-border insolvency for ATR purposes in practice

The MLCBI has been frequently invoked in insolvency practice and especially from the mid-2000s, when major economies including the UK and the US incorporated it in their legal systems.[100] Recognition of foreign proceedings have been given by courts in enacting countries as a matter of course,[101] and a range of discretionary relief has been granted, including to support the protection, preservation, tracing, and recovery of assets.[102] For example, in *Swissair*,[103]

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the English Court turned over assets to the Swiss foreign proceedings, to be distributed under Swiss law. In *Akers SAAD*,[104] the Australian Court recognized the Cayman Islands foreign proceedings and entrusted the distribution of all of the debtor's assets located in Australia to the foreign representatives. In other cases, courts applied the MLCBI to enforce foreign orders, such as substantive consolidation (pooling assets/debts of group entities),[105] or to defer to foreign insolvency laws or to apply foreign laws. For example, in *Condor*,[106] the US Court applied foreign avoidance law (the law of Nevis) to recover certain assets fraudulently transferred to the US.

As noted above, ATR can be especially tricky in cross-border insolvency cases involving digital assets and cryptocurrencies because of the elusive nature of these assets; but in that context too, we can observe a growing role of the MLCBI and mechanisms reflecting modified universalism. For example, on 30 December 2022, the trustee of an allegedly fraudulent Estonian crowdfunding platform (Tallinn-headquartered Envestio) sought recognition of the Estonian insolvency proceedings in the US,[107] to pursue a stay on any actions against the company in order to secure assets and recover evidence in the US.[108] The trustee argued in the recognition application pursuant to Chapter 15 of the US Bankruptcy Code (the US enactment of the MLCBI) that funds raised from investors were transferred to shell-companies or converted to cryptocurrencies and transferred further to various cryptowallets and that evidence of some of the transactions was believed to exist in the US.[109] Through the recognition process, the trustee aimed to recover assets and help determine the reasons for Envestio's insolvency, as relevant documents were held by witnesses in the US.[110] The US Court granted recognition to the Estonian proceeding in February 2023 as a foreign main proceeding. It also granted various relief that assists in ATR, including an automatic stay, a prohibition on all persons and entities from transferring, encumbering, or otherwise disposing of any assets of the debtor or the debtor's bankruptcy estate located in the US, an order that persons and entities that are in possession, custody, or control of the debtor's property (located in the US) shall notify the trustee, authorizing the trustee to examine witnesses, take evidence, or seek the delivery of information concerning the debtor's assets, take discovery in connections with assets, and entrust the trustee with the full administration and realization of the debtor's bankruptcy estate and assets within the US.[111]

In the case of the crypto hedge fund 3 AC,[112] ATR was being facilitated through various modified universalism-based mechanisms and MLCBI provisions concerning recognition, relief, and cooperation.[113] Thus, after 3 AC was placed into liquidation proceedings in June 2022 in the BVI, the appointed liquidators secured recognition of their appointment and of the proceedings as foreign main proceedings in the US pursuant to Chapter 15 of the US Bankruptcy Code, which resulted in an automatic stay. The BVI proceedings were also recognized in Singapore, and proceedings were stayed there as well. Further, the Singapore Court assisted the liquidators to compel the hedge fund's founders to assist them and explain the Singaporean entity's dealings, as well as produce records in possession of the Singapore branch. The BVI proceedings were also recognized in Canada in October 2022, and further recognitions were sought in other jurisdictions.[114] A court-to-court cooperation protocol was signed between the US, Singapore, and BVI courts,[115] and the US Court made further orders to require that the fund's founders produce relevant documents and to permit the liquidators to transfer any 3 AC assets traced in the US, including cryptocurrencies or other digital assets, to the main proceedings in the BVI.[116]

In another insolvency case of a cryptocurrency platform that dominated headlines, that of FTX,[117] cooperation and recognition initially seemed to resolve a chaotic situation undermining ATR. Insolvency proceedings were opened against FTX Digital Markets Ltd in the Bahamas, while FTX Trading Ltd and affiliates filed Chapter 11 bankruptcy proceedings in Delaware, US. At the time, a petition for recognition of the Bahamas foreign proceedings pursuant to

Chapter 15 of the US Bankruptcy Code was pending in New York. The US debtors petitioned for the transfer of the Chapter 15 motion to Delaware, and for centralizing and coordinating the process there, arguing that:

> "It is critical to the efforts to end the chaos and to ensure that assets can be secured and marshaled in an orderly process that all proceedings related to the Debtors and their affiliates—including the Chapter 15 Case—take place in a single venue. That venue is this Court, the United States Bankruptcy Court for the District of Delaware… There is no doubt that there will need to be close coordination between the Chapter 11 Cases and the Bahamas proceeding relating to FTX DM. Whether that proceeding justifies the granting of relief under chapter 15 must first be determined. Basic principles of efficient judicial administration and effective coordination argue strongly in favour of all U.S. proceedings relating to the FTX group occurring in a single U.S. court—this Court. Having two bankruptcy courts consider related issues simply makes no sense. It would result in potentially inconsistent opinions, duplication of efforts, and unnecessary expense."[118]

The parties and the authorities involved then managed to cooperate, clearing the path to the recognition of the proceedings. It was agreed to proceed with parallel proceedings in the US and the Bahamas, but to cooperate and to coordinate the process as much as possible, dividing responsibilities regarding the recovery of value from assets and property of the various affiliates. The cooperation agreement also provided facilities for information sharing between the parties.[119]

We can thus observe some successful application and use of the MLCBI to achieve quite effective ATR, but there are also gaps and uncertainties, in particular, regarding the scope of the discretionary relief and the use of the framework in enterprise group cases. We next consider the attempt to address these issues through additional model laws, again highlighting, in this respect, the relevance of these regimes for ATR efforts.

4.4 | Recognition and enforcement of ATR-related judgments

The MLCBI has been vague on the issue of the enforcement of judgments and orders related to insolvency. However, enabling effective ATR, per the norm of modified universalism, requires that the central process and its judgments and orders have effect in other countries where the debtor has assets. While the MLCBI includes provisions on cooperation, assistance, and relief, and even though relief may include any appropriate relief, none of the provisions of the MLCBI explicitly mention the enforcement of judgments of the foreign court.

In *Rubin v Eurofinance*,[120] the UK Supreme Court refused to enforce an insolvency-related judgment of a US Bankruptcy Court, which was recognized as the main insolvency forum. The US court judgment was in default of appearance in respect of fraudulent conveyances and transfers. The UK Supreme Court concluded that neither the MLCBI provisions on assistance, cooperation, or relief, nor common law provide special rules on the enforcement of insolvency judgments.[121] Therefore, the Court applied the ordinary common law rule according to which a judgment *in personam* cannot be enforced against persons who were not present in the foreign country or did not submit to the jurisdiction of the court entering the judgment.[122] This restrictive interpretation of the MLCBI has been followed by some courts.[123] Other courts have taken a broader, more universalist stance.[124]

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In any event, the MLCBI appeared to have a gap or at least an uncertainty, which resulted in deliberation to complement it with a Model Law on Recognition and Enforcement of Judgments (MLIJ),[125] driven as well by concerns regarding ATR.[126] Indeed, when the MLIJ project was considered, there was growing recognition of the challenges of ATR across borders, and because of the limited reach of the MLCBI, which has not been adopted by the majority of countries, it was thought that perhaps a new separate instrument could induce greater participation in the cross-border framework.[127] The MLIJ is an ATR facilitator because the adoption of the MLIJ by the country of the in-bound court may give insolvency representatives in the country where the proceeding is handled greater certainty regarding the ability to reach those assets located abroad by enforcing orders regarding recoveries.

The MLIJ explicitly requires enforcing foreign judgments related to insolvency.[128] It also provides the definition of insolvency-related judgments, the procedure for seeking their recognition and enforcement,[129] and the safeguards/grounds to refuse recognition and enforcement.[130] Judgments and orders within the scope of the instrument include any decision related to insolvency proceedings (including an interim proceeding)[131] issued by a court or administrative authority, including regarding the avoidance of preinsolvency transactions, orders concerning the recovery of assets and pursuit of claims by the insolvency representative, or contributions from directors.[132]

From the time recognition/enforcement of a judgment is sought until a decision is made, it is also possible to seek urgent provisional relief to preserve the possibility of recognizing and enforcing the judgment. Such interim relief may be in the form of a stay of the disposition of any assets of any party against whom the judgment was issued, and this option is arguably "flexible enough to encompass an *ex parte* application for relief, where the law of the enacting State permits a request to be made on that basis,"[133] or the granting of other legal or equitable relief as appropriate.[134] The MLIJ also includes an Article X, which states that the discretionary relief provision in the MLCBI—article 21—does allow the enforcement of judgments, contrary to the previous narrower interpretations (e.g., in *Rubin v Eurofinance*). This provision helpfully clarifies the scope of the MLCBI discretionary relief.

It is also possible to invoke the MLIJ, if enacted in the in-bound country, in circumstances where the judgment related to assets that were located in the originating country at the time the proceedings in the originating country commenced, even if that country is not the main forum or a forum where the debtor has an establishment; or where the representative in main or nonmain proceedings participated in the proceeding in the originating country to the extent of engaging in the substantive merits of the cause of action to which that proceeding related.[135] This provision has been viewed as quite "peculiar," but it is aimed at enabling ATR efforts of representatives of recognizable proceedings (per the MLCBI framework), even where those efforts occurred in another jurisdiction.[136]

The MLIJ has not been enacted by any country yet,[137] and therefore, there is no practical experience with implementing its provisions. The UK is the first country to have commenced a consultation process regarding the possible adoption of the MLIJ, although the proposed enactment contemplates only partial adoption of the instrument, essentially the enactment of Article X, which will clarify that it is possible to enforce foreign judgments pursuant to the MLCBI framework, and by providing certain additional guidance for courts based on the MLIJ text.[138]

4.5 | Enterprise group cross-border insolvency and ATR

A significant addition to the model law system for cross-border insolvency is the Model Law on Enterprise Groups Insolvency (MLEGI), which was adopted by UNCITRAL in 2019.[139]

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The original MLCBI did not only exclude enterprise groups from its scope but also did not address them explicitly and comprehensively. The key dilemma with enterprise groups is whether to give effect to the economic reality of integrated businesses operating through separate legal entities and address the group as a whole, or to strictly adhere to the corporate form and address each group member separately.[140] In the context of cross-border insolvency, this dilemma is intertwined with the conflict between universalism and territorialism and the possibility of fitting this more complex structure into the framework of the modified universalism norm (discussed in Part 3). A global approach to the multinational default of enterprise groups can benefit the group stakeholders, as a group resolution can give effect to group synergies and enable a group solution that maximizes assets and increases returns. For ATR, cooperation and centralization can be efficient as it can increase information flows across group entities that typically have been interlinked and make efforts to trace and recover assets more efficient and less fragmented.

The MLCBI can support centralized approaches in group cross-border insolvencies where a joint COMI can be identified and recognized in regard to all the relevant entities in the group, but the MLCBI lacks sufficient tools to deal with the myriad of group structures, particularly the more decentralized ones. The practice of cross-border insolvencies has demonstrated the deficiencies of the MLCBI in this respect where, for example, in *Nortel*,[141] proceedings regarding various entities in the group were conducted in multiple jurisdictions, including Canada, the US, and the UK. It was difficult and costly to reach a coordinated solution regarding a group that was heavily integrated. After prolonged litigation, the US and Canadian courts managed to reach a consistent conclusion regarding the complex question of the allocation of the estates among the stakeholders.[142] We have also shown above how in FTX Trading, there was risk to efficient ATR where multiple proceedings were opened, undermining a coordinated centralized process that could "end the chaos" and "'ensure that assets can be secured and marshaled in an orderly process."[143] The MLCBI was invoked, but the recognition process was patchy regarding separate entities.

The newer MLEGI provides bespoke mechanisms to deal with cross-border insolvencies involving enterprise group members. It facilitates cooperation between entities belonging to the same group, and importantly, it introduces the mechanism of opening a "group planning proceeding," which may be opened in the forum of at least one entity's COMI integral to the group solution located.[144] Other entities can participate in the planning proceeding, and a group representative is appointed to develop and implement a group solution. The planning proceeding can be supported in the planning forum, where the insolvency representative can seek relief, and can be recognized and assisted by courts hosting subsidiaries and branches, and those courts may refrain from opening additional proceedings and instead defer to the planning proceedings and the group solution.[145]

It is possible to provide any assistance at any time to the group representative,[146] and the MLEGI further specifies explicit forms of relief, including such that is aimed to protect, preserve, realize, or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding, or the interests of the creditors of such an enterprise group member. The relief that the planning forum or courts in host jurisdictions may grant includes a stay of execution against the assets of the enterprise group member; suspension of the right to transfer, encumber, or otherwise dispose of any assets; a stay on the commencement or continuation of individual actions or proceedings concerning the assets, rights, obligations, or liabilities of the group member; entrustment of the administration or realization of all or part of the assets of the enterprise group member to the group representative or another designated person; the

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examination of witnesses, the taking of evidence, or the delivery of information concerning the assets, affairs, rights, obligations, or liabilities of the enterprise group member; as well as other forms of relief.[147]

Provisional relief may also be granted on application for recognition of a foreign planning proceeding, to cover the time from the filing of an application for recognition of a foreign planning proceeding until the application is decided:

> "where relief is urgently needed to preserve the possibility of developing or implementing a group insolvency solution or to protect, preserve, realize, or enhance the value of assets of an enterprise group member subject to or participating in a planning proceeding or the interests of the creditors of such an enterprise group member."[148]

The MLEGI has not yet been enacted in any country's law; hence, it has not yet been used in practice. The UK consultation process we have noted above regarding the adoption of the MLIJ also includes a proposal to adopt the MLEGI in its entirety and only with minimal modifications to integrate it into the system. It is noted in the consultation in this respect that:

> "[B]y removing the barriers that prevent insolvencies from being dealt with in a holistic fashion, rather than piecemeal in each jurisdiction, the value that is present in a business as a going concern can be better preserved…."[149]

4.6 | Gaps and challenges

The Model Laws are conducive to ATR, but it is only the MLCBI that has been "adopted" (and only partially), as it has been enacted in certain countries' legal systems. Applications of the MLCBI, however, are sometimes restrictive, especially with regard to provisions that are expressed in vague terms, such as the discretionary assistance and relief that are not specified. We also see deviations from the MLCBI text when it is enacted in some systems, and some of these deviations can be damaging from an ATR perspective, for example where a stay of executions is not automatic,[150] and so may be more time consuming, or where a public policy safeguard is drafted in broader terms,[151] which may result in less cooperation, or where there are reciprocity requirements that may render the law either more restrictive in its reach or even completely ineffective.[152] Safeguards are important, but if they are excessive, valuable time can be lost in identifying and preserving the value of assets, or it may even be impossible to do so. Canada's adoption of the MLCBI did not include the word "manifestly" in the public policy safeguard,[153] but the courts have universally held that this public policy exception is to be interpreted narrowly,[154] thus facilitating the court's granting of timely relief.

Encouraging wider adoption of the Model Laws with limited deviations in enactment and application would be highly conducive to ATR. In this regard, there is merit, as well in recognizing biases and in increasing awareness concerning territorialism inclinations that decision makers might be prone to.[155] Countries and implementing institutions may be reluctant to assist in ATR regarding assets situated within their borders, as they may be concerned about short-term implications of surrendering control and may give greater weight (because of "loss aversion"[156]) to the loss of control over assets compared with the gains from cooperation, especially if they are less practiced in cross-border cooperation and have traditionally adhered to a

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more territorialist approach.[157] Vagueness in the law can exacerbate such tendencies as it provides more room for the operation of cognitive biases. If given an open-ended choice regarding the manner of enactment or application of provisions, implementing institutions might apply the law so that it fits with the existing local system and its traditional norms, rather than change the *status quo* and cooperate more fully.[158] Ambiguities in the rules, and lack of comprehensive and concrete ATR tools, can be especially problematic in cross-border cases involving MSMEs. Thus, clarifications of the MLCBI relief provisions through adoption of Article X of the MLIJ and adoption of the MLEGI could be conducive to the ATR project.

Another important gap in the cross-border insolvency system is the absence of concrete rules on applicable law, causing uncertainties and inconsistencies in the application of the Model Law system. This gap is being considered by UNCITRAL. A key challenge in this regard is a prima facie "contradiction" in the MLCBI, which, if not resolved, can impact on ATR effectiveness. The MLCBI encourages centralization and deference to the main forum through recognition and relief, mainly to the main proceeding, but it is not entirely clear whether the relief that may be granted to support the main proceeding solely refers to what is available locally under domestic laws of in-bound courts or if it can allow deference to the main forum laws, judgments, and orders. Article 20 of the MLCBI, concerning the stay, refers to the law of the in-bound courts of host countries, where it provides that the:

> "scope, and the modification or termination, of the stay and suspension… are subject to… any provisions of law of the enacting State relating to insolvency that apply to executions, limitations, modifications or termination in respect of the stay and suspension…."[159]

The assistance provision (Article 7),[160] as well, refers to any other assistance based on local law.

Article 21(1)(g) of the MLCBI, which allows the court to grant any additional relief, refers to relief available under the laws of the in-bound courts receiving the request. However, this relief could be in the form of deference to the main forum's laws and judgments. Indeed, in practice, in-bound courts have enforced main foreign forums' judgments and deferred to the foreign law based on the discretionary relief provisions,[161] and Article X of the MLIJ clarifies that this approach was correct. Therefore, in terms of ATR, there could be some confusion regarding the laws and tools that can be invoked. Thus, we argue that the Model Law framework could benefit from applicable law reform in general and, for our purposes, from ATR-specific clarifications.

5 | CROSS-BORDER ASSET TRACING AND RECOVERY IN INSOLVENCY: STRENGTHENING THE SYSTEM

The cross-border efficiency of ATR would benefit from a clear set of ATR tools based on common features, effectively systemizing the existing tools before describing more precise rules or principles to treat them accordingly across borders. The insights from domestic legal systems that offer a range of different ATR tools then allow for the development of an enhanced and effective ATR framework for cross-border recognition without unnecessary delay. The first step in the development of such a framework, therefore, is to identify the key objectives, features, and safeguards of the different tools. The second step would consist of suggesting a set of cross-border rules for the most efficient treatment of ATR tools.

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5.1 | Key features of ATR tools

We have identified in Part 2 that ATR tools can be commonly categorized into three broad types of relief:

1. access to information (disclosure);
2. temporarily restraining asset disposition or transfers (freezing); and
3. recovery and realization of assets.

This categorization is useful when describing the steps necessary to enable the administrator of the insolvency estate to effectively collect the debtor's assets and realize on the value. However, it is still incomplete and imprecise in exposing the detailed characteristics of different ATR tools, and how they impact on the issue of applicable law. Such understanding is crucial for an attempt to develop a fitting and nuanced legal framework that also takes account of the potential application of different legal systems. Thus, we suggest refining this broad categorization of ATR tools by introducing the following timing, finality, and applicability of tools.

5.1.1 | Timing of relief and review

Time is often of the essence in regard to enforcement efforts, in particular, in the context of insolvency law and especially in regard to aspects of ATR. In both domestic and cross-border cases, urgent relief may be needed. More specifically, requests to receive information about the location of assets and to subsequently temporarily freeze identified assets before they dissipate must be treated with urgency in order to be useful and effective. Recovery actions, by contrast, do not seem to share the same level of urgency in principle. Once control of an asset is established, a sense of urgency is limited to cases where the value of the asset diminishes over time, especially in "melting ice cube" situations.[162]

The need for urgency and efficiency informs the decision on policy options in regulating the timing of relief and the availability of judicial review. Only a high degree of urgency would justify immediate relief without a prior hearing, potentially even without prior notice to affected parties. The rights of the debtor and relevant third parties would be respected by allowing for judicial review of the measure *ex post* (after the fact), including the ability to achieve measures to be lifted or adjusted and damages to be paid. The latter would be secured by asking the applicant to place a bond or other form of security with the in-bound court in cases with limited *ex ante* involvement of the affected party. The in-bound court should be able to impose sanctions for noncompliance on persons who fail to produce evidence pursuant to its relief order, where disclosure reasonably appears to be within that person's control.

Less urgent measures allow for more *ex ante* scrutiny before relief is granted. Notice would be given and, possibly, a hearing would be required to consider objections. Placing a bond or similar security may be discretionary for provisional relief and not needed at all in cases where relief is only granted after a final decision of the court.

Integrally linked to the timing of relief is the jurisdictional basis on which the in-bound court can make an urgent order *ex parte*, and where appropriate, a temporary order sealing the existence of the information order until it is executed. Many jurisdictions have provisions in their domestic insolvency law that creates a duty on the debtor and its principals to disclose the existence of and location of all their assets.[163] Evidence of breach of this duty in the main

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insolvency proceeding is highly persuasive when in-bound courts are asked to grant relief *ex parte*, including a sealing order until the assets are located and/or frozen. The in-bound court may require security or indemnification.

5.1.2 | Finality or reversibility

The issue of timing and review leads to an assessment of finality or reversibility of decisions. Some ATR tools may be based on court orders that are conditioned on the final assessment of the underlying legal right. The right of the administrator to recover or realize assets of the debtor or a third party may only be enforceable after a final decision on the merits in a court of law, if disputed. Measures based on these rights are difficult, if not impossible, to reverse. Similarly, the right to access information (in a register, document, or in the knowledge of a person) creates knowledge that, once shared, is impossible to forget and thus difficult to reverse. The recognition and enforcement of respective orders would need to reflect this risk when considering the precondition for granting such ATR tools and securing the adequate protection of affected rights.

By contrast, freezing orders entail a mere interim effect. While they need to be prepared by obtaining relevant information about the location of assets and the person in control, their effect on the rights of these parties is merely temporary and reversible. Any damage caused by unduly delaying the exercise of control over assets by a freezing order is, in principle, a monetary interest that can be compensated by bonds or other security filed with the court.

5.1.3 | Applicability of ATR-related laws in original and in-bound jurisdictions

In principle, deference to the foreign law concerning the application of ATR tools can avoid duplicity of proceedings and expedite ATR relief. Otherwise, issues that have already been canvassed in the originating court applying its law may be assessed again in the in-bound court under its own relevant laws. Such repetition expends resources in duplication and increases the risk of delay,[164] which is especially relevant for ATR tools that are sought to be used in an urgent situation. Thus, the need for repetition or deference must be carefully assessed and may well vary for the different groups of ATR tools. We suggest that it is useful, in this regard, to distinguish between the different types of tools and steps, when considering the law that should apply.

First, regarding access to information, we need to consider the variety of sources and tools to access relevant information. Information can be found in public registers of the in-bound jurisdiction, for instance, registers for land, vehicles, companies, pledges, beneficial ownership, or bank accounts. The rights and limits to access such registers and the procedures to receive information should, therefore, be governed by the in-bound jurisdiction as the jurisdiction organizing the register. Deference to foreign law should mostly be limited to the competence of a person (office holder) to apply for access. By contrast, information contained in private documents or in the private knowledge of a person is possibly accessible with less involvement of the in-bound jurisdiction. The decision to share is an individual one. A duty to share information under a foreign law should be respected (i.e., recognized across borders). Privacy and confidentiality concerns could be addressed as safeguards in case the foreign law does not seem to reflect such concerns adequately. The enforcement of such duties, for example, the production of a document or the interview with a person of interest, is nonetheless a matter of local law.

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The competence of local authorities and their procedures to execute orders are difficult, if not impossible, to import. As a matter of principle in private international law, the use of force in enforcement is always regulated by local law, reflected, for instance, in rights to remain silent or the availability and maximum duration of prison terms for persons in contempt of court orders.

Second, freezing of assets is a temporary measure pending the final assessment of the ability of the debtor or the administrator or a third party to control or transfer the assets. It is a common effect of the commencement of insolvency proceedings reflected in statutory moratoria or first-day stay orders. Their cross-border effectivity is key to any cross-border insolvency framework, and they are therefore provided specifically in the prominent existing cross-border insolvency frameworks.[165] It is important that such measures imposed in the main, collective proceedings are recognized and given effect to, but this recognition does not mean that a stay issued under the law in the main proceeding is precisely the same in the foreign in-bound jurisdiction.[166] Indeed, the question whether a stay is needed, which should primarily be determined by the main forum, may well be treated separately from the matters of the scope, duration, and manner of enforcement. The latter aspects could be delegated to local laws.

Finally, the recovery of assets situated in foreign jurisdictions depends on the existence of claims and the enforcement of such claims. Insolvency representatives may rely on rights of the debtor against the person in control of the debtor's assets, for instance, a foreign bank or a crypto platform. Further, the insolvency law of the main proceedings may provide for insolvency-specific claims, most prominently avoidance claims. All of these claims are ancillary (related) to insolvency proceedings. Whilst deference to the foreign law, including through recognition and enforcement of orders and judgments of the main proceeding, is required to give effect to decisions regarding recovery matters ancillary to the proceedings, the manner of enforcement of a right to transfer assets is a matter of local law. Furthermore, in the insolvency context, the willingness to allow for a transfer of value to the main forum prompts a need to consider whether local interests are adequately protected.

5.2 | An enhanced cross-border framework for ATR tools

The type of relief and their characteristics along the parameters identified above would need to be reflected in the cross-border framework, which, we argue, could be amplified to address ATR more explicitly. The guiding principles that should underpin cross-border effectiveness of the three key tools of information, temporary freezing, and recovery and realization orders are the court's consideration of whether the relief sought is fair, effective, timely, and necessary to the integrity of the process; whether the relief assists in preserving and maximizing the value of the insolvency estate; and whether it enhances comity and cooperation across borders. The cross-border system should acknowledge differences in available tools and in the way they may be implemented in the countries where assets are located while providing a framework that can ensure smooth and speedy ATR.

5.2.1 | Cross-border access to information held abroad

Access to information is a key component in any system aimed at the ability of an insolvency representative or creditors to investigate the existence and location of assets of the debtor.

The ability of individuals to transfer assets across borders or hold them in a virtual realm has produced the need to be able to find these assets, including as part of a criminal, tax, or insolvency law investigation. An important starting point is that domestic legislation should impose a duty on the debtor and its principals to disclose all assets of the debtor, *wherever located*. The duty would typically comprise a requirement to prepare and share documents, hand over books and records, and provide any other asset-related information.

For the insolvency administrator or creditors, it is typically the evidence of suspected violation of this duty to disclose that provides grounds to appear before a court to seek an information order. Similarly, there is a duty to cooperate with the insolvency professional in terms of disclosing assets that were transferred out of the debtor's estate during periods subject to avoidance or reviewable transaction rules. The administration of the estate and the fair treatment of creditors depends on a correct assessment of the assets available for distribution. If the transfer of assets was across borders, then the issue that arises is that third parties in the other jurisdiction may not disclose information about the assets without legal authority from their own jurisdiction.

The in-bound court should recognize orders for information, including public records, relevant private information, and witness testimony, granted by the originating foreign court. In the normal course, a notice to affected parties is required, and absent objection, the court should have the authority to recognize the foreign order for access to information without a full hearing on the merits. An *ex parte* measure is justified where the need for such information is urgent or where an element of surprise is needed, and the benefits outweigh any potential harm resulting. 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. The in-bound court's ability to recognize and support an *ex parte* measure may be conditioned on additional statutory or common law requirements.

In principle, information held in public registers should be made available to foreign creditors and insolvency administrators. While the rights and limits to access such registers and the procedure to receive information would be governed by the in-bound jurisdiction as the jurisdiction organizing the register, public information should be accessible with ease, ideally without any costs or registration online.[167] Where concerns for privacy result in limited access to the register under the law applicable, foreign parties should not be discriminated against, but rather, enjoy the same access as domestic parties. The non-discrimination approach would include the ability of foreign insolvency representatives to access such registers. The implementation of non-discriminatory access practices would be a matter of the law of the register.[168]

As noted above, relevant information is often held by third parties. In case of a company debtor, the duties of the debtor commonly apply to the (former) management and, in some jurisdictions, to the employees of the debtor. Asset-related information is commonly held by banks, accountants, and financial advisers of the debtor and many laws provide for the need to share this information with the domestically-recognized insolvency administrator.[169] The same may not be true for recipients of assets from debtors prior to the commencement of insolvency proceedings. In any case, concerns for privacy and confidentiality may limit any duty to share information. For digital assets, the issue of control is a separate issue to resolve in this context.[170]

Importantly, in a cross-border case, requests concerning information about the debtor should be resolved in an expedited manner. The question of the law applicable to a duty to provide information is less crucial if the relevant jurisdictions provide similar duties. In the interest of clarity and to avoid duplication and delay, the duty under the law of the forum (in the main proceedings) should suffice to carry a request for information from the debtor (unless local secondary proceedings have commenced and require the application of local law). In any event, the existence of a duty under the laws of the in-bound jurisdiction should also suffice.

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Where a need for urgency is credibly demonstrated ('hot pursuit'),[171] in particular, in cases of criminal or bad faith debtors, the request to produce the information should result in a measure of support without prior notice or hearing. The rights of the debtor are adequately protected by the ability to invoke confidentiality concerns in the process of enforcement. This process would follow the rules of the law of the in-bound state and may require measures of support by local authorities.[172]

The assessment is slightly different when the duty of third parties is concerned. Their treatment is less uniform across jurisdictions. In addition, these parties may have legitimate reasons not to share information, for instance, based on confidentiality, privacy, or business reasons. Policy makers applying the international framework for ATR need to consider such concerns against the interests of insolvency law and provide for a resolution of potential conflicts.

Solutions could nonetheless look similar to those suggested for the duty of the debtor, in particular, where third parties are closely related to the debtor, for example, the debtor's management, leading employees, or family members. The law of the main forum would govern the existence of a duty, while local law would describe the means to enforce such duties. Justified concerns could be addressed procedurally, for instance, by sharing information with the local court that would decide whether and to what extent relevant information is shared with the foreign representative.

These measures are then accompanied by some important safeguards. Where orders/measures for recognition of a foreign order/measure for information are granted without notice, the in-bound court may order protection of confidential or commercially sensitive information (sealing orders), and/or may require some security for harm. The in-bound court should also be able to impose sanctions on persons who fail to produce evidence that reasonably appears to be within that person's control. If an *ex parte* order/measure for temporary sealing of the information order is sought, the in-bound court may require the applicant to indemnify 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.

5.2.2 | Temporary freezing of assets in cross-border insolvencies

An interim freezing order should be available in principle for application across borders whenever insolvency proceedings are commenced and a stay or moratorium is issued by operation of law (*ex lege*) or by court order. The existence of such a freezing order shall be recognized without delay abroad. As a mere interim and reversible measure, the need for safeguards is limited. The placement of a bond may further mitigate concerns.

Where needed, the interim freezing order should also be available without prior notice and hearing (*ex parte*). As part of the interim relief sought, the in-bound court may be asked to implement certain steps included in a foreign proceeding, and this request may require taking actions that would require applying local laws as well. For example, the local law (i.e., the law where the property is registered) would apply regarding how to make entries giving the foreign representative control of the debtor's assets in the local registry.

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Once a foreign main insolvency proceeding and foreign representative are recognized by an in-bound court, the in-bound court can defer to and recognize freezing orders (suspension of right to transfer assets) of the originating court, assuming the order is not contrary to the public policy of the in-bound court. In this respect, the MLCBI already offers a framework for cross-border ATR.[173] Key, however, is a consistent application and interpretation of the scope of the relief and timeliness in the granting of the relief, such that assets are not dissipated or transferred to yet another jurisdiction pending the hearing of the motion for relief.

Here again, there are safeguards. 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 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.

5.2.3 | Cross-border recovery of assets

The ability of a foreign representative to recover assets based on a pre-existing claim of the debtor or an insolvency-specific claim depends on a final adjudication of the claimed right. The foreign representative should be able to initiate recovery proceedings, for example, to avoid certain transactions, and to enforce such judgments in countries where the assets are located. It is important, in this respect, that the cross-border regime as enacted in domestic laws is clear concerning the scope and coverage of insolvency-related orders and judgments to include the recovery tools, to avoid ambiguities and divergent interpretations.[174]

As a general rule, insolvency-specific claims, such as avoidance, should be governed by the law of the insolvency forum and judgments issued accordingly should be enforced in the in-bound jurisdiction under local enforcement rules for foreign judgments upon recognition. The adequate protection of local assets and interests can be safeguarded in the recognition and support procedure where recognition and support should be granted unless clear and limited grounds for refusal are established reflecting public policy and adequate protection concerns.[175] In cases where the recovery of assets is not contested, ATR specific rules in the in-bound jurisdiction should allow for the sale and transfer of local assets or proceeds based on the recognition of the foreign proceedings and the authorization of the administrator for the estate pursuant to the law of the insolvency forum.[176]

In the MLCBI context, in-bound courts should be able to grant relief, especially following recognition of foreign main proceedings, pursuant to avoidance and other recovery orders applied in the main proceeding. The onus here will be higher as the request is to transfer assets out of the foreign jurisdiction. Recovery and realization orders in most cases will require a full hearing and final judgment on ownership and claim to the assets, which is why the temporary freezing orders above are critically important. In-bound courts should be able to enforce originating court decisions concerning avoidance transactions intended to defeat, delay or hinder the ability of creditors to realize on the value of assets to meet their claims, allowing recovering of assets inappropriately disposed of or transferred to persons involved in such transactions. Since these orders will be final decisions of the court, the ordinary considerations concerning recognition of foreign judgments concerning foreign law will be applicable.

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6 | CONCLUSION

Our exploration of the myriad ATR tools in different legal systems allowed us to identify certain features, with further parameters that can assist in creating a toolkit that supports ATR effectiveness across borders, protecting the value of the debtor's estate with a view of maximizing return to creditors. We referred to these tools generically as: information orders, temporary freezing orders, and recovery and realization orders, also exploring the principles underlying the granting of such orders. We further discerned the common objectives, features, and safeguards of these tools, and considered how they can fit within the broader cross-border insolvency context and frameworks.

We have shown that the existing model laws system is already highly conducive to ATR. However, a remaining challenge is the limited number of countries that have adopted the model laws to date. It is important to have wide adoption of model laws as they offer important mechanisms to advance cross-border ATR. There also needs to be clarity in how in-bound courts will approach cross-border requests for information, temporary freezing orders, and realization of assets, as creditors' expectations in this respect are relevant at the outset of granting credit to a debtor with assets or operations in a foreign jurisdiction. Clarity is also needed in terms of the authority of the in-bound court to grant different forms of relief based on the circumstances, including timely interim relief on an urgent basis, relief after recognition of a foreign main proceeding, and granting ATR remedies in realization, in turn avoiding duplication of hearings where possible, but ensuring that the in-bound court retains authority to order the use of local tools to complement the ATR tools of the home jurisdiction.

All existing legal frameworks may benefit from more precise rules on the cross-border treatment of ATR:

1. Information orders deserve an expedited treatment in a cross-border framework. The finality of granting access to information is especially justified where an order was already issued pre-commencement. In other cases, the court or authority granting access should require a right to access under local law or the foreign *lex fori concursus* (law of the insolvency forum). In the latter case, local law safeguards should inform the decision about the methods employed and limits to grant access.
2. Freezing orders also deserve expedited treatment, but interim relief would suffice in most cases. The order should be granted automatically following the petition for recognition if also requested. As a safeguard, the extent and duration of a stay may be governed by local law (*lex rei sitae*).
3. Recovery orders are covered in existing frameworks as insolvency-related judgments when they are judgments in such matters, especially avoidance claims. In cases where the recovery of assets has not been contested, host jurisdictions should allow for the sale and transfer of assets/proceeds abroad by recognizing the foreign *lex fori concursus* authorization of the administrator for the estate.

Cross-border recognition of a set of rules and principles based on the idea of differentiating three ATR tool categories we have identified would considerably enhance the effective and timely tracing and recovery of assets, considerably advancing the cross-border insolvency system. MSMEs and their stakeholders, in particular, can benefit from this enhanced cross-border ATR regime. Indeed, uncertainties and gaps in the system supporting ATR can result in losses to stakeholders affected by insolvencies of all business sizes, but such uncertainties can be

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particularly detrimental in small and medium enterprise cross-border insolvencies where there are typically more limited resources.

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ENDNOTES

[1] United Nations Commission on International Trade Law, UNCITRAL Model Law on Cross-Border Insolvency (1997) with Guide to Enactment and Interpretation (2013), available at: <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (MLCBI).

[2] United Nations Commission on International Trade Law, UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), available at: <https://uncitral.un.org/en/texts/insolvency/modellaw/mlij> (MLIJ); United Nations Commission on International Trade Law, UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment (2019), available at: <https://uncitral.un.org/en/MLEGI> (MLEGI).

[3] The authors recognize that these assets are frequently called digital assets and that there are nuanced difference between these terms, but for purposes of this article, the terms are being used interchangeably. (till August 2023)

[4] A poignant example is the 3 AC proceedings, discussed in Part 4.3 of this article. (from September 2023)

[5] See Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (OUP, 2018), 10 ("Mevorach, *The Future of Cross-Border Insolvency*").

[6] See Lucian Bebchuk and Andrew Guzman, "An Economic Analysis of Transnational Bankruptcies" (1992) 42 *LJ & Econ* 775, 776 and the reference there to examples of such cases.

[7] Ronald Davis et al., *Micro, Small, and Medium Sized Enterprises Insolvency, A Modular Approach* (OUP, 2018) ("Davis et al.").

[8] Ibid., 10–12 (noting that while definitions of MSMEs differ, there is no denying their immense significance to the global economy as a major source of jobs, economic growth, and dynamism in the economy).

[9] Ibid., 13–14.

[10] Including as a result of implementing the Directive (EU) 2019/1023 of 20 June 2019 on preventive restructuring frameworks. See, for example, the reform of the Spanish insolvency Law which came into effect on 26 September 2022 (Law 16/2022).

[11] See UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises (2021), available at: <https://uncitral.un.org/en/lrimse>; World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes, 2021, Principles C18-C20, available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/35506/Principles-for-Effective-Insolvency-and-Creditor-and-Debtor-Regimes.pdf?sequence=1&isAllowed=y> ("World Bank Principles").

[12] World Bank Principles (above note 12); UNCITRAL Legislative Guide on Insolvency Law, Parts one and two (2004), Part three (2010), Part four (2019), Part five (2012), available at: <https://uncitral.un.org/en/texts/insolvency>.

[13] These various measures are summarised and references to the Guide are provided in working papers prepared by the UNCITRAL Secretariat as part of the ongoing ATR project undertaken by Working Group V; see A/CN.9/WG.V/WP.186 Civil asset tracing and recovery tools used in insolvency proceedings (6 February 2023), available via UN Official Documents website at: <https://documents.un.org/prod/ods.nsf/home.xsp> (search for V2300666.pdf).

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[14] Preambles, MLCBI; MLIJ; MLEGI.

[15] UNIDROIT, Draft UNIDROIT Principles on Digital Assets and Private Law (January 2023), available at: <https://www.unidroit.org/work-in-progress/digital-assets-and-private-law/digital-assets-and-private-law-public-consultation/>; UNIDROIT, Digital Assets and Private Law Working Group, "Draft Principles and Concepts," UNIDROIT 2022 Study LXXXII – W.G.7 – Doc. 2 (December 2022), available at: <https://www.unidroit.org/wp-content/uploads/2022/12/W.G.7-Doc.-2-Draft-Principles-and-Commentary.pdf>. Principle 19(2)(b) concerns the fraudulent transfer of assets. Under the applicable State's insolvency or private law, a transfer of ownership of digital assets may typically be rescinded by the transferor's insolvency representative, if the transfer was made in a prescribed period prior to the insolvency and if the transferor transferred the digital assets to defraud its (other) creditors. Thus, a State's insolvency or private law may infringe upon the proprietary right in a digital asset of a person who has acquired that digital asset. Similarly, the applicable insolvency or private law may enable a transfer of digital assets amounting to a "preference" to be rescinded by the insolvency representative of the transferor, if certain conditions are fulfilled.

[16] UNCITRAL, "Civil asset tracing and recovery in insolvency proceedings," A/CN.9/WG.V/WP.178.

[17] In some common law countries, these orders are called "Norwich orders," for example, Canada. In the UK House of Lords judgment in *Norwich Pharmacal Co v Customs and Excise Comrs* [1974] AC 133, Lord Reid articulated the basic principles surrounding this equitable remedy at 175: "if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers ... justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration." See also Benjamin Bathgate et al., "International Fraud & Asset Tracing," in International Fraud & Asset Tracing 2022-Canada (Global Practice Guides) (Chambers and Partners, 2022).

[18] § 22(3), InsO. The right continues with the insolvency practitioner appointed in formally opened insolvency proceedings, see § 148, InsO.

[19] Ibid., § 101(1) and (3), referring to § 97.

[20] *Norwich Pharmaceutical v Customs & Excise* (above note18); see also *Picard v Fim Advisers LLP & ors* [2010] EWHC 1299 (Ch), 2010 WL 1990762.

[21] Section 25(1)(5), CJJA 1982; *Credit Suisse v Cuoghi* [1998] QB 818.

[22] See letters rogatory instead.

[23] *Bluemoon v. Ceridian*, 2022 ONSC 301 (Ont SCJ [Commercial List]), paragraph 28. See also *Thomas McNamara v Tough and English*, 2023 CarswellOnt 319, 2023 ONSC 315 (Ont SCJ [Commercial List]).

[24] *Thomas McNamara v Tough and English* (above note 24), paragraph 32.

[25] See, for example, Anton Piller orders in the UK and in Canada; Jason Squire, "Anton Piller orders" (January 2013), available at: <https://www.lerners.ca/lernx/enforcement-of-anton-piller-orders/>.

[26] "Gag order" is the nomenclature used in the US for temporary sealing orders.

[27] In the US, a party may petition the US federal district courts for discovery in aid of foreign litigation under § 1782, Title 28, Bankruptcy Code. Initiated by a letter rogatory issued from a non-US tribunal delivered directly to the district court (usually included as part of an application prepared by a party or other interested person); or a party or other interested person may make an application, without a letter rogatory, directly to the district court.

[28] See, for example, Canadian judgments in *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, [2006] 2 SCR 189; *British Columbia* (*Attorney General*) *v Malik* (2011), 2011 CarswellBC 923, 2011 CarswellBC 924, 76 CBR (fifth) 56 (SCC).

[29] See, for example, *Glaxo Wellcome PLC v MNR*, 1998 CanLII 9,071 (FCA), [1998] 4 FC 439.

[30] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ("EIR").

[31] Articles 21(1) and (3), EIR.

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[32] For example, called a Mareva injunction in the UK and in Canada; see *Mareva Compania Naviera SA v International Bulkcarriers* [1980] 1 All ER 213; see in Canada,*O.K. Tire Stores Inc v McLaughlin* (2008), 2008 CarswellOnt 809, 40 CBR (fifth) 142 (Ont SCJ). See also Lloyd Houlden, Geoffrey Morawetz and Janis Sarra, *The Annotated Bankruptcy and Insolvency Act* (Carswell, 2022), 12§18 and § 14:19; *MFC Structures Ltd v Mady Collier Centre Ltd*, 2015 CarswellOnt 4,747, 2015 ONSC 2111 (Ont SCJ [Commercial List]); *Aetna Financial Services Ltd v Feigelman*, [1985] 1 SCR 2, [1985] SCJ 1 (SCC); *Christian-Philip v Rajalingam*, 2020 ONSC 1925 (Ont SCJ); *1,839,392 Ontario Limited v 1,839,314 Ontario Inc* et al 2020 ONSC 2244 (Ont SCJ); and *Sibley & Associates LP v Ross*, 2011 ONSC 2951 (Ont SCJ), paragraph 63.

[33] Regulation (EU) 655/2014 of the European Parliament and of the Council of 15 May 2014 on establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters ("EAPO").

[34] See further discussion of the concept of main proceeding in Part 4.1.

[35] See further Part 4.3.

[36] *Re Pelletier*, 2021 CarswellAlta 1707, 90 CBR (sixth) 163, 2021 ABCA 264 (Alta CA), affirming *Re Pelletier*, 2020 CarswellAlta 1,677, 82 CBR (sixth) 197, 2020 ABQB 540 (Alta QB). The factors that Canadian courts consider in determining whether to grant Mareva relief to a foreign representative *ex parte* are: a strong prima facie case; setting out the grounds of the claim and the amount thereof, and fairly stating the points that could be made against it by the defendant; some grounds for believing that the defendant has assets in Canada; some grounds for believing that there is a serious risk of the defendant's assets being removed from the jurisdiction or dissipated or disposed of before the judgment or award is satisfied; proof of irreparable harm if the injunctive relief is not granted; the balance of convenience favors the granting of the relief; and an undertaking as to damages, *Thomas McNamara v Tough and English*, 2023 CarswellOnt 319, 2023 ONSC 315 (Ont SCJ) [Commercial List].

[37] See, for instance, Reinhard Dammann, 'Preservation measures' in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2nd edn) (OUP, 2022), Article 52 paragraph 52.15.

[38] Houlden, Morawetz and Sarra (above note 33), 12§18. The Supreme Court of the United States ruled against recognizing Mareva orders in *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc*, 527 US 308, given that they were not part of the law of equity at the time of US Independence; however, this rejection has been ameliorated in certain states by state legislation, and courts have been willing to issue asset-freezing preliminary injunctions in cases in which "the movant seeks equitable relief…and the preliminary injunction is ancillary to the final relief"; *New Falls Corp v Soni Holdings LLC*, 2019 US Dist LEXIS 113901, 2019 WL 4015170 (EDNY July 5, 2019); see also Deckert v Indep Shares Corp, 311 US 282.

[39] *SFC Litigation Trust v Allen Tak Yuen Chan*, 2017 ONSC 1815 (Ont Div Ct), at paragraph 38. See also Houlden, Morawetz and Sarra (above note 33), I§11; *Thrive Capital Management Ltd. v Noble 1,324 Queen Inc*, 2021 ONCA 474.

[40] *Sibley & Associates LP v Ross*, 2011 ONSC 2951 (Ont SCJ), at paragraph 63.

[41] § 917, ZPO.

[42] Ibid., § 926.

[43] Article 11, EAPO.

[44] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ("Brussels 1a Recast"). See Articles 36 and 39, Brussels 1a Recast.

[45] See Ivo Bach, in Volkert Vorwerk and Christian Wolf (eds), *Beck'scher Online-Kommentar ZPO* (47th edn) (Beck, 2022), § 328, ZPO, paragraph 3.

[46] Article 23, MLCBI.

[47] Including any obligation to or for the benefit of an insider under an employment contract.

[48] § 548—Fraudulent transfers and obligations, 11 US Code.

[49] Idem.

10991107, 2023, 2, Downloaded from https://onlinelibrary.wiley.com/doi/10.1002/iir.1499 by Test, Wiley Online Library on [05/09/2023]. See the Terms and Conditions (https://onlinelibrary.wiley.com/terms-and-conditions) on Wiley Online Library for rules of use; OA articles are governed by the applicable Creative Commons License

[50] UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency, recommendation 217 ("UNCITRAL Legislative Guide on Insolvency Law").

[51] Ibid., recommendation 228.

[52] Articles 19(1), 20(1) and 32, EIR.

[53] For more details, see for example, Stephan Madaus, Anna Wilke, and Philipp Knauth, "Bringing Non-EU Insolvencies to Germany: Really so Different from the UNCITRAL Model Law on Cross-Border Insolvency?" (2020) 17(1) *International Corporate Rescue* 21–28.

[54] §§ 335, 343, 352, InsO.

[55] The treatment of annex actions is not yet established by German case law and disputed in legal literature, see for example, Christoph Thole, in varii auctores, *Münchener Kommentar InsO* (fourth edn) (Beck, 2020), § 343, InsO, paragraph 85.

[56] *In re Three Arrows Capital Limited*, High Court of Justice Virgin Islands (Commercial Division), 5 Case No BVIHCOM2022/0119 (27 June 2022) and *In re Three Arrows Capital, Ltd*, Chapter 15 decisions, US Bankruptcy Court Southern District of New York, Case No 22–10920.

[57] UNIDROIT 2022 – Study LXXXII – W.G.7 – Doc. 2, paragraph 6. "Electronic records" comprise a class of which "digital assets" form a subset. For example, the definition of "digital asset" includes an electronic record only if it is "capable of being subject to control," Principle 2, paragraph 1; "Control" refers to a digital asset where a person can establish that it has the exclusive ability to change the control of the digital asset to another person, the exclusive ability to prevent others from obtaining substantially all of the benefit from the digital asset; and the ability to obtain substantially all the benefit from the digital asset, Principle 2, paragraph 3; and a transfer is defined as a change of a proprietary right in a digital asset, which is distinguished from a change of control of a digital asset. UNIDROIT draft principles treat digital assets as being susceptible to being the subject of proprietary rights, without addressing whether they are considered "property" under the other law of a State, Article 15 ("UNIDROIT 2022").

[58] Idem.UNIDROIT's approach is to provide an incentive for those who create new digital assets or govern existing systems for digital assets to specify the applicable law in or in association with the digital asset itself or the relevant system or platform.

[59] Idem, starting with whether the domestic law of the originating court addresses law applicable to such issues, and if not, whether it expressly specifies applicable law to the system/platform on which the digital asset is recorded. UNIDROIT's draft guidance also specifies that if a custodian enters into an insolvency proceeding, a digital asset that it maintains on behalf of a client under a custody agreement does not form part of that custodian's assets for distribution to its creditors and the insolvency representative must take reasonable steps for the digital assets maintained for its client to be returned to the control of that client or of a custodian nominated by that client.

[60] UNCITRAL, Inventory of civil asset tracing and recovery tools used in insolvency proceedings, A/CN.9/WG. V/WP.182 (December 2022), paragraph 31 ("UNCITRAL, WP.182").

[61] Ibid., paragraph 94, citing *CMOC Sales & Marketing Ltd v Persons Unknown and 30 Others*, [2018] EWHC 2230 (Com.) (England); *ChainSwap v Persons Unknown*, BVIHC (COM) 2022/031 (British Virgin Islands).

[62] See Jay Westbrook, "Choice of Avoidance Law in Global Insolvencies" (1991) 17 *Brooklyn J Int Law* 499–538; Jay Westbrook, "A Global Solution to Multinational Default" (2000) 98 *Mich Law Rev* 2,276–2,328 (hereafter Westbrook); Irit Mevorach, "Modifed Universalism as Customary International Law" (2018) 96 *Texas Law Rev* 1403–1436 ("Mevorach, Modified Universalism").

[63] See Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 32–38.

[64] Ibid., 14–28.

[65] Ronald Davis et al., *Financial Institutions in Distress: Recovery, Resolution, Recognition* (OUP, 2023), Chapters 3, 10 (to be published). Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 110–124; Mevorach, Modified Universalism (above note 63), 1403–1436.

[66] See Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 4–12.

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[67] This observation is premised on the view that insolvency law should promote the procedural goals of efficiency to achieve the substantive goal of fairness. See Riz Mokal, *Corporate Insolvency Law: Theory and Application* (OUP, 2005), 24–25.

[68] Above note 2.

[69] See below note 153 and accompanying text.

[70] See Westbrook (above note 61), 2276–2328.

[71] Articles 25–27, MLCBI.

[72] Ibid., Articles 2(b), 15–17.

[73] Ibid., Article 20.

[74] Namely, a place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services: Article 2(c), (f), MLCBI. Some countries, such as Canada, have adopted the MLCBI but do not require an establishment as criteria for recognizing a foreign non-main proceeding: Part 4, section 45, Companies' Creditors Arrangement Act, RSC, 1985, c C-36, as amended.

[75] A range of discretionary relief may be sought pursuant to Article 21, MLCBI.

[76] Ibid., Articles 6, 22.

[77] Ibid., Article 19.

[78] Ibid., Article 19(1)(a).

[79] Ibid., Article 19(1)(b).

[80] Ibid., Article 19(1)(c), 21(c). Such freezing orders are provided in the MLCBI pending recognition of a foreign proceeding and Article 21 on recognition of a foreign proceeding.

[81] Ibid., Article 19 (1)(c), 21(d).

[82] Ibid., Article 19(1)(c), 21(g).

[83] Ibid., Article 2(d).

[84] Ibid., Article 19(3).

[85] If the foreign proceeding is non-main all relief is discretionary and the court must be satisfied that the relief relates to assets that should be administered in the foreign non-main proceeding or concerns information in that proceeding.

[86] Article 17(3), MLCBI.

[87] Ibid., Article 20(1)(a). 1. Upon recognition of a foreign proceeding that is a foreign main proceeding, (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations, or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

[88] Ibid., Article 20(1)(b).

[89] Ibid., Article 20(1)(c).

[90] Ibid., Article 6.

[91] Ibid., Article 22(1).

[92] Ibid., Article 21(1)(d).

[93] Ibid., Article 21(1)(e).

[94] Ibid., Article 21(1)(f).

[95] Ibid., Article 23(1).

[96] Ibid., Article 9.

[97] Ibid., Articles 11, 12, 24.

[98] Ibid., Article 7.

[99] Ibid., Articles 25–27.

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[100] The US enacted the MLCBI in 2005, with Chapter 15, US Bankruptcy Code (11 USC) implementing the Model Law in the United States. In Great Britain, the Model Law was implemented by the Cross-border Insolvency Regulations 2006.

[101] Already in a study conducted in 2010–11, it was possible to show that recognition is granted in most cases when the MLCBI is invoked: see Irit Mevorach, "On the Road to Universalism: a Comparative and Empirical Study of UNCITRAL Model Law on Cross-Border Insolvency" (2011) 12 *EBOR* 517, 533–537 ("Mevorach, On the Road").

[102] Mevorach, On the Road (above note 102), 543–549.

[103] *In re Swissair* [2009] EWHC 2099 (Ch) (UK).

[104] *Akers v SAAD Investments Company Ltd* [2010] FCA 1121.

[105] See, for example, *In re Trade and Commerce Bank*, No 05–60279 (Bankr. SDNY, 2005) (US); *In re Fraser Papers Inc*, et al., No 09–12123 (Bankr D Del, 2009) (KJC) (US).

[106] *In re Condor Insurance Limited*, 601 F 3d 319, 2010 WL 961613 (fifth Cir 2010) (US).

[107] Bankruptcy Court for the Southern District of Florida; see Ben Clarke, "Ch 15 round-up: Estonian trustee seeks US recognition to pursue missing crypto" (*Global Restructuring Review*, 10 January 2023).

[108] Clarke (above note 107).

[109] Idem.

[110] Idem.

[111] Case No 22-19961-MAM, Order Granting Recognition of Foreign Main Proceeding Pursuant to §§ 1,515 AND 1517 of the Bankruptcy Code and Granting Related Relief (2 February 2023), available at: <https://files.lbr.cloud/public/2023-02/Envestio%20Recognition%20Order.pdf?VersionId=GkCgmm9nzsXXhPoNyLxUlP2j4xYLxtF5>.

[112] See, in the USA, *In re: Three Arrows Capital, Ltd*, Case No 22–10920 (MG), US Bankruptcy Court Southern District of New York.

[113] William Macadam and Kyriaki Karadelis, "US court approves 3 AC communication protocol, subpoenas founders" (*Global Restructuring Review*, 13 December 2022).

[114] Idem.

[115] See *In re: Three Arrows Capital, Ltd, Case No. 22–10,920* (*MG*) Order Approving Cross-Border Court-to-Court Communications Protocol, available at: <https://files.lbr.cloud/public/2022-12/Communication%20protocol.pdf?VersionId=0wmJ1eVJdoAUarnMB721.FPRWuFwUW5P>.

[116] Macadem and Karadelis (above note 114).

[117] *FTX Trading Ltd* et al., US Bankruptcy Court for the District of Delaware, Case No 22–11068 (JTD).

[118] *FTX Trading Ltd* et al., US Bankruptcy Court for the District of Delaware, Case No 22–11068 (JTD), Emergency Motion Pursuant to Fed R Bankr P 1014(B) (I) to Transfer Chapter 15 Proceeding Relation to FTX Digital Markets Ltd and (II) For a Stay, [paragraphs 1, 3].

[119] William Macadam, "FTX CEO and Bahamian JPLs sign co-operation agreement" (*Global Restructuring Review*, 9 January 2023). Later, on 19 March 2023, FTX Trading and four other debtors in the Chapter 11 proceedings filed a claim against the Bahamian affiliate and its joint provisional liquidators alleging they have tried to relocate the group's Chapter 11 bankruptcy to the Bahamas by making false allegations regarding assets' ownership (*In re FTX Ltd* et al Case No. 22-11068) (JTD); Teodor Teofilov, "FTX sues Bahamian liquidators over property ownership" (*Global Restructuring Review*, 22 March 2023). On 8 June 2023, the joint provisional liquidators sought to lift the Chapter 11 stay in order to apply to the Bahamas' Supreme Court to determine whether the exchange's customers belong to US entity FTX Trading or to Bahamas-registered FTX Digital Markets. The Judge in the US Bankruptcy Court for the District of Delaware rejected the application to lift the stay, ordered the Bermudian liquidators and the group's US lawyers to retain a mediator with experience in the area and urged them to find a way to cooperate and resolve their issues: see Teodor Teofilov, "Delaware judge urges mediation in FTX's Bahamas-US dispute" (*Global Restructuring Review*, 12 June 2023).

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[120] *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236.

[121] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26; [2007] 1 AC 508.

[122] These principles are known as the "Dicey rule."

[123] The MLIJ Guide to Enactment and Interpretation ("MLIJ Guide to Enactment"), 11 refers to the decision of the Supreme Court of Korea of 25 March 2010 (case No 2009 Ma1600). See also Min Han (2015) "Recognition of insolvency effects of a foreign insolvency proceeding: focusing on the effect of discharge," in Muruga Ramaswamy and João Ribeiro (eds) *Trade development through harmonization of commercial law* (New Zealand Association for Comparative Law, 2015), 345–36.

[124] See for example, *In re Metcalfe & Mansfield Alternative Investments*, 421 BR 685 (Bankr. SDNY 2010). See also Irit Mevorach, "Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?" (2021) *European Business Organization Law Review* 283, 289–293 ("Mevorach, Overlapping International Instruments").

[125] Above note 3.

[126] The problem of asset-tracing and recovery in different contexts has thereafter been further considered at an UNCITRAL Colloquium and subsequently it was decided to deliberate on an instrument focusing on ATR (see UNCITRAL), International Colloquium on Civil Asset Tracing and Recovery (6 December 2019), available at: <https://uncitral.un.org/en/assettracing>.

[127] Mevorach, Overlapping International Instruments (above note 125), 293–4.

[128] Article 13, MLIJ.

[129] Ibid., Articles 2(d), 11.

[130] These include public policy, adequate protection, fraud, inconsistency with other judgments, interference with collective insolvency proceedings, and jurisdictional grounds: Articles 7, 14, MLIJ.

[131] Article 2(a), MLIJ.

[132] Ibid., Article 2(c).

[133] MLIJ Guide to Enactment (above note 124), paragraph 93.

[134] Article 12, MLIJ.

[135] Ibid., Article 14(h).

[136] Rodrigo Rodriguez, "The new UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments" (2023) *European Insolvency and Restructuring Journal* (to be published).

[137] At the time this article was written.

[138] See: <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency>.

[139] Above note 3.

[140] See Irit Mevorach, *Insolvency within Multinational Enterprise Groups* (OUP, 2009), 32–61.

[141] See for example, *Re Nortel Networks UK Limited & Others* [2015] EWHC 2506 (Ch); *In re Nortel Networks, Inc*, 532 BR 494 (Bankr D Del 2015); *Re Nortel Networks Corp*, 2015 ONSC 2987 (Ont SCJ [Commercial List]).

[142] See John Pottow, "Two Cheers for Universalism: Nortel's Nifty Novelty," 351; DJ Miller and Michael Shakra, 'Nortel: The Long and Winding Road,' 306, both chapters in Janis Sarra and Justice Barbara Romaine (eds), *Annual Review of Insolvency Law* (Carswell, 2015).

[143] See above notes 118–120 and accompanying text.

[144] Article 2(g), MLEGI.

[145] Ibid., Articles 20–32.

[146] Ibid., Article 8.

[147] Ibid., Articles 21 and 24.

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[148] Ibid., Article 22.

[149] See: <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation>.

[150] See Chapter 5, Republic of Korea Debtor Rehabilitation and Bankruptcy Act 2005 (with effect from 1 April 2006). See also Soogeun Oh, "An Overview of the New Korean Insolvency Law" (2007) 16 *Norton Journal of Bankruptcy Law and Practice* 5. Japan too deviated from the MLCBI in significant ways, including imposing more onerous conditions for recognition: Japanese Law for Recognition and Assistance to Foreign Insolvency Proceedings (with effect from 1 April 2001). See also Kazuhiko Yamamoto, "New Japanese Legislation on Cross-Border Insolvency as Compared to the UNCITRAL Model Law" (2002) 11(2) *Int Insolv Rev*, 67.

[151] See for example, Article 278, Romania Law 85/2014 on insolvency prevention procedures and insolvency proceedings.

[152] Idem. See also section 2, South Africa Cross-Border Insolvency Act 42 of 2000.

[153] Section 61(2), Companies' Creditors Arrangement Act.

[154] See for example, *Re Hartford Computer Hardware Inc*, 2012 CarswellOnt 2,143, 2012 ONSC 964 (Ont SCJ); *In The Matter of Voyager Digital Ltd*, 2022 ONSC 4553 (Ont SCJ); and *Re Pelletier*, 2021 ABCA 264 (Alta CA).

[155] See Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 66–76 on decision-making biases affecting choices in cross-border insolvency.

[156] Prospect theory has shown that people have asymmetrical attitudes towards gains and losses, and their perceived utility is increased less by gains than by averted losses: Daniel Kahneman and Amos Tversky, "Prospect Theory: An Analysis of Decisions Under Risk" (1979) 47 *Econometrica* 263, 265–69.

[157] Cooperative approaches can be incentivized by interactions between policy makers, regulators, or judges and the development of mutual trust: Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 74–75.

[158] The *status quo* bias is another robust "anomaly"affecting choices as experiments have shown that the disadvantages of a change loom larger than its advantages. See Daniel Kahneman, Jack Knetch, and Richard Thaler, "Anomalies: The Endowment Effect, Loss Aversion and *Status Quo* Bias" (1991) 5(1) *J Econ Perspectives* 193; William Samuelson and Richard Zechhauser, "*Status Quo* Bias in Decision Making" (1998) 1 *Journal of Risk and Uncertainty* 7. See also Mevorach, *The Future of Cross-Border Insolvency* (above note 6), 152.

[159] Article 20, MLCBI.

[160] Ibid., Article 7 refers to the power of the court to "provide additional assistance to a foreign representative under other laws of this State."

[161] See above notes 106–107 and accompanying text.

[162] An expression used in reference to rapidly diminishing value of bankrupt estate assets in the US; see, for example, Melissa Jacoby and Edward Janger, "Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy" (2014) 123 *Yale LJ* 862.

[163] See, for example, section 158, Canada's Bankruptcy and Insolvency Act, RSC 1985, c B 3, as amended; § 521 Debtor's duties, US Bankruptcy Code.

[164] See also above Part 4.6.

[165] See mainly Article 20, MLCBI; see also Articles 19(1), 20(1), EIR.

[166] Such a rule only exists in the EU framework, see Article 7(2) lit. b, c, and f, EIR. In contrast, see Article 20(1), MLCBI, which reserves the availability, effects, and duration of a stay to local law.

[167] See, for example, the insolvency registers in the EU, accessible at: <https://e-justice.europa.eu/246/EN/bankruptcy_amp_insolvency_registers__search_for_insolvent_debtors_in_the_eu?init=true>.

[168] See, for example, the new proposal of the European Commission for a Directive that, amongst other issues, would aim to harmonize access of insolvency representatives to public registers in another Member State by mandating the implementation of harmonized rules into local laws; see Title III of the proposal for a Directive harmonizing certain aspects of insolvency law, 7.12.2022, COM(2022) 702 final.

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169 See above Part 2.1.2.

170 As discussed in Part 2.4.

171 See *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm), 2022 WL 17326039, [30] and [37].

172 The resulting limited deference to foreign law is a concept, which is also enshrined in Articles 21(1) and (3), EIR. Article 19(1)(c), MLCBI could provide for such an order as an interim measure pending recognition.

173 Article 20(1)(c), MLCBI provides an automatic freezing order where a foreign main proceeding is recognized by the in-bound court, while Article 21(1)(c), MLCBI gives the in-bound court the discretion to implement a freezing order on recognition of a foreign proceeding.

174 See, for instance, in Germany where insolvency-related claims such as avoidance claims are not covered by the local cross-border insolvency framework for recognition of foreign judgments issued in insolvency proceedings (§ 343, InsO). See also the ambiguity surrounding the interpretation of the term in Article 6(1), EIR, highlighted in the CERIL Statement 2021-1 on identifying annex actions under Article 6(1) of the European Insolvency Regulation 2015, available at: <https://www.ceril.eu/news/ceril-statement-2021-1-on-identifying-annex-actions-under-articl>.

175 See, Articles 6, 21, and 22, MLCBI; Articles 13, 14, and Article X, MLIJ; see also Article 32(2), EIR with reference to Article 45, EU Judgment Regulation (Regulation (EU) 1215/2012).

176 See, for instance, Article 21(1), EIR.

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