INSOL INTERNATIONAL

AVOIDANCE OF ANTECEDENT TRANSACTIONS AND CROSS-BORDER INSOLVENCY

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

Avoidance of Antecedent Transactions and Cross-border Insolvency

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

This latest publication from INSOL International gives a detailed overview of the restructuring and insolvency law governing the avoidance of payments and other transactions (and the consequences of that avoidance) in nineteen key jurisdictions around the world.

In almost all jurisdictions, any restructuring or insolvency brings with it an examination of the path that led the debtor into its restructuring and an effort to ensure similarly situated creditors receive roughly similar recoveries. A key part of both of these aspects of the restructuring process is often the evaluation and potential avoidance of the payments and other transactions effected before and during insolvency.

Accordingly, the avoidance of antecedent transactions is a very important element of our worldwide restructuring and insolvency practice. In the right circumstances, avoidance and recovery of assets can help to maximize value for a debtor's stakeholders - at the same time, though, potential avoidance should be governed by strict and certain rules, and avoidance actions are often highly technical.

For all of these reasons, the information set forth in this publication should offer a very helpful practical guide for any restructuring and insolvency practitioner. Specifically, it discusses the statutory and common law authority for avoiding antecedent transactions, common defenses, choice-of-law issues, disclosure and discovery issues, access (and barriers thereto) to particular jurisdictions' courts, judicial assistance for and against foreign claimants, and recognition issues (including whether each jurisdiction has adopted the UNCITRAL Model Law on Cross-Border Insolvency). It is a strong example of the worldwide resources employed by INSOL in its work researching international and comparative insolvency issues, facilitating the exchange of knowledge across jurisdictions, and taking a leading role in international educational matters relating to restructuring and insolvency.

On behalf of INSOL International and all of its associated restructuring and insolvency practitioners, I thank project leader Farrington Yates and everyone else whose hard work has gone into producing this excellent resource.

James H.M. Sprayregen
President
INSOL International

Foreword

As commerce becomes more global and interconnected, restructuring and insolvency has had to follow. It is entirely commonplace for insolvency proceedings to embrace far-flung corporate groups with debtors, creditors and interested parties spilling over country lines. As part of any insolvency proceeding, treating similarly situated creditors in a fair and consistent manner focuses the attention of professionals on investigating transfers of the debtor's assets for potential avoidance and recovery. Particularly in cases involving outright fraud or "Ponzi" schemes, the avoidance and recovery of transactions completed prior to the commencement of insolvency proceedings is sometimes the primary mechanism to recover and redistribute value to creditors and interested parties. The circumstance when assets to be recovered are located in another jurisdiction adds another layer of complexity and challenge to the effort.

Through this publication, INSOL International provides insight into the regimes in a number of jurisdictions providing for the avoidance, claw-back and recovery of antecedent transactions. By soliciting responses from the contributing authors to 10 questions, we intend to provide a framework so that the reader can understand the basic approach to avoidance taken in each country as well as the similarities and differences between jurisdictions. I hope that you will find this publication useful, informative and a good starting point for the analysis of how antecedent transactions will be considered in countries worldwide.

I would like to thank the authors for their time and effort spent to contribute to this publication. Many are INSOL Fellows who graciously accepted my invitation to pen chapters notwithstanding busy practices. My thanks also goes to the team at INSOL International that supported this endeavor. I very much appreciated their guidance and encouragement with respect to content, coverage and … of course … meeting publication deadlines all done with grace and good humor.

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Contents

ARGENTINA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Under the Argentine Bankruptcy Law number 24.522, as amended, the general purpose of a bankruptcy is to identify all the assets and liabilities of the debtor, liquidate the debtor's assets and distribute the proceeds of such liquidation among all creditors in accordance with their verified claims and in the order of priority after giving effect to preferences established by the Argentine Bankruptcy Law.

A bankruptcy may be commenced either voluntarily upon the petition of the debtor or involuntarily upon the petition of one or more creditors. The petitioner must show the company is insolvent or has entered into a "suspension of payments" status. If the petition is made by a creditor, the creditor must submit evidence that the debtor qualifies for bankruptcy proceedings and offer sufficient evidence of its claims, and that the debtor has suspended or defaulted compliance of its obligation to the petitioning creditor, or is otherwise unable to comply regularly with its obligations.

After complying with some formalities requested by the Argentine Bankruptcy Law the debtor is summoned to appear before the court and during a five-day period give evidence that it is not insolvent. The usual way to give proper evidence of not being insolvent is to deposit before the court the amount due to the creditor. If the judge considers that the evidence is insufficient to prove that the debtor is solvent the judge will declare the debtor bankrupt and start the liquidation proceeding. Such an order is subject to appeal.

A debtor is also subject to a bankruptcy and liquidation proceeding if in a restructuring proceeding the debtor is not able to approve the plan submitted to the admitted unsecured creditors or if approved, the debtor does not comply with the payments as agreed with the creditors.

1.1 Actions with "claw-back" period

1.1.1 Acts that the Argentine Bankruptcy Law deems null and void by declaration of the law

Certain acts performed by the debtor during the claw back period may be declared by the bankruptcy court as not binding on creditors without the need for an express action or petition against the parties, or any further procedures. These acts are:

(i) gratuitous acts;

(ii) advance payments of debts falling due, according to the relevant time and on the day of the bankruptcy or later; and

(iii) the creation of mortgages, pledges or any other security, with respect to certain obligations which originally were not secured.

1.1.2 Acts that require proof of damage to creditors and knowledge by the counterparty of the agreement of the "cessation of payments" by the debtor

Other acts prejudicial to the interests of the creditors performed within the claw back period may be declared not binding on creditors, if the counterparty acting with the bankrupt debtor had knowledge of its suspension of payments.

This declaration is to be claimed by the bankruptcy trustee or a recognized creditor by means of an action filed before the judge hearing the bankruptcy proceedings, and is processed through fact finding proceeding.

The action is in principle exercised by the bankruptcy trustee and is subject to the prior authorization of the simple majority of the principal amount which has been proved and declared admissible. It is not subject to any prior court tax, without detriment to its payment by whoever were to be defeated.

This provision of the law is not applicable with respect to the ordinary management acts performed during the pendency of a restructuring case ("*concurso preventivo*"), nor with respect to any management acts beyond the ordinary course of business or acts of disposition executed within the same period, or during the period of performance of the restructuring process with judicial authorization conferred in the terms of the law.

The declaration foreseen in these provisions of the Argentine Bankruptcy Law, shall become statute barred if the claims are filed after three (3) years counting as from the date of the bankruptcy decree.

The assets that become subject to insolvency proceedings by virtue of these provisions are subject to dispossession.

1.1.3 The claw back period

Basically in a bankruptcy scenario the avoidance of acts performed during the "claw-back period", is regulated by the Argentine Bankruptcy Law.

The claw back period starts from the date that the debtor entered into a "suspension of payments" stage, as determined by the court by a final resolution that becomes *res judicata* with respect to the bankrupt debtor, the creditors and those third parties who participate in the procedure. On the contrary, there is a rebuttable presumption with respect to the third parties who did not take part in the process.

The determination of the date of commencement of the suspension of payments and, as a consequence, the claw back period, may not be related back beyond two (2) years before the date of the bankruptcy decree or of the filing of an application for restructuring insolvency proceedings ("*concurso preventivo*"), a proceeding similar to the US Chapter 11.

The claw back period is therefore defined as the period which lapses between the date fixed as the day in which the suspension of payments commenced and the declaration of bankruptcy of the insolvent debtor.

Within thirty (30) days following the filing of the general report by the bankruptcy trustee (a report that informs the judge and the creditors of the situation of the debtor's assets and liabilities, the cause of insolvency, the existence of acts that can be subject to avoidance claims, etc), interested parties may file objections to the initial date of the suspension of payments proposed by the receiver.

The judge may order the production of such evidence as deemed necessary.

The resolution fixing the date of commencement of the suspension of payments may be appealed against by those who have participated in its formulation and by the bankrupt.

1.2 Avoidance of acts according to the Civil Code Regulation

The act based on fraud committed between a third party and the insolvent debtor may also be declared null and void under the Civil Code rules.

The "*Acción Pauliana*" action regulated by the Civil Code is a legal concept that allows creditors to obtain the avoidance of acts of the debtor in fraud of its creditor's rights. The economic purpose of the action is to maintain the required equity in the debtor's property to avoid the debtor to undermine legitimate rights of its creditors.

This is a personal action so that it does not pursue a right of possession of the first or subsequent purchasers regardless of their good or bad faith, but is intended to remedy the objective consequences of one unlawfull behavior of the debtor.

The doctrine supports three requirements for the validity of the avoidance of the act: (i) the damage to creditors, defined as those acts that actually produce this effect because of the detriment of the debtor's assets: (ii) the fraudulent conveyance, consisting in the intent of the debtor to dispose of its property, place it beyond the reach of its creditors or to aggravate the situation of its insolvency; and (iii) the fraudulent conduct of the debtor that requires the third party's knowledge of the state of insolvency of the debtor.

The main effect of the "*Acción Pauliana*" is the restitution to the estate of the debtor of the property that was fraudulently transferred. Once the court makes such an order it would benefit all the creditors including those persons or entities that became creditors after the date the fraudulent act was executed.

When the avoided act is aconsequence of a sale of property, the asset must be returned with any benefits that were produced during that period.

If the debtor has already been declared bankrupt, the "*Acción Pauliana*" governed by the Civil Code may only be initiated or continued by the creditors after having required the bankruptcy trustee to start or continue it, substituting the plaintiff, within a period of thirty (30) days.

QUESTION 2

2. What are the common defences?

There is a different situation in relation to the proceeding to declare the avoidance of those acts considered above in point 1.1.1 and those included in points 1.1.2 and 1.2.

Those acts that the Argentine Bankruptcy Law deems null and void without the need to show additional evidence that was presented during the claw-back period, can be challenged by the affected party or by the debtor, by means of an ancillary proceeding filed before the court handling the bankruptcy proceeding. In such a proceeding the plaintiff must give evidence that the act is not one of those deemed void by law, or that it was not executed during the claw-back period, or that it was carried on in the ordinary course of business or that its avoidance does not benefit the creditors.

The other acts subject to a declaration of avoidance mentioned in points 1.1.2 and 1.1.3 require the filing of a proceeding by the bankruptcy trustee with a request to the bankruptcy judge with proper evidence that the challenged act between the parties of an agreement was executed by the debtor's counterparty knowing of the state of insolvency of the debtor and the act or agreement caused damage to the debtor's creditors.

The defendant must file the answer to the complaint with all its objections or defences, filing all documentary evidence and listing any additional evidence that the defendant may require to be produced, during a period of 15 business days from the date the service of the claim is received by the defendant. An extension of the term must be granted if the defendant is domiciled abroad. The term of the extension is determined by the court. If one of the defendants is granted an extended term to file the answer to the complaint, the other defendants, if any, have the right to that same term.

Preliminary objections, if any, must be filed along with the answer to the complaint. Preliminary objections, in principle, should be decided by the court before dealing with the substance of the dispute. Some may act as a temporary obstruction to the action which cannot continue until the issue is resolved. Others may put an end to the action. Some of the preliminary objections admitted by the Procedural Code are as follows:

(a) lack of jurisdiction;

(b) lack of legal capacity to take part in an action or of authority, if that person who is acting is an agent of the claimant or the defendant;

(c) lack of a cause of action against the defendant, when it is quite evident;

(d) existence of another claim pending, in this matter already filed by the bankruptcy trustee;

(e) deficiencies in the way the claim has been presented; and

(f) *res judicata*.

The motion to dismiss based on statute of limitations rules must also be filed with the answer to the complaint, or on the first appearance of the defendant before the court. In case the facts in which the motion is based are evident, the issue may be decided as a preliminary motion to dismiss. Otherwise it will be decided at the moment of issuing the final judgment.

Substantive defences are, *inter alia*, that the act was not executed during the "claw-back" period, that the defendant had no knowledge of the debtor's insolvency, the lack of existence of damage to the creditors, that the debtor is no longer insolvent or that the decree deciding the commencement of the "suspension of payment" is not final and is subject to a pending appeal.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

Without detriment to the receiver's responsibility in the bankruptcy proceeding, any interested creditor – including foreign creditors may bring this action at their expense, after thirty (30) days have lapsed after requesting the receiver to initiate it.

At the request of the party and at any state of the process, the judge may order that the third party guarantee the potential costs of the action, to which end the judge shall make a provisional estimate. If the guarantee is not furnished, the action shall be considered withdrawn with costs against the plaintiff. In both cases if ineffectiveness were declared, the creditor shall have the right to be reimbursed for the expenses and shall have a special preference over the assets recovered, as determined by the judge, between one third and one tenth of the proceeds and up to the amount of the claim.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

A foreign party can start a claim under foreign avoidance law in Argentina. According to Section 20 of the Argentine Constitution, foreigners are entitled to civil rights that are enjoyed by Argentine citizens. The term foreigner has been broadly construed to include any person not holding Argentine nationality. As we refer below the foreign law rights of the plaintiff must be proved as a fact and the court has authority to make its own enquiries as to the application of the foreign law.

If the defendant is a debtor whose bankruptcy has already been declared, the creditor shall be limited in the legal standing to bring such a claim according to the rules of the Argentine Bankruptcy Law, explained above.

According to the Procedural Code, applicable in proceedings before Federal courts and the courts of the City of Buenos Aires, in the event that the foreign plaintiff has neither his residence nor real estate in Argentina, the plaintiff will be required to submit a bond to guarantee any responsibilities of the plaintiff inherent in the demand.

The amount to be posted as a bond is not determined by the law, but by the court. It usually varies from 20% to 30% of the amount of the claim. In the event that the foreign party obtains a judgment abroad the bond would not be required.

QUESTION 5

5. Who decides issues of foreign law?

In principle, issues of foreign law are treated as questions of fact which, if disputed, must be proved by the interested party. This is generally proved by expert evidence or by other means (i.e. the report of the consular authorities of the petitioner's jurisdiction). Furthermore, the National Procedural Code authorizes the court to make its own inquires as to the dispositions of the relevant foreign laws. Pursuant to the provisions of some international treaties, the laws of certain foreign jurisdictions need not be proved in an Argentine court.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

The Argentine Bankruptcy Law does not provide for any main or ancillary procedure to aid foreign creditors or bankruptcy trustees to obtain assistance in Argentina. The court in a foreign country will have to seek assistance by means of the terms of an existing international convention or by a letter rogatory sent by the foreign court to the Argentine court with jurisdiction over the subject matter and the defendant.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, how does your country s version of the Model Law address avoidance under foreign law?

Argentina has not adopted the Model Law on Cross-Border Insolvency of the United Nations Committee on International Trade Law (UNCITRAL).

Given the absence of adopting the UNCITRAL Model Law, practitioners must turn to the local Argentinian rules on international jurisdiction referring by analogy to conventions signed by our country, or apply the principles of extension to domestic rules of territorial jurisdiction.

The sources of law on cross-border insolvency cases are the Argentine Bankruptcy Law and the international rules of Treaties signed by Argentina of Montevideo in 1889 (between Argentina, Peru, Bolivia, Colombia, Uruguay and Paraguay) and 1940 (between Argentina, Uruguay and Paraguay).

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

Argentine Bankruptcy Law does not provide any rule on the disclosure or discovery of documents. The applicable rules are provided by the Procedural Codes of each jurisdiction.

Argentina executed the Convention for the Gathering of Evidence in Foreign Countries in Commercial and Civil Matters of 1970, which was ratified by Law 23,480 in 1987 but it made a declaration stating: *'The Argentine Republic shall not comply with letters rogatory that have as their object a procedure known in the states of 'Common Law' as 'the pretrial discovery of documents'.'*

The procedure for the discovery of documents is therefore alien to the Argentine legal system. Parties are under no obligation to produce documents other than those upon which they wish to rely on. However, a party may request that its opponent (or a third party) produce one or more specifically identified documents which are relevant to the resolution of the dispute.

Parties may request information on specific and clearly defined facts that result from documents, files or records of public or private entities or from notaries. The entity which is required to provide the information may only refuse to comply with the court order if it is under some duty of confidentiality or if there is a justified cause for not disclosing the information.

The Procedural Code was enacted prior to the invention of faxes and e-mails, so there is no statutory provision on the admissibility and weight of these types of evidence. However, the Procedural Code authorizes any means of evidence provided it does not conflict with the principles of morality, affects personal freedom or is expressly forbidden.

There are a few cases where the admissibility of faxes or e mails have been judicially analyzed. It has been held that faxes may be used as documentary evidence but, as they do not have the original signature of the sender, faxes must be complemented by other means of evidence. Judges will accord weight to the different forms of evidence, according to their own reasoned opinion. As for e-mails, they have been compared to normal correspondence and benefit from the rules regarding privacy.

Parties may also request admissions from their opponents on disputed facts. These requests should be answered by each party (or a representative of the party if it is a legal entity) at a formal hearing. The requesting party must submit a written request that the opponent swear to a statement that is submitted that a certain fact which is controversial and is detrimental to the deposing party's position is or is not true. If the opponent says it is true (admission), that point is established and no further evidence on that point is required. If the opponent denies it, the question is only construed as an assertion by the party which made it. A written record of the responses is kept in the court file.

QUESTION 9

9. How are litigation fees and costs assessed?

Filing a court action in Argentina requires up-front payment of a court tax equal to 3% (three per cent) of the amount of the claim. When no economic amount is involved, a court tax of only AP (pesos) 70, needs to be paid. Since that the court tax is a tax imposed by a Congressional statute, the obligation to pay it cannot be waived at the discretion of the Government or by the courts.

The general rule on legal costs is that the loser must pay the legal costs incurred by the winner, although in exceptional cases the court may exempt the loser from this burden. This includes not only the court tax (if previously paid by the winner) but also the fees of the winner's counsel and of the experts appointed by the court. All these fees are set by the court as a percentage of the amount of the controversy within the parameters set mainly by the law that governs the legal profession. In the case of counsel, they can be set between 14% and 28% for lower court work in the aggregate for both counsel and barrister (*procurador*). Subsequent appellate work before the Court of Appeals and also before the Supreme Court is remunerated at 25% to 35% of the lower court fee for each appellate stage. However, total fees awarded for lower court work (inclusive of counsel, *procurador* and court appointed experts) cannot exceed 25% of the amount of the award. Fees can be awarded also for the winner in ancillary motions which are contested, regardless of whether that party wins the main action.

When the amount subject to controversy is very high, the Supreme Court has ruled that the legal fee percentages should not be applied mathematically but some regard must be given to the value of the legal work carried out.

In principle, the experts' fees are fixed by the courts in accordance with the regulations relating to fees which apply to the different professions of the expert. In the absence of regulations specific to a particular profession of expert, the courts will fix fees in accordance with equity and their own discretion.

Experts' fees should always be proportional to the fees for the rest of the professionals who take part in the case. In general, fees are calculated as a percentage of the amount adjudicated in the final judgment (about 5%).

The court shall also take into account the following points when fixing experts' fees:

(a) circumstances of the case and the complexity of the matters involved;

(b) professional services rendered and the difficulty of the case; and

(c) amount in dispute.

If the experts fees are not met by the party ordered to do so by the court, the expert may require payment of up to 50% of the fees from the other parties.

During the enforcement of a foreign judgment it could be argued that the request of its domestic recognition of *exequatur* would only be subject to the nominal court tax for cases on the basis that domestication of a foreign judgment does not include, *per se*, its enforcement. However, when a plaintiff initiates enforcement proceedings it must pay the full court tax (i.e. 3% of the value of the claim).

A waiver of legal costs (i.e. an authorisation to litigate *in forma pauperis*) can be requested by parties who can show that they lack the means to defray such costs. This is an ancillary proceeding which can be contested by the counter-party in the litigation. If the waiver is granted, (i) no court tax needs to be paid; (ii) no award of legal costs against the party who obtained the waiver may be imposed; and (iii) the party thus benefited may obtain attachment orders and other preliminary measures without posting a bond.

As a rule, this benefit is extended only to individuals. Exceptionally, companies which are insolvent or near insolvency may also obtain this benefit.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Pursuant to Article 75, paragraph. 22 of the Argentine Constitution, international treaties have a higher status than federal laws and, consequently, over provincial laws too. Therefore, as expressly provided by the Procedure Code, the rules of the Convention prevail over those of the Procedure Code and also over those of the provincial codes of procedure.

Other than the limitation of discovery mentioned above, Argentine courts will give full assistance to foreign courts if requested with the formalities agreed in international treaties or, in the absence of such treaties by means of a letter rogatory issued by the foreign court and delivered throughout the correspondent authorities of each government.

If an international treaty for the enforcement of foreign judgments exists between a foreign country and Argentina, the rules of such a treaty will prevail. In the absence of such a treaty, the Procedural Code will be applicable.

Argentina is party to multilateral treaties such as the Montevideo Treaties on Procedural Law of 1889 and 1940 and the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards of 1979. Argentina also became a party in 1988 to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('the New York Convention'), subject to certain reciprocity and commercial reservations.

Since foreign judgments are not self-executing, the Procedure Code sets forth the process that must be followed for domesticating and enforcing foreign judgments in the absence of a treaty.

There are two stages in this proceeding: (i) the domestication of the foreign judgment (called "exequatur"); and (ii) its enforcement.

Subject to certain requirements, the Argentine courts will enforce foreign judgments that resolve disputes and determine the rights and obligations of the parties to an agreement. The Procedural Code sets out the following requirements that a foreign judgment must meet to be recognized, without further discussion on its merits:

(a) The judgment must have been issued by a court with jurisdiction pursuant to the relevant Argentine conflicts of law principles, be final in the jurisdiction in which it was rendered and result from a personal action or an *in rem* action concerning moveable assets; if the judgment arises in an *in rem* action, personal property must have been transferred to Argentina during or after the prosecution of the foreign action;

(b) The defendant against whom enforcement of the judgment is sought must have been duly served with the summons and, in accordance with due process of law, given an opportunity to defend against the foreign action;

(c) The judgment must have been valid in the jurisdiction where it was rendered and its authenticity must be established in accordance with the requirements of Argentine law;

(d) The judgment must not violate any principles of public policy of Argentine law; and

(e) The judgment must not be contrary to a prior or simultaneous judgment of an Argentine court.

Reciprocity is not required for an Argentine court to recognise a foreign judgment. A foreign default judgment will only be recognised if the defendant was duly served with the summons and was given an opportunity to defend against the foreign action in accordance with due process of the law.

To enforce a foreign judgment in Argentina, a notarised copy of the decision must be filed with the Argentine court and the petitioner must file a statement evidencing that each of the aforementioned requirements has been fulfilled. In addition, all documents (which must be originals or notarised copies) submitted to the court must be authenticated by the Argentine consulate with jurisdiction in the country where the documents were issued. If that country has ratified the 1961 Hague Convention on the Abolition of Legalisation of Documents, the authentication by the Argentine Consulate may be substituted by the apostille.

A claimant seeking recognition of a foreign judgment is entitled to request and obtain provisional measures from a local court pending the decision on recognition. Provisional measures may be granted at the commencement of the proceedings or thereafter.

Once all formalities have been complied with, and if the foreign judgment meets local requirements for recognition, the local court is not entitled to reopen the case heard by the foreign court.

AUSTRALIA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Transactions entered into by a company prior to liquidation are not, in general, voidable at common law, even if the company was insolvent at the time the transaction was entered into.

The statutory mechanisms under which antecedent transactions can be set aside are principally those set out in Division 2 of the Corporations Act 2001 (Cth) (Corporations Act). They are described under the following heads (referred to as "voidable transactions"):

(a) Unfair preferences - s 588FA;

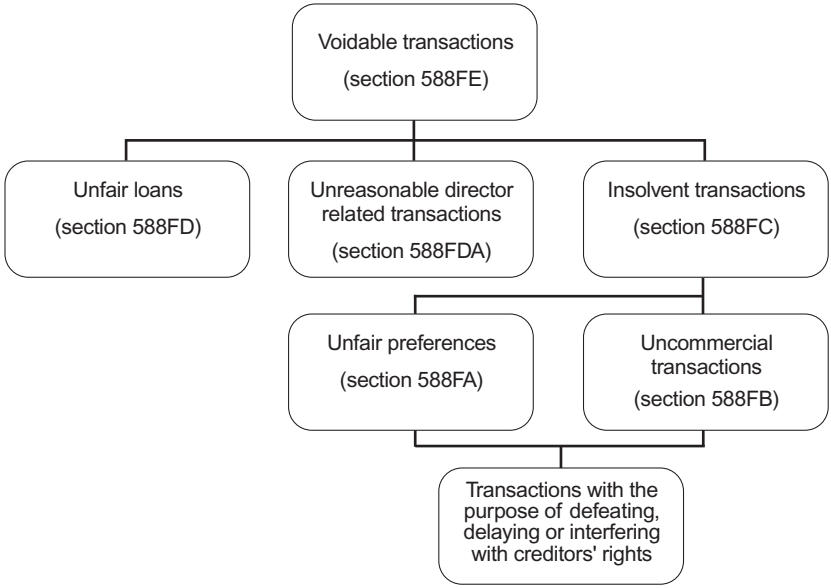
(b) Uncommercial transactions - s 588FB;

(c) Unfair loans - s 588FD;

(d) Unreasonable director related transactions - s 588FDA; and

(e) Transactions with the purpose of obstructing creditors' rights - s 588FE(5).

This is depicted in the following diagram:



There are some other avenues available to the liquidator, including:

(a) avoidance of security interests in respect of circulating assets;

(b) void dispositions made after the commencement of the liquidation of the company; and

(c) proceeds of executions or attachments received prior to the liquidation of the company.

1.1 Unfair preferences - section 588FA

A transaction will be an "unfair preference" given by the company to a creditor if, and only if:

(a) the company and the creditor were parties to the transaction (even if someone else was also a party); and

(b) the transaction resulted in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would have received in respect of the debt if the creditor proved for the debt in a winding up of the company.

The focus of section 588FA is on the advantage received by the creditor as a result of the transaction, not the detriment suffered by the company or the effect of the transaction on the creditors. Transactions that have a neutral effect on the company's assets may still be deemed an unfair preference, whereas payments to secured creditors will not, unless the payment made is in excess of the value of the security interest.

In order to avoid unfair preferences and uncommercial transactions, they must be "insolvent transactions" within the meaning of section 588FC. A transaction will be deemed to be an insolvent transaction if the company was insolvent or became insolvent as a result of the transaction.

A company will be insolvent when they are unable to pay their debts as and when they fall due. A cash flow test as opposed to balance sheet test is utilised in the test for insolvency.

The onus of proving insolvency rests with the liquidator and the burden of proof is 'on the balance of probabilities'. There are, however, a number of statutory presumptions of insolvency which may assist a liquidator, including the failure to keep proper accounting records or if the company has been proved to be insolvent in other recovery proceedings.

Further, for an unfair preference to be voidable, it must have occurred within the time limit prescribed by the Corporations Act. Where the transaction was entered into for the purpose of defeating, delaying or interfering with the rights of creditors or was with a related entity, the statutory time limit is extended.

1.2 Uncommercial transactions - section 588FB

A transaction will be an "uncommercial transaction" of the company if, and only if, it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction. Section 588FB is of wide import and will apply to transactions that lack commercial quality or where the bargain is of such a magnitude it cannot be explained by commercial practice.

When determining whether a transaction is uncommercial, regard must be had to the following matters:

(a) the benefits (if any) to the company of entering into the transaction;

(b) the detriment to the company of entering into the transaction;

(c) the respective benefits to other parties to the transaction of entering into the transaction; and

(d) any other relevant matter.

The section calls for an objective inquiry. It is not an inquiry into what the particular company might have done, but rather whether or not a reasonable person would have entered into the transaction. The Court must have regard to the company's circumstances, which include the state of knowledge of the company when it entered into the transaction. However, unlike a transaction giving rise to an unfair preference, it is not necessary for the party to the transaction to be a creditor of the company.

Common examples of a transaction that is prone to being deemed an uncommercial transaction include circumstances in which the company:

(a) makes a gift;

(b) agrees to perform a task for no consideration;

(c) purchases property which has a market value less than the price paid;

(d) leases an asset above its rental value;

(e) disposes of property for a price less than its market value;

(f) agrees to pay for services a sum which exceeds their value;

(g) agrees to provide services for a sum less than their value;

(h) provides a guarantee for no benefit or a benefit less than the value of the benefit conferred by the guarantee; and

(i) provides security for a previously unsecured loan.

Further, a transaction must be an insolvent transaction to be deemed an uncommercial transaction.

1.3 Unfair loans - section 588FD

A transaction will be an "unfair loan" of the company if, and only if, the interest on, or charges in relation to, the loan were extortionate when the loan was made, or have since become extortionate because of a variation to the loan agreement.

In determining whether or not a loan is unfair, regard must be had to the following matters as they existed at the time the loan was entered into:

(a) the risk to which the lender was exposed;

(b) the value of any security in respect of the loan;

(c) the term of the loan;

(d) the schedule for payments of interest and charges and for repayments of principal;

(e) the amount of the loan; and

(f) any other relevant matter.

The ability to avoid an uncommercial transaction is designed to prevent the rights of the general body of unsecured creditors from being prejudiced by the fact that the company entered into a loan agreement for which the consideration was excessive. It is not, however, aimed at loans that in hindsight could be regarded as bad bargains, but rather loans that are grossly unfair.

Unlike unfair preferences and uncommercial transactions, it is not a requirement that an unfair loan be an insolvent transaction. The Corporations Act prescribes a time limit in which proceedings need to be commenced by the liquidator in order to avoid the consequences of an unfair loan.

1.4 Unreasonable director related transactions - section 588FDA

A transaction will be an "unreasonable director related transaction" if, and only if the payment, disposition or issue is or will be made to a director of the company, a close associate of a director, or a person on their behalf or benefit, and it may be expected that a reasonable person in the company's circumstances would not have entered into the transaction, having regard to:

(a) the benefits (if any) to the company of entering into the transaction;

(b) the detriment to the company of entering into the transaction;

(c) the respective benefits to other parties to the transaction of entering into it; and

(d) any other relevant matter.

The transaction only applies to certain types of transactions. These are:

(a) a payment made by the company;

(b) a conveyance, transfer or other disposition of property of the company;

(c) the issue of securities by the company; or

(d) the company incurring an obligation to make such a payment, disposition or issue.

The transaction will often be used to recover unreasonable payments to directors, particularly bonus payments made prior to the liquidation of the company.

Where a transaction is entered into for the purpose of meeting an obligation that the company has previously incurred, the reasonableness is assessed at the time when the transaction was entered into, rather than at the time when the obligation was incurred. This enables a liquidator to recover payments where the true magnitude of the unreasonableness involved only becomes apparent when the company actually made the payment, even if it appeared reasonable at the time the company agreed to make the payment.

There is no requirement for the transaction to be an insolvent transaction. Significantly, the defences available in respect of unfair preference and uncommercial transactions are not available to this category of voidable transaction. Defences to avoidance claims are discussed in greater detail below.

1.5 Time limits

In order for a transaction to be challenged, it must have occurred within the time period prescribed by the Corporations Act. The table below sets out the relevant time limits. The time limits rely on a key date known as the 'Relation Back Day' which is generally, but not always, the day on which the winding up is taken to have begun.

Transaction	Section	Time Limit	Section
Unfair loans	588FD	At any time on or before the winding up began	588FE(6)
Unfair preferences or uncommercial transactions with the purpose the purpose of defeating, delaying or interfering with creditors' rights	588FE(5)	During the 10 years ending on the relation back day	588FE(5)
Unfair preferences with a related entity	588FA	During the 4 years ending on the relation back day	588FE(4)
Uncommercial transactions with a related entity	588FB	During the 4 years ending on the relation back day	588FE (4)

Unreasonable director-related transactions	588FDA	During the 4 years ending on the relation back day or on or before the day when the winding up began	588FE (6A)
Uncommercial transactions	588FB	During the 2 years ending on the relation back day	588FE (3) 588FE (3)
Unfair preferences	588FA	During the 6 months ending on the relation back day or after that day but on or before the day when the winding up began	588FE(2)
Floating charges	588FJ	During the 6 months ending on the relation back day or after that day but on or before the day when the winding up began	588FJ(1) (b)

The application must be made by the liquidator during the period beginning on the relation back day and ending either 3 years after the relation back day or 12 months after the first appointment of a liquidator, whichever is the later. This period may be extended by the Court provided that the application for extension is made prior to the expiry of the above time period.

1.6 Relief

On the application of a liquidator, the Court may make one or more of the following orders in respect of a voidable transaction:

(a) an order directing a person to pay to the company an amount equal to some or all of the money that the company has paid under the transaction;

(b) an order directing a person to transfer to the company property that the company has transferred under the transaction;

(c) an order requiring a person to pay to the company an amount that, in the Court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction;

(d) an order requiring a person to transfer to the company property that, in the Court's opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction;

(ii) proceeds of property that the company has transferred under the transaction;

(e) an order releasing or discharging, wholly or partly, a debt incurred, or a security or guarantee given, by the company under or in connection with the transaction;

(f) if the transaction is an unfair loan and such a debt, security or guarantee has been assigned, an order directing a person to indemnify the company in respect of some or all of its liability to the assignee;

(g) an order providing for the extent to which, and the terms on which, a debt that arose under, or was released or discharged to any extent by or under, the transaction may be proved in a winding up of the company;

(h) an order declaring an agreement constituting, forming part of, or relating to, the transaction, or specified provisions of such an agreement, to have been void at and after the time when the agreement was made, or at and after a specified later time;

(i) an order varying such an agreement as specified in the order and, if the Court thinks fit, declaring the agreement to have had effect, as so varied, at and after the time when the agreement was made, or at and after a specified later time; and

(j) an order declaring such an agreement, or specified provisions of such an agreement, to be unenforceable.

In respect of unreasonable director related transactions, the Court may make those orders only for the purpose of recovering, for the benefit of the creditors of the company, the difference between the total value of the benefits provided by the company under the transaction and the value (if any) that it may be expected that a reasonable person in the company's circumstances would have been provided having regard to the balancing matters set out in the Corporations Act.

The Court is provided with flexibility in order to do justice between the parties involved.

1.7 Avoidance of security interests in respect of circulating assets

Section 588FJ applies where the company is being wound up in insolvency and the company created a circulating security interest in property of the company during the 6 months ending on the relation-back day or after that day but on or before the day when the winding up began.

The circulating security interest is void (unless it is proved that the company was solvent immediately after that time), as against the company's liquidator, except so far as it secures:

(a) an advance paid to the company, or at its direction, at or after that time and as consideration for the circulating security interest;

(b) interest on such an advance;

(c) the amount of a liability under a guarantee or other obligation undertaken at or after that time on behalf of, or for the benefit of, the company;

(d) an amount payable for property or services supplied to the company at or after that time; or

(e) interest on an amount so payable.

1.8 Executions, attachments and the like

Section 569 applies where a creditor has:

(a) issued execution against property of a company; or

(b) instituted proceedings to attach a debt due to a company or to enforce a charge or a charging order against property of a company within 6 months immediately before the commencement of the winding up.

If the company commences to be wound up, the creditor must pay to the liquidator an amount equal to the amount (if any) received by the creditor as a result of that process, less an amount for costs.

1.9 Void dispositions

Under section 468, any disposition of property of the company, made after the commencement of the winding up by the Court is void, unless the Court orders otherwise. However, the following dispositions are exempt:

(a) a disposition made by the liquidator, or by a provisional liquidator, of the company pursuant to the Corporation Act or an order of the Court;

(b) a disposition made in good faith by, or with the consent of, an administrator of the company; and

(c) a disposition under a deed of company arrangement executed by the company.

QUESTION 2

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2. What are the common defences?

Section 588FG sets out what must be proved in order for a claim to be defended. The section distinguishes between a person who is a party to the transaction and a person who is not a party to the transaction. The section provides that the Court must not make an order that would prejudice a right or interest of that party where the criteria of the section is satisfied.

The statutory defences would not need to be employed unless all the essential elements of a voidable transaction claim had been made out by the liquidator. In the case of unfair preferences and uncommercial transactions, the recipient will often defend the case on the basis that the company was solvent either at the time the transaction was entered into, or immediately after the transaction, or in the case of unfair preferences, that the transaction was part of a running account.

2.1 Non party

A person or entity that was not a party to the transaction will need to demonstrate that it received no benefit as a result of the transaction or, if there was a benefit received:

(a) the benefit was received in good faith; and

(b) when it was received the person had no reasonable grounds for suspecting that the company was insolvent (or would become insolvent because of the transaction); and

(c) when it was received a reasonable person in the recipient's circumstances would have had no such grounds for so suspecting.

This exception is designed to safeguard innocent parties who received a benefit from someone who directly or indirectly received the benefit because of a voidable transaction.

2.2 Parties

A party to a transaction that is being challenged as voidable will need to prove that they:

(a) became a party to the transaction in good faith to establish a defence;

(b) at the time when the person became a party to the transaction, had no reasonable grounds for suspecting that the company was insolvent (or would become insolvent because of the transaction) at the time that the person became such a party; and

(c) at that time, a reasonable person in the recipient's circumstances would have had no such grounds for so suspecting.

Further, the party must show that they provided valuable consideration under the transaction or changed their position in reliance of the transaction.

2.3 Running account

The "running account" principle is not a defence per se. It acts to change the way that the transaction is viewed when the elements of the section are satisfied.

The running account principle applies where:

(a) a series of transactions are, for commercial purposes, an integral part of a continuing business relationship between a company and a creditor of the company (including such a relationship to which other persons are parties);

(b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of the series of transactions forming part of the relationship.

In those circumstances:

(a) all the transactions forming part of the relationship are viewed as if they together constituted a single transaction; and

(b) the single transaction may only be taken to be an unfair preference given by the company to the creditor if the single transaction is taken to be such an unfair preference.

If the purpose of the payments is to induce the creditor to provide further goods or services as well as to discharge pre-existing indebtedness, the payment will not be a preference unless the payments exceed the value of the goods or services acquired. If, however, the purpose was to pay an existing debt, no protection is afforded by the section.

2.4 Time limits

As noted above, the liquidator may bring an application for an extension of time to bring voidable transaction proceedings provided that the application for an extension is made prior to the expiry of the limitation period. The liquidator is not permitted to make successive applications for an extension but the Court may vary the date of the original extension order according to its procedural powers.

When bringing an application for an extension of time to bring voidable transaction proceedings, the liquidator can seek either:

(a) a “shelf order”, which is an order extending the time generally to bring voidable transaction proceedings against any recipient; or

(b) a specific order extending time to bring voidable transaction proceedings against a specific entity or person.

A party seeking to defend a voidable transaction claim commenced during the extended limitation period may wish to set aside the extension order which would render the proceeding deemed void from its beginning. Factors that may lead a Court to set aside a shelf order include:

(a) whether parties affected by the order were denied procedural fairness in not having been given notice of the extension application; and

(b) whether the liquidators failed to satisfy the duty of candour to the Court in seeking the extension.

Accordingly, when bringing an extension application, particularly for a shelf order, the liquidator should ensure that:

(a) all persons that may be affected by the order and that are known to the liquidator at the time that the order is sought are notified that such an order is sought; and

(b) all relevant facts are disclosed to the Court, including the status of their investigations with respect to specific potential preference claims.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

An eligible foreign party has standing to pursue avoidance actions in the Courts pursuant to the Cross Border Insolvency Act 2008 (Cth) (CBIA) which includes at Schedule 1, the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law (Model Law).

As a result of the operation of Article 23(1) of the Model Law, once a foreign main proceeding has been recognised in Australia under the CBIA, the foreign representative (usually, a liquidator) can initiate actions "to avoid or otherwise render ineffective acts detrimental to creditors that are available locally to an insolvency administrator of a reorganisation or liquidation."

Thus, the foreign representative is given standing to pursue avoidance actions that would be available to an Australian liquidator "arising under or because of" Division 2 of Part 5.7B of the Corporations Act (for example, the statutory avoidance actions found in sections 588FA, 588FB, 588FD and 588FDA).

The foreign representative's standing to pursue avoidance actions pursuant to Article 23 must also be read in light of section 17(2) of the CBIA. This section makes Division 2 of Part 5.7B of the Corporations Act apply with appropriate changes, in relation to an action for the purposes of a foreign main proceeding in the same way they would apply if the action were for the purposes of a proceeding in relation to a company within the meaning of the Corporations Act. Thus, the limitation in relation to the definition of "company" within section 9 of the Corporations Act is removed in favour of the foreign liquidator.

The effect of Article 23, is to give the foreign representative standing to initiate avoidance actions despite the fact that they are not the liquidator appointed in the Australian insolvency proceedings. However, if the foreign representative is acting in relation to a foreign non-main proceeding, Article 23(2) requires the Australian Court to be satisfied that the avoidance action pursued is in relation to assets that should properly be administered in the foreign non-main proceeding, having regard to Australian law.

Article 7 of the Model Law and section 19(1) of the CBIA ensures that an Australian Court or liquidator is not limited by the Model Law from providing additional assistance to a foreign representative under "other laws" (for example, pursuant to section 581 of the Corporations Act, which is discussed further below).

The issue of standing can be a complex one, as Article 23 permits the enacting State to determine to the extent to which a foreign representative can pursue avoidance actions. Moreover, Article 23 has specifically been drafted narrowly, so as to prevent creating any substantive rights or guidance in relation to the conflict of law issues that may arise (UN Doc A/CN.9/435 at paragraph 64). Thus, the question of the "applicable law" is to be resolved by the conflict of laws rules that apply in Australia (as the enacting State). A discussion of those principles, however, is outside the scope of this text.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

A foreign party may seek to bring a claim under foreign avoidance law directly against a transferee in Australia either pursuant to the Model Law, or pursuant to the common law and existing statutory aids to international insolvency that have been left intact notwithstanding the implementation of the Model Law.

For the Model Law to apply to the situation where a foreign party seeks to bring a claim under foreign avoidance law directly against a transferee in Australia, the foreign party must apply to the Court to recognise that there is a "foreign proceeding" in progress. A further prerequisite to the application of the Model Law is that the Court recognise the foreign party as a "foreign representative."

If the foreign party is recognised as a foreign representative, the foreign party can enjoy the application of the Model Law and seek the assistance of the Australian Court. If the debtor concerned is an individual, the foreign party will appeal to the Federal Court of Australia to perform the relevant functions. If the debtor is a non-individual, the Federal Court of Australia, or the Supreme Court of an Australian State or Territory, can perform the relevant functions.

The right of a foreign representative to bring a claim in the Court under Australian avoidance law, the *lex fori*, is a right for which the Model Law expressly provides. However, the Model Law is silent on the circumstances in which a foreign representative applies to the Court to commence a proceeding under foreign avoidance law, the lex concursus.

The Guide to Enactment to the Model Law confirms that the Model Law does not create any substantive rights regarding such avoidance actions and does not provide any solution involving conflict of laws. Rather, the Model Law leaves open the choice of law issue.

The Model Law does, however, provide that upon recognition of a foreign proceeding, the Court may, at request of the foreign representative, grant "any appropriate relief" as long as that relief is necessary to protect the assets of the debtor or the interests of the creditors. The Court can grant such relief under any conditions it considers appropriate. However, such relief would only be granted if the Court is satisfied that the interests of the creditors and other interested persons, including the debtor, are adequately protected.

It is in this area of discretionary relief that the Court may tailor relief to the case at hand to promote the purposes of the Model Law. Those purposes include, amongst other things, the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor, and the protection and maximisation of the value of the debtor's assets.

Such discretionary relief could feasibly include relief pursuant to foreign avoidance law, but the question remains an untested one under the Model Law in Australia.

Given that the Model Law is to be interpreted with regard to its international origin, the need to promote uniformity in its application, and with regard to the observance of good faith, it is likely that the Australian Court will seek guidance from Courts abroad.

Accordingly, it is likely that the Court applying the Model Law would, in the appropriate circumstances, be open to apply foreign avoidance law against a transferee in Australia directly.

The Model Law is the most probable route via which a foreign party seeking to bring a claim under foreign avoidance law directly against a transferee in Australia would do so. The Model Law is now the starting point for eligible cross-border insolvency related proceedings.

In regards to the possibility of such an action pursuant to the common law of Australia, however, that too is a novel question. The United Kingdom House of Lords has expressed the view that under principles of common law, whilst a Court would ordinarily apply its own insolvency laws, in some cases a consideration of its own conflict of laws rules would lead to a different result[1]. Accordingly, it again appears open that such a common law claim may be entertained by an Australian Court.

QUESTION 5

5. Who decides issues of foreign law?

The Court will treat the content of foreign law as a question of fact, not of law. The content of the foreign law must be pleaded and proved in evidence by one of the parties before the Court and, in the absence of evidence of the foreign law, the law of the forum will apply.

The onus of proving the content of the foreign law falls upon the party who asserts that the foreign law differs from Australian law. If neither party pleads the content of the foreign law as being different, the matter will proceed under Australian law. If a party fails to plead the content of the foreign law, or pleads but fails to prove its content in evidence, the Australian Court cannot assume the foreign law is different to Australian law.

If, in the pleadings or at trial, one party admits to the opposing party's submissions on the content of the foreign law, no dispute as to the content of the foreign law arises and no further proof is necessary. However, if the content of the foreign law is in dispute, proof of the foreign law is required.

The Evidence Act 1995 (Cth) (Evidence Act), governs matters of evidence before the Federal Courts of Australia. Section 174 provides that evidence of a statute, proclamation, treaty or act of state of a foreign country may be adduced by tendering documentary copies of that material. Section 175 provides that evidence of the common law of a foreign country may be

[1] *Re HIH Casualty and General Insurance Ltd and other companies; McMahon and others v McGrath and another* [2008] UKHL 21 at [28]

adduced by producing a book containing reports of judgments of the foreign Court, if those reports would be used in that foreign country to assist the foreign Courts in similarly interpreting the foreign law. The foreign reports may also be used in the aid of interpreting the statutes of the foreign country.

Whilst the provisions of the Evidence Act assist in the facilitation of the proof of the foreign law, it may nevertheless be required to supplement the documentary material with expert evidence. The expert will give evidence orally, or by affidavit, which is a sworn written statement.

The Court will hear from a witness who has skills in the law of the relevant foreign place and is likely to know how the issues would be accommodated by the foreign law. An expert will need to have specialised knowledge of the foreign law based on the expert's training, study, or experience. Practical expertise will be preferred, with judges, lawyers, or academics from the foreign field suitable candidates.

Where a fact of foreign law is so well known, or the foreign country is a settled British colony in which there was a reception of the common law of England that still applies, the Court may not require proof of the foreign law but may take judicial notice of that fact.

That the content of foreign law is a question of fact, not law, means that an earlier decision of the Court on the content and meaning of a foreign law is not binding on subsequent like cases. It may be that the later Australian Court will interpret the same foreign law differently.

Once the content of the foreign law is, as a matter of fact, established, the application of the foreign law to the facts of the case before the Australian Court is a matter for that Australian Court.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

A Court in a foreign country can seek assistance from the Court on matters of foreign avoidance law in a number of ways, the first of which is pursuant to the Model Law. The purpose of the Model Law is, amongst other things, to promote cooperation in cases of cross-border insolvency between courts of a foreign state and Australian courts. The scope of application of the Model Law expressly applies where assistance is sought in Australia by a foreign court.

For the Court to co-operate with a foreign Court regarding a foreign proceeding, the Model Law does not require that a previous formal decision be made to recognise the foreign proceeding. However, to avail itself of assistance under the Model Law, the foreign court must satisfy the definition of "foreign court" under the Model Law, which is defined broadly as any judicial or other authority competent to control or supervise a foreign proceeding.

Chapter IV of the Model Law deals with co-operation with foreign courts and foreign representatives and is described as a core element of the Model Law. An Australian and foreign Court are entitled under the Model Law to communicate directly with, or to request information or assistance directly from, each other, pursuant to Article 25(2). This avoids the traditional time-consuming procedures such as letters rogatory.

In all matters to which the Model Law applies, the Courts are directed to cooperate with foreign courts to the "maximum extent possible'. The mechanisms for the implementation of such cross-border co-operation are varied and include the following:

(a) the appointment of a person or body to act at the direction of the court;

(b) via communication of information 'by any means considered appropriate';

(c) through coordination of the administration and supervision of the debtor's assets and affairs;

(d) through approval or implementation of agreements concerning the coordination of proceedings; and

(e) through co-ordination of concurrent proceedings regarding the same debtor.

However, this list is not exhaustive but merely illustrative. The courts may co-operate in any manner appropriate to facilitating the purposes of the Model Law. Inter-court communication should be within the bounds of the principle of comity, and it may not be appropriate for courts to engage in substantive discussions on issues of controversy that are between the parties and which may come before the court for determination. However, such inter-court assistance is not precluded by the Model Law, and the ways in which such co-operation manifests are still being established.

Apart from the Model Law, a court in a foreign country may also seek assistance from an Australian court on matters of foreign avoidance law pursuant to the Corporations Act.

If the court is in a foreign country that is deemed a prescribed country by the Corporations Act, the Australian court is mandated to act in aid of, and be auxiliary to, the foreign court that has jurisdiction in an external administration matter pursuant to section 581(2)(a) of the Corporations Act. The prescribed countries are found in regulation 5.6.74 of the Corporations Regulations 2001 (Cth) and comprise the Bailiwick of Jersey, Canada, the Independent State of Papua New Guinea, Malaysia, New Zealand, the Republic of Singapore, Switzerland, the United Kingdom, and the United States of America.

Where the foreign country is not a prescribed country, the Australian court may still provide such aid on a discretionary basis pursuant to section 581(2)(b) of the Corporations Act.

Section 581(3) provides that where a letter of request is received from a court of any other country requesting aid in an external administration matter, and that letter is filed in an Australian court, the Australian court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within the Court's own jurisdiction.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

The Model Law has been adopted in Australia via the CBIA, which received royal asset on 26 May 2008. The provisions of the Model Law, contained in Schedule 1 to the CBIA, came into force on 1 July 2008. Australia's version of the Model Law addresses avoidance actions in the following ways.

First, the Model Law applies where assistance is sought in a foreign country in connection with a proceeding under Australian avoidance law, or where creditors or other interested persons in a foreign country have an interest in requesting the commencement of, or participation in, a proceeding under Australian avoidance law.

An Australian insolvency official such as a Trustee in Bankruptcy (personal insolvency) or a Liquidator (corporate insolvency) is authorised by Article 5 of the Model law to act in a foreign country on behalf of a proceeding under Australian avoidance law. However, the scope of the insolvency official's powers will only be to the extent permitted by the applicable foreign law.

Just as an Australian insolvency official is authorised to act abroad, Article 11 of the Model Law entitles a foreign representative to apply to commence a local proceeding under Australian avoidance law, if the conditions for commencing such a proceeding are otherwise met. Article 23 gives the foreign representative standing to initiate, in particular, Australian avoidance law claims. Upon recognition of a foreign main proceeding, the foreign representative can also participate in an Australian avoidance law proceeding, if one is already underway. Under Article 28, a proceeding may only be commenced if the debtor has assets in Australia, and the effects of the proceeding will be restricted to the assets located in Australia.

Foreign creditors also have access to an Australian proceeding concerning Australian avoidance law, pursuant to Article 13 of Australia's Model Law.

Article 31 provides that for the purposes of a proceeding under Australian avoidance law, the recognition of a foreign main proceeding is, in the absence of evidence to the contrary, proof that the debtor is insolvent.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

A liquidator may examine officers of the company as of right (known as a "mandatory examination") or certain other persons (known as "discretionary examinations") about the "examinable affairs" of the company.

The Court will permit discretionary examinations if it is satisfied that the person:

(a) has taken part or been concerned in examinable affairs of the corporation and has been, or may have been, guilty of misconduct in relation to the corporation; or

(b) may be able to give information about examinable affairs of the corporation.

The "examinable affairs" of the company are of wide scope and are defined as:

- the promotion, formation, management, administration or winding up of the corporation; or
- any other affairs of the corporation (including anything that is included in the corporation's affairs because of section 53); or
- the business affairs of a connected entity of the corporation, in so far as they are, or appear to be, relevant to the corporation or to anything that is included in the corporation's examinable affairs because of paragraph (a) or (b).

The liquidator's examination is to be held in public unless the Court considers that, by reason of special circumstances, it is desirable to hold the examination in private.

The liquidator may require the person to produce at the examination certain documents that are in the person's possession and relate to the corporation or to any of its examinable affairs.

In addition to the power to examine the parties mentioned above, the liquidator has the other procedural avenues of obtaining documents, either prior to or during the course of the proceeding. These include:

(a) an application for preliminary discovery (i.e. pre-commencement discovery);

(b) discovery/disclosure by way of categories of documents, or a general discovery order; and

(c) issue interparty Notice to Produce for Inspection or Notice to Produce to Court, or a Subpoena to Produce Documents.

Certain procedural rules of Court dictate when and to what extent discovery can be ordered in a proceeding and at what time. A discussion of those principles is outside the scope of this text.

QUESTION 9

9. How are litigation fees and costs assessed?

When a liquidator seeks to commence avoidance actions, the proceedings are brought in the liquidator's own name. Accordingly, like any other litigant, the liquidator faces the possibility of an adverse finding by the Court, and the possibility of cost orders being made against the liquidator.[2] For this reason, an application that a liquidator provide security for costs will usually be rejected.

One of the issues that arises is whether the liquidator is personally liable or whether the costs order may be satisfied out of the company's assets. For example, liquidators often attempt to limit their personal liability by commencing these proceedings as "a party in their capacity as liquidator" of the company. However, the court does not limit liability in this way.

If the role of the liquidator is presumed to be analogous to the role of a trustee, then the liquidator should be personally liable for costs and any right of indemnity against the assets of the company would be irrelevant as far as the successful party's entitlement was concerned[3]. However, a right to indemnity is usually found, unless the liquidator's conduct in the litigation is below the requisite standard.[4]

On the other hand, some courts have made orders requiring the successful parties' costs to be paid out of (and be limited to) the assets of the company: an exception being made where the actions of the liquidator in the litigation are so unreasonable as to warrant personal liability[5].

This approach is consistent with the statutory scheme which gives priority to the distribution of the company's assets to expenses that have been properly incurred (section 556(1)(a), (dd) and (de) of the Corporations Act). Accordingly, if the litigation costs have been prudently and reasonably incurred by the liquidator in the course of carrying out their proper duties, a right of indemnity should be found.[6]

Section 556(1) of the Corporations Act will then operate so that the costs and expenses incurred by the liquidator in realising the company's assets are paid in priority. However, this may open up the risk that the liquidator's remuneration may be deferred behind adverse costs orders made against the company.

[2] *Jonas v Rocklea Spinning Mills Pty Ltd* (2000) 18 ACLC 333
[3] *Bell Group Ltd (in liq) v Westpac Banking Corp* (1997) 16 ACLC 65
[4] *Cresvale Far East Ltd (in liq) v Cresvale Securities Ltd (No 2)* (2001) 39 ACSR 622
[5] *Cuthbertson & Richards Sawmills Pty Ltd v Thomas (No 2)* [1999] FCA 1789
[6] *Mead v Watson as Liquidator for Hypec Electronics* (2005) 23 ACLC 718

Costs are a discretionary matter for the Court. The default position is usually that costs "follow the event," so that the unsuccessful party is liable to pay the successful party's costs on a "party-party" basis (that is, the successful party is to be indemnified for costs "properly" incurred in the pursuit of justice, as opposed to all costs). However the Court may depart from this position where the Court considers it appropriate to give effect to the relative success of each party on the various issues between them or where, for example, an order for indemnity costs is appropriate.

Unless, the parties agree on the quantum of costs between themselves or the Court orders costs a fixed sum, costs are usually quantified through a process of taxation or costs assessment by a costs assessor appointed by the Court.

The ordering and assessment of costs by the Court is determined under the ordinary court rules for the jurisdiction in which the proceedings have been commenced. Australia has both a Federal and State court system. Accordingly, parties will require specific advice in relation to the manner in which costs are ordered and assessed in their jurisdiction. A discussion of those principles is outside the scope of this text.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Although a foreign judgment does not create a direct right of execution in Australia, it is possible for foreign judgments avoiding antecedent transactions to be enforced in Australia. Accordingly, a foreign liquidator has three main avenues available for enforcement.

First, Part 5.6 Division 9 of the Corporations Act, specifically section 581, allows Australian courts to aid a foreign court that has jurisdiction in an external administration matter. Section 581 assistance is mandatory for certain prescribed jurisdictions and discretionary in all other instances. Section 580 defines "external administration matter" to include matters which relate to the winding up or insolvency of a body corporate or Part 5.7 body outside of Australia.

When an Australian Court acts in this capacity it may exercise such powers with respect to the matter, as though the matter had arisen within its jurisdiction. The section 581 procedure requires the "letter of request" or "request for assistance" to be made to an appropriate Australian court by the foreign court. Re Chow Cho Poon (Private) Ltd (2011) 249 FLR 315 is an example of a successful application of these provisions.

Second, pursuant to the Foreign Judgments Act 1991 (Cth) (FJA) it is possible to register a foreign judgment in Australia and thus circumvent the need to commence new proceedings based on the judgment (as a debt) in an Australian court.

However, the FJA only applies to foreign judgments from countries where there is an assured relationship of reciprocity of treatment in relation to enforcement and where the foreign judgement is “final” or “conclusive”. As the FJA is directed to monetary judgments, the judgments in relation to antecedent transfers would be captured by these provisions. Once a foreign judgment is registered, the registering (Australian) court, has the same enforcement powers as though the judgment were made in Australia.

The final avenue available is for the foreign representative to have the foreign proceeding recognised under the Model Law, in order to enliven the relief provisions in Article 21. Alternatively, pursuant to Article 25, the Model Law mandates co-operation to the maximum extent possible in matters referred to in Article 1, between Australian court and foreign courts or foreign representatives.

BRAZIL

Introduction[1]

The Brazilian Bankruptcy Law – Law No. 11.101/05 ("BBL") is now heading towards its 10th anniversary[2]. It replaced the previous bankruptcy law which was in force since 1945. The BBL promoted a major overhaul into the Brazilian corporate insolvency system. It ultimately shifted from a liquidation orientated and outdated legislation to embrace modern underlying principles of corporate restructuring designed and directed to rescue distressed but viable businesses.

Indeed the BBL provides distressed companies with opportunities and tools to restructure its obligations and operations and continue as a going concern through the use of rehabilitation processes named (a) judicial reorganisation (*recuperação judicial*); or (b) out-of-court reorganisation / prepackage reorganisation (*recuperação extrajudicial*). If restructuring and rehabilitation is not feasible then business should be promptly and efficiently discontinued through a bankruptcy liquidation (*falência*) process.

The judicial reorganisation is a judicial procedure somewhat inspired and analogous to a Chapter 11 case under the US Bankruptcy Code. It is a tool essentially designed to promote effective restructuring and reorganisation of viable companies enduring a financial-economic crisis. In short, protected by enforcements and other actions for a certain period of time (stay period), the debtor is entitled to submit, negotiate and eventually approve with its creditors a judicial reorganisation plan ("Plan of Reorganisation") where it can generally rescale its operations and modify the debt (and eventually equity portion) of its capital structure. Upon approval and confirmation of the Plan of Reorganisation, pre-petition claims are generally discharged and debtor would enjoy a fresh start.

The out-of-court reorganisation or prepackage reorganisation is also a judicial procedure designed to promote corporate restructuring. Similarly to prepackage arrangements in other jurisdictions, the main goal of the prepackage reorganization is to provide expedited confirmation of a plan of reorganisation ("Prepackage Plan") previously negotiated and eventually accepted by requisite majorities involving certain classes of creditors or group of creditors of the same nature and similar payment conditions or with all the creditors who are eligible for inclusion in the Prepackage Plan.

When compared to a full-blown judicial reorganisation proceeding, the prepackage reorganisation tends to be a fast-track and the more efficient procedure, though in practice it is significantly less used than judicial reorganisation. It also tends to minimise transaction costs and the time spent in court. It also reduces uncertainty given the fact that the Prepackage Plan has been previously negotiated and approved by certain requisite majority of claims and creditors.

Finally the bankruptcy liquidation of a corporate debtor, whether filed for by third parties (involuntary bankruptcy) or by the debtor itself (voluntary bankruptcy), is mainly characterised by the acknowledgment that its business is no longer viable. The bankruptcy liquidation procedure essentially consists of a collective enforcement procedure to which all creditors are subject to, assets will be gathered, appraised and liquidated and proceeds will be distributed for payment of the creditors in accordance with the pre-established ranking of priorities.

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[1] The authors Giuliano Colombo and Thiago Braga Junqueira are respectively partner and associate in Pinheiro Neto Advogados, in Brazil. The opinions expressed herein are those of the authors and not of Pinheiro Neto Advogados.

[2] The BBL was enacted in February, 2005.

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

As in many other jurisdictions, one of the main policies of the BBL is to maximise value for creditors and debtors while ensuring equality of distribution amongst creditors. The principles of pars *conditium creditorium* and of fair distribution ultimately repudiates the actions of a debtor or a creditor prior to the bankruptcy liquidation or other insolvency regime that have the effect of allowing one creditor or other third party (or insider) to obtain an unfair advantage at the expense or to the detriment of other creditors and stakeholders.

Although the BBL represents a leap ahead in terms of modernising the Brazilian insolvency system, when it comes to addressing the issue of antecedent and fraudulent transfers and transactions, the BBL has not been significantly innovative and has not departed from the relevant provisions of the previous bankruptcy legislation. For instance, it specifically failed to expressly address the tools available to challenge antecedent transactions during a judicial reorganisation or out-of-court reorganisation proceedings.

Notwithstanding the foregoing, Brazilian legislation, notably the BBL, the Civil Code and the Code of Civil Procedure effectively regulates the effects and consequences of antecedent and fraudulent transactions as corollary of the principles of pars *conditium creditorium* and fair distribution to creditors and stakeholders.

In general there are 3 (three) different statutory theories for avoiding antecedent and fraudulent transactions in Brazil. If a debtor is running its activities as a going concern including in a judicial reorganisation or out-of-court reorganisation, the disposal or encumbrance of the debtor's property may be declared null and void or ineffective if consummated in fraud against creditors (*fraude contra credores*) or fraud against enforcement proceedings (*fraude à execução*).

Furthermore, in cases where a debtor's bankruptcy liquidation has been adjudicated, certain acts and transactions performed before the bankruptcy liquidation decree are ineffective or avoidable, notably when consummated within a specified prepetition claw back period, through the filing of specific claw back (revocation) lawsuit (*ação revocatória*).

1.1 Fraud against creditors

As a rule, all debtors' assets account for its obligations. Therefore, under a default scenario creditors are entitled to access and expropriate a debtor's property to satisfy the respective unpaid obligation. In general if a debtor disposes of its property in a malicious manner when insolvent or to the level where remaining assets will be insufficient to ensure the payment of its obligations, such transfer would be fraudulent against (unsecured) creditors.

Indeed Section 159 of the Brazilian Civil Code establishes that transactions for no consideration (i.e. donations or disposal or encumbrance of assets) may be declared null and void if consummated (i) when the debtor was already insolvent or became insolvent as a result of the fraudulent transaction; and (ii) with a frivolous intention to defraud creditors. In addition, onerous transactions are also voidable if consummated when the debtor's insolvency is known or should have been known by the debtor's counterparty in the relevant transaction. For the purposes of the Civil Code, a debtor is insolvent when its liabilities exceed its assets (balance sheet test).

Accordingly, two elements must be generally satisfied for avoiding an antecedent transaction entered with an intention of fraud against creditors: (a) objectively, the transactions must cause a debtor's insolvency and / or be implemented when a debtor was already insolvent (*eventus damni*); and (b) subjectively, parties must implement the transaction with fraudulent intent (*consilium fraudis*), mainly to defraud the debtor's existing creditors.

Prejudiced unsecured or secured[3] creditors whose claims arose and exist before the transaction are entitled to file a revocatory suit (*ação pauliana*)[4] seeking the avoidance and nullification of the fraudulent transaction. In addition to showing a debtor's insolvency, creditors must show the fraudulent collusion among a debtor and counterparty. Typically this exercise will require a creditor to show the transfer was made for no consideration or inadequate equivalent value (i.e. not arms length transaction) in exchange for the asset or obligation or create a preference to an unsecured creditor.

In general the revocatory lawsuit can be filed within 4 (four) years counted from the occurrence of the fraudulent transaction. If litigation is successful, disposal or encumbrance of the debtor's asset should be considered null and void and parties should return to *status quo* with the relevant assets by (or equivalent cash indemnification if the asset is unavailable) returning to the debtor's property.

Although the BBL is silent in this respect, the prevailing academic view is that creditors and stakeholders are entitled to promote revocation lawsuits for avoiding fraudulent transactions antecedent to a debtor's filing for judicial reorganisation or out-of-court reorganisation based on the provisions of the Civil Code (as opposed to or complimentary to the BBL).

1.2 Fraud against enforcement proceedings

In addition, the encumbrance or disposal of a debtor's assets while pending an enforcement proceeding (*ação de execução*) against the debtor seeking to collect an unpaid debt under a fast-track procedure may be considered fraud against enforcement proceedings, as set forth in section 593 of the Brazilian Code of Civil Procedure ("BCPC").

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[3] To the extent the collateral is insufficient to fully satisfy the debt.
[4] Set forth in article 161 of the Brazilian Civil Code.

Court precedents and legal writing generally supports the view that the disposal or encumbrance of a debtor's asset may be considered ineffective if, cumulatively, (i) the enforcement proceeding is pre-existing (antecedent) to the transaction; (ii) the buyer or debtor's counterparty was (should be) unequivocally aware of the antecedent enforcement proceeding; and (iii) the transaction compromised a debtor's capability to solve its obligations.

By contrast to fraud against creditors, it is not mandatory that the said sale or encumbrance was implemented under fraudulent collusion and intent among a debtor and a third party-buyer. In other words, even transactions implemented at arms length basis may be voided when objectively consummated in fraud against enforcement proceedings. Further, the transaction should be ultimately considered ineffective, allowing creditors to access the transferred property even if the property is in the possession of third parties.

Ruling on the ineffectiveness (or not) of the transaction should occur incidentally to the respective enforcement proceeding. Thus, the process tends to be significantly more straightforward than recognition of fraud against creditors, mainly because the prejudiced creditor is entitled to seek proper protection under the same proceeding instead of having to pursue a null and void declaration by means of an independent and time-consuming process. Fraud against enforcement proceedings may be argued at any time by the relevant creditor while pending the respective enforcement proceeding.

1.3 Bankruptcy liquidation and antecedent transactions

The BBL also regulates scenarios where antecedent transactions are deemed ineffective or voidable. Indeed, certain specific acts and contracts performed under a statutory period before the adjudication of a debtor's bankruptcy liquidation (*falência*) are considered ineffective. Further, acts performed with the intent to hinder or defraud creditors may also be declared null and void.

Section 129 of the BBL establishes that certain acts performed during a claw back (look–back) period (*termo legal*) shall be declared ineffective in relation to the estate. The claw back can generally be up to the 90- days period prior to: (a) the filing of a bankruptcy liquidation (involuntary) request by debtor's creditor; (b) the filing for court-protection under judicial reorganisation (in case judicial reorganisation has been subsequently converted into bankruptcy liquidation proceedings); or (c) outstanding protest of a debtor's title due to lack of payment.

A null and void declaration should apply regardless of whether the involved parties were aware of the financial condition of the debtor or had the intention to defraud creditors. The following transactions (*inter alia*) if completed during the claw back period shall be considered objectively ineffective: (i) payment of obligations not matured (i.e. preferred payment); (ii) payment of matured obligations in a different manner than originally established by the parties in the relevant contracts; and (iii) creation of collateral to secure an existing unsecured debt. The transfer of substantially all of the debtor's assets shall also be ineffective if completed without consent or payment of all creditors existing at the time of the transfer.

The ineffectiveness of the transaction can be recognised and declared by the Bankruptcy Court on its own initiative (*ex officio*). It can be argued as a defence under and during bankruptcy liquidation proceedings or in an independent lawsuit or ancillary proceeding filed for this purpose by the court-appointed trustee or interested parties. It is generally accepted that there is no time constrains or statute of limitations for the declaration of ineffectiveness of acts performed before the bankruptcy adjudication, provided the transaction was completed during the claw back period or other statutory period specifically set forth in the BBL.

In addition, similarly to the fraud against creditors under the Civil Code, transactions implemented before or after a debtor's bankruptcy liquidation adjudication may be revoked if they were performed fraudulently, irrespective of whether they were committed during the claw back period. Indeed, section 130 of BBL establishes that acts performed with the intent to defraud creditors may be revoked, provided there is evidence of (i) the fraudulent collusion between the debtor and the contracting third party; and (ii) the actual loss suffered by the estate.

It follows from the above that in bankruptcy liquidation two elements must be satisfied for avoiding an antecedent transaction: (a) *objectively*, transactions must cause a debtor's estate a loss (*eventus damni*); and (b) *subjectively*, parties must have implemented the transaction with fraudulent intention (*consilium fraudis*), mainly to defraud debtor's existing creditors.

The court-appointed Trustee, the Public Prosecutor Office and creditors are entitled to file a claw back lawsuit (*ação revocatória*) seeking the avoidance and nullification of the fraudulent transaction. The claw back lawsuit can be filed within 3 (three) years as from bankruptcy adjudication. The claw back lawsuit will be heard by the Bankruptcy Court.

Similarly to the litigation to void fraudulent transactions under the Civil Code, interested parties will need to show the actual loss experienced by the estate as a result of the transaction. Typically this exercise can be particularly problematic when debating adequate equivalent value (i.e. not arms length transaction) in exchange for the asset or obligation at the time of the relevant transaction.

Also similarly to the revocation lawsuit under the Civil Code, if the claw back litigation is successful, disposal or encumbrance of the estate's assets should be considered null and void and parties should return to the *status quo* with the relevant assets (or equivalent cash indemnification if the asset is unavailable) returning to the estate. Note that to ensure the end result of the claw back proceeding the Bankruptcy Court may order the precautionary freezing and attachment of the defendant's assets.

In general, revocation and claw back litigation are very fact-intensive and can be a time-consuming and costly exercise in Brazil. A typical litigation of this nature could take more than 5 (five) years to be resolved.

Notwithstanding the foregoing, it is worth noting that acts implemented in accordance with a plan of reorganisation during a (preceding) judicial reorganisation proceeding should not be subject to ineffectiveness or a nullity declaration. Thus, in case of conversion of the reorganisation proceedings into bankruptcy liquidation (due to the non-compliance with the plan of reorganisation), sale or encumbrance of assets performed pursuant to the terms of the plan of reorganisation should be preserved, even if it qualifies under one of the provisions of section 129 or 130 of BBL.

QUESTION 2

2. What are the common defences?

In all statutory claims disputing antecedent fraudulent transactions listed above, debtor's and counterparty's defences will typically gravitate around statutes of limitation, debtor's solvency at the time of the transaction, existence of other assets to satisfy the obligations (either at the time of the transaction or the subsequent litigation) adequate equivalent consideration and acquirers' diligence, independence (i.e not an insider) and good faith. Indeed good faith acquirers are generally entitled to full restitution of the assets or payments made on the account of the antecedent transaction.

Under fraud against creditors, occasionally debtors and counterparties will also argue the transaction was entered in the ordinary course of business and was necessary to maintain a debtor's ongoing operations and should be preserved under specific safe harbours of the Civil Code.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

Foreign parties are generally allowed to litigate in Brazil. A foreign party or creditor, therefore, is entitled to seek ineffectiveness or nullity of certain antecedent transactions under any statutory proceedings indicated in question 1 above. However, foreign parties with no immovable assets in Brazil seeking to litigate in Brazil must post a bond to ensure payment of court costs and attorney's fees (in case they are ultimately defeated), normally ranging from 10% to 20% of the amount under dispute[5].

[5] Attorney's fees should be equivalent up to 20% of the economic amount involved in the litigation.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

Foreign law is accepted and applied by Brazilian Courts to avoid a transaction involving a local transferee, provided it does not violate Brazilian public policy, sovereignty and good moral principles. It is a responsibility of the interested party to prove the content and existence of the applicable foreign avoidance law[6].

QUESTION 5

5. Who decides issues of foreign law?

Brazilian Courts decides which law should be applied to rule a specific litigation. Typically a Brazilian Court would look into the relevant contracts to establish the substantive law applicable to resolve the dispute. However, depending on the circumstances it is not uncommon for Brazilian Courts to apply Brazilian substantive law even if the relevant transaction and respective contracts were governed by a different operative law.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Yes. Application for the enforcement in Brazil of a foreign court (*interim*) order in relation to a case in progress before a foreign court (or the converse) must be made to the competent authorities by means of a letter rogatory to which competent *exequatur* should be given by the Chief Justice of the Superior Court of Justice[7]. A recognised letter rogatory will be translated into Brazilian Portuguese and sent to the competent court through diplomatic channels for enforcement subject to the Internal Rules of the Superior Court of Justice[8].

[6] In some cases, Brazilian law should be applied when the dispute involve real estate assets located in Brazil.

[7] Article 201 of the Code of Civil Procedure. Recognition will generally be denied if the award or the letter rogatory awaiting *exequatur* violate the Brazilian public policy, sovereignty and good moral principles.

[8] The Constitutional Amendment No. 45-2005 transferred the jurisdictional competence for analysis of letters rogatory and *exequaturs* from the Federal Supreme Court to the Superior Court of Justice (see also Code of Civil Procedure, Article 211).

Besides the statutory rules on judicial co-operation that apply to any foreign State, there are bilateral and multi-lateral treaties (such as the Inter-American Convention on Letters Rogatory, CIDIP-I, Panama, 1975, and its Additional Protocol, CIDIP-II, Montevideo, 1979; both promulgated in Brazil in 1996) signed between Brazil and a number of States,[9] normally containing provisions aiming at expediting the acts that have to be performed for the competent *exequatur* to be obtained from the Superior Court of Justice.

In addition, Brazilian laws are generally favourable towards co-operation with other countries. In some specific cases in which there is no order from a foreign Court, foreign authorities may request assistance from Brazilian central authorities by means of a direct assistance request to be heard and (eventually) granted by the Ministry of Justice. Under very specific circumstances, certain Brazilian local authorities may, upon request of a foreign authority accepted by the appropriate diplomatic channels at the Ministry of Justice – initiate proceedings in Brazil based on the direct assistance request.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency?

The existing BBL does not have specific provisions or sections governing cross-border insolvency proceedings and the potential co-operation among courts in different jurisdictions. Brazilian legislature however, is currently considering to amend the BBL to adopt a version of the Model Law on Cross-Border Insolvency that was promulgated by the United Nations Commission on International Trade Law (UNCITRAL)[10].

[9] For a complete list of all international Jurisdictional Co-operation treaties that Brazil is part of, please see: *http://www.agu.gov.br/sistemas/site/TemplateImagemTextoThumb.aspx?idConteudo=113478&ordenacao=1&id_site=4922*

[10] Note that in practical terms we have experienced reorganization cases where Brazilian courts cooperated with foreign courts and vice-versa, regardless of the lack of formal law governing such interaction in Brazil.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

BBL embraces the principle of transparency under local insolvency regimes. Indeed, there are statutory provisions regulating the disclosure of debtor's relevant information to the parties affected by a debtor's insolvency. The main objective of such provisions is to provide creditors an opportunity to assess whether a debtor's activities are viable and an eventual restructuring proposal is (or not) reasonable and fair.

Under judicial reorganisation proceedings a debtor must present a series of documents and relevant information regarding its assets and financial situation upon filing for court protection. Further, both a debtor and court-appointed trustee should present periodic information and reports regarding a debtor's activities and economic-financial situation (i.e. financial statements), among other obligations.

Brazilian procedural and substantive law are not as broad in disclosure and discovery as one would experience in common law countries. Indeed full discovery is not provided for in Brazilian civil proceedings or in the BBL. There is a proceeding in which the party can request to the court the disclosure of documents in the possession of the opposing and / or third parties. The requesting party shall specify in detail the document and its purpose, indicating the facts that relate to the document and the circumstances and grounds on which the party bases itself to affirm that such document exists and it is in the possession of the other party.

However, given its harsh requirements, this procedure is rarely used in Brazil for discovery purposes. If a party unjustifiably refuses to produce the requested document or any other evidence, the judge can only determine as (subjectively) admitted the facts the other party intended to prove with the documentary evidence not presented.

QUESTION 9

9. How are the litigation fees and costs assessed?

The costs of litigation are generally associated and dependent on the amount of the claim under dispute and complexity of the case. The costs of litigation may vary from state to state, but they typically reflect a percentage of the amount under discussion. Normally the party who initiates the court proceedings must bear the filing costs (usually 1%–5% of the claim or economic benefit arising out of the claim). Also, the defeated party who files an appeal must pay costs of appeal (usually 2% of the claim).

As mentioned in question 3 above, Brazilian law does not require any special qualification for a foreign resident to bring an action before the Brazilian courts, except to post a bond sufficient to cover the costs and legal fees of the other party, if the foreign party has no real property in Brazil to guarantee payment.

A defeated party will normally reimburse the winning party for all court costs paid during the proceedings, including attorney fees which would typically be arbitrated by the court in the range of 10% to 20% of the amount under dispute (i.e. value of the transaction).

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

The Superior Court of Justice is the competent court to hear cases concerning the recognition of foreign judgment and awards. This procedure is regulated *inter alia* by the Superior Court of Justice's Resolution No. 9/2005. The Superior Court of Justice has been analysing only formal aspects of the foreign judgments or awards. Typically the merits of the decision have not been revisited by the Superior Court of Justice (i.e. there is no retrial of the case). Once the foreign award is confirmed and ratified, a letter of judgment enforceable in the appropriate court will be issued and judicial enforcement will follow the rules applicable to the enforcement of judgments rendered in Brazil.

Pursuant to applicable provisions of Resolution No. 9/2005, a foreign award will be confirmed by the Superior Court of Justice if (i) the judgment is entered by a competent court; (ii) the parties are regularly served process in the original case; (iii) the judgment is final and unappeasable, complying with the necessary formalities in the country where the award was rendered; and (iv) the judgment is legalised by the Brazilian consulate and translated by a sworn-in translator in Brazil. Further, Resolution No. 9/2005 establishes that the recognition will be denied by the Superior Court of Justice if the award awaiting exequatur violates the Brazilian public policy, sovereignty and the good moral principle.

BRITISH VIRGIN ISLANDS

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

The BVI has a common law system based upon English law. It has its own legislative framework and has adopted some UK legislation (particularly with respect to the implementation of international treaties). English common law is extended to the BVI by the Common Law (Declaration of Application) Act (Cap. 13). The result is that English authorities, whilst not strictly binding as precedents, are persuasive and, subject to there being any differing Eastern Caribbean Supreme Court authorities, are routinely relied upon by the BVI Court. Authorities of other Commonwealth or common law jurisdictions, such as Canada and Hong Kong, are also frequently cited.

The law governing the ability to set aside antecedent transactions is largely codified in Part VIII of the Insolvency Act, 2003 ("the Act"). The Act provides for four types of "voidable transactions":

- unfair preferences;
- undervalue transactions;
- voidable floating charges; and
- extortionate credit bargains.

In order for a transaction to be liable to be challenged under Part VIII of the Act, it must have been entered into within the relevant "vulnerability period." This is measured backwards from the "onset of insolvency" which is defined in section 244(1) as:

(a) the date on which the application for the administration order was filed, where a company is in administration or is in liquidation and the liquidator was appointed by the Court immediately following the discharge of an administration order;

(b) the date on which the application for the appointment of a liquidator was filed, where a company is in liquidation and the liquidator was appointed by the Court in circumstances other than those set out in paragraph (a); or

(c) the date of the appointment of the liquidator, where a company is in liquidation and the liquidator was appointed by its members.

The vulnerability period for "extortionate credit transactions" is five years prior to the onset of insolvency. In relation to the other "voidable transactions" a vulnerability period of six months applies unless the transaction was entered into with a "connected person", in which case the period is two years.

A “connected person” in relation to an insolvent company is defined in s.5(1) of the Act as:

(a) a promoter of the company;

(b) a director or member of the company or of a related company;

(c) a beneficiary under a trust of which the company is or has been a trustee;

(d) a related company;

(e) another company one of whose directors is also a director of the company;

(f) a nominee, relative, spouse or relative of a spouse of a person referred to in paragraphs (a) to (c); and

(g) a trustee of a trust having as a beneficiary a person who is, apart from this paragraph, a connected person.

Section 5(2) of the Act provides that a company is “related to another company if:

(a) it is a subsidiary or holding company of that other company;

(b) the same person has control of both companies; and

(c) the company and that other company are both subsidiaries of the same holding company.”

The Act also defines “holding company” and “subsidiary”. Section 4(1) of the Act provides that “a company is a subsidiary” of another company, its “holding company”, if that other company:

(a) holds a majority of the voting rights in it;

(b) is a member of it and has the right to appoint or remove a majority of the board;

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company which is itself a subsidiary of that other company.

Section 4(2) of the Act provides that “a foreign company” and “any other body corporate” is capable of being a subsidiary or a holding company for the purposes of the Act.

In order to obtain relief the liquidator will need to show that at the time that the company entered into the transaction the company was either insolvent, or that the transaction caused it to become insolvent (s.244(2)). The definition of “insolvency” for these purposes excludes balance sheet insolvency (s.244(3)). Where a transaction is with a “connected person” or a “related company” then except in relation to voidable floating charges, insolvency will be presumed.

1.1 Unfair preferences

A transaction amounts to an "unfair preference" if it is an "insolvency transaction", was entered into within the "vulnerability period" described above and "has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if the transaction had not been entered into" (s.245(1)). A transaction will not amount to an unfair preference "if the transaction took place in the ordinary course of business" (s.245(2)). The test is objective, so that the liquidator is not under any requirement to show intention. However, the "ordinary course of business" is not defined by the Act and this, at least, provides the court with some scope to take account of subjective factors. Where the transaction is with a "connected person" there is a presumption that the transaction was an insolvency transaction and that it did not take place in the ordinary course of business "unless the contrary is proved." (s.245(4)). Finally, it should be borne in mind that "a transaction may be an unfair preference notwithstanding that it is entered into pursuant to an order of a court or tribunal in or outside of the Virgin Islands." (s.245(3)).

1.2 Undervalue transactions

Section 246(1) of the Act provides that "a company enters into an undervalue transaction with a person where the transaction is an "insolvency transaction", is entered into within the vulnerability period and:

(a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or

(b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company.

Although there is no current BVI authority on the point, the requirement that the disparity in the value of consideration should be "significant" is likely to mean that a liquidator will not be able to undo a transaction on the grounds alone that it amounted to a poor bargain – for the insolvent company.

Pursuant to s.246(2) "a company does not enter into an undervalue transaction with a person if:

(a) the company enters into the transaction in good faith and for the purposes of its business; and

(a) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company."

Again the fact that a transaction was entered into pursuant to a Court order does not prevent the same from being a transaction at any undervalue (s.246(3)). Similarly the transaction is presumed to be at an undervalue if it entered into with a connected person (s.246(4)).

1.3 Voidable floating charges

Any floating charge entered into within the vulnerability period amounts to "a voidable floating charge" (s.247(1)). Pursuant to s.247(2) a floating charge is not voidable to the extent that it secures:

(a) money advanced or paid to the company, or at its direction, at the same time as, or after, the creation of the charge;

(b) the amount of any liability of the company discharged or reduced at the same time as, or after, the creation of the charge;

(c) the value of assets sold or supplied, or services supplied, to the company at the same time as, or after, the creation of the charge; and

(d) the interest, if any, payable on the amount referred to in paragraphs (a) to (c) pursuant to any agreement under which the money was advanced or paid, the liability was discharged or reduced, the assets were sold or supplied or the services were supplied.

Section 247(4) provides that for the purposes of (c) above "the value of the assets or services sold or supplied is the amount in money which, at the time they were sold or supplied, could reasonably have been expected to be obtained for the sale or supply of the goods or services in the ordinary course of business and on the same terms, apart from consideration, as those on which assets or services were sold or supplied to the company." This provision is clearly designed to prevent the parties from providing overvalued goods or services to reduce the scope of any floating charge which is susceptible to these provisions.

Again, where a floating charge is granted to a connected person there is a presumption that it is an "insolvency transaction"(s.247(3)). However there is no presumption against the application of the exceptions set out in s.247(2) above.

1.4 Extortionate credit transactions

Section 248 of the Act provides that "a transaction entered into by the company within the vulnerability period for, or involving the provision of, credit to the company, is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit:

(a) the terms of the transaction are or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of credit; or

(b) the transaction otherwise grossly contravenes ordinary principals of fair trading."

There is no BVI authority on what amounts to either grossly exorbitant payments or the type of transaction that would grossly contravene the ordinary principles of fair trading. The authors are of the view that the Court would attempt to give these words their ordinary and natural meaning and usual business transactions would not be caught by these provisions.

There are no provisions relating to extortionate credit transactions entered into with connected persons. In addition, there is no requirement that a transaction must amount to an "insolvency transaction" to fall foul of the section.

1.5 Remedies

Where a liquidator is able to satisfy the Court that a transaction amounts to a "voidable transaction" as set out above, the Court has a broad range of discretionary remedies available to it. These are set out in s. 249(1) which provides that the Court "on the application of the office holder":

(a) may make an order setting aside the transaction in whole or in part;

(b) in respect of an unfair preference or an undervalue transaction, may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; and

(c) in respect of an extortionate credit transaction, may by order provide for any one or more of the following:

  (i) the variation of the terms of the transaction or the terms on which any security interest for the purposes of the transaction is held;

  (ii) the payment by any person who is or was a party to the transaction to the office holder of any sums paid by the company to that person by virtue of the transaction;

  (iii) the surrender by any person to the office holder of any asset held by him as security for the purposes of the transaction; and

  (iv) the taking of accounts between any persons.

Section 249(2) provides that as regards unfair preferences and/or undervalue transactions and without prejudice to subsection 1(b) above the Court may:

(a) require any assets transferred as part of the transaction to be vested in the company;

(b) require any assets to be vested in the company if it represents in any person's hands the application either of the proceeds of sale of assets transferred or of money transferred, in either case as part of the transaction;

(c) release or discharge, in whole or in part, any security interest given by the company or the liability of the company under any contract;

(d) require any person to pay, in respect of benefits received by him from the company, such sums to the official holder as the Court may direct;

(e) provide for any surety or guarantor whose obligations to any person were released or discharged, in whole or in part, under the transaction, to be under such new or revived obligations to that person as the Court considers appropriate;

(f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such obligation to be charged on any assets and for the security interest or charge to have the same priority as a security interest or charge released or discharged, in whole or in part, under the transaction;

(g) provide for a person effected by an order under s.249(1) to submit a claim in the liquidation of the company in such amount as the Court considers fit; and

(h) require the company to make a payment or transfer assets to any person affected by an order under s.249(1).

Further s.249(3) provides that in respect of an unfair preference or an undervalue transaction, the Court may make an order which "may affect the assets of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction."

Pursuant to s.251 "any monies paid to, assets recovered or other benefit received by the liquidator" in respect of the provisions set out above is ring fenced in order to pay the "unsecured creditors" of the company. It is not clear why the legislature decided to protect unsecured rather than other classes of creditor. This anomaly is of particular concern in relation to persons in the position, for example, of secured creditors under a floating charge who would in certain circumstances appear to be prejudiced by enforcement action taken by the liquidator.

QUESTION 2

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2. What are the common defences?

The safe harbour provisions in relation to each of the "voidable transactions" are set out above. If a transaction is not caught by the Act the liquidator will not be able to apply for relief under those provisions. It is important to note that the remedies available in respect of each type of voidable transaction are not exclusive and a liquidator may apply for relief in respect of one or more of the provisions.

The Court is also limited in the order that it may make in relation to an unfair preference or undervalue transaction pursuant to s.250 such that it cannot:

(a) prejudice any interest in the assets that was acquired in good faith and for value from a person other than the company, or prejudice any interest deriving from such an interest; or

(b) require a person who received a benefit from the transaction in good faith and for value to pay a sum to the liquidator, except where that person was a party to the transaction or, in respect of an unfair preference, the preference was given to that person when he was a creditor of the company.

Section 250(3) provides that a "where a person would, apart from the requirement of good faith, fall within the circumstances set out in paragraph (a) or (b) it is presumed, unless the contrary is proved that he acquired the interest or received the benefit in good faith". However, this subsection does not apply to a person who, at the time of the transaction had (a) notice of (i) the fact that the transaction was an unfair preference or an undervalue transaction, (ii) notice of relevant insolvency proceedings or (b) was, at the time of the transaction, a connected person (s.250(4)(a) and (b)).

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

No. Only an "office holder" as defined in s. 244(1) may bring an application before the Court in respect of the provisions governing voidable transactions. This is defined as (a) the administrator in the case of a company in administration and (b) the liquidator in the case of a company in liquidation.

QUESTION 4

4. Can a foreign party claim under foreign law directly against a transferee in your home country?

The law governing orders in aid of foreign proceedings is contained in Part XIX of the Insolvency Act, 2003. Section 467(2) provides that "a foreign representative may apply to the Court for an order under subsection (3) in aid of the foreign proceeding in which he is authorized".

"A foreign representative" is defined as "a person or body, including one appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding. Further, "foreign proceeding" means a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, liquidation or bankruptcy and "debtor" shall be construed accordingly." Finally, a "relevant foreign country means a country, territory or jurisdiction" which has been "designated by the Commission." (s.466(1)). At present these are Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the United Kingdom and the USA.

Section 467(3) provides that subject to s.468 upon an application the Court may:

(a) restrain the commencement of any proceedings, execution or other legal process or the levying of any distress against a debtor or in relation to any of the debtor's property;

(b) restrain the creation, exercise or enforcement of any right or remedy over or against any of the debtor's property (this is not to affect the right of a secured creditor to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest (s.467(5));

(c) require any person to deliver up to the foreign representative any property of the debtor or the proceeds of such property;

(d) make such order or grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in a co-ordination of a Virgin Islands insolvency proceeding with a foreign proceeding;

(e) appoint an interim receiver of any property of the debtor for such term and subject to such conditions as it considers appropriate;

(f) authorize the examination by the foreign representative of the debtor or of any person who could be examined in a Virgin Islands insolvency proceeding in respect of a debtor;

(g) stay or terminate or make any other order it considers appropriate in relation to a Virgin Islands insolvency proceeding; or

(h) make such order or grant such relief as it considers appropriate.

In deciding whether to grant the relief sought the Court must be "guided by what will best ensure the economic and expeditious administration of the foreign proceeding" consistent with a number of principals including "the just treatment of all persons claiming in the foreign proceedings" and "comity"(s.468).

QUESTION 5

5. Who decides issues of foreign law?

Pursuant to s.467(5), the BVI Court has a discretion as to whether to apply BVI law or that which applies to the foreign proceedings. However, s.468(2) provides that the Court shall not affect the right of any creditor to the right of set off as provided in s.150 nor result in a preferential creditor receiving less than he would receive in a BVI insolvency proceeding, without their consent. The Court will generally require expert evidence of foreign law from a lawyer of good standing qualified in the relevant jurisdiction.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

A foreign Court in a designated foreign country may apply for assistance under Part XIX as set out above. If the foreign proceeding is taking place elsewhere then it may be possible for the creditors or members (as appropriate) of a company with a connection to the BVI (eg it has assets in the territory) to apply to appoint a liquidator in the BVI pursuant to s.163 of the Act.

QUESTION 7

7. Has your country adopted the UNICITRAL Model law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

The BVI has not adopted the UNICITRAL Model law on Cross-Border Insolvency. Part XVIII of the Act contains provisions which are based on the Model Law. However, this has not yet been brought into force.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

In the BVI insolvency commences with the appointment of a liquidator over a company. Once appointed the liquidator assumes custody and control of the assets of the company and the directors and other officers remain in office but cease to have any powers, functions or duties other than those set out in the Act. This means that to all intents and purposes the liquidator stands in the shoes of the former directors and is entitled to all of the information that is available to the company.

In addition, liquidators have broad powers set out in Part XI of the Act to enable them to investigate the affairs of an insolvent company. Pursuant to s.277 of the Act, a liquidator may require a person who has been an officer or employee of the company within 2 years of the date of his or her appointment of the liquidator to prepare a statement of affairs which sets out (a) the assets and liabilities of the company, (b) the names and addresses of the creditors of the company and (c) the security interests held by the creditors of the company and the dates upon which the security interests were created.

Further, pursuant to s.282 of the Act, the liquidator may require:

(a) an officer or former officer of the company;

(b) a member or former member of the company;

(c) a person who was involved in the promotion or formation of the company;

(d) a person who is, or within the relevant period has been, employed by the company including a person employed under a contract of service;

(e) a person who is, or at any time has been, a receiver, a accountant or auditor of the company;

(f) a person who is or who, at any time has been, an officer of or in the employment of a company which is an officer of the company; or

(g) a person who has acted as administrator or provisional liquidator of the company.

To provide him with such information concerning the company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs as he reasonably requires and / or to attend on the liquidator at a reasonable time and place and/or to be examined on oath or affirmation by the liquidator or the liquidator's legal practitioner.

A liquidator may also apply to the Court under s. 284 for an order that the above persons be examined before the Court. The Court may order that the examination take place in public or in private and that the person concerned is to produce at the examination any books, records or other documents in his possession or control that relate to the company, or a connected company, including the promotion, formation, business, dealings, accounts, assets, liabilities or affairs of the company or connected company.

Where a person refuses without reasonable grounds to comply with a notice to produce a statement of affairs pursuant to s.277, provide information pursuant to s.282 or comply with an order for examination pursuant to s.285 they commit an offence.

In addition, where a liquidator seeks to bring an action under the legislation relating to antecedent transactions they should proceed by way of an ordinary application in the insolvency proceedings (Insolvency Rules, 2005 ("IR") 13(2)). This will be treated as a fixed date claim form (IR 13(3)) for the purposes of the Civil Procedure Rules ("the CPR") which are extended to insolvency proceedings by IR Rule 4. The Court will then set a date for a hearing either to dispose of the matter or to give further directions to trial.

Part 28 of the CPR provides for the disclosure of documents in proceedings before the Court. The Court may order that a party give "standard disclosure" in which case CPR Rule 28.4 provides that a "party must disclose all documents which are directly relevant to matters in question in the proceedings." The liquidator may also apply for specific disclosure of particular documents or classes of documents if they are able to satisfy the criteria in CPR Rule 28.6. Chief amongst these is the requirement that the Court "must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs." Such applications tend to made where a party considers that an order for standard disclosure has not been properly met. As a result of these orders it should be possible for a liquidator to obtain all documentary evidence held by a respondent that is directly relevant to the issues to be determined in the application.

Where the liquidator suspects that the respondent has failed to provide such evidence contrary to an order of the Court, it may be possible to bring contempt proceedings, or (which is more usual) cross examine the respondent on this issue at trial in order to impeach their credibility.

QUESTION 9

9. How are litigation fees and costs assessed?

On 15 February 2010, the Commercial Costs Rules came into force by virtue of the Eastern Caribbean Supreme Court Civil Procedure Rules (Application to the Virgin Islands) (Amendment) Order 2010. These amended the Civil Procedure Rules governing costs in cases before the Commercial Division of the High Court in the BVI.

The general rule is set out in rule 64.6. This provides that normally costs follow the event so that the Court must order the losing party to pay the winning party its costs.

However, the Court has a good degree of discretion and pursuant to 64.6(3) may order a person to pay:

(a) costs up to a certain date only;

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person's costs.

The Court may not make an order under (a) or (b) unless it satisfied that an order under (c) would not be more practicable.

In determining who should be liable to pay costs the Court must have regard to all of the circumstances and in particular:

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued:

(i) a particular allegation;

(ii) a particular issue;

(iii) the case

(c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;

(d) whether it was reasonable for a party to –

(i) pursue a particular allegation; and / or

(ii) raise a particular issue; and

(e) whether the claimant gave reasonable notice of the intention to issue a claim.

Trial costs are normally subject to detailed assessment before the trial judge or otherwise a Master or Registrar of the High Court.

The liquidator's costs of pursuing litigation on behalf of the company are costs in the liquidation and reduce the amount of money that is available to creditors (s.207(1)).

The remuneration of a liquidator is governed by Division 2 of Part XVI of the Act and is generally fixed by the court by reference to the time properly given by him and his staff in carrying out his duties in the insolvency proceeding (s.432(3)).

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your county?

As set out above, a foreign representative from a relevant foreign country may apply to the Court for assistance under Part XIX of the Act. In other cases it is also possible for an application to be made in the BVI for a liquidator to be appointed over a foreign company which has a connection to the BVI pursuant to s.163(4) of the Act.

CANADA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

1.1 Overview

In Canada, authority for the avoidance of antecedent transactions can be found in federal, provincial and territorial statutes. Although the actions provided for under federal and provincial or territorial statutes are similar they are not identical, creating incentives to seek relief under alternative statutes in appropriate circumstances.

Avoidable transfers under both federal and provincial statutes fit mainly, but not exclusively, into two categories: (i) preferences and (ii) fraudulent transfers or transfers at undervalue. Certain transactions may satisfy the requirements of both categories and be avoidable under multiple statutes. Preferences are concerned with the transfer of property benefitting one creditor over another. By contrast, fraudulent conveyances and transfers at undervalue are concerned with transactions that are designed to hinder the collection efforts of creditors and therefore apply to dealings with all parties, not just creditors. Fraudulent transfers/transfers at undervalue arise where no consideration is received by the debtor, or where the consideration received is less than the value of the consideration given by the debtor. While a preference is exclusively an insolvency related remedy, a transfer at undervalue/fraudulent transfer, in some of its statutory forms, may encompass solvent debtors making inappropriate transactions.

Other types of actions to avoid antecedent transfers include actions under the business corporations statutes that allow for broad, equitable remedies and actions to recover losses from directors or controlling shareholders for their conduct in connection with inappropriate transactions.

1.2 Federal law

In the federal context, the applicable statutory provisions with respect to insolvent persons can be found in the Bankruptcy and Insolvency Act. The reviewable transaction provisions of the BIA also apply to proceedings under the Companies' Creditors Arrangement Act, with certain modifications. In addition, certain limited types of companies (including banks, trust companies, insurance companies and certain federal corporations not incorporated under the Canada Business Corporations Act) may seek insolvency protection under the Winding Up and Restructuring Act, which includes provisions for the avoidance of antecedent transfers. More generally, the CBCA allows a court to make an order unwinding an antecedent transaction in certain circumstances.

1.2.1 The Bankruptcy and Insolvency Act

1.2.1.1 Transfers at undervalue

A transfer at undervalue is defined in section 2 of the BIA as "a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor". Examples include a transfer of an asset as a gift or in exchange for "conspicuously less" than the value of the property or services provided by the debtor.

The BIA establishes different criteria for attacking transfers at undervalue, depending on the nature of the relationship between the debtor and the transferee. If the transfer was made to an arm's length party, the party attacking the transaction must establish:

(i) the transfer occurred within the year prior to the initial bankruptcy event;

(ii) the debtor was insolvent at the time of the transaction or rendered insolvent by the transaction; and

(iii) "the debtor intended to defraud, defeat or delay a creditor."

Where a debtor is transacting with a non-arm's length party, the party attacking the transaction must establish:

(i) the transfer at undervalue occurred within the year prior to the initial bankruptcy event; or

(ii) the transfer at undervalue occurred within the five years prior to the initial bankruptcy event "and (a) the debtor was insolvent at the time of the transfer or rendered insolvent or (b) the debtor intended to defraud, defeat, or delay a creditor."

The BIA sets out specific criteria for determining whether a party is related. The BIA presumes that related parties do not to deal at arm's length while so related. However, an arm's length relationship is a question of fact that must be established for the relevant time period. Related parties include (i) individuals connected by "blood relationship, marriage, or common-law partnership or adoption"; (ii) an entity and an individual, or a person who is a member of a related group controlling it; (iii) a combination of (i) and (ii); and (iv) entities controlled by related individuals or by other related entities.

For both arm's length and non-arm's length transactions, the BIA establishes a look back period based on the "date of the initial bankruptcy event." The "date of the initial bankruptcy event" with respect to a person (which includes, among others, a corporation, partnership, or legal representative of a person) is the earliest of: (i) an assignment into bankruptcy, (ii) the date a proposal or notice of intention is made by the debtor, (iii) the date the first application for a bankruptcy order against the person is filed (in most cases), and (iv) the date when proceedings are commenced against the debtor or by the debtor under the CCAA.

If the court determines that a transaction is a transfer at an undervalue under the BIA, the court may "order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor…". A "person who is privy" includes any person "not dealing at arm's length with the party to the transfer and who, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person." The Supreme Court of Canada has confirmed that the BIA is flexible with respect to avoidable transfers and that courts may take equitable considerations into account. Thus, a court may decline to exercise jurisdiction over a transaction if entering an order would be inequitable under the circumstances.

1.2.1.2 Preferences under the BIA

Section 95 of the BIA provides a remedy to a trustee where the bankrupt has given an unjust preference to a creditor prior to the bankruptcy. In order for section 95 to apply to a transaction, the following elements must be established:

(i) there must be: "transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered,"

(ii) the debtor must have been an "insolvent person" at the time of the transaction, and

(iii) the parties must have been in a debtor-creditor relationship.

In the event that the parties are dealing at arm's length, the trustee may examine a transfer that occurred within three months of the initial bankruptcy event (commonly called the "look back period"). If the parties are not dealing at arm's length, the look back period is twelve months before the initial bankruptcy event. The definitions of "arm's length" and "initial bankruptcy event" discussed above also apply to actions under section 95.

With respect to arm's length transactions under section 95(1)(a), the intent required depends on the relationship between the debtor and the creditor. The bankrupt must intend to prefer the transferee over other creditors. The creditor's intent is not relevant to the determination; only the intent of the debtor must be established. Intent is presumed if the effect is to prefer one creditor over another. Intent is a complicated, fact specific inquiry and courts will look to factors such as whether the transaction was in the ordinary course of business or made good financial sense for the debtor at the time of the transaction. By contrast, with respect to non-arm's length transactions under section 95(1)(b), the relevant question is effect, not intent. The central issue in such cases is whether the transfer has the effect of giving one creditor a preference over another, regardless of the good faith of the parties involved. A transfer or payment found to be an unjust preference under section 95 of the BIA is void as against the trustee.

Section 98 addresses the situation where a person has acquired property from a bankrupt under a transaction that is void or voidable and has sold or disposed of the property. Where this occurs, the money or other proceeds are deemed to be the property of the bankrupt. If a person who has acquired property of the bankrupt transfers it to a third party not acting in good faith for adequate consideration, the trustee may recover the property or the value from the third party. However, where the third party did act in good faith and provided adequate consideration for the property, then the trustee's only recourse for the recovery of the consideration paid or given by the third party is against the transferee.

1.2.1.3 Dividends and the redemption of shares

Section 101 of the BIA allows a trustee to review certain payments of dividends and redemptions of shares of the corporation that took place within one year of the initial bankruptcy event. If the transaction occurred at a time when the corporation was insolvent or the transaction rendered the corporation insolvent, the court may issue a judgment against the directors if it determines that the directors did not have reasonable grounds to believe the corporation was solvent or that the transaction would not render the corporation insolvent. The judgment will be for the amount of the dividend or redemption, plus interest. In determining whether to grant judgment, the court will consider whether the directors acted like prudent and diligent persons in the same circumstances would have acted and whether they relied in good faith on (a) financial and other statements provided by the corporation or written reports of the auditor to establish the financial condition of the corporation; or (b) a report on the corporation's affairs prepared by a professional pursuant to a contract with the corporation. A judgment may also be issued against shareholders related to the directors of the corporation in the amount of the dividend or the redemption, plus interest.

1.2.2 Fraudulent preferences under the Winding Up and Restructuring Act

Certain types of companies, including banks, insurance companies, loan companies and trust companies are not eligible to file under the BIA or CCAA but may instead seek insolvency protection under the WURA. Applications under this legislation are relatively rare and thus case law interpreting the statute is limited. The WURA includes provisions for the avoidance of transfers that are similar to the preferences and transfers for undervalue under the BIA, but the provisions do not precisely parallel the BIA and CCAA. Where a winding up order is made under the WURA, the court may appoint one or multiple liquidators of the estate and effects of the company.

Transactions that demonstrate intent to defraud creditors may be avoided under the WURA. These contracts include (i) contracts without consideration and (ii) contracts with a party aware of the company's inability to pay its debts, which result in injury to creditors. The applicable look back period is three months preceding the commencement of the winding-up, or at any time afterwards.

Contracts or conveyances for consideration respecting either real or personal property by which creditors are injured or obstructed and which are entered into within thirty days of the commencement of the winding up or any time thereafter are voidable if the contracting party, whether or not a creditor of the company, had no knowledge of the company's inability to perform under the contract. The contract may be set aside on terms that protect the contracting party from actual loss or liability by reason of that contract.

However, contracts with respect to real or personal property made by the debtor with intent to defraud creditors are void. One distinction from the BIA is that under the WURA, the party contracting with the debtor must share the intention to defraud creditors. Thus, the transaction in question will only be void if the debtor and the party contracting with the debtor both have the intention to defraud creditors.

Transactions that prefer one creditor over another may be avoided under the WURA. The statute requires a transfer in contemplation of insolvency to a creditor whereby the creditor receives an unjust preference over other creditors. Such transactions may be recovered by the liquidator through a court action. In the thirty days before the winding up, there is a presumption of insolvency of the debtor and evidence of pressure is not admissible to defend a transaction taking place in that period. As under the BIA, there are exceptions to this presumption for certain financial contracts. The presumption does not apply to a sale, deposit, pledge or transfer of financial collateral made pursuant to an eligible financial contract. Eligible financial contracts are prescribed by regulation and include derivatives agreements and agreements to borrow or lend securities or commodities.

The liquidator may also seek to recover any payments made by the debtor within thirty days of the winding up to a party with knowledge of the debtor's inability to meet its obligations. Similarly, if a debt is transferred to another company in an attempt to create a set-off of obligations and the recipient is aware of the company's inability to meet its obligations, set-off may be prevented.

Consistent with the BIA, the WURA allows the liquidator to examine dividends paid within twelve months of the winding up proceeding to determine whether such a dividend was made while the company was insolvent or whether it was rendered insolvent by the transaction. If the court determines that the company was insolvent or rendered insolvent, and the directors of the company did not have reasonable grounds to believe the company was solvent and would remain solvent, the court may grant judgement against the directors and officers in the amount of the dividend. In determining whether to grant judgment, the court will consider similar factors as it would under the BIA, as described in section 1.2.2. A judgment may also be issued against shareholders or federal credit unions related to the directors of the corporation in the amount of the dividend or the redemption, plus interest.

1.2.3 The Canada Business Corporations Act

The CBCA sets out the corporate governance framework of federally incorporated companies and includes provisions regulating the incorporation, amalgamation and dissolution of corporations, as well as the powers and duties of directors and officers. While not an insolvency statute, the CBCA gives the court a broad discretion to set aside transactions that are unfair, oppressive or prejudicial to a class of a corporation's stakeholders. In particular, the CBCA provides that where the court is satisfied that "in respect of a corporation or any of its affiliates:

(a) any act or omission of the corporation or any of its affiliates effects or threatens to effect a result;

(b) the business or affairs of the corporation or any of its affiliates are, have been, or are threatened to be carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are, have been, or are threatened to be exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director, or officer of the corporation, the court may make an order to rectify the matters complained of."

If the court determines that the conduct was oppressive as set out in the statute, the court may "make any interim or final order it thinks fit, including an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract." As such, a court may use this broad power to avoid a transaction and restore the parties to their prior positions.

1.3 Provincial law

In circumstances of preferences or fraudulent conveyances, provincial legislation may apply. For example, Ontario statutes that provide for the avoidance of antecedent transfers include the Fraudulent Conveyances Act (Ontario), the Assignment and Preferences Act (Ontario), the Bulk Sales Act (Ontario) and the Ontario Business Corporations Act. The Supreme Court of Canada has held that these types of provincial statutes are validly enacted pursuant to provincial powers to legislate with respect to property and civil rights matters, and that in enacting the BIA, the Federal Parliament "refrained from completely covering the whole field of transactions avoided by provincial legislation."

1.3.1 The Fraudulent Conveyances Act (Ontario)

The OFCA provides that every conveyance of real or personal property made with intent to defeat, hinder, delay or defraud creditors or others can be set aside by the creditor. The insolvency of the party transferring the assets is not a pre-requisite to the application of the OFCA. The OFCA may be available in circumstances where the provisions of the BIA would not apply.

Under the OFCA, three elements must be established in order to successfully attack an antecedent transfer:

(i) a conveyance,

(ii) of real or personal property of the debtor, and

(iii) intent to defeat, hinder, delay or defraud creditors or others.

A conveyance includes a gift, grant, charge or encumbrance. While "property" is a broad term, it includes only property that would be available to unsecured creditors in a bankruptcy. As a result property held in trust or that is exempt from execution is excluded.

In order to avoid a transfer under the OFCA, the plaintiff must prove intent on the parts of both the transferor and transferee. Intent is ascertained by reviewing the circumstances of the transfer and the "badges of fraud" as identified by case law. The "badges of fraud" are no more than both "typical or suspicious facts that may allow the court to make a finding of fraud absent an explanation from the debtor" and may include:

(i) grossly inadequate consideration,

(ii) a close relationship between the parties,

(iii) unusual haste to make the conveyance, and

(iv) an ongoing enforcement action related to the property.

These "badges of fraud" vary from case to case. If the transferee has the intent to "defeat, hinder, delay or defraud creditors or others", even if the transferee provides valuable consideration, the transfer is void. In short, the transferee's intent is highly relevant under the OFCA and in order to rely upon the good faith defences of the statute (as discussed below in section 2.2), the transferee must have clean hands.

Once it has been determined that a fraudulent conveyance has occurred, it will be deemed "void" as against creditors and parties to the transfer. Usually, the court will grant an order directing the transferee to make the property available to the transferor's creditors.

1.3.2 The Assignment and Preferences Act (Ontario)

The APA applies to set aside transactions made by an insolvent person or a person in contemplation of insolvency, with intent to give an unjust preference to a creditor. As a result, the transaction may be declared void. The APA may also catch transactions that are outside the time periods of the BIA. The APA contains fraudulent conveyance provisions similar to those contained in the OFCA. The four elements required to prove that a fraudulent conveyance has taken place under the APA are as follows:

(i) a "gift, conveyance, assignment, transfer, delivery over or payment";

(ii) of real or personal property;

(iii) "made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is "on the eve of insolvency"; and

(iv) "with intent to defeat, hinder, delay, or prejudice creditors, or any one or more of them."

In addition, section 4(2) of the APA sets out the 3 elements of an unjust preference under the APA:

(i) a "gift, conveyance, assignment or transfer, delivery over or payment" was made by the debtor;

(ii) "by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency"; and

(iii) "with the intent to give such creditor an unjust preference over other creditors or over any one or more of them."

If an action is commenced within sixty days of the date of the transfer or the debtor makes an assignment into bankruptcy within sixty days of the transfer, the court will presume that the transfer was made with the requisite intent. The doctrine of pressure cannot be used to rebut this presumption, but, practically, use of the presumption is constrained by the limited window in which a plaintiff must file an action to make use of the presumption.

In addition to the general defenses discussed below, the APA exempts certain transfers, even if the requisite elements are met. The exemptions include, among others, an assignment to the applicable sheriff, a good faith, ordinary course transaction or a transaction with an innocent purchaser, a payment of money to a creditor, a conveyance in good faith in exchange for present value, security in exchange for present value, a conveyance in exchange for "fair and reasonable value."

1.3.3 The Bulk Sales Act

The BSA applies to sales of assets out of the ordinary course of business with certain exceptions for, among others, sales by a creditor realizing upon security, a receiver, or a trustee. The BSA establishes a process which involves filing certain forms, making disclosures regarding unsecured creditors and, in some instances, paying a portion of the sale price to a trustee for the benefit of unsecured creditors. Although the language of the statute is broad, recent case law makes clear that the BSA does not apply to ordinary course financing transactions. If a buyer does not comply with the BSA and compliance has not been waived by order of the court, a creditor of the seller (or if the seller is in bankruptcy, the trustee) may bring proceedings to set aside the transaction.

The Supreme Court of Canada has held that courts must apply a purposive interpretation of the BSA and take into account the commercial realities. More specifically, even if a seller fails to strictly comply with the BSA, a creditor does not automatically become entitled to a better result than it would have had the seller complied. Instead, the court should consider the specific facts of the case "to determine what, if anything, should be done to put the unpaid creditors in the position they would have been in had the Act been complied with or whether a strict liability to pay, under s. 16(2), would lead to an unfair result." As a result, while the BSA remains the law in Ontario, case law now holds that creditor remedies under the statute are narrower than a plain reading of the text would otherwise suggest.

1.3.4 The Provincial Business Corporations Acts

Where a corporation is incorporated under a provincial statute, rather than the CBCA, creditors cannot avail themselves of the CBCA remedies, but may look to the applicable provincial business corporation statute. Like the CBCA, most provincial business corporations acts provide for actions in favor of creditors, with broad, equitable remedies. For example, the Ontario Business Corporations Act provides for an oppression remedy that permits a court to make broad, equitable remedies, including the setting aside of a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract.

Provincial legislation in other provinces, including British Columbia and Alberta, provides for similar remedies to correct harm to creditors.

QUESTION 2

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2. What are common defences?

Although some of the governing statutes contain a list of applicable defences (certain of which are highlighted below), other defences are common to one or more of the statutes.

2.1 Failure to demonstrate the relevant elements

Unless the statute specifically states otherwise, the applicant must establish for the court each of the relevant elements enumerated in the statute (although in some instances the applicant will be aided by a statutory presumption). Therefore, a creditor may defend against an avoidance action by demonstrating that the applicant has failed to meet his prima facie case or by successfully rebutting evidence of any one of the essential elements.

What is required to establish each element varies. For example, with respect to transfers at undervalue, the Court has made clear that the element of "conspicuously less than fair market value" is a fact intensive determination and, therefore, merely pleading the allegation is not sufficient to demonstrate this element. A challenge to the characterization of a transfer as a transfer for conspicuously greater or less value may, therefore, be an effective defence. Similarly, insolvency is a matter of fact that must be determined by the court. Certain statutes require that the transfer occur within a set period of time of a subsequent event such as the initial bankruptcy event. If the defendant creditor can establish that the transfer occurred outside the relevant time period, the requisite elements will not be established.

2.2 Time limitations

The statute may create a limitation period in which the challenge must be brought. Where the statute does not contain a limitation period, other legislation of general applicability may set time limitations. For example, in Ontario, the Limitations Act, 2002 creates a general limitations period of two years from discovery of the transaction.

2.3 Defences to preferences

2.3.1 Ordinary course of business

To defend against a preference action, a defendant may demonstrate that a transaction was undertaken in the ordinary course of business. This defence generally means that the debtor must be operating and not taking extraordinary steps to mitigate its financial pressures.

2.3.2 Transactions to continue business

A creditor can also defend against a preference by showing evidence that the debtor made the payment with a reasonable expectation that it would allow the debtor to continue to carry on its business. The debtor's belief must be reasonable and cannot be a gamble with the debtors' assets.

Similarly, a creditor may defeat a preference by demonstrating that a charge was given in exchange for a present advance of cash or to obtain goods from a creditor. In the case of the APA, the statute explicitly provides that any contemporaneous exchange for value must be for fair and reasonable "relative value to the consideration provided."

2.3.3 Preferred creditors

Under the BIA, certain types of creditors, such as landlords, are entitled to be paid before other unsecured creditors. As a result, a creditor may defend against a preference by demonstrating he or she would otherwise be entitled to the payment under the BIA.

2.4 Statute specific defences

2.4.1 OFCA

The statute allows a transferee to defend against an action on the basis that the transferee is an innocent purchaser for value. A transfer that meets the OFCA criteria can be "saved" if the property was conveyed "upon good consideration and in good faith to a person not having at the time of the conveyance to the person notice or knowledge…". "Good consideration" is not the same thing as "fair market value", but is instead only a measure that some reasonable consideration has been paid. Further, as discussed above, the terms "good faith" and "without notice of knowledge" require that the transferee will not share in the transferor's intent to harm creditors.

2.4.2 APA

The APA (in the context of fraudulent preferences and fraudulent conveyances) sets forth specific transactions that are "saved" despite the fact that the plaintiff can establish each of the requisite elements. The exemptions include, among others: (i) a good faith, ordinary course transaction or a transaction with an innocent purchaser, (ii) a payment of money to a creditor, (iii) a conveyance in good faith in exchange for present value, (iv) security in exchange for present value, (v) a conveyance in exchange for "fair and reasonable value".

A creditor need not show that good consideration is the full value of the property transferred, but only that the consideration paid "bear[s] fair and reasonable relative value to the consideration therefor."

QUESTION 3

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3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

A foreign party may sue in a Canadian court if two requirements are met. First, it must have the capacity to sue in a Canadian court. For example, the foreign party must be recognized as a person not under a legal disability. Second, the foreign party must have a cause of action, such that it is the proper plaintiff. More specifically, the party must own the action or otherwise be the appropriate plaintiff under the foreign legal system.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

If a Canadian court can assume jurisdiction, a foreign party may bring a claim under foreign avoidance law directly against a transferee in Canada. To assume jurisdiction, a Canadian court will need to be satisfied that there is a connection between the legal situation or the subject matter of the litigation with the Canadian forum. This is referred to as a real and substantial connection.

In the provinces of British Columbia, Saskatchewan and Nova Scotia what constitutes a real and substantial connection is defined by statute modeled after the Uniform Court and Jurisdiction Proceedings Transfer Act. In the remaining provinces (excluding Québec which is governed by the Civil Code of Québec), a foreign party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connective factor that links the subject matter of the litigation to the forum. In a tort action under common law, the following factors are presumptive (and rebuttable) connecting factors that entitle a court to assume jurisdiction over a dispute:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- the tort was committed in the province; or
- a contract connected with the dispute was made in the province.

What constitutes a real and substantial connection in the non-tort context in provinces not governed by statutes modelled on the Uniform Court and Jurisdiction Proceedings Transfer Act is still evolving. It is reasonable to expect that a similar framework to the tort context would apply and that the framework set out by the statutes modeled after the Uniform Court and Jurisdiction Proceedings Transfer Act would offer guidance.

A defendant can rebut the presumption of jurisdiction by establishing facts which demonstrate that the connecting factors are either weak or that there is no real relationship between the matter and the forum. Even if the defendant is unable to rebut the presumption of jurisdiction on the part of the Canadian court, the court may decline to exercise its discretion on the basis of forum non conveniens. It is for the defendant to invoke the doctrine of forum non conveniens and it has the burden of establishing that there is clearly a more appropriate forum than the one selected by the plaintiff.

If a foreign law is applicable, it will generally be applied. However, Canadian courts will not apply certain categories of foreign statutes, including: blocking legislation, penal legislation, revenue legislation, and public laws where the claimant is a foreign state and the beneficiary of the relief sought is the foreign state. Further, a Canadian court will not recognize or enforce a foreign law that is contrary to the Canadian jurisdiction's fundamental public policies (the forum's conception of essential justice and morality). In addition, the foreign law must be one that the Canadian court has the power to apply. If the foreign statute provides that only the foreign court or tribunal may provide relief under the foreign law, the Canadian court will not grant a request under the foreign law.

QUESTION 5

5. Who decides issues of foreign law?

The party relying on foreign law has the burden of proof of the foreign law. The party must establish the effect of the foreign law in the pleadings and adduce evidence to prove the law as a fact. A Canadian court will not conduct its own research into foreign law. Foreign law will be established as fact by the testimony of a properly qualified expert. The expert must be independent, and therefore counsel for the parties cannot be a proper witness. Although it is not required that the expert practice in the foreign legal system, the expert must be a person whose occupation makes it necessary to have knowledge of the relevant law.

Although a Canadian court may dispense with the formal requirement to prove foreign law through an expert on consent of the parties, it may not do so if it would need to speculate on how the foreign law would apply.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

We have not identified any cases in which Canadian courts have given advisory opinions to foreign courts. However, in cross-border cases, courts often adopt the Guidelines Applicable to Court to Court Communications in Cross-border Cases as proposed by the American Law Institute. Although the Guidelines do not provide for specific advice from one court to another, they do allow courts to transmit "formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings or other documents directly to the other Court" so long as adequate notice to counsel is provided. Although the Guidelines are largely procedural, in the context of an ongoing proceeding, on proper notice, a Canadian court could provide information to a requesting foreign court.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

7.1 Overview

The United Nations Commission on International Trade Law (UNCITRAL)'s Model Law on Cross-Border Insolvency was incorporated into the Canadian bankruptcy and insolvency regimes by way of the 2005 amendments to the federal CCAA and the BIA, which took effect in 2009. To adopt the Model Law, Parliament revised Part IV of the CCAA and Part XIII of the BIA; the provisions in both Acts are largely the same, with certain differences reflecting the fact that the CCAA is intended to apply to the reorganization of major corporations. The BIA and CCAA do not incorporate Article 23 of the Model Law, as discussed in section 7.4 below.

7.2 Recognition of foreign proceedings under the CCAA and BIA

Consistent with the Model Law, the first step in achieving recognition of a foreign proceeding is an application to the court by a foreign representative. In Ontario, the application is made to the Superior Court of Justice, Commercial List. The BIA contains a comprehensive list of provincial courts vested with the jurisdiction to consider bankruptcy and other matters under the BIA. For instance, the Supreme Courts of British Columbia and Nova Scotia have jurisdiction to hear such matters; whereas the Courts of Queen's Bench are vested with this jurisdiction in Alberta and New Brunswick. The CCAA is less specific, stating that, "any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated." The applicant must prove to the court that he or she is a "foreign representative" and that the application involves a "foreign proceeding," as defined in the CCAA and BIA. If the applicant does so, the court must make an order recognizing the foreign proceeding.

Next, the court must determine whether the foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. A foreign main proceeding is a foreign proceeding in a jurisdiction where the debtor has its centre of main interests. The presumption is that the debtor's centre of main interests is located in the jurisdiction of its registered office, though this is rebuttable. Earlier case law provided a list of relevant factors when considering the center of main interest, including the jurisdiction where the debtor carries on business and is subject to regulation, and the location where the debtor's employees, primary assets and key stakeholders are located.

However, more recent case law on this topic narrows the list of relevant factors to three. In the *LightSquared LP* proceedings, Morawetz J. of the Ontario Superior Court of Justice (Commercial List) held that "[w]hen a court determines there is proof contrary to the presumption…" the court should consider whether:

(i) the location is readily ascertainable by creditors;

(ii) the location is one in which the debtor's principal assets or operations are found; and

(iii) the location is where the management of the debtor takes place."

By contrast, a foreign non-main proceeding is any foreign proceeding other than a foreign main proceeding.

If a proceeding is found to be a foreign main proceeding, under both the CCAA and BIA provisions, the court must issue an order staying all proceedings against a debtor under the BIA or the WURA, restraining further proceedings in any action against the debtor, and prohibiting the commencement of any action, suit or proceeding against the debtor, as well as the sale by the debtor of its assets outside the ordinary course of business. If the proceeding is a non-main proceeding, the court has the discretion to make any order that it considers appropriate to protect the debtor's property or the interests of a creditor or creditors. The exercise of the court's discretion is fettered by Part IV of CCAA and Part XIII of the BIA, which contain a public policy exception that permits the court to "refuse to do something that would be contrary to public policy."

7.3 Application to avoidance actions under foreign law

Part IV of the CCAA and Part XIII of the BIA do not specifically reference avoidance actions under foreign law. As discussed in section 4, if the appropriate jurisdictional prerequisites are met, a foreign party may bring an action in an Ontario court under foreign law. In addition, where issues of foreign avoidance law are relevant to adjudication of a claim in a Canadian court, the court may determine issues of foreign law.

7.4 Application to avoidance actions under Canadian law

The BIA and CCAA do not incorporate Article 23 of the Model Law, which allows the incorporating jurisdiction to describe in detail the "actions to avoid acts detrimental to creditors" which a foreign representative has standing to bring. Moreover, the BIA and CCAA provisions incorporating the Model Law and facilitating cross-border transactions are silent on avoidance of antecedent transfers. In light of the silence of the statutes, case law has developed explaining how a foreign representative can avail itself of avoidance actions under Canadian law.

In *Tucker v. Aero Inventory (UK) Ltd*, the administrators of Aero Inventory (UK) Ltd and Aero Inventory plc (collectively "Aero") applied to the Ontario Superior Court of Justice (the "Court") for an order recognizing the administration proceedings commenced in respect of Aero in the High Court of Justice of England and Wales as a foreign main proceeding under section 47 of the CCAA.

After analyzing the factors set out in Part IV of the CCAA, Justice Newbould made an order recognizing the foreign proceeding as a foreign main proceeding, stayed all proceedings in respect of Aero, the foreign representatives or their business or property, and appointed KPMG Inc. as the information officer.

Thereafter, the administrators bought a motion for an order temporarily lifting the stay granted by the Court, and granting leave to file an assignment in bankruptcy for Aero. The administrators wanted to assign Aero into bankruptcy in order to enable them to pursue reviewable transactions, settlements and preferences or undervalue transactions under Canadian law. In granting the motion, Justice Morawetz reasoned that Part IV of the CCAA allowed concurrent BIA and CCAA proceedings. This was evident from the permissive phrasing of section 48(4). Justice Morawetz further reasoned that the administrator's actions in seeking the motion were in line with public policy, because their intent was to invoke Canadian bankruptcy proceedings in order to make use of Canadian preference provisions to maximize Aero's assets. Further, if the administrators were denied the relief requested, the adverse consequence may have been that a preferential transaction would have become immune from review.

In a later decision, Justice Morawetz revisited the issue of the multiple Canadian proceedings, determining that a preference action under section 95 of the BIA could only be brought in bankruptcy proceedings, or where a monitor has been appointed and is pursuing a preference after a plan of compromise or arrangement has been proposed under section 36.1 of the CCAA. Justice Morawetz concluded that the Trustee's action should proceed under the BIA, not the CCAA, as there was no intent to pursue a plan of compromise in the CCAA proceedings. He noted that the CCAA should be used with the BIA to enable courts to review transactions entered into between debtors and creditors just prior to the commencement of formal insolvency proceedings, reasoning that it would be important to ensure there is "an appropriate review mechanism in place to challenge transactions that are not consistent with ordinary course activities and have had the effect of unfairly transferring value to a third party during the review period." Thus, a proceeding under Part IV of the CCAA, in which there is no intent to pursue a compromise or plan of arrangement, does not provide an avenue to pursue avoidance of antecedent transfers under the CCAA or BIA. Instead, a more fulsome CCAA or BIA proceeding must be commenced.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

8.1 Disclosure and discovery obligations in Ontario: documentary discovery

8.1.1 Affidavit of documents and discovery plan

The Ontario Rules of Civil Procedure (the "Rules") govern disclosure and discovery obligations in all civil litigation in Ontario. Parties to civil litigation must agree on a "Discovery Plan" which will govern the scope and timeline of discovery. The Discovery Plan will generally include an agreement on the types of documents, nature of relevant documents, or search terms to be used to identify relevant documents. A party to civil litigation must swear an affidavit of documents listing – to the full extent of the party's knowledge, information and belief – all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. If the party is a corporation or partnership then a representative of such corporation or partnership must swear the affidavit. The obligation to identify relevant documents is a positive obligation on the party to the litigation; the opposing party does not need to request specific documents. Instead, the general rule is that all relevant non-privileged documents must be produced, subject to the agreement of the parties in the Discovery Plan.

The documents listed in the affidavit of documents are set out in three separate schedules. Schedule A contains the documents the party does not object to producing. Schedule B contains documents that the party claims privilege over and the grounds for that claim. Schedule C sets out documents which were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. The definition of "control or power" is broad enough to include documents the party has the power to possess or to obtain from others, such as from employees, banks, professionals, the government, insurers, third party service providers and, in some circumstances, affiliated companies.

8.1.2 Production of documents and inspection powers

A party will have to produce all documents in Schedule A of its affidavit of documents to the other parties in the proceeding. Under the language of the Rules, a party may serve a request to inspect documents on another party and may examine all non-privileged documents in the other party's power, possession or control. The inspecting party may make a copy of these documents at its own expense. In any event, the party is required to produce the documents at its examination for discovery and at trial. Despite the wording of the Rules, as a general matter of practice, however, parties will not have to personally inspect the documents nor wait until examinations for discovery in order to review the opposing parties' documents. Instead, a party will generally write to the opposing party following receipt of the opposing party's affidavit of

documents and will request production of the Schedule A documents. Depending on the amount of documents either a hard copy will be produced, with the requesting party paying the reasonable copying fees of same, or the documents may be provided electronically. In any event, the parties' production obligations should be set out in the Discovery Plan.

8.1.3 Privileged documents

A party will not have to produce, at first instance, documents over which privilege is claimed. The most common types of privilege are (i) solicitor-client privilege, (ii) litigation privilege, (iii) settlement privilege and (iv) common interest privilege. Solicitor-client privilege generally protects all communications between a party and its legal counsel with respect to the giving and receiving of legal advice. Solicitor-client privilege can be waived by a party, but not by its lawyers. Litigation privilege generally protects documents which are produced or brought into existence for the dominant purpose of aiding in the conduct of litigation. Settlement privilege protects communications made on a without prejudice basis with a view to resolving the dispute giving rise to the litigation. Common interest privilege protects communications made in some circumstances where two parties share a common goal in opposition to other parties, such as where two defendants communicate in furtherance of making a common defence to the plaintiff's case. A party who has claimed privilege over a document may not use the same at the trial, except to impeach the testimony of a witness or with leave of the trial judge, unless it abandoned the claim of privilege by giving written notice at least ninety days before the commencement of the trial. This rule does not give a party license to "ambush" another party via privileged documents and must be read in a manner to discourage "tactical manoeuvres."

The definition of "document" under the Rules includes "a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form." While the scope of disclosure under the Rules is quite broad, the standard of relevant documents represents a narrowing of such scope; previously all documents with a "semblance of relevance" had to be produced.

The Rules were amended on 1 January, 2010 to include the proportionality principle. A party's approach to preserving, disclosing and producing documents must be proportionate, taking into account, among other things, the importance and complexity of the case, the amounts and interests at stake, and the costs, delay, burden and benefit associated with each step.

The disclosure obligations under the Rules are of an ongoing nature and, as such, if a party comes into possession or control of relevant documents after completing its affidavit of documents, it will be required to submit a supplementary affidavit of documents disclosing such additional documents.

8.1.4 Consequences for failure to disclose documents

There are consequences if a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with the Rules, an order of the court or an undertaking. If the document is favourable to the party's case, the party may not use the document at trial, except with leave of the trial judge. If the document is not favourable to the party's case, the court may make such order as is just, including striking out the statement of defence if the party is a defendant or dismissing the action if the party is the plaintiff.

8.2 Disclosure and discovery obligations in Ontario: examination for discovery

8.2.1 Overview

A party to an action may conduct an examination for discovery on any other party adverse in interest. In the case of a corporation, the examining party may choose which officer, director or employee shall be examined on behalf of the corporation, but the corporation may move to have a different individual examined. Similarly, the examining party may examine a partner on behalf of a partnership and a sole proprietor on behalf of a sole proprietorship.

An examining party is limited under the Rules to no more than 7 hours of examination except if the other parties consent or the court grants leave. If a person being examined does not know the answer to a question, he or she may undertake to answer the question at a later date. They will fail to answer that question if he or she does not provide an answer within sixty days of the response. A person being examined may also refuse to answer a question or take the question under advisement. If a person takes a question under advisement, it will be treated as having been refused if he or she does not provide an answer within sixty days of the response.

8.2.2 Failure to answer questions

Parties who fail to answer questions may not introduce such information at trial without leave of the court. The party which asked the question (or, indeed, any party adverse in interest that was entitled to ask questions at the examination) may move before the court to compel answers to questions refused or taken under advisement or to compel further and better answers to the answers to undertakings.

8.2.3 Confidentiality of disclosed documents

All parties and their lawyers are deemed to undertake not to use evidence or information to which the Rules apply for any purposes other than those of the proceeding in which same was obtained, except with consent or evidence (or information obtained therefrom) which is filed with the court or given or referred to during a hearing. Documents disclosed in open court are public documents, however a confidentiality or sealing order may be obtained to keep the documents from entering the public domain.

The Supreme Court of Canada has ruled that the test to obtain a confidentiality order over such documents is as follows:

(i) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(ii) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

The risk in question must be real and substantial, in that the risk is well grounded in the evidence. The risk must also pose a serious threat to the commercial interest in question. In order to qualify as an "important commercial interest," the interest must be one which can be expressed in terms of a public interest in confidentiality and not merely specific to the party requesting the order.

QUESTION 9

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9. How are litigation fees and costs assessed?

9.1 Overview of the Ontario costs regime

In Canada, the successful party to an action generally receives costs from the unsuccessful party, unless there are valid reasons to depart from this rule, such as misconduct.

Costs include both fees and disbursements, and are intended to be compensatory rather than punitive; thus, they can only be awarded to the extent that there are pecuniary losses. Costs awards are discretionary, unless a relevant statute specifically indicates otherwise. While the courts have an unfettered discretion to award or deny costs, the decision to deny the successful party costs is unusual and must be based upon good reasons.

There are two classes of costs: partial indemnity costs, which are paid by one litigant to another; and substantial indemnity costs, which are paid by the client to his or her solicitor. Partial indemnity costs indemnify a beneficiary for a portion of his or her costs, whereas substantial indemnity costs reflect a full indemnity of the legal costs incurred by the beneficiary, exclusive of any unreasonable legal fees that were not necessary to prosecute or defend the action fairly. Substantial indemnity costs are rare and may be awarded only where a litigant exhibited unfair conduct. Some jurisdictions recognize a third class of costs, higher than substantial indemnity costs. For instance, in Newfoundland and Labrador, the Court of Appeal has recognized "solicitor-and-own client costs", which are similar to substantial indemnity costs "but include further disbursements and charges as between the solicitor and client arising in equity.

The partial indemnity rate is not defined, but is generally between 40-60% of a lawyer's actual rate. The substantial indemnity rate is defined as 1.5 times what would otherwise be awarded as the partial indemnity rate. However, the Ontario Court of Appeal has made it clear that the calculation of a costs award should not be mechanical, but will depend on the circumstances of each case, the objective being to determine an amount that is fair and reasonable for the unsuccessful litigant to pay. A court in Ontario can also take into account other factors in exercising its discretion to award costs, including the apportionment of liability and the complexity of the proceeding. In exceptional cases, instead of fixing costs, a court may refer the matter of costs for an assessment by an assessment officer. An assessment officer is appointed by the provincial government and follows any directions set out in the judgment to assess costs in favour of the party to whom they have been awarded.

The Rules also contain specific cost sanctions that are designed to encourage litigants to make offers to settle early. Rule 49 states that where a plaintiff makes an offer at least seven days before a hearing, the offer has not expired, been withdrawn or been accepted before the commencement of the hearing and the plaintiff receives a judgment as or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date of the offer and to substantial indemnity costs thereafter. Similarly, where a defendant makes an offer at least seven days before a hearing, the offer has not expired, been withdrawn or been accepted and the plaintiff obtains judgment as favourable as or less favourable than the defendant's offer, the plaintiff is entitled to partial indemnity costs to the date of the offer, and the defendant is entitled to partial indemnity costs from that date on.

9.2 Costs awards in avoidance transactions

The costs rules in avoidance transactions mirror the general costs rules set out above. Costs awards are entirely within the court's discretion. However, the general rule is that the successful trustee will usually be entitled to costs. The court may order the bankrupt's estate to pay the legal costs in particularly difficult cases.

Where a trustee initiates an unsuccessful fraudulent preference action, the costs of the successful party and the trustee will usually be payable out of the assets of the bankrupt's estate. However, if the trustee is aware that there are no assets or insufficient assets in the estate, or fails to do an investigation of the assets, and proceeds with litigation, the trustee may be ordered to personally pay the successful creditor's costs. In one case, a trustee was ordered to pay security for costs pursuant to clause 56.01(1)(d) of the Rules where there were insufficient assets in a bankrupt corporation's estate to pay for the defendant's costs.

In line with usual practice, costs are awarded on a partial indemnity basis; substantial indemnity awards are rare. Unless the allegations in the application were malicious, reckless, scandalous or in bad faith, substantial indemnity costs will not be awarded, even where a party is unsuccessful.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

In order to be effective, foreign judgments must be recognized and enforced. Recognizing a judgment means that it would be treated in the same manner as a judgment made in the applicable province. Once a judgment is recognized, a party must take specific enforcement steps in order to realize upon same.

The process for enforcing judgments obtained outside of Canada differs depending on whether the judgment was from the United Kingdom or from a different foreign country. Ontario enacted the Reciprocal Enforcement of Judgments (U.K.) Act to implement the "Convention Between Canada And The United Kingdom Of Great Britain And Northern Ireland Providing For The Reciprocal Recognition And Enforcement Of Judgments In Civil And Commercial Matters." The federal jurisdiction, the territories and the other common law provinces (i.e. not Quebec) have enacted similar legislation to enforce this convention. Civil and commercial judgments of a British court whereby a sum of money is made payable (including arbitral awards which have become enforceable in the United Kingdom in the same manner as a British judgment) may be registered as a judgment of the Ontario Superior Court of Justice. Once a British judgment has been registered it may be enforced as any Ontario judgment could be.

There is no Ontario legislation regarding the enforcement of judgments from foreign countries aside from the Reciprocal Enforcement of Judgments (U.K.) Act. The recognition and enforcement of judgments of non-British foreign judgments is made pursuant to the common law. Historically, only foreign judgments for liquidated damages would be recognized. However, the Supreme Court has opened the door to enforcing equitable orders but has noted that doing so "will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt."

In order to be recognized as a judgment, a foreign judgment must satisfy the following criteria:

(i) the foreign court properly assumed jurisdiction;

(ii) the judgment is final and conclusive; and

(iii) the judgment is not for a penalty, taxes, or enforcement of a foreign public law.

10.1 Proper assumption of jurisdiction

As mentioned in section 4 above, the enforcement of foreign judgments is governed by a statute modeled after the Uniform Court and Jurisdiction Proceedings Transfer Act in the provinces of British Columbia, Saskatchewan and Nova Scotia. In the remaining provinces (excluding Québec which is governed by the Civil Code of Québec), the Supreme Court of Canada has held that a province must recognize and enforce a judgment of a court of another country if a real and substantial connection exists between that court and the subject matter of the litigation (in the absence of any other issues). A real and substantial connection will exist where there is at least one presumptive connecting factor and the party challenging the assumption of jurisdiction fails to rebut the presumption of jurisdiction. In cases concerning torts, the presumptive connecting factors are:

(i) the defendant is domiciled or resident in the jurisdiction;

(ii) the defendant carries on business in the jurisdiction;

(iii) the tort was committed in the jurisdiction; or

(iv) a contract connected with the dispute was made in the jurisdiction.

The court may identify new presumptive connecting factors over time. The relevant considerations for identifying such new presumptive factors include:

(i) similarity of the connecting factor with the recognized presumptive connecting factors;

(ii) treatment of the connecting factor in the case law;

(iii) treatment of the connecting factor in statute law; and

(iv) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

10.2 Final and conclusive

A foreign judgment must be final and conclusive before it can be enforced. This does not mean that a party must exhaust all appeals before a judgment is declared final and conclusive. Even if a judgment is under appeal, it still is considered final and conclusive under Ontario law. In the event that a foreign judgment is recognized while that same judgment is still under appeal in a foreign jurisdiction, it would be the usual course to stay the enforcement of such a judgment until the foreign appeal is disposed of.

10.3 Not for a penalty, taxes, or enforcement of a foreign public law

The traditional rule is that foreign judgments for a penalty, taxes, or enforcement of a foreign public law should not be recognized. However, the Court of Appeal for Ontario has held that the public law enforcement exception rests "on a shaky doctrinal foundation." In any event, remedial statutes which seek to recover costs incurred or which are similar in nature to common law claims would likely not be found to be considered public law enforcement, especially if a similar statute exists in Ontario. Penal judgments include quasi-criminal judgments such as civil contempt.

10.4 Defences to recognition of judgments

Once it has been established that a judgment should be recognized, the court should consider the defences which are available to a defendant in contesting such recognition. A foreign judgment should not be recognized if it was obtained by fraud. However, fraud is interpreted narrowly. While fraud can always be raised as a defence, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. The defendant must demonstrate that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment.

A foreign judgment should not be recognized if the foreign proceedings were contrary to Canadian notions of fundamental justice. The defendant must establish that the foreign proceeding was unfair; it is not the plaintiff's burden to prove that the proceeding was fair. The defence of "natural justice" relates to form, not substance, and is thus limited to the procedure by which the foreign court arrived at its judgment. This assessment will be "easier" in situations where the foreign legal system is similar or familiar to Canadian courts.

A foreign judgment should not be recognized if it is contrary to the Canadian concept of justice and basic morality. This is a high threshold and such foreign judgments would only fail to be recognized on this ground if recognizing same would "shock the conscience" of a reasonable Canadian.

Even if a foreign judgment could otherwise be recognized and enforced, a party seeking to do so must be cognizant of the limitations periods set out under the Limitations Act, 2002. Although there is no appellate authority that addresses the applicable limitation period under the Limitations Act, 2002 to a proceeding commenced in Ontario to recognize a foreign judgment, it would be prudent to commence such a proceeding within two years since the making of that judgment in the foreign court.

CAYMAN ISLANDS

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Claims for the avoidance of antecedent transactions in the Cayman Islands arise pursuant to both statute and common law. Whilst these claims largely mirror those which are available in other common law jurisdictions, the legislative regime in the Cayman Islands has not developed at the pace of many other jurisdictions. Claims for the avoidance of antecedent transactions remain rare, in part due to a lack of jurisprudence on which to rely when considering the merits of bringing such a claim. Whilst we have been seeing an increase in volume of such claims over recent years, they typically do not proceed to trial and many are not pursued due to the high threshold required to successfully make them out.

The Companies Law (2013 Revision) (as amended) ("Companies Law") gives rise to the following claims which are available to a liquidator of an insolvent company.

1.1 Voidable preferences

Section 145(1) of the Companies Law provides that preferential transactions occurring within six months preceding the liquidation are invalid. In determining whether a transaction is preferential, the transaction must be in favour of a creditor with "a view to giving such creditor a preference over other creditors". Previously, the law required that the company have a "dominant intention to prefer that creditor over others". The current voidable preference provision has not yet been the subject of any judicial determination and the position in relation to preferential transactions therefore remains somewhat unclear. Notably, however, section 145(2) of the Companies Law has the effect of deeming a transaction to have been made with a view to giving such a creditor a preference where the transaction involves a "related party" of the company. For the purposes of the section, the commonly accepted definition of a "related party" has been expanded to include any party which "has the ability to control the company or exercise significant influence over the company in making financial and operating decisions".

Whilst the Companies Law does not specify who can bring a voidable preference claim, it is likely that only an official liquidator (that is, a liquidator of a company where the liquidation is subject to the supervision of the Court) has standing to bring such a claim.

If a transaction is set aside as a voidable preference, the transaction is invalid and must be unwound. This would theoretically result in the Court making an order requiring the creditor to return a payment or asset to the company. The creditor would then have to prove for the amount of its claim in the liquidation.

Historically, it has been difficult to bring voidable preference actions in the Cayman Islands and we are not presently aware of any action of this type which has successfully progressed to a final judicial determination.

1.2 Fraudulent dispositions

Section 146 of the Companies Law provides that any disposition of property made at an undervalue (which includes a disposition for no consideration) by or on behalf of a company with an intent to defraud its creditors shall be voidable as against the official liquidator(s). An official liquidator must bring an application under this section within six years of the relevant disposition.

Whilst the Companies Law defines "intent to defraud" as an intention to wilfully defeat an obligation owed to a creditor, the application of section 146 has not previously been tested in the courts. If tested, it may well be the case that the courts look to follow the approach taken in relation to an analogous provision in another common law jurisdiction, such as England. However, in circumstances where the burden of proof in establishing an "intent to defraud" rests with the official liquidator(s), there may be inherent evidentiary difficulties in establishing the requisite subjective intention on the part of the company at the time of making the relevant disposition.

In the event that a disposition is set aside under section 146 and the transferee has not acted in bad faith, the Companies Law provides that the transferee shall have a first and paramount charge over the relevant property in an amount equal to the "entire" costs properly incurred by the transferee in defending the claim.

Creditors prejudiced by a disposition of property made at an undervalue are able to commence proceedings to set aside the disposition pursuant to the Fraudulent Dispositions Law (1996 Revision) ("Fraudulent Dispositions Law"), the requirements and operation of which are substantially the same as section 146.

In addition to the statutory claims described above, antecedent transactions are also capable of being avoided in the Cayman Islands through bringing traditional common law claims (such as claims based, for example, on unjust enrichment or mistake) where the circumstances allow.

QUESTION 2

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2. What are the common defences?

Whilst there are no specific statutory defences to voidable preferences or fraudulent disposition claims arising under the Companies Law, the requirements of the relevant provisions give rise to certain matters which may be pleaded in defence of any claim brought by an official liquidator (or creditor in the case of proceedings commenced pursuant to the Fraudulent Dispositions Law). For example, a party may plead in its defence that:

(a) in the case of a voidable preference:

- the conveyance or transfer of property was not preferential (i.e. there was no element of intent);

- the conveyance or transfer of property was not made within 6 months of the commencement of the liquidation;
- the party receiving the transfer or conveyance of property was not a creditor of the company; and / or
- the company was able to pay its debts (in accordance with the relevant provision of the Companies Law) at the time the conveyance or transfer took place;

(b) in the case of a fraudulent disposition:

- the claim is statute barred in circumstances where it is made out of time;
- there was no disposition of property;
- the relevant disposition of property was not made at an undervalue; and / or
- there was no "intention to defraud" creditors.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

Despite the fact that claims seeking to avoid antecedent transactions are rarely made in the Cayman Islands, the ability of a foreign party (in this case, the Trustee for the liquidation of *Bernard L. Madoff Investment Securities LLC*) to pursue avoidance actions in the Cayman Islands was recently considered by the Grand Court in *Irving H Picard and Anor v Primeo Fund* (In Official Liquidation) (2013 unreported).

As set out in further detail below, Part XVII of the Companies Law formalises the Court's powers to make orders in aid of foreign insolvency proceedings. However, the Court found in *Picard* that Part XVII of the Companies Law merely "supplements and partially codifies the common law".

Essentially, this meant that the Court had to consider two relevant questions:

(i) whether a foreign party has standing to pursue avoidance actions in the Cayman Islands pursuant to Part XVII of the Companies Law; and

(ii) in any event, whether the Court has jurisdiction at common law to allow a foreign party to pursue avoidance actions in the Cayman Islands.

Whilst the Court found that its powers to make orders in aid of foreign insolvency proceedings under Part XVII of the Companies Law did not extend to allowing a foreign party to pursue avoidance actions in the Cayman Islands, it did, however, find that it retained jurisdiction at common law to provide assistance in aid of foreign bankruptcy proceedings, and that this assistance extended to allowing a foreign party to pursue avoidance actions in the Cayman Islands regardless of whether or not the Court had (or would have had) the power to make a winding up order (pursuant to Cayman Islands law) in respect of the company the subject of the foreign bankruptcy proceedings.

It appears that only a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding will have standing to pursue avoidance actions in the Cayman Islands, and that standing will not extend to other interested parties (such as creditors or shareholders).

However, it is worth noting that the position in the Cayman Islands in this regard remains uncertain, as an appeal (and cross-appeal) of the Grand Court's decision in *Picard* was recently heard by the Cayman Islands Court of Appeal. It is widely anticipated that, regardless of the Court of Appeal's decision, these issues are likely to fall for the consideration of the UK Privy Council.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

Whilst the current position in the Cayman Islands is that the Court has jurisdiction at common law to allow a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding to pursue avoidance actions in the Cayman Islands, the Court found in *Picard* that this will only extend to bringing a claim under domestic avoidance law. Foreign avoidance law has no application in the Cayman Islands. Although, as noted above, the first instance decision is presently the subject of appeal and cross-appeal.

It remains open for a foreign party to bring a claim under foreign avoidance law in that foreign jurisdiction. However, in light of the decision of the Supreme Court of the United Kingdom in *Rubin v Eurofinance S.A.* [2012] UKSC 46, any attempt to enforce a foreign judgment in the Cayman Islands will likely turn on whether the Cayman defendant submitted to that jurisdiction.

QUESTION 5

5. Who decides issues of foreign law?

The Court made it clear in *Picard* that foreign avoidance law has no application in the Cayman Islands. Accordingly, it is not necessary for any determination to be made in the Cayman Islands with respect to the interpretation or application of foreign avoidance law.

Outside of the sphere of avoidance law, from time to time the Court does apply foreign law in order to determine certain rights as between parties to a commercial dispute (for example, rights arising under a contract governed by foreign law). In these circumstances, it ultimately falls to the Court to determine what foreign law is; however, the parties to the dispute will generally adduce expert evidence to assist the Court in this process.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

As a matter of policy, the Cayman Islands have made considerable effort to promote international co-operation and enforcement with respect to cross-border insolvencies through the implementation of relevant enabling legislation and the development of case law to assist such situations. The Cayman Islands recognises that one of the most essential elements of co-operation in cross-border cases is communication among the administering authorities of the countries involved.

Part XVII of the Companies Law formalises the Court's powers to make orders in aid of foreign insolvency proceedings. These powers continue the historical approach of the Cayman Islands based on comity. They follow many of the principles enshrined in the UNCITRAL Model Law on Cross-Border Insolvency, but stop short of implementing it.

Part XVII of the Companies Law defines "foreign bankruptcy proceedings" as including proceedings for the purposes of reorganising or rehabilitating an insolvent debtor. A foreign representative is defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

The Companies Law provides that, upon the application of a foreign representative, the Grand Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of: (a) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor; (b) enjoining the commencement or staying the continuation of legal proceedings against a debtor; (c) staying the enforcement of any judgment against a debtor; and (d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by, and produce documents to, its foreign representative.

All such orders will be discretionary rather than mandatory. The foreign bankruptcy proceeding must take place in the country in which the debtor is incorporated or established.

In determining whether to make an ancillary order, the Companies Law provides that the Court is required to be guided by matters which will best assure an economic and expeditious administration of the debtor's estate consistent with:

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

The Cayman Islands has not adopted the UNCITRAL Model Law.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

In all proceedings commenced in the Cayman Islands (including insolvency proceedings), the Court has the power to make orders in relation to the discovery and inspection of documents where there are factual matters in dispute between the parties. Of course, the burden of proof dictates that a party bringing a claim must make out the necessary elements of that claim on the balance of probabilities. This generally requires a party to adduce evidence and disclose or discover documents in support of its claim. Conversely, a party opposing a claim will generally seek to adduce evidence and to disclose or discover documents which support the matters raised in its defence, and which contradict the position of the party bringing the claim.

Generally speaking, a party ordered to make discovery is required to discover all documents in its possession, custody or power relating to any question in dispute between the parties. This includes any document which adversely affects the case of a party who is ordered to make discovery.

QUESTION 9

9. How are litigation fees and costs assessed?

As is the case in many other common law jurisdictions, a successful party in litigation is generally entitled to recover an amount in respect of its costs. However, any award of costs remains entirely within the discretion of the Court.

The award and assessment of costs in the Cayman Islands is determined in accordance with the Grand Court Rules 1995 (Revised Edition) ("Grand Court Rules"). No distinction is made between civil proceedings of a general nature and insolvency proceedings for this purpose.

The Grand Court Rules provide that the overriding objective of the Court is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred in conducting that proceeding in an economical, expeditious and proper manner, except when it appears to the Court that, in the particular circumstances of the case, some other order should be made with respect to the whole or any part of those costs.

Ordinarily, the Court will provide the parties to a proceeding with the opportunity to reach agreement as to the amount of costs which should be paid to the successful party by the unsuccessful party by making an order which provides for the payment of those costs, but which specifies that the amount of those costs will be determined by a formal taxation procedure if the parties fail to reach agreement.

In the absence of an order to the contrary, a costs order generally entitles a party to recover their costs on a "standard basis", which is defined by in Grand Court Rules as being "a reasonable amount in respect of all costs reasonably incurred", having regard to the cost, importance and complexity of the case. However, if warranted by the circumstances of the case, the Court may award costs on an "indemnity basis", which is defined by the Grand Court Rules as being all costs incurred, save for those that "are of an unreasonable amount or have been unreasonably incurred". An award of costs on this basis usually results in the successful party recovering a much larger proportion of its costs when compared to the recovery of costs on a "standard basis", but will usually fail to result in the recovery of all of the costs incurred by the party in the litigation process.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

The Cayman Islands have enacted a Foreign Judgments (Reciprocal Enforcement) Law (1996 Revision) ("Enforcement Law"), which provides a comprehensive framework for the registration of foreign judgments in the Cayman Islands. The Enforcement Law requires a judgment to be registered in the Cayman Islands within six years of being obtained, at which point it can be enforced as if it were a judgment made in the Cayman Islands. However, the Enforcement Law has so far only been extended to certain states and territories of Australia. Consequently, the recognition and enforcement of foreign judgments are determined according to common law principles, including in particular whether the foreign court had jurisdiction according to Cayman Islands' law. Determining whether or not a foreign court had jurisdiction is a difficult exercise having regard to a relatively recent divergence of common law authority (e.g. Rubin) in a number of important jurisdictions.

Theoretically, in order to enforce a foreign judgment (other than a judgment made in Australia) avoiding an antecedent transaction, the party seeking to enforce the judgment must commence an action in the Cayman Islands which is based on that judgment. Generally speaking, the Court will order that a foreign judgment can be enforced in the Cayman Islands, provided that: (i) the court issuing the judgment had valid jurisdiction (according to Cayman Islands' law, but noting the difficulty referred to above); (ii) the judgment is final and conclusive in the court that issued it; and (iii) it is not contrary to public policy.

However, there is currently a proposed amendment to the Enforcement Law which, if enacted, would provide for foreign monetary judgments (that is, judgments which provide for payment of a sum of money which is not in respect of taxes or other charges or in respect of a fine or penalty) to be registered where the judgment is final and conclusive as between the parties. It is anticipated that this process would be largely administrative in nature, and would have the effect of affording the foreign judgment the same status as a monetary judgment granted in the Cayman Islands. It is likely that this would apply to most foreign judgments avoiding antecedent transactions.

COLOMBIA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

1.1 According to article 74 of the Colombian Insolvency Law (Law 1116 of 2006), in the course of insolvency proceedings, any creditor, or the insolvency representative may commence an avoidance action against the following acts executed by the debtor when such acts:

(a) adversely affect any creditor; or,

(b) affect the priority order for payments; and

(c) the assets that comprise the debtor's estate are insufficient to satisfy all credits recognised within the insolvency proceedings.

- Payment of obligations, accords and satisfaction transactions, and any act that implies the transfer, disposition, constitution or cancellation of liens or property rights of the debtor that reduce its patrimony, or leases that hinder the reorganisation proceedings; in both events, those acts taking place during the 18 months prior to the commencement of the insolvency provided that there is no evidence that the transferee or lessee acted in good faith.

- Gratuitous acts executed within the 24 months prior to the initiation of insolvency proceedings.

Amendments to the by-laws within the 6 months prior to the commencement of insolvency proceedings when such amendments diminish the debtor's estate in prejudice of the creditors or modify the liability of the shareholders of the debtor.

The avoidance action is aimed to overturn past transactions in which the insolvent debtor was a party or when the transaction involved the debtor's assets and produced effects such as the reduction of the net worth of the debtor's or affected the legal priority order among creditors. It is an action designed to preserve the integrity of the insolvency estate.

A transaction granting a security interest for existing debts might be avoided on the basis that it is a preferential transaction.

1.2 Avoidance proceedings in the enterprise group context

In the context of Enterprise Groups' Regulation (Decree 1749 of 2011) there are additional provisions related to avoidance actions.

Such regulation provides avoidance criteria in the enterprise group context in order to protect intra-group transactions in the interest of the group as a whole, and in other cases to subject the transactions to a particular scrutiny because of the relationship between parties as group members.

Article 21 of Decree 1749 of 2011 specifies that in addition of article 74 of Law 1116 of 2006, the insolvency judge must regard circumstances in which the transaction took place.

Those circumstances include among others:

(a) the purpose of the transaction;

(b) whether the transaction contributed to the commercial operations of the group as a whole;

(c) whether the transaction granted advantages to enterprise group members or other related persons that normally would not be granted between unrelated parties;

(d) the dates of the operations; and

(e) the impossibility to identify the real beneficiary of the operation.

Article 22 of Decree 1749 of 2011 provides the suspect period for enterprise group members when the members of the group commenced the insolvency proceedings in different dates[1] or as a result of a joint application for commencement of all insolvency proceedings[2].

1.3 Transactions exempt from avoidance actions

The Colombian insolvency law includes specific exemptions from the operation of avoidance powers for transactions (i) related to the function of financial markets, such as close-out netting of securities regulated by articles 2, 10 and 11 of Law 964 of 2005[3] or derivative contracts[4] and (ii) acts or contracts related to the public securities market[5].

1.4 Avoidance proceedings

Law 1116 of 2006 establishes that proceedings for the avoidance of the specified transactions can be initiated by the insolvency representative; and the law also allows avoidance proceedings to be commenced by creditors on an equal basis[6]. The action requires a request to the insolvency judge[7] to declare the transaction void, following the rules of the General Procedure Code related to the "verbal proceeding".

The avoidance action against gratuitous transactions or an accord and satisfaction transaction can be taken ex officio by the insolvency judge as an incidental proceeding in the course of the insolvency proceeding on behalf of the creditor's interest[8].

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1 The suspect period for all members of the enterprise group is counted from the moment the first member of the group commenced the insolvency proceeding.
2 Same date for commencement for all members.
3 Literal a) article 5 Law 1116 of 2006.
4 Article 74 of Law 1328 of 2009.
5 Literal b) article 5 Law 1116 of 2006.
6 Article 75 of Law 1116 of 2006.
7 Article 6 of Law 1116 of 2006, Superintendency of Companies or the ordinary Civil court *(Juez civil del circuito*).
8 Paragraph of article 75 of Law 1116 of 2006.

The assets or value recovered by the creditor or by the insolvency representative will be part of the estate that benefit all creditors.

One of the peculiarities of the Colombian avoidance transactions system is the incentive for the creditor that exercise with success the avoidance action, this incentive is stated in article 75 of Law 1116 of 2006. According to this provision, in case the action is successful, totally or partially, the demanding creditor has the right to receive a 40% reward of the value of the asset recovered for the estate of the debtor, or 40% of the value of the direct or indirect benefit reported. This will be recognised in the judgment.

These rewards for the creditor are exorbitant and possibly contrary to the purpose of the avoidance action itself, that is, to avoid that one creditor or a specific third party takes advantage over all creditors.

In general, the concept of a reward is positive, there is a necessity to attract the interest of creditors to initiate the avoidance action, but this always implies costs and the consequence of sharing with all creditors the benefits gained by a successful action. The idea of compensating expenses and conceding and paying an award is positive, however, the problem of the Colombian system is the amount of the reward, which in some cases may represent more than the credit itself. Sometimes this incentive could generate undesirable behaviour among other creditors, which would acquire small credits only with the idea of initiating the avoidance action and obtaining the reward for their own benefit.

1.5 Statute of limitations for commencement of avoidance proceedings

The Colombian insolvency law establishes specific statutes of limitations for the commencement of the avoidance proceedings. The avoidance action shall be commenced within the 6 months after the "recognition and classification of liabilities and voting rights" judgment was issued by the insolvency judge.[9]

In non-insolvency scenarios, the Colombian Civil Code also addresses these types of transactions by means of the "actio pauliana". When the initiation of the avoidance proceeding is not possible because the legal time bar expired, the insolvency representative or any of the creditors would be able to use this non-insolvency law action in addition to the provisions of the insolvency law itself. However, it is worth noting that this non-insolvency action would be brought before the ordinary civil courts (not before the insolvency judge).

1.6 Effect of avoidance on the counter party

According to Colombian Insolvency Law, the effect of an avoidance transaction is that the transaction will be reversed and the defeated party will be ordered to return the assets obtained or pay the value of the transaction, or reverse the transfer to the insolvency estate. In case that it is shown that the defeated party acted in bad faith, it will also be required to return civil fruits or any other benefit[10].

[9] Article 75 of Law 1116 of 2006.
[10] Article 75 of Law 1116 of 2006.

QUESTION 2

2. What are common defences?

The Colombian insolvency law provides different but defined criteria for avoidance transactions that will need to be proven by the claimant. The law also provides different defences available to the creditors or counterparties. The insolvency law also specifies the characteristics of a transaction and its effects.

Article 74 of Law 1116 of 2006, describes the avoidance criteria and the manner in which they are combined.

First type of transactions[11] – combines a suspect period (within 18 months) and bad faith. It applies for non-gratuitous acts.

Second type of transactions[12] – establishes a suspect period (within 24 months). It applies for gratuitous acts.

Third type of transactions[13] – combines a suspect period (within 6 months) with the effect of the transaction, when the amendment of by laws produces the reduction of the net worth in detriment of the creditors or modifies the liability of the shareholders.

There are general defences that apply to all types of transactions but also other defences that are available depending on the type of transaction subject to avoidance.

2.1 General defences[14]

- The transaction is not detrimental to creditors.
- The transaction does not affect the priority payment or even when the transaction contains the elements of preference, the transaction was consistent with normal commercial practices (arms-length transaction) and with the ordinary course of business between the parties to the transaction[15].
- The debtor's assets are sufficient to cover the total amount of the liabilities.

2.2 Other defences

These are available depending on the type of transaction subject to the avoidance action. The defences are:

[11] Numeral 1 article 74.
[12] Numeral 2 article 74.
[13] Numeral 3 article 74.
[14] First paragraph of article 74 of Law 1116 of 2006.
[15] Paragraph 3 of article 17 of Law 1116 of 2006, for example, a payment for the supplier of goods or to the workers of the company.

First type of transactions[16] – The transaction cannot be avoided when the counter party did not know the debtor was insolvent at the time the transaction took place. According to the Colombian Insolvency Law and the jurisprudence of the Superintendency of Companies[17], in this case the counter party acted in good faith.

This approach requires a consideration of the intention of the parties to the transaction and other factors such as the debtor financial situation[18] at the time the transaction occurred, this defence involves elements that are subject to dispute and require determination by the insolvency judge. According to the Constitutional Court, the defendant has the burden of proof regarding its good faith.[19]

Second type of transactions[20] – In the case of gratuitous transactions such as gifts or donations, the Colombian law adopted an objective approach that determines that all of those transactions are avoidable within the 24 months before the commencement of the insolvency proceedings and no defences are available to the parties.

This type of transaction is avoided without requiring the insolvency representative or the creditor prove anything other than it constitutes a gratuitous transaction as defined by the insolvency law and that it occurred within the suspect period.

Third type of transactions[21] – The amendment of by laws did not reduce the net worth, or produced its reduction but not to the detriment of the creditors, or the amendment did not modify the liability of the shareholders.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

The Colombian insolvency law does not establish a different treatment or any limitation for foreigners that would restrict access to the Colombian courts[22]. Foreign creditors generally have the same rights regarding proceedings in Colombia related to the insolvency of a debtor. As stated above, Law 1116 in 2006 establishes that proceedings for the avoidance of the specified transactions can be taken by creditors and by foreign creditors on an equal basis.

[16] Numeral 1 article 74.
[17] In this case the Colombian law would make avoidance depending on the knowledge of the insolvency by the transferee. This has been the general ruling by the Superintendency of Companies. In the case: *Henry Ureña y otros vs. Internacional de Luminarias S.A. en liquidación judicial and Electro Diseños S.A. Decision 801-000042.*
[18] Insolvent.
[19] Constitutional Court, decisión C-527 of 2013.
[20] Numeral 2 article 74.
[21] Numeral 3 article 74.
[22] Article 98 of Law 1116 of 2006.

In 2006, Colombia implemented the Model Law on Cross-Border Insolvency into its national insolvency regime, Law 1116 of 2006[23]. A foreign representative may directly address to a competent Colombian authority, the Superintendency of Companies or the ordinary civil court for assistance.[24] If the Colombian court recognises the foreign proceeding, the foreign representative is entitled to initiate avoidance actions following the insolvency law[25].

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

Law 1116 of 2006 determines that the law governing the avoidance of transactions should be the Colombian insolvency law. In consequence, the foreign claimants will face restrictions when bringing a claim under foreign avoidance law directly against a transferee in Colombia.

Nevertheless, in a pure theoretical scenario[26], by the application of provisions on cross-border insolvency included in Law 1116 of 2006, the Colombian insolvency judge could apply the avoidance law of the foreign debtor's home country[27], accepting the claim of the foreign party in application of the principle contained in numeral 3 of article 85 of the insolvency law, which states that one of the purposes of the cross-border insolvency regulation is "A fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor". In fact the purpose of the avoidance action in the foreign insolvency proceeding is to reconstitute the debtor's estate.

Accordingly under article 96 of Law 1116 of 2006, after the recognition of the foreign proceeding by the competent Colombian authority, the foreign representative would be entitled to request the commencement of an insolvency proceeding or an avoidance action proceeding depending on the existence of an ongoing insolvency proceeding. Also, article 108 of Law 1116 of 2006 establishes that after the recognition of the foreign proceeding, the foreign representative specifically is entitled to commence an avoidance proceeding in Colombia, although, as mentioned above, under the application of Law 1116 of 2006[28].

[23] Title III on Cross-Border Insolvency.
[24] Article 94 of Law 1116 of 2006.
[25] Article 108 of Law 1116 of 2006.
[26] There has been just one case on recognition in Colombia. Since Title III of Law 1116 of 2006 came into force, there have been no court decisions concerning choice of law rules for avoidance actions.
[27] "The ability to apply foreign law may well redound to the theory of universalism, that all bankruptcy assets and claims should be administered in the debtor s "home country" under the laws of that country" Jay Lawrence Westbrook, "Universalism and Choice of Law" 23 Penn St Int 1L Rev 625,634 (2005), cited by Look Chan Ho, "Applying foreign law under the UNCITRAL Model Law on Cross-Border Insolvency, Published version in (2009) 24:11 Butterworths Journal of InternationalBanking and Financial Law 655.
[28] By using the insolvency law of Colombia (Articles 74 and 75 of Law 1116 of 2006), where the transaction is located.

However, the recognition of the insolvency proceeding means that the effects attributed to the insolvency proceeding by the law of the foreign country in which the proceeding was opened extends to assets and creditors in Colombia[29].

When the competent Colombian authority has recognised the foreign insolvency proceeding, the authority accepts that transactions or contracts in Colombia have a foreign element, and the parties in the transaction or in the contract are subject to the foreign insolvency law applicable to it.

The insolvency judge should take into account the foreign insolvency law that governs the assets and transactions in Colombia that also will govern the avoidance actions in regard to the transaction or the contract subject to the avoidance powers.

The avoidance law of the home country of the foreign insolvency proceeding should be the law that is applied[30].

When the policies of the two jurisdictions are in conflict, the insolvency judge can refuse the application based on foreign avoidance law if that application would be manifestly contrary to the public policy of Colombia[31]. In such a case there is no doubt Law 1116 of 2006 would be applied.

QUESTION 5

5. Who decides issues of foreign law?

Law 1116 of 2006 attributes the Superintendency of Companies and the civil courts the power to act as an insolvency judge and to act as a competent Colombian authority to recognise foreign insolvency proceedings.

The foreign party in the avoidance proceeding bears the burden to prove the avoidance law of the foreign jurisdiction where the foreign insolvency proceeding is taking place.

Article 177[32] of the Colombian General Procedure Code, Law 1564 of 2012, establishes the requirements for recognition of a foreign law.

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[29] One of the purposes of the recognition is that debtor's assets and claims are administered centrally under the insolvency law of the debtor's COMI country.

[30] This possibility need to succeed, a strong cooperation and coordination behavior by the courts around the globe.

[31] Article 91 of Law 1116 of 2006.

[32] Article 177 of the General Procedure Code: "The text of legal rules that does not have national scope and of foreign laws, will be submitted in copy to the process, ex officio or upon request. The full or partial copy of the foreign law must be issued by the competent authority of the given country, by the country's consul in Colombia or requested to the Colombian consul in the country. An expert opinion can also be attached rendered by an expert person or institution based on their knowledge or experience regarding the law of a country or territory outside Colombia, regardless of whether it is enabled to act as a lawyer there. In the case of foreign unwritten such, can be proved with the testimony of two or more lawyers of the country of origin or by expert opinion in the terms of the preceding paragraph. These rules shall apply to resolutions, circulars and opinions of administrative authorities. However, its presentation is not deemed to be necessary when they are published on the website of the public authority. When necessary, proof of its validity will be required."

Additionally, upon recognition of the foreign proceeding, whether main or non-main, where necessary to protect the assets of the foreign debtor or the interests of the creditors, the insolvency judge at the request of the foreign representative, can provide for the examination of witnesses for the purposes of article 177 mentioned above.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Colombian law contains several provisions dealing with assistance to foreign courts[33], that regulate exequatur, letters rogatory, etc. Colombia is also a party to the following International Treaties and Conventions:

- Montevideo treaty on Commercial International Law 1889, Title X on Bankruptcies, regulates relations with Argentina, Bolivia, Paraguay, Peru and Uruguay.
- Inter-American Convention on Extraterritorial Validity of Foreign judgments and Arbitral Awards, Montevideo Uruguay May 8 of 1979 (Ratified by Law 16 of 1981)
- Inter-American Convention on Proof of and Information on Foreign Law, Montevideo Uruguay May 8 of 1979 (Ratified by Law 49 of 1982)
- Inter-American Convention on execution of preventive measures, Montevideo Uruguay May 8 of 1979 (Ratified by Law 42 of 1986)
- Inter-American Convention on International Commercial Arbitration, Panama City, January 30 1975 (Ratified by Law 44 of 1986)
- Inter-American Convention on the Legal Regime of Powers of Attorney to be used abroad, Panama City, January 30 1975 (Ratified by Law 80 of 1986)
- Inter-American Convention on the taking of evidence abroad, Panama City, January 30 of 1979, Protocol La Paz, Bolivia May 24 of 1984 (Ratified by Law 31 of 1987)
- Treaty on Letters Rogatory between Colombia and Chile, Bogotá June 17 of 1981 (Ratified by Law 45 of 1987)
- Inter-American Convention on Letters Rogatory, and Protocol on Letters Rogatory, Montevideo May 8 1979 (Ratified by Law 27 of 1988)
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, The New York Convention 1958 (Ratified by Law 39 of 1990)
- Convention Abolishing the Requirement of Legalisation for Foreign Public Documents October 5 of 1961 (Ratified by Law 455 of 1998)

[33] Articles 605 to 609 of General Procedure Code.

- Convention on the Service Abroad of Judicial and Extra judicial Documents in Civil or Commercial Matters, November 15 of 1965 (Ratified by Law 1073 of 2006)

- Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18 of 1970 (Ratified by Law 1282 of 2009)

- Additionally, Law 1116 of 2006, in its third title, regulates the requirements and resulting effects of the recognition of foreign insolvency proceedings in Colombia.

According to numeral 1st of Article 86 of Law 1116 of 2006, the system of cross-border insolvency provisions of Title III of the law apply when a foreign court solicits assistance in Colombia regarding a foreign insolvency proceeding or a proceeding depending upon the existence of an insolvency proceeding such as the avoidance action.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Title III of Law 1116 of 2006 introduced the UNCITRAL Model Law on Cross-Border insolvency in articles 85 to 116, without any deviation from the text of the Model Law.

The Colombian Cross-Border insolvency law does not address choice of law issues in relation to transaction avoidance.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

The Colombian insolvency regime establishes in article 13 of Law 1116 of 2006 the obligation of the debtor to present as part of the application for the commencement of the insolvency proceeding, the financial statements regarding 3 years prior to the commencement of the reorganisation proceeding. The same obligation is established prior the commencement of the liquidation proceeding according with the paragraph of article 49 of Law 1116 of 2006. Once the insolvency proceeding has been commenced the information is available for the scrutiny of the foreign creditor. There is no other opportunity for creditors in the insolvency proceeding to analyse any other information from the insolvent debtor.

Nevertheless, as part of the avoidance process the foreign creditor can request information relating to the specific transaction subject to the action.

There is no discovery in Colombia[34]. The General Procedure Code of Colombia allows a person intending to file a claim or fearing to be sued, to:

(a) ask its prospective counter party to answer a questionnaire on the facts related to the subject matter of the prospective proceedings[35];

(b) request its prospective counter party or third parties – where appropriate, to disclose documents or accounting books, as well as to exhibit movable goods[36];

(c) ask for witness statements to be rendered[37];

(d) request the practice of a judicial inspection on persons, documents, locations or goods[38]; and

(e) ask for the submission of expert reports[39].

QUESTION 9

9. How are litigation fees and costs assessed?

In avoidance litigation, the losing party is liable for the payment[40] of three types of sums[41]:

(a) The costs of the proceedings[42], which depend on the specific amount claimed and the special circumstances of the case.

(b) The attorney's fees and expenses pursuant to the "Acuerdo" 1887 of 2003, issued by the Judiciary Superior Council.

(c) The judicial tariff, fixed at 1.5 per cent of the monetary claims contained in the statement of claim but in no case should the tariff be more than 200 legal monthly minimum wage (SMLMV)[43].

[34] Extract from Colombia, Eduardo Zuleta and William Araque. Gómez-Pinzón Zuleta Abogados S.A. LatinLawyer, Published on Wednesday, 30 October 2013 and last verified on Friday, 8 November 2013. Available at: http://latinlawyer.com/reference/topics/60/jurisdictions/8/colombia/

[35] Articles 184 and 185 General Procedure Code, Law 1564 of 2012.

[36] Articles 189 General Procedure Code, Law 1564 of 2012.

[37] Articles 187 and 188 General Procedure Code, Law 1564 of 2012.

[38] Articles 186 and 189 General Procedure Code, Law 1564 of 2012.

[39] Article 189 General Procedure Code, Law 1564 of 2012.

[40] Articles 365 and 366 of Law 1564 of 2012 General Procedure Code.

[41] Extract from Colombia, Eduardo Zuleta and William Araque. Gómez-Pinzón Zuleta Abogados S.A. LatinLawyer, Published on Wednesday, 30 October 2013 and last verified on Friday, 8 November 2013. Available at: http://latinlawyer.com/reference/topics/60/jurisdictions/8/colombia/

[42] Article 361 of Law 1564 of 2012 General Procedure Code.

[43] Article 8 Law 1653 of 2013. The litigation before the Superintendency of Companies are not subject to the judicial tariff.

(d) If the losing party requested interim measures, it would be liable for the damages caused by the implementation thereof, thus in some cases courts require the constitution of a guarantee before adopting such measures.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

The judgment rendered by a foreign court in connection with avoidance proceeding over assets located in Colombia would not be directly enforceable. This is due to the fact that any judgment rendered by a foreign court which is intended to be enforced in Colombia, must be subject to exequatur proceedings before the Supreme Court of Colombia.

The exequatur process[44] allows for judgments rendered abroad, to be executed in Colombia. Exequatur is a simple process of judicial validation that renders a foreign decision valid within the territory of Colombia. Pursuant to articles 605 and 606 of the General Procedure Code (Law 1564 of 2012 the "GPC"), the courts of Colombia would give effect and enforce a decision obtained in a court outside Colombia without re-trial or re-examination of the merits of the case provided.

Article 605 of GPC regulates the effects of foreign decisions (including final judgments and any other decision issued outside of Colombia) when jurisdiction has been found abroad.

These decisions shall have the validity granted to them under international treaties executed between Colombia and the country in which the decisions were issued (i.e. diplomatic reciprocity)[45] If no such treaty exists, the validity of these decisions shall be assessed with reference to the validity that the country in which they were issued would grant to an analogous decision by a Colombian authority (i.e. legislative reciprocity)[46].

It must be noted that the Colombian Supreme Court of Justice has also recognised that the legislative reciprocity can be "based on legal texts or in the jurisprudential practice of the country of origin of the decision subject matter of the exequatur."[47]

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[44] Cross-Border Insolvency I. Guide to Recognition and Enforcement. INSOL International. Colombia Chapter. October 2012.

[45] "Diplomatic reciprocity occurs when Colombia and the country issuing the judicial judgment subject matter of the exequatur have signed a public treaty allowing the judgments of Colombian courts to be treated equally in the other country, and as a consideration, allowing the judgments issued in the other country to be binding in Colombia." Execution in Colombia of foreign judgments concerning debts, Cavelier Abogados, available www.Cavelier.com.

[46] "Legislative reciprocity occurs when juridical effects are recognized to the judgments of Colombian courts by the legislation of the country from which the judgment subject matter of the exequatur comes, and the judgments made by their courts have the same binding strength in Colombia." Execution in Colombia of foreign judgments concerning debts, Cavelier Abogados, available www.Cavelier.com.

[47] Supreme Court of Justice, judgment February 2 of 1994, Ref. File No 4150 Magistrate Hector Naranjo Marín.

Article 606 (GPC) sets forth the requirements for the recognition or enforcement of foreign judgments. Provisions included in international treaties prevail over Article 606 of GPC even if the treaty does not include the exequatur procedure.

The requirements for the recognition or enforcement of foreign judgments are:

(i) That the judgment does not refer to *in rem* rights over assets located in Colombian territory at the time when the proceeding began[48].

(ii) That the judgment does not breach the Colombian public policy provisions, except for rules of procedure.

(iii) That it is a final ruling according to the law of the country of origin, and it is submitted in legalised copy.

(iv) That the matter of the judgment to which it refers is not of exclusive jurisdiction of Colombian judges.

(v) That there are no proceedings or enforced judgments in Colombia concerning the same subject matter.

(vi) That if the judgment has been rendered in a contentious matter, the requirements of summons, and opportunity of opposition by the defendant have been fulfilled as provided by the law of the country of origin. This is presumed if the ruling is final.

(vii) The compliance of the exequatur procedure (Article 607 GPC).

Once the formal requirements are satisfied, the Civil Cassation Court of the Colombian Supreme Court will recognise the foreign judgment. Another judicial authority may be competent depending to any treaties to which Colombia is party, in which another judicial authority is determined.

The provisions of Law 1116 of 2006 on Cross-border insolvency provides recognition for foreign insolvency proceedings but does not provide recognition of judgments of avoidance actions which depend on the existence of an ongoing insolvency proceeding. Recognition and enforcement of these judgments are subject to the General Procedure Code.

[48] This requirement may be a barrier for the recognition or enforcement of a decision in regard of the avoidance of antecedent transactions referred to *in rem* rights.

ENGLAND AND WALES

QUESTION 1

1. In your country[1], what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Statutory

The Insolvency Act 1986

In the sub-paragraphs below each of the following grounds for challenge in order to avoid antecedent transactions will be briefly addressed[2]:

- Disclaimer of onerous properties (1.1);
- Transactions at an undervalue (1.2);
- Preferences (1.3);
- Extortionate Credit Transactions (1.4);
- Avoidance of Floating Charges (1.5); and
- Transactions Defrauding Creditors (1.6).

[1] Unless stated otherwise herein, references to "English" and "England" should be read to include "Welsh" and "Wales" respectively.

[2] This chapter is limited to corporate debtors only and does not address the avoidance of antecedent transactions where the debtor is a private person.

The legislative source for each of the above grounds for challenge is the Insolvency Act 1986 (the "IA 86"), including the Insolvency Rules 1986 (the "IR 86"). The table below provides a summary of these statutory grounds for challenge:

Grounds of Challenge	**Disclaimer of onerous property**	**Transactions at an undervalue**	**Preferences**	**Extortionate Credit Transactions**	**Avoidance of Floating Charges**	**Transactions Defrauding Creditors**
Insolvency Act Statutory Reference	Sections 178 to 182 IA 86	Section 238 IA 86	Section 239 IA 86	Section 244 IA 86	Section 245 IA 86	Section 423 IA 86
Solvency requirement of Company Company	must be in a winding up proceeding Company	must be in an administration or winding up proceeding Company	must be in an administration or winding up proceeding Company	must be in an administration or winding up proceeding Company	must be in an administration or winding up proceeding Company	can be either solvent or insolvent
Look Back Period	n/a	2 years before the onset of insolvency	6 months / 2 years before the onset of insolvency	3 years before the onset of Insolvency	12 months / 2 years before the onset of insolvency	n/a
Who can bring claim[3]	liquidator	administrator or liquidator	administrator or liquidator	administrator or liquidator	automatic invalidation of challenged charge	administrator, liquidator or victim
Connected Persons[4]	n/a	A rebuttable statutory presumption regarding the inability to pay its debts requirement exists for transactions with a connected person	The look back period is extended to 2 years for a preference given to a connected person (not being an employee only)	n/a	The look back period is extended to 2 years for a preference given to a connected person	n/a

However, under English corporate insolvency law, the provisions applying to the avoidance of antecedent transactions can not only be found in statutes, but also in common law and certain international legislation. However, before briefly addressing the common law and international legislation, it should also be mentioned that certain different rules apply to a "Bank"[5].

[3] The Department for Business, Innovation and Skills has published the UK Government's proposals on "Transparency and trust: enhancing the transparency of UK company ownership and increasing trust in UK business" dated 16 April 2014 following a consultation launched in July 2013 (https://www.gov.uk/government/consultations/company-ownership-transparency-and-trust-discussion-paper). This paper sets out possible future proposals which may allow liquidators to assign fraudulent or wrongful trading actions to third parties.

[4] A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

[5] The term "Bank" is defined in Section 2 BA 09 as "a UK institution which has permission under Part 4 of the Financial Services and Markets Act 2000 to carry on the regulated activity of accepting deposits".

The Banking Act 2009

The Banking Act 2009 ("BA 09") was enacted in order to address the situation where all or part of the business of a Bank has encountered, or is likely to encounter, a financial difficulty[6]. Bank Liquidators[7] and Bank Administrators[8] may be appointed under the BA 09 to provide for bank liquidation or bank administration accordingly[9]. The antecedent transaction remedies under the IA 86 apply to Banks in financial difficulties with certain carve-outs as set out in the BA 09. These nuances are only very briefly addressed below in relation to each ground for challenge, where relevant.

Common law

The *pari passu* principles of English corporate insolvency law favour equality among creditors, meaning that certain transactions will need to be readjusted and transactions in which property or payments are transferred by the insolvent company will have to be reversed[10]. Two important common law doctrines that will be addressed in 1.7 below are:

- The anti-deprivation principle; and
- The so-called "rule in British Eagle"[11].

These doctrines are derived from the core English law principle that an insolvent entity is not allowed to arrange its affairs in a way that frustrates the legitimate interests of the creditors of that entity[12].

International legislation

In England, the UNCITRAL Model Law on Cross-Border Insolvency (the "UNCITRAL Model Law") was implemented in the Cross-Border Insolvency Regulations 2006 (the "CBIR 2006")[13]. In addition, as a member state of the European Union, England is also bound by the Council Regulation (EC) No 1346/2000 on insolvency proceedings (the "EU Insolvency Regulation"). Furthermore, England is also a signatory to the Brussels Convention[14] (the "Brussels Convention").

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6 Section 1 BA 09
7 Section 103 BA 09
8 Section 145 BA 09
9 In short, a bank administration is used where part of the business of the Bank is sold to a commercial purchaser or transferred to a bridge bank (Section 136 BA 09).
10 Principles of Corporate Insolvency Law, Professor RM Goode, 2011, page 344
11 *British Eagle International Air Lines Ltd v Cie Nationale Air France* [1975] 1 WLR 758
12 *Higinbotham v Holme* [1812] 19 Ves Jun 88
13 It should be noted that Article 2 of Schedule 1 to the CBIR 2006 lists 13 categories of entities (such as credit institutions, building societies, insurance companies, utility companies and certain statutory bodies) to which the CBIR 2006 do not apply.
14 *The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters* dated 27 September 1968

Other features

At the outset, it is worth noting that most antecedent transactions are not automatically void. Following a successful challenge, a Court may declare an antecedent transaction void. Additionally, it should be noted that while most challenges require the company that entered into the antecedent transaction that is being challenged to be subject to an insolvency proceeding, certain challenges (such as the challenge of "Transactions Defrauding Creditors") can also be brought outside of insolvency proceedings.

1.1 Disclaimer of onerous property

The power to disclaim ownership of onerous property is an unconventional avoidance power in that it does not enable the augmentation of the assets of the estate available to creditors, but is aimed instead at the disposal of assets in order to limit the liabilities of the insolvent party (the "Debtor")[15]. For a disclaimer of onerous property challenge to be successful, the following requirements must be met:

- Only liquidators[16] have this power;
- The power can only be used in respect of property; and
- For the power to be successfully exercised it must be established that the property is "onerous".

1.1.1 Liquidators only

The power to disclaim onerous property requires the company to be in a winding up proceeding and is therefore not available to administrators in an administration proceeding or administrative receivers in administrative receivership proceeding[17].

1.1.2 Property

The term "property" is widely defined in Section 436 IA 86 as including "money, goods, things in action, land, and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property". It has been further clarified in case law[18] that "property" must involve some element of benefit or entitlement for the person holding it.

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[15] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 7.01

[16] Sections 178-182 IA 86

[17] In short, "winding up" is a liquidation focused insolvency procedure under the IA 86 pursuant to which the assets of a company are realized and distributed to creditors by a liquidator. "Administration" is a rescue focused insolvency procedure under the IA 86 where a company may be reorganized and able to continue to trade. "Administrative Receivership" is the remedy of a secured creditor which allows for the realisation of assets subject to security by the appointment of an administrative receiver. It should be noted that this remedy of administrative receivership was abolished by the Enterprise Act 2002 in all but a few limited circumstances. Administrative Receivership is, for example, still available to a holder of a qualifying floating charge where such charge was created before 15 September 2003.

[18] *Re SSSL Realisations (2002) Ltd* [2006] EWCA Civ 7 at 35

1.1.3 Onerous property

Section 178(3) IA 86 defines "onerous property" for the purpose of the disclaimer challenge as (a) any unprofitable contract and (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability upon the company to pay money or perform any other onerous act. The classic example of onerous property is leasehold property, however the power to disclaim is certainly not limited to leasehold property and extends to all onerous property[19]. In case law[20], the following 5 principles have been adopted to better understand what is meant by an "onerous contract":

- A contract is unprofitable if it imposes on the company continuing financial obligations which may be regarded detrimental to the creditors, which presumably means that the contract confers no sufficient reciprocal benefit;
- Before a contract may be unprofitable, it must give rise to prospective liabilities;
- Contracts which will delay the winding up of the company's affairs, because they are to be performed over a substantial period of time and will involve expenditures that may not be recovered, are unprofitable;
- No case has decided that a contract is unprofitable merely because it is financially disadvantageous. The cases focus on the nature and cause of the disadvantage; and
- A contract is not unprofitable merely because the company could have made, or could make, a better bargain.

In short, a critical feature of an onerous contract is that performance of the future obligations will prejudice the liquidator's obligations to realize the company's property and pay a dividend to creditors within a reasonable time – that is whether it will impede the liquidators in discharging his functions in the liquidation.[21]

1.1.4 Effect of the disclaimer

The disclaimer acts to identify the rights, interests and liabilities of a Debtor in or in respect of the property being disclaimed and acts only as far as is necessary for the purpose of releasing the Debtor from any liability. The aim of the power to disclaim onerous property is in accordance with the general aims of many of the avoidance provisions in the IA 86; namely to prevent needless depletion of the Debtor's assets by the continuance of contracts that are unprofitable or that give rise to liabilities[22]. This power does not allow the Debtor to be released from any liability that will affect the rights and liabilities of any other person[23].

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[19] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 7.02

[20] *Transmetro Corporation Ltd v. Real Investments Pty Ltd* [1999] 17 A.C.L.C. 1,313 at 21

[21] *Ibid* at [36] – [54]

[22] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 7.01.

[23] Section 178(4) IA 86

A third party who has sustained a loss or some damage as a result of the disclaimer is deemed to be an unsecured creditor in relation to the loss or damage and is therefore entitled to prove in the liquidation accordingly[24].

A liquidator may, by giving the prescribed notice[25], disclaim onerous property at any time, even if he has already taken possession of it, tried to sell or exercised rights of ownership of it[26]. However, this discretion of the liquidator can be limited when a landlord (in case of a lease) or any other person has served a so-called "notice to elect" on the liquidator[27].

1.1.5 BA 09

In the case of a Bank Administration which involves a transfer to a bridge bank, until the Bank of England has given a so called "Objective 1 Achievement Notice"[28], a notice of disclaimer may be given only with the Bank of England's consent[29].

1.1.6 Statutory exclusions

There are statutory exclusions in relation to certain financial markets. A disclaimer is not available in relation to market contracts which are connected with recognized investment exchanges or clearing houses both in the UK and overseas[30]. Similarly a disclaimer is not available in relation to transfer orders or contracts for the purposes of realizing security in payment and securities settlement systems[31].

1.2 Transactions at an undervalue

For a challenge of a transaction at an undervalue to be successful, the following requirements must be met[32]:

- The challenge must be brought by an office-holder;
- The challenge must relate to a transaction entered into by the Debtor with any person;
- The challenged transaction must be at an undervalue;
- The challenged transaction must have been entered into by the Debtor at a relevant time; and

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[24] Section 178(6) IA 86. See also *Re Park Air Services Plc; Christopher Moran Holdings Ltd -v- Bairstow and Another HL* [1999] as per Lord Millett, in which some of the issues relating to the determination of damages following a successful disclaimer are addressed.
[25] For more guidance on "the prescribed form", see IR 86 rule 4.187 and Form 4.53A.
[26] Section 178(2) IA 86
[27] Section 178(5) IA 86. Within a period of 28 days (or such longer period as the Court may allow), the liquidator will have to make a decision on whether or not to disclaim.
[28] "Objective 1 Achievement Notice" is defined as a notice given by the Bank of England notifying the Bank Administrator that the residual bank is no longer required in connection with the private sector purchaser or bridge bank (Section 139 (1) BA 09).
[29] Section 145 BA 09
[30] Section 194 (1) Company Act 2006
[31] Financial Markets and Insolvency (Settlement Facility) Regulations 1999 (SI 1999/2979)
[32] Sections 238(1) and (2) and 240(2) IA 86

- The challenged transaction must have resulted in an inability by the Debtor to pay its debts.

1.2.1 Office-holder

In this context an office-holder means either an administrator or a liquidator.[33] This means that the company whose transaction is being challenged must have either entered into an administration proceeding or gone into liquidation for this challenge to be available. For the purpose of this challenge, a company goes into liquidation if it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has already gone into liquidation by passing such resolution.[34]

1.2.2 The challenged transaction

The determination of what constitutes a transaction in this context is not always straightforward. The term 'transaction' is to be given a wide interpretation[35] and it is defined as including a 'gift, agreement or arrangement'[36]. A relatively simple example of a transaction at undervalue is where a Debtor makes a gift of its property or undertakes a burden for no consideration. However, the construction 'transaction' can become more complicated when, for example, the sale of a business incorporates more than one component transaction. The Supreme Court[37] held that where a transaction involves more than one part (for example the company agrees to sell an asset to A conditional on B agreeing to enter into a collateral agreement with the company) then the consideration for the two parts of the transaction can be combined[38].

1.2.3 At an undervalue

Pursuant to Section 238(4) IA 86, the Debtor enters into a transaction with a person at an undervalue if:

- the Debtor makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the Debtor to receive no consideration; or

- the Debtor enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the Debtor.

In terms of the consideration provided for a transaction, the court is invited to consider the adequacy of the consideration given. The leading case of *Re MC Bacon* determined that the granting of security by the Debtor does not usually amount to a transaction at an undervalue as the security given does not deplete an asset or diminish its value[39]. In other words, loss by the Debtor

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[33] Section 238(1) IA 86

[34] Section 247(2) IA 86. The time when a company "goes into liquidation" is to be distinguished from the time when its winding up "commences". See also *Mettoy Pension Trustees Ltd v. Evans* [1991] 2 All E.R. 513.

[35] *Pagemanor Ltd v Ryan* [2002] BPIR 593, affirmed [2002] EWCA Civ 1518, CA.

[36] Section 436 IA 86.

[37] At that time, the Supreme Court was known as the House of Lords

[38] *Philips v Brewin Dolphin Bell Lawne Limited* [2001] 1 WLR

[39] *Re MC Bacon Ltd* [1990] BCC 78

of the ability to apply the proceeds of the assets otherwise than in satisfaction of the secured debt is not capable of valuation on money terms, nor is the consideration received by the Debtor in return[40]. Similar reasoning may possibly be applicable to a guarantee given by the Debtor of another's indebtedness[41]. The Supreme Court[42] in *Philips v Brewin Dolphin* held that in determining the sufficiency of the consideration provided, not only the value of the consideration paid by the Debtor at the date of the transaction should be taken into account but also its value subsequently. Therefore, a subsequent decrease in value of consideration paid by the Debtor in relation to a transaction could result in that transaction being classed as a transaction at an undervalue. It must be noted that more emphasis should be placed on identifying the consideration received by the Debtor than on identifying the transaction[43].

1.2.4 Relevant time

The so-called "look back period" for a transaction at an undervalue challenge is the period of 2 years ending with the "onset of insolvency"[44]. The precise date of the onset of the insolvency of the Debtor and the 2 year time limit depends on the insolvency procedure in question.

- In an administration the onset of insolvency is the earlier of the date on which[45];
- the application to court for an administration order is issued;
- a notice of intention to appoint an administrator is filed at court otherwise; or
- the date on which the appointment of an administrator takes effect.

In a liquidation, the onset of insolvency is the date of the commencement of the winding up[46]. That date is either the date on which a winding up petition is presented to the court[47] or the date on which the Debtor passed a resolution for winding up[48].

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[40] See also *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 in which case it was questioned whether the value to the creditor of the right to have recourse to his security should invariably be left out of account when assessing the respective considerations given by the parties.
[41] Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013, sixteenth edition, Volume 1 p. 248.
[42] At that time, the Supreme Court was known as the House of Lords
[43] As per Lord Scott in *Philips v Brewin Dolphin*
[44] Section 240(1)(a) IA 86
[45] Section 240 (3)(a) – (c) IA 86
[46] Section 240(3)(e) IA 86
[47] Section 129 IA 86, in the case of a compulsory liquidation following a Court order.
[48] Section 86 IA 86 for a voluntary resolution to wind up the Debtor at the instigation of the creditors or members of the Debtor.

1.2.5 Inability to pay debt

The "relevant time" requirement can only be met if[49] the Debtor is, at that time, unable to pay its debts[50] or becomes unable to pay its debts in consequence of the challenged transaction. The burden of proof here rests with the applicant of the challenge. However, if the transaction was made with a so-called "connected person"[51], then there is a statutory presumption that the Debtor is unable to pay its debts at the time of the transaction, unless it can be otherwise shown[52].

1.2.6 Transaction at an undervalue challenge in solvent situations

As will be discussed in more detail in Section 1.6 below regarding the "Transactions Defrauding Creditors" challenge, if the transaction was entered into at an undervalue for the purpose of putting assets beyond the reach of a creditor so as to frustrate an actual or potential claim that the creditor has against the Debtor, then the transaction at an undervalue challenge can also apply in situations where the Debtor is solvent.

1.2.7 Restoration of the original position of the debtor

Once all of the requirements for the transaction at an undervalue challenge have been fulfilled to the court's satisfaction, the court is required to make an order as it thinks fit to restore the position to what it would have been if the Debtor had not entered into the transaction[53]: in other words, restoration of the original position of the Debtor. The court's discretion to undo the transaction remains unfettered, and therefore it may make a variety of orders[54]. Although the aim of the court is to restore the original position as accurately as possible, this may not be possible. It should be noted that this reasoning is not sufficient to prevent a court from making an order and the court should try to restore the position so far as practicable[55].

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[49] Section 240(2) IA 86

[50] The inability to pay its debt must be within the meaning of Section 123 IA 86, which contains both a cash-flow insolvency test and a balance sheet insolvency test.

[51] A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

[52] Section 240(2) IA 86. *Re Casa Estates (UK) Limited (in liquidation) Carman v Bucci* [2014] EWCA Civ 383, CA, demonstrates there is a high threshold for rebutting this presumption.

[53] Section 238(3) IA 86

[54] Section 241(1) IA 86 lists a number of orders that could be made. In the case of bank administrations, the Court must have regard to Objective 1 of Section 137 BA 09.

[55] *Chohan v Saggar* [1994] 1 BCLC

1.2.8 Miscellaneous

For the purposes of the Limitation Act 1980, transactions at an undervalue challenges are generally subject to a statute of limitations period of 12 years.[56] However, where the substance of the claim is not to set aside a transaction but to recover a sum the statute of limitations period is 6 years[57]. The right of the office-holder to institute proceedings to set aside a transaction at an undervalue under Section 238 IA 86 does not form part of the Debtor's property at the commencement of the administration or liquidation. It is therefore not capable of being charged by the Debtor before an administration or winding up or being sold by the administrator or liquidator afterwards[58].

1.2.9 BA 09

In the case of Bank Liquidation, anything done by the Bank in connection with the exercise of a stabilisation power under Part 1 of the BA 09 is not a transaction at an undervalue for the purposes of s 238 IA 86[59].

1.3 Preferences

For a preference challenge to be successful, the following requirements must be met:

- the challenge must be brought by an office-holder;
- the challenged transaction entered into by the Debtor must constitute a preference;
- the challenged transaction must have been entered into by the Debtor at a relevant time; and
- the challenged transaction has resulted in an inability by the Debtor to pay its debts.

1.3.1 Office-holder

This requirement is the same as for a transaction at an undervalue challenge[60]. The office-holder can be an administrator or a liquidator[61].

1.3.2 Preference

According to Section 239(4) IA 86, a company gives a preference to a person if:

- That person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; or

[56] Section 8(1) of the Limitations Act 1980
[57] *Re Priory Garage (Walthamstow) Ltd* [2001] B.P.I.R. 144
[58] *Re Yagerphone Ltd* [1935] Ch. 392; *Re Oasis Merchandising Services Ltd* [1998] Ch. 170.
[59] Section 103 BA 09
[60] See Section 1.2 above.
[61] Section 239(1) IA 86

- The company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company going into insolvent liquidation, will be better than the position he would have been in if that thing had not been done.

A payment made by a Debtor may constitute a preference, even where the payment was not made directly to the creditor or guarantor who is preferred. A payment to the Debtor or one of the Debtor's creditors, where the end result is a reduction of the amount owed to that creditor will be classed as a preference[62]. Although not expressly required under the IA 86, the improvement in the position of the defendant creditor must logically entail some advantage at the expense of other creditors[63]. A preference therefore ought not be to be found where the person benefiting from a transaction was already in a favoured position as a creditor and would therefore not affect the entitlement of the other creditors[64].

1.3.3 Influenced by a desire to bring about a preference

For a preference to exist, it must be established that the Debtor was "influenced by a desire" to bring about a preference[65]. A statutory presumption in respect of this desire exists if a company has given a preference to a person connected with the Debtor (otherwise than by reason only of being its employee)[66] at the time the preference was given, unless the contrary is shown[67].

The Debtor must have positively wished to place the preferred party into a better position subject to a hypothetical liquidation. It is, however, necessary to draw a distinction between the consequences of a Debtor's actions that are inevitable and an actual desire by the Debtor to achieve those consequences. Fittingly, if a Debtor is driven in its action by a desire to make proper commercial considerations, rather than a desire to give a preference, then the preferential act will still be valid[68]. It is insufficient in itself that a Debtor had a desire to benefit the preferred creditor, unless that desire actually influenced the decision to give a preference[69]. The test of what constitutes a preference is a subjective one[70]. A Debtor can be held to have given a preference, even if its actions are passive rather than active. A Debtor can suffer a preference where it allows something to happen where it has the power to stop or obstruct that thing from happening[71].

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62 *Re Sonatacus Ltd* [2007] EWCA Civ 31

63 Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 5.51.

64 *Ibid*

65 Section 239(5) IA 86

66 A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

67 Section 239(6) IA 86

68 *Re Fairway Magazines Limited* [1992] BCC 924

69 Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 5.96

70 In *Re M.C. Bacon Ltd* [1990] B.C.C. 78 at 87, Millett J. held that "(…) Intention is objective, desire is subjective. A man can choose the lesser of two evils without desiring either … A man is not to be taken as *desiring* all the necessary consequences of his actions … It will still be possible to provide assistance to a company in financial difficulties provided that the company is actuated only by proper commercial considerations. (…)".

71 *Parkside International Ltd (in administration)* [2008] EWHC 3654 (Ch)

1.3.4 Relevant time

The relevant time concerning a preference challenge is the time when the decision by the Debtor was made to enter into the transaction, but not the time that the transaction was effected[72]. The so-called look back period for a preference challenge is the period of 6 months ending with the "onset of insolvency"[73]. There is an extended look back period of 2 years for preferences given to connected persons[74].

The rules for establishing the precise date of the "onset of the insolvency" of the Debtor and the relevant look back period depend on the insolvency procedure in question and are similar to those addressed in Section 1.2 above for the transaction at an undervalue challenge[75].

1.3.5 Inability to pay debts

Like the similar requirement that exists for a transaction at an undervalue challenge, the "relevant time" requirement can only be met if[76] the Debtor is, at that time, unable to pay its debts[77] or becomes unable to pay its debts in consequence of the challenged transaction. However, unlike the provisions applying to transactions at an undervalue, for a preference challenge there is not a statutory presumption that the Debtor was unable to pay its debts at the time of the transaction if the transaction was with a connected person.

1.3.6 Restoration of the original position of the debtor

The observations made on this topic in Section 1.2 above relating to the transaction at an undervalue challenge also apply to a preference challenge.

1.3.7 Miscellaneous

The observations made in Section 1.2 above for the transaction at an undervalue challenge in respect of statute of limitation, and limitation on having the right to make a preference challenge either charged or transferred also apply to a preference challenge.

1.3.8 BA 09

In the case of a bank liquidation, anything done by a bank in connection with the exercise of a stabilisation power under Part 1 of the BA 09 is not a transaction at an undervalue for the purposes of Section 239 IA 86[78].

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[72] *Re MC Bacon Ltd* [1990] BCC 78. However, there is an opposing view that the definition of "preference" at Section 239(4) IA 86 is where the Debtor does anything or suffers anything to be done which, in either case, has the relevant effect of showing a preference (paragraph 14.10 *Corporate Insolvency*, Bailey, Groves and Smith, 4th Edition 2012).

[73] Section 240(1)(b) IA 86

[74] A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

[75] Section 240(3)(a)-(c) and (e) IA 86

[76] Section 240(2) IA 86

[77] The inability to pay its debt must be within the meaning of Section 123 IA 86, which contains both a cash-flow insolvency test and a balance sheet insolvency test.

[78] Section 103 BA 09

1.4 Extortionate credit transactions

A high interest rate may be justified, as a potential Debtor with financial difficulties may be regarded as a credit risk, however the rate charged may go far beyond that which would reflect this risk. This may be seen to disadvantage other creditors who have been reasonable in their dealings with the Debtor and the IA 86 accordingly provides for such transactions to be adjusted on the ground that they constitute extortionate credit transactions[79]. For an extortionate credit transaction challenge to be successful, the following requirements must be met:

- The challenge must be brought by an office-holder;
- The challenged transaction must be an extortionate transaction involving the provision of credit[80]; and
- The challenged transaction must have been entered into by the Debtor at a relevant time.

1.4.1 Office-holder

This requirement is the same as for a transaction at an undervalue challenge.[81] The office-holder can be an administrator or a liquidator.[82]

1.4.2 Extortionate transaction

Pursuant to Section 244(3) IA 86 a transaction is extortionate if, having regard to the risk accepted by the person providing the credit:

- the terms of the credit transaction are, or were such as to require grossly exorbitant payments to be made (whether unconditionally or in certain circumstances) in respect of the provision of the credit; or
- it otherwise grossly contravened ordinary principles of fair dealing.

Unusually for antecedent transaction challenges, a rebuttable statutory presumption exists that the challenged transaction is extortionate. In other words, the burden of proof always rests on the person that provided the Debtor with the credit[83]. However, in a commercial transaction where the interest rates are spelled out at the outset, the test for what is “extortionate” is a very stringent test[84].

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[79] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 6.01

[80] The term ‘credit’ is not defined under the IA 86, however under Section 9 of the Consumer Credit Act 1974, this term is defined broadly as including ‘a cash loan, and any other form of financial accommodation’.

[81] See Section 1.2 above.

[82] Section 244(1) IA 86

[83] Section 244(3) IA 86

[84] *White v Davenham Trust Ltd* [2010] EWHC 2748 (Ch); [2011] B.C.C. 77

1.4.3 Relevant time

The look back period for a extortionate credit transaction challenge is a period of 3 years ending with the day on which the Debtor entered into administration or went into liquidation[85].

1.4.4 Remedies

Pursuant to Section 244(4) IA 86 the court has extensive powers to issue an order that[86]:

- sets aside the challenged transaction in whole or in part;
- varies the terms of the transaction or security held for purposes of the challenged transaction;
- requires any person who is or was a party to the challenged transaction to repay any sums paid to that person;
- requires any person to surrender any property or security held for purposes of the challenged transaction; or
- directs accounts to be taken by any persons.

1.5 Avoidance of floating charges

The purpose of an avoidance of floating charges challenge is to prevent companies on their last legs from creating floating charges (i) to secure past debts or (ii) for moneys which do not go to swell their assets and become available for creditors[87]. This is in contrast to any security which is created in exchange for new consideration. Although the floating charge itself may be invalidated by a successful challenge, the debt itself which was secured under the charge remains valid. Such debt will now be unsecured (assuming the debt is not secured by security other than the invalidated floating charge).

For an avoidance of floating charges challenge to be successful, the following requirements must be met[88]:

- The challenge must be brought by an office-holder;
- The challenged floating charge must not be given in exchange for new consideration;
- The challenged floating charge must have been given by the Debtor at a relevant time; and
- If the person in favour of whom the challenged floating charge is created is not connected with the Debtor, the challenged floating charge must have resulted in an inability by the Debtor to pay its debts.

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[85] Section 244 (2) IA 86

[86] Section 244(5) IA 86 further clarifies that a extortionate credit transaction challenge can be exercised concurrently with a transaction at an undervalue challenge.

[87] *Re Orleans Motor Co Ltd* [1911] 2 Ch 41 at p.45

[88] Section 245 IA 86

1.5.1 Office-holder

This requirement is the same as for a transaction at an undervalue challenge[89]. The office-holder can be an administrator or a liquidator[90].

1.5.2 New consideration

Under Section 245 of the IA 86, upon a Debtor going into either administration or liquidation, a floating charge which was created at a relevant time (as explained below) will be declared invalid, other than to the extent of new consideration provided by the beneficiary of the charge[91]. According to Section 245(2) IA 86, any new consideration is carved out from the invalidation of the successfully challenged floating charge and consists of the aggregate of:

- the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the Debtor at the same time as or after, the creation of the charge[92];
- the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the Debtor; and
- the amount of such interest (if any) as is payable falling within bullet points 1 and 2 above in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

In other words, a successfully challenged floating charge will not be invalidated to the extent the charge has increased the Debtor's assets with new consideration in the ways set forth in bullet points 1, 2 and 3 above.

1.5.3 Relevant time

The so-called look back period for an avoidance of floating charges challenge is the period of 12 months ending with the "onset of insolvency"[93]. There is an extended look back period of 2 years[94] for challenges of floating charges that were created in favour of a person connected with the Debtor[95].

The rules for establishing the precise date of the "onset of the insolvency" of the Debtor and the relevant look back period depend on the insolvency procedure in question and are similar to those addressed in Section 1.2 above for the transaction at an undervalue challenge[96].

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89 See Section 1.2 above.
90 Section 245(1) IA 86
91 [A2027] Tolley's Insolvency Law, Issue 90 (October 2013)
92 Section 245(6) IA 86 explains that the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time the goods or services were supplied could reasonably have been expected to be obtained for supplying them in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the Debtor.
93 Section 245(3)(b) IA 86
94 Section 245(3)(a) IA 86
95 A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.
96 Section 245(5)(a)-(d) IA 86

1.5.4 Inability to pay debts

Like the similar requirement that exists for a transaction at an undervalue challenge, the "relevant time" requirement can only be met if[97] the Debtor is, at that time, unable to pay its debts[98] or becomes unable to pay its debts in consequence of the challenged floating charge. This requirement does not exist if the challenged floating charge was created in favour of a person connected with the Debtor[99].

1.6 Transactions defrauding creditors[100]

For a transactions defrauding creditors ("TDC") challenge to be successful, the following requirements must be met[101]:

- The TDC challenge can be brought by an office-holder and a "victim" of the challenged transaction (the "TDC Victim")[102];
- The challenged transaction must be at an undervalue; and
- The company must have entered into the challenged transaction for the purpose (the "TDC Purpose") of (i) putting assets beyond the reach of a person who is making, or may at some time make, a claim against the company or (ii) otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

1.6.1 Office-holder and TDC victim

In a case where the company is being wound up or is in administration, a TDC challenge can be brought by (i) the administrator, (ii) the liquidator, (iii) the official receiver and (with leave of the court) by a TDC Victim[103]. In any case where the TDC Victim is bound by a voluntary arrangement approved under Part I (Company Voluntary Arrangement) IA 86, a TDC challenge can be brought by the supervisor of the voluntary arrangement or by any person who (whether or not so bound) is such a victim[104]. In any other case, a TDC

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97 Section 245(4) IA 86

98 The inability to pay its debt must be within the meaning of Section 123 IA 86, which contains both a cash-flow insolvency test and a balance sheet insolvency test.

99 A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

100 There has been a provision along the lines of the transactions defrauding creditors challenge as set forth in Section 423 IA 86 in English law since 1571, and ultimately it can trace its ancestry back to the Paulian action of Roman law. See Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013, sixteenth edition, Volume 1 p. 488.

101 In relation to a Bank Liquidation anything done by the Bank in connection with the exercise of a stabilisation power under Part 1 of the BA 09 is not a transaction at an undervalue for the purposes of section 423 IA 86 (Section 103 BA 09), In relation to Bank Administration, in considering granting leave under section 424 (1) IA 86, the Court must have regard to Objective 1 of section 137 BA 09 and when considering making an order in reliance of section 425 IA 86, the Court must have regard to Objective 1 of section 137 BA 09.

102 In *Fortress Value Recovery Fund v Blue Skye Special Opportunities Fund* [2013] EWHC 14 (Comm) "victim" in the context of a TDC challenge was widely defined and it was clarified that a victim need not be a person whom the Company had in mind when entering into the challenged transaction.

103 Section 424(1)(a) IA 86. In case the company is a private individual has been adjudged bankrupt, also the trustee in bankruptcy will be entitled to bring a TDC challenge.

104 Section 424(1)(b) IA 86. In case the of a private individual, this also applies to Part VIII (Individual Voluntary Arrangements) IA 86.

challenge can be brought by a TDC Victim[105]. Any application made for a TDC challenge is to be treated as made on behalf of every TDC Victim[106]. Furthermore, the TDC Victim need not have been in the contemplation of the Debtor at the time of the transaction nor need he be immediately prejudiced by the transaction, it is enough if he is only potentially prejudiced[107]. In the appropriate case, also the Pensions Regulator[108] and the Financial Conduct Authority[109] have a right to make a TDC challenge.

1.6.2 Undervalue

The prerequisites for a transaction to be "at an undervalue" under Section 423(1) IA 86 are the same as under Section 238(4) of IA 86 as addressed in Section 1.2 above[110].

1.6.3 TDC purpose

The formation of the TDC Purpose is a subjective one. The court must be satisfied that the company actually had the intent to fulfill the TDC Purpose, not just that a reasonable person acting in the company's position would have had that intent[111]. For something to constitute a TDC Purpose, it would seem that it must be more than a mere hope or a recognition of possibility[112]. The court will consider all of the circumstances of the transaction when assessing the company's purpose, including for example, the size of a disposition in comparison to the company's available resources at the time. These assessments will take precedence over any evidence provided by the company regarding the purpose of the transaction[113].

1.6.4 Brief comparison with a transaction at an undervalue challenge

There is a considerable overlap between a TDC challenge and a transaction at an undervalue challenge as addressed in Section 1.2 above. However, key distinguishing features between the two types of challenges are[114]:

- A TDC challenge is also available in certain solvent situations and therefore not confined to situations where the company is subject to an administration or liquidation.

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[105] Section 424(1)(c) IA 86
[106] Section 424(2) IA 86
[107] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 10.02
[108] Section 58 of the Pensions Act 2004
[109] Section 375 of the FSMA 2000
[110] In the case of a private individual, a transaction entered into by the private individual with another person is also considered to be a transaction at an undervalue if the private individual enters into the transaction with the other person in consideration of marriage or the formation of a civil partnership (Section 423(1)(b) IA 86).
[111] *Hill v Spread Trustee Company Ltd and another* [2006] All ER (D) 202
[112] *Ibid* as per Arden LJ at paras 130-3 referring to Asquith LJ in *Cunliffe v Goodman* [1950] 1 ALL ER 720 commenting that a person cannot be said to have an intention merely because he contemplates that something as a possibility or if his wishes are merely a minor factor in the achievement of a particular result.
[113] *Moon v Franklin* [1996] BPIR 196. Recent cases have established that a substantial purpose to do so is sufficient (see *Spa Leasing Limtied v Lovett and Others* [1995] BCC 502 and *Concept Oil Services Ltd v En-Gin Group LLP and others* [2013] EWHC 1897).
[114] Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013, sixteenth edition, Volume 1 p. 246.

- There is no time limit (or look back period) for a TDC challenge.
- A TDC challenge may be brought not only by an office-holder, but also by a TDC Victim.
- A TDC challenge has the additional requirement of demonstrating a TDC Purpose.

1.6.5 Remedies

Pursuant to Section 423(2) IA 86 the court has a particularly broad remit of power to (i) restore the position to what it would have been if the challenged transaction had not been entered into; and (ii) protect the interests of TDC Victims[115]. Certain of the orders a court may make in relation to a successful TDC challenge are listed in (a) to (f) of Section 425(1) IA 86.

Equitable remedies – the anti – deprivation principle and the rule in British Eagle

The anti-deprivation rule aims to prevent attempts to withdraw an asset on bankruptcy or liquidation or administration of a Debtor, thereby reducing the value of the Debtor's insolvent estate to the detriment of creditors. The rule in British Eagle on the other hand reflects the principle that statutory provisions for *pro rata* distribution may not be excluded by a contract which gives one creditor more than its proper share[116]. Put simply the anti-deprivation principle acts to the effect that "one cannot contract out of the provisions of the insolvency legislation which govern the way in which assets are dealt with in a liquidation"[117]. In a corporate insolvency situation, the anti-deprivation principle applies so that the Debtor, which has attempted to reduce the value of its insolvent estate, continues to be the owner of its property, but only for the purpose of holding the property on trust for creditors in accordance with the IA 86[118]. The rule in British Eagle operates to invalidate an arrangement for the distribution of assets of a Debtor that does not accord with the *pari passu* distribution regime under English insolvency law[119].

Insolvency requirement

The anti-deprivation rule applies only upon the commencement of an administration or liquidation in respect of the Debtor[120] and the *pari passu* rule in British Eagle applies only upon the voluntary winding up of the Debtor[121].

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[115] *Dornoch Ltd v Westminster International BV [2009]* EWHC 1782 (Admlty),
[116] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services* [2012] 1 A.C. 383 para 1
[117] *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWCA Civ 1160
[118] *Ibid* at 383 para 5
[119] *Ibid* at 391. It should be noted, however, that in *Re Maxwell Communications Corp Plc (No. 2)* [1994] 1 All ER 737 it was held that nothing in a subordination agreement undermines either the *pari passu* principle or mandatory insolvency set-off rules. In *Re SSSL Realisations* [2006] EWCA Civ 7, the Court of Appeal confirmed this first instance decision by holding that contractual subordination provisions are valid on the insolvency of the Debtor.
[120] *Re Harrison* [1879] 14 Ch D 19, 25 per James LJ
[121] Section 107 IA 86.

Application

In a corporate insolvency situation, the anti-deprivation principle allows the officer holder the remedy of a constructive trust[122]. The rule in British Eagle may be brought by the office holder or a creditor[123].

QUESTION 2

2. What are common defences?

In respect of each antecedent transaction challenge, the requirements for a successful challenge have been addressed in Section 1 above. A common defence will be to argue that one or more of the requirements for a successful challenge are not met.

2.1 Transaction at an undervalue challenge and preference challenge

For a transaction at an undervalue challenge, a court shall not make an order if it is satisfied that[124]:

- The Debtor, which entered into the challenged transaction did so in good faith and for the purpose of carrying on its business; and
- At the time it did so there were reasonable grounds for believing that the challenged transaction would benefit the Debtor.

In addition, for both a transaction at an undervalue challenge and a preference challenge, court orders shall not[125]:

- prejudice any interest in property which was acquired from a person other than the Debtor and was acquired in good faith and for value, or prejudice any interest deriving from such an interest; and
- require a person who received a benefit from the challenged transaction or preference in good faith and for value to pay a sum to the office-holder, except where that person was a party to the challenged transaction or the payment is to be in respect of a preference given to that person at a time when he was a creditor of the Debtor.

In this context, there is a rebuttable statutory presumption that the interest was acquired or the benefit was received otherwise than in good faith[126] if the relevant person:

[122] [A2001] Tolley's Insolvency Law, Issue 90 (October 2013)
[123] *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services* [2012] 1 A.C. 383 (where the claimant was one of 29 Companies who as creditors had invested in notes which were subject to a swap agreement with one of the defendants)
[124] Section 238(5) IA 86
[125] Section 241(2) IA 86
[126] Section 241 (2A) IA 86

- had notice of the relevant surrounding circumstances[127] and of the relevant proceedings[128]; or

- was connected with, or an associate of, either the Debtor in question or the person with whom the Debtor entered into the challenged transaction or to whom that Debtor gave the challenged preference[129].

2.2 TDC challenge

A court order in respect of a successful TDC challenge must not[130]

- prejudice any interest in a property which was acquired from a person other than the Debtor and was acquired in good faith, for value and without notice of the relevant circumstances[131], or prejudice any interest deriving from such an interest[132]; or

- require any such person who received a benefit from the challenged transaction in good faith, for value and without notice of the relevant circumstances to pay any sum, unless he was a party to the challenged transaction.

2.3 Avoidance of a floating charge

A creditor seeking to resist its floating charge being set aside must demonstrate that the charge granted in its favour was given by the Debtor in consideration for value. In order for the charge to be validly executed, the creditor must advance consideration for the creation of the charge; commonly this consideration will be the promise to lend money[133]. The creditor should also ensure that the consideration provided in return for the floating charge is available for the Debtor to do with it as it wishes[134]. Creditors therefore providing monies to one company within a group structure may face difficulty when taking security for that money from other members of the group, such as the parent company. A floating charge taken over the assets of a parent company in return for advances made to its subsidiary could create issues for the chargee as the transaction could be set aside for lack of consideration[135].

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[127] As addressed in Section 241(3) IA 86

[128] As addressed in Sections 241 (3A), (3B) and (3C) IA 86.

[129] A person is connected with a company if (a) he is a director or shadow director of the company, or an associate of such director or shadow director, or (b) he is an associate of the company. (Section 249 IA 86). The meaning of "associate" in this context is set forth in Section 435 IA 86.

[130] Section 425(2) IA 86

[131] Relevant circumstances is defined in Section 425(3) IA 86.

[132] A "bona fide third person in good faith for value" is in this circumstance, a person unconnected to the Debtor who has acquired the property for value and has acted in relation to that acquisition in good faith. (*Midland Bank Trust Co Ltd v Green* [1981] AC 513)

[133] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 17.26-27

[134] *Re Fairway Magazines Ltd* [1992] BCC 924.

[135] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 17.34

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

To the extent there is a "foreign proceeding"[136] which is recognized in accordance with the provisions of the CBIR 2006, a foreign party qualifying as a "foreign representative"[137] has standing to make an application to the court for an order under or in connection with[138]:

- Section 138 IA 86 (a transaction at an undervalue challenge);
- Section 139 IA 86 (a preference challenge);
- Section 244 IA 86 (an Extortionate Credit Transactions challenge);
- Section 245 IA 86 (an Avoidance of Floating Charges challenge); and
- Section 423 IA 86 (a TDC challenge).

Such an application is referred to as a so-called "article 23 application"[139]. When the "foreign proceeding" is a "foreign non-main proceeding"[140], the court must be satisfied that the article 23 application relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding[141].

If at the same time, a proceeding under British insolvency law[142] is taking place regarding the Debtor, an article 23 application will also require permission by the High Court[143]. However, an article 23 application will not be available to challenge any transaction, preference or floating charge entered into or made before the date on which the CBIR 2006 came into force[144].

A foreign party qualifying as a TDC Victim has standing to pursue a TDC challenge in England[145].

[136] As defined in Article 2(i) of Schedule 1 to the CBIR 2006
[137] As defined in Article 2(j) of Schedule 1 to the CBIR 2006
[138] Article 23(1) of Schedule 1 to the CBIR 2006
[139] Article 23(2) of Schedule 1 to the CBIR 2006
[140] As defined in Article 2(h) of Schedule 1 to the CBIR 2006
[141] Article 23(5) of Schedule 1 to the CBIR 2006
[142] As defined in Article 2(b) of Schedule 1 to the CBIR 2006
[143] Article 23 (6)(a)(i) of Schedule 1 to the CBIR 2006
[144] Article 23(9) of Schedule 1 to the CBIR 2006. The effective date of the CBIR 2006 is 4 April 2006 (Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013, sixteenth edition, Volume 2 p. 180.)
[145] Article 23(1) of Schedule 1 to the CBIR 2006

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

Assuming that the foreign avoidance law requires the opening of foreign insolvency proceedings in respect of the Debtor, a distinction should be made between those European jurisdictions that are subject to the EU Insolvency Regulation and those jurisdictions that are not.

4.1 Jurisdictions subject to the EU Insolvency Regulation

If the foreign insolvency proceeding in respect of the Debtor are opened in a European jurisdiction that is subject to the EU Insolvency Regulation, then pursuant to Article 4(2)(m) of the EU Insolvency Regulation, the law of the State of the opening of proceedings shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors[146]. However, pursuant to Article 13 of the EU Insolvency Regulation, article 4(2)(m) shall not apply where the person who benefited from the act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

Recognition of the foreign insolvency proceedings and the effects of recognition are addressed in Articles 16 and 17 of the EU Insolvency Regulation.

Assuming the foreign party bringing the claim under the foreign avoidance law is the "liquidator"[147] in the recognized foreign insolvency proceedings of the Debtor, then the liquidator may exercise all the powers conferred on him by the law of the State of the opening of proceedings in the courts of another Member State, as long as no other insolvency proceedings have been opened in that other Member State nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State[148]. However, in exercising his powers, the liquidator shall comply with the law of the Member State within the territory of which he intends to take action[149].

[146] Article 4.2(m) of the EU Insolvency Act would include provisions relating the avoidance of antecedent transactions such as preferences, transactions at an undervalue etc. See Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013, sixteenth edition, Volume 2 p. 152. Examples of cases include: *Becheret Thierry v. Industrie Guido Malvestio SpA* [2005] B.C.C. 974 and *Saigon v. Deko Marty Belgium N.V.* [2009] B.C.C. 347.

[147] As defined in Article 2(b) of the EU Insolvency Regulation.

[148] Article 18(1) of the EU Insolvency Regulation

[149] Article 18(3) of the EU Insolvency Regulation

4.2 Jurisdictions not subject to the EU Insolvency Regulation

A foreign party with a foreign avoidance law claim from a jurisdiction that is not subject to the EU Insolvency Regulation, will have to rely on the CBIR 2006. Assuming the foreign party bringing the claim under the foreign avoidance law is the "foreign representative"[150] and the foreign insolvency proceedings of the Debtor is recognized as a "foreign proceeding"[151], the foreign representative is entitled to apply directly to a court in Great Britain[152].

QUESTION 5

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5. Who decides issues of foreign law?

When an English court correctly assumes jurisdiction over a dispute involving foreign law, then the English court can decide issues on foreign law by allowing parties to put in evidence a finding on a question of foreign law[153]. In short, based on expert evidence as to foreign law[154], an English court can decide issues on foreign law.

QUESTION 6

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6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Again, it is assumed that the foreign avoidance law requires foreign insolvency proceedings in respect of the Debtor to be opened.

The EU Insolvency Regulation does not address court to court assistance[155], therefore the CBIR 2006 will apply to both European jurisdictions subject to the EU Insolvency Regulation and other jurisdictions that are not.

The CBIR 2006 also applies where "assistance is sought in Great Britain by a foreign court or foreign representative in connection with foreign proceedings"[156]. An English court may cooperate directly to the maximum extent possible with foreign courts[157] and the English court is entitled to communicate directly with, or

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[150] As defined in Article 2(j) of Schedule 1 to the CBIR 2006
[151] As defined in Article 2(i) of Schedule 1 to the CBIR 2006
[152] Article 9 of Schedule 1 to the CBIR 2006
[153] Rule 33.7 of Part 33 of the Civil Procedure Rules 1998, as explained in the White Book 2013 on Civil Procedure, Volume 1, pp. 1024 and 1025.
[154] See generally Part 35.33 of the Civil Procedure Rules 1998 and on expert evidence as to foreign law 35.5.4 of the White Book 2013 on Civil Procedure, Volume 1, p. 1090.
[155] Article 31 of the EU Insolvency Regulation does address co-operation and communication amongst liquidators.
[156] Article 1(1) of Schedule 1 to the CBIR 2006
[157] Article 25(1) of Schedule 1 to the CBIR 2006

to request information or assistance directly from, foreign courts[158]. Co-operation may be implemented by any appropriate means, including, *inter alia*[159]:

- appointment of a person to act at the direction of the court; or
- communication of information by any means considered appropriate by the court.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does you country's version of the Model Law address avoidance actions under foreign law?

As stated in Section 1 above, in England, the UNCITRAL Model Law was implemented in the CBIR 2006. The British government chose to make few modifications to the UNCITRAL Model Law in enacting these regulations, although some modifications to take account of matters such as the section 426 IA 86 cooperation provision were necessitated, but these modifications were not intended to undermine the underlying aims of the UNCITRAL Model Law[160]. As addressed in Section 3 above, the CBIR 2006 does address avoidance challenges under English law in the context of article 23 applications. As addressed in Section 4 above, avoidance challenges under foreign law of European jurisdictions that are subject to the EU Insolvency Regulation, are governed by the relevant provisions of the EU Insolvency Regulations. For jurisdictions that are not subject to the EU Insolvency Regulation, it should be noted that the CBIR 2006 does not specifically address avoidance challenges under foreign law.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

Any party to insolvency proceedings may apply to the court for an order[161]:

- that any other party (i) clarify any matter which is in dispute in the proceedings, or (ii) give additional information in relation to such matter in accordance with CPR Part 18 (further information)[162]; or

[158] Article 25(2) of Schedule 1 to the CBIR 2006
[159] Article 27 of Schedule 1 to the CBIR 2006. See further UNCITRAL Practice Guide on Cross-Border Insolvency Cupertino of 1 July, 2009 accessible through the UNCITRAL website.
[160] Transaction Avoidance in Insolvencies, Second edition, Parry, Ayliffe and Shivji, 2011, at paragraph 21.98
[161] Rule 7.60(1) of the IR 86
[162] Part 18 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 1, pp. 524-533.

- to obtain disclosure from any other party in accordance with CPR Part 31 (disclosure and inspections of documents)[163].

Such an application may be made without notice being served on any other party.[164] The EU Insolvency Regulation prescribes that the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened[165]. In a recent case[166] the English court has held that where a Debtor is incorporated in another Member State (in that case in Luxembourg), but the insolvency proceedings are commenced in England, English law will be relevant as to the question of whether documents relating to the insolvency proceedings benefit from a certain legal professional privilege.

An office-holder[167] is further entitled to apply to court for an order in which any person, who has in his possession or control any property, books, papers or records to which the Debtor appears to be entitled, is required forthwith (or within such period as the court may direct) to deliver, surrender or transfer the property, books, papers or records to the office-holder[168].

QUESTION 9

9. How are litigation fees and costs assessed?

In all court proceedings, costs are always awarded at the discretion of the Court, the only exceptions being where:

i) There is a contractual agreement between the parties which binds the court;

ii) A claimant discontinues a claim[169]; or

iii) A "Part 36 Offer" is made under CPR 36[170].

[163] Part 31 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 1, pp. 886-966.

[164] Rule 7.60(2) of the IR 86

[165] Article 4(1) of the EU Insolvency Regulation

[166] *Andrew Lawrence Hosking, Simon James Bonney (Joint Liquidators of Hellas Telecommunications (Luxembourg)) v Nauta Dutilh Avocats Luxembourg, Margaretha Wilkenhuysen, Jean-Michel Schmit, Josee Weydert, Wind Telecom S.p.A* [2013] WL 3811077

[167] Meaning the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be (Section 234(1) IA 86).

[168] Section 234(2) IA 86.A similar power exists under Section 236(2) IA 86 where a Court – on the application of an office-holder can summon to appear before it any person whom the Court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the Debtor.

[169] Part 38.6 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 2, pp. 1168-1171. In this instance it would be the Claimant that would be liable for costs.

[170] Part 36 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 2, pp. 1129-1154. A Part 36 Offer is an offer to settle made by one party to another party and if the particular rules set out in detail in the Civil Procedure Rules are followed, then the Part 36 Offer will be given without prejudice except to costs status..

The general rule under English law for costs is that the unsuccessful party will be ordered to pay the costs of the successful party, however the court may make a different order[171].

Claims relating to antecedent transactions can be broadly divided in to two groups:

i) claims which are brought by either the administrator or liquidator; and

ii) claims which are brought by another aggrieved person, i.e. a TDC Victim.

In relation to the first category, if the challenge at court by the insolvency practitioner is successfully made against the Debtor, then the fees and expenses incurred by the insolvency practitioner may be recovered from the estate of the insolvent Debtor[172]. However if the successful claim is made by the insolvency practitioner and brought against both the Debtor and an existing creditor (for example the creditor which received a preference), then both the estate of the insolvent Debtor and the existing creditor will be liable for the costs of the insolvency practitioner relating to the court challenge[173]. Should the claim by the insolvency practitioner be unsuccessful, then the expenses relating to the claim will still be expenses of the insolvency practitioner and so long as reasonably incurred and reasonable in amount, still chargeable to the estate of the Debtor as expenses[174].

Where a TDC Victim brings a successful claim against a Debtor, the payment of the litigation costs would usually fall to the Debtor. Should the Debtor be solvent at the time of the successful claim, then the costs would usually be awarded by the court against the Debtor and directly payable by the Debtor[175]. If the Debtor is however insolvent at the time of the successful challenge, then the litigation costs will become provable debts payable by the insolvent estate of the Debtor[176]. Should the TDC Victim be unsuccessful in its claim, then as the unsuccessful party, it will usually be ordered to pay its own costs and the costs of the Debtor.

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[171] Part 44 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 2, pp. 1309.

[172] In an administration, the costs may be treated as expenses properly incurred by the administrator in performing his functions as administrator within the meaning of rule 2.67 of the IR 86 (SI 1986/1925). In a liquidation, they may be treated as expenses incurred in preserving and realising the assets of the company, including the conduct of legal proceedings, as set out in rule 4.218 of the IR 86.

[173] In practice, in the case of a loan agreement, the creditor is likely to have acquired an indemnity from the Debtor at the outset of its provision of credit to the Debtor, covering, amongst other things, all litigation costs that may arise in relation to the credit. (see Section 7 of the LMA Term and Revolving Facilities Agreement: http://www.lma.eu.com/documents.aspx)

[174] Rule 2.67 of the IR 86 (SI 1986/1925)

[175] Part 44 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 2, pp. 1309.

[176] Rule 12.3 of the IR 86

Where the costs of any person are payable as an expense out of the insolvent estate, the amount payable must be decided by detailed assessment, unless agreed between the office-holder and the person entitled to payment[177]. In the absence of an agreement between the office-holder and the person entitled to payment, the office-holder may serve notice[178] requiring that person to commence detailed assessment proceedings in accordance with CPR 47[179]. Detailed assessment proceedings must be commenced in the court to which the insolvency proceedings are allocated or, where in relation to a Debtor there is no such court, any court having jurisdiction to wind up the Debtor[180]. The CBIR 2006 provides that in any proceedings before the English court, the court may order costs to be decided by detailed assessment[181].

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

For the purpose of answering this question, it is assumed that a foreign avoidance of antecedent transaction transfer challenge requires the Debtor to be in a foreign insolvency proceeding.

10.1 Jurisdictions subject to the Brussels Convention

The Brussels Convention applies between its contracting parties. Article 26 of the Brussels Regulation provides that a judgment[182] given in a Member State shall be recognized in other Member States without any special procedure being required[183]. This applies in England to the effect that a judgment given by court of another Member State in which a challenge of an antecedent transaction under that foreign law is awarded will be recognized and enforceable by the English courts.

[177] Rule 7.34(1) of the IR 86

[178] Rule 7.34(2) of the IR 86

[179] Part 47 of the Civil Procedure Rules 1998, as further explained in the White Book 2013 on Civil Procedure, Volume 1, pp. 1470-1520.

[180] Rule 7.34(3) of the IR 86. For the rules on procedure where detailed assessment is required, also see rules 7.35-7.42 of the IR 86.

[181] Article 25 of Schedule 2 to the CBIR 2006. See also articles 65 and 66 of Schedule 2 to the CBIR 2006.

[182] Article 32 of the Brussels Regulation defines "judgement" as any judgment given by a Court or tribunal of a Contracting State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the Court.

[183] This is subject to paragraph 1 of Article 27 of the Brussels Regulation which sets out that a judgment shall not be recognised if such recognition is contrary to public policy in the State in which recognition is sought and paragraphs 2 to 4 set out further grounds for refusal of enforcement.

10.2 Commonwealth states or jurisdictions with which the UK has a Bilateral Treaty

Under the Administration of Justice Act 1920, a judgment obtained in the superior court of any of the members of the Commonwealth outside the UK[184] may be registered and enforced in England[185]. Similarly, judgments obtained in the higher courts of specified foreign countries with which the UK has entered into bilateral treaties with may be enforced by registration in the UK[186].

10.3 Foreign state with which there is no treaty with the UK

In the Rubin Case[187] the Supreme Court held that a default judgment setting aside an antecedent transaction that was handed down by the New York court against a defendant, who was not present at the trial in New York and located in the United Kingdom, was not enforceable in England[188].

[184] A current list of the Commonwealth member countries can be found at (http://thecommonwealth.org/member-countries)

[185] Section 9 (1) – (3) Administration of Justice Act 1920

[186] Section 2 of the Foreign Judgments (Reciprocal Enforcement) Act 1933

[187] *Rubin and another (Respondents) v Eurofinance SA and others (Appellants) and New Cap Reinsurance orporation (In Liquidation) and another (Respondents/Cross Appellants) v A E Grant and others as Members of Lloyd's Syndicate 991 for the 1997 Year of Account and another (Appellants/Cross Respondents)* [2012] UKSC 46

[188] It should be noted that a key factor in this non recognition by the Supreme Court was the fact that the defendant had not appeared or otherwise subjected itself to the jurisdiction of the New York court that rendered the default judgment against the defendant.

FRANCE

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Under French law, the provisions of Articles L. 632-1 to L. 632-4 of the Commercial Code enable a specific action against payments, transactions or commitments which were made between the time when the company is actually unable to pay its debts when they fall due ("*état de cessation des paiements*" literally translated as default in payment - CDP) and the date of the opening of an insolvency proceeding (this twilight period is called "*période suspecte*").

The consequence of such an action, if granted, is that these transactions become null and void.

The idea is to challenge an unfair transaction by the debtor based on a breach of equality between the creditors due to this commitment or transaction that would damage the ability of the debtor to restructure its company or its assets in the event of liquidation.

These provisions on avoidance transactions apply both in administration and liquidation proceedings through Articles L. 632-1 to L. 632-4 of the Commercial Code for administration and by reference to provisions of Article L. 641-14 of the Commercial Code for liquidations.

These provisions do not exist in the corpus of the new "*safeguard*" or "*accelerated financial safeguard*" according to the necessary lack of default of payments required for entering into this proceeding.

However, all payments, transactions or commitments made by the debtor during the twilight period are not held null and void. Indeed, the required legal certainty and the warranted ignorance of creditors of their debtors' insolvency ("*default in payment*") require limiting nullity only to fraudulent acts.

Hence, the provisions of the Commercial Code distinguish 2 types of nullity; (i) automatic and (ii) non automatic:

1.1 Automatic nullity

The provisions of Article L. 632-1 of the Commercial Code enumerate 11 specific causes of automatic nullity performed by the debtor after the date on which insolvency was declared ("*default in payment*"):

(i) all free transfers of moveable or immoveable property;

(ii) any commutative contract in which the debtor's obligations substantially exceed those of the other party;

(iii) any payment, however effected, of debts not due on the date of payment;

(iv) any payment for debts due made other than in cash, negotiable instruments, bank transfers, the transfer vouchers referred to in Law No. 81-1 of 2 January 1981 facilitating corporate credit, or any other method of payment generally accepted in business dealings;

(v) Any deposit and any consignment of funds made, failing a judicial decision having res *judicata status*;

(vi) any contractual mortgage, any mortgage ordered by the court, or any statutory mortgage between spouses, and any hypothecation right or pledge registered on the debtor's property for debts previously contracted;

(vii) any protective measure, unless the registration or the distraining order predates the date of cessation of payment;

(viii) any authorisation and purchase option;

(ix) any transfer of property or any transfer of rights in a trust estate unless this transfer has taken place by way of a guarantee of a debt simultaneously contracted;

(x) any amendment to a trust contract affecting rights or property already transferred in a trust estate place by way of a guarantee of a debt contracted prior to the amendment; and

(xi) where the debtor is a limited liability individual entrepreneur, any allocation or change in any allocation of a good, excluding the income payment, impoverishing the estate for the benefit of another estate of this entrepreneur.

1.2 Non automatic nullity

According to the Article L 632-2 of the Commercial Code, the nullity of a transaction can also be granted by the judge if he or she is satisfied that those who have dealt with the company after the date of its insolvency ("*default in payment*") were fully aware that the company was in default. This nullity can also apply to transactions made up to six months before the default according to Article L 632-1-II of the Commercial Code.

There is a particular aspect in French law regarding free settlements that stipulates that they can be voided up to 2 years before the default in payment.

Moreover, according to the Law of 26 July 2005, all enforcement processes can be voided on these grounds, as long as this measure has been executed after the company has been found in default, and being assured that the pursuant was fully aware that the company was insolvent.

We have to emphasise that for all these cases of non automatic nullities, the Court has to be convinced of the knowledge of the debtor's default by the creditor at the time of the transaction, and the final decision is with the Court according to its sovereign power (*Chambre commerciale de la Cour de cassation, 25 June 1991).*

QUESTION 2

2. What are common defences?

According to Article L. 632-4 of the Commercial Code, the avoidance actions are brought only by the judicial administrator, the judicial liquidator, the plan performance supervisor or the public prosecutor. Neither the creditor nor the debtor is allowed to bring an avoidance action (*Chambre commerciale de la Cour de cassation*, 6 May 1997; 12 June 2001).

Article L. 622-20 of the Commercial Code adds that a "controller" is allowed to act directly on behalf of the creditors in case of lack of diligence of the insolvency practitioner.

Avoidance actions are subject to the exclusive jurisdiction of the court opening the insolvency proceedings (*Chambre commerciale de la Cour de cassation*, 7 April 2009) by summons.

These nullities can be challenged by different means of defence by the debtor or the creditor concerned. They are as follows:

2.1 Date of the transaction

First of all, the temporal criterion is important; the only avoidance transaction that can be condemned is a transaction concluded within the period between the insolvency ("*default in payment*") of the company and the opening of an insolvency proceeding.

According to French law this period cannot be any longer than 18 months.

Accordingly, if it is proved that the transaction has been concluded outside this specific period, the judge cannot invalidate it or nullify it.

2.2 Proof of knowledge

Besides specific automatic cases pointed out in Article L. 632-1 of the Commercial Code, the proof of knowledge of insolvency of the debtor is very often difficult to argue. The jurisprudence is restrictive in its approach and the Court has to be satisfied that this default in payment could not be ignored by the contracting party.

2.3 Prescription of action

Article L. 632-4 of the Commercial Code does not provide any deadline for these actions against avoidance transactions. However, the Supreme Court (*Chambre commerciale de la Cour de cassation*, 12 November 1991) decided that the Court could not invalidate such a transaction after the bankruptcy judge had approved the claim of the same particular claimant.

2.4 *Action paulienne*

Creditors are also allowed to bring an "*actio paulienne*" provided by Article 1167 of the Civil Code against all acts made by debtor (*Chambre commerciale de la Cour de cassation*, 8 October 1996) even if these acts can't be held null and void on the legal basis of Articles L. 632-1 to L. 632-4 of the Commercial Code. Contrary to the nullity ordered by the insolvency court which has an *erga omnes* effect, the contested act on the ground of *paulienne* fraud is only unenforceable which means that the unenforceability of it will only benefit the prosecuting creditor.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

On an international level, it is generally admitted that the law which is applied to the insolvency proceeding is the law of the country where the proceeding was initially opened.

Hence, where the insolvency proceedings are opened in France, the law which applies to avoidance actions is the French law.

Indeed, where the insolvency proceedings are opened in France, the EU Regulation on insolvency proceeding of 29 May 2000 applies. Where the centre of a debtor's main interests is situated in the EU, according to Article 4(2)(m) of the EU Regulation, "*the law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular: […] the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors*". But Article 13 of the Regulation provides that "*Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case*".

French international private law also states that the law which applies to avoidance actions is the law of the country where the proceeding was initially opened (*Chambre commerciale de la Cour de cassation*, 2 October 2012).

The avoidance actions are part of the French insolvency regime. This insolvency regime prevails on contract law and is applicable to these avoidance actions in case of opening an insolvency procedure in France. The *lex concursus* prevails on *lex contractus*.

Accordingly, a foreign party who wishes to act against an antecedent transaction after the opening of an insolvency proceeding in France must follow the rules stipulated under the French Commercial Code.

Hence, where the insolvency proceedings are opened in France, the law which applies to the avoidance action is French law.

Now, according to article L 632-4, any action against an antecedent transaction concluded within this *période suspecte* is reserved for the insolvency practitioner appointed by the Court; the judicial administrator or insolvency practitioner acting as a creditors 'representative or as a judicial liquidator, or to the state representative (Public prosecutor).

Since the application in 2006 of the "Safeguard law" of 26 July 2005, Article L. 622-20 of the Commercial Code provides for the ability of the aforementioned "controller" to act directly on behalf of the creditors in case there is lack of diligence by the insolvency practitioner.

Consequently, other than this hypothesis, these actions specific to insolvency proceedings cannot be pursued directly by the foreign party except where the person who benefited from an act detrimental to all the creditors can provide proof that the act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that the law does not allow any means of challenging that act in the relevant case.

The only case that would allow a foreign creditor to take a direct action against an antedecent transaction outside insolvency specific legislation would be by way of an "*action paulienne*". It has been admitted by a decision of the Supreme Court ("*Cour de cassation*") that such an action can be launched by any person with an interest against a transaction carried out outside the *période suspecte* or within, but not covered by, an aforementioned text on antecedent transactions (*Chambre commerciale de la Cour de cassation*, 8 October 1996). This action could only be beneficial to the pursuant, and the claimant is obliged to provide evidence of fraud.

In that case, the Brussels I Regulation in principle applies to avoidance actions brought by creditors, provided that the defendant (i.e. the counterparty of the insolvent debtor) is domiciled in a member state of the European Union (including Denmark), which as a general rule provides that the defendant in an avoidance action may be sued in the courts of the member state in which it is domiciled (article 2(1) Brussels I Regulation).

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

A foreign party cannot, in principle, bring a claim under foreign avoidance law against a defendant in France.

As stated above, the main criterion is to know where the insolvency proceeding was initially opened.

According to the *lex fori concursus*, if the insolvency proceeding is opened in France, the applicable law is French law. Consequently, a claim must be brought under French law and cannot be brought under foreign law.

An action sought in order to void a transaction must therefore follow the proceeding and the rules stated above. The main reason why insolvency rules apply, versus the law governing the contract, is that the contract is not void in itself but its avoidance is the consequence of the opening of an insolvency proceeding. For a claim it is different, a creditor can declare a claim to the insolvency practitioner, which can be challenged later on and accepted, or not, as part of the estate by the bankruptcy judge.

The answer is different in the case of a proceeding opened outside France. The foreign proceeding will guide the action even if the transferee is in France and even if French law would not have voided the transaction in its own corpus.

On the other hand, the question of enforcement of such a foreign judgment will have to comply with French requirements with an *exequatur* that states how a foreign judgment is to be executed.

QUESTION 5

5. Who decides issues of foreign law?

In principle the French court is presumed to know the law, including foreign law (*iura novit curia*). Should the court require (additional) information on the content of the foreign law, it can decide at its own discretion in which way it wishes to obtain information regarding the content of the foreign law that is applicable. Generally the court can request for information on foreign law from the designated foreign body under the European Convention on Information on Foreign Law and the parties.

The European Convention on Information on Foreign Law applies in case the state of both the requesting authority and the requested authority are party to the Foreign Law Convention. The Foreign Law Convention allows a judicial authority, such as the French court, to request designated national liaison bodies of other contracting states to provide it with information on the requested state's law and procedure in civil and commercial fields as well as on their judicial organisation. The designated body to whom the request for information has been made is obliged to follow up this request and must respond to the request as soon as possible. French courts do not often use this option in order to obtain information.

The court can also request the parties to the proceedings to provide the court with information on the content of foreign law (*Première chambre civile de la Cour de cassation*, 13 November 2003). In practice, such a request is usually complied with. A common form of supplying the French court with such information is by means of an expert opinion (*Chambre civile de la Cour de cassation*, 19 October 1971) or an expert testimony by a foreign legal expert (*Première chambre civile de la Cour de cassation*, 30 January 2007).

If the court is not able to determine the content of the foreign law and should a legal ground and a prevailing doctrine that deals with the determination of the relevant foreign issue not be available, French courts rely on principles of French law (Première chambre civile de la Cour de cassation, 21 November 2006).

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Based on the Foreign Law Convention, a transmitting agency of another party to the Foreign Law Convention can request the designated French body for information on *inter alia* French avoidance law.

Court to court protocols in case of cross-border insolvency are not so common but in recent cross-border cases there appears to be more and more co-operation between insolvency practitioners, particularly within Europe, according to the EU Regulation on insolvency proceeding of 29 May 2000 rules.

Indeed, EIR (European Insolvency Regulation 1346/2000) has set up special rules for conflicting laws within Europe, and which are applicable in France, that can create principal and secondary proceedings in cross-border cases. Secondary proceedings are of course governed by the principal proceeding. The co-operation of IPs and courts is becoming stronger within the international context of cross-border companies.

The project of reform of the EIR that should come about in 2014 could also give more visibility on how groups of companies within Europe are dealt with, and reinforce court to court co-operation that would lead to efficient handling of avoidance transaction in cross-border contexts.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

France has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

In relation to debtors with their COMI in a member state of the European Union (with the exception of Denmark), the Insolvency Regulation provides for rules regarding cross-border insolvencies that are to a large extent similar to the UNCITRAL Model Law on Cross-Border Insolvency.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

There are no specific rules regarding disclosure or discovery in France.

Historically, creditors have not had access to the proceedings; they are represented by an insolvency practitioner during the administration process who takes the lead of the process.

Of course any discovery by a claimant can be brought to the attention of the insolvency practitioner and the Court but the counsel of a claimant can be granted access to the proceeding only in certain cases and through a specific proceeding; he must be appointed "controlling party, controller" by the bankruptcy judge.

The status of the controlling party may be granted by the court to a claimant who justifies provisions of article L 621-10 and L 621-11. The controller and its counsels will be informed of details of the proceeding and will be heard by the court during the insolvency proceeding.

The main costs for obtaining this status are the claimant's counsel costs.

The conduct of the proceedings has no particular specificities. The general rules on civil procedure apply (Articles 132 à 137 of Civil Procedure Code). Hence, the party who relies on a document is bound to disclose it to the other party. Service of documents must be spontaneous.

If the service of documents has not been carried out (spontaneously), the judge may, without any formality, be requested to order such service.

The judge sets, if necessary, under a periodic penalty payment, the time-limit and, where applicable, the terms and conditions of the service. The judge may exclude from the debate those documents which have not been served in due time.

The party who does not return the documents served may be compelled to do so, if necessary, under a periodic penalty payment. The amount of the periodic penalty payment may be determined by the judge who ordered it.

QUESTION 9

9. How are litigation fees and costs assessed?

There are no specific rules regarding fees and costs in avoidance litigation in France.

Legal costs are based on a pricing system and their amount is fixed at a flat rate in advance. Further, legal cost will be borne by the losing party, unless the judge, by a reasoned decision, imposes the whole or part of it on another party.

According to article 700 of Civil Procedure Code, the judge will order the party obliged to pay for legal costs or, in default, the losing party, to pay to the other party the amount which he will fix on the basis of the sums outlayed but not included in the legal costs.

The judge will take into consideration the rules of equity and the financial condition of the party ordered to pay. He may, even *sua sponte*, for reasons based on the same considerations, decide that there is no need for such order.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Should a creditor have been able to obtain a judgment from a court of a European Union member state against the transferee (i.e. the counterparty of the debtor), such judgment will in principle be recognised based in France without any further special procedure being required (based on article 33 Brussels I Regulation). However, leave to enforce (*exequatur*) from the French court is required (article 509 Civil Procedures Code).

Based on article 25 of the EU Insolvency Regulation judgments handed down by the competent court that derive directly from the insolvency proceedings and are closely linked with them are automatically recognised in France. In line with the *Deko Marty* decision, this includes judgments in relation to avoidance actions by virtue of insolvency (CJEU 12 February 2009, C-339/07 (*Deko Marty*)). The recognition of such judgment in France can only be refused in case the enforcement would be manifestly contrary to the French public policy (article 26 Insolvency Regulation), which is seldom the case. The articles regarding enforcement of the Brussels I Regulation apply to the enforcement of the judgment (see article 25(1) Insolvency Regulation), thus, as described above, leave to enforce (exequatur) from the French court is required. It should be noted that the grounds for refusing recognition and enforcement described in the Brussels I Regulation (see above) are not applicable in case of judgments that are recognised based upon the Insolvency Regulation.

Apart from the Insolvency Regulation and Brussels I Regulation, there are no other regulations, treaties or conventions arranging the recognition and enforcement of such judgments. In such case French law applies, the enforceability of a foreign judgement in France implies the proceeding of an exequatur.

This proceeding is brought before the Civil Court (*Tribunal de Grande Instance*) by a lawyer.

The judge must certify that the:

– decision is definitive and enforceable in the country of origin;

– proceeding has respected the rights of the defence;

– judgment is not contrary to rules protecting human dignity.

When granted, the *exequatur* gives full effect to a foreign judgment as if it had been rendered in France.

GERMANY

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

In Germany, avoidance of transactions or - as German law states it: legal acts (*Rechtshandlungen*) - in an insolvency is governed by Sec. 129 et seq. of the German Insolvency Code ("*Insolvenzordnung*" or in short "InsO").

As a prerequisite for any avoidance action, Sec. 129 InsO requires that a transaction creates a disadvantage for creditors of the insolvent debtor.

German law recognises two different types of disadvantages: Direct disadvantage (*unmittelbare Benachteiligung*) and indirect disadvantage (*mittelbare* Benachteiligung).

A direct disadvantage is given if the legal act itself creates the disadvantage. This is the case if a certain legal act does not trigger an equivalent compensation, for example, if the insolvent debtor sold assets below their value or bartered away assets, such a deal caused a direct disadvantage for the remaining creditors.

An indirect disadvantage is given if the legal act was the basis for a later disadvantage, for example, if the insolvent debtor sold assets at or even above their value, no direct disadvantage is given and the debtor received the same or even more value than it gave away. However, if the debtor has spent the money and thus the money is no longer available for the remaining creditors, this indirectly creates a disadvantage for them. In practice, the criteria of indirect disadvantage are very often fulfilled.

Some norms under German insolvency law require a direct disadvantage of the remaining creditors. In general however, it suffices if a disadvantage is caused indirectly.

Such indirect or direct disadvantage is a basic requirement for avoidance but in itself does not create an avoidance claim. In addition, the requirements of a special avoidance rule need to be given. German law insofar provides for the following avoidance rules.

1.1 Avoidance of congruent cover (Sec. 130 InsO)

Avoidance is possible in case the creditor got exactly what he has entitled to within a period of three months before filing of the application for insolvency when at the point of time of the legal act the debtor had been illiquid and the creditor knew thereof or after the filing, if the creditor knew of the illiquidity or the filing.

1.2 Avoidance of incongruent cover (Sec 131 InsO)

Avoidance is possible in case the creditor receives something else than what he was entitled to, e.g. not normal payment but by foreclosure proceedings, within a period of three months before filing of the application for insolvency. In the first month before or after the filing, no further requirements are given. In the second and third month before filing, in addition the debtor needed to be illiquid or the creditor had to know that the legal act was to the disadvantage of other creditors.

These two Sections 130 and 131 InsO are of major importance in practice.

1.3 Avoidance of legal acts, which are directly disadvantageous for the creditors (Sec. 132 InsO)

Avoidance is possible in case the legal act is directly disadvantageous within a period of three months before filing of the application for insolvency when at the point of time of the legal act the debtor had been illiquid and the creditor knew thereof or after the filing, if the creditor knew of the illiquidity or the filing.

Avoidance in accordance with this Sec. 132 InsO had relatively minor importance in practice.

1.4 Avoidance on the grounds of intentional fraudulent trading (Sec. 133 InsO)

Avoidance is possible in case of intentional fraudulent trading by the debtor within a period of ten years before or after filing of the application for insolvency, and at the point of time of the legal act the creditor knew of the debtor's fraudulent intent.

Sec. 133 InsO becomes more important in practice as the jurisdiction of the German Federal Supreme Court created several assumptions for the intentional fraudulent trading on which the insolvency administrator can rely on. The German Federal Supreme Court held that the insolvency administrator pursuing an avoidance claim may show that the debtor acted with fraudulent intent by proving that it was illiquid or imminently illiquid at the point of time the legal act was done, and by showing that the debtor knew that there are or will be other creditors (such knowledge of other creditors will almost always be the case). The creditor's knowledge of the fraudulent intent of the debtor is assumed by law if the creditor knew of the illiquidity or imminent illiquidity of the debtor. Thus, the administrator only needs to show that the debtor was illiquid or imminently illiquid at the point of time of the legal act and the creditor knew thereof. This in principle triggers the assumption that the debtor acted with fraudulent intent and that the creditor knew this. As Sec. 133 InsO allows for avoidance of legal acts up to ten years prior to the filing of the application, this is a very far-reaching instrument. There are currently discussions on how to deal with this Section in practice and whether the legislator needs to interfere. However, no concrete measures have been taken by the legislator to narrow down the scope of Sec. 133 InsO yet.

1.5 Avoidance of gratuitous acts (Sec. 134 InsO)

Avoidance is possible in case of gratuitous acts of the debtor within a period of four years before or after filing of the application for insolvency.

Section 134 InsO has some relevance in practice as the German Federal Supreme Court considers not only donations, but also several other acts as gratuitous. This is often the case with cash-pools, when the cash-pool leader effects payment on a third party's claim against the already insolvent debtor.

1.6 Avoidance of payments on shareholder loans (Sec. 135 InsO)

Avoidance is possible in case of payment on shareholder loans or comparable acts within the last year before or after filing of the application for insolvency.

Sec. 135 InsO is quite new and has come into effect only in November 2008, however, due to the lack of further requirements as illiquidity, knowledge thereof and the coverage of comparable acts it is to be expected that this Sec. will be relevant in practice.

Next to avoidance under the insolvency regime, German law recognises avoidance actions of any creditor with an enforcement order under certain preconditions, which are not elaborated in detail.

QUESTION 2

2. What are common defences?

According to Sec. 142 InsO, spot business transactions with a justified compensation are not subject to avoidance except for avoidance on the grounds of intentional fraudulent trading (Sec. 133 InsO). However, the exchange of performances has to happen within a narrow time frame of some weeks. In practice, it is not very often that this defence can be invoked.

The two major defence lines are to contest the illiquidity of the debtor and the knowledge of the creditor receiving something, e.g. payment, thereof. Without knowledge of the creditor and its good faith in the solvency of the debtor, the requirements for the most important avoidance actions of congruent cover (Sec. 130 InsO), incongruent cover (Sec 131 InsO) within the second and third month before filing, and also on the grounds of intentional fraudulent trading (Sec. 133 InsO) are difficult to establish.

In particular in European cross-border cases the defendant may defend itself in accordance with Art. 13 of the "Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings ("European Insolvency Regulation") by arguing that the transaction is subject to the law of another member state and would not be avoidable under such law.

The defence of the statute of limitation does not play a major role in practice as avoidance claims under German law become time - barred only after three years after the end of the year in which the final insolvency proceedings have been initiated.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

In principle, any foreign party may pursue claims in the German Courts as long as the competency of the German courts is given and the German law acknowledges the representation of the debtor. For insolvency proceedings in member states of the European Union, for which the European Insolvency Regulation applies, the automatic recognition of the insolvency administrator is governed by Sec. 18 of the European Insolvency Regulation. Sec. 18 paragraph 2 of the European Insolvency Regulation explicitly entitles the (foreign) insolvency administrator to pursue avoidance actions.

For non-EU member states, the competency of the administrator has to be evaluated in each case, however, as German law acknowledges the principle of universalism, this will generally be the case. Exceptions may be made if the courts opening the proceedings would not be competent to do so under German law or if the acknowledgements violate the *ordre public*.

In practice, one barrier to use the German courts might be the compulsory use of German language in German court proceedings, accompanied with the burden to translate all documents, including exhibits. In practice, a lot of German judges do accept exhibits in the English language, however, if the court requires a translation, the party submitting the document needs to obtain a certified translation.

Foreign parties with their seat outside the European Union further on request of the defendant need to provide security for costs, the amount of which lies in the discretion of the court.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

In principle, German courts may also decide on claims under foreign avoidance laws, on the assumption that the German court is competent to decide on the case. In practice, this is not very common.

QUESTION 5

5. Who decides issues of foreign law?

In Germany, judges are considered competent to decide on the basis of foreign law. Typically, a German judge will rely on the expertise of a German expert, often a university professor teaching foreign law. Such an expert will be appointed by the court and renders his opinion independent from the parties. Generally, such expert opinion is rendered in written form and the parties do have the possibility to ask questions in a later hearing.

The result of the expert opinion, however, is not binding. The court itself has to decide the question of foreign law and may deviate from the expert's opinion. This is regularly the case if the parties provide the court with respective counter - opinions.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Foreign courts may generally seek assistance from German courts if such assistance is provided for in treaties or agreements. This for example applies for matters of evidence taking, or enforcement issues. German courts generally do not provide assistance as to the interpretation of German law.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Germany has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

German insolvency law does not provide for special disclosure or discovery procedures in insolvency litigation matters. German courts in insolvency litigation matters insofar need to rely on the German Code of Civil Procedure, which only provides for very limited means of discovery or disclosure.

In principle, German civil procedural law does not provide for sophisticated document production procedures, and in particular does not allow "fishing expeditions". A party may request disclosure of documents only if it has a claim to be provided with specified documents, for example if the document has been produced by the other party (there are no common examples in insolvency settings, one of the common examples for a court ordering to disclose documents are medical reports, which a patient may claim from its physician). In other cases, if one party in the proceedings has referred to a document, it is in the court's discretion to order the other party to disclose such a document. In practice, German courts, however, are very reluctant to order such disclosure.

In insolvency related litigation and in particular in avoidance actions, one of the most important factors is the point of time when the debtor became illiquid or over-indebted. The burden of proof for such illiquidity or over-indebtedness at a certain point of time generally lies with the insolvency administrator avoiding any antecedent transaction. In order to establish this, the managing director of the insolvency debtor is required to co-operate with the insolvency administrator and has to answer questions as well as provide any documentation available. The opponent in a litigation, however, is usually not required to assist the insolvency administrator.

QUESTION 9

9. How are litigation fees and costs assessed?

The party prevailing in any litigation before the state courts is in principle entitled to reimbursement of its statutory lawyer's fees and the court costs. The statutory lawyer's fees are calculated depending on the value in dispute and are independent from the hours worked. There is a cap for the value in dispute as basis for lawyer's fees of EUR 30 million. Even if the value in dispute is higher, the statutory lawyer's fees are only calculated on the basis of this cap. There is no discussion about the reasonableness of the fees.

In practice, in cross-border litigation cases lawyers usually work on an hourly rate basis, however, they are required to charge at least the statutory fees. If the hourly fees exceed the statutory fees, which is likely in most complex cases, the reimbursement claim of the prevailing party will anyway be restricted to the statutory fees.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

German law acknowledges and provides for the enforceability of foreign judgments if certain preconditions are met. For the enforcement of foreign judgments avoiding antecedent transfers, these judgments need to be confirmed by a German enforcement judgment in accordance with Sec. 328, 722 and 723 German Code of Civil Procedure. For such enforcement, reciprocity must be given and German law must acknowledge the competence of the foreign court by a hypothetical application of German competence rules.

An avoidance judgment of a court of a member state of the European Union, to which the European Insolvency Regulation applies, will, be acknowledged automatically under the prerequisites of Sec. 25 of the European Insolvency regulation. Enforcement of such judgments is possible in accordance with Sec. 38 et seq. of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which requires a declaration of enforcement only without any further review in substance by the German courts.

GREECE

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise for avoiding antecedent transactions?

The avoidance of antecedent transactions is regulated in Article 41 ff. of the Greek Bankruptcy Code (Law No. 3588/2007, as currently in force).

Greek Law recognizes the concept of the "suspect period". It is defined as the period between the date on which the debtor actually ceased payments and the date on which it was declared bankrupt. The decision that declares the debtor's bankruptcy will also set the date on which payments are deemed to have ceased. This period may not be longer than two years.

The debtor's transactions that took place during the suspect period are annulled or may be annulled.

The following transactions that are restrictively enumerated within the Bankruptcy Code are presumed to prejudice creditors' interests and are automatically null and void:

- donations and gratuitous acts;
- payments of debts that did not fall due and payable;
- payments of due debts that were not made in cash; and
- creation of security over the debtor's estate for pre-existing debts.

Any of the debtor's other transactions (effectively, non-gratuitous transactions) may be annulled if the debtor's counterparty did not act in good faith, that is, it knew that the debtor was in the state of suspension of payments and that the transaction was detrimental to creditors' interests.

Another ground upon which the debtor's transactions can be annulled, is the fraudulent prejudice of creditors' interests. More specifically, fraudulent acts committed by the debtor during the last five years prior to the declaration of bankruptcy to the detriment of its creditors' interests or to establish a preference of some creditors over the others, can be voided and the assets may be recovered by the debtor, provided that the third party knew of the debtor's intent.

In all cases, the annulment of a transaction that occurred during the suspect period is effected by a court decision pursuant to the application of the insolvency administrator ("syndikos"). Nevertheless, creditors are not deprived of their right to seek directly the annulment of a transaction provided that the insolvency administrator, after being informed in writing, fails to act.

QUESTION 2

2. What are common defences?

As noted above, non-gratuitous transactions may be annulled if the debtor's counterparty acted in good faith.

Furthermore, Art. 45 of the Bankruptcy Code lists a number of actions that are not revocable. So, a typical defence would be that the challenged transaction falls in the exclusions of Art. 45.

These exclusions include:

(a) Acts lying within the sphere of the professional or business activities of the debtor performed in the ordinary course of its business.

(b) Acts of the debtor, which are statutory excluded from avoidance. Such provisions include (i) any mortgage or loan granted by a company under the Law of 17.07/13.08.1923 and Law 4001/1959 to secure a loan; (ii) any pledge or mortgage granted to secure claims from bond loans issued according to Law 3156/2003; (iii) the transfer of claims pursuant to Law 3156/2003 regarding the securitisation of claims; (iv) actions performed within the framework of Law 3389/2005 regulating public-private partnerships ("PPP"); in particular, any securities granted by a special purpose vehicle set up for the purposes of the PPP ("SPV") or any third party in favour of a credit or financial institution or any third party in order to secure claims towards the SPV.

(c) Acts conducted by the debtor in the course of implementation of a reorganization plan or a recovery agreement that was succeeded by liquidation due to non-performance.

(d) Any performance by the debtor against immediate consideration in cash of equal value.

Moreover, the avoidance action is time barred with the lapse of one (1) year from the day the insolvency administrator obtained knowledge of the act and in any case after the lapse of two (2) years from the declaration of bankruptcy.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

The nationality of a party is not relevant to its being granted standing before a Greek court. There are, therefore, no legal barriers to a foreign claimant's access to the Greek justice system.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

A Greek court may hear a claim made under foreign law by application of the choice of law rules of either the EU Regulation 1346/2000 (European Insolvency Regulation, EIR) or the UNCITRAL Model Law as adopted by Greece.

According to Art. 3 of the EIR, the courts of the Member State within the territory of which the debtor's COMI is situated shall have jurisdiction to open insolvency proceedings. Although this provision does not regulate international jurisdiction relating to avoidance actions, the European Court of Justice has ruled that Art. 3 applies also for trials closely related to insolvency, including avoidance actions (case C-339/07, "Deko Marty"). Therefore, when insolvency proceedings are in another EU Member State, Greek courts will not have jurisdiction to decide an avoidance action brought under that main proceeding, as the courts of the country where the debtor's COMI is situated will have that exclusive jurisdiction.

A different approach is adopted with regard to non-main insolvency proceedings (secondary or territorial) brought in a EU member state other than Greece; in these cases, the insolvency administrator may bring an action to set aside transactions in the interests of the creditors in Greece, provided that the debtor's COMI is not situated in Greece (Art. 3(2) and 18(2) EIR).

As a side note, the Greek Bankruptcy Code has also adopted the concept of *vis attractiva concursus*, according to which Greek courts, as long as the debtor's centre of main interests (COMI) is situated in Greece, have exclusive international jurisdiction to open insolvency proceedings, as well as decide avoidance actions, even if the defendant is domiciled abroad (Art. 4 and 48 of the Bankruptcy Code).

With regard to non-EU countries, Law No. 3858/2010, incorporating UNCITRAL Model Law on Cross-border Insolvency, applies. Accordingly, upon recognition of a foreign procedure, the foreign insolvency administrator has standing to request the avoidance of transactions under the rules and conditions entailed in the Greek Bankruptcy Code; see Question 7. It is required, of course, that national courts have also jurisdiction under usual procedural provisions (e.g. when property is situated in Greek territory).

QUESTION 5

5. Who decides issues of foreign law?

Under Art. 337 of the Civil Procedure Code, the court considers foreign law provisions without further proof, but if this is not feasible, it may order an expert testimony. For example, the court might resort to expert reports prepared by the Hellenic Institute of International and Foreign Law.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Law No. 3858/2010 introduces the concept of co-operation between the Greek courts, foreign courts and insolvency administrators among different jurisdictions. Because of its novelty, that provision has not been tested in practice in our jurisdiction.

The EIR includes provisions with regard to the co-operation between the insolvency administrator of main and secondary proceedings.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Law No. 3858/2010, which came into force on 28 June 2010, substantially repeats the text of the UNCITRAL Model Law on Cross-Border Insolvency; caution is required with the definitions, especially that of 'foreign proceedings', as the law seems to apply only to foreign proceedings that involve the appointment of an insolvency administrator. Foreign creditors that seek to commence or participate in bankruptcy proceedings in Greece have the same rights as domestic creditors.

With regard to avoidance actions, Art. 23 of Law No. 3858/2010 follows substantially the relevant provision of the Model Law. Accordingly, upon recognition of a foreign procedure, the foreign insolvency administrator has standing to request the avoidance of acts detrimental to creditors.

Furthermore, when the foreign procedure is a foreign non-main procedure, the court must be satisfied that the actions of the foreign insolvency administrator relate to assets that, under the Greek Bankruptcy Code, should be administered in the foreign non-main procedure.

The provision of Art. 23 does not address the issue of the applicable law for such avoidance actions, i.e. whether the *lex fori concursus* or the *lex fori* should regulate these actions. Provided that international jurisdiction of a Greek court with regard to avoidance actions relating to foreign (non EU country) insolvency proceedings is ascertained, the rationale underpinning both UNCITRAL Model Law and Law No. 3858/2010 argues for applying the *lex fori,* namely Greek law, provided that the action under scrutiny relates to property situated in Greece (see also Art. 20 par. 2 of Law No. 3858/2010). The same conclusion could be drawn from the policy objective of ensuring the uniform application of this law (Art. 8 of Law No. 3858/2010).

Besides, the Guide to Enactment of the UNCITRAL Model Law clearly stipulates in para. 165 that *"The procedural standing conferred by article 23 extends only to actions that are available to the local insolvency administrator in the context of an insolvency proceeding"*.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

There are no special provisions in the Greek Bankruptcy Code, other than the Article mentioned in Question 1.

It should be also noted that under the Greek Civil Procedure Code there is no disclosure process, i.e. a pre-trial stage of the proceedings leading to the exchange of documents between the parties. The general rule is that all documents to which reference is made in the action or which support the factual allegations of a party must be disclosed with that party's pleadings.

QUESTION 9

9. How are litigation fees and costs assessed?

The avoidance action is brought by the insolvency administrator. The remuneration of the administrator is determined by the bankruptcy court, after the conclusion of the operations of bankruptcy. The bankruptcy court will take into consideration the value of the insolvency estate, the time the insolvency administrator was occupied, as well as the beneficial results of the insolvency admistrator's acts to the insolvency stakeholders' interests (Art. 81 of the Greek Bankruptcy Code).

With regard to the litigation expenses, in the case of avoidance actions brought before the first instance court, such expenses will not exceed the amount of Euros 300 (including bailiff's expenses and fees). If the judgment of the first instance court is appealed, supplementary expenses of approximately 300 Euros should be expected.

Avoidance actions are governed by procedural rules of general application (Art. 173 ff. of the Greek Code of Civil Procedure), according to which the losing party bears the litigation costs.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Art. 25 of the EIR provides for the automatic recognition not only of the judgment concerning the opening of proceedings but also of judgments deriving directly from the insolvency proceedings, i.e. also judgments annulling transactions. Unless domestic public policy is affected (Art. 26), judgments issued in EU countries are automatically enforced in Greece.

With regard to non-EU countries, Law No. 3858/2010 regulates only the recognition of judgments opening insolvency proceedings. The issue of recognition of other judgments, like the ones avoiding transactions, is highly controversial, and, in any case, not sufficiently tested in Greece. On the assumption that national procedural rules apply, foreign judgments will be automatically recognized and enforced, as long as certain conditions are met (Articles 780 and 905 of the Civil Procedure Code). Accordingly, for a foreign decision to be recognized i) the issuing court must have applied the substantive law applicable under Greek conflict of laws rules, while ii) the recognition of the judgment must not contradict public order (*ordre public*), i.e. fundamental rights and principles of domestic law. In the case of avoidance actions, though, meeting the first condition will not be an easy task, since the applicable law for such actions is disputed in Greece. The outcome of recognition attempts, therefore, will not be predictable.

For example, doubts could arise in a case when a Russian court issues a decision relating to immoveable property situated in Greece (since this is the case where recognition shall be needed in Greece) applying Russian law. Greek courts, though, might require application of Greek law for the decision to be recognized in Greece (as to the application of the *lex fori* in case of avoidance actions of this kind see Question 7). No doubt, the rule of Art. 780 of the Civil Procedure Code poses a great burden for the recognition of such decisions.

Finally, any measures to be taken in Greece requiring the involvement of a public authority (e.g. public auctions) will be conducted in accordance with Greek law.

HONG KONG

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

1.1 Sources of law

The laws for avoiding antecedent transactions are found in the Companies (Winding Up and Miscellaneous Provisions") Ordinance (Cap 32) ("C(WUM)O")[1], which covers corporate insolvency, and the Bankruptcy Ordinance (Cap 6) ("BO") which covers personal insolvency. These provisions in the C(WUM)O and the BO are supplemented by more detailed rules set out in the Companies (Winding-up) Rules (Cap 32H) ("CWUR") and the Bankruptcy Rules (Cap 6H) ("BR") respectively, as well as a body of well developed case law that further elaborates how laws are applied. Both the personal and corporate insolvency laws of Hong Kong and its surrounding body of case law are historically inherited from the laws of England. Hong Kong's legislation was originally modelled on the equivalent English Bankruptcy Acts and Companies Acts though they have since been heavily amended. Similarly, the Hong Kong courts[2] have developed its case law closely following developments in England and other similar Common Law jurisdictions.

1.2 In a corporate insolvency context, the following transactions can be challenged and unwound by a liquidator as antecedent transactions pursuant to the C(WUM)O:

- unfair preferences;
- extortionate credit transactions;
- floating charges;
- fraudulent conveyances;
- fraudulent trading; and
- dispositions of property made after the commencement of the winding up.

Each of these types of avoidance provisions are discussed in detail further below.

[1] A new companies' law, the Companies Ordinance (Cap 622) ("New Companies Ordinance"), came into effect on 3 March 2014. The New Companies Ordinance covers all the areas regulated under the old company's law, the Companies Ordinance (Cap 32), except the prospectus regime and the winding-up and insolvency provisions. These two areas will remain under the old Companies Ordinance which has now been renamed the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32).

[2] The original jurisdiction for companies matters lie with the High Court of Hong Kong, Court of First Instance: Section 2(1), High Court Ordinance (Cap 4). A reference in this article to "Court" shall mean the High Court, Court of First Instance.

In addition to the above there are also general provisions of the C(WUM)O which concern broad offences by directors and officers of companies which can also be used by a liquidator to recover assets for the benefit of the company's estate. Though these are not considered antecedent transaction provisions as they do not enable a transaction to be avoided or unwound, they are often considered alongside antecedent transactions. The key provision is Section 276 of the C(WUM)O which concerns breaches of duties and misfeasance by officers of the company. Under this section, on a finding of misfeasance or a breach of duty, the Court can compel the director or officer to repay or restore the money or the property of the company as compensation. While the transaction itself is not avoided, liquidators in Hong Kong could use the section in circumstances where no other cause of action is available. For example, unlike in England and Australia, there are no statutory provisions in the C(WUM)O to enable a liquidator to challenge transactions entered into by a company at undervalue - though such a provision does exist in BO and applies in the context of personal insolvencies[3].

Therefore as an alternative, a liquidator who believes that there has been a transaction at undervalue may consider whether the entering into of that transaction gives rise to a statutory or general law cause of action against the directors or officers of the company or other third parties, and if so commence an action to recover value for the estate of the company by this means[4]. Further, the insolvent company may have causes of action arising out of the general law against its directors, officers or third parties in respect of antecedent transactions. These actions may include a breach of contract, a tort (such as negligence or fraud), an action for breach of fiduciary duty or knowing involvement in a breach of fiduciary duty. These actions lie outside the scope of this chapter and will not be discussed further.

1.2.1 Unfair preferences

An unfair preference is a transaction which the company has undertaken with a creditor, surety or guarantor, which has the effect of placing that creditor in a more advantageous position than he would otherwise have been following that company's liquidation. Under sections 266 and 266B of the C(WUM)O, liquidators are able to challenge as unfair preferences those transactions entered into by a company within 6 months (or where the transaction has been entered into with certain related parties, within 2 years) prior to the commencement of its winding up[5].

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[3] Section 49 Bankruptcy Ordinance (Cap 6). The Government of Hong Kong has recently commenced a law reform review on the corporate insolvency law in Hong Kong in April 2013. See "Improvement of Corporate Insolvency Law Legislative Proposals", Financial Services and the Treasury Bureau, April 2013 ("Consultation Paper"). During the resultant consultation process, the Government has proposed that a provision similar to section 49 of the Bankruptcy Ordinance be introduced for corporate insolvencies. This would allow a liquidator to challenge an antecedent transaction as being undervalued.

[4] See *Tradepower Holdings Ltd (In Liquidation) v Tradepower (Hong Kong) Ltd & Ors* [2008] HKCA 438 (29 October 2008), and see also discussion in *Re Ocean Time Development Ltd* (Unreported, HCCW 334/2004, HCCW 334B/2004).

[5] In the case of a compulsory winding up, the commencement of the winding up is the date of the presentation of the petition to the Court. See Section 184 C(WUM)O. See also sections 209B, 228A 230 C(WUM)O for other types of winding up.

The C(WUM)O does not itself contain detailed provisions as to what does or does not constitute an unfair preference in relation to companies. Instead the C(WUM)O incorporates, by way of deeming, the provisions in respect of unfair preferences under Section 50 of the Bankruptcy Ordinance that apply to personal insolvencies to apply to corporate insolvencies[6]. Accordingly, a company will be considered to have given an unfair preference if:

- the person to whom the unfair preference was given is one of the company's creditors or a guarantor or a surety for any of the debts or liabilities of the company; and

- the company has done something which has the effect of putting that person into a position which, in the event of the company being wound up, is better than the position he would have been if that thing had not been done[7].

- in order for a liquidator to unwind a transaction they believe constitutes an unfair preference, the office holder must make an application to the court and show that:

- the company was insolvent[8] at the time the preference was given, or have become insolvent as a result thereof; and

- the company must have been influenced by a desire to prefer the person who received the preference[9]. Liquidators have historically had trouble establishing to the satisfaction of the Court that the company had a subjective desire to prefer the recipient. Defendants would claim that genuine pressure was exerted on the debtor for payment so as to negate the claim there was a desire to prefer[10]. But since the case of Re Sweetmart Garment Works Ltd (in Liquidation)[11], the Court has been more willing to infer an intention to prefer from the circumstances of the case even in the absence of direct evidence to that effect. Therefore whilst that desire to prefer must be one of the factors which motivated those who make the decision, it need not be the sole or primary factor. In the case of a transaction involving certain types of related parties (that fall into the category defined as 'associates' of the company as defined in the BO (see discussion at Section 1.2.4 below)) this task is slightly easier as the onus of proof is reversed and it is presumed that the company intended to put that related party in a better position[12] except where that related party is an employee in which case the onus is not reversed; and

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6 Sections 266 and 266B of the C(WUM)O. These deeming provisions apply only to liquidations commenced after 1 April 1998. This deeming approach, instead of setting out a separate set of provisions applicable specifically to corporate insolvency, has resulted in a number of anomalies, which are discussed in Section 1.2.4 below. As such, the Government has proposed in the Consultation Paper that new provisions governing unfair preferences to be incorporated directly into the companies law, which would address these anomalies.

7 Section 50(3) Bankruptcy Ordinance (Cap 6) and Section 266B C(WUM)O.

8 A debtor is insolvent if it is unable to pay its debts as they fall due or the value of its assets is less than the amount of its liabilities, including its contingent and prospective liabilities: see Section 51(3) Bankruptcy Ordinance (Cap 6).

9 Following *Re MC Bacon Limited* [1990] BCLC 324, and *Re Phantom Records Limited* (unreported, CFI, HCMP 2770 of 2003, 7 December 2006), it is no longer necessary to establish objectively a dominant intention to prefer as required under the old law of fraudulent preferences, but a subjective desire to better the creditor's position.

10 See for instance, *Trustees of the Property of Hau Po Man Stanley (in bankruptcy) v Hau Po Fun Ivy* [2005] 2 HKC 227

11 [2008] 2 HKC 252.

12 Section 50(5) Bankruptcy Ordinance (Cap 6).

- the alleged preference was given within the relevant timeframe, namely:

  - 6 months prior to the commencement of the winding up; or

  - 2 years prior to the commencement of the winding up, where the counterparties to the transaction are 'associates' as defined in the BO[13].

Section 51B of the BO, then defines 'associates' as follows:

(1) a person who is debtor's spouse, or is a relative, or the spouse of a relative of the debtor or his spouse;

(2) a person whom he is in partnership, and of the spouse or a relative of any debtor with whom he is in partnership;

(3) a person who is the employees of the company, which include any director or other officer of the company;

(4) a person who acts as trustee of a trust; or

(5) a company where that debtor has control of it or if that debtor and persons who are his associates together have control of it.

Unlike in the context of bankruptcy where the 'debtor' is an individual, in a corporate insolvency, the term 'debtor' must be read to refer to company itself and this has lead to some anomalies in the meaning of 'associates' and accordingly, the scope of the provision itself when applied to corporate insolvencies. The following shortcomings can be noted:

- a subsidiary of the debtor company is considered as an associate, but not its holding or parent company;

- a fellow subsidiary of the same holding company is not considered as an associate;

- directors are considered as associates, but the definition of associates does not catch the spouse or relatives of these directors; and

- shadow directors of the debtor company are not caught.

If the Court finds that the transaction was an unfair preference, it is empowered to make such order as it thinks fit to restore the position to what it would have been if the company had not given the unfair preference. Provided that in considering what orders to make, the court will not prejudice any interests which have since been acquired by third parties in good faith and for value without notice of the insolvency or impending insolvency[14].

[13] Section 266B(1)(b) C(WUMO. As to the commencement of the winding up, see *n. 5* above.
[14] Section 51A(2) Bankruptcy Ordinance (Cap 6).

1.2.2 Extortionate credit transactions

Credit transactions that the company is or was a party to can also be challenged by a liquidator where the terms of that transaction are grossly unfair or require payment of exorbitant interest rates as these may constitute an extortionate credit transaction.

A liquidator can only challenge the transaction as being an extortionate credit transaction if the company entered into the transaction within 3 years prior to:

- the commencement of a voluntary winding-up; or
- the date of the winding-up order[15].

A credit transaction is an extortionate credit transaction if, having regard to the risk accepted by the person providing the credit to the company:

- the terms require grossly exorbitant payments to be made (either actual or contingent); or
- the transaction grossly contravenes principles of fair dealing.

There is however little judicial guidance on what constitutes 'grossly exorbitant' payments or what will be considered as 'grossly contravening' the principles of fair dealing such that the transaction is extortionate, but it can be observed that this same test applies under the Money Lenders Ordinance (Cap 163) and in that Ordinance there is a rebuttable presumption that any effective annual interest rate in excess of 48% per annum is extortionate[16]. Accordingly, in practice, liquidators have generally taken this as the general standard by which they will measure credit transactions[17].

In order for a liquidator to unwind a transaction he or she believes constitutes an extortionate credit transaction, he or she must make an application to the Court, and the legislation reverses the onus of proof such that it will be assumed that the credit transaction with respect to which the application is made is (or was) extortionate, unless the contrary is proven.

If the Court finds that the transaction was an extortionate credit transaction, the court can make one or more of the following orders to:

- set aside the whole or part of any obligation created by the transaction;
- vary the terms of the transaction or vary the terms on which any security for the purposes of the transaction is held;
- require any person who is or was a party to the transaction to pay to the liquidator any sums which have been paid by the company to that person, by virtue of the transaction;

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[15] Section 264B(3) Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32). See also the equivalent provision for personal insolvencies, Section 71A BO.

[16] Section 25, Money Lenders Ordinance (Cap 163). Furthermore if the true annualised percentage interest rates exceeds 60%, it is also constitutes an offence under that Ordinance.

[17] See for instance, *Hang Seng Credit Card Limited vs Tsang Nga Lee & others* [2003] HKLRD 33.

- require any person to surrender to the liquidator any property held by him as security for the purposes of the transaction; and / or

- direct that an account be taken between any persons[18].

1.2.3 Floating charges

Floating charges[19] which give no additional value to the company but have the effect of converting an unsecured creditor into a secured creditor are void as against a liquidator under section 267 of the C(WUM)O.

This provision applies to the following types of charges:

- the charge was created as a floating charge within 12 months prior to the commencement of the winding - up[20]; and

- the company was insolvent when the charge was created (or became insolvent as a consequence thereof), save that it does not apply to the extent of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate specified in the charge or at the rate of 12 per cent per annum, whichever is less. This exception is interpreted narrowly by the Courts, so where the payment was not made at the time the charge was given or subsequent to it[21], or where anything other than money is given as consideration for the charge (eg property or services), or where a lender has paid money directly to another party (such as the creditors) in consideration of the floating charge, then the chargee will not fall within this exception and the charge will be void as against the liquidator[22].

In respect of the solvency of the company at the time of the creation of the charge, the law presumes that the company was insolvent, so the onus of proof to prove otherwise lies with the chargee. Accordingly, in order for the floating charge to be exempt from invalidation, the chargee must prove that the company was solvent at the time the charge was created.

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[18] Section 264B(4) C(WUM)O.

[19] A floating charge is a general charge over the all of the assets of the charger, not limited or defined to cover only specific identified pieces of the chargor's property. On the occurrence of certain pre-defined events the floating charge will crystallize becoming a fixed or specific charge: See Hong Kong Legal Dictionary, Lexisnexis Butterworths (First Edition, 2004) at 399.

[20] Unlike other avoidance provisions in the C(WUM)O, the relevant timeline for invalidating a floating charged is defined to be within 12 months prior to the winding-up regardless of whether the person created the charge is connected to the insolvent company or not. As a result, the Hong Kong Government has in its Consultation Paper suggested reforms to extend the period for which a liquidator can void a floating charge to two years prior to the commence of winding up where it has been given in favour of a connected party: Section 5.26, page 56 of the Consultation Paper. As to the commencement of the winding up, see n. 5 above.

[21] See *Active Base Ltd v Roderick John Sutton* [2009] 12 HKCFAR 621.

[22] See *Re Dream Asia Limited* (Unreported, HCMP 4394/2002), and also Section 5.28, page.57 of the Consultation Paper.

Unlike other anti-avoidance actions however, it should be noted that this provision has no retrospective operation[23]. Therefore even if the charge was created within 12 months of the date of commencement of the winding - up, the charge - holder will not be required to disgorge the money he has already received if the charge has been satisfied in full at the date of the commencement of the liquidation[24].

If a floating charge is declared void the contractual obligation to repay to the chargee remains effective as a debt[25], and where a charge has been assigned to a third party, the charge is invalid even against a third party assignee of that charge, though the debt obligation remains.

1.2.4 Fraudulent conveyances

A fraudulent conveyance is a disposition of property by the company prior to the commencement of the winding up which was made with an intent to defraud creditors[26]. While strictly not an antecedent action, as the availability of the claim does not depend on insolvency proceedings having been commenced, Section 60 of the Conveyancing and Property Ordinance (Cap 219) provides that every disposition of property made with intent to defraud creditors shall be voidable at the instance of a person prejudiced thereby[27]. A liquidator can therefore use this provision on behalf of the Company to void certain prior conveyances of the company's property. The provision does not cover any estate or interest in property disposed of for valuable consideration and in good faith, or for good consideration and in good faith to a person that, who at the time of the disposition, had no notice of the intent to defraud creditors[28].

Where a liquidator suspects a transaction to have been a fraudulent conveyance, the liquidator can apply to Court to have it set aside, regardless of how long ago that transaction occurred, as there is no time limit. Despite there being no time limit set for bringing actions, the requirement to prove a subjective intent to defraud is a high standard so there have been few successful cases in Hong Kong. In recent cases, however, the Courts have been more willing to infer an intention to defraud from the circumstances of the case even in the absence of direct evidence to that effect. It was on this basis the liquidators in *Tradepower Holdings Limited (in liquidation) v Tradepower (Hong Kong) Limited*[29] successfully set aside a transfer of property as one having been undertaken with an intent to defraud creditors. In that case, a company, which was about to become subject to a default judgment, transferred its entire shareholding in a related company to another company controlled by the same directors for no consideration. On the winding up of the transferor company, the liquidators applied to have the transfer voided, but were unsuccessful at first instance with the Court finding no direct intent to defraud

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[23] See *Mace Builders (Glasgow) Ltd v Lunn* [1986] 3 WLR 921.
[24] Ibid.
[25] *Re Parkes Garage (Swadlicote) Ltd* [1929] 1 Ch 239.
[26] This means an actual subjective intent to defraud creditors: See *Lloyds Bank v Marcan* [1973] 2 All E.R. 359.
[27] Section 60(1) Conveyancing and Property Ordinance (Cap 219).
[28] Section 60(3) Conveyancing and Property Ordinance (Cap 219).
[29] [2008] HKCU 1715.

creditors. This was reversed on subsequent appeals, and the Court of Final Appeal[30] held that a subjective intent to defraud could be inferred from the objective facts that the transfer was for no consideration and that creditors had suffered as a consequence[31].

1.2.5 Fraudulent trading

Whereas fraudulent conveyances typically concern specific dispositions of property, fraudulent trading concerns the ongoing activities of a company which have been carried on with an intent to defraud creditors. While strictly not an anti-avoidance provision, as it does not void the underlying transactions, section 275 of the C(WUM)O provides that where in the course of the winding up of a company it appears that the business of the company has been carried on with fraudulent intent, the Court can order that any director, officer or any other person involved in such an activity be personally liable, for any or all of the debts of the company without limitation. The application can be made to the court by the liquidator, the Official Receiver, or any contributory or creditor of the company.

Similar to fraudulent conveyances, it is a requirement to prove that the directors or person involved in the trading of the company acted with an actual subjective intention to defraud as liability depends on establishing an element of actual dishonesty[32]. This is difficult even though the courts have held that it is the civil standard of proof which applies, that is, it is only necessary to show it on balance of probabilities[33].

In the absence of actual dishonesty, the mere preference of one creditor over another would not be sufficient to establish liability under this provision[34], nor would a reckless disregard as to whether the carrying on of the business may result in creditors being left unpaid[35]. The courts have been more cautious to infer fraud from the circumstances in respect of this provision as it imposes personal liability on the individual director or person involved[36]. Therefore they have held that there generally must be some other act which could show dishonesty, such as a misrepresentation to creditors as to the company's position or a dishonest intent to gain some advantage, before fraud will be inferred by the court[37].

In addition to this civil action, fraudulent trading is also a criminal offence and any person found guilty may be liable to a maximum sentence on indictment of up to 5 years' imprisonment[38].

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30 The Court of Final Appeal is the highest appellate court in Hong Kong.

31 Ibid at 88. In fact, Justice Ribeiro PJ cast the grounds for an inference widely finding that: "Where it is objectively shown that a disposition of property unsupported by consideration is made by a disponor when insolvent (or thereby renders himself insolvency) with the result that his creditors (including his future creditors) are clearly subjected at least to a significant risk of being unable to recover their debts in full, such facts ought in virtually case be sufficient to justify the inference of an intent to defraud creditors on the disponor's part".

32 *Re Patrick and Lyon Ltd* (1933) Ch 786, *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [2000] HKCFA 31.

33 *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [2000] HKCFA 31.

34 *Re Sarflax Ltd* [1979] Ch 592; [1979] 1 All E.R. 529.

35 *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [2000] HKCFA 31.

36 *Tradepower Holdings Limited (in liquidation) v Tradepower (Hong Kong) Limited* [2008] HKCU 1715.

37 *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [2000] HKCFA 31.

38 Section 275(3) C(WUM)O.

1.2.6 Dispositions of property after the commencement of the winding up

The C(WUM)O provides that in a compulsory winding up, any disposition of a company's property made after the commencement of the winding up (which in a compulsory winding up is the date of presentation of the winding up petition[39]) or any alteration in a member's status[40] is, unless the Court otherwise orders, void[41]. The meaning of 'disposition' is construed widely by the Courts and will include the payment and repayment of money[42], though property refers to only property that the company is beneficially entitled to, so it would not include a sale by a mortgagee or receiver under a mortgage made prior to the commencement of the winding up[43].

The purpose of this rule is to preserve the status quo following the presentation of the winding up petition and support the underlying principle of a pari passu distribution of assets[44].

While a liquidator will scrutinise a company's transactions that have occurred prior to the commencement of the winding up to determine if there have been any void dispositions of property or alterations in a member's status, affected counterparties to such transactions, such as creditors and contributories, can seek a validation order from the Court if they believe there are grounds to justify the transaction. The court will exercise its discretion to make a validation order where it can be shown that the disposition is expedient or necessary in the interests of the company and unsecured creditors are not prejudiced as a result of the transaction[45].

QUESTION 2

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2. What are common defences?

2.1 Limitation periods and antecedent transactions

Before specific defences are discussed which might be raised in respect of each type of avoidance action which a liquidator may bring, it is not uncommon for defendants to also plead that a liquidator's particular recovery action has become statute barred. This is perhaps in part due to the difficulties in determining the applicable limitations period which applies to a liquidator's recovery action.

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[39] See Section 184(2) C(WUM)O and n.5 above.

[40] As section 182 C(WUM)O applies only to Court liquidations, section 232 of the C(WUM)O voids the transfer of shares after commencement of voluntary winding up.

[41] See also Section 42, Bankruptcy Ordinance (Cap 6) for the equivalent position in an individual insolvency.

[42] *Re Arts Knitting Factory Ltd* [1974] HKLR 422, *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814,

[43] *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616.

[44] *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814, *Re APP (Hong Kong) Ltd* (Unrep, 8 March 2004 , Kwan J [2004] HKCFI 81, HCCW1130/2003).

[45] *Re Webb Electrical Ltd* [1988] BCLC 382. See for example in *Re Linfa Industrial Co Ltd* [2000] HKCFI (7 January 2001).

In Hong Kong, civil actions, which include a liquidator's actions in respect of antecedent transactions, are subject to the Limitations Ordinance (Cap 347) which proscribe the period in which certain actions must be commenced. These time periods start to run on the accrual of the cause of action and if they are not commenced within the requisite timeframes, they become statute barred. Insofar as antecedent transactions are concerned, the cause of action normally accrues either on the appointment of the liquidator or the commencement of the winding up as that is when all the ingredients of the cause of action are complete[46].

In other limited circumstances there will be an extension of the limitation period such as in the case of fraud, concealment or mistake, such that the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it[47]. Outside of these limited circumstances, a court has very limited powers to override the applicable limitation periods once the period has passed[48].

For antecedent transactions, the applicable limitation periods are set out in Section 4 of the Limitations Ordinance and it provides that:

(a) actions founded on simple contract or based on tort, actions to enforce a recognisance, or actions to recover any sum recoverable by virtue of any Ordinance or imperial enactment[49] shall not be brought after the expiration of 6 years from the date on which the cause of action accrued; and

(b) an action upon a specialty shall not be brought after the expiration of 12 years from the date on which the cause of action accrued[50];

Whether a particular liquidator's avoidance action falls into the first of the two limbs set above in 2.1 para 4 above and is statute barred after 6 years, or the second limb such that it is statute barred after 12 years, depends on whether it is an action to enforce or for a recovery of a sum of money under an Ordinance, or whether it is a 'specialty'. In this context, a specialty can refer to a contract under seal or a cause of action based on a statute (not involving the recovery of a sum of money)[51].

The courts will therefore examine on a case by case basis whether in substance, or in essence, the relief sought in application is one for the recovery of money by virtue of the relevant sections of the Ordinance to determine the applicable limitation period[52]. Therefore an unfair preference action where the only substantive relief available to the applicant is an order for the payment of money would fall into the first category and be statute barred after 6 years. On the other hand, an unfair preference action to set aside a property transaction would fall into the second and be statute barred after 12 years[53].

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[46] *See Hill v Spread Trustee Co Ltd & anor* [2007] 1 BCLC 450, 481-482 and 487-488 and *Re Overnight Ltd* (in liq) [2010] BCC 787 at 794. As to the commencement of the winding up, see *n.5* above.

[47] Section 26 Limitations Ordinance (Cap 347).

[48] See section 30 Limitations Ordinance (Cap 347), and these relate primarily to personal injury cases.

[49] Section 4(1)(d) Limitations Ordinance (Cap 347).

[50] Section 4(3) Limitations Ordinance (Cap 347).

[51] *Alliance Bank of Simla v Carey* (1880) 5 CPD 429 and *Collin v Duke of Westminster* [1985] 1 QB 581.

[52] *Re Priory Garage (Walthamstow) Ltd* [2001] 1 BPIR 144, and Joint and Several Liquidators of *Faith Dee Ltd v Yip Shu Chee & Others* [2013] HKCFI 189 (Unreported, HCCW 237/2005).

[53] Ibid.

2.2 Unfair preferences

As the key element for an unfair preference action is to prove the actual subjective desire to prefer, the most common defence is to show that the transaction occurred as a result of pressure to repay the debt or as a result of a demand. For example, in the case of *The Joint and Several Trustees of the Property of Hau Po Man, Stanley (in bankruptcy) v Hau Po Fun Ivy and Derek Yuen*[54], the bankrupt was a dentist in financial difficulties who had borrowed money from various persons, including his sister. Prior to the bankruptcy order, the bankrupt repaid his sister and the trustee challenged the repayment as an unfair preference. The bankrupt explained that the repayment was made as a result of pressure from his sister after being told by his sister that he would be excluded from his family if he did not repay his debts to her. In addition the husband of the sister visited to the dental surgery, where the bankrupt was in practice, and made verbal threats and unpleasantness to persuade the bankrupt to repay the outstanding amount. The court concluded that the payments were not unfair preferences as the repayment was not motivated by a desire to prefer the sister, but a desire to avoid the moral unpleasantness as a result of the pressure exerted.

Another defence to a claim of receiving an unfair preference is that the recipient is an innocent third party who has acquired the property in good faith and for valuable consideration[55], as a court will not make any order that prejudices the rights of such parties (such as ordering it to pay a sum of money to the liquidator) or those who derive their interest from such parties. Another common approach is to plead that the action has been statute barred. The applicable limitation period for unfair preference actions vary on a case by case basis depending on the true nature of the relief sought as discussed in detail at Section 2.1 para 6 above.

2.3 Extortionate credit transactions

As discussed in Section 1.2.2 above, in certain circumstances a credit transaction is presumed to be extortionate. This has the effect of reversing the onus of proof such that it is the lender who must prove the contrary - namely that in the circumstances, the credit transaction was not grossly unfair or the applicable interest rate was not exorbitant.

2.4 Floating charges

The most common defences to an action by a liquidator to void a floating charge granted by a company are to show either that the charge was given for cash paid to the company or that the company was solvent immediately after the creation of the charge. The floating charge is considered to be valid to the extent that cash was paid or where the chargee can prove that the company was solvent immediately after the creation of the charge[56].

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[54] CACV 234 of 2004 (5 May 2005).
[55] Section 51A(2) Bankruptcy Ordinance (Cap 6).
[56] Section 267 C(WUM)O.

Another possible defence to these actions is to plead that the action has become statute barred. There have however been no authoritative decisions on the applicable limitation period for these types of actions either in Hong Kong or in respect of the equivalent statutory provisions in England. Therefore, on the basis of the principles discussed at Section 2.1.6 above, the courts will consider on a case by case basis the true nature of the remedy sought to determine the applicable limitation period[57]. As the nature of a remedy in an application under section 267 of the C(WUM)O is arguably declaratory in nature (and the repayment of any money is a consequence of it but not the relief itself), it is likely that Section 4(3) of the Limitations Ordinance would apply to applications under section 267 of the C(WUM)O such that any application must be commenced by a liquidator within 12 years from the date of his appointment.

2.5 Fraudulent conveyances

As discussed at Section 1.2.4 above, recoveries under this section are generally rare due to the requirement to prove there was an actual subjective intent to defraud creditors. Generally a subjective intent can be negated if the directors of the company were motivated to make the conveyance by other legitimate concerns, so a common defence to these actions is to show that the driver for the disposition was a legitimate one (albeit perhaps an un-commercial one).

Other defences in an action for fraudulent conveyances include:

- showing that the disposition was for valuable consideration and done in good faith, or
- showing it was for good consideration and in good faith to a person that, at the time of the disposition, had no notice of the intent to defraud creditors[58], or
- that the action has become statute barred.

The applicable limitation periods for fraudulent conveyance actions will vary on a case by case basis depending on the true nature of the remedy sought (as discussed at Section 2.1 para 6 above)[59]. If the nature of the remedy sought is to set aside property transactions, it is likely that Section 4(3) of the Limitations Ordinance would apply to applications such that any application must be commenced by a liquidator within 12 years. Alternatively, if the remedy sought is only for the recovery of money, it is likely that the action is subject to a 6 year limitation period. This is however subject to the extension of the limitation period set out in section 26 of the Limitations Ordinance such that the period of time does not start to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

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[57] *Joint and Several Liquidators of Faith Dee Ltd v Yip Shu Chee & Others* [2013] HKCFI 189 (Unreported, HCCW 237/2005).

[58] Section 60(3) Conveyancing and Property Ordinance (Cap 219).

[59] *Joint and Several Liquidators of Faith Dee Ltd v Yip Shu Chee & Others* [2013] HKCFI 189 (Unreported, HCCW 237/2005).

2.6 Fraudulent trading

Similar to the discussion in respect of fraudulent conveyances above, liability under this section requires proof there was an actual subjective intent to defraud creditors on the part of the director or person involved in the trading. But unlike in actions involving fraudulent conveyances, the courts are reluctant to impose liability for fraudulent trading by reason of inferring fraud from the circumstances of the case[60]. Therefore the most common defence to these actions is to show that the director or person involved acted honestly, even if it was unreasonable or unjustified in the circumstances. An honest but unreasonable or unjustified belief as to a company's future solvency or ability to perform would be sufficient to displace an inference of fraud[61].

The applicable limitations period for fraudulent trading actions will, as discussed at Section 2.1 para 6 above, vary on a case by case basis depending on the true nature of the remedy sought[62]. Given the character of the available remedy under this provision is the recovery of money, it is likely that the limitation period is 6 years pursuant to 4(1)(d) of the Limitations Ordinance. This is however subject to the extension of the limitation period set out in section 26 of the Limitations Ordinance, such that the period of time does not start to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. On the other hand, for the criminal offence of fraudulent trading, no limitation period applies.

2.7 Dispositions of property after the commencement of winding up

If there has been a disposition of property by a company after the commencement of the winding up, the recipient (or any other interested party) can seek a validation order from the court. The court will exercise its discretion to make a validation order where it can be shown that the disposition is expedient or necessary in the interests of the company and unsecured creditors are not prejudiced as a result of the transaction. One often cited example is where a company had an opportunity to sell a piece of its property for an exceptionally good price if it acted quickly[63].

There may also be a good defence where an intermediary has not had notice of the winding up petition and acted in good faith, without benefiting from the transaction directly. In *HSBC v Vesoco*[64], the court held that the bank permitted payments to be made out of the company's account after presentation of the petition but before its advertisement. The court validated the payments as they were made in good faith, in the ordinary course of business and the bank did not benefit directly from the payments.

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[60] See Section 1.6.3 above.

[61] *Re White and Osmond (Parkstone) Ltd* (Buckley J, Unrep. 1960). See also *Aktieselskabet Dansk Skibsfinansiering v Wheelock Marden & Co Ltd* [2000] HKCFA 31.

[62] *The Joint and Several Liquidators of Faith Dee Ltd v Yip Shu Chee & Others* [2013] HKCFI 189 (Unreported, HCCW 237/2005).

[63] See *Re Gray's Inn Construction Co Ltd* [1980] 1 All ER 814 at 820.

[64] [2002] 2 HKC 708. See also *Bank of Ireland v Hollicourt* [2001] All ER 289, where bank was considered a "mere conduit" and did not itself dispose of the company's property.

The applicable limitation period for dispositions of property after the commencement of the winding up will, as discussed at Section 2.1 para 6 above, vary on a case by case basis depending on the true nature of the remedy sought[65]. If the nature of the remedy sought is to set aside property transactions, it is likely that Section 4(3) of the Limitations Ordinance would apply to applications such that any application must be commenced by a liquidator within 12 years from his or her appointment. Alternatively, if the remedy sought is only for the recovery of money, it is likely that the action is subject to a 6 year limitation period.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

3.1 Standing to bring avoidance actions

In Hong Kong, the starting point is that only the liquidator of a company will have standing to bring avoidance actions before the court. However, in limited cases, other third parties who have been affected by the antecedent transaction are also given standing to apply directly to the court for redress, as set out in the table below. Those third parties may include an overseas creditor or shareholder of the company.

Table A – Standing to bring avoidance actions

Antecedent Transaction	Party or Parties with Standing to Bring an Action
Unfair preference	Liquidator
Extortionate credit transaction	Liquidator
Grant of floating charge	Liquidator
Fraudulent conveyance	Any person prejudiced by the disposition (which would include a liquidator or a creditor),
Post-commencement disposition of property	Liquidator, Official Receiver, any interested party, including a contributory or creditor
Fraudulent Trading	Liquidator, Official Receiver, contributory or creditor

Where a liquidator does have standing to bring an action but does not wish to pursue the action for reasons such as costs, it is possible for a creditor to fund the costs of the action with the consent of the liquidator. In those circumstances, if the action is ultimately successful then that indemnifying creditor can receive a preferential dividend for those funds advanced to the liquidator to pursue that action[66].

[65] *Joint and Several Liquidators of Faith Dee Ltd v Yip Shu Chee & Others* [2013] HKCFI 189 (Unreported, HCCW 237/2005).
[66] Section 265(5B) C(WUM)O.

3.2 A foreign insolvency practitioner as a party

Where the foreign party is not a creditor of a company which is being wound up in Hong Kong, but rather an overseas insolvency practitioner of a company acting or appointed under foreign laws and there is no winding up of that company in Hong Kong, there are no applicable statutory provisions which provide for the recognition of the foreign proceedings or foreign appointed insolvency practitioners such that they could bring proceedings directly in the courts of Hong Kong. It is however possible for a foreign liquidator to bring certain actions in the Hong Kong Courts where the court recognises the foreign insolvency proceeding under the general law principles of comity[67]. Once recognised, the foreign appointed liquidator will have standing to sue without the need to commence a separate winding up in Hong Kong[68].

Recognition is forthcoming under Common Law principles provided that certain conditions are satisfied, on a similar basis to those principles which apply to the recognition of foreign judgments (See Section 10). The first is that there is no question as to the jurisdiction of the foreign court over the company[69]. Generally, the courts will regard a foreign court as having jurisdiction over a company:

- where the company is incorporated in that country or state[70];
- where the law of the country of incorporation recognises the law of the place of the place of the winding up[71]; or
- where the company has submitted to the courts of that jurisdiction[72].

Outside these scenarios the court may also recognise the foreign court as having jurisdiction on the basis of some other reasonable connection with that foreign place. For example, in *BCCI (Overseas) Ltd v BCCI (Overseas) Ltd (Macau Branch)*[73], which involved the winding up of a Cayman Islands incorporated company, the Hong Kong Court recognised the liquidator appointed by the Grand Court of the Cayman Islands and it also recognised the liquidator of the company's Macau branch appointed under the laws of Macau as being the lawful representative of the Macau creditors[74]. A similar situation arose in *Russo - Asiatic Bank*[75], where there were liquidations in two foreign countries, but no valid liquidation at the place of the company's incorporation and in that case the Hong Kong Court recognised the liquidators of both jurisdictions before it.

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[67] The Hong Kong courts have, like their English counterparts, followed the long established principle of universalism: See Sheldon, R. et al "Cross-border insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 230.

[68] See *Re Davidson's ST* (1873) LR 15 Eq 383; *Bank of Credit and Commerce International Hong Kong Ltd v Sonali Bank* [1995] 1 Lloyd's Rep. 227.

[69] Per Godfrey JA, *Chen Lei Hung v Ting Lei Miao* [1998] 3 HC 119.

[70] *Tillemont Shipping Corporation SA v Taitexma Enterprise Corporation* [1993] 2 HKC 129.

[71] For instance, the laws of each individual state within a federal country such as Australia. See Sheldon, R. et al "Cross-border Insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 237.

[72] See Sheldon, R. et al "Cross-border insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 258 citing *Re Davidson's Settlement Trusts* (1873) LR 15 Eq 383.

[73] [1997] HKLRD 304.

[74] See Sheldon, R. et al "Cross-border Insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 237

[75] (1930) 24 HKLR 16; [1997] HKLRD 304, CA (Hong Kong).

The Court will also consider if recognition of the foreign insolvency proceeding will offend any public policy considerations, such as whether those foreign proceedings will treat all creditors equally such that it does not discriminate between local and foreign creditors[76]. The Court may also deny recognition if the foreign proceedings were obtained by fraud or as a result of a denial of natural justice[77].

Once recognised, the Hong Kong Court will render whatever assistance it can so that the foreign liquidator can take control the assets located in Hong Kong or sue in the Hong Kong Courts on behalf of the company. This may include the ability of the foreign liquidator to commence avoidance actions which would be available to a domestic liquidator[78].

This would not, however, extend to permitting a foreign liquidator to take action in a Hong Kong Court for actions that are only available under a foreign law. This is discussed in detail in Section 4 below.

3.3 Commencing ancillary winding up proceedings

Another way for a foreign party to engage the anti-avoidance provisions of the Hong Kong insolvency regime is to commence a winding up of the company in Hong Kong. Assuming that the Court does have jurisdiction to wind up the company[79] and there is already a winding up in another jurisdiction which can be regarded as the principal liquidation[80], the Hong Kong winding up could be conducted as an ancillary winding up[81]. The liquidator appointed in Hong Kong

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[76] See Sheldon, R. et al "Cross-border insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 230

[77] Ibid, See also *Hong Kong Institute of Education v Aoki Corporation* (No 2) [2004] 2 HKC 397.

[78] Per Lord Hoffman, in *The Cambridge Gas Transport Case* [2006] UKPC 26, [2007] 1 AC 508 at [20]. See also *Schmitt v Deichmann* [2012] 2 All ER 1217 and *Irving H Picard and Bernard L Madoff Investment Securities LLC v Primeo Fund* (Jones J, 14 January 2013).

[79] The Court only has jurisdiction to wind up foreign companies that are not incorporated or registered in Hong Kong in certain circumstances: see Section 327 C(WUM)O. Accordingly, the Courts will also consider the following factors:

(i) Whether the unregistered company has sufficient connection to Hong Kong (also known as sufficient connection test), which includes, but is not limited to, the presence of any assets or any business operations in Hong Kong;

(ii) Whether the winding up of the unregistered company in Hong Kong would possibly benefits those who apply for it;

(iii) Whether the Courts have jurisdiction or power over those who might benefit from any distributions of assets by the unregistered company; and

(iv) Whether there are any other more appropriate forums or jurisdictions in which the insolvency proceedings could proceed: See *Re Real Estate Development Co* [1991] BCLC 210, *Re Zhu Kuan Group Co Ltd* [2004] HKCF1 795 (2 August 2004) (HKLII), *Re Information Security One Ltd* [2007] HKCF1 848 (13 August 2007) (HKLII), *Re Kam Kwan Sing v Kam Kwan Lai & Ors* (HCCW 154/2010), See also *Re ECM Real Estate AG*(In Liquidation) [2013] HKCFI 882; [2014] 1 HKC 78; HCCW277/2011 (29 May 2013) in respect of an unregistered company in Hong Kong.

[80] See *Tillemont Shipping Corporation SA v Taitexma Enterprise Corporation* [1993] 2 HKC 129.

[81] Generally at Common Law, if there is already a winding up in the place of the company's domicile, the courts of that jurisdiction will be regarded as the principal court to conduct the winding up of the company and all other courts all as ancillary to it. See Sheldon, R. et al "Cross-border insolvency" (Bloomsbury Professional, Third Edition, 2011), Chapter 6 at 232. See also *Re Pioneer Iron and Steel Group Co Limited* [2013] HKCFI 324; HCCW322/2010 (6 March 2013).

could then pursue the antecedent transactions under Hong Kong law for the benefit of the estate, before those assets are remitted to the foreign insolvency proceeding for distribution to all creditors globally (including any local Hong Kong creditors)[82].

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in our home country?

There are no applicable statutory provisions which provide for the recognition of the foreign insolvency proceedings or foreign appointed insolvency practitioners such that they could bring a claim based on a foreign insolvency law directly in the courts of Hong Kong.

It is not clear whether the Hong Kong courts would permit a foreign party to bring a claim under foreign avoidance law directly against a transferee at Common Law. The Court's power to recognise foreign insolvency proceedings and to grant assistance is discussed at Section 3.2 above, but whether that assistance extends as far as enabling the foreign liquidator or representative to commence actions under a foreign law directly in the Hong Kong courts is yet to be tested. That issue did however recently come before the Grand Court of the Cayman Islands in the case of *Irving H Picard and Bernard L Madoff Investment Securities LLC v Primeo Fund*[83]. In a first instance decision, the Grand Court of the Cayman Island held that at Common Law, recognition of the foreign insolvency proceeding carries with it the active assistance of the court and that assistance could extend to conferring on the foreign representative all those powers the court could confer on a locally appointed liquidator[84]. This included a cause of action under a local insolvency law, but it did not extend to a cause of action under a foreign law[85]. Given the decision reached by the Cayman Court relies on some old Privy Council decisions, the Courts are likely to consider it closely were a similar question to come before it and it would be open to a Hong Kong court to reach the same conclusion.

If however a foreign insolvency practitioner first obtained a judgment under the foreign law in another court (eg that of his home jurisdiction), it would then be possible, subject to the satisfaction of certain conditions, to bring recognition and enforcement proceedings in the Hong Kong courts once that foreign court has heard the claim and made a final and conclusive order between the parties. This is discussed below in Section 10.

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[82] On the recognition and remission of assets back to principal winding up see *Re International Tin Council* [1987] Ch 419; *McGrath and Others v Riddell and Another* [2008] UKHL 21 (Also known as *Re HIH Insurance*).

[83] (Unrep., Jones J, 14 January 2013).

[84] It should be noted an appeal was lodged with the Cayman Island Court of Appeal and that court delivered an interim decision in April 2014 (See *Picard (Trustee for the liquidation of Bernard L Madoff Investment Securities LLC) v Primeo Fund (in official liquidation)* (Unrep, Cayman Island Court of Appeal, 16 April 2014). However, that interim decision did not deal with the issues in respect of the application of the Common Law. As at the time of writing, the Court of Appeal of the Cayman Islands had not yet delivered its final decision.

[85] See *Irving H Picard and Bernard L Madoff Investment Securities LLC v Primeo Fund* (Unrep. Jones J, 14 January 2013) at 29.

QUESTION 5

5. Who decides issues of foreign law?

Foreign law, meaning the law of a foreign jurisdiction[86], is treated by the courts in a civil proceeding as a question of fact and accordingly it may be pleaded as such by the party seeking to rely on it[87].

The party relying on the foreign law must then prove it by adducing evidence from a suitably qualified expert witness (unless it is taken as agreed by the other side). In the absence of evidence of foreign law, the court will assume that the law is the same as Hong Kong.

A person is competent to be an expert witness on foreign law if he is suitably qualified on account of his experience or knowledge as to the law of a place outside of Hong Kong, regardless of whether or not he is entitled to act as a legal practitioner in the jurisdiction in respect of which he is testifying[88]. But the court will not simply accept uncontradicted evidence as of the foreign law uncritically as the court is expected to look at the underlying basis of the opinion[89]. If the circumstances so warrant, the court is entitled to reject as unsatisfactory, uncontradicted evidence of the foreign law[90].

Where there is conflict in evidence as to the foreign law, it is for the Judge to resolve the conflict and decide what the foreign law is.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

A court in a foreign jurisdiction can seek the assistance of the courts in Hong Kong as the courts have the statutory authority to assist pursuant to Part VIII of the Evidence Ordinance (Cap 8), which implements parts of the relevant Hague Convention[91], and Order 70 of the Rules of the High Court (Cap 4A). These rules permit the court to assist the foreign court to obtain evidence gathering in aid of a foreign proceedings and are not specifically limited to proceedings in respect of foreign avoidance laws. The process would be by way of the foreign court issuing a letter of request seeking the assistance of the Hong Kong Court. The designated authority to receive such requests is the Chief Secretary for Administration, who will then send it on to the Registrar of the High Court.

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86 Section 2, Legal Practitioners Ordinance (Cap 159).

87 *Ascherberg Hopwood and Crew Ltd v Casa, Musicale Sonzogn O Do Piero Ostalo, Societa in Nome Collectivo & Others* [1971] 1 WLR 1128(CA), Guaranty Trust Co of New York v Hannay & Co [1918] 2 KB 623.

88 Section 59(1) of the Evidence Ordinance (Cap 8).

89 *Korea Data Systems, Co Ltd v Jay Tien Chiang* [2001] 3 HKC 239.

90 *Traffic Stream Infrastructure Company Ltd v Full Wisdom Holdings Ltd & Others* [2004] HKCFA 56.

91 Part VIII of the Evidence Ordinance (Cap 8). The Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters at (hereinafter referred to as the "Convention") applies in Hong Kong.

As much as possible the courts will strive to give effect to a letter of request insofar as it is proper, practicable and permissible to do so under the laws of Hong Kong[92]. Therefore a foreign court can request the Hong Kong Court's assistance to obtain evidence in Hong Kong for use in civil or criminal proceedings in that foreign country's court, or to perform some other judicial act such as the making of a *Norwich Pharmacal* order. *Norwich Pharmacal* orders compel a third party to provide discovery in relation to an alleged wrongdoing perpetrated against the applicant, and are usually made to assist the applicant obtain evidence in support of proceedings against wrongdoers or to locate assets. It is settled law in Hong Kong that a *Norwich Pharmacal* order may, in appropriate cases, be made in aid of a foreign proceeding or potential foreign proceeding[93].

That said, as the power to assist is a matter of discretion for the court, the court will not exercise its discretion where such requests are considered frivolous, vexatious or an abuse of process[94] and it has the power to reject in whole, or in part, the request and / or delete from the request any parts that it considers excessive[95]. Therefore, a court would not, for example, make a general order as to discovery against a party because it will not allow a 'fishing expedition' to be undertaken[96].

In addition, it is also possible for a foreign party to seek other interim relief from the court pursuant to Section 21M of the High Court Ordinance (Cap 5). This provision permits the court to grant interim relief such as the appointment of receiver to property in Hong Kong or a Mareva injunction[97] even in the absence of substantive proceedings in Hong Kong. The court can however only grant relief where it is in aid of proceedings which have been or are to be commenced in a place outside Hong Kong, and are capable of giving rise to a judgment which may be enforced in Hong Kong under any Ordinance or at Common Law.

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[92] See "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 1232, citing *Seyfang v GD Searle & Co* [1973] QB 148 at 151 per Cooke J.

[93] *Manufacturer's Life Insurance Company of Canada v Harvest Hero International Ltd* [2002] 1 HKLRD 828.

[94] Per Lord Diplock in *Rio Tinto Zinc Corp v Westinghouse Electric Corporation* [1978] AC 547.

[95] "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 1233, citing per Woo J. in Re Q Ltd [1997] 4 HKC 439 at 444B and following *Rio Tinto Zinc Corp v Westinghouse Electric Corporation* [1978] AC 547.

[96] *Radio Corp. of America v Rauland Corp.* [1956] 1 QB 618.

[97] This is an order to prevent someone moving assets out of the jurisdiction, or otherwise dealing with certain property the subject of the injunction: *Mareva Compania Naviera SA v International Bulkcarriers SA (The Mareva)* [1975] 2 Lloyd's Rep 509 [1980] 1 All ER 213n. See also Order 29A, Rule 1(1) Rules of the High Court (Cap 4A).

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Hong Kong has not adopted, ratified or implemented the UNCITRAL Model Law, though this has been considered in the past[98]. There are also no other applicable statutory provisions that empower a Hong Kong court to render assistance to a foreign court in an insolvency proceeding through other means (See Sections 3 and 4 above).

There are also no plans at present to adopt and implement the UNCITRAL Model Law as part of the current consultation on the proposals to improve Hong Kong's corporate insolvency laws and the Consultation Paper on reform of the corporate insolvency law is silent on this issue.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

8.1 Nature of insolvency regimes and civil proceedings

In relation to the general discovery and disclosure of information during the course of a winding up, there are two relevant parts to Hong Kong's legislative regime to consider. On the one hand, the C(WUM)O obliges those who were concerned in the formation and control of the company to disclose certain information and to assist the liquidator with his or her investigations into the affairs of the company and on the other, it provides access to this information for stakeholders, such as creditors and contributories, in the interests of transparency.

In the specific context of anti-avoidance proceedings, the rules in respect of discovery and disclosure are the same as those for other civil proceedings in the courts as Hong Kong does not have a separate and distinct companies' court, nor a bankruptcy court that deals only with these specific matters. The original jurisdiction to hear all matters concerning companies, including the winding up of companies, is vested in the High Court of Hong Kong, Court of First Instance[99]. As a matter of practice companies matters are normally listed before a designated judicial officer referred to as the "companies judge"[100].

[98] See for instance, recommendations in the Twenty Eighth Annual Report of the Standing Committee on Company Law Reform (SCCLR), 2011/2012 (http://www.cr.gov.hk/en/standing/docs/28anrep-e.pdf) The SCCLR considered that the issue of cross border insolvency was important to Hong Kong and expressly agreed that review on the possible adoption of the Model Law should be included (at p. 7).

[99] See 2(1), High Court Ordinance (Cap 4), Section 176, C(WUM)O, and Order 4, Rule 2, Rules of High Court (Cap 4A).

[100] See "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 515.

Therefore actions in respect of antecedent transactions are also commenced in this court, and the rules in respect of discovery and disclosure that apply during anti - avoidance proceedings are the same as those which apply to all civil proceedings before the court.

8.2 Disclosures and information gathering in the course of a liquidation

The regime under the C(WUM)O obliges those who were concerned in the formation and control of the company to disclose information and assist the liquidator in their investigations into the affairs of the company. This obligation commences at the time the winding up order is made. At that time, when the debtor company is placed into liquidation, all the powers of the directors cease except unless sanctioned to continue[101], and then in the case of a compulsory liquidation, the directors or officers of the company are obliged to provide a statement of affairs to the liquidator within 28 days of the commencement of the winding up[102]. The statement of affairs is a proscribed form statement that lists all of the assets, debts, liabilities, securities of the company as well as its known creditors, which must be verified by affidavit. In a voluntary liquidation, the directors must also prepare a similar statement of assets and liabilities as part of the procedure to commence a voluntary winding up itself[103].

Furthermore, the liquidators will take control of all the assets of the company to which the company is prima facie entitled, including any books and records[104] and it is an offence for any past or present officer of the company who defaults in their obligation to deliver up all books and records in his possession or under his control to the liquidators[105]. In addition, those who have prepared the statement of affairs or any persons involved in the affairs of the company can be compelled to attend and answer questions by the liquidator or provisional liquidator to assist their investigations into the affairs of the company[106]. The court can also order these parties and certain other third parties such as contributories, banks, trustees or agents that are suspected of having property of the company (including books and records of the company) to hand them over the liquidator[107].

In addition to these powers, there are also broad two inquisitorial powers available to a liquidator, but which creditors and contributories can also (to differing extents) initiate or engage in. These are known as ‘Private’ and ‘Public’ examinations. While the provisions in respect of private and public examinations apply principally to compulsory liquidations, the court has a power to make order for these examinations in a voluntary liquidation[108].

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[101] In a compulsory winding up, sanction must come from the liquidators or the Court see *Re Oriental Bank Corp; Ex parte Guillemin* (1884) 28 Ch D 634, whereas in a creditors’ voluntary liquidation it can come from the creditors and in a members’ voluntary liquidation, from the members: See Section 244 and 235 (2) C(WUM)O.

[102] Section 190 C(WUM)O.

[103] See Section 233 C(WUM)O for a members’ voluntary winding up, and Section 241(3) for a creditors’ voluntary winding up.

[104] Section 197 C(WUM)O.

[105] Section 271(1)(c) C(WUM)O.

[106] CWUR Rules 39(1) and 41.

[107] Section 211 C(WUM)O.

[108] Section 255 (1) C(WUM)O. See also *Re Campbell Coverings Ltd* (No. 2) [1954] Ch 255.

8.2.1 Private examinations

Under section 221 of the C(WUM)O, at any time after the making of a winding up order, the court may summon before it "any officer of the company or person known or suspected to have in his possession any property of the company or supposed to be indebted to the company, or any person whom the court deems capable of giving information concerning the promotion, formation, trade, dealings, affairs, or property of the company" and examine that person on oath. The court may also require him to produce any books and papers in his custody or power relating to the company[109].

The power of the court under this section is general and unlimited such that it is possible for the court to make an order against a wide range of parties, including banks, brokers, auditors[110], liquidators[111] and even those resident outside of Hong Kong[112].

An action under this section is commenced with the issue of a summons in court by the liquidator, and done on an *ex parte* basis to avoid tipping off the person to be examined[113]. It also is possible for the Official Receiver[114] or a creditor and contributory to make the application[115]. The applicant must state the reasons for application and then a hearing for the application is held before a judge in chambers to decide the scope of the examination. Once an order for examination has been granted and served on the examinee, the examinations are conducted by the liquidator or his legal representatives in chambers, and the proceedings are not open to the public[116]. The examination can take the form of oral examinations or interrogatories. But unlike similar documents in the winding up proceedings, the summons, affidavits, dispositions and / or transcripts in these examination proceedings are not accessible to any third party unless ordered by the court[117], which is why these examinations are referred to as 'private examinations'.

This broad inquisitorial power to conduct private examinations is given to assist the liquidator to carry out his or her duties[118]. Therefore where a liquidator makes an application, he or she must show that the order is reasonably required in order to carry out his or her duty. This may include showing that reasonable steps have been taken to try and obtain the information voluntarily or to otherwise demonstrate to the court that the private examination is the last resort to obtain necessary information of the affairs of the company. If the liquidator satisfies the court of this, the court will take care not to avoid granting orders which may be unnecessarily wide, oppressive or could require any person to exposes himself / herself to potential liability[119].

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[109] Section 221 C(WUM)O.
[110] *Re New China Hong Kong Group Ltd* [2003] 3 HKLRD 799.
[111] *Re Weihong Petroleum Co Ltd* (1999) HCCW 19 of 1998.
[112] *Re Joint and Several Liquidators of The New China Hong Kong Group Ltd* [2006] HKEC 325.
[113] See *Hing Wah Blanket Co Ltd (In Voluntary Liquidation) and Webetter Investments Ltd (In Voluntary Liquidation)* (1994) (High Court, Unreported MP No 2745 of 1994), [1994] HKLY 167.
[114] The Official Receiver is an appointed government official whose office is responsible for supervision of the laws relating to insolvency and personal bankruptcy and the regulation of private insolvency practitioners.
[115] *Re Weihong Petroleum Co Ltd* (1999) HCCW 19 of 1998.
[116] CWUR Rule 6 and Section 222A C(WUM)O.
[117] CWUR Rule 62.
[118] *Re New China Hong Kong Group Ltd* [2003] 3 HKLRD 799.
[119] *The Joint and Several Liquidators of Akai Holdings Ltd v The Grande Holdings Ltd & Ors* [2006] HKCFA 111 (15 December 2006).

Any person who refuses to comply with an order would be held in contempt of court[120].

8.2.2 Public examinations

If in a winding up, the liquidator or the Official Receiver makes a report to the court that in his or her opinion, a fraud has been committed by any person in the promotion or formation of the company or by any other officer in relation to the company since its formation, the court may direct that person or officer to attend before the court to be publically examined in respect to his conduct or dealings[121]. In deciding whether or not to order a public examination, the court will be confined to considering the contents of the report lodged[122].

These applications, like those for private examinations, are generally made on an *ex parte* basis[123], and can be made against parties resident outside of Hong Kong. But unlike the private examination, if the court orders a public examination, the time and place of the examination will be advertised in local newspapers and also in the Government Gazette, and notice given to creditors and contributories[124]. This allows any creditors or contributories to attend the examination and to pose questions to the defendants[125].

As in the case of a private examination, a default in attending a public examination is a criminal offence[126].

8.2.3 Access to information

In addition to compelling certain officers or people to disclose information, the insolvency regime in Hong Kong also permits stakeholders to access certain information about the winding up of the company. Any person who states that they are a creditor of the company can obtain a copy of the statement of affairs from the liquidators[127]. Creditors and contributories can also apply to the court for an order to inspect the books and papers of the company[128]. As every affidavit, summons, order, proof, notice and disposition[129] relating to the winding up of the company is kept in a distinct file by the Registrar of the court, a creditor whose proof of debt has been admitted by a liquidator has a right to inspect the file. Contributories and former officers and directors of the company also have this right to inspect the court file[130].

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120 CWUR Rule 61. See also Paragraph 8.2.21 as to general rights of parties to access to information in a winding up.
121 Section 222 C(WUM)O, CWUR Rule 49.
122 See *Re Great Kruger Gold Mining Co, Ex Parte Barnard* [1892] 3 Ch 307 (CA).
123 See *Hing Wah Blanket Co Ltd (In Voluntary Liquidation) and Webetter Investments Ltd (In Voluntary Liquidation)* (1994) (High Court, Unreported MP No 2745 of 1994), [1994] HKLY 167.
124 CWUR Rules 54, 55.
125 Section 222(2), (3) C(WUM)O.
126 CWUR Rule 56.
127 Section 190(6) C(WUM)O.
128 Section 219 C(WUM)O.
129 Except dispositions under Section 221 of the C(WUM)O (that is, private examinations), which are not filed: See CUWR Rule 62. Evidence from these examinations are not open for inspection except by order of the Court.
130 CWUR Rule 16. A small fee is payable for creditors. Currently it is HK$1 for each inspection per day and a further payment of HK$0.75 per folio of 72 words for taking copies / extracting from such documents.

8.3 Discovery and disclosure in civil proceedings

Anti - avoidance actions by liquidators are in the nature of civil proceedings in the courts, and the insolvency regime does not supplement, amend or provide any special or additional rules to the discovery process that normally applies to civil litigation. Therefore the same rules which apply to any civil litigation commenced in the court also apply to a liquidator's anti - avoidance action. While an exhaustive discussion of the discovery process is beyond the scope of this paper, we provide a brief overview below.

In the course of civil proceedings, discovery refers to the process when both the plaintiff and the defendant are required to disclose and exchange to each party all the relevant documents that are or have been in their custody, possession or control in respect of the facts in issue in the proceeding. This process is governed by the rules of the relevant court handling the proceedings, which for anti - avoidance actions would be the Rules of the High Court of Hong Kong.

Following the close of pleadings[131], the discovery process requires each party to the proceeding to prepare all the relevant documents and list them out in a prescribed form ("List of Documents"), in which the date of document, reference number and a description for each document is be presented. Documents subject to legal privilege are not required to be disclosed as part of the discovery process[132]. These Lists of Documents must be exchanged between the parties without further order of the Court at a prescribed time after the close of pleadings[133] and inspection by the other party would take place following this exchange.

Discovery[134] applies to a wide range of information, including any information in papers, video, sound recording, emails or computer's hard disk etc whether situated in Hong Kong or any other part of the world. Both the plaintiff and the defendants are required to disclose the existence of all documents as long as they are relevant to the litigation and which are in its "possession, custody or power"[135]. If the documents have been lost or disposed of prior to the litigation, the responsible party is required to provide an explanation.

There is also a continuous obligation for each party to disclose the relevant documents throughout the litigation process until the proceedings have concluded.

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[131] "Pleadings" are the preliminary documents filed by each party that sets out the allegations of fact to be relied on by that party in the proceedings.

[132] See Order 24, Rule 5 Rules of the High Court, See also Order 24 of the District Court and see also discussion at See "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 524.

[133] This usually happens within 14 days of the close of pleadings in the case and occurs without order of the court under the rules of the Court: Order 24 Rule 2, Rules of the High Court, See also Order 24 of the District Court.

[134] Order 24, Rules of the High Court, See also Order 24 of the District Court.

[135] Order 24, Rules of the High Court, See also Order 24 of the District Court.

QUESTION 9

9. How are litigation fees and costs assessed?

9.1 Introduction

In Hong Kong, lawyers (both solicitors and barristers) usually charge on hourly basis for contentious matters. They are expressly prohibited from entering into any agreements where the lawyer's fee is dependent on the outcome of the proceedings (often referred to as "no win no fee" agreements). Third party funding of litigation funding is not generally permissible. If anyone enters into such arrangements this may constitute champerty or maintenance, which are both criminal offences and civil torts in Hong Kong. However, there are limited circumstances in which a third party may fund an action without falling foul of the rules against champerty and maintenance. For example, a liquidator of a company may assign a cause of action to another person for the purpose of collecting on the claim.

9.2 Costs follow the event

In Hong Kong, the Common Law indemnity principle applies in civil litigation which means that the losing party (hereafter referred to as the "Paying Party") in the proceedings must pay the prevailing party's (known as the "Receiving Party") legal costs. This rule of cost-shifting is also known as 'costs follow the event'.

For applications made at interlocutory stages prior to the trial, separate costs orders can also be made, to reflect the success and failure at specific stages in the litigation process (regardless of the ultimate outcome of the proceedings). For example, for an application for an extension of time to file some court documents, the courts may summarily assess the costs of such application immediately after the hearing of the application. This is intended to deter parties from making ill-conceived interlocutory applications since the losing party will need to pay the other party's costs immediately rather than at some distant point in the future.

9.3 Taxation

It is however not the case that every dollar spent by the other party is to be reimbursed by the Paying Party. Unless the parties agree the amount of costs between themselves[136], the costs of the Receiving Party must be taxed by the court. That is, the relevant bills must be presented before a judicial officer (a judge or a Taxing Master) who will scrutinise them. The process of taxation is governed by the rules of the relevant court which set down various types of taxation (referred to as bases of taxation) which will each determine how much of the costs incurred by the Receiving Party will be reimbursed by the Paying Party.

[136] The parties can always agree the amount of costs between them: Rule 2, Rules of the High Court O. 62A (Cap. 4A).

In the High Court, the rules concerning taxation are set out in The Rules of the High Court (Cap 4A) Order 62 rule 21 and following. The court of Final Appeal adopts the High Court's rules on the taxation of costs[137], whereas in the District Court, the rules are The Rules of the District Court (Cap 336H) O62 rule 21 and following. In each of these jurisdictions, the rules provide that no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court, though limited exceptions may apply[138].

There are currently five bases of taxation applied in the High Court, namely:

(a) party and party basis, where all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed[139];

(b) common fund basis[140], there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and the ordinary rules that apply to taxation on a solicitor and client basis apply where the costs are to be paid out of a common fund in which the client and others are interested shall be applied, whether or not the costs are in fact to be so paid;

(c) trustee basis[141],where no costs shall be disallowed except in so far as those costs or any part of their amount shall not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid, and should for that reason be borne by him personally;

(d) solicitor and own client basis[142], on the taxation of a solicitor's bill to his own client (except a bill to be paid out of funds provided pursuant to Section 27 of the Legal Aid Ordinance, or a bill with respect to non-contentious business), all costs shall be allowed except insofar as they are of unreasonable amount or have been unreasonably incurred, and;

(e) indemnity basis[143], where all costs shall be allowed except those unreasonably incurred or of unreasonable amount.

Costs include fees, charges, disbursements, expenses and remuneration[144]. But this is all subject to the overriding principle that a Receiving Party cannot receive more on taxation than what they have actually incurred in paying their own solicitors[145].

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137 Rule 57(1), Hong Kong Court of Final Appeal Rules (Cap 484A).
138 For instance, see O.62, Rules 10 and 11 Rules of the High Court (Cap. 4A).
139 Order 62, Rule 28(2) The Rules of the High Court (Cap 4A). In the District Court, see Order 62, Rule 28(2) The Rules of the District Court (Cap 336H).
140 Order 62 Rule 28(3), (4) The Rules of the High Court (Cap 4A). In the District Court, see Order 62, Rule 28(3) The Rules of the District Court (Cap 336H).
141 Order 62 Rule 31(2) The Rules of the High Court (Cap 4A). In the District Court, see Order 62, Rule 31(2) The Rules of the District Court (Cap 336H).
142 Order 62 Rule 29 The Rules of the High Court (Cap 4A). No equivalent rule exists in the District Court.
143 Order 62 Rule 28(4A) The Rules of the High Court (Cap 4A). In the District Court, see Order 62, Rule 28(4A) The Rules of the District Court (Cap 336H).
144 Order 62 Rule 1, The Rules of the High Court.
145 *Gundry v Sainsbury* [1010] 1 KB 645, see fuller discussion at "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 1166-1167.

Where the basis on which costs are to be taxed is set out in the court's order, the taxing master is bound by the terms of those orders. But where the orders do not state the basis of taxation, then the costs must be taxed on a Party and Party basis[146].

Since at least 1985, the Registrar of the (then) Supreme Court, and today, the High Court has issued guidelines which set the recommended allowable hourly rates for solicitors in taxation on a Party and Party basis (the "Scale Rates"). These Scale Rates are intended to apply as a guide to the taxing master as to what reasonable hourly rates are on a Party and Party taxation. It is not intended that the scale should be binding in all circumstances, and as stated in the notes accompanying them, there may be cases where a higher rate would be reasonable and should therefore be allowed[147]. The matter of allowable hours and allowable costs remains at the discretion of the court and it is a matter for the individual judgment of the taxing master who examines the court file. Therefore where, for instance, great responsibility has been accepted by the solicitor, or where he has been exercising specialist skill, this may justify a higher than normal rate. Similarly, the taxing master may consider whether there has been unusual reliance upon counsel or there has been a failure to delegate mechanical tasks to junior staff so as to attract a lower than normal hourly rate.

Furthermore, while the current Scale Rates are intended for use on a Party and Party taxation in civil litigation, they also influence the taxation process undertaken on the other bases and jurisdictions, because they are used as a reference or indicator of the acceptable level of hourly rates for solicitors.

9.4 Recoverability gap

The basic principle underlying Party and Party taxation is to allow only such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the Receiving Party, and no more. Being the narrowest of all the bases of taxation, it means in practice that a portion of the Receiving Party's actual costs will not be reimbursed pursuant to a Party and Party cost order. This is not unique to Hong Kong, and is a feature of all jurisdictions that apply the Common Law indemnity principle[148].

The exact amount of difference between the Receiving Party's actual legal costs and those recovered on a Party and Party taxation, or the recoverability gap, is largely unknown due to a lack of empirical data. One global study on litigation costs suggests that in Hong Kong the general recoverability gap is between zero percent and 40 percent of actual incurred costs[149], but it does not detail precisely how many cases fall within this range. One reason for this is because the current Scale Rates for the High Court were set in 1997 and have not been updated since then in spite of changing market rates.

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[146] See *Cope v. United Dairies (London) Ltd* [1963] 2 Q.B. 33, see fuller discussion at "Hong Kong Civil Procedure" Hon. Justice Patrick Chan PJ, (Sweet & Maxwell, Hong Kong, 2012) (the "White Book") Volume 1 at 1166-1167.

[147] See Circular No. 32/85, Law Society of Hong Kong.

[148] Victoria Law Reform Commission *Civil Justice Review: Report* (Melbourne Victoria, March 2008) at 648.

[149] C. Hodges, S Vogenauer, M Tulibacka *Costs and Funding of Civil Litigation: A Comparative Study* (Oxford, Oxford University Press 2009) at [21]. However the report does not detail how many cases experience a recoverability gap of this magnitude.

Most recent studies suggest the gap ranged from approximately 30 percent to as much as 60 percent in some cases, and that the recoverability gap in the District Court is more pronounced.

9.5 Costs and settlement offers

Under the rules of civil procedure in Hong Kong's courts, the making and rejection of settlement offers by a party can also impact on the ultimate costs that will be awarded to the successful party. An order for indemnity costs or an otherwise adverse costs order may also be made against the recipient of a "sanctioned settlement offer" where the offer is not accepted and the party making the sanctioned settlement offer has gone on to obtain a more favourable judgment. A settlement offer qualifies as a "sanctioned offer" if it complies with certain formalities set out in the relevant civil procedure rules of the court.

9.6 Security for costs

Given the nature of costs orders in this jurisdiction, the court has the power prior to trial, to order that an overseas plaintiff should provide security for the defendant's costs, usually by depositing cash in court or in some situations by way of bank guarantee. This power is discretionary and will depend in part upon a preliminary assessment of the merits of the case and whether the foreign party is likely to be able to meet any future costs order. Domestic plaintiffs are not obliged to provide security, unless they are limited companies and there is credible evidence that they may be unable to pay whatever costs may be awarded against them. Security can only be ordered against a defendant in respect of a counter claim.

QUESTION 10

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10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Judgments of foreign courts which void antecedent transfers could be enforceable in Hong Kong in one of two ways. The first is where they can be registered under the statutory registration scheme for foreign judgments, and the second is if they could be recognised and enforced at Common Law. Where it is possible to enforce them under the statutory scheme, then that must be done and the Common Law option is not available.

10.1 Enforcement by statutory registration scheme

Hong Kong has a statutory registration scheme for foreign judgments[150] to facilitate the reciprocal recognition and enforcement of judgments. This scheme however applies only to the judgments from the courts of certain countries and only to certain types of judgments. Therefore whether a foreign judgment avoiding antecedent transfers is enforceable depends on whether it is from the court of a foreign country to which this scheme applies and whether it is one in the nature of a final and conclusive judgment that orders a party to pay a fixed sum of money.

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[150] Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

Under Section 3 of the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), the Chief Executive in Council may declare whose court judgments can be registered and enforced in the courts of Hong Kong. Currently, that list mainly covers countries in Europe (such as Belgium, France and the higher courts of current and former Commonwealth countries (such as Australia, Singapore, Malaysia and New Zealand)[151]. It is notable that this scheme does not cover judgments from the courts of mainland China or Macau[152].

Further, only certain kinds of judgments from the courts of those countries are registerable and enforceable in Hong Kong under the scheme. Namely, the judgment must be:

(a) one for the payment of a sum of money (and which is not in the nature of a tax, fine or other charge); and

(b) it must be final and conclusive between the parties[153].

Additionally, the judgment shall not be registered where it has been wholly satisfied; and / or that judgment could not be enforced by execution in the country of the original court[154].

If the judgment is registerable, the judgment creditor can apply to the Hong Kong Court for registration anytime within 6 years of the date of the foreign judgment. The application can be made *ex parte* by the judgment creditor but he must make an affidavit, which exhibits different supporting documents to the application including, but not limited to, the certified or duly authenticated copy of the foreign judgment; a translated copy (if the foreign judgment is not in English) certified by a notary public; details of the debtors and creditors involved and the amount of interest (if any) etc. Any foreign currencies should be converted into Hong Kong dollars at an exchange rate prevailing on the date of registration[155]. Once the registration of foreign judgment has been completed, the notice of registration must be served on the judgment debtor by delivering the notice to its last known place of abode or business. Serving the notice out of the Hong Kong jurisdiction is also allowed without having to further seek leave of the court[156].

On registration, thejudgment will have the same force and effect for the purposes of execution as if the Hong Kong court in which it is registered had originally given the judgment. Also the sum for which a judgment is registered shall carry interest[157].

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[151] For full list, see Schedule 1 and 2 of The Foreign Judgments (Reciprocal Enforcement) Order (Cap 319A).

[152] It should be noted that certain commercial judgments from the courts of mainland China are separately dealt with by the Mainland Judgments (Reciprocal Enforcement) Ordinance (Cap 597). However that applies only to certain types of commercial contracts, and does not apply to insolvency related proceedings or judgments.

[153] Section 3(2) Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

[154] Section 4 Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

[155] Section 4 Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

[156] Order 71, Rule 7 Rules of the High Court (Cap 4A).

[157] Section 4 Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319).

10.2 Enforcement of foreign judgments under Common Law

For any foreign judgment that cannot be registered under the Foreign Judgments (Reciprocal Enforcement) Ordinance (Cap 319), it may be possible to have them recognised and enforced at Common Law. But the question of what Common Law principles a Hong Kong court might apply to the recognition of insolvency related judgments of foreign courts has recently become less certain as a result of recent English and Cayman Island decisions in this area. While these decisions are not binding on the Courts of Hong Kong, they have persuasive authority and the Courts will consider them closely. The central issue is whether the Court ought to apply the normal rules it applies in determining whether to enforce a normal civil judgment of a foreign court, or whether such judgments form part of the foreign insolvency itself such that they constitute a special exception from those usual rules.

Normally the Common Law allows an in personam action to be brought upon a foreign judgment where:

- The foreign judgment is a final and conclusive judgment conclusive upon the merits of the claim;
- The foreign judgment must be for a definitive sum; and
- The foreign judgment must come from a "competent" court, as determined by the private international law rules applied by the Hong Kong courts[158].

The situations in which a foreign court is "competent" are generally those set out in Rule 43 of Dicey's Conflict of Laws[159] which states that: "a court of a foreign country outside the United Kingdom has jurisdiction to give a judgment in personam capable of enforcement or recognition as against the person against whom it was given in the following cases:

- First Case - If the person against whom the judgment was given was, at the time the proceedings were instituted, present in the foreign country.
- Second Case - If the person against whom the judgment was given was claimant, or counterclaimed, in the proceedings in the foreign court.
- Third Case - If the person against whom the judgment was given submitted to the jurisdiction of that court by voluntarily appearing in the proceedings.
- Fourth Case - If the person against whom the judgment was given had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of that court or of the courts of that country.

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[158] See Rules 32, 42 and 43 of Dicey, Morris and Collins, *Conflict of Laws*, 15th ed, 2012, para 14R-054. See also *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and Others* [2013] HKCFI 1885; [2014] 1 HKLRD 197; HCCT45/2010 (Unrep, Deputy High Court Mayo, 31 October 2013).

[159] Dicey, Morris and Collins, Conflict of Laws, 15th ed, 2012, para 14R-054. See also Lord Collins in *Rubins v Euro Finance SA* [2012] UKSC 46 at [29] – [31] stating these principles as being implicit in the Common Law requirement for a foreign court to have "competent jurisdiction".

In the earlier English cases of *McGrath and Others v Riddell and Another*[160] and Cambridge Gas Transport[161], the English courts tended to the view that foreign insolvency orders formed a sui generis category of judgments, and were not like ordinary judgments which are made inter - parties. Accordingly in *Cambridge Gas Transport*, the Privy Council held that a Chapter 11 reogranisation plan could be automatically enforced in the Isle of Man without the commencement of a local winding up as the orders of the US Court did not fall to be treated either as an in *personam* or *in rem* judgment and accordingly the usual rules governing recognition of foreign judgments did not apply.

But when a similar issue arose before the United Kingdom Supreme Court in *Rubin v Eurofinance SA*[162] it held that *Cambridge Gas Transport* was wrongly decided and concluded that the recognition and enforcement of foreign insolvency judgments are subject to the same Common Law restrictions which apply to the enforcement of any other type of foreign judgment.

To date, neither the decision of the Privy Council in *Cambridge Gas* nor the decision of the United Kingdom Supreme Court in *Rubin* have been considered or applied by the Hong Kong Courts in respect of an application seeking similar relief. If and when the issue comes before the Courts in Hong Kong, they will certainly consider the reasoning in both cases. But until then it remains unclear which principles will apply at Common Law for the recognition and enforcement of an insolvency order from a foreign court.

[160] [2008] UKHL 21 (Also known as *Re HIH Insurance*).
[161] [2006] 2 All ER.
[162] [2012] UK SC 46.

ITALY

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

In the Italian legal system avoidance actions are set forth by different provisions of law and may be brought either in a non-insolvency scenario, or during insolvency proceedings (i.e., bankruptcy or extraordinary administration).

1.1 General conditions for claw back actions

Article 2901 of the Italian Civil Code allows an ordinary claw back action against detrimental acts and / or transfers in general, when both the following conditions are present:

(i) the debtor was aware of the detriment which the act / transfer would cause to the rights of the creditors or, if such act / transfer was precedent to the existence of the claim, that act was fraudulently designed for the purpose of prejudicing the satisfaction of the claim; and

(ii) in the case of a non-gratuitous act / transfer, the third person involved (i) was aware of said detriment or (ii) if the act was prior to the existence of the claim, participated in the fraudulent project.

In this kind of action, payments of due obligations are not subject to revocation.

Such ordinary claw back actions may be brought in relation to any acts and / or transfers carried out by debtors either before insolvency declaration, or during insolvency proceedings. Before the insolvency declaration, creditors are entitled to bring such action, while during insolvency proceedings only the trustee (in bankruptcy) or the extraordinary commissioner (in extraordinary administration) are entitled to act.

1.2 Acts subject to claw back actions

Pursuant to Article 67, paragraphs 1 and 2 of the Italian Bankruptcy Law (Italian Royal Decree no. 267/1942, as subsequently amended and supplemented: the "IBL"), the trustee (in bankruptcy) or the extraordinary commissioner (in extraordinary administration) would be entitled to start claw back actions with respect to anomalous as well as normal acts.

1.2.1 Anomalous acts

These are:

(a) transactions in which the services rendered by the insolvent entity or the obligations undertaken by the latter exceeded for more than a quarter the consideration received by the insolvent entity (e.g. payment of consideration for services substantially higher than the current market price);

(b) payments made by the insolvent entity not in cash or other usual means of payment (e.g. payments performed by sale of receivables);

(c) the execution of guarantees (e.g. mortgages, pledges) on the insolvent entity's assets, aimed at securing debts still not due as of the date of the guarantee;

(d) the execution of guarantees (e.g. mortgages, pledges) on the insolvent entity's assets aimed at securing debts already due as of the date of the guarantee,

if carried out within the one year (points a), b) and c) above) or the six months (point d) above) preceding the declaration of insolvency, unless the party which had relationships with the insolvent entity gives evidence that such party was not aware of the insolvency status of same (art. 67, paragraph 1 of IBL);

1.2.2 Normal acts

These are:

(a) payments of due debts;

(b) transactions carried out under current market conditions (e.g. payment of a market price consideration);

(c) execution of guarantees (e.g. mortgages, pledges) on the insolvent entity's assets, granted simultaneously with the relevant debt of the insolvent entity (or of any third party),

if carried out in the six-month-period prior to the declaration of insolvency and if the trustee gives evidence that the creditor or the third party involved was aware of the insolvency of the insolvent entity (art. 67, paragraph 2 of IBL).

Furthermore, Article 91 of the Legislative decree no. 270/99 (applicable only to extraordinary administration proceedings) provides that, in relation to any transactions carried out by entities of the same group of the insolvent company (e.g. any controlling or controlled entities, either directly or indirectly, of the insolvent company), the claw back action may be brought by the extraordinary commissioner within a longer suspect period, i.e. –

- 5 years (rather than 1 year), as to anomalous acts; and

- 3 years (rather than 6 months), as to normal acts.

QUESTION 2

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2. What are common defences?

Typical and common defences are included in certain claw back actions exemption rules and the statute of limitation.

Pursuant to Article 67, paragraph 3 of the IBL, an insolvency claw back action exemption rule would apply, provided that the relevant requirements are met.

2.1 Actions that are exempt

The following transactions performed by the insolvent entity prior to the declaration of insolvency cannot be set aside:

(i) payments of goods and services performed in the framework of the business activity in the usual terms;

(ii) remittances on a bank account, provided that same have not significantly and permanently reduced the insolvent entity's debt vis-à-vis the bank;

(iii) sale of real estate assets at a fair price, provided that same are used as house of the purchaser or his / her relatives;

(iv) acts, payments and guarantees performed in the execution of a reorganisation plan aimed at the (i) reorganisation of the insolvent company's debt, and (ii) economic and financial recovery of business activities;

(v) transactions, payments and guarantees performed in the execution of a composition with creditors proceedings or a debt restructuring agreement approved by the court;

(vi) payment of consideration for services performed by employees or consultants of the insolvent entity;

(vii) payments of debts due and outstanding performed in order to receive the services required for the opening of a composition with creditors proceedings.

According to Article 69b of the IBL, the insolvency claw back actions may be brought only within a 3 year period from the insolvency declaration and, in any case, within a 5 year term from the date in which the transaction was carried out.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

A foreign party would have standing to pursue avoidance actions in Italian courts. Indeed, as a general rule, the Bankruptcy Court which declared the insolvency of the debtor has jurisdiction in relation to, among other things, any actions arising from the insolvency declaration, including avoidance actions (Article 24 of the IBL).

The above mentioned rule is confirmed by the Council Regulation (EC) No. 1346/2000 of 29 May, 2000 on Insolvency Proceedings (hereinafter, the "Regulation"). In particular, according to Article 4, paragraph 2, (m) of the Regulation, the Italian law (as law of the State of the opening of proceedings) shall determine, among other things, the rules relating to voidness, voidability or unenforceability of legal acts detrimental to creditors.

However, with respect to claw back actions, reference shall be made also to Article 13 of the Regulation, according to which the general rule on the law of the State of opening of proceedings (i.e., Article 4, paragraph 2(m) of the Regulation) shall not apply where the entity who benefited from an act detrimental to all the creditors provides proof that:

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and

- that the law does not allow any means of challenging that act in the relevant case.

Therefore, it is essential to make an assessment also in relation to the law applicable to the act.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

A foreign party may have access to Italian courts and would be entitled to bring a claim under foreign avoidance law directly against a transferee in Italy, on the basis of the general principle of law or the place where the defendant has its residence or domicile or registered office. Indeed, pursuant to Article 3 of the Italian law May 31, 1995 no. 218 (hereinafter, the "Italian Conflict of Laws Rules"), the Italian jurisdiction would apply when the defendant has its residence or domicile or registered office in Italy.

QUESTION 5

5. Who decides issues of foreign law?

According to Article 14 of the Italian conflict of laws rules, the ascertainment of the applicable foreign law is made by the *court ex officio*. For this purpose, the court may use any legal tools provided by international legislations, as well as any information provided by the Ministry of Justice, experts and / or specialized institutions.

It is important to mention that foreign law shall not apply if the relevant effects are contrary to Italian public order rules, as well as any Italian rules which shall necessarily apply, having regard to the relevant scope or object (e.g. labour law rules).

QUESTION 6

6. Can a court in foreign country seek assistance from a court in your country on matters of foreign avoidance law?

There does not appear to be a general protocols of assistance but, at a European level the European Communication & Co-operation Guidelines for Cross-Border Insolvency (hereinafter, the "Guidelines") may apply. According to Guideline no. 16:

- courts are advised to seek to give effect to the objective of enabling courts and liquidators to operate efficiently and effectively in cross-border insolvency proceedings within the context of the Regulation;

- courts are advised to operate in a co-operative manner to resolve any dispute relating to the intent or application of the Guidelines or the terms of any co-operation agreement or protocol;

- courts are advised to consider whether an appointment of the liquidator in main proceedings or a nominated agent of such liquidator as a liquidator or a co-liquidator in secondary proceedings would better ensure co-ordination between different proceedings under the courts' supervision;

- to the maximum extent permissible under national law, courts conducting insolvency proceedings or dealing with requests for assistance or deciding on any matters relating to communications from other courts should co-operate with each other directly, through liquidators or through any person or body appointed to act at the direction of the courts.

In any event, according to Article 25 of the Regulation judgments issued by a court whereby the judgment concerning the opening of proceedings is recognised in accordance with Article 16 of the Regulation and which derive directly from the insolvency proceedings and / or which are closely linked with them shall also be recognised with no further formalities.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Italy has not implemented the Model Law on Cross-Border Insolvency yet.

In any event, the Italian conflict of laws rules would apply for the recognition and enforcement of a foreign order or judgment also in relation to insolvency orders, as well as a claw back order or judgment issued in another State. In particular, according to Article 64 ff. of the Italian conflict of laws rules, any foreign order or judgment would be automatically recognised in Italy, provided that:

(i) the foreign court had jurisdiction according to the Italian jurisdiction and competence principles;

(ii) the writ of summons was duly served upon the defendant pursuant to the provisions of law of the place where the proceeding had been held, and the defence rights were not breached;

(iii) parties regularly appeared before the court, or the party's failure to appear was regularly declared in accordance with the foreign law;

(iv) the foreign judgment has become final (*res iudicata*) and it is no longer appealable;

(v) the judgment is not contrary to another final judgment issued by an Italian court;

(vi) there are no proceedings pending in Italy on the same subject matter and between the same parties, which started before the foreign proceeding; and

(vii) the effects of the foreign order or judgment are not contrary to the Italian public policy.

Should the foreign order or judgment not be voluntarily enforced or complied with, or be challenged by the counterparty, or whenever it is necessary to enforce the order or judgment in Italy and to foreclose against assets in Italy, a petition shall be filed before the Italian Court of Appeal of the place where the order or judgment has to be enforced. The Italian Court of Appeal having jurisdiction will then double check the existence of all the above mentioned requirements, without considering the merits of the claim, in order to issue the recognition and enforcement order.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

As a preliminary step, a writ of summons shall be served by the plaintiff. The defendant shall file an appearance and answer brief at least 20 days before the date of the first hearing.

With reference to discovery or disclosure, at the first hearing the Judge, upon request of the parties, will:

(a) grant the parties with (i) a 30-day term to file briefs in order to specify and amend their claims and defences; (ii) a further 30-day term in order to file replies and to request evidences and file documents; and (iii) a further and final 20–day term in order to challenge counterparty's requests for evidence; and

(b) schedule a new hearing for the decision on the requests of evidence or reserve its decision on such requests (in such a case, by following order the Judge will inform the parties on its decision relating to the requests of evidence and on the date of the new hearing);

If the Judge decides to admit the evidences requested by the parties (also partially), the same will schedule a new hearing to carry out such evidences (for example testimonial evidence, production of documents); if a sole hearing is not sufficient to carry out the evidences, the Judge will schedule one or more evidentiary hearings.

Furthermore, the Judge could also decide to carry out an expert's report for specific technical issues. In such a case, the Judge will schedule a further hearing to appoint the expert; the expert will perform his task (the parties have the right to appoint their own expert entitled to attend the court appointed expert's operations) and finally file its report. Such a procedure could have a length of one year.

Following the evidentiary hearing(s) (if scheduled), the Judge will schedule a further hearing for the final pleadings by the parties. At the hearing, the Judge will grant the parties with a 60-day term for the filing of final briefs and a further 20-day term for the reply briefs.

The first instance judgment should be issued by the court approximately within 4-6 months after the filing of the reply briefs.

The whole proceeding (starting from the first hearing) usually has an average length of approximately 3-5 years, which depends also on the number of hearings to be scheduled and the workload of the court.

With reference to legal fees and costs, it is worth mentioning that a recent Ministry of Justice Decree (no. 140/2012) has amended the general lawyers' tariffs and provided, among other things, different amounts depending on the value of the case, from a minimum of Eur 25,000 to a maximum of Eur 1,500,000.

QUESTION 9

9. How are litigation fees and costs assessed?

As a general rule of the Italian legal system, fees and costs are awarded to the prevailing parties, on the basis of the general lawyers' tariffs, unless in particularly complex matters. In such a case, the Judge may decide to compensate fees and costs among the parties.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Foreign judgments avoiding antecedent transfers would be enforceable in Italy according to the rules set forth by the Italian conflict of laws rules. Indeed, any foreign order or judgment would be automatically recognised in Italy, provided that:

(i) the foreign court had jurisdiction according to the Italian jurisdiction and competence principles;

(ii) the writ of summons was duly served upon the defendant pursuant to the provisions of law of the place where the proceeding had been held, and the defence rights were not breached;

(iii) parties regularly appeared before the court, or the party's failure to appear was regularly declared in accordance with the foreign law;

(iv) the foreign judgment has become final (*res iudicata*) and it is no longer appealable;

(v) the judgment is not contrary to another final judgment issued by an Italian court;

(vi) there are no proceedings pending in Italy on the same subject matter and between the same parties, which started before the foreign proceeding; and

(vii) the effects of the foreign order or judgment are not contrary to the Italian public policy.

Should the foreign order or judgment not be voluntarily enforced or complied with, or be challenged by the counterparty, or whenever it is necessary to enforce the order or judgment in Italy and to foreclose against assets in Italy, a petition shall be filed before the Italian Court of Appeal of the place where the order or judgment has to be enforced. The Italian Court of Appeal having jurisdiction will then double check the existence of all of the above mentioned requirements, without considering the merits of the claim, in order to issue the recognition and enforcement order.

Apart from the above mentioned provisions of Italian law, reference shall be made also to Article 25 of the Regulation. Indeed, judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 of the Regulation and which derive directly from the insolvency proceedings and / or which are closely linked with them (even if they were handed down by another court) shall also be recognised with no further formalities.

JAPAN

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

1.1 Japanese insolvency law regimes

In Japan, insolvency proceedings are implemented through any one of the following four distinct insolvency law regimes:

- Bankruptcy Act,[1]
- Special Liquidation,[2]
- Civil Rehabilitation Act,[3] and
- Corporate Reorganization Act[4].

Corporate Reorganization and Civil Rehabilitation are restructuring proceedings. Bankruptcy and Special Liquidation are liquidation proceedings. With the exception of Lehman Brothers Japan (which filed for Civil Rehabilitation), most large cases in Japan are filed under Corporate Reorganization. While each regime has slightly different characteristics, the substantive avoidance provisions of the Bankruptcy Act, Civil Rehabilitation Act and Corporate Reorganization Act are nearly identical[5].

1.2 Fraudulent conveyance action under Japan's Civil Code

In addition to the provisions for avoidance under the insolvency law regimes, under Japan's Civil Code[6] an obligee may file an action to rescind an act that an obligor committed knowing that it would prejudice the obligee[7]. The beneficiary must also have known (at the time of the act) that the obligee would be prejudiced. Once a proceeding is filed under an insolvency law regime, the sole authority to exercise avoidance power under the statutes (including fraudulent conveyances) vests with the court-appointed trustee / supervisor. If a Civil Code action for fraudulent conveyance is pending at the time of an insolvency filing, that action will be suspended and the trustee / supervisor appointed by the court in the proceeding will take over as successor plaintiff[8].

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1 Act No. 75, June 2, 2004.
2 Articles 510-574 and 879-902 of Companies Act; Special Liquidation does not have avoidance provisions, so it is not discussed in this chapter.
3 Act No. 225, December 22, 1999.
4 Act No. 154, December 13, 2002.
5 See generally Bankruptcy Act, Articles 160-176; Civil Rehabilitation Act, Articles 127-141; Corporate Reorganization Act, Articles 86-98.
6 Act No. 89, April 27, 1896.
7 Civil Code, Articles 424-426.
8 Corporate Reorganization Act, Article 98; Civil Rehabilitation Act, Article 140.

1.2.1 Civil law jurisdiction

Common law and legal precedent do not play a significant role in deciding avoidance actions in Japan. Japan is a civil law jurisdiction and in theory, court precedent is not strictly binding in subsequent cases. Even Supreme Court precedents are technically little more than the final resolution of the case that was before the court. In practice, however, lower courts generally follow Supreme Court precedents, and the Supreme Court itself is generally hesitant to overrule its own precedents. Where there is no Supreme Court precedent addressing the legal question, relevant opinions from the High Courts receive the same level of deference. Therefore, while precedent is not technically binding, precedent can be a good predictor of how any given case will be decided.

1.2.2 Right of avoidance

In Corporate Reorganization and Bankruptcy, the power of avoidance is vested exclusively with the court-appointed trustee[9]. Civil Rehabilitation is a quasi-DIP proceeding where a member of the debtor's management (or the debtor's counsel) is appointed as trustee. Clearly, empowering the former management to avoid transactions that it approved prior to filing for insolvency raises a conflict of interest. Accordingly, the Civil Rehabilitation Act does not permit the debtor itself to exercise any avoidance power, but rather, vests this power with the court-appointed supervisor[10]. Under all three regimes, the rights of avoidance must be exercised within two years from the commencement of the proceeding, but looks back 20 years for an act giving rise to the right of avoidance[11]. Additional conditions discussed below will effectively limit the 20 year period of time that the trustee can look back retroactively.

Japan does not have an independent bankruptcy judiciary and insolvency cases are heard by a national system of District Courts. Most large cross-border matters are heard by the Tokyo District Court. The District Court judges hearing the insolvency case also have jurisdiction over any avoidance actions relating to the debtor[12]. Procedurally, the avoidance action may be filed in two steps:

- the "fast track" procedure, and
- an ordinary lawsuit.

The fast track procedure requires only a *prima facie* showing of evidence, so that the avoidance (or rejection) order may be issued on an expedited basis[13]. The losing party may then challenge the court's expedited decision by converting the matter into an ordinary lawsuit heard by other judges of the same District Court[14].

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[9] Bankruptcy Act, Article 173; Corporate Reorganization Act, Article 94.
[10] Civil Rehabilitation Act, Article 135.
[11] Bankruptcy Act, Article 176; Civil Rehabilitation Act, Article 139; Corporate Reorganization Act, Article 97.
[12] Bankruptcy Act, Article 173; Civil Rehabilitation Act, Article 135; Corporate Reorganization Act, Article 94.
[13] Bankruptcy Act, Article 174; Civil Rehabilitation Act, Article 136; Corporate Reorganization Act, Article 95.
[14] Bankruptcy Act, Article 175; Civil Rehabilitation Act, Article 137; Corporate Reorganization Act, Article 96.

1.2.3 Substance of avoidance provisions

When Japan's insolvency laws were reformed in 2000, a clear distinction was made between fraudulent conveyances and preferences.

1.2.3.1 Fraudulent conveyance

Upon commencement of an insolvency proceeding, the following acts (except for creating a lien interest and extinguishing a debt which are discussed as preferences) are voidable as a fraudulent conveyance:

- the debtor and the beneficiary entered into a transaction with knowledge that the transaction impaired the interests of other creditors[15],
- after the occurrence of a cessation of payments or filing for any of the insolvency proceedings (collectively, "insolvency event"), the debtor entered into a transaction that impaired the interests of creditors and the beneficiary was aware of both the occurrence of the insolvency event and the fact that the transaction impaired creditors[16], and
- within six months prior to the insolvency event, the debtor and the beneficiary entered into a transaction (insofar as the debtor received no or substantially no consideration)[17].

Further, a debtor's conveyance of assets for reasonable consideration can still be voidable, if:

- the assignment of the assets creates an actual risk of concealment, gift or other transaction that impairs the interests of creditors by changing the form of the assets (such as the conversion of real estate into cash),
- the debtor intended to conceal the consideration, and
- the beneficiary was aware of the debtor's intent to conceal[18].

1.2.3.2 Preference

Upon commencement of an insolvency proceeding, the following acts are voidable as a preference:

- the debtor collateralized its assets to secure an existing claim or paid an existing claim, after an inability of payment or filing for any of the insolvency proceedings (collectively, "substantial insolvency event"), and the creditor was aware of the occurrence of the substantial insolvency event, and

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[15] Bankruptcy Act, Article 160(i); Civil Rehabilitation Act, Article 127(1)(i); Corporate Reorganization Act, Article 86(1)(i).

[16] Bankruptcy Act, Article 160(ii); Civil Rehabilitation Act, Article 127(1)(ii); Corporate Reorganization Act, Article 86(1)(ii).

[17] Bankruptcy Act, Article 160(3); Civil Rehabilitation Act, Article 127-2; Corporate Reorganization Act, Article 86(3).

[18] Bankruptcy Act, Article 161; Civil Rehabilitation Act, Article 127(3); Corporate Reorganization Act, Article 86-2.

- the debtor collateralized its assets to secure an existing claim or paid an existing claim within 30 days before a substantial insolvency event, despite the fact that the debtor was not obligated to do so, or was not obligated to do so at the time of the collateralization or payment (except where the beneficiary was unaware that such collateralization or payment impaired other creditors)[19].

If a loan is new money and the collateral is fair equivalent value, the avoidance analysis does not apply. In other words, Japan observes the New Value Rule.

1.2.4 Unsecured lender example

In a variation of further assurance language, it is common for Japanese banking transaction agreements to generally provide that the bank may later demand (additional) collateral. For the purposes of a preference analysis, a debtor is considered obligated to provide collateral if such demand provision exists in the loan agreement. However, if that same unsecured lender is granted the security interest while the debtor is cash flow insolvent, such grant is a voidable preference. More precisely, the key test for inability of payments / cash flow insolvency is when the debtor became unable to pay its current liabilities when due in general. Note that a debtor is not deemed insolvent when it is unable to make its payments or based on the cash flow test insofar as it is capable of obtaining financing from a third party to pay its indebtedness when due.

QUESTION 2

2. What are common defences?

As discussed above, the common defences to an avoidance action are:

- lack of knowledge;
- time-barred (with time periods discussed above);
- contemporaneous exchange; and
- new value.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

As discussed below, a foreign party may pursue avoidance actions in Japanese courts by enforcing a foreign judgment or by obtaining recognition of the foreign insolvency proceeding.

[19] `Bankruptcy Act, Article 162; Civil Rehabilitation Act, Article 127-3; Corporate Reorganization Act, Article 86-3.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

In general, a foreign party has access to Japanese courts. With respect to the applicable law, there are no conflict of laws rules in Japan to determine the laws applicable to avoidance actions. However, it is generally understood that the law applicable to the claimant's right against the transferor shall govern, provided that the transaction between the transferor and the transferee shall be voidable under the law applicable to the transaction.

QUESTION 5

5. Who decides issues of foreign law?

As stated above, Japan has no statutory conflict of laws rules with respect to determining issues of foreign law in an avoidance action. Two positions have more support than the others:

- the legal logic or the principles behind the law of the jurisdiction in question shall apply, or
- the laws of the country with the legal structure most similar to that of the jurisdiction in question shall apply.

Foreign laws are not treated as facts to be established by the parties. Accordingly, a plaintiff will not lose the case merely because it failed to establish the applicable foreign law. Foreign laws are, however, not treated in the same way as the laws of Japan.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Yes. Japan enacted the Act on Recognition of and Assistance in Foreign Insolvency Proceedings[20] and a series of Acts to amend relevant portions of the insolvency laws[21]. This legislation introduced procedures to recognize foreign insolvency proceedings and to abolish the rigid territoriality principles that previously existed under Japanese law. The effect of a Japanese

[20] Act on Recognition of and Assistance in Foreign Insolvency Proceedings (Act No. 129 of November 29, 2000).

[21] See Act to Amend a Portion of Civil Rehabilitation Act (Act No. 128 of November 29, 2000).

insolvency proceeding now extends to the debtor's assets located outside of Japan. In addition, any recovery of a creditor obtained by the exercise of its rights from the debtor's assets located outside of Japan is credited against payments under the proceeding in Japan.

Under the Act on Recognition and Assistance, a foreign trustee (including a debtor in the case of DIP) may file a petition with the Japanese court seeking recognition of the relevant foreign insolvency proceeding and then request an order for assistance. The court may, upon petition, appoint a "recognition trustee" to administer the debtor's business and property in Japan. The Act on Recognition and Assistance also adopted the principle that a debtor shall be subject to only one insolvency proceeding in Japan, and established rules to resolve treatment of multiple proceedings (when a recognition proceeding was filed where a domestic proceeding or another recognition proceeding exists).

The amended Acts clarified that the Japanese court has jurisdiction over an insolvency case as long as the debtor has either an address, residence, business or other offices, or assets within Japan. The Acts to amend also abolished the mutuality principle so that equal (national) treatment is provided to foreign parties regardless of whether such foreign party's home country provides national treatment to a foreign party.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Japan adopted the Act on Recognition of and Assistance in Foreign Insolvency Proceedings which is based upon the UNCITRAL Model Law on Cross-Border Insolvency. The version of the Model Law adopted by Japan does not specifically address avoidance actions under foreign law.

A foreign trustee may file a petition with the Tokyo District Court for recognition of its home country's insolvency proceeding. Upon recognition, the foreign trustee is entitled to request that the Tokyo District Court issue various assistance orders enumerated in the Act, including an order appointing a recognition trustee. As to avoidance actions, as explained above, the issue of applicable law will arise.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

In Japan, a party is generally responsible for collecting its own evidence. Japanese attorneys do not have any meaningful discovery power to compel production of evidence from other parties. This includes a trustee or supervisor exercising avoidance powers. Japanese insolvency laws do not have separate rules regarding document production consequently, the provisions in the Code of Civil Procedure will apply[22].

A court may assist in the collection of evidence by ordering a defending party to disclose information if:

- the information sought is clearly necessary for the disposition of the case, and
- it is difficult for the moving party to collect the evidence on its own.

Separately, the party (usually a plaintiff with limited access to the evidence) may ask the court to secure evidence prior to the submission of the complaint if it is likely the evidence may become unavailable at a later stage. In any event, these limited procedures to obtain court assistance in document production are very narrow in scope.

With respect to disclosure in Japanese insolvency proceedings in general, the court procedure in Japan is geared to confidentiality, and court dockets and filings are often available only to interested parties. Japanese insolvency proceedings have less burdensome notice and disclosure obligations than some jurisdictions and even creditors have limited access to information.

QUESTION 9

9. How are litigation fees and costs assessed?

Generally in Japan, plaintiffs must pay a fee for filing a lawsuit. The fee is calculated based on the amount of claimed damages. As the amount claimed increases the fee increases in absolute terms, but decreases as a percentage of the claim[23]. These filing fees do not apply when a trustee or supervisor brings an avoidance action in an insolvency proceeding as a "fast track procedure" but the filing fees will apply if the decision in the fast track procedure is challenged as an ordinary case.

[22] See Code of Civil Procedure, Articles 132 and 220-231.

[23] For example, cases claiming 1 million JPY, 25 million JPY, and 100 million JPY would require fees of 10,000 JPY, 95,000 JPY and 320,000 JPY respectively.

While the small court costs are paid by the losing party[24], legal fees are generally borne by each respective party. In tort actions, however, the "loser-pays" rule may apply and in most cases approximately 10% of the damages will be awarded as legal fees. In general, legal fees in Japan are often less expensive than fees would be for a comparable suit in other jurisdictions. This is largely due to the expedited evidentiary process in Japan, which does not require discovery or depositions.

Translations can be a substantial cost if documentary evidence is originally in a different language. All documents submitted in Japanese courts must be submitted in Japanese.

The remuneration of a court-appointed trustee is:

- in a bankruptcy case, determined by the court when interim and final distributions are made to the creditors, and
- in a corporate reorganization case, remuneration is paid on a monthly basis as initially fixed at the start of the proceeding, and also in lump sum at the completion of the service as trustee.

These fees include the cost of bringing any avoidance actions, and the court determines the fee amounts above by taking such efforts into account. In the event a matter is particularly complicated, the trustee may request special permission of the court to hire special counsel.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Japanese law does not distinguish a foreign judgment avoiding antecedent transfers from other judgments, nor does it distinguish between judgments obtained from insolvency and non-insolvency courts.

The Civil Execution Act[25] and the Code of Civil Procedure[26] establish the mechanism for the recognition and execution of foreign judgments. The Civil Execution Act provides that the judgment must be final and non-appealable and must fulfill the four requirements set forth in Article 118 of the Code of Civil Procedure. Specifically, to enforce an award rendered abroad against a Japanese entity:

- the foreign court must have had jurisdiction over the defendant (permitted by law or treaty);

[24] Code of Civil Procedure, Article 61.
[25] Act No. 4 of March 30, 1979; Article 24.
[26] Act No. 109 of June 26, 1996; Article 118.

- the defendant must have received adequate service of process (which does not include service by publication);

- the award and the procedure must not violate the public policy of Japan; and

- the State that rendered the award must recognize the legitimacy of Japanese awards (reciprocity).

Particular types of awards such as punitive damages, may violate the “public policy” requirement. For example, the Supreme Court of Japan has refused to enforce punitive damages assessed by a U.S. court although it upheld the judgment with respect to actual damages and costs that could be distinguished from the punitive damages. Also, a defendant can raise a “public policy” defense if the procedures through which the judgment was rendered were not consistent with Japanese public policy. It is possible that a foreign judgment avoiding an antecedent transaction may be considered against Japanese public policy, and therefore unenforceable, if Japanese law would not have allowed such avoidance.

NIGERIA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

In Nigeria, the Companies and Allied Matters Act CAP C.20 LFN 2004 (CAMA) directly provides the legal / statutory framework for the avoidance of antecedent transactions. Section 495 of CAMA generally prohibits and vitiates fraudulent preference of creditors. Under the Act, conveyances, mortgage, delivery of goods, payment, execution or other acts relating to property of the company shall if made or done by or against the company be deemed a fraudulent preference in the event of the winding up of the company, under certain circumstances. The Act envisages that the conveyance to creditors of a company after the presentation of a winding up petition (filing at the registry) or a resolution of the company for winding up is a fraudulent preference. See Section 495(3).

The Act further prohibits the conveyance or assignment by a company of all its property to trustees for the benefit of all its creditors. See Section 495(2) CAMA.

Section 496 of CAMA imposes personal liability on beneficiaries of fraudulent preference as surety for the debt to the extent of the charge on the property or the value of the interest in the property, which ever is less. The provision also empowers the court in a case of fraudulent preference to grant leave to join the surety or guarantor of a debt as a third party as if in an action for recovery of the sum paid.

Furthermore, floating charges created on the property of a company within 3 months of the commencement of winding up shall be invalid, unless it is proved that immediately after the creation of the charge that the company was solvent. See Section 498 CAMA. For other antecedent transactions it is also 3 months under Section 495 by way of incorporation of the 3 months period stated in the Bankruptcy Act.

Also criminal prosecution is available where pursuit of avoidance claims may no longer be available owing to time limitations. The Act provides that if it appears to the Court in the course of winding up that any past or present officer of the company has been guilty of any offence in relation to the company for which he is criminally liable, the matter may be referred to the Attorney General of the Federation for criminal prosecution. See Section 508 of the Act.

Apart from the provisions of CAMA, in Nigeria other laws such as the Economic and Financial Crimes Act CAP E1 LFN, 2004, the Criminal Code and other laws governing prosecution of economic crimes in Nigeria make provisions that are akin to the effect of avoidance of antecedent transactions, in terms of confiscation and forfeiture of the proceeds of economic crimes. For example the EFCC Act in Sections 23, 24, 25, 26, 28 and 29 provides for the tracing, disclosure, attachment, seizure and forfeiture of assets and properties acquired as a result of illegal acts which include fraudulent preferences in

winding up. However we note that the order for confiscation and forfeiture would be made upon an interim application by authorised officer before conviction and request for final order of forfeiture after conviction for the offence. See Sections 29 and 30 of the EFCC Act. Unlike in the usual avoidance claims, the properties forfeited are vested in the Government and not the liquidator of the Company. The language of the EFCC Act is that it is the authorised officer meaning EFCC Officer that can enjoy the rights under the Act. The liquidator would not qualify though the liquidator can make a compliant to EFCC and therefore enjoy the benefit of any recovery under the Act.

Furthermore, CAMA empowers a liquidator of a company to avoid onerous contracts that affect the property of a company in winding up. The liquidator may make the application to disclaim an onerous contract within 12 months of the commencement of winding up proceedings and in accordance with the provisions of the Act. See Section 499 of CAMA. In furtherance to the avoidance of antecedent transactions, CAMA equally provides for the avoidance of attachment, sequestration or execution against the company after the commencement of winding up. See. S. 497 of CAMA. In the event of winding up, the Act restricts the rights of creditors to retain benefits from execution as against the liquidator of the company, if such execution was not concluded before the commencement of winding up proceedings. However where any creditor has had notice of a meeting for voluntary winding up of a company, the date of the notice will be substituted for the date of commencement of winding up. See Section 500 CAMA. In this vein Section 501 of CAMA also requires the sheriff in execution against the company, to deliver goods and money seized to the liquidator, where notice of the appointment of a provisional liquidator or the making of a winding up order or the passing of a resolution for voluntary winding up has been given to the sheriff.

Aside from statutory provisions, the basic principles of common law on avoidance of contract would also be available under Nigerian jurisprudence and could be relied upon to avoid antecedent contract / transactions in deserving cases, particularly for a liquidator. Vitiating factors such as misrepresentation, mistake, duress, undue influence, fraud and illegality may be available not just for transactions occurring in the immediate run up to insolvency (i.e. the 3 month limitation period provided for under CAMA) but for older contractual arrangements. Those common law principles usually also provide for the remedy of rescission, which is tantamount to avoidance of the transaction.

However, the decision of the Nigerian Supreme Court in the case of *FMBN v NDIC* (1999) 2 NWLR Pt. 591, 333 @p.341, ratio 4, appears to have created an exception to the bar on the prosecution of actions or proceedings by other courts against a company in liquidation. The Court qualified the provisions of Sections 417 CAMA, in holding that an action may be sustained in the State High Court against a company under going liquidation at the Federal High Court. This decision is at variance with the principles of collective proceedings, which envisages that all creditors make their claim before the Liquidator, in winding up proceedings.

QUESTION 2

2. What are common defences?

In Nigeria, although the jurisprudence on antecedent transactions may not be developed in terms of case law, however intrinsic in certain provisions of CAMA are possible defences to civil or criminal action for antecedent transactions. For instance under CAMA, directors are under obligation to act in “good faith” and “in the best interest of the company”. See Section 282 CAMA. The business judgment rule may avail a director in an action or charge a defence for antecedent transactions, except that it can be shown that the transaction was laced with improper motives and/or fraudulent intent.

The common law defence of being an innocent purchaser for value is codified under CAMA and may apply to restrict the powers of a liquidator in avoiding antecedent transactions. Under Section 500 (1) (b) of the CAMA, a creditor who has completed execution on the assets of a company before the commencement of winding up will be entitled to retain the benefits of such execution against the liquidator, where the goods are purchased by another person in good faith under the sale of a sheriff of the court.

The CAMA appears to provide a strong time bar defence / limitation period for avoidance claims. By virtue of section 495(1) of CAMA, there appears to be a very short period created for those transactions that would be caught up by the avoidance claims of a liquidator. The Section refers to principles applicable to bankruptcy (personal insolvency) under Section 46(1) Bankruptcy Act which impose a 3 month limitation period. See also Section 495(3) CAMA. Section 498 of CAMA retains the same period for avoidance of floating charge created within 3 months preceding commencement of winding up.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country’s courts?

In Nigeria, avoidance actions are basically available to the liquidator. A foreign party can generally sue under Nigerian law and in circumscribed circumstances earlier described in answer to question 1 pursue avoidance claims. i.e. a foreign liquidator and not just any creditor. In addition, although, Nigeria has not enacted any cross-border insolvency legislation, a foreign party in the sense of a foreign insolvency representative may be allowed to pursue avoidance actions, possibly within the context of enforcement of foreign judgments as allowed under the Foreign Judgments (Reciprocal Enforcement) Act CAP. F 35, LFN, 2004 where that party has obtained certain orders relating to avoidance of the antecedent transactions in the foreign jurisdiction and requires same to be enforced.

The Act applies to foreign judgments / orders from civil proceedings and judgments and orders in criminal proceedings for the payment of money for compensation or damages to an injured party. The Act only applies to foreign judgments of countries which accord reciprocal treatment to judgments given in Nigeria. However, a foreign claimant or more appropriately foreign judgment creditors must also apply for and register the foreign judgments in Nigeria within 6 years of the judgment.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

The general position of Nigerian law is that any person, national or foreign has the right of access to Nigerian courts. Save for evidential purpose, where expert evidence on same would be admissible, foreign law is enforceable in Nigeria by way of choice of law clauses in a contract or transaction. This is particularly relevant to international transactions. However to be effective and enforceable foreign choice of law must be real, genuine, bona fide, legal and reasonable. It should not be capricious and absurd. In other words, the foreign law must be that of a country that is sufficiently related to the transaction. See the Supreme Court decision in *Sonnar (Nig.) Ltd. V. Partenreedi M.S. Nordwind (1987) 4 NWLR Pt. 66 P. 520*. It depends on whether the foreign party bringing a foreign avoidance claim is bringing the action on the basis of contract or on the basis of avoidance principles applicable in the foreign insolvency system. On the one hand, it is conceivable that if a foreign transaction involving a Nigerian transferee with a foreign choice of law clause is made, it appears that, a party may be able to bring a claim under foreign avoidance law against a transferee in Nigeria. On the other hand, in the absence of clear exceptions under the Nigerian insolvency framework which is solely focused on a territorial approach, it would be difficult to convince a liquidator or the Court to recognise foreign avoidance claims brought pursuant to a foreign insolvency regime.

QUESTION 5

5. Who decides issues of foreign law?

Nigerian Courts determine issues of foreign law. Unlike domestic law that is judicially noticed, foreign law is an issue of fact under Nigerian law which cannot be presumed but rather must be proved. Where there is a question as to foreign law, the opinion of experts who in their profession are acquainted with such law are admissible evidence of it. Such experts may also produce books or authorities, which they declare to be works of authority upon foreign law in question, which books the Court, having received all necessary explanations from the experts may construe for itself. See Section 69 of the Evidence Act, No.18, 2011.

An expert in the foreign law of a country could be a professional i.e. lawyer of the country concerned. The expert may also be someone who holds an official position which requires and therefore presumes the knowledge of the foreign law in question. However, persons other than lawyers maybe considered as "specially skilled" on a point of foreign law by virtue of their knowledge gained for their respective profession which may not be law. See. *Said Ajani v. The Comptroller of Customs (1954) 14 WACA 37*.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

There are no provisions, procedures or mechanisms specifically addressing this issue. The assistance that can be rendered by Nigerian Courts to a foreign party is limited with respect to enforcement of a foreign judgment.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

Nigeria has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

At the early stage in insolvency proceedings, for example, winding up, the Company Winding Up Rules, ("CWR") 2001, make provision for the advertisement of winding up petition by order of court before the hearing of the Petition. See Rule 19 of the CWR. The Rules require that the Petition be advertised once or as many times as the Court may direct in the Gazette and in one national newspaper and one other newspaper in the state where the office of the company being petitioned is located. The advert is also required to invite interested members of the public / companies / creditors to make their claim at the hearing of the Petition. This mechanism offers disclosure of the likely insolvency of a company to the Nigerian public. A foreign or local creditor may notify of their intention to appear in the petition to support or oppose same and

file relevant proofs of his claim. Such a person may also apply to the court for copies of the processes where the Court had not given directives for same to be served on the parties which formally signified their intention to participate in the petition within the prescribed period under the Winding up Rules. A creditor may also apply to a liquidator to give account.

Also, in furtherance of effective asset recovery the CAMA requires directors of a company to provide the receiver or liquidator of a company with the statements of the affairs of the company. Such statement of account are to contain or show the company's asset, debts and liabilities, the names, residences and occupations of its creditors, the securities held by them, the dates when securities were given, etc. See Ss.397 and 420 of CAMA. The Act similarly requires that the statements of account are verified by affidavit of authorised officers of the company. Unlike in other jurisdictions where a creditor may be entitled to reports from the liquidator or Insolvency Administrator, this is not automatic in Nigeria.

Also by reason of the requirements of disclosure and accountability imposed on receivers and liquidators to make a report / account to the Corporate Affairs Commission and / or the court, a foreign or a local party may through use of local solicitors - initiate searches in the court or at the Corporate Affairs Commission. See Section 398, 399 CAMA (accounts by a receiver). See Section 429 of CAMA (accounts by a liquidator).

Outside the specific requirements above described associated to insolvency proceedings, where the insolvency rules or any other special rules of the Federal High Court are silent on any issue, the Civil Procedure Rules of the Federal High Court of Nigeria apply. For instance, Order 43 of the Federal High Court (Civil Procedure) Rules make provisions for discovery and inspection of documents. Under the Rules, a Plaintiff or a defendant may deliver interrogatories in writing within 7 days of the close of pleadings to the opposite party to answer, which shall be answered by affidavit within 7 days. Objections to answering interrogatories are allowed on grounds that they are scandalous or irrelevant. The judge may order a party to answer a question that is omitted or insufficiently answered.

Similarly a party may apply for discovery of documents within 7 days of close of pleadings and the other party is required to answer by affidavit within 7 days with copies of the documents requested to be submitted. Objections can be made to discovery and the court would exercise its discretion in allowing or refusing an application for discovery. The court may limit the documents or class of documents for which discovery may apply.

QUESTION 9

9. How are litigation fees and costs assessed?

In Nigeria, legal practitioners do not have unlimited powers to charge fees for services they render to their clients. The level of regulation varies, depending on whether the work involved is contentious or non-contentious. Although specific limitations are not placed on contentious / litigation fees, Rules 52 of the Rules of Professional Conduct, 2007 list criteria for charging of professional fees in contentious matters, as follows;

- time required;
- skill and labour required;
- novelty and difficulty of the questions involved;
- amount / claim involved; and
- experience and years of practice, etc.

Non-contentious matters or transactions are regulated by the Legal Practitioners (Remuneration for Legal Documentation and other Land Matter) Order 1991 which provides different scales of charges for different categories of non contentious legal services.

Professional fees could be recovered by way of action in court. The procedure for recovery may depend on whether the legal practitioner had an agreement with the client in writing over his fees or whether the lawyer rendered his services and served his bill thereafter. However in both cases the service of bill of charges and the expiration of one month period are condition precedent to bringing an action to recover the charges / legal fees in court. See Section 16(2) of the Legal Practitioners Act.

With respect to costs without specific regards to avoidance litigation, Order 25 of the Federal High Court (Civil Procedure) Rules sets out principles to be observed by the Court in fixing costs. By virtue of this Order, in fixing the amount of costs, the principle to be observed is that the party who is in the right is to be indemnified for the expenses to which he has been unnecessarily put in the proceedings, as well as compensated for his effort in coming to court. The judge may take into account all the circumstances of the case.

A litigant may obtain orders of court for the cost of litigation from the losing party. This is usually by way of a prayer or relief for cost of litigation in the originating processes (writ of summons, originating summons, originating motions or petition) employed in commencing the suit. The Court has the discretion depending on the circumstances and outcome of the case to grant such prayer for cost of litigation. It is however usual practice for the party seeking an order as to cost of litigation to exhibit a copy of the payment slips/document evincing monies paid to his counsel as legal fees.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

Foreign judgments avoiding antecedent transfer are enforceable in Nigeria. However the limitation to this is that it is only foreign judgments of countries which accord reciprocal treatment to judgments given in Nigeria, that are enforceable. The Foreign Judgments (Reciprocal Enforcement) Act applies to foreign judgment / order from civil proceeding and judgments and orders in criminal proceedings for the payment of money for compensation or damages to an injured party. However, a foreign judgment creditor must also apply for and register the foreign judgment in Nigeria within 6 years of judgment, to enforce same in Nigeria.

The application must be made to a superior court of Nigeria. However, foreign judgments will not be registered where; it has been wholly satisfied or it could not be enforced by execution in the country of the original court. See Section 4 of the Foreign Judgments (Reciprocal Enforcement) Act.

SINGAPORE

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

At present, the majority of the statutory provisions addressing insolvency law in Singapore are found in the Companies Act (Cap.50) (the "Companies Act"), the Companies (Winding Up) Rules (Cap.50, Regulation 1) (the "Winding Up Rules") and the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap.50, Regulation 3) (the "Application of Bankruptcy Act Provisions Regulations"). In addition, there is a body of case law that has been built up over the years which have interpreted the various applicable statutory or regulatory provisions.

The liquidator and/or judicial manager have power to recover property of the Company that has been improperly dissipated before winding up. Typical applications made by the liquidator and/or judicial manager to avoid antecedent transactions include transactions entered into at an undervalue and giving of an unfair preference.

Section 329 of the Companies Act read with Section 98 of the Bankruptcy Act (Cap.20) ("Bankruptcy Act") provides that if a Company has been wound up and the Company had at the relevant time, entered into a transaction at an undervalue, the Court shall make such order as it thinks fit for restoring the position to what it would have been if the Company had not entered into that transaction. A transaction made at an undervalue may be challenged by the liquidator if:

(a) the transaction occurs within five years ending with the day of the making of the application or the commencement of winding up; and

(b) the Company was insolvent at the time or becomes insolvent as a consequence of the transaction.

Section 329 of the Companies Act read with Section 99 of the Bankruptcy Act provides that if a Company has been wound up and the Company had, at the relevant time, given an unfair preference to any person, the Court shall make such order as it thinks fit for restoring the position to what it would have been if the Company had not given the unfair preference. A transfer of property or other act relating to property amounts to an unfair preference if:

(a) the person to whom the property is transferred is a creditor of the Company or surety or guarantor of the Company's debts;

(b) the transaction puts the person in a better position than he would otherwise have been in when the Company is placed in winding up;

(c) the Company was influenced, in deciding to give the preference, by a desire to produce the effect mentioned at (b) above; and

(d) the transfer occurred at the relevant time, which is either 2 years prior to commencement of winding-up if the person receiving the preference is a related party or 6 months otherwise.

QUESTION 2

2. What are common defences?

The common defences which may be relied upon to refute allegations of undue preferences and transactions at an undervalue are set out below.

A transaction will not be considered to be at an undervalue and an undue preference will not be considered to have been given if at the time of the transaction, the Company was not insolvent, or did not become insolvent as a consequence of the transaction (section 100(2) of the Bankruptcy Act read with section 329 of the Companies Act).

A transaction entered into by an insolvent Company will not be at an undervalue if the Court is satisfied that the Company did so in good faith and for the purpose of carrying on its business and at the time it did so, there were reasonable grounds for believing that the transaction would benefit the Company (regulation 6 of the Application of Bankruptcy Act Provisions Regulations).

An order that a transaction was at an undervalue or an unfair preference shall not prejudice any interest in property which was acquired from a person in good faith, for value and without notice of the relevant circumstances or prejudice any interest deriving from such an interest (section 102(3)(a) of the Bankruptcy Act read with section 329 of the Companies Act). In addition, such an order shall not require a person who received a benefit from the transaction or unfair preference in good faith, for value and without notice of the relevant circumstances to pay a sum to the Official Receiver, the Liquidator or the Judicial Manager, except where he was a party to the transaction or the payment was to be in respect of an unfair preference given to that person at the time when he was a creditor of the Company (section 102(3)(b) of the Bankruptcy Act read with section 329 of the Companies Act).

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

Generally, foreign claimants do not have standing to pursue avoidance actions in the Companies Act. If a foreign company registered under Pt XI Div 2 of the Companies Act goes into liquidation or is dissolved in its place of incorporation or origin, the liquidator of the foreign company shall, until a liquidator for Singapore is duly appointed by the Court, have the powers and functions of a liquidator for Singapore (section 377(2)(b) of the Companies Act). This would include bringing an action in the name and on behalf of the Company to pursue avoidance actions. The Court of Appeal in *Beluga Chartering GmbH v. Beluga Projects (Singapore) Pte Ltd* [2014] SGCA 14 has also indicated that the liquidator of a foreign company will be recognised as the representative of the company for the purposes of getting in and realising the company's worldwide assets and there would generally be no basis for a Singapore court to decline to recognise the liquidator's claim to assets belonging to the company under the general principles of property law.

However, the Singapore Court may have common law discretion to provide assistance to a foreign party to pursue avoidance actions. Such common law discretion to assist a foreign administrator was affirmed by Justice Proudman in *In re Phoenix Kapitaldienst GmbH* [2012] 3 WLR 681 and although there is not a reported case, the author is of the view that this English case would be persuasive in the Singapore courts.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

The Singapore Court may have common law discretion to provide assistance to a foreign party to pursue avoidance actions. However, there is no legal basis to provide the Court with discretion to apply foreign avoidance law against a transferee in Singapore.

QUESTION 5

5. Who decides issues of foreign law?

Foreign law is treated as a fact i.e. it must be pleaded and proven. In the event that parties choose not to plead foreign law in litigation in Singapore, the law of the forum will apply by default.

The court may have recourse to materials such as any statement of law contained in books or reports printed or published under the authority of that country. As a general rule, expert opinion will still be required to assist the court in interpretation of such material. Expert opinion is to be given in a report written and signed by the expert. The purpose of the expert opinion is to, amongst others, inform the court as to the relevant content of foreign law, the sources of such law and to assist the court in making a finding as to what the foreign court's ruling would be on an issue if there is no existing authority on point.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

This issue has not been considered in any reported judgments in Singapore.

The Singapore Court may have common law discretion to assist a foreign court. The common law discretion to assist provisional liquidators appointed by the High Court of Justice of England and Wales pursuant to a letter of request by the Supreme Court of New South Wales to transmit English assets to Australia was affirmed by Lord Hoffman and Lord Walker (minority) in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. The approach of Lord Hoffman and Lord Walker was affirmed by Vinodh Coomaraswamy JC in *Beluga Chartering GmbH v. Beluga Projects (Singapore) Pte Ltd* [2013] 2 SLR 1035 and the Court of Appeal decision in *Beluga Chartering GmbH v. Beluga Projects (Singapore) Pte Ltd* [2014] SGCA 14.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does you country's version of the Model Law address avoidance actions under foreign law?

No, the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law") has not been adopted in Singapore.

However, the 2013 Report by the Insolvency Law Review Committee (the "Committee"), a committee appointed by the Ministry of Law, recommended that the Model Law be adopted, with appropriate modifications and exclusions. The Committee also recommended that the Model Law apply only to corporate insolvencies, and to review, at an appropriate juncture, whether the Model Law ought to extend to individual insolvencies after it has been in operation for some time.

The Committee's recommendations are currently being reviewed by the Government.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

Past or present officers or a contributory of a company which is being wound up has to *inter alia* assist and co-operate with the liquidator of a Company to deliver property, books and papers of the Company under the person's control, to produce books and papers affecting or relating to the property or affairs of the Company. Any person who contravenes section 336 of the Companies Act shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$10,000.00 or to imprisonment not exceeding two (2) years.

Every officer or contributory of any company being wound up who *inter alia* destroys, mutilates, alters or falsify any books, papers or securities shall be guilty of an offence and be liable on conviction to a fine not exceeding S$10,000.00 or to imprisonment for a term not exceeding two (2) years.

The discovery obligations of parties in an application to avoid antecedent transactions are set out in the Rules of Court (2006 Rev. Ed.) (the "Rules"). Order 88 Rule 2(1) of the Rules provides *inter alia* that every application under the Companies Act must be made by originating summons and that the Rules shall apply. Although there is no reported case, the author is of the view that the discovery obligations set out under the Rules may be applicable.

QUESTION 9

9. How are litigation fees and costs assessed?

There are two types of legal fees (technically referred to as costs in Singapore), namely, solicitor-to-client cost and party-to-party cost. The former refers to cost payable by a party to their own solicitor. The latter refers to cost payable by one party in the litigation to the other party.

Generally, a client is liable to their solicitor for solicitor-to-client cost on an indemnity basis i.e. all costs allowed except insofar as the amount is unreasonable or unreasonably incurred. Depending on the circumstances and the complexity of the case, clients may be able to reach an agreement with their solicitors for their solicitor-client cost to be capped at an agreed amount or for cost to be charged on a time-cost basis.

The quantum of party-to-party cost is at the court's discretion and is usually awarded on a standard basis i.e. cost reasonably incurred. Generally, cost follows the event i.e. the successful litigant will get an award for cost.

However, the rule may be departed from when it appears to the Court that in the circumstances of the case, some other order should be made. In exercising its discretion, the Court shall take into account, *inter alia*, the conduct of all parties including conduct before and during the proceedings and the parties' conduct in relation to any attempt at resolving the matter by alternative forms of dispute resolution. Cost may be dealt with by the Court at any stage of the proceedings or after the conclusion of proceedings. Any costs ordered shall be paid notwithstanding that the proceedings have not been concluded, unless the Court otherwise orders.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

This issue has not been considered in any reported judgments in Singapore.

An application may be made pursuant to section 4 of the Reciprocal Enforcement of Foreign Judgments Act (Cap.265) or section 3(1) of the Reciprocal Enforcement of Commonwealth Judgments Act (Cap.264). In addition, the Singapore Courts may have power under the common law to enforce such foreign judgments.

The common law power to enforce a foreign judgment was recently affirmed by Lord Collins in *Rubin and another v. Eurofinance SA and others (Picard and others intervening)* [2013] 1 AC 236 (UKHL). This decision of the English court is likely to be persuasive in the Singapore courts.

SOUTH AFRICA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

When dealing with South African law it is significant to note that our common law consists of the Roman Dutch law[1]. English law did however influence certain areas of mercantile law, such as the law of insolvency and company law. The law in general is not a codified legal system and similar to English law, whereby the law must be sought in court decisions and individual statutes[2]. In terms of the Constitution[3] legislation may be tested by the courts so as to establish the constitutionality thereof – the Constitution being the supreme law of the land to which all other laws must conform[4].

South African insolvency law is neither pure Roman-Dutch law, nor English law. It is not contained in one single Act although it is essentially regulated by the Insolvency Act 24 of 1936[5] (the Insolvency Act) which is regarded as the main source of Insolvency Law and which Act governs the sequestration of individuals and related matters[6]. The Insolvency Act should however not be regarded as a complete statement of the law of insolvency and does not impinge on any common law right consistent with its provisions[7]. Mention must be made of the fact that to a considerable extent our various acts relating to insolvency law are declaratory of the common law[8].

Regarding corporate insolvency law, the former Companies Act 61 of 1973 (the 1973 Companies Act) and the Close Corporations Act 69 of 1984 contain chapters that dealt with the winding-up (or liquidation) of companies and close corporations respectively[9]. The 1973 Companies Act has been replaced by the Companies Act 71 of 2008 (the 2008 Companies Act) as from 1 May 2011.

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1 *Fairlie v Raubenheimer* 1935 AD 15 at 146; Mars 13.

2 Smith & Boraine "Crossing borders into South African Insolvency Law: From Roman-Dutch Jurists to the Uncitral Model Law" 2002 *American Bankruptcy Institute Law Review* 141.

3 Constitution of the Republic of South Africa (Act No. 108 of 1996).

4 *Holomisa v Argus Newspaper Ltd* 1996 6 BCLR 836 (W) at 836J; Botha "Administrative Justice and Interpretation of Statutes: A Practical Guide" in Lange *The Right to Know* (2004) 14.

5 Hereafter referred to as the Insolvency Act or Insolvency Act of 1936. While it primarily deals with the sequestration of individuals, partnerships and other entities that cannot be wound up under the provisions of the Companies Act 61 of 1973 (hereafter referred to as the 1973 Companies Act), it applies mutatis mutandis to insolvent companies and close corporations by virtue of s 339 of the 1973 Companies Act and s 66 of the Close Corporations Act 69 of 1984 (hereafter referred to as the Close Corporations Act) respectively.

6 See Kunst et al Meskin *Insolvency Law* (1990, loose leaf); Bertelsman et al Mars *The Law of Insolvency* (2008) and Sharrock et al Hockly's Insolvency Law (2007) for current texts on South African insolvency law.

7 Such as the *Actio Pauliana* – action available to creditors defrauded by alienation. For a comprehensive discussion of the *Actio Pauliana* see Boraine "Towards Codifying the actio Pauliana" 1996 SA Merc LJ 213.

8 Smith Insolvency Law (1988) 7.

9 Hockly 241.

Both insolvent and solvent companies may at present be wound up in certain circumstances however at present the 2008 Companies Act does not provide comprehensively for the winding-up of all companies. The winding-up of companies is regulated firstly by sections 79–81 of the 2008 Companies Act which deal with the winding-up of solvent companies. Furthermore chapter 14 (ss 337–426) of the 1973 Companies Act continues (with certain exceptions), to apply to the winding-up and liquidation of insolvent companies as if the 1973 Companies Act had not been repealed[10]. In undertaking the winding-up of an insolvent company in terms of the 1973 Companies Act, this would apply both to a company whose liabilities exceed its assets, and to a company which is unable to pay its debts as and when they fall due for payment[11].

Statutory impeachable dispositions are regulated by the Insolvency Act, and these provisions will also be applicable to insolvent companies. The insolvency representative[12] may approach the court to set aside certain dispositions made by the insolvent before sequestration. Although the Insolvency Act deals with the grounds upon which a disposition of an insolvent's property can be set aside, it does not deprive the creditors of their rights under the common law to have a disposition set aside if such disposition defrauded the creditor[13]. The insolvency representative may rely on the common law action of the Actio Pauliana, in circumstances where any alienation defrauded or prejudiced the creditors, or he may elect to rely on the statutory provisions contained in the Insolvency Act[14]. All the transactions referred to in the Insolvency Act deal with "dispositions" of rights to property as defined in section 2 of the Insolvency Act. The Insolvency Act provides for the following categories of voidable dispositions: dispositions without value, voidable preferences, undue preferences and collusive transactions.

Section 339 of the 1973 Companies Act states that, in the winding-up of a company unable to pay its debts, the provisions of the law relating to insolvency must, in so far as they are applicable, be applied mutatis mutandis in respect of any matter not specifically provided for by the 1973 Companies Act. Certain sections of the 1973 Companies Act make particular areas of insolvency law applicable to the winding-up of a company and in the case of voidable dispositions, section 340 provides that:

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[10] S 224(3) read with item 9(1) sch 5 of the 2008 Companies Act. This chapter of the previous 1973 Companies Act is to remain in effect until legislation providing for the winding up of insolvency companies has been adopted. See Hockly 240.

[11] *Boschpoort Ondernemings (Pty) Ltd v ABSA Bank Limited*, Supreme Court of Appeal Case reference 936/2012 2013; JDL 2676 (SCA).

[12] The insolvency representative is known as a trustee in the case of sequestration in terms of the Insolvency Act 1936 and as a liquidator in the case of a company wound up in terms of the provisions of the 1973 Companies Act.

[13] For a plea to improve this remedy in South African law, see Boraine 1996 *SA Merc LJ* 213. See also *Duet and Magnum Financial Services CC (in liquidation) v Koster* [2010] ZASCA 34 at para 13 in which the Court pointed out that the Insolvency Act created remedies in addition to those available at common law for fraud, or under the Actio Pauliana. See also Brzezinska "Actio Pauliana of the bankruptcy receiver within or outside the bankruptcy proceedings?" INSOL International Technical Paper available at https://www.insol.org/page/349/2013-turton-award-winner (07-01-2014).

[14] Hockly 148.

"Every disposition by a company of its property which, if made by an individual, could, for any reason, be set aside in the event of his insolvency, may, if made by a company, be set aside in the event of the company being wound up and unable to pay all its debts, and the provisions of the law relating to insolvency shall mutatis mutandis be applied to any such disposition".

1.1 Fraudulent conveyances under the common law

The uncodified principles of the actio Pauliana as they applied in Roman-Dutch law still apply in their original form[15]. The remedy is available to any creditor which enforces a debt against a debtor irrespective of whether proof existed that the debtor is in fact insolvent or whether such debtor has been formally been declared insolvent[16]. To avoid a fraudulent conveyance under the actio Pauliana, the following must be proved:

(a) the alienation must have diminished the debtor's assets;

(b) the recipient must not have received his own property;

(c) the debtor alienator must have had the intention to defraud his creditors, but if value was received, the recipient must have been aware of such an intention to defraud;

(d) the fraud must have caused detrimental consequences for the creditors[17].

1.2 Undervalue transactions in terms of insolvency law

Apart from the common law remedy, the Insolvency Act also makes provision for the setting aside of certain transactions which the insolvent entered into prior to sequestration and where the outcome of the transaction was to prejudice creditors or to prefer only certain creditors above others. In terms of the Insolvency Act, any disposition by the insolvent not made for value can be set aside by the court if the insolvency representative can prove, in instances where the disposition was made more than two years before the date of sequestration, that immediately after the disposition was made, the person disposing of the property was insolvent and thus that such person's liabilities exceeded his or her assets[18]. If the disposition was made less than two years prior to sequestration, the court can set it aside if the beneficiary is not able to prove that the assets of the insolvent exceeded his liabilities immediately after the disposition was concluded[19].

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[15] See also Boraine "Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-Border Context" 2009 *SA Merc LJ* 455.

[16] *Commissioner of Customs and Excise v Bank of Lisbon* 1994 (1) SA 205 (N); Boraine 2009 *SA Merc LJ* 455.

[17] For a detailed discussion see Boraine "Avoidance Provisions in a Local and Cross-border Context: A Comparative Overview" 2008 *INSOL International Technical Series* Issue No. 7 available at http://www.insol.org/TechnicalSeries/pdfs/TechnicalSeriesIssue7.pdf (07-01-2014).

[18] S 26(1) of the Insolvency Act.

[19] Boraine *INSOL International Technical Papers Series, No.13*.

1.3 Preferences in terms of insolvency law

According to section 26 of the Insolvency Act the insolvency representative has to prove that the insolvent made the disposition, when he made it and that no value was received[20]. The term 'without value' in the context of section 26 is not defined in the Insolvency Act. As no technical meaning can be ascribed to the term, it should be interpreted in the ordinary sense of the word, implying without reasonable value or not for adequate value[21]. The word 'value' has over time been given various explanations such as a donation or payment in terms of an invalid or illegal contract[22].

Preferences differ from dispositions not made for value in that preference law deals with the settling of a pre-existing debt. A disposition by a debtor may be set aside as a voidable preference in terms of s 29(1) of the Insolvency Act if the debtor was unable to pay all his creditors in full and consequently favoured only certain creditors. The insolvency representative must prove that:

(a) a disposition was made by the insolvent within six months prior to sequestration;

(b) the effect of the disposition was to prefer one creditor above the others; and

(c) immediately after the making of such disposition the insolvent's liabilities exceeded the value of their assets[23].

Section 30 of the Insolvency Act prescribes the requirements for an undue preference. This type of preference comprises of a disposition of assets to a creditor, made at any time before sequestration, but whilst the liabilities of the debtor exceeded his assets, with the intention of preferring one creditor above others[24].

Section 31(1) of the Insolvency Act provides that the court may also set aside a transaction where the debtor intentionally colluded with another person to dispose of his property in a manner which has the effect of prejudicing his creditors or of preferring one of his creditors above another. Intentional collusion is a requirement and both parties must have anticipated the outcome. Collusion in this context is an agreement with a fraudulent purpose, and does not merely signify an agreement which has the result that one creditor is preferred over another[25].

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[20] Hockly 140.

[21] *Estate Wege v Strauss* 1932 AD 76.

[22] Boraine *INSOL International Technical Series* 13. It was held that disposition in discharge of an obligation to return an illegal payment is not a disposition without value in the case of Fourie NO v Edeling NO [2005] 4 All SA 393 (SCA) para 19. See also Cronje SARIPA Notes: Diploma in Insolvency Law and Practice 2013 (on file with the author) 111.

[23] Boraine INSOL International Technical Series 13-14.

[24] *Ibid*.

[25] *Meyer NO v Transvaalse Lewendehawe Koöperasie Bpk en andere* 1982 (4) SA 746 (A) 771; Hockly 147.

The trustee, in their representative capacity, is responsible for instituting proceedings to set aside an impeachable disposition. If the trustee fails to act, any creditor may step in and institute such legal proceedings in the name of the trustee, provided that the creditor has indemnified the trustee against the legal costs which might be incurred[26].

Section 34 of the Insolvency Act provides that if a trader transfers in terms of a contract any business belonging to him or her or the goodwill of such business, or any goods or property forming part thereof other than in the ordinary course of the trader's business or for the purposes of securing payment of a debt and fails to publish a notice of such intended transfer in the Government Gazette and in two issues of an Afrikaans language and in two issues of an English language newspaper circulating in the district in which the business is carried on, then the transfer would be void as against the trader's creditors for a period of 6 months after such transfer and would also be void against the trustee if the estate was sequestrated at any time within the said period.

The purpose of the section is to prevent traders who are in financial difficulties from disposing of their businesses or the assets thereof to a third party in circumstances where the third party would not acquire liability for the debts of the business but would nevertheless have paid the purchase consideration to the seller which could then be dissipated and not paid to the creditors. The effect would be that the purchaser would be free to dispose of the assets regardless of the claims of creditors against the seller (the trader).

"Trader" is broadly defined in the Insolvency Act[27]. It includes any person who carries on any trade, business, industry or undertaking in which property is sold or is bought, exchanged or manufactured for purpose of sale or exchange or in which building operations of whatever nature are performed or an object whereof is public entertainment or which carries on the business of a hotel-keeper or someone who acts as a broker or agent of any person in the sale or purchase of any property or in the letting or hiring of immovable property.

"Transfer" in the sense contemplated by section 34 is, in turn, also broadly defined and includes actual or constructive transfer of possession[28].

QUESTION 2

2. What are common defences?

The Insolvency Act[29] regulates certain transactions which the insolvent entered into before sequestration and which prejudiced the creditors or preferred only one or certain of the creditors above the others. The Act however does provide for certain exceptions and common defences.

[26] S 32 (1) of the Insolvency Act.
[27] S 2 of the Insolvency Act.
[28] S 34 (4) of the Insolvency Act.
[29] Insolvency Act, 24 of 1936.

At the outset it is clear from the definition ascribed to the term "disposition" in section 2 of the Insolvency Act that a disposition made in compliance with an order of court is specifically excluded, provided that the insolvent was personally responsible for such disposition with the aim of complying with the order of court[30].

Section 26 of the Insolvency Act deals with any disposition by the insolvent not made for value. An exception to the general principle in section 26 is benefits received under a duly registered ante–nuptial contract ("pre-nuptial")[31]. A pre-requisite for such an exception is that the disposition must be an immediate benefit completed within three months of date of marriage and given in good faith by a man to his wife or child born out of the marriage[32]. The contract must have furthermore been duly registered at least two years prior to sequestration[33].

A disposition by a debtor can, in terms of section 29(1), be set aside as a voidable preference if it appears that the debtor was unable to pay all his existing debt in full yet favoured a particular creditor for instance by full payment of his pre-existing debts[34]. A beneficiary can prevent a transaction from being set aside if that provision is able to prove firstly, that the disposition was made in the ordinary course of business and secondly, that in doing so the beneficiary had no intention to prefer one creditor above another[35].

The test with regard to whether a disposition was made in the ordinary course of business is an objective one, namely whether the disposition was in accordance with ordinary business methods adopted by solvent persons in business. Accordingly, having regard to the fact that international business methods may differ, the ordinary, honest and solvent businessman would have acted no differently in similar circumstances[36].

The second part of the defence, namely that the debtor did not intend to prefer one creditor above the others, has to be proven by the beneficiary, independently from the first part of the defence. The test has a subjective element as it is concerned with the subjective intention of the debtor.

In terms of the Prescription Act,[37] and subject to certain qualifications, prescription generally starts to run as soon as the debt becomes due. These qualifications are that a debt shall not be deemed to be due until the creditor (in this case the insolvency representative) has knowledge of the identity of the debtor and of the facts from which the debt arose. The prescriptive period for debts (ie the limitation period within which the debt would become superannuated) is three years,[38] unless specifically otherwise provided for in the Prescription Act[39].

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[30] SARIPA.
[31] S 27.
[32] S 27. See *Brink v Kitshoff* 1996 (4) SA 197 (CC) for a case where a provision was declared unconstitutional because of discrimination based on sex and marital status.
[33] Hockly 142.
[34] Ibid.
[35] S 29(1). See *Janse van Rensburg NO v Steenkamp* 2010 (1) SA 649 (SCA).
[36] SARIPA; Hockly 143.
[37] Act 68 of 1969.
[38] Section 11(d) of the Prescription Act, 68 of 1969.
[39] Section 12(1) of the Prescription Act, 68 of 1969.

In respect of disposition claims, the Supreme Court of Appeal (SCA)[40] has held that prescription would ordinarily commence running no later than the date of appointment of the liquidator[41] unless there were circumstances delaying the commencement of prescription. The Court rejected an argument that the debt i.e. the obligation to return the property or to repay the value thereof, becomes due only once a Court granted an order setting aside the disposition.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

When dealing with cross-border insolvency law in the South African legal system it is necessary to distinguish between the current position under the common law and the statutory position that will apply once the Cross-Border Insolvency Act[42] comes into full effect[43]. As South Africa currently has no enforceable legislative dispensation, the common law remains applicable[44].

The Cross-Border Insolvency Act was enacted on 8 December 2000 and came into force on 28 November 2003. One of the main objectives of the Cross-Border Insolvency Act is to regulate the recognition of foreign representatives from States designated by the Minister in terms of section 2(2) of that Act. In terms of section 2(2)(a), the Cross-Border Insolvency Act applies only in relation to States designated by the Minister of Justice by notice in the Government Gazette and accordingly the Act will have no practical effect until such time as States have been so designated. The following discussion represents the position regarding the recognition of foreign representatives in South Africa until such time as the Cross-Border Insolvency Act becomes fully operative[45].

With regard to the recognition of foreign appointments, the Foreign Trustees and Foreign Liquidators Recognition Act of 1907 was the first legislation which dealt with this subject and it provided that the (then) Supreme Court could recognise the appointment of a foreign representative. Although this Act has been repealed, some of its principles have endured through precedent[46].

[40] *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) SA 499 (SCA).

[41] *Duet and Magnum Financial Services CC (in liquidation) v Koster* 2010 (4) (SA 499 SA 499 (SCA) para 27.

[42] Act 42 of 2000.

[43] Although the Act was assented to and came into effect on 28 November 2003 it will not take full effect until the Minster of Justice and Constitutional Development has designated the foreign states in respect of which the Act will apply.

[44] Bertelsman *et al Mars The Law of Insolvency* (2008) 660.

[45] For a detailed discussion of the South African Process of adopting the UNCITRAL Model Law see Smith & Boraine "Crossing borders into South African Insolvency Law: From Roman-Dutch Jurists to the Uncitral Model Law" 2002 *American Bankruptcy Institute Law Review* 173-175; See also Olivier & Boraine "Some aspects of International Law in South African Cross-border Insolvency Law" 2005 CILSA 5.

[46] *Kunst et al Meskin Insolvency Law* (1990, loose leaf) para 17.3.2.5; *Ex parte Steyn* 1979 (2) SA 309 (O).

Considerations of comity and convenience play a significant role in the exercise of the discretion of the court to recognise a foreign representative. Thus, having regard to comity, convenience and equity, a South African High Court is entitled to recognise the appointment of a foreign representative. The principles of international private law will also be applied in such an instance, especially with regard to the treatment of property situated in this jurisdiction[47].

The movable property of the insolvent automatically vests in the foreign trustee in whatever jurisdiction it may be situated, if, at the time of the insolvency order, the insolvent was domiciled in the area of jurisdiction of the court that granted the order[48]. By a fiction of law the insolvent's movable property is deemed to be present at this domicile[49]. Therefore according to South African law, a foreign trustee is automatically vested with the insolvent's movable property wherever situated, provided that at the date of sequestration the insolvent was domiciled in the area of jurisdiction of the Court which was responsible for granting such order.

Whereas in the case of movable property recognition is considered to be a mere formality, recognition concerning immovable property is a pre-requisite and the courts are afforded discretion to either reject or approve such application for recognition. Immovable property is administered according to the *lex rei sitae* – the law of the place where the property is situated. The sequestration of an estate outside South Africa does not divest the insolvent of immovable property situated in South Africa[50].

Although there is theoretically a difference in procedure when dealing with movable and immovable property, this does not mean that the foreign trustee is entitled simply to deal with movable property situated in South Africa. He is still required to seek recognition by the South African High Court before being able to do so[51]. In terms of section 20 of the Insolvency Act, the property of the insolvent individual vests in his trustee, however a company being wound-up does not lose title to its assets and the property is deemed to be under the custody and control of the liquidator. It is therefore essential for the foreign representative of a juristic person to apply for recognition where he has to contend with either movable or immovable property within South Africa[52].

In terms of common law principles, the foreign insolvency representative wanting to pursue avoidance transactions in South African courts will at the outset have to make an "inward bound" request and approach the South African High Court to apply for recognition as well as request the court to award him the necessary powers to pursue such transaction. Recognition of the foreign representative allows him to rely on local South African law in the performance of his duties and thus enables the applicant to invoke the active assistance of the Court[53].

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[47] Meskin para 17.3.2.6.

[48] Olivier & Boraine 2005 *CILSA 6*.

[49] In the case of a company the place of incorporation may be substituted for the place of domicile, but the principal place of business may afford jurisdiction even if it differs from the place of the registered office. See Meskin para 17.2.

[50] Olivier & Boraine 2005 CILSA 6.

[51] Mars 664. Cf *Ex parte Palmer NO: In re Hahn* 1993 (3) SA 359 (K) 362E; *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) 179D.

[52] Meskin para 17.2; *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA).

[53] Ibid.

In South African insolvency law the court that hears the application is the relevant division of the High Court. In exercising its discretion, territoriality remains largely the norm applied by the South African courts[54]. Contrary to the practice in various international jurisdictions, the foreign representative is usually[55] recognised in South African insolvency law rather than the foreign insolvency proceedings[56]. In principle, the foreign applicant may request to be permitted to pursue local transactions in terms of foreign avoidance provisions, but the South African court will at best agree to such transaction being dealt with in terms of South African insolvency law[57].

Although the Cross-Border Insolvency Act has not yet come into effect, it does determine that with regard to access to South African courts the foreign representative may apply directly to our courts and in doing so does not automatically subject himself or the debtor's matters to that jurisdiction for other purposes[58].

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

The position regarding voidable transactions will be influenced to some extent by the specific insolvency proceedings of such a case. In the instance of concurrent proceedings each separate jurisdiction will apply its own particular avoidance provisions to those transactions that occurred within the relevant jurisdictions. If a foreign representative wishes to become part of the concurrent proceedings in South Africa he / she will as a minimum requirement have to qualify for ancillary relief in terms of South African law with the aim of joining the South African proceedings in order to lodge a claim on behalf of the foreign creditors against the South African estate. The foreign representative will have to apply South African insolvency law to attack dispositions that occurred within this jurisdiction[59].

In the case where there is only one main proceeding the foreign representative will have to approach the South African court with the aim of having the foreign bankruptcy order as well as their appointment recognised.

[54] Boraine "Comparative Notes on the Operation of Some Avoidance Provisions in a Cross-Border Context" 2009 SA *Merc LJ* 463.

[55] In the unreported matter of Overseas Shipholding Group, Inc and 180 others, High Court of South Africa, KwaZulu-Natal Division, case reference 12827/12, the Court granted an order recognising an Order granted by the US Bankruptcy Court, Delaware, ordering specifically that the automatic stay and related provisions of Section 362 of the US Bankruptcy Code would apply of full force and effect in South Africa in regard to the Applicants and any assets of any Applicant in South Africa or its territorial waters at any time.

[56] Cronje *SARIPA Notes: Diploma in Insolvency Law and Practice* 2013 (on file with the author) 454.

[57] An example of the type of order which the court will grant when a foreign representative applies for recognition is to be found in *Moolman v Builders & Developers (Pty) Ltd* 1990 (1) SA 954 (A); Cronje 456.

[58] S 9 of Cross-Border Insolvency Act 42 of 2000.

[59] Boraine 464.

A court in South Africa has the discretion derived from considerations of comity and convenience to recognise a foreign representative[60]. As part of such a recognition order, the foreign representative will have to request the court to grant the office holder the necessary powers that will enable such officer to administer property situated in that court's area of jurisdiction. The office holder's position largely depends on the discretion of the court, where territoriality is still essentially the norm. In theory, the officer holder may ask to be allowed to attack local transactions in terms of English avoidance provisions, but in all probability the South African court will at best allow the office holder to deal with such transactions in terms of South African insolvency law[61]. According to Boraine the position is nevertheless not clear, especially since the time periods in the statutory provisions are calculated as from the date of formal bankruptcy. In the absence of a statutory rule, a South African court may argue that the ancillary order in the format of a recognition order does not amount to a bankruptcy order for this purpose[62].

One of the leading works, Meskin, submits that, in all cases where local creditors' rights may be affected, the court ought to issue a rule nisi containing directions as to the publication thereof, and should make such directions as may be appropriate in the circumstances to protect the rights of those creditors[63].

In the case of *Ex parte LaMonica v In re Eastwind Development SA* (*Baltic Reefers Management Ltd intervening*)[64] the application was for the recognition by the South African court of a foreign representative to enable him to pursue certain claims in this jurisdiction. The applicant was appointed by the United States Bankruptcy Court of the Southern District of New York as bankruptcy trustee of a Panamanian company. The court held that a foreign appointed representative required recognition by an order of a South African court before the foreign representation was entitled to deal with local assets and confirmed that the court exercises discretion and is guided by grounds of comity and convenience.

The court held further that according to the information before it, it had no reason to believe that the applicant was not acting bona fide and that the applicant would fail in their duties if they did not pursue claims which he regarded as valid. Therefore the consideration of comity and convenience favoured the order sought by the applicant, and the application accordingly succeeded.

When the Cross-Border Insolvency Act[65] takes effect, section 23 of that Act will grant a foreign representative standing to attack transactions in South Africa in terms of local insolvency laws[66].

This is in accordance with the UNCITRAL Model Law on Cross-Border Insolvency.

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[60] Meskin.
[61] Boraine 463.
[62] Boraine 464.
[63] Meskin.
[64] [2010] JOL 24783 (WCC).
[65] Act 42 of 2000.
[66] Boraine 464.

QUESTION 5

5. Who decides issues of foreign law?

South Africa is not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters. For several years the common law applied to the ascertainment of foreign law[67]. With the enactment of the Law of Evidence Amendment Act[68] the position changed and it is no longer necessary to prove foreign law where the foreign law can be ascertained readily and with sufficient certainty[69]. The common law will however continue to govern circumstances where the Law of Evidence Amendment Act does not apply.

What is referred to as the "Passive Approach" is typical in common law jurisdictions, where parties are responsible for asserting facts and invoking applicable law[70]. In these jurisdictions, the court's role is generally limited to the drawing of conclusions from proof presented by the parties. Judges in these states play no active role in the gathering of information on facts[71]. In jurisdictions such as South Africa where courts are regarded as "passive" in their approach to the treatment of foreign law, parties are obliged to plead and prove the relevant content of the foreign law invoked.

The usual way in which foreign law may be proved is by expert evidence and one of the most frequent forms of evidence of foreign law accepted is that of an affidavit (sworn statement) or at times a written opinion from a practitioner in the particular foreign jurisdiction. It should be noted that the expert evidence is not conclusive and that "the ultimate decision as to the content of the foreign law is the court's which must have regard to relevant rules of the foreign legal system"[72].

According to section 1(1) of the Law of Evidence Amendment Act "any court may take judicial notice of the law of a foreign state… in so far as such law can be ascertained readily and with sufficient certainty". However section 2 provides that neither party is precluded by section 1 "from adducing evidence of the substance of a [foreign] legal rule… which is in issue in the proceedings concerned". Often the foreign law will only be able to be determined "readily and with sufficient certainty" when the applicable local statutes and subordinate legislation are placed before the court, and section 1(2) confirms that section 1(1) can be fortified in this way[73].

[67] Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* (2012).
[68] Act 45 of 1988.
[69] Forsyth.
[70] Shaheeza Lalani "Establishing the Content of Foreign Law: A Comparative Study" 2013 *The Maastricht Journal of European and Comparative Law* 78.
[71] Ibid.
[72] Forsyth 113.
[73] Forsyth 115.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Save for the enactment of the Cross-Border Insolvency Act,[74] South Africa has not concluded any cross-border insolvency protocols or arrangements with any other jurisdictions. As such there are currently no protocols nor guidelines intended to permit courts to communicate or to seek direct assistance from courts in South Africa on matters of foreign avoidance law[75].

The preamble to the Cross-Border Insolvency Act reads as follows:

"AND WHEREAS there is a need -

- *to strengthen co-operation between the courts and other competent authorities of the Republic of South Africa and those of foreign states involved in cases of cross-border insolvency;*
- *for greater legal certainty for trade and investment;*
- *for fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;*
- *for protection and maximisation of the value of the debtor's assets*
- *for the facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment"*

The Cross-Border Insolvency Act is therefore intended to strengthen co-operation between South African and foreign courts in the administration of insolvent estates. Section 25(1) of that Act clearly states that In relation to any proceedings envisaged in section 2(1) of the Act, the court is required to co-operate "to the maximum extent" possible with foreign courts or representatives[76]. This can be done directly or through a local insolvency representative such as a trustee or liquidator[77]. The court may also communicate and seek information or assistance directly from such foreign courts or representatives[78].

The Act is silent on the nature of such communication and presumably the assistance of the Department of Foreign Affairs may be sought[79].

[74] 42 of 2000.
[75] The Act is in force, but will only become effective once States have been designated in terms of the Act.
[76] S 25(1).
[77] Ibid.
[78] S 25(2).
[79] Kunst *et al Meskin Insolvency Law* (1990, loose leaf) para 17.4.6.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency?

The UNCITRAL Model Law was adopted as part of South African domestic legislation by way of the Cross-Border Insolvency Act[80] (the Act). The Cross-Border Insolvency Bill was approved by the State President on December 8, 2000 and published as the Cross-Border Insolvency Act in the Government Gazette on 15 December, 2000. Although the Act came into effect on 28 November 2003, it is for all practical purposes not yet in operation as it requires the designation of certain foreign states by the Minister[81] of foreign states to which the Act will apply[82].

The most significant deviation from the UNCITRAL Model Law can be found in the reciprocity provision of section 2 of the Act. Section 2 affords the Minister discretionary powers to designate a state if satisfied that the recognition afforded by the law of such a State to proceedings under South African insolvency law justifies the application of the Act to foreign proceedings in such a State[83]. At present, no States have yet been designated, but, once such designation takes place, a dualistic system will be introduced to the recognition of foreign bankruptcy orders in that representatives from designated States will follow the procedure envisaged by the Act, whilst representatives from non-designated States will continue to follow the process based on the common law and precedents[84].

Various requirements are stated in the preamble of the Act[85] which include strengthening the cooperation between courts and other competent authorities of South Africa and those of foreign states involved in Cross-border Insolvency matters[86]. The approach of the Act towards avoidance actions under foreign law is set out in section 9 which enables the foreign representative to directly apply to the South African High Court for relief, as well as in section 23 which states that upon recognition of a foreign proceeding, the foreign representative will attain locus *standi* to initiate legal action to set aside any disposition upon the same basis as would be available to a South African insolvency representative[87].

[80] 42 of 2000.

[81] Minister of Justice and Constitutional Development.

[82] Mars 660. For a detailed discussion of the history of the adoption process of the UNCITRAL Model Law see Boraine and Smith "Crossing Borders Into South African Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law" 2002 *American Bankruptcy Institute Law Review* 173.

[83] Ibid.

[84] Mars 679; SARIPA 448.

[85] See above re question 6.

[86] Preamble to Act 42 of 2000.

[87] Ss 9 and 23 of the Cross-Border Insolvency Act. See also Smith and Boraine 2002 *American Bankruptcy Institute Law Review* 192.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

Questions of disclosure or discovery of documents are dealt with by the provisions of rule 35 of the High Court rules, which rule deals with "discovery, inspection and production of documents".

In general terms, the insolvency representative would have no entitlement to obtain discovery or production of the documents from the recipient of an impeachable transaction until such time as the formal discovery process is underway.

The insolvency representative as a party to the litigation may require any other party to that litigation by notice in writing to make discovery under oath within 20 days of all documents and tape-recordings to any matter in question in such litigation. Such notice may, however, not be given before the close of pleadings save with the leave of a Judge[88].

If the insolvency representative believes that there are, in addition to documents or tape recordings already disclosed, other documents (and this would include copies thereof) or tape recordings which may be relevant to the matter in question in the possession of any party, then the insolvency representative may give notice to such other party requiring them to make the same available for inspection or to state on oath within 10 days that such documents are not in their possession, in which case the representative would be required to state their whereabouts if known to them[89].

Documentation which is to be produced is documentation which relates to "any matter in question" in the proceedings which documents may be or have at any time been in the possession or under the control of such other party.

The purpose of the discovery process is to ensure that the parties to the dispute are, before the matter proceeds to trial, informed of the content of documentary evidence which may be produced during the course of such trial[90].

The process of discovery may be undertaken upon a cooperative basis with opposing counsel, however, this is unlikely to occur in practice.

The procedures whereby a Judge would undertake case management are not entrenched in South Africa, which has the effect that should the other party fail to make discovery, the insolvency representative will be required to launch a specific High Court application to compel the recalcitrant party to make discovery, alternatively to make proper discovery of documentation.

[88] Rule 35(1) of the High Court rules initially published in terms of the Supreme Court Act, Act 59 of 1959, and retained by the Superior Courts Act, Act 10 of 2013.
[89] Rule 35(3) of the High Court rules.
[90] *Durbach v Fairway Hotel Limited* 1949 (3) SA 1081 (SR) at 1083.

Any party to a High Court proceeding may at any time before the hearing of such proceeding, deliver a notice to the other party in whose pleadings or affidavits reference is made to any document or tape-recording to produce such document or tape-recording for inspection and to permit the insolvency representative to make a copy or a transcription thereof[91]. This, of course, assumes that there is specific reference to a document or tape-recording in the pleading or affidavit of the respondent or defendant as the case may be.

Regarding the costs, reference is made to the response to question 9 below. Generally, if the insolvency representative had no option but to launch an application to compel the production of documents, then the court would be moved to order that the costs of such application should be borne by the recalcitrant party which has failed to produce documentation.

Such applications can be brought upon a basis that they are relatively urgent, however, if the application is opposed and has to be fully argued, it could be some months before a court pronounces upon the matter. Such disputes would generally go to matters such as whether or not the documentation was actually referred to in the pleadings or affidavits or whether or not the documentation was relevant to a matter in question in the proceedings.

QUESTION 9

9. How are litigation fees and costs assessed?

In general terms, a successful litigant has the prospect of being awarded that person's costs in litigation proceedings. Primarily, however, the court has a discretion to award such costs[92].

In general terms the rule of thumb would be that costs would follow the event, in other words that the insolvency representative, if successful, could expect to be awarded their costs. The scale of such costs to be awarded would be in the discretion of the court.

Generally, the successful party would be awarded costs upon a "party and party" scale, but in certain circumstances the court may award costs on a punitive scale. This could potentially be on the scale as between "attorney and client". Such award would be by reason of special considerations which might arise for example from the circumstances surrounding the proceedings, or from the conduct of the unsuccessful party.

When costs are awarded, unless agreement can be reached between the parties, it would be necessary for the official known as the Taxing Master of the High Court to assess or tax such bill of costs as may be prepared and submitted by the successful party. Procedures for obtaining taxation differ in the various High Courts in South Africa. It must be noted that the quantum of the costs will not be assessed by the High Court itself notwithstanding that it will, in the exercise of its discretion, decide whether or not to award costs and, if it does, as to the scale upon which such costs are awarded.

[91] Rule 35(12) of the High Court rules.
[92] "Law of Costs" Third Edition by Andries Cilliers paragraph 2.03 and the cases cited therein.

In the case of High Court proceedings, the scale of costs is determined by a tariff of court fees prescribed by rule 67 of the High Court rules, initially published in terms of the Supreme Court Act[93] and retained by the Superior Courts Act[94]. Where the insolvency representative is successful and is awarded party and party costs, such costs will be taxed in terms of the tariff. The tariff is generally substantially lower than the rates which would be agreed between the attorney and their own clients. To the extent that the costs charged to the insolvency representatives by their attorneys may exceed the amounts recoverable, such costs would have to be borne by the Insolvent Estate concerned.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

South Africa is not party to any treaty regarding the reciprocal enforcement of foreign commercial judgments, and is therefore not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial matters. Enforcement of foreign judgments is governed in South Africa generally by common law and, in specific cases by statute, in the latter case by the Enforcement of Foreign Civil Judgments Act[95].

The Common law method for recognizing and enforcing foreign judgments in South Africa still plays a significant role in this field of law along with the statutory procedure available under the Enforcement of Foreign Civil Judgments Act. At the outset, the Enforcement of Foreign Civil Judgments Act currently applies only to Namibia, and thus, until more countries are designated, the common-law action will remain the only method for enforcing foreign judgments apart from civil matters which are governed by specific legislation[96].

[93] Act 59 of 1959.

[94] Act 10 of 2013, section 51.

[95] Act 32 of 1988. There are a number of other statutes in South Africa dealing with international cooperation in civil matters; the Enforcement of Foreign Civil Judgments Act 32 of 1988, the Foreign Courts Evidence Act 80 of 1962, the Reciprocal Service of Foreign Process Act 12 of 1990, the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, the Reciprocal Enforcement of Maintenance Orders (countries in Africa) Act 6 of 1989 and the Reciprocal Enforcement of Maintenance Orders Act 80 of 1963.

[96] SA Law Reform Commission *Report on Consolidated Legislation pertaining to International Judicial Co-operation* (2006).

South African courts will enforce a foreign judgment if certain requirements are met. These are founded mainly on the Roman Dutch common law. A foreign judgment is consequently not directly enforceable in South Africa but establishes a cause of action that will be enforced by South African courts if the following requirements are met:

- the foreign court must have had international competence as determined by South African law;[97]
- the judgment must be final and conclusive and must not have become superannuated;
- the enforcement of the judgment must not be contrary to South African public policy;
- the judgment must not have been obtained fraudulently;
- the judgment must not involve the enforcement of a penal or revenue law of the foreign state; and
- enforcement must not be prohibited by the Protection of Businesses Act 99 of 1978.[98]

Interestingly, in the unreported matter of *Overseas Shipholding Group, Inc*,[99] the Court granted an order recognising an order granted by the US Bankruptcy Court, Delaware, ordering specifically that the automatic stay and related provisions of section 362 of the US Bankruptcy Code would apply of full force and effect in South Africa in regard to the Applicants and any assets of any Applicant in South Africa or its territorial waters at any time. In another recent matter based on similar facts the Durban High Court in OXL N.V[100] recognised a foreign "business rescue"[101] order made at the instance of the Commercial Court in Brugge. In both these cases the court recognised a foreign judgment on what appear to be considerations of South Africa's international obligations of comity, and the objectives of the Cross-Border Insolvency Act.

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[97] The grounds for international competence include that the defendant must have been habitually resident, domiciled or present in the area of jurisdiction of the foreign court at the time of commencement of the action; or the defendant must have submitted to the jurisdiction of the foreign court. See *Purser v Sales* (613/98) [2000] ZASCA 46; 2001 (3) SA 445 (SCA) ; [2001] 1 All SA 25 (A) (28 September 2000). In the decision, *Richman v Ben-Tovim* 2007 2 SA 283 (SCA); [2007] 2 All SA 234 (SCA), the Supreme Court of Appeal of South Africa found that the mere physical presence of the defendant in the foreign jurisdiction at the time process was served is a sufficient basis for international jurisdiction in the context of the recognition and enforcement of foreign judgments sounding in money.

[98] As affirmed in J*ones v Krok* 1995(1) SA 677(A). See also *Purser v Sales; Purser and Another v Sales and Another* [2000] ZASCA 46; 2001 (3) SA 445 (SCA).

[99] *Overseas Shipholding Group, Inc and 180 others*, High Court of South Africa, KwaZulu-Natal Division, case reference 12827/12.

[100] OXL N.V, High Court of South Africa, KwaZulu-Natal Division, case reference 1681/14.

[101] See corresponding business restructuring provisions in s 133 of South Africa's Companies Act 71 of 2008.

THE NETHERLANDS

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

The Dutch Bankruptcy Act (*Faillissementswet*) ("DBA") provides for the ability to avoid legal acts performed by a debtor prior to the adjudication of its bankruptcy, where such acts are detrimental to its creditors. The avoidance action is commonly referred to as *actio pauliana*. The *actio pauliana* only exists in case of bankruptcy proceedings (*faillissement*) and not in case of suspension of payment proceedings (*surseance van betaling*). The DBA provides for rules regarding the avoidance of voluntary legal acts (i.e. legal acts that are not based on a pre-existing legal obligation) and obligatory legal acts (i.e. legal acts that consist of the performance of a pre-existing legal obligation).

1.1 Voluntary legal acts

In a bankruptcy, the liquidator may invoke the nullity of any voluntary legal act performed by the debtor if (i) the debtor did not have a legal obligation to perform the act, (ii) the creditors of the debtor were prejudiced in their recourse as a consequence of the act, and (iii) at the moment of performance of the legal act, the debtor and its counterparty knew or should have known that one or more creditors (present or future) would be prejudiced (article 42 DBA). The requirement of knowledge by the counterparty (as described under (iii)) does not apply if the legal act is performed for no consideration (*om niet*).

In certain circumstances, the burden of proof as to the aforementioned knowledge is reversed. If a transaction is entered into by a debtor within one year preceding the adjudication of its bankruptcy, and the debtor did not have a pre-existing obligation to carry out such a transaction, the knowledge that such a transaction would prejudice one or more (present or future) creditors is assumed for both the debtor and its counterparty (proof to the contrary being allowed) in case, *inter alia*, the transaction regards:

(a) an agreement in which the value of the performance by the debtor considerably exceeds the value of the performance by its counterparty ('not at arm's length');

(b) the debtor paying a debt or giving security for a debt which is not yet due; or

(c) a legal act between certain 'related' parties, such as group companies and directors.

In case the prejudicial transaction performed within one year preceding the adjudication of bankruptcy was for no consideration, the 'knowledge' referred to above is assumed.

Should the bankruptcy be preceded by Dutch suspension of payment proceedings, the one year 'suspect' period for the reversal of the burden of proof covers the year before the opening of those suspension of payment proceedings, rather than the subsequent opening of bankruptcy proceedings.

The ability to challenge transactions on the basis of the DBA is an exclusive power of the liquidator. Once bankruptcy proceedings are opened, creditors have no individual means to challenge transactions.

1.2 Obligatory legal acts

The liquidator may invoke the nullity of an obligatory legal act performed by the debtor, even if the debtor did have a legal obligation to perform the contested act, in case:

(i) the counterparty knew that a request for bankruptcy had been filed; or

(ii) the performance of the obligation was the result of (*mala fide*) consultation between the debtor and the counterparty with the intention to give preference to the latter over the debtor's other creditors (article 47 DBA).

1.2.1 Avoidance outside insolvency proceedings

The Dutch Civil Code ("DCC") provides for largely similar provisions for creditors to challenge voluntary legal acts of the debtor outside bankruptcy proceedings (article 3:45 DCC). However, since the avoidance action requires that the creditors are prejudiced in their recourse, avoidance actions outside bankruptcy are less common. To establish that one is prejudiced in its recourse, the recourse must be limited, which in effect means that the debtor is apparently unable to provide sufficient recourse to satisfy its creditors in full. In that situation, that debtor is likely to be subjected to insolvency proceedings.

QUESTION 2

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2. What are common defences?

2.1 Common defences - general

The most common defences against an *actio pauliana* are:

- the legal act derived from a pre-existing legal obligation to perform;
- the contested act did not prejudice the creditors;
- (the debtor or) the counterparty to the transaction did not know nor ought to have known that the transaction would prejudice the creditors (i.e. no knowledge);
- the contested act is part of a larger transaction which as a whole is not detrimental; and
- the avoidance action has become time-barred.

2.1.1 Pre-existing obligation

As mentioned above, the avoidance action requires that there was no legal obligation to perform, i.e. that the transaction was voluntary. To the extent that a certain legal act is performed pursuant to a pre-existing obligation, such act cannot be nullified based on the *actio pauliana* regarding voluntary acts. A typical example hereof is the rendering of additional security based on an obligation in existing loan documentation to render additional security upon request of the lender.

2.1.2 No detriment to creditors

An act is considered to be prejudicial to the other creditors when the contested legal act has prejudiced the *recourse (recovery) options* of the other creditors. It should be noted that this can also be the case when fair consideration has been paid but such consideration is not equally available for creditors to take recourse. For example, when the purchase price of an asset sold by the debtor is paid into an account of the debtor with a debit balance and is set-off by the relevant bank (which had no security interest over the sold asset), the purchase price never becomes available for recourse to the other creditors. Thus, despite the fact that a fair consideration has been paid, such act can be prejudicial to the creditors. The fact that a prejudicing legal act was also beneficial to the creditors can be used as defence, since the benefits of the legal act have to be taken into account when determining whether the legal act was detrimental to the creditors.

2.1.3 No knowledge

As mentioned above, the prejudice relates to the recourse position of the creditors. Thus, the required knowledge that the transaction would prejudice creditors, entails knowledge that the debtor will no longer be able to (fully) pay its creditors. The Dutch Supreme Court has ruled that knowledge of prejudice therefore requires that the debtor and the counterparty knew or ought to have known that a bankruptcy with a deficit was foreseeable with a reasonable degree of probability at the time the legal act was performed. The knowledge of the (mere) chance of prejudicing the creditors is not sufficient. Counterparties acting in good faith (thus without such knowledge) can in principle use their ‘good faith’ as a defence. In case the debtor and its counterparty were aware of the debtor’s financially distressed position, the argument that the debtor still had a going concern perspective at the time of the transaction may therefore constitute a defence (although one must be aware that this is looked at with hindsight, in a situation where the debtor has in fact gone bankrupt).

2.1.4 Set of legal acts constitute one transaction

Based on case law, when bringing an avoidance action, the liquidator cannot 'cherry pick' one particular legal act of the debtor that was prejudicial to its creditors, if that act was part of a larger transaction that, when taken as a whole, was not prejudicial to the creditors. For example, when a debtor is released by its lender of its financial liabilities as part of a group restructuring, and the debtor waives inter company receivables against other group companies that remain liable towards the lender, the waiver of receivables may in itself be detrimental. However, when taken as a whole, the release by the lender counterbalances the waiver and therefore the transaction as a whole is not vulnerable to avoidance action.

2.1 5 Time bar - limitation

The legal action to avoid prejudicial legal acts (based on article 42 or 47 DBA) becomes time-barred after three years counting from the date the liquidator discovered the act was prejudicial. Consequently, the legal action cannot become time-barred before three years after the opening of the bankruptcy proceedings (since no liquidator exists prior thereto).

2.2 Common defences - obligatory legal acts

Common defences specifically concerning obligatory legal acts (article 47 DBA) are:

(i) the counterparty did not know a request for bankruptcy had been filed; or

(ii) the performance of the obligation was not the result of *mala fide* consultation.

With regard to the first defence, it must be noted that it is relevant whether the petition that the creditor was aware of, actually led to the bankruptcy. Furthermore, it is not sufficient (for successful avoidance) that the creditor knows that bankruptcy is imminent and may be filed for or should have known about a petition.

In principle the liquidator will have to prove the presence of the intention of both parties to prefer this specific creditor over the other creditors, which is evidenced by consultation. The mere fact that parties know or should know that the legal act is in principle detrimental to the other creditors is not sufficient (in case of such obligatory act). There must be some form of collaboration, also referred to above as *mala fide* consultation.

In practice, proving the required consultation is difficult for the liquidator, since the payment is often made by a debtor who feels forced by the creditor, rather than because he actually intended to prefer that creditor. However, case law shows that under certain circumstances (e.g. in case of related entities) the consultation will be presumed by the court, which presumption is then rebuttable.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

3.1 Jurisdiction and standing

In case Dutch bankruptcy proceedings have been opened in relation to the debtor, the Dutch liquidator has the *exclusive* power to pursue avoidance actions against counterparties (involved in the prejudicing legal act) of that debtor. Individual creditors of the debtor, irrespective of their domicile, do not have standing in the Dutch courts in case they want to pursue avoidance actions themselves against counterparties of the debtor during bankruptcy proceedings.

Creditors of the debtor do have the right to contest claims of other creditors (in validation proceedings) based on the *actio pauliana* rules laid down in the DBA.

As a more general notion, Dutch courts do not distinguish between a foreign creditor and a Dutch creditor. Thus, to the extent a Dutch creditor would have standing in court, a foreign creditor would equally be able to pursue an action in court.

Therefore, a foreign creditor may (only) be able to bring an (Dutch law) avoidance claim in a Dutch court if it concerns a claim outside Dutch bankruptcy proceedings.

The question whether the Dutch court has jurisdiction in the avoidance action brought by a foreign creditor of the debtor is governed by either:

- the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation");
- the Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (22007A1221(03)) (the "Lugano Convention"); or
- Dutch private international law.

3.1.1 Brussels I Regulation

In general avoidance actions brought by creditors (rather than an insolvency administrator) will not be considered to derive from or be closely linked with the insolvency of the debtor (see CJEU 19 April 2012, C-213/10 (*F-Tex*) and CJEU 12 February 2009, C-339/07 (*Deko Marty*). Therefore, the Brussels I Regulation in principle applies to avoidance actions brought by creditors, provided that the defendant (i.e. the relevant party to the transaction) is domiciled in a member state of the European Union, which as a general rule provides that the defendant in an avoidance action may be sued in the courts of the member state in which it is domiciled (article 2(1) Brussels I Regulation). Thus, if the defendant of the avoidance action is domiciled in the Netherlands, the Dutch courts will accept jurisdiction.

3.1.2 Lugano Convention

The Lugano Convention, which contains jurisdiction rules similar to those of the Brussels I Regulation, effectively extends the scope of the Brussels I Regulation to Iceland, Norway and Switzerland (who are not a party to the Brussels I Regulation).

3.1.3 Dutch private international law

In case neither the Brussels I Regulation nor the Lugano Convention apply, Dutch law determines whether the Dutch court has jurisdiction, which is the case if the defendant has its domicile in The Netherlands.

3.2 (Other) Barriers

A barrier that foreign claimants can be confronted with is the obligation to provide security for the defendant's costs of the proceedings, in case such security is requested by the defendant (Article 244 of the Dutch Code of Civil Proceedings, "DCCP"). Such an obligation in principle exists, unless:

(i) the absence of such obligation follows from a Treaty or European Union Regulation;

(ii) the cost order is (easily or automatically) enforceable in the claimants country of residence;

(iii) if there are plausible means of recovery against the claimant in The Netherlands; or

(iv) if it produces an impediment (*belemmering*) to the right of access to a court.

QUESTION 4

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4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

In case the debtor is a foreign legal or natural person in relation to which insolvency proceedings have been opened outside the Netherlands, the following applies to the question whether the liquidator or a creditor of such foreign person can have standing in Dutch courts to bring such action.

Two regimes can be distinguished:

- the regime applicable in case the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (the "Insolvency Regulation") applies;
- the regime when the Insolvency Regulation does not apply.

4.1 European Insolvency Regulation

When insolvency proceedings are opened against a debtor with its centre of main interests (COMI) within the European Union (with the exception of Denmark) the Insolvency Regulation applies. Based on article 3(1) Insolvency Regulation and the decisions of the Court of Justice of the European Union ("CJEU") in re *Deko Marty*, the courts of the member state within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action to set aside a transaction by virtue of insolvency that is brought against a person whose registered office is in another member state (CJEU 12 February 2009, C-339/07 (*Deko Marty*)). This rule also applies in case the defendant is domiciled outside the European Union (or in Denmark) (CJEU 16 January 2014, C-328/12 Schmid/*Hertel*). This jurisdiction is assumed to be exclusive, although the CJEU has not explicitly ruled whether such is indeed the case.

Based on the above it can be said that a foreign liquidator cannot pursue foreign law avoidance actions in the Dutch courts in case the insolvency proceedings have been opened in another member state of the European Union (with the exception of Denmark), regardless of the domicile of the defendant (i.e. the debtor's counterparty).

4.2 Insolvency Regulation does not apply

4.2.1 Foreign liquidators

In case (the liquidator of) a debtor with its COMI outside the European Union (or in Denmark) Dutch (private international) law applies. In the event of avoidance transactions brought by liquidators in such proceedings, the Dutch court has jurisdiction if the defendant is domiciled in the Netherlands (article 2 DCCP).

Whether the foreign liquidator has standing in the Dutch court depends on two questions: (i) does the foreign liquidator have the power to pursue avoidance actions under the applicable foreign (insolvency) law? and (ii) if so, can those powers conferred to the liquidator be exercised in The Netherlands? Since the first question depends on foreign (insolvency) law, this will not be further discussed. Should the liquidator have the power to pursue such avoidance actions in The Netherlands, the foreign liquidator in principle has standing to pursue those actions before the Dutch court based on Dutch private international law (Dutch Supreme Court 24 October 1997 In re *Gustafsen q.q./Mosk*).

4.2.2 Foreign creditors

As mentioned above, avoidance actions brought by creditors (rather than an insolvency administrator) are not considered to derive from or be closely linked with the insolvency of the debtor (see CJEU 19 April 2012, C-213/10 (F-Tex)). Consequently, if the foreign avoidance law (also within the EU) allows a creditor to bring an avoidance action against a transferee (be it through assignment of such claim by the liquidator or if such foreign law allows for such individual avoidance action by a creditor), the Insolvency Regulation does not apply.

In that case, Dutch courts can base their jurisdiction on the same grounds as referred to in question 3. If the defendant of the foreign avoidance claim is domiciled in the Netherlands, the courts can accept jurisdiction.

4.2.3 Dutch courts and foreign law

When determining what law is applicable to the matter at hand, the Dutch court will apply the rules of private international law and the law designated by the aforementioned rules. This only concerns the applicable substantive law. Should foreign law be applied, such application of foreign law does not regard the application of foreign private international law. Question 5 covers how Dutch courts will determine issues of foreign law.

Foreign law will not be applied where the effects of such recognition or enforcement would be manifestly contrary to the public policy of The Netherlands (article 10:6 DCC).

QUESTION 5

5. Who decides issues of foreign law?

In principle the Dutch court is presumed to know the law, including foreign law. In practice, a Dutch court will not always be fully educated on matters of foreign law, but it is to the discretion of the court whether it deems itself equipped to rule on the issue without further assistance.

Should the court require (additional) information on the content of the foreign law, it can decide at its own discretion in which way it wishes to obtain information regarding the content of the foreign law applicable. Generally the court can request for information on foreign law from:

- the designated foreign body under the European Convention on Information on Foreign Law;
- research institutions such as the International Judicial Institute and/or Asser Institute;
- the parties; or
- an expert.

5.1 Foreign Law Convention

The Dutch court may appeal to the European Convention on Information on Foreign Law (7 June 1968) (the "Foreign Law Convention") to seek information on foreign law from a country that is a party to the Foreign Law Convention (the convention requires reciprocity)[1]. The Foreign Law Convention allows a judicial authority, such as the Dutch court, to request designated national liaison bodies of other contracting states to provide it with information on the requested state's law and procedure in civil and commercial fields as well as on their judicial organisation. Such requests are put forward by a Dutch transmitting agency.

[1] In addition to The Netherlands, the other parties to the Convention are Albania, Azerbaijan, Belgium, Germany, Bulgaria, Costa Rica, Cyprus, Denmark, Estonia, Finland, France, Georgia, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Mexico, Moldavia, Montenegro, Norway, Ukraine, Austria, Poland, Portugal, Romania, Serbia, Slovenia, Slovakia, Russia, Spain, Czech Republic, Turkey, United Kingdom, White Russia, Iceland, Sweden and Switzerland.

Whether matters of foreign avoidance law fall within the material scope of the Foreign Law Convention is determined by the national law of the (transmitting agency of the) state that requested the information. Under Dutch law, avoidance actions would fall within the scope of the Foreign Law Convention. The designated body to whom the request for information has been made is obliged to follow up this request and must respond to the request as soon as possible. The Foreign Law Convention has been implemented in article 67 DCCP. If the court wishes to obtain information through article 67 DCCP, it has to involve the parties to the dispute in preparing its questions (Article 67 en 68 DCCP). The courts do not often use this option in order to obtain information.

5.2 Research institutions

Since it is the court's discretion how to obtain information on foreign law, the court can also rely on information (regarding private international law and foreign law) obtained by research carried out by independent experts, for example from the International Judicial Institute (*Internationaal Juridisch Instituut*) in The Hague (The Netherlands). The Dutch T.M.C. Asser Institute also provides for similar information and research carried out by independent researchers and regularly works closely together with the International Judicial Institute.

5.3 Evidence from parties

The court can also request the parties to the proceedings to provide the court with information on the content of foreign law. In practice, such request is usually complied with. A common form of supplying the Dutch court with such information is by means of an expert opinion or an expert testimony by a foreign legal expert. It should be noted that parties are not obliged to argue and / or prove the content of foreign law and the court is not bound by the parties' point(s) of view regarding foreign law.

5.4 Appointing an expert

Pursuant to article 194 DCCP the court can also appoint an expert to render evidence on matters of foreign law.

Should the court not able to determine the content of the foreign law and should a legal ground and a prevailing doctrine that deals with the determination of the relevant foreign issue not be available, various solutions are applied by the courts, such as (i) determining the content in line with a legal system related to the foreign law, (ii) applying international accepted standards, (iii) relying on principles of Dutch law.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Dutch law does not provide for a general obligation for Dutch courts to provide foreign courts with information on avoidance law. There are however situations in which a Dutch court can be approached.

As set out above in question 5, a court in a foreign country that is party to a Foreign Law Convention, can request information on matters of Dutch law. It should approach its national transmitting agency to request the designated Dutch body for information on Dutch avoidance law.

Although the Insolvency Regulation currently does not contain any provisions on the co-operation between courts of different member states on issues of foreign (avoidance) law, the European Commission recently published a proposal for amending the Insolvency Regulation, and the amendments include the introduction of provisions that allow the national courts of Member States *inter alia* to request information or assistance from each other. It could be argued that the aforementioned co-operation between courts includes information and assistance in relation to issues of foreign (avoidance) law. Whether or not this will be the case is currently uncertain.

Beside the Foreign Law Convention and the Insolvency Regulation, there are no statutory regulations which oblige the Dutch courts or any other Dutch authority to provide the courts of foreign states with information on Dutch avoidance law.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

The Netherlands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

In case Dutch bankruptcy proceedings have been opened, creditors of the debtor can no longer initiate proceedings against the counterparty of the debtor based on the Dutch *actio pauliana* (see question 3). Therefore, the Dutch regime in insolvency regarding disclosure and/or discovery from the perspective of a foreign claimant is only relevant in case avoidance action is brought outside Dutch bankruptcy proceedings, which can be the case if (i) Dutch suspension of payment proceedings have been opened in relation to the debtor or (ii) the debtor is subject to foreign insolvency proceedings.

Should a foreign claimant institute proceedings before a Dutch court to avoid antecedent transactions outside bankruptcy proceedings, Dutch procedural law (*lex fori processus*) is always applicable with respect to the manner in which proceedings are conducted (article 10:3 DCC). Although the possibilities under Dutch procedural law regarding (mandatory) disclosure, document production and discovery are relatively limited, especially compared to the arrangements available for discovery in the United States of America, there are certain provisions a (foreign) claimant can rely on in order to obtain information in respect to the contested legal act.

A claimant can obtain specific documents or data carriers through initiating disclosure proceedings against the other party based on article 843a DCCP, in case the following conditions are met: (i) the claimant has a 'justified interest' to obtain the relevant documents or data carriers, (ii) this interest concerns specific documents or data carriers (article 843a DCCP may not used for 'fishing expeditions'), and (iii) the contents of the documents or data carriers relates to a legal relationship in which the claimant is a party. Such disclosure proceedings are separate legal proceedings which can be initiated irrespective of the jurisdiction in which the principal action is or may be brought.

In case the foreign claimant is a creditor of the insolvent debtor, such a claimant will probably have some difficulties using article 843a DCCP for disclosure, since the relevant documents in general would relate to the contested legal act, which (often) does not concern a legal relationship between the defendant and the creditor, but rather between the defendant and the debtor. In case the foreign claimant is the foreign liquidator of the debtor that performed the contested legal act with the defendant, article 843a DCCP can be used.

The defendant can refuse to comply with a demand for information if there are substantial reasons (*gewichtige redenen*) to do so, or if it can reasonably be expected that proper justice can also be warranted without awarding the inspection in said documents or data carriers.

During the course of (pending) legal proceedings, article 22 DCCP provides each party to the proceedings with the possibility to request the judge in the proceedings to give an order to the other party to provide certain documents which are relevant for the proceedings. Again, parties can refuse to provide the ordered information for substantial reasons.

QUESTION 9

9. How are litigation fees and costs assessed?

In the Netherlands the starting point is that the 'losing' party will be ordered to pay the 'costs of the proceedings' of the party in whose favour the judgment is rendered. The amount of those costs of the proceedings is set by the court at its own discretion. As a rule, the costs awarded are only a fraction of the costs actually incurred (see also below). Consequently, it is fair to say that in most proceedings, each party bears practically all of its own costs.

Dutch law limits the type of costs that can be awarded, namely:

(i) the fees of the lawyer in the proceedings in conformity with the scale of fees in civil cases; and

(ii) the actual costs made in relation to disbursements, court fees, expert evidence.

In civil cases (such as avoidance actions) the fees of the lawyer are determined through applying the a scale with fixed amounts per 'action' taken in the matter, such as submitting a writ of summons or pleadings before the court. The amount that can be charged per action depends on the interest of the matter expressed in euros (the higher the interest the higher the amount up to a certain maximum), and is provided in the Civil Cases (Fees) Act (*Wet tarieven in burgerlijke zaken*). In case the interest cannot be expressed in euros a special (fixed) scale applies. It should be noted that the fees as calculated by applying these fixed amounts are generally (significantly) lower than the actual fees (usually less than EUR 10,000).

In addition to compensation of legal fees, the losing party can be obliged to compensate the actual costs made by the other party in relation to disbursements such as court fees, cost of service or experts' fees (in case of a court-ordered expert examination).

The court can rule that each party should bear its own costs, for example when a claim is only partially awarded. Also, the court can decide that certain costs have been made or caused unnecessarily and are for that reason to be borne by the party that made or caused these costs.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

In The Netherlands three regimes can be distinguished in relation to recognition and enforceability of judgments of a foreign court regarding avoidance actions.

10.1 Brussels I Regulation

Should a creditor have been able to obtain a judgment from a court of a European Union member state against the transferee (i.e. the counterparty of the debtor), such judgment will in principle be recognised in The Netherlands without any further special procedure being required (based on article 33 Brussels I Regulation). However, leave from the Dutch court is required to enforce (*exequatur*, Article 985 DCCP). The proceedings to obtain such relief are a mere formality.

The judgment will not be recognised in The Netherlands in case: (i) such recognition is manifestly contrary to the public policy of The Netherlands, (ii) it was given in default of appearance, and the defendant was not able to defend himself or challenge the judgment (iii) it is irreconcilable with a judgment given in a dispute between the same parties in The Netherlands, (iv) if it is irreconcilable with an earlier judgment given in another state involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in The Netherlands, (v) if the judgment conflicts with sections 3, 4 and 6 of the Brussels I Regulation or (vi) if such recognition conflicts with earlier agreements between states (article 34 and 35 Brussels I Regulation).

10.2 Insolvency Regulation

Based on article 25 of the Insolvency Regulation judgments handed down by the competent court that derive directly from the insolvency proceedings and are closely linked with them are automatically recognised in The Netherlands. In line with the *Deko Marty* decision, this includes judgments in relation to avoidance actions brought by the insolvency liquidator (CJEU 12 February 2009, C-339/07 (*Deko Marty*)). The recognition of such a judgment in The Netherlands can only be refused in case the enforcement would be manifestly contrary to the Dutch public policy (article 26 Insolvency Regulation), which is seldom the case. The articles regarding enforcement of the Brussels I Regulation apply to the enforcement of the judgment (see article 25(1) Insolvency Regulation). Thus, as described above, leave to enforce (*exequatur*) from the Dutch court is required. It should be noted that the grounds for refusing recognition and enforcement described in the Brussels I Regulation (see above) are not applicable in case of a judgments that are recognised based upon the Insolvency Regulation.

10.3 Lugano Convention

The recognition of judgments from the courts of Iceland, Norway and Switzerland is governed by the Lugano Convention (see also question 3). The Lugano Convention provides for similar rules on (recognition and) enforcement of foreign judgments as the Brussels I Regulation.

Apart from the Insolvency Regulation, Brussels I Regulation, Lugano Convention and certain bilateral treaties[2] there are no other regulations, treaties or conventions arranging the recognition and enforcement of such judgments. In such case Dutch private international law applies. The general principle is that foreign judgments which are not recognised under any treaty, regulation or specific provision in Dutch law, cannot be (immediately) enforced in The Netherlands. Such matters can, and in order to be enforceable, have to be brought again before the Dutch court (article 431 DCCP). Usually, when hearing the case, the Dutch court will allow the foreign judgment as evidence in the case. Consequently, the proceedings before the Dutch court can be relatively short, depending on the manner in which the foreign judgment was rendered.

[2] The Netherlands is party to bilateral treaties regarding the enforcement of foreign judgments with Austria, Belgium, Germany, Italy and the United Kingdom. Those treaties only apply in respect to matters that are not covered by European Community Regulations or the Enforcement Convention.

UNITED STATES OF AMERICA

QUESTION 1

1. In your country, what are the sources and predicates – statutory, common law or otherwise – for avoiding antecedent transactions?

Under the Bankruptcy Code, there are two primary procedural mechanisms to avoid antecedent transactions, those being (i) avoidance of preferential transfers and (ii) avoidance of fraudulent transfers.

With respect to preferential transfers, under section 547 of the Bankruptcy Code, a debtor or trustee can avoid the transfer of any interest in property of the debtor (1) for the benefit of a creditor, (2) on account of an antecedent debt owed by the debtor before such transfer was made, (3) made while the debtor was insolvent, (4) made within 90 days prior to the petition date or one (1) year prior to the petition date if the transfer was made to an "insider" of the debtor; and (5) that enabled the creditor to receive more than what that creditor would have received under a Chapter 7 liquidation if the transfer had not been made.

With respect to fraudulent transfers, under section 548 of the Bankruptcy Code, a transfer can be avoided if it was made by the debtor (i) with the intent to hinder or defraud existing creditors (referred to as a "Subjective Avoidance Action") or (ii) for less than reasonably equivalent value (a) while the debtor was insolvent or the transfer rendered the debtor insolvent; (b) the result would leave the debtor with unreasonably small capital; (c) intended to incur debts that would be beyond the debtor's ability to pay; or (iii) was made for the benefit of an "insider" under an employment contract and not in the debtor's ordinary course of business (referred to as an "Objective Avoidance Action").

Of note, in the United States, there is a federal and state statutory regime with respect to avoidance actions. Most states have statutes providing for similar causes of action to avoid antecedent transactions as those found in the Bankruptcy Code. Indeed, a number of states have adopted a version of the Uniform Fraudulent Transfer Act ("UFTA") which superseded the Uniform Fraudulent Conveyance Act ("UFCA") in most states, the primary exception being that the UFCA is utilised in the state of New York. Both the UFTA and UFCA provide broadly for the causes of action and remedies under state law for avoiding transactions made by a transferor with an intent to hinder or defraud present or future creditors as well as those for avoiding transfers made by a transferor for less than equivalent value and which leave the transferor insolvent, unable to pay its debts as they come due or unreasonably capitalised. As each state adopts its version of the UFTA or UFCA, there may be slightly different terminology used, so careful review is warranted.

Under section 544 of the Bankruptcy Code, the debtor or the trustee in a bankruptcy proceeding can, in addition to those for preference and avoidance under sections 547 and 548 of the Bankruptcy Code respectively, adopt causes of action under state law UFTA or UFCA. Debtors or trustees incorporate the underlying state law causes of action to obtain the benefit of longer look-back periods than those found in the Bankruptcy Code.

Under section 551 of the Bankruptcy Code, the avoidance of an antecedent debt is made in two steps – the first to avoid the transfer under the provisions described above, and then the second to recover the asset transferred (or its corresponding value) from the transferee for the benefit of the bankruptcy estate.

Section 550 of the Bankruptcy Code also addresses the liability of initial and subsequent transferees and provides separate defences as described further below.

QUESTION 2

2. What are common defences?

Preference and avoidance actions both have "look-back" periods governed by the Bankruptcy Code. The debtor or trustee my recover transfers as preferences made 90 days prior to the bankruptcy petition date, unless the transferee is an "insider" in which case the look-back period is one (1) year. For fraudulent transfers, the debtor or trustee may recover transfers made up to two (2) years prior to the bankruptcy petition date. The Bankruptcy Code also contains an incorporating provision in section 544(b) which allows the debtor or trustee to assert preference or avoidance actions that are provided for under state law and which usually provide for longer look-back periods of up to four (4) years depending on the state and type of claim.

Typical defences to preference actions include a demonstration that the debtor was solvent when the transfers were made, or that the transfers were made (i) to be a contemporaneous exchange for new value given to the debtor, (ii) in the ordinary course of business with the debtor or according to ordinary business terms, (iii) to create a security interest in property acquired by the debtor or (iv) to or for the benefit of a creditor to the extent that, after such transfer, the creditor gave new value to or for the benefit of the debtor.

For avoidance actions, defences commonly asserted with respect to the Subjective Avoidance Action include that the transfers were made in good faith and without the intent to hinder or defraud present or future creditors. Typical defences to the Objective Avoidance Action include that the transfers were made for reasonably equivalent value and which did not render (a) the debtor insolvent, (b) the debtor unreasonably capitalised or (c) the debtor unable to pay its debts as they became due.

Moreover, in addition to the defences that can be asserted by an initial transferee of an avoidable transfer, section 550 of the Bankruptcy Code provides that subsequent transferees can assert separate and additional defences when the transferee takes the transferred asset for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer. There is also a "single satisfaction" rule.

QUESTION 3

3. Does a foreign party have standing to pursue avoidance actions in your country's courts?

Foreign parties have access to US courts as do parties resident or domiciled in the United States as long as there is a basis for jurisdiction such as the transfer occurred within the territory of the United States. The court system in the United States is divided generally between those courts from the federal system and those courts of a particular state. Parties frequently provide in contracts the venue or site where claims and suits can be brought as well as what substantive law governs. There may be threshold gating issues prior to the exercise by a state or federal court of jurisdiction such as the amount in controversy or whether the act on which the claim is based occurred within the state or territorial United States.

QUESTION 4

4. Can a foreign party bring a claim under foreign avoidance law directly against a transferee in your home country?

Absent a contractual basis to provide a foreign party access to federal or state courts in the United States and the application of foreign avoidance law, there may be challenges to a foreign party suing a transferee directly without first taking preliminary steps. As discussed further below, the United States has adopted its version on the UNICTRAL Model Law on Cross-Border Insolvency as Chapter 15 of the Bankruptcy Code. Chapter 15 provides the basis and prerequisites for recognition of a foreign representative and foreign insolvency proceeding by a US bankruptcy court. That chapter prohibits the use of US preference or avoidance law in Chapter 15 proceedings.

QUESTION 5

5. Who decides issues of foreign law?

The judge overseeing trial of the matter will determine issues of foreign law. Rule 41.1 of the Federal Rules of Civil Procedure allows for the use of expert testimony to provide assistance to the court on determining exactly what foreign law applies and how it is to be construed.

QUESTION 6

6. Can a court in a foreign country seek assistance from a court in your country on matters of foreign avoidance law?

Bankruptcy judges in the United States use frequently cross-border protocols and the guidelines proposed by the International Insolvency Institute on court-to-court communications in cross-border insolvency cases to seek assistance from foreign courts on issues of foreign avoidance law. Ultimately, if the bankruptcy court decides that issues of foreign law are best addressed in the home jurisdiction or elsewhere, then it can abstain from adjudicating the matter or dismiss the proceeding to force the parties to pursue their rights and remedies in the more suitable or home forum.

QUESTION 7

7. Has your country adopted the UNCITRAL Model Law on Cross-Border Insolvency? If so, then how does your country's version of the Model Law address avoidance actions under foreign law?

The United States adopted its version of the UNCITRAL Model Law as Chapter 15 of the Bankruptcy Code. Chapter 15 of the Bankruptcy Code is silent with respect to the use of foreign avoidance laws in insolvency proceedings. Chapter 15 contains a prohibition that a foreign representative cannot utilise US avoidance actions without filing plenary proceedings, those being, as examples, a Chapter 7 liquidation or Chapter 11 reorganisation. There is no similar prohibition to the foreign representative utilising avoidance actions under foreign law in Chapter 15 proceedings. As a result, a body of case law has developed where bankruptcy courts have permitted foreign representatives to assert foreign avoidance actions in Chapter 15 proceedings. *Fogerty v. Petroquest Resources Inc.* (*In re Condor Ins. Ltd.*), 601 F. 3d 310 (5th Cir. 2010); *In re Atlas Shipping A*/*S*, 404 BR 724 (Bankr. SDNY 2009). As another example, in the Chapter 15 proceedings of *Fairfield Sentry*, the foreign liquidator, after recognition, removed actions that were filed in the New York state court to the US bankruptcy court and then amended those actions to include claims for undervalue and unfair preferences under the Insolvency Act for the British Virgin Islands. In re *Fairfield Sentry Limited, et al.*, Case No. 10-13164 (SMB), United States Bankruptcy Court, Southern District of New York.

QUESTION 8

8. What does your country's insolvency regime provide regarding disclosure or discovery?

The Federal Rules of Bankruptcy Procedure generally incorporate the Federal Rules of Civil Procedure with respect to "contested matters" or adversary proceedings. A contested matter arises when a motion is met with an objection while an adversary proceeding is a more formal complaint initiating a separate litigation within the bankruptcy proceeding. Moreover, Rule 2004 of the Federal Rules of Bankruptcy Procedure provide for an examination of the debtor, creditor or party in interest with respect to the debtor's assets, operations or restructuring. A "2004 examination" is utilised when a party is seeking general information as opposed to that subject of a contested matter or adversary proceeding where the Federal Rules of Civil Procedure are incorporated expressly.

The Federal Rules of Civil Procedure also have procedures for compelling the attendance of witnesses which are incorporated in the Federal Rules of Bankruptcy Procedure and Rule 2004. The Federal Rules of Civil Procedure are revised routinely and to address challenges regarding the discovery process. For example, the Federal Rules of Civil Procedure now contemplate a preliminary status conference between the parties and the court to discuss the issues presented in the litigation, give direction on procedure, provide an opportunity for parties to disclose on a preliminary basis information on insurance coverage and related issues and to agree a framework to exchange documents and conduct discovery. The litigants are obligated to work together in good faith in discovery matters. If an issue becomes disputed, then the court is available to resolve the conflict and to police the parties' conduct through sanctions, if warranted.

QUESTION 9

9. How are litigation fees and costs assessed?

The United States does not follow the "prevailing party" rule common in other jurisdictions with respect to the award of professional fees and costs in a litigation. Generally, absent a contractual obligation to the contrary, the parties bear their individual professional fees and costs. In certain circumstances, where a litigant abuses the litigation process or pursues frivolous or baseless claims for purposes of harassment, a court may award sanctions.

QUESTION 10

10. Are foreign judgments avoiding antecedent transfers enforceable in your country?

The United States is not a party to any international agreements or treaties concerning recognition, and then enforcement, of foreign judgments. Neither are there any federal statutes governing the enforcement or recognition of judgments rendered in the courts of foreign nations. Historically, this meant that enforcement of foreign judgments depended upon notions of "comity," as set forth by the United States Supreme Court in the case of *Hilton v. Guyot*, 159 U.S. 113 (1895). Over time, and as a practical matter, comity has given way to the Uniform Foreign Money-Judgments Recognition Act (the "Uniform Act"), as enacted in various forms by the states. Thus, foreign country judgment enforcement in the United States is generally a matter of the law of the state in which enforcement is sought and not a matter of federal law, with courts (federal or state) applying the law of the state in which they sit.

The Uniform Act requires that certain conditions be satisfied with regard to the fairness and quality of the underlying judgment before a foreign judgment will be recognized. Once recognized, enforcement of judgments is generally ministerial. However, courts may look behind the foreign judgment for the limited purpose of determining whether the judgment is contrary to the public policy of the enforcing state or the United States.

The decision as to the state or states in which to bring an action to enforce a foreign judgment turns on whether the judgment debtor has assets in that state to satisfy a judgment. Indeed, courts do not need personal jurisdiction over a defendant subject to a foreign judgment, only that the defendant have assets in that state which may satisfy the judgment.

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociacion Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals – R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law & Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants
(Restructuring and Insolvency Faculty)
Hungarian Association of Insolvency Practitioners
INSOL Europe
INSOL India
INSOL New Zealand
INSOLAD - Vereniging Insolventierecht Advocaten
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Brasileiro de Gestão e Turnaround
Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Law Council of Australia (Business Law Section)
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REFor – The Insolvency Practitioners Register of the National Council
of Spanish Schools of Economics
Russian Union of Self-Regulated Organizations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
The Association of the Bar of the City of New York
Turnaround Management Association (INSOL Special Interest Group)

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