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# International Caribbean Insolvency Symposium

## Choosing Your Battleground: Assessing the Appropriate Forum

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# Choosing Your Battleground: Assessing the Appropriate Forum

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## Choice of battleground considerations

- Forum choice
- Discovery powers and limitations
- Limitation periods
- Arbitration
- Madison Asset LLC (In Official Liquidation)
- ICP Asset Management

## Madison Asset LLC (In Official Liquidation)

- Cayman Islands investment fund in official liquidation
- Usual fact pattern – limited realizable assets but good claims
- Cayman or the US
- Funding
- Adverse costs risk
- Which US jurisdiction
- Cayman claims in US litigation

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## Battleground chosen: arbitration agreements

- Line between insolvency/ winding up and arbitration public policies
- Correct test to be applied when a debt is subject to an arbitration clause
- *Sian Participation Corp (In Liquidation) v Halimeda International Ltd* [2024] UKPC 33 (BVI appeal to the Privy Council)
- *FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 (Cayman Islands appeal to the Privy Council)
- *Mozambique v Prinvest Shipbuilding SAL (Holding) and others* [2023] UKSC 32

## FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation

- Issue falls within the scope of the arbitration agreement?
- The court must ascertain the substance of the dispute
- Partial stays/ fragmentation of the dispute
- A matter of judgment and common sense



## Sian Participation Corp (In Liquidation) v Halimeda International Ltd

- *Salford Estates* approach
- Debt subject to an arbitration clause (“any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement”)
- Privy Council asked to examine correct test to be applied when a debt is subject to an arbitration clause
- *Willers v Joyce* direction



## Sian Participation Corp (In Liquidation) v Halimeda International Ltd

*“...Although there is a superficial family likeness between a creditor’s winding up petition and a contributory’s petition for winding up on the just and equitable ground [as in FamilyMart], the two types of proceedings are in substance quite different. A contributory’s petition has to show circumstances, usually inequitable conduct by other shareholders, which make it just and equitable to wind up the company, and that conduct has to be pleaded in detail and, if disputed, proved bell, book and candle at a trial. Any dispute about it has to be resolved in the winding up proceedings. Even though the proceedings are not, viewed as a whole, a claim which can be arbitrated, those disputes are likely to raise distinct matters which can be resolved by a declaratory arbitral award, while the winding up proceedings are stayed, whether under an applicable provision for a mandatory stay (not applicable here) or (possibly) as a matter of case management discretion.”*

- Lord Briggs and Lord Hamblin in *Sian* at para 95

## Battleground chosen: proceedings commenced outside the jurisdiction

- Considerations on an application for a stay of Cayman Islands proceedings
- *In re New Silk Route* (Unreported, 10 February 2022)
- *In re Youbi Capital (Cayman) GP* (Unreported, 4 April 2023)
- *In re TFKT True Holdings* (Unreported, 3 October 2024)

## Assessment of appropriate Battleground

- *Taiping Trustees Limited v Valley Stone Industry Ltd et al* (Unreported, 29 January 2024)
- *Maples FS v B&B Protector Services Limited et al* (2022 2 CILR 59)
- Real and substantial connection
- Weighing of connecting factors/ Spiliada principles

## Battleground: tracing assets

- UNCITRAL asset tracing and recovery
- Worked examples in the US, Switzerland and the Isle of Man

ABI CARIBBEAN INSOLVENCY SYMPOSIUM  
CAYMAN ISLANDS  
JANUARY 23-25, 2025

ISSUES TO CONSIDER AND TOOLS  
AVAILABLE IN ASSET TRACING &  
RECOVERY

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**ASSET TRACING AND RECOVERY**  
**FRAUD CASE**  
**PONZI SCHEME**  
**CRIMINAL PROCEEDING**  
**WIRE INITIATED**  
**SUMMARY OF CASE**

Four individuals who lived in South Africa had been involved in various schemes to obtain funds from innocent victims by making false claims to individuals to induce them to put their saving and retirement funds into alleged business operations that were profitable when in fact, they were not.

The four individuals developed a scheme they believed would generate substantial funds in excess of their prior schemes that produced income, but not at a level that would allow them to live a luxury lifestyle.

The new scheme was based on statements made by two of the individuals who were brothers that a servant of theirs whose lineage went back to Cleopatra who had a secret formula for a beauty cream that would, upon application on a woman's face, make her look ten years younger. The scheme involved the creation of three entities. One entity, called Activator Supply, sold a kit consisting of a white powder that contained secret ingredients based on the secret formula from the servant of the two brothers. Each kit sold for forty dollars (\$40.00) (U.S. Currency). The white powder would be put into special container made of paper and cheese, with milk being added and the contents would ferment for ten (10) days and the packet would be sent to the second entity called Culture Farms, which would process the packet and after processing would send the completed substance to the third party, a cosmetics company called "Cleopatra's Secret", who would process the cosmetic from the substances sent from Culture Farms. The victim who

purchased the kit from Activator Supply for forty dollars (\$40.00) would receive eight dollars (\$8.00) for each processed packet sent to Culture Farms. A portion of the completed substance would be retained by the victim and could be placed in the second container with additional milk and cheese to become fermented over a ten (10) day period. The substance would produce a total of ten (10) packets from each kit. So, for a forty dollars (\$40.00) investment, a victim could recover a return of eighty dollars (\$80.00) in a period of four months. Victims were initially required to purchase a minimum of ten (10) kits for four hundred dollars (\$400.00), which the victims were advised would produce eight hundred dollars (\$800.00) in a period of four (4) months.

After four (4) months, the victims had to purchase additional kits as the time period of four (4) months was the period in which the white powder would remain active.

#### **INITIAL OPERATIONS IN SOUTH AFRICA**

The scheme was initially conducted in South Africa over a period of two (2) years. The scheme was extremely successful as the initial victims were paid pursuant to the brothers marketing statements "That an investment of four hundred dollars (\$400.00) would produce eight hundred dollars (\$800.00) in a four month time period." The scheme failed when there were not any remaining parties to sell the kits to and the shame and the company closed and thousands of victims remained unpaid.

#### **OPERATIONS IN THE UNITED STATES**

The scheme was exported to the United States and the same structure was established. In six (6) months sales of kits produced receipts of one hundred and eighty million dollars (\$180,000,000.00) to Activator Supply Company ("ASC"). Culture Farms Incorporated ("CFI") processed the containers received into additional kits to market and sell, and the paper content in

the processed kits continued to increase as the containers continued to be ground up into additional kits to be sold. No cosmetic was ever made from the containers received by CFI and none of the fermented containers were ever sent to Cleopatra's Secret.

**CORPORATE STRUCTURE OF ACTIVATOR SUPPLY COMPANY,  
CULTURE FARMS AND CLEOPATRA'S SECRET**

Activator Supply Company, Culture Farms, Inc. and Cleopatra's Secret, Inc. were corporations each with a President and Secretary and a board of five (5) Directors.

Three of four of the fraudsters were on each of the Boards of Directors with the fourth Director being the respective President of each corporation and the fifth Director being the respective secretary of each corporation. Notwithstanding the corporate structure, the total control and direction of each of the three corporations were with the four (4) fraudsters. The physical location of Activator Supply Company was originally in Nevada and later moved to Kansas. Culture Farms, Inc. was located in the State of Kansas and Cleopatra's Secret, Inc. was located in the State of California.

**FAILURE OF BUSINESS  
OPERATIONS OF ACTIVATOR SUPPLY COMPANY  
AND CULTURE FARMS, INC.**

Various regulators began to examine the business operations of Activator Supply Company, Culture Farms, Inc. and Cleopatra's Secret, Inc. Actions by various regulators resulted in the cessation of business operations by the three (3) respective corporations and as a result of the cessation of business operations, a number of creditors filed an involuntary bankruptcy proceeding in the State of Kansas against Activator Supply Company and Culture Farms, Inc. None of the Officers or Directors of Activator Supply Company or Culture Farms, Inc. appeared in person or by counsel. The Court, after consideration of the evidence provided by the Petitioning Creditors, granted the Petition and Ordered Activator Supply Company and Culture Farms, Inc.

into Chapter 7 bankruptcy proceedings, which are liquidation proceedings. A Chapter 7 Bankruptcy Trustee was appointed.

#### CRIMINAL PROCEEDINGS

At or about the entry of Activator Supply Company and Culture Farms, Inc. into Chapter 7 bankruptcy proceedings a total of twelve (12) persons were indicted and the criminal proceedings were filed in the United States District Court for the District of Kansas. Under the Laws in the United States, the bankruptcy proceedings and criminal proceedings are in separate Courts with separate Judges being appointed to each respective proceedings.

#### APPOINTMENT OF CHAPTER 7 TRUSTEE

Under the Law in the United States, Chapter 7 Trustees are responsible for the handling of the liquidation of Chapter 7 bankruptcy estates. One of the first duties of a Chapter 7 Trustee is to preserve the assets of the Debtors, which included any funds on hand, personal property, books and records of the respective Debtors.

Activator Supply Company and Culture Farms, Inc. had one (1) principal office in Lawrence, Kansas. The Chapter 7 Trustee determined from corporate records filed with the Secretary of State of Kansas that prior to the filing of the Petition, all the Officers and Directors had resigned from their respective positions. The Chapter 7 Trustee's attempt to contact the prior Directors and Officers was not successful as counsel for the former Officers and Directors advised that all of the Directors and Officers of the respective corporation were taking the Fifth Amendment of the United States Constitution, therefore, they are all refusing to testify as their testimony may tend to incriminate them. The Chapter 7 Trustee went to the Offices of Activator Supply Company and Culture Farms, Inc. to take possession of the books and record, and upon entry, found all the records had been shredded and burned. The records of investors in the scheme

had also been destroyed. The records on any bank accounts had been also destroyed. The Chapter 7 Trustee reviewed the criminal indictment filed against the twelve (12) Defendants, which was a public document and available to the general public.

**PROCEDURES TO OBTAIN INVESTIGATIVE RECORDS**

The Chapter 7 Trustee determined under Rule 6(e) of the Federal Rule of Criminal Procedure that investigative records could be obtained subject to the approval of the Attorney General of the United States and subject to the approval of the Federal District Judge in which this criminal proceeding was pending. A request was made to the Attorney General and after discussions with an Assistant Attorney General, consent was given by the Attorney General of the United States for the Chapter 7 Trustee to obtain the investigative records of the criminal investigation subject to consent and approval of the United States District Court Judge before which the criminal proceeding was pending.

The Chapter 7 Trustee filed a Motion in the criminal proceedings requesting the release of the investigative records of the Federal Bureau of Investigation to the Chapter & Trustee for use in the bankruptcy proceedings. The twelve (12) Defendants all objected to the release of the investigative records of the Federal Bureau of Investigation to the Chapter 7 Trustee. The Federal District Court Judge Ordered and evidentiary hearing to be held and directed the twelve (12) Defendants and the Chapter 7 Trustee to file briefs prior to the evidentiary hearing to set out any facts to be considered by the Court along with citations of case law to provide a legal basis for each of the twelve (12) Defendants and the Chapter 7 Trustee respective positions. The Court held the evidentiary hearing and related that he had to carefully weigh the position of the twelve (12) Defendants and the Chapter 7 Trustee and not to prejudice the rights of the twelve (12) criminal Defendants. The Court took the matter under advisement and issued an Opinion granting the

Chapter 7 Trustee's request as to any business records, bank statements, transfers of assets to any party, reconciliation summaries as to bank accounts, summaries as to transfers of assets and any related information, any identification of any person or entities involved in the operations of the entities. The Chapter 7 Trustee has been appointed as the Chapter 7 Trustee as to the two (2) entities, Activator Supply Company and Culture Farms, Inc., and has the authority to seek out and exam any documentation as to the transfer of funds or assets to jurisdictions outside the United States and records or identification of investors, documentation as to their investment(s), the amount(s) placed into the scheme, any funds paid out and information as to the name of the investor(s), address, phone number or any e-mail or contact information. No appeal of the Order was taken by the twelve (12) Defendants. The Chapter 7 Trustee had no further involvement in the criminal proceeding, except after a trial and conviction of the twelve (12) Defendants, the Chapter 7 Trustee was requested to advise the Court in a public hearing if any of the twelve Defendants had cooperated in the liquidation of the bankruptcy estates and the recovery of assets which may have been transferred. The Chapter 7 Trustee advised the Court that none of the twelve (12) Defendants had cooperated or provided any information as to any transfers that had occurred.

**RECEIPT OF EVALUATION OF THE DOCUMENTS RECEIVED FROM  
THE FEDERAL BUREAU OF INVESTIGATION PURSUANT TO THE  
ORDER OF THE CRIMINAL COURT JUDGE**

The Chapter 7 Trustee received thirty-seven (37) banker boxes of records from the Federal Bureau of Investigation pursuant to the order of the Federal District Judge assigned to the criminal proceedings. The information and documentation included bank records from sixty (60) banks in which Activator Supply Company and Culture Farms, Inc. had bank accounts, copies of transfers to banks outside of the United States, transfers of funds or assets to third parties, identification of victims and related contact information, identification of persons involved in the scheme and

related contact information and an extensive related information and material. The Chapter 7 Trustee identified the various causes of action to be addressed based on information from the documents turned over by the Federal Bureau of Investigation.

**CAUSES AGAINST BANK OF AMERICA**

Bank of America was one of the primary depository Banks for Activator Supply Company. The documents turned over to the Chapter 7 Trustee included the account opening documents and signature cards containing the persons who were authorized to sign on the account, deposit funds and sign checks to disburse funds. The Chapter 7 Trustee reviewed the account statements and copies of cancelled checks along with the monthly bank statements. The Chapter 7 Trustee found a number of checks on the bank account that were signed by an individual not a signatory on the account. The account was fully reviewed by the Chapter 7 Trustee and he determined over three million dollars (\$3,000,000.00) in checks were issued. An action was brought by the Chapter 7 Trustee for the turnover of the funds Bank of America allowed to be disbursed by an unauthorized signatory on the account. After a trial, Bank of America was Ordered to turnover to the Chapter 7 Trustee funds in excess of three million dollars (\$3,000,000.00) for allowing funds held in the bank account of Activator Supply Company to be disbursed to an unauthorized signatory. Bank of America turned over the three million dollars (\$3,000,000.00) Ordered by the Bankruptcy Court.

**INTERNATIONAL TRANSFER OF FUNDS FROM ACCOUNTS OF  
ACTIVATOR SUPPLY COMPANY**

Over thirty million dollars (\$30,000,000.00) were transferred by wire from the various bank accounts held in the name of Activator Supply Company in the United States to the Isle of Man, to the Cayman Islands, to Switzerland and to the Netherland Antilles and to Wales.

**ACTIONS FOR RECOVERY IN THE ISLE OF MAN**



Eight million dollars (\$8,000,000.00) were wire transferred to the Bank in the Isle of Man from a bank account held by Activator Supply Company in the United States. The Chapter 7 Trustee retained counsel in the Isle of Man to assist him in the tracing and recovery of funds transferred by Activator Supply Company to the Isle of Man. Isle of Man counsel advised that if recognition of the Chapter 7 Trustee was granted which is discretionary, the relief granted would be limited. The alternative would be to place Activator Supply Company into a winding up proceedings in the Isle of Man based on the eight million dollars (\$8,000,000.00) wired by Activator Supply Company into the Isle of Man. The application was filed in the Isle of Man to place Activator Supply Company into a winding up proceeding.

The Deemster (name that Judges are called in the Isle of Man) Ordered a hearing to be held and the Chapter 7 Trustee testified in the Isle of Man hearing and responded to a number of questions asked by the Deemster. The Court at the conclusion of the hearing granted the application to place Activator Supply Company in a winding up proceeding and appointed the Chapter 7 Trustee and Isle of Man accountant as Joint Liquidators of Activator Supply Company in the winding up proceeding.

The Joint Liquidators made a demand to the Bank in the Isle of Man to which the eight million dollars (\$8,000,000.00) had been transferred to. Under the Laws in the Isle of Man, a Bank is required to provide information requested by the Joint Liquidators in regard to funds of Activator Supply Company as part of the winding up proceedings. The Bank in the Isle of Man responded that the funds were placed in the account of an accountant in the Isle of Man but could not provide the bank statements as the funds belonged also to other parties within the same account. In the Isle of Man trust funds are allowed to be held in the general account of the accountant. A demand was made to the accountant to provide an accounting of any funds held in his account and to

provide documentation. The accountant responded that the funds are no longer an asset of Activator Supply Company and he is not authorized by the owner of the funds to provide an accounting of the funds received.

Isle of Man counsel recommended the filing of an application for disclosure and seizure of the books and records of the accountant to obtain information as to whether the eight million dollars (\$8,000,000.00) is still in the account of the accountant or whether the funds have been transferred or released and documentation as to when and where the funds were disbursed to and to whom. In support of the Application, documents, depositions and finding of fact and rules of law by the United States Bankruptcy Judge, among wire transfer documents demonstrating the transfer of United States bank accounts of the eight million dollars (\$8,000,000.00) of Activator Supply Company into the Isle of Man Bank and the demand.

The Application with the documents was prepared and requested a Mareva Injunction to obtain the records of the accountant as to the eight million dollars (\$8,000,000.00) received in his account and records of the account to see what happened to the eight million dollars (\$8,000,000.00). As is customary, a deposit was required an undertaking to be placed in the trust account of the Joint Liquidation counsel and a third prior independent counsel was required to be present to monitor the process of the Joint Liquidators removing the records of the accountant to the Office of the Joint Liquidators.

A Gag and Seal Order was requested to protect against the records being destroyed. The Deemster granted the Application with a requirement to deposit an undertaking in the trust account of the co-liquidation counsel which was accomplished. The Deemster appointed a third party counsel to oversee the seizure and Granted the Gag and Seal Order. A lorry was arranged and movers for seven o'clock a.m. at the accountant's office. The staff at the accountant's office came

in at seven o'clock a.m., while the accountant came in at 9:00 a.m. The Order was served on staff and the Gag and Seal order prevented the staff from contacting the accountant. Staff pointed out five filing cabinets that information and documentation as to receipt and transfer of the eight million dollars (\$8,000,000.00).

The five filing cabinets were removed under the watchful eye of the counsel appointed by the Deemster to oversee the removal. The five filing cabinets were removed and taken to the Joint Liquidator's Office and the documents and contents began to be reviewed by the Joint Liquidator, who was an accountant. The Joint Liquidator found the eight million dollars (\$8,000,000.00) had been removed when the proceeding had been granted by the Deemster. The funds in the amount of seven million eight hundred and fifty thousand dollars (\$7,850,000.00) had been sent to a bank in the Channel Islands. The sum of one hundred and fifty thousand (\$150,000.00) had been paid out to the two (2) brothers who were the fraudsters involved in the initial scheme.

A Queen's counsel from London filed an application to set aside the Order and to require the five filing cabinets to be returned with all copies made and the undertaking to be paid to the accountant as damages. The hearing was held before the Deemster, the Joint Liquidator testified as to what happened to the eight million dollars (\$8,000,000.00). After an evidentiary hearing, the Deemster denied the requests of the accountant.

The accountant appealed to the staff of government court who denied his appeal. He then appeared to the privy counsel in London. The basis for the appeal was that the Court relied on accounts, pleading and Court Order from the bankruptcy court in the United States was improper and that evidence should be stricken. The Privy counsel found the Manx Court had properly provided the documents and the bankruptcy court finding and denied the appeal of the accountants, interlocutory appeals are allowed in the Isle of Man and while the appeals are pending the case is

stayed. The appeals took a period of nine (9) months to complete. The Deemster then granted an application to allow the Joint Liquidators to use the information in the Channel Islands or by jurisdictions to which the funds were transferred.

**GUERNSEY CHANNEL ISLANDS**

The transfer of seven million eight hundred and fifty thousand dollars (\$7,850,000.00) was transferred from the Isle of Man to a Bank in Guernsey in the Channel Islands.

Counsel was retained in the Channel Islands in Guernsey to continue tracing the proceeds of eight million dollars (\$8,000,000.00) transferred from a U.S. Bank account of Activator Supply, Inc. in the United States to a Bank in the Isle of Man. A disclosure application was prepared and filed in the Royal Court in Guernsey in the Channel Islands requiring the Bank, in which funds from the Isle of Man were transferred to, in the sum of seven million eight hundred and fifty thousand dollars (\$7,850,000.00). The Application was made by the Joint Liquidators in the Isle of Man. The Disclosure Order was granted by the Royal Court and served upon the Bank to which the funds had been transferred to.

The Bank replied that no funds were in the account and under the Law in Guernsey in the Channel Islands if no funds were in the account, then the Bank is not required to produce an accounting. The response was challenged and the challenge was denied by the Royal Court and an appeal was taken. The Joint Liquidator (the Chapter 7 Trustee) met with the Attorney General in Guernsey in the Channel Islands, with his counsel and explained the problems with the current Law as fraudsters were taking advantage of the same. The Attorney General proposed to modify the Law to allow and require the Bank to provide an accounting. Parliament agreed and modified the current Law to provide for an accounting and made the law retroactive for two (2) years. The new Law passed. At the hearing on the appeal, the Appellate Court was aware of the new Law

and advised the Joint Liquidator could, without prejudice, withdraw the current application and could file a new disclosure application under the new Law. The Joint Liquidator withdrew, without prejudice, the old application and filed a new application which was granted and served on the Bank into which the funds had been transferred. The Bank responded with documentation and an affidavit as to receipt of the funds from the Isle of Man Bank and upon receipt, the funds were placed into an account and immediately transferred to another account in the same Bank. Seven months later, the funds were transferred to an account in the Netherland Antilles with that transfer no funds remained in the Bank in Guernsey in the Channel Islands. The amount of the funds transferred to the Bank in the Netherland Antilles was seven million eight hundred and fifty thousand dollars (\$7,850,000.00). The company into which the funds were transferred from the Isle of Man was established by the two (2) brothers who were part of the initial fraudsters.

#### **NETHRELAND ANTILLES ACCOUNT**

The funds transferred from the Bank in Guernsey in the Channel Islands were transferred into a trust. Netherland Antilles counsel was retained and based upon treaties between the Netherland Antilles and the Channel Islands the Disclosure Orders issued in the Channel Islands were recognized in six (6) days. Netherland Antilles counsel for the Joint Liquidators filed an application for disclosure from the trust and the trust consented and an Order for Disclosure was granted. Under the Laws of the Netherland Antilles trusts are recognized entities and the trustees must be independent fiduciaries who take directions from the beneficiaries of the Trust. A complete accounting was provided by the Trustees of the Trust along with an itemization of receipts and disbursements. The funds remaining were around five hundred thousand (\$500,000.00) but an accounting was provided as to the recipients of eight million two hundred fifty thousand (\$8,250,000.00) with these funds going to various individuals in the United States.

SWITZERLAND

The sum of twelve million dollars (\$12,000,000.00) was wire transferred to a Bank in Zurich Switzerland from accounts of Activator Supply in the United States. The Chapter 7 Trustee retained Swiss counsel to assist in the tracing of funds into the Swiss Bank accounts. After meetings and discussions with Swill counsel, the Chapter 7 Trustee was advised under Swiss Law that he would not be recognized and given standing to require the Swiss Bank to account and produce documentation as to the twelve million dollars (\$12,000,000.00) transferred into the Swiss Bank account. The Chapter 7 Trustee researched alternatives available. The Chapter 7 Trustee determined only one course of action was available to him. The Chapter 7 Bankruptcy Trustee was appointed through the Department of Justice of the United States. The Chapter 7 Trustee founds the United States and Switzerland had treaties for disclosure of information. The Chapter 7 Trustee met with the Office of International Affairs in Washington D.C. The Office of International Affairs is part of the Department of Justice and coordinated MLAT (Mutual Legal Assistance Treaties) with numerous countries including Switzerland. The Chapter 7 Trustee related he was appointed by the Department of Justice and why couldn't he participate in MLAT requests to countries, including Switzerland, in fraud cases. The Office of International Affairs coordinated with the Swiss Central Authority, the Swiss counterpart as to MLAT. After a year of discussions and negotiations, the request was granted. The Chapter 7 Trustee had to prepare the MLAT, which he did, and submitted to the Office of International Affairs in Washington D.C. The MLAT was translated into German and submitted to the Swiss Central Authority. Nine months later the Chapter 7 Trustee received, in the mail, a large package from the Swiss Central Authority. The package contained affidavits in English from Swiss Bank Officers at the bank in which the twelve million dollars (\$12,000,000.00) was deposited, and information as to persons

who set up the accounts, copies of bank account statements for twelve (12) bank accounts were included. Also the original signature cards for cash of the twelve (12) accounts were included. The twelve (12) criminal Defendants each had a separate bank account with the twelve million dollars (\$12,000,000.00) being allocated among the accounts. An accountant who was a former Swiss citizen was the signatory on each of the twelve (12) bank accounts along with his brother. Substantial distributions were made from each of the twelve (12) bank accounts. All transfers were made after the filing of the involuntary bankruptcy. The accountant was living in Los Angeles, California and the Chapter 7 Trustee obtained an Order requiring him to testify as to his involvement as a signatory. The examination was held in Los Angeles and the accountant appeared and testified over two (2) hours he had no involvement with any of the criminal Defendants and held no money for them. The Chapter 7 Trustee showed the accountant an exhibit which was copy of the signature cards to the twelve (12) bank accounts. The accountant was asked if his signature appeared on the opening account statement and signatures cards. The accountant related he could not tell from the copy. The Chapter 7 Trustee presented the accountant with the original signature cards and he stated he refused to testify further. The Bankruptcy Judge was called to require the accountant to testify. The Bankruptcy Judge had the Court reporter transcribing the depositions and related he had waived his right to self-incrimination and Ordered the accountant to answer the questions proposed by the Chapter 7 Trustee. The accountant answered the question and explained each of the disbursements from the twelve (12) accounts. Based on the information, the Chapter 7 Trustee recovered three million dollars (\$3,000,000.00) from parties who received funds.

The Chapter 7 Trustee with this information was fully able to reconcile the twelve (12) bank accounts. The Chapter 7 bankruptcy provided information for use in the criminal proceeding.

The Chapter 7 Trustee also received a portion of the funds back in the amount of four million dollars (\$4,000,000.00).

**CAYMAN ISLANDS**

The Chapter 7 Trustee identified several million dollars which was transferred to a Bank in the Cayman Islands from accounts of Activator Supply Company held in the United States.



# Index Exhibit 2

U.S. v. Theron, 116 F.R.D. 58 (1987)

116 F.R.D. 58  
United States District Court,  
D. Kansas.

UNITED STATES of America, Plaintiff,  
v.  
Frans J. THERON, Defendant.

No. 85-20068-02.

May 11, 1987.

Individual who had been convicted of mail fraud in underlying criminal action moved for reconsideration of court's order authorizing trustee in bankruptcy for two debtor corporations formed by individual, to inspect and copy bank and other financial records presented to grand jury. The District Court, Earl E. O'Connor, Chief Judge, held that: (1) grand jury secrecy provision did not prohibit disclosure of records; (2) even, if grand jury secrecy provision generally applied, disclosure of requested documents was authorized under express exception to rules; (3) Right to Financial Privacy Act did not prevent disclosure of corporate records; (4) individual did not have standing to challenge disclosure of records of other customers of corporations under Act; and (5) records of which individual was customer were disclosable pursuant to Act.

Denied.

West Headnotes (6)

[1] **Grand Jury**

⚡ Grounds or objections in general

Grand jury secrecy provision did not prohibit disclosure of bank records of corporations and individual defendants who were convicted of mail fraud, to trustee in bankruptcy, though such records were introduced in grand jury proceeding, where trustee sought records only for their intrinsic value, in order to trace funds that were diverted to overseas accounts, so that assets of estates could be marshaled for benefit of creditors. Fed.Rules Cr.Proc.Rule 6(e), 18 U.S.C.A.

Cases that cite this headnote

[2] **Grand Jury**

⚡ Grounds or objections in general

Even if grand jury secrecy provision generally applied to case where trustee in bankruptcy sought bank records of corporation and individuals, which were disclosed to grand jury in ~~previous criminal proceeding~~ disclosure of requested documents to trustee was authorized under express exception to rule which allows for disclosure if party requesting materials makes strong showing of particularized need and if use to which materials are sought is related fairly and directly to some identifiable litigation, pending or anticipated, where delay in obtaining information would prejudice trustee, and release of documents would not reveal identity of any witness or deter future witnesses from being candid with other grand juries. Fed.Rules Cr.Proc.Rule 6(e)(3)(C)(i), 18 U.S.C.A.

Cases that cite this headnote

[3] **Bankruptcy**

⚡ Right; grant or denial; discretion

Defendants in mail fraud case were not entitled to have district court stay its order authorizing trustee in bankruptcy to copy certain financial records of defendant and their corporations, which had been presented to grand jury in underlying criminal case, until after defendants' appeals had been decided, where documents were only sought for their intrinsic value and delay in disclosing such records would greatly prejudice trustee in bankruptcy, who was attempting to identify and marshal assets of bankrupt estate prior to expiration of statute of limitations on preferential transfers.

1 Cases that cite this headnote

[4] **Banks and Banking**

⚡ Depositors' passbooks and accounts

U.S. v. Theron, 116 F.R.D. 58 (1987)

Disclosure of corporate bank records, which were obtained pursuant to subpoenas in criminal matter, to trustee in bankruptcy, did not violate Right to Financial Privacy Act, where Act barred disclosure of records of individuals, but not of corporations. Right to Financial Privacy Act, §§ 1101-1122, 1101(4), 5), 12 U.S.C.A. §§ 3401-3422, 3401(4, 5).

1 Cases that cite this headnote

## Attorneys and Law Firms

\*59 Benjamin L. Burgess, U.S. Atty., Richard L. Hathaway, Asst. U.S. Atty., Topeka, Kan., for plaintiff.

Bruce C. Houdek, Kansas City, Mo., William W. Robertson, Peter B. Bennett, Hannonch, Weisman, P.C., Roseland, N.J., for defendant.

## MEMORANDUM AND ORDER

## [5] Banks and Banking

✦ Depositors' passbooks and accounts

Defendant who was convicted of mail fraud did not have standing to challenge disclosure of financial records of other individuals, which were obtained pursuant to subpoena in grand jury proceeding, to trustee in bankruptcy, under the Right to Financial Privacy Act, where Act was intended for benefit of particular individual customer, rather than for third party who did not want information to be revealed. Right to Financial Privacy Act of 1978, § 1117(a), 12 U.S.C.A. § 3417(a).

Cases that cite this headnote

## [6] Banks and Banking

✦ Depositors' passbooks and accounts

Financial records of individual who was customer in transactions involving mail fraud, could be released to trustee in bankruptcy under exception to Right to Financial Privacy Act, where such information was obtained pursuant to subpoena issued under authority of federal grand jury, as federal district court directed that such disclosure be made pursuant to grand jury secrecy provision. Right to Financial Privacy Act of 1978, §§ 1120, 1120(2), 12 U.S.C.A. §§ 3420, 3420(2); Fed. Rules Cr. Proc. Rule 6(e)(3)(C) (i), 18 U.S.C.A.

1 Cases that cite this headnote

BARL E. O'CONNOR, Chief Judge.

Defendant Frans J. Theron, one of twelve defendants in this criminal matter (commonly referred to as the "Culture Farms" case) has moved for reconsideration of the court's order authorizing the trustee in bankruptcy for Culture Farms, Inc., and Activator Supply Company, Inc., to inspect and copy bank and other financial records presented to the grand jury. *United States v. Stemm*, No. 85-20068-01 (D.Kan., unpublished, Mar. 12, 1987) [Available on WESTLAW, DCT database]. We shall deny the motion.

## \*60 I. Background

In this mail fraud case, the government alleged that the defendants engaged in a scheme and artifice to defraud "growers" of milk cultures by representing that the milk cultures could be grown and sold at a substantial profit to Culture Farms, Inc. ["Culture Farms"]. The defendants told the growers that Culture Farms would sell the dried cultures to another company, which, they said, would use the cultures to produce cosmetics. The government further charged that the defendants created several companies, which they secretly controlled, to give the appearance that the companies were dealing with each other at arms length. Two of those companies were Culture Farms, Inc. ["Culture Farms"] and Activator Supply Company, Inc. ["Activator Supply"]. All twelve of the defendants have pleaded guilty and have been sentenced.

Both Culture Farms and Activator Supply are now in bankruptcy. The trustee in bankruptcy for the bankruptcy estates is Christopher J. Redmond. On January 5, 1987, Redmond moved the court for an order authorizing him to review certain documents that had been presented to the grand jury. In particular, he sought, as the representative of the bankruptcy estates, to inspect and copy the bank

U.S. v. Theron, 116 F.R.D. 58 (1987)

records and other financial records of Culture Farms, Activator Supply, and the defendants. In support of his motion, Redmond stated that his review of various books and records of Culture Farms and Activator Supply led him to believe that there had been extensive commingling of funds between those two companies and other entities and persons. In addition, Redmond stated that there is evidence indicating that at least \$15 million was transferred to overseas accounts in the Netherlands, the Grand Cayman Islands, the Isle of Mann, and Zurich. He argued that he needed to obtain the bank records that were presented to the grand jury to trace these funds. On March 12, 1987, the day three of the final four defendants were sentenced, we granted Redmond's motion. Frans Theron subsequently filed the instant motion for reconsideration.<sup>1</sup>

<sup>1</sup> We shall assume, without deciding, that Theron has standing to argue against disclosure. At least one court has hinted that perhaps only the government, "which is the custodian of the records and the protector of grand jury secrecy," may object to disclosure. *In Re Grand Jury Investigation*, 630 F.2d 996, 998 n. 2 (3d Cir.1980).

## II. Analysis

In his motion, Theron raises two separate arguments. First, he argues that disclosure of the grand jury records to the bankruptcy trustee violates the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. Second, he maintains that disclosure of the defendants' bank records violates the Right to Financial Privacy Act, 12 U.S.C. §§ 3401-22. We shall address his arguments seriatim.

### A. Rule 6(e)

[1] Rule 6(e), the grand jury secrecy provision, does not prohibit disclosure of the records in question to the bankruptcy trustee for at least two reasons. First, the records are not privileged grand jury materials that fall within the rule's prohibition against disclosure of information. As the Tenth Circuit noted in *United States ex rel. Woodard v. Tynan*, 757 F.2d 1085 (1985), the rule is designed only to prevent disclosure "of what is said or what takes place in the grand jury room." *Id.* at 1087 (quoting *United States v. Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir.1960)). Thus, although the rule may,

under some circumstances, proscribe the disclosure of documents,

it is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury. Thus, when testimony or data is sought for its own sake—for its intrinsic value in the furtherance of a lawful investigation—rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed \*61 to a grand jury or that the same documents had been, or were presently being, examined by a grand jury.

*Tynan*, 757 F.2d at 1087 (quoting *Interstate Dress Carriers*, 280 F.2d, at 54). See also *In Re Grand Jury Investigation*, 630 F.2d 996, 1000-01 (3d Cir.1980), cert. denied, 449 U.S. 1081, 101 S.Ct. 865, 66 L.Ed.2d 805 (1981); *Cumis Insurance Society, Inc. v. South-Coast Bank*, 610 F.Supp. 193, 198 (N.D.Ind.1985).

Here, the trustee's request falls precisely within the Tenth Circuit's holding in *Tynan*: he seeks the records for their intrinsic value. That is, he needs them only to trace the funds that were diverted to overseas accounts so that he can marshal as much of the assets of the estates as possible for the benefit of the creditors.

[2] Second, even if Rule 6(e) generally applies here, disclosure of the requested documents is authorized under one of the express exceptions to that rule. Rule 6(e)(3)(C) (i) provides:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminary to or in connection with a judicial proceeding.

Under this subdivision, disclosure may be made only if the party requesting the materials makes a strong showing of particularized need, *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 443, 103 S.Ct. 3133, 3148, 77 L.Ed.2d 743 (1983), and if the use to which the materials are sought

U.S. v. Theron, 116 F.R.D. 58 (1987)

is "related fairly directly to some identifiable litigation, pending or anticipated." *United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 3167, 77 L.Ed.2d 785 (1983).

Theron does not deny that the trustee seeks the documents for use in pending litigation: the bankruptcy cases of both Culture Farms and Activator Supply. He does, however, argue that the trustee has not shown a particularized need for the documents. We disagree.

The Supreme Court has established the required showing. To demonstrate a particularized need, the party requesting the materials must show that the materials are "needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed...." *Sells Engineering*, 463 U.S. at 443, 103 S.Ct. at 3148 (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979)).

The trustee's request—perhaps as clearly as any request could—meets all of these requirements. From the evidence already available to the trustee, he has stated that it appears that the defendants and their related companies engaged in numerous fraudulent transactions and preferential transfers. The statute of limitations on the preferential transfers requires the trustee to act by September of 1987, only a few months from now. Thus, if he is forced to seek the financial records from each of the dozens of banks through which the defendants channeled the money, he likely will be unable to trace the transfers before the statute of limitations period ends. Certainly, it would be extremely unjust—and the height of irony—to allow defendants to prevent disclosure of the records to the trustee in time to enable him to trace the funds for the benefit of the creditors merely because a federal grand jury had examined the records in the course of its investigation of the defendants' criminal wrongdoing.

For much the same reason, the need for disclosure outweighs the need for continued secrecy. As we have stated, the trustee requires the records as soon as possible to avoid a statute of limitations problem. On the other hand, the need for continued secrecy is minimal. The grand jury has long since completed its work (over a year and a half ago), and release of the documents will not reveal the identity of any witness or in any way deter future witnesses from being candid with other grand juries.

And, finally, despite Theron's assertion to the contrary, the trustee's request is no \*62 broader than necessary. He seeks—and the order granted him—access to financial records that are "reasonably calculated to lead to the discovery of ... when and where assets of Culture Farms, Inc., and Activator Supply Company, Inc., were transferred ... and where those assets may be traced ..." *Stemm*, No. 85-20068-01, slip op. at 4-5 (Mar. 12, 1987) [Available on WESTLAW, DCT database]. The court fails to perceive how that order could have been more narrowly tailored to accommodate the trustee's need to trace the funds and, indeed, Theron does not even attempt to suggest how it could have been narrowed.

Accordingly, we conclude that, because the trustee seeks the records for their intrinsic value and not to learn what took place before the grand jury, Rule 6(e) does not bar their release. In the alternative, even if Rule 6(e) applies, the provisions of Rule 6(e)(3)(C)(i) authorize disclosure of the records in question.

[3] Before turning to the second major issue raised by Theron, we note that he argues that the court should at least stay its order authorizing the trustee to copy the record until after the defendants' appeals have been decided. But he does not cite a single case to support his stay request and we conclude that there is no satisfactory reason to grant it. Many courts have authorized the release of grand jury materials well before the appeal process has ended; often before the grand jury has completed its investigation. See, e.g., *In Re Grand Jury Investigation*, 630 F.2d at 998-1001; *In Re SJC Mfg. Corp.*, 479 F.Supp. 647, 651 (E.D.N.Y.1979); *Capitol Indemnity Corp. v. First Minnesota Constr. Co.*, 405 F.Supp. 929, 931 (D.Mass.1975). In fact, the Tenth Circuit, as we quoted above, has stated that when documents are sought for their intrinsic value, "it is not a valid defense to disclosure that the same ... documents had been, or were presently being, examined by a grand jury." *Tynan*, 757 F.2d at 1088 (emphasis added). Of course, if documents that the grand jury is contemporaneously examining may be made available to third parties, then there can be no requirement that the court wait until after the appeal process has been completed to authorize disclosure. Nor should the court wait when, as here, delay would greatly prejudice the party making the request for release of the documents.

#### B. The Right to Financial Privacy Act

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Theron's second argument is that disclosure of the bank records, which were obtained pursuant to subpoenas, violates the Right to Financial Privacy Act ["the Act"]. 12 U.S.C. §§ 3401-22. For several reasons, we disagree.

[4] First, the Act does not apply to corporate records and the bulk of the records sought are the records of the two debtor-corporations: Culture Farms and Activator Supply. Sections 3402 and 3403, together, prohibit the disclosure to government authorities of information contained in the financial records of a customer of a financial institution. A "customer" is defined as "any person or authorized representative of that person who utilized ... any service of a financial institution...." 12 U.S.C. § 3401(5) (emphasis added). A "person," in turn, is defined as "an individual or a partnership of five or fewer individuals." *Id.* at § 3401(4) (emphasis added). Hence, the Act does not bar disclosure of the records of corporations such as Culture Farms and Activator Supply. *See also Spa Flying Service, Inc. v. United States*, 724 F.2d 95 (8th Cir.1984).

[5] Second, concerning the records of the individual defendants, Theron does not have standing to challenge the disclosure of the records of the other defendants/customers. The Act obviously was intended for the benefit of the particular customer, not for a third party who does not want the information to be revealed. Thus, for example, the Act provides that any government agency or financial institution that violates the act "is liable to the customer to whom such records relate...." *Id.* at § 3417(a) (emphasis added). Accordingly, Theron's argument, even if it were a sound \*63 one, would affect only a small fraction, if any, of the records covered by the court's order.

[6] Finally, as to those few records of which Theron was the customer, the Act contains an express exception that authorizes their release in the instant case. Section 3420, which covers grand jury information, provides:

Financial records about a customer obtained from a financial institution pursuant to a subpoena issued under the authority of a Federal grand jury—

....

(2) shall be used only for the purpose of considering whether to issue an indictment ..., or of prosecuting a crime for which that indictment ... was issued, or for a purpose authorized by rule 6(e) of the Federal Rules of Criminal Procedure.

12 U.S.C. § 3420(2) (emphasis added). As we concluded in the first section of this memorandum and order, Rule 6(e) (3)(C)(i) authorizes disclosure of the information "when so directed by a court preliminarily to or in connection with a judicial proceeding." Because we have directed that such a disclosure should be made, the requirements of section 3420 are satisfied. Therefore, the court's order did not violate the Act and we shall deny Theron's motion.

IT IS THEREFORE ORDERED that defendant Frans J. Theron's Motion for Reconsideration of Order Authorizing Inspection and Copying of Grand Jury Records, Return of Grand Jury Materials and Staying Production of Documents to Trustee in Bankruptcy is denied.

#### All Citations

116 F.R.D. 58

End of Document

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# Index Exhibit 3

AMERICAN BANKRUPTCY INSTITUTE



U. S. Department of Justice

*Criminal Division*

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Washington, D.C. 20530

August 8, 1995

VIA EXPRESS MAIL

Christopher J. Redmond  
Redmond, Redmond and Nazar  
Attorneys at Law  
9th Floor  
200 West Douglas  
Wichita KS 67202-3089

Re: Swiss Mutual Legal Assistance Request in the Matter of  
Activator Supply Company, Inc., and Culture Farms, Inc.

Dear Chris:

Richard Owens has reviewed your request and, in light of his recent consultations with the Swiss, has made some revisions and comments. I have typed them on the disk for your convenience. As you will see, he feels you should include more information regarding the specific intent of the defendants. The Swiss stressed the necessity for this element in all future fraud requests.


I have marked two places in the text with a double asterisk (\*\*). In both these places the text is not properly aligned when printed, although it appears to be on the screen.

Please provide the information Rich requests and return to me for signature and submission to Swiss authorities. I look forward to your response.

Sincerely,

George W. Proctor  
Director  
Office of International Affairs

by:

  
Tressa J. Borland  
Trial Attorney

Enclosure





*Criminal Division*

U. S. Department of Justice

*Washington, D.C. 20530*

**DRAFT**

TO: The Central Authority of Switzerland

SUBJECT: Request for Assistance in the Investigation  
of Activator Supply Company, Inc., and  
Culture Farms, Inc.

The Central Authority of the United States requests the assistance of the appropriate authorities in Switzerland pursuant to the Treaty on Mutual Assistance in Criminal Matters. The Bankruptcy Trustee is conducting an investigation of the principals of Activator Supply Company, Inc., and Culture Farms, Inc., for bankruptcy fraud and the illegal conversion of millions of dollars of the bankruptcy estates.

The Trustee needs Swiss bank records to identify the funds and to determine their disposition. The Trustee is coordinating his investigation with the United States Attorney's Office and will refer evidence of criminal activity to the U.S. Attorney for criminal prosecution.

THE FACTS

Between December 1984 and May 1985, the principals of Activator Supply and Culture Farms -- Willard Barnes Bass, Jr., Kristine Ann Gunn, Larry Stephen Huff, Christopher Joseph Mancuso, Roland Rocco Nocera, Ronald L. Rakow, Paul George Stemm, Terrence James Taylor, Frans Jacobus Theron, Gert Albertus Theron, William Field Wagner, and Charles Allen West -- defrauded over 28,000

investors of \$80 million dollars in a pyramid and Ponzi scheme. Based upon this illegal activity, Bass, Gunn, Huff, C. Mancuso, Nocera, Rakow, Stemm, Taylor, F. Theron, G. Theron, Wagner and West were convicted on charges of mail fraud. On March 6, 1985, the Kansas Securities Commissioner determined that Activator Supply and Culture Farms had violated securities laws and ordered both businesses to cease operations and prohibited them from operating in the future. Culture Farms was placed in bankruptcy and a Bankruptcy Trustee was appointed on August 11, 1986. Activator Supply was placed in bankruptcy and a Bankruptcy Trustee was appointed on October 16, 1986. The Trustee's responsibilities are to review the financial affairs of the corporations, recover funds diverted by the corporations, and take any actions necessary to recover assets for the benefit of the creditors. QUESTION: WHY IS THIS A FRAUD MATTER? WE NEED SOME FACTS THAT SHOW A BASIS OF FRAUD. DID THE TRUSTEE ORDER AN ACCOUNTING OF ASSETS: OBLIGATION OF DEFENDANTS TO DO SO? RESULT? NO COOPERATION? NO ACCOUNTING? NO DISCLOSURE OF SZ ASSETS?

[NOTE: \$80 MILLION FRAUD, SEARCH HERE IS FOR \$10 MILLION. DOES EFFORT REGARDING OTHER \$70 MILLION SHOW FRAUD? PLEASE EXPLAIN IN A PARAGRAPH OR TWO.]

Instead, the principals of the Activator Supply and Culture Farms, with the assistance of others, transferred substantial corporate funds to numerous foreign bank accounts. The nonprincipals who were involved are Joy Allen, the wife of Huff; Marlene Allen, an attorney for Huff and F. Theron; Harry Hicks, an attorney for Taylor, Stemm and F. Theron; James Mancuso, brother of

C. Mancuso; Joseph Victor Nash, an accountant; Joy Theron, the wife of F. Theron; and Barbara West, the wife of West. These individuals either (1) transferred funds of Activator Supply or Culture Farms to Swiss bank accounts; (2) were signatories of the Swiss bank accounts; or (3) received funds from Swiss bank accounts.

About the time of the collapse of Activator Supply and Culture Farms, Nash opened a Swiss bank account on behalf of the principals of Activator Supply and Culture Farms at Algemene Bank Nederland (ABN), Talstrasse 41 CH-8022 Zurich, under the code name "Sperling 6771," customer number 134555/002. QUESTION: IN ANTICIPATION OF EFFORTS IN BANKRUPTCY TO REMOVE ASSETS? PURPOSE? Between May 31 and July 1, 1985, Nocera, the President of Activator Supply, transferred a total of \$3.6 million dollars from the Activator Supply account at Continental Illinois Bank & Trust Company in Chicago to the Sperling account. Nash then made the following transfers from the Sperling account:

<u>Name of Bank</u>	<u>Address</u>	<u>Account No.</u>	<u>Attention of and Order</u>	<u>Date and Amount of Transfer</u>
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	PO 30221 SOAP	Claude Gabriel Order DD. 7.6	June 7, 1985 1,500,000.00
ABN Bank Zurich	Talstrasse 41 8022 Zurich	11689 Senior	K. Arm	July 25, 1985 900,000.00
ABN Bank Zurich	Talstrasse 41 8022 Zurich	11688 Phan	K. Arm	July 26, 1985 150,000.00
ABN Bank Zurich	Talstrasse 41 8022 Zurich	9022 Turbo	K. Arm	July 26, 1985 50,000.00

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ABN Bank Zurich	Talstrasse 41 8022 Zurich	11689 Senior	K. Arm	July 26, 1985 100.00
Bank Louis Dreyfus	Bahnhofstrasse 98	Victor	Order No. 525 Mr. Limacher	July 26, 1985 500,000.00
Bank Louis Dreyfus	Bahnhofstrasse 98	Victor	Order No. 525 Mr. Limacher	July 26, 1985 250,000.00

The principals of Activator Supply and Culture Farms then transferred the funds from the above accounts to Swiss bank accounts, as follows:

<u>Name of Bank</u>	<u>Address</u>	<u>Acct. No. &amp; Acct. Code</u>	<u>Atten</u>	<u>Date of Transfer and Amount</u>
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3061 SOAP	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3062 Boxer	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3063 Turbo	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3064 Phan	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3065 Senior	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3066 Boy	R. Limacher	Unknown
Bank Louis Dreyfus	Bahnhofstrasse 98 8022 Zurich	3067 Woodie	R. Limacher	Unknown
Bank Louis	Bahnhofstrasse 98 8022 Zurich	3071 Arlington	R. Limacher	Unknown

# 2025 INTERNATIONAL CARIBBEAN INSOLVENCY SYMPOSIUM

## Dreyfus

ABN Bank	Talstrasse 41 8022 Zurich	9021 Boxer	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	9022 Turbo or Boxer	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11688 Phan	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11689 Senior	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11690 Boy	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11691 Woodie	K. Arm or Ms. Steinmann	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11747 Testa	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11748 Rosa	K. Arm	Unknown
ABN Bank	Talstrasse 41 8022 Zurich	11749 Countash	K. Arm	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32211 SOAP	C. Gabriel	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32212 Boxer	C. Gabriel	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32213 Turbo	C. Gabriel	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32214 Phan	C. Gabriel	Unknown
Credit Suisse	Street Address Unknown Zurich	0858- 920960-71 Givsen	Unknown	Unknown
Swiss Bank	Paradeplatz 6 8022 Zurich	P-O 32215	C. Gabriel	Unknown

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Corp.		Senior		
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32216 Boy	C. Gabriel	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 32217 Woodie	C. Gabriel or Markus Banz	Unknown
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	P-O 33256	C. Gabriel	Unknown
Omni Bank AG	Postfach 561 6301 Zug	4383 Seki	H. Zollner	Unknown

From May 4, 1985, to August 8, 1985, Stemm, Taylor, C. Mancuso and Huff directed the transfer of over \$4,000,000 PURPOSE? from Activator Supply and Culture Farms through various foreign accounts to account number 67510604 in the name of Givsen Limited at the Isle of Man Bank, Limited. From November 1985, through August 1986, the following deposits were made to Givsen Limited's account number 67510604 from various Swiss banks:

<u>Name of Bank</u>	<u>Address</u>	<u>Account No.</u>	<u>Attention of and Code</u>	<u>Date and Amount Transferred</u>
Bank Louis Swiss	Street Address Unknown Zurich	Unknown	Theatrical Trust	November 6,** 1985 \$160,000.00
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	Theatrical Trust	Dec. 2, 1985 190,000.00
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	C.J. Mancuso	Dec. 2, 1985 217,000.00
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	C.J. Mancuso	Dec. 9, 1985 2,413.82

# 2025 INTERNATIONAL CARIBBEAN INSOLVENCY SYMPOSIUM

Bank Louis Dreyfus	Bahnhofstrasse 98	Unknown	Theatrical Trust	Dec. 20, 1985 100,000.00
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	C.J. Mancuso	Feb. 12, 1986 165,000.00
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	C. Mancuso Loan	May 15, 1986 101,300.00
Credit Suisse	Zurich	Unknown	C. Mancuso Loan Repayment	June 19, 1986 7,000.00
Credit Suisse	Zurich	Unknown	C. Mancuso Loan Repayment	Aug. 5, 1986 4,000.00

Both West and Stemm transferred large sums of money from Activator Supply to the trust account of Marlene A. Allen, attorney for Huff and F. Theron. PURPOSE? M. Allen then transferred \$500,000.00 to San Diego Trust and Savings Bank, San Diego, California, and directed the following transfers to:

<u>Name of Bank</u>	<u>Address</u>	<u>Account No.</u>	<u>Attention of and Code</u>	<u>Date and Amount Transferred</u>
ABN Bank	Talstrasse 41 8022 Zurich	11688	Phan Special Instruction Zip 8022	June 4, 1985 250,000.00
ABN Bank	Talstrasse 41 8022 Zurich	9022	Boxer Special Instruction Zip 8022	June 4, 1985 250,000.00

Stemm transferred \$400,000 from various Swiss banks through Achates Trust to account number 20-130-481 at Mitsui Manufacturing Bank, Newport Beach, California. This account is in the name of Harry E. Hicks, an attorney for Huff, F. Theron, and Taylor. The

# AMERICAN BANKRUPTCY INSTITUTE

transfers are as follows:

<u>Name of Bank</u>	<u>Address</u>	<u>Account No.</u>	<u>Attention of and Code</u>	<u>Date and Amount Transferred</u>
ABN Bank	Talstrasse 41 8022 Zurich	Unknown	Unknown	Sept. 27, 1985 99,980
ABN Bank	Talstrasse 41 8022 Zurich	Unknown	Unknown	Oct. 14, 1985 38,622
Bank Louis Dreyfus	Bahnhofstrasse 98	Unknown	Unknown	Nov. 19, 1985** 100,000
Swiss Bank Corp.	Paradeplatz 6 8022 Zurich	Unknown	Unknown	Dec. 9, 1985 150,000

In July and August 1985, Jackson & Co., Isle of Man accountants, acting under the direction of Stemm, Taylor and C. Mancuso, transferred \$605,000 of Activator Supply funds and \$700,000 of Culture Farms funds to Achates Trust, Limited, a Guernsey company. PURPOSE? Achates Trust, Limited, created Balestra, Incorporated, a Liberian corporation to which it transferred \$1.3 million of Activator Supply and Culture Farm funds. Jeremy Graham Steere and Leslie Anthony Steere (acting under the direction of Taylor, Stemm and C. Mancuso) were officers and directors of both Achates Trust, Limited, and Balestra, Incorporated. Stemm had power of attorney over Balestra, Incorporated. On November 25, 1985, \$35,000 was transferred from Balestra, Incorporated's account number 550-476-6 at the Royal Bank of Canada (CI), Limited, to Credit Suisse, 1110 Morges, Switzerland, to the attention of Mr. Fontana, Reference "ROK."

On August 15, 1985, \$1.2 million was transferred from Swiss



Bank Corporation, Geneva, to Achates Trust, Limited, and National Westminster Bank, PLC, Guernsey, (C.I.). The transfer carried the notation "CACCA."

--- Result? \$ recovered? etc. (\$80 to \$10)

OFFENSES

118 U.S.C. § 152. Concealment of Assets. False Oaths and Claims. Bribery.

A person who -- (1) knowingly and fraudulently conceals from a . . . trustee . . . charged with the control or custody of property, or from creditors . . . any property belonging to the estate of a debtor;

\* \* \*

(5) knowingly and fraudulently receives any material amount of property from a debtor after [the filing of a case under Title 11], with the intent to defeat [the provisions of Title 11];

\* \* \*

(7) in a personal capacity or as agent or officer of any person or corporation, . . . with intent to defeat [the provisions of Title 11], knowingly and fraudulently, transfers or conceals any of his report or the property of such person or corporation;

--- shall be fined not more than \$5,000.00, imprisoned not more than 5 years, or both.

SUBSTITUTE THE BRACKETED TEXT FOR BRACKETED LANGUAGE DESCRIBING THE ILLEGAL CONDUCT.

18 U.S.C. § 3057. Civil Duty to Report Crimes (Bankruptcy Investigations).

(a) Any . . . trustee having reasonable grounds for believing that any violation [of] the laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, shall report to the appropriate United States attorney all of the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed.

PERSONS AND ENTITIES INVOLVED

1. ACHATES TRUST, LTD.

AMERICAN BANKRUPTCY INSTITUTE

Place of incorporation: Guernsey, Channel Islands

Address: P. O. Box 612 Suite F5  
Hirzel Court  
St. Peter Port, GUERNSEY  
CHANNEL ISLANDS GY1 4NZ  
UNITED KINGDOM

Chief Executive Officer: Leslie Steere

2. JOY LYNN ALLEN

Date of Birth: October 11, 1950

Place of Birth: unknown

Citizenship: U.S.

Race: Caucasian

Passport Number: US 030486575

Social Security Number: 315-56-1396

Address: 39 Saddlebow  
Canoga Park, California 91307

Joy Lynn Allen was the wife of Larry Huff.

3. MARLENE A. ALLEN

Date of Birth: unknown

Place of Birth: unknown

Citizenship: U.S.

Race: Caucasian

Height: 5'6"

Weight: 150 pounds

Eyes: brown

Hair: brown

Passport Number: unknown

Social Security Number: 551-58-8997

- Address:  
2381 El Amigo  
Del Mar, California 92014
4. ARIATE, N.V.  
Place of incorporation: Curacao  
Netherlands Antilles  
Address: Atruka International  
Trust (Curacao), N.V.  
De Ruyter Kade  
P.O. Box 523  
Curacao  
Netherlands Antilles  
Chief Executive Officer: Bernard M. Schnitger
5. BALESTRA, INC.  
Place of incorporation: Monrovia, Liberia  
Address: 1 Place du Commerce  
St. Peter Port  
Guernsey, Channel Islands  
President and Director: Leslie Anthony Steere  
Guernsey, Channel Islands  
Secretary-Treasurer: Jeremy Graham Steere  
Guernsey, Channel Islands
6. WILLARD BARNES BASS, JR.  
Date of Birth: January 15, 1941  
Place of Birth: Seattle, Washington  
Citizenship: U.S.  
Race: Caucasian  
Passport Number: unknown  
Social Security Number: 569-50-5343  
Address: 18 Foxhill  
Irvine, California
7. BERLINETTA, INC.  
Place of incorporation: Laduz, Liechtenstein  
Address: Laduz, Liechtenstein

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8. GIVSEN, LIMITED

Place of incorporation: Douglas, Isle of Man  
Address: Box 44  
Foufinch Road  
Douglas, Isle of Man  
President: Barry Kingsley Jackson

9. KRISTINE ANN GUNN

Date of Birth: October 21, 1961  
Place of Birth: Benton Harbor, Michigan  
Citizenship: U.S.  
Race: Caucasian  
Passport Number: unknown  
Social Security Number: 564-84-4382  
Address: 2886 Andalucia Court  
Palm Springs, California

10. HARRY E. HICKS

Date of Birth: unknown  
Place of Birth: unknown  
Citizenship: U.S.  
Race: Caucasian  
Height: 5'7"  
Weight: 160 pounds  
Eyes: brown  
Hair: brown  
Passport Number: unknown  
Social Security Number: 530-16-5493  
Address: 1605 East 4th Street  
Santa Ana, California 92701

## 11. LARRY STEPHEN HUFF

Date of Birth: October 27, 1941  
 Place of Birth: Omaha, Nebraska  
 Citizenship: U.S.  
 Race: Caucasian  
 Height: 5'10"  
 Weight: 190 pounds  
 Eyes: brown  
 Hair: brown  
 Passport Number: unknown  
 Social Security Numbers: 913-89-2194  
 571-50-1897  
 910-09-2755

Address: 39 Saddlebow Road  
 Bell Canyon, California

## 12. BARRY KINGSLEY JACKSON

Date of Birth: unknown  
 Place of Birth: Douglas, Isle of Man  
 Citizenship: Isle of Man  
 Race: Caucasian  
 Height: 5'9"  
 Weight: 185 pounds  
 Eyes: brown  
 Hair: black  
 Passport Number: unknown  
 Social Security Number: none  
 Address: P.O. Box 44  
 Fourfinch Road  
 Douglas, Isle of Man

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13. JACKSON & CO.

Place of incorporation: Douglas, Isle of Man  
Address: P.O. Box 44  
Fourfinch Road  
Douglas, Isle of Man  
Managing Partner: Barry Kingsley Jackson

14. CHRISTOPHER JOSEPH MANCUSO

Date of Birth: December 13, 1957  
Place of Birth: New York, New York  
Citizenship: U.S.  
Race: Caucasian  
Height: 6'1"  
Weight: 180 pounds  
Eyes: brown  
Hair: brown  
Passport Number: unknown  
Social Security Number: 560-17-5785  
Address: 5727 Canoga Ave.  
Suite No. 244  
Woodland Hills, California

15. JAMES MANCUSO

Date of Birth: May 13, 1959  
Place of Birth: Bayside, New York  
Citizenship: U.S.  
Race: Caucasian  
Height: 5'7"  
Weight: 165 pounds  
Eyes: brown

2025 INTERNATIONAL CARIBBEAN INSOLVENCY SYMPOSIUM

Hair: brown  
Passport Number: unknown  
Social Security Number: 560-17-7397  
Address: 5030 Paradise Road A-107  
Las Vegas, Nevada 89119

16. MASHBIR INVESTMENTS, LIMITED

Place of incorporation: Douglas, Isle of Man  
Address: P.O. 44  
Fourfinch Road  
Douglas, Isle of Man  
President: Barry Kingsley Jackson  
Chief Executive Officer: Barry Kingsley Jackson

17. JOSEPH VICTOR NASH

Date of Birth: April 14, 1943  
Place of Birth: Switzerland  
Citizenship: U. S.  
Race: Caucasian  
Height: 5'10"  
Weight: 210 pounds  
Eyes: brown  
Hair: black  
Passport Number: US-G1492936  
Social Security Number: unknown  
Address: 449 S. Beverly Drive  
Beverly Hills, California 90212

18. ROLAND ROCCO NOCERA

Date of Birth: August 10, 1931  
Place of Birth: Chicago, Illinois  
Citizenship: U.S.

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Race:	Caucasian
Sex:	Male
Height:	5'10"
Weight:	180 pounds
Eyes:	brown
Hair:	brown
Passport Number:	unknown
Social Security Number:	339-22-9711
Address:	2 Lagoon Road Belvedere, California
19. RONALD L. RAKOW	
Date of Birth:	November 10, 1937
Place of Birth:	New York, New York
Citizenship:	U.S.
Race:	Caucasian
Passport Number:	unknown
Social Security Number:	unknown
Address:	104C Calle Patricia San Clemente, California
20. JEREMY GRAHAM STEERE	
Date of Birth:	unknown
Place of Birth:	unknown
Citizenship:	Channel Islands
Race:	Caucasian
Passport Number:	unknown
Social Security Number:	none
Address:	1 Place du Commerce St. Peter Port, Guernsey



21. LESLIE ANTHONY STEERE
- Date of Birth: unknown
- Place of Birth: unknown
- Citizenship: Channel Islands
- Race: Caucasian
- Sex: Male
- Passport Number: unknown
- Social Security Number: none
- Address: 1 Place du Commerce  
St. Peter Port, Guernsey
22. PAUL GEORGE STEMM
- Date of Birth: July 14, 1933
- Place of Birth: Chicago Illinois
- Citizenship: U.S.
- Race: Caucasian
- Passport Number: US-031144900
- Social Security Number: unknown
- Address: 306 Columbia Street  
Newport Beach, California
23. TERRENCE JAMES TAYLOR
- Date of Birth: November 2, 1945
- Place of Birth: London, England
- Citizenship: United Kingdom
- Race: Caucasian
- Height: 5'8"
- Weight: 170 pounds
- Eyes: blue

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Hair:	blonde
Passport Number:	unknown
Social Security Number:	none
Address:	2533 Winterbrook Lawrence, Kansas
24. FRANS JACOBUS SMIT THERON	
Date of Birth:	November 11, 1941
Place of Birth:	Cape Town, Republic of South Africa
Citizenship:	South African
Race:	Caucasian
Sex:	Male
Passport Number:	unknown
Social Security Number:	none
Address:	280 Camino Del Sur Palm Springs, California
25. GERT ALBERTUS THERON	
Date of Birth:	March 2, 1983
Place of Birth:	Cape Town, Republic of South Africa
Citizenship:	South African
Race:	Caucasian
Sex:	Male
Passport Number:	unknown
Social Security Number:	unknown
Address:	24982 Via Marfil Mission Viejo, California
26. JOY THERON	
Date of Birth:	unknown

Place of Birth:	unknown
Citizenship:	U.S.
Race:	Caucasian
Passport Number:	unknown
Social Security Number:	unknown
Address:	280 Camino del Sur Palm Springs, California

Joy Theron is the wife of Gert Albertus Theron.

27. WILLIAM FIELD WAGNER

Date of Birth:	July 24, 1951
Place of Birth:	Peoria, Illinois
Citizenship:	U.S.
Race:	Caucasian
Passport Number:	unknown
Social Security Number:	unknown
Address:	540 N. West Knoll Drive Los Angeles, California

28. BARBARA KELLY WEST

Aliases:	Barbara Jean West Barbara J. Kelly
Date of Birth:	December 22, 1940
Place of Birth:	unknown
Citizenship:	U.S.
Race:	Caucasian
Height:	5'3"
Weight:	130 pounds
Eyes:	blue
Hair:	brown

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Passport Number: unknown  
Social Security Numbers: 546-54-1147  
355-28-6811  
Address: 226 Riviera Circle  
Larkspur, California 94939

Barbara Kelly West is the wife of Charles Allen West.

29. CHARLES ALLEN WEST

Date of Birth: September 19, 1933  
Place of Birth: Fayette County Pennsylvania  
Citizenship: U.S.  
Race: Caucasian  
Height: 5'8"  
Weight: 170 pounds  
Eyes: green  
Hair: brown  
Passport Number: US 030634633  
Social Security Number: 577-44-5548  
322-24-5582  
Address: 226 Riviera Circle  
Larkspur, California 94939

NEED FOR ASSISTANCE

The Trustee is attempting to reconcile in excess of \$10 million dollars that is missing from the bankruptcy estate and has not been accounted for. The Trustee seeks Swiss banking records to determine the disposition of the funds.

MUST RESTATE NEED. TRUSTEE NEEDS TO CONFIRM THAT PARTIES INTENTIONALLY HID ASSETS OF THE ESTATE BY SHARING CONDUCT AND DISPOSITION OF \$10 MILLION.

REQUEST FOR FREEZE

The Bankruptcy Trustee also requests that the Swiss authorities freeze any funds located in the following accounts:

1) Algemene Bank Nederland (ABN) Bank

- a. 1689 Senior
- b. 9021 Boxer
- c. 9022 Burbo or Boxer
- d. 9022 Turbo
- e. 11688 Phan
- f. 11690 Boy
- g. 11691 Woodie
- h. 11747 Testa
- i. 11748 Rosa
- j. 11749 Countash

2) Bank Louis Dreyfus

- a. Victor
- b. 3061 SOAP
- c. 3062 Boxer
- d. 3063 Turbo
- e. 3064 Phan
- f. 3065 Senior
- g. 3066 Boy
- h. 3067 Woodie
- i. 3071 Arlington

3) Bank Louis Swiss

account numbers unknown

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4) Credit Suisse

0858-920960-71

5) Omni Bank AG

4383 Seki

6) Swiss Bank Corporation

a. PO 32211 SOAP

b. PO 32212 Boxer

c. PO 32213 Turbo

d. PO 32214 Phan

e. PO 32215 Senior

f. PO 32216 Boy

g. PO 32217 Woodie

h. PO 33256

i. PO 80221 SOAP

7) any other accounts at other Swiss banks to which Activator Supply or Culture Farms funds were transferred.

If any funds remain in these accounts, the Trustee is prepared to initiate civil litigation in Switzerland to recover these funds on behalf of the creditors of Activator Supply and Culture Farms, and has retained Dr. Alfred Meili and Dr. Andreas Haffter of Reichenbach, Tuchs Schmid, Meili & Schubiger, Talacker 50, CH 8001 Zurich, for this purpose.

DOCUMENTS NEEDED

Please provide complete copies of any and all records at ABN Bank, Algamene Bank, Bank Louis Dreyfus, Bank Louis Swiss, Credit Suisse, Omni Bank, Zurich, Swiss Bank Corporation, and any

other bank in Switzerland traceable to the subject matter of this request for assistance, relating to:

1. Activator Supply Co.
2. Culture Farms, Inc.
3. Achates Trust, Limited
4. Joy Lynn Allen
5. Marlene A. Allen
6. Ariate, N.V.
7. Balestra, Inc.
8. Willard Barnes Bass, Jr.
9. Berlinetta, Inc.
10. Kristine Ann Gunn
11. Harry E. Hicks
12. Larry Stephen Huff
13. Barry Kingsley Jackson
14. Jackson & Co.
15. Christopher Joseph Mancuso
16. James Mancuso
17. Mashbir Investments, Limited
18. Joseph Victor Nash
19. Roland Nocco Nocera
20. Ronald L. Rakow
21. Paul George Stemm
22. Jeremy Graham Steere
23. Leslie Anthony Steere
24. Terrence James Taylor

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25. Frans Jacobus Smit Theron
26. Gert Albertus Theron
27. Joy Theron
28. William Field Wagner
29. Barbara Kelly West
30. Charles Allen West

Records should be for the period from January 1, 1985, to the present and should include, but not be limited to:

1. original signature cards;
2. documentation of account opening;
3. account ledger cards;
4. periodic account statements;
5. records (copied front and back) of all items deposited, withdrawn or transferred;
6. wire transfers;
7. correspondence to, from, or on behalf of, the account holder; and
8. memoranda related to the account.

## TESTIMONY NEEDED

Please identify the official(s) of ABN Bank, Algamene Bank, Bank Louis Dreyfus, Bank Louis Swiss, Credit Suisse, Omni Bank, Swiss Bank Corporation, or any other bank in Switzerland connected to the subject matter of this request for assistance, who opened an account in the name, or for the benefit, of any of the above-named parties, or who has personal knowledge of any transactions reflected in the records of such account. Please interview such



official(s) regarding the following points:

1. the identity of the person(s) who opened each account;
2. the circumstances under which each account was opened;
3. the nature and structure of each account;
4. the disposition of the funds in each account;
5. the identity of persons ordering such disposition;
6. the nature and extent of any conversations or discussions with any persons connected to the account.

If no account exists at ABN Bank, Zurich, Switzerland; Bank Louis Dreyfus, Zurich, Switzerland; or Swiss Bank Corporation, Zurich, Switzerland; please identify the official(s) who can testify to that fact.

PROCEDURES TO BE FOLLOWED

Please ask the cantonal magistrate to do the following:

1. interview the appropriate business bank officials and provide a proces-verbal pursuant to Article 1 (4)(b), 10 and 12;
2. require production of original or true copies of the documents from the bank pursuant to Article 1 (4)(c) and 18 (1);
3. attach to the documents a certificate of authenticity of business records completed and signed by the person producing the documents pursuant to Articles 1 (4)(e) and 18 (2);
4. affix his seal or stamp upon the certificate pursuant to Article 18 (3) if satisfied that, under the procedure followed, a false statement on the certificate would subject the person who completed and signed it to criminal penalty under Swiss law; and
5. invite the bank officials giving testimony and producing

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the documents to appear at some future date at Wichita, Kansas, at the expense of the United States Government, to testify at the trial pursuant to Article 23 (92). If any witness chooses not to appear in the United States, a formal deposition of the witness at some future date is requested pursuant to Articles 10 and 12.

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George W. Proctor  
Director  
Office of International Affairs  
Criminal Division

# Index Exhibit 4

## Annex II

### ATR Toolbox

#### A. Insolvency-specific ATR Tools

Description	Reference in UNCITRAL Insolvency texts (the Guide, MLCBU, MLIU, MLEGG)	Purpose	Conditions	Safeguards
Domestic Context				
Imposition of obligations on the debtor and persons exercising factual control over the debtor to have due regard to the interests of creditors and other stakeholders in the period approaching insolvency and to take reasonable steps to avoid insolvency and, where it is unavoidable, to minimize its extent	Rees. 255-266, 372	To avoid insolvency and, where it is unavoidable, to minimize its extent	<p><i>Preventive measures</i></p> <p>Obligations arise whether the debtor or persons exercising factual control over the debtor knew or ought to have known that insolvency was imminent or unavoidable.</p> <p>The cause of action for loss or damage suffered as a result of the breach of the obligations belongs to the insolvency estate.</p> <p>The insolvency representative has the principal responsibility for pursuing an action for breach of those obligations.</p> <p>Creditors and other parties in interest may be permitted to pursue such an action with the</p>	<p><b>Safeguards for directors include:</b> elements to be proved to establish a breach of the obligations; the party responsible for proving those elements; specific defences to an allegation of breach of the obligations, which may include that the director took reasonable steps to avoid insolvency and, where it is unavoidable, to minimize its extent, and limits on the liability (e.g., under the Guide, the liability is limited to the extent to which the breach caused loss or damage).</p> <p><b>Safeguards for creditors include:</b> procedures that facilitate the commencement and conduct of action to recover compensation for the breach</p>

**Commented [SM1]:** For illustration; not complete; to be aligned with the narrative part once it is finalized.

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCB/MLL/MLRG)	Purpose	Conditions	Safeguards
			<p>agreement of the insolvency representative or leave of the court.</p> <p>The costs of an action are paid as administrative expenses.</p> <p>Alternative approaches to address the pursuit and funding of such actions may be permitted.</p>	<p>of those obligations: liability of directors for loss or damage caused to creditors as a consequence of the breach of the directors' obligations in the period approaching insolvency; and appropriate remedies (e.g., payment in full to the insolvency estate of any damages assessed by the court; disqualification; criminal law sanctions).</p>
<ul style="list-style-type: none"> <li>Stay of execution against the assets of the debtor</li> <li>Entrusting the administration or supervision of the debtor's business to an insolvency representative or other person designated by the court</li> <li>Entrusting the realization of all or part of the assets of the debtor to an insolvency representative or other person designated by the court</li> <li>Other relief</li> </ul>	Recs. 39-45	<p>To ensure that the value of the assets of the debtor is not diminished by the actions of the debtor, creditors or third parties between application for commencement of insolvency proceedings and commencement of insolvency proceedings</p>	<p><i>Provisional measures</i></p> <p>Provisional measures may be granted (or must be granted under certain conditions) at the request of the debtor, creditors or third parties.</p> <p>The need for relief must be urgent and must outweigh any potential harm resulting from such measures. Where the party other than the debtor applies for the measure, the applicant may be required to provide evidence that the measure is necessary to preserve the value or avoid dissipation of the assets of the debtor.</p> <p>Measures may be (or must be under certain conditions) reviewed and modified or terminated by the court on its own motion or at the request of the insolvency representative, the</p>	<p><i>Safeguards for the debtor and other parties in interest affected by a provisional measure</i></p> <p>Include: notice of an application or court order for the provisional measure; an opportunity to challenge the application and the order; if an order is made on an <i>ex parte</i> basis, the right to be heard promptly on whether the measure should be continued. In addition, the debtor is entitled to continue to operate its business and to use and dispose of assets in the ordinary course of business, except to the extent restricted by the court.</p> <p><i>General safeguards:</i> since the measures are provisional in nature and are granted before the court's determination that the commencement</p>

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCB/MLEJ/MLEGD)	Purpose	Conditions	Safeguards
			debtor, a creditor or any other person affected by the provisional measures.	criteria have been met, the court must be satisfied that there is some likelihood that the debtor will satisfy the commencement requirements. Some form of security for costs, fees or damages, such as the posting of a bond, may be required in case insolvency proceedings are not subsequently commenced or the measure sought results in some harm to the debtor's business. Sanctions may be imposed in connection with an application for provisional measures.
<ul style="list-style-type: none"> <li>Stay of proceedings (this is a defined term, see the Glossary)</li> </ul>	Recs 46-51	<p>To preserve and protect the value of the insolvency estate from individual actions of creditors or possible dissipation of the insolvency estate assets by the debtor; to facilitate administration of insolvency proceedings in a fair and orderly manner; eventually to maximize the value of the insolvency</p>	<p><i>Measures upon commencement</i></p> <p>The stay of proceedings is automatic upon commencement of insolvency proceedings under the Guide. In some jurisdictions, the court grants a stay upon application of a party in interest provided certain conditions are satisfied.</p>	<p>The stay does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor.</p> <p>There may be exceptions to the application of the stay. Under certain conditions, the stay may be suspended.</p> <p>The duration of the stay may be fixed for secured creditors in liquidation proceedings.</p> <p>Upon application to the court, a secured creditor is entitled to protection from diminution of the value of encumbered assets or request relief from the stay.</p>

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLLI/MLEGD)	Purpose	Conditions	Safeguards
		estate for the benefit of all creditors and other parties in interest, including the debtor itself and its employees.		Similar protections are extended to the owners of assets held by the debtor during insolvency proceedings.
<ul style="list-style-type: none"> <li>Unenforceability against the insolvency representative of automatic termination and acceleration clauses</li> <li>Special regime for continuation, rejection or assignment of contracts not fully performed</li> </ul>	Recs. 69-86	To maximize the value and reduce the liabilities of the insolvency estate	Under the Guide, automatic upon commencement of insolvency proceedings.	Exemptions and special rules for certain contracts (e.g. financial and labour).  Safeguards for counterparties to continued contracts include: a fixed deadline for decisions to be taken by the insolvency representative on rejection, continuation or assignment of a contract; notice of the decision; right to be heard; and right to request a prompt decision.
<ul style="list-style-type: none"> <li>Drawing up an inventory of insolvency estate assets; taking books, records and other evidence into custody; in liquidation proceedings, closing warehouses or the entire business and sequestering certain fungible assets, like cash.</li> </ul>	Recs. 35-38, 87-99, 217 and 313-316	To identify and constitute the insolvency estate and to minimize the dissipation of the insolvency estate assets	These measures may or must be taken immediately upon commencement of insolvency proceedings. The date by reference to which the estate will be constituted should be specified, being either the date of application for commencement or the effective date of commencement of insolvency proceedings.	Certain assets may be excluded from the estate, including assets that are necessary for the debtor to earn a living, post-application earnings from the provision of personal services, or personal or household items. Further exemptions may apply to joint assets such as matrimonial property. Excluded assets should be clearly identified.

Description	Reference in	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>Control over the use and disposal of the insolvency estate and operation of the debtor's business</li> </ul>	UNCITRAL Insolvency Guide (the MLCB/ MLI/ MLEGD Rees 52- 62, 112, 113, 120, 284-286	To provide clarity and certainty on who can do what with respect to the insolvency estate assets and under which conditions; to prevent and identify promptly unauthorized use of the insolvency estate assets	Depends on whether full or partial DIP in place or full displacement of the debtor by the insolvency representative.	Procedural protections to ensure that the proceedings are fair, that the maximum price is achieved and that, overall, the procedure for disposal of assets is transparent and well-publicized include, providing notice to creditors and to prospective purchasers in a manner that will ensure the information is likely to come to the attention of interested parties, allowing creditors to raise their objections or concerns (either with the insolvency representative or the court, as appropriate), requiring assets to be valued by neutral, independent professionals and, in the case of auctions, requiring pre-bidding qualification and minimum prices were appropriate and preventing and punishing collusion among bidders.  Some jurisdictions provide for the court to play a significant role in the sale of assets. The court fixes the time, the form and the conditions of sale. Some jurisdictions impose a duty to obtain the best price reasonably obtainable at the time of sale.
<ul style="list-style-type: none"> <li>Notice of commencement of insolvency proceedings</li> </ul>	Rees 23-25 302-303 310-312	To ensure that information of commencement of insolvency is made public to interested	The court or another party may be responsible for giving notice of commencement. Appropriate means are to be used to ensure that the notice will come to the attention of parties in interest.	Safeguards include: the individual notice to the debtor and all known creditors is, as a rule, required; a special notice may need to be served to registers to enable them to freeze entries in



Description	Reference in UNCITRAL insolvency texts (the Guide/MLCBU/MLL/MLGJ)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>Mail block: a court order, given after commencement of insolvency proceedings, that the post office is to send all or certain pieces of the mail addressed to the debtor to the insolvency representative for opening and review before forwarding it to the debtor.</li> </ul>		<p>parties and to discourage third persons or creditors from entering into invalid, unenforceable, or avoidable transactions with the debtor, and from making payments to the debtor instead of the insolvency representative.</p> <p>To prevent, or find out about, a debtor's actions that would disadvantage creditors (e.g., dissipation of assets).</p>	<p>The notice should include: (a) the effective date of the commencement of insolvency proceedings; (b) information concerning the application of the stay and its effects; (c) information concerning submission of claims, including the time and place for submission; (d) the procedures and time period for the submission of claims and proof of claims; (e) the consequences of failure to submit a claim; (f) where applicable, time period for raising objections to the commencement of insolvency proceedings; (g) information concerning the procedure for verification of claims; and (h) where applicable, information about a creditor meeting.</p> <p>An application to the court by the insolvency representative is required.</p>	<p>the registries with respect to the debtor and the insolvency estate assets.</p>
			<p>The debtor has a right to appropriate notice and a right to be heard, although the measure may be ordered <i>ex parte</i>, where this is necessary to protect the insolvency estate. In such case, the debtor should be provided with the right to challenge the measure.</p>	

*Obligations of the debtor and third parties including government agencies*

Description	Reference in UNCTRA I. Insolvency texts (the Guide/MLCB/MLJ/MEGI)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>The debtor's obligation to cooperate with and assist the insolvency representative in performing its duties and refrain from conduct that might be injurious to the conduct of the proceedings.</li> </ul>	110, 111, and 290	To ensure that insolvency proceedings can be conducted effectively and efficiently and to facilitate a thorough, independent assessment of the business activities including its assets and liabilities, financial position and affairs generally.	Automatic upon commencement of insolvency proceedings. Additional obligations arise if DIP is in place or depending on the debtor's involvement otherwise in insolvency proceedings.	It may be appropriate to impose a duty of confidentiality on the insolvency representative because much of the information that will be obtained concerning the debtor's affairs will be of a commercially sensitive nature, confidential or subject to obligation owed to other persons, suppliers, research and development information) and should not be disclosed to third parties who may be in a position to take unfair advantage of it. Where the information is to be disclosed to creditors, those creditors should be under the same obligation of confidentiality as the insolvency representative.
<ul style="list-style-type: none"> <li>Obligations of third parties, including government agencies</li> </ul>	-	To identify, collect, and preserve the debtor's assets.	Applies to all who have control over the insolvency estate assets; those with whom the debtor holds accounts; or those who have particular knowledge about the insolvency estate assets – as well as governmental agencies.	Certain privileges, such as the attorney-client privilege may prevent a third party from having to provide information related to the debtor and its assets. Certain documents and information may be subject to data protection laws and thus

Description	Reference in UNCLITRA I Insolvency texts (the Guide/MLCB/MLB/MLBEG)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>To displace the debtor from operation of the business fully or partly and represent the insolvency estate;</li> <li>To obtain information concerning the debtor, its assets, liabilities and past transactions;</li> </ul>	120-121, 111, 52 Articles 5, 9, 7, 11, 12, 15, 19, 21-24, 26 of MLCB	<i>Powers of the insolvency representative</i> To protect and preserve the assets of the insolvency estate, to administer the reorganization or the liquidation of the insolvency estate.	such as tax authorities and social insurance agencies, who may have obligations such as: (a) to provide the insolvency representative with information about the insolvency estate assets; (b) to open rooms and containers for inspection; and (c) to turn over the insolvency estate assets to the insolvency representative. In some jurisdictions, these obligations arise by law upon commencement of insolvency proceedings and are directly enforceable, thus permitting the insolvency representative to demand the respective information without the need for a disclosure order or a search order from a court. In other jurisdictions, this obligation can be ordered by a court.	must be treated with particular care by the insolvency representative and may not be shared with creditors and others.
				The insolvency representative is subject to qualification, quality, conflict of interest, duty of care, transparency and accountability standards and may be subject to liability for non-performing its functions and duties or not performing them well (including removal, disqualification, compensation of damages and criminal liability).

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLA/MLRGJ)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>To take all steps required to protect, preserve and restore the integrity of the insolvency estate prevent unauthorized disposal of the insolvency estate's assets; and (c) demand payment of debts and the return of assets</li> </ul>			<p>particular the type of proceedings (liquidation or reorganization; simplified or standard proceedings) and the regime in place (e.g. full or partial DIP or the full displacement of the debtor by the insolvency representative).</p> <p>Practical considerations may limit ATR powers of the insolvency representative and influence its ATR steps and strategies.</p>	<p>The insolvency representative may be required to report to the court and to creditors on a regular basis, or in respect of certain activities. In particular, notice may be required to be given to the court or to creditors before the insolvency representative takes certain decisions.</p> <p>An obligation of confidentiality is usually imposed on the insolvency representative to ensure that confidential or other sensitive information is not disclosed to third parties who may be in a position to take unfair advantage of it.</p> <p>The insolvency representative is given with the right to be heard when its rights, interests or duties are affected.</p>
<ul style="list-style-type: none"> <li>Measures to determine the categories of transaction to be subject to avoidance procedures. These are transactions that are intended to defeat, hinder or delay creditors from collecting their claims; transactions at undervalue; and transactions with certain creditors that</li> </ul>	<p>87-99/217-218, 228 and 316 Article 23 MLCBI</p>	<p>To ensure that creditors receive a fair allocation of an insolvent debtor's assets that is consistent with established priorities and preserving the integrity of the insolvency estate.</p> <p>Avoidance provisions</p>	<p><i>Avoidance</i></p> <p>Avoidance applies retroactively to transactions concluded before the commencement of insolvency proceedings. Avoidance of a particular transaction generally requires an application to the court to declare the transaction void. Many jurisdictions provide that proceedings for the avoidance of specified transactions should be taken by the insolvency representative. Other jurisdictions provide creditors with the right to commence such proceedings but with prior consent of the</p>	<p>Limited duration of suspect period; limited time period for commencing avoidance actions; elements to be proven; the party responsible for proving them; specific defences to avoidance; presumptions; shifting the burden of proof, including that the transactions was entered into in the ordinary course of business.</p>

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCB/MLLP/MLRGJ)	Purpose	Conditions	Safeguards
could be regarded as preferential.		may also have a deterrent effect; discouraging creditors from pursuing individual remedies in the period leading up to insolvency.	Insolvency representative. Where the consent of the insolvency representative is required, but not obtained, some insolvency laws permit a creditor to seek court approval to commence avoidance proceedings. A counterparty to an avoided transaction must return to the estate the assets obtained or if the court so orders, make a cash payment to the insolvency estate for the value of the transaction. The counterparty has the unsecured claim unless the claim is disallowed or subordinated.	
<ul style="list-style-type: none"> <li>An action against a director for breach of his obligations in the period approaching insolvency.</li> </ul>	219-231, 262-266, 372	<p><i>Actions against directors, shareholders and other related persons</i></p> <p>To hold directors accountable for their actions in the period approaching insolvency, to protect creditor interests.</p>	<p>See above under <i>Preventive measures</i>.</p> <p>All actions against a director must be on the basis that the conduct being examined occurred in the vicinity of insolvency and may be considered injurious and therefore a breach of obligations imposed on directors in the period approaching insolvency.</p> <p>In contrast to avoidance, what is being sought is not the recovery of assets of the company but a contribution from the person in breach to remedy the damage suffered by creditors.</p>	See above under <i>Preventive measures</i> .

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLL/MEGD)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>Extension of liability</li> <li>Contribution orders</li> <li>Subordination</li> </ul>				
<ul style="list-style-type: none"> <li>Substantive consolidation permits the court, in insolvency proceedings involving two or more enterprise group members, to disregard the separate identity of each group member in appropriate circumstances and consolidate their assets and liabilities, treating them as held and incurred by a single entity.</li> </ul>	219-231, 138	To ensure efficient and effective administration of insolvency proceedings; to rectify abuses that might have occurred before commencement of insolvency proceedings.	Substantive consolidation is most appropriate in the circumstances such as where there is no real separation between the group members or the group structure is being maintained solely for dishonest or fraudulent purposes. The debtor, any of its creditors or a government authority is permitted to make an application for substantive consolidation.	Affected creditors should have the right to be notified of any order for consolidation made at the time of commencement and have a right to appeal and special protections.
<ul style="list-style-type: none"> <li>Procedural consolidation: refers to the coordination of the conduct and administration of multiple insolvency proceedings involving one or possibly more than one court. Although administered in a coordinated manner, the assets and liabilities of different persons involved in the procedural coordination remain separate and distinct.</li> </ul>	202-210	To ensure efficient and effective administration of insolvency proceedings, including by obtaining comprehensive information about the debtor, the value of the insolvency estate, identification of creditors and other	The court may consider whether to order procedural coordination on its own initiative or in response to an application from authorized parties, the insolvency representative or a creditor. Procedural coordination may give rise to issues of jurisdiction with respect to joint applications for commencement. Criteria, such as priority of filing, amount of indebtedness or location of the centre of control, are relevant in deciding a court's competency.	Notice to all affected parties in interest and the right to be heard and object.

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCB/MLH/MLGG)	Purpose	Conditions	Safeguards
The effect of procedural coordination is limited to administrative aspects of the proceedings and does not touch upon substantive issues.		parties in interest, and in avoiding duplication of efforts		
The procedure for submission, verification and admission of claims and the consequences of failure to submit a claim on time, as well as the review of decisions concerning the admission of claims.	169-184 and 319-325	To establish the existence and value of creditor claims for purposes of distribution.	<i>Treatment of creditor claims</i> Procedures for submission, verification and admission of claims may depend on the type of proceedings and types of claims (e.g., claims of related persons may be subject to scrutiny and special treatment). Different mechanisms may be in place for provisional admission and adjudication of disputed claims, including in courts other than those administering insolvency proceedings.	Creditors whose claims have been denied or subjected to restrictive treatment as a claim by a related person should be given notice of that fact and have an opportunity to request the court to review their claim. Claims disputed in the insolvency proceedings should be admitted provisionally by the insolvency representative pending resolution of the dispute by the court. A reasonable period of time should be given to creditors to submit their claims expeditiously.
<b>Cross-border insolvency context</b>				
• Right of direct access to courts by a foreign representative.	Articles 7, 9 & 10 MLCBI	To provide expedited and direct access for foreign representatives to the courts of the foreign	<i>Access</i> The provisions provide only for the foreign representative's standing to apply directly to foreign courts and request assistance required for foreign proceedings; all other requirements of the foreign court must be met. Recognition of	Neither the foreign representative nor the foreign assets and affairs of the debtor is subject to the jurisdiction of the foreign State for any purpose other than the application made.

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLJ/MLEG)	Purpose	Conditions	Safeguards
		State; to alleviate the need to meet formal requirements such as licenses or consular action; to increase cross-border assistance that is available in the foreign State to foreign representatives and foreign proceedings.	a foreign proceeding is not a pre-condition for giving such a standing to foreign representatives.	
<ul style="list-style-type: none"> <li>Application by a foreign representative for commencement of insolvency proceedings in a foreign state.</li> </ul>	Article 10-11 MLCBI	To ensure that the foreign representative has standing to request the commencement of an insolvency proceeding in a foreign State without any further formalities to be fulfilled (e.g., license, letters rogatory).	The conditions applicable in the foreign State for commencing an insolvency proceeding must be met. Recognition of a foreign proceeding is not a pre-condition for giving a standing to foreign representatives to request commencement of insolvency proceedings in a foreign State.	An application does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the foreign court for any purpose other than the application. This is to protect foreign representatives and creditors from exposure to all-embracing jurisdiction of the foreign courts.
<ul style="list-style-type: none"> <li>Participation of a foreign representative in the insolvency proceedings</li> </ul>	Article 12 MLCBI	To ensure that the foreign representative is given standing to	Applies to foreign representatives of both main and non-main proceedings.	The insolvency law of the foreign State applies to the exercise of such a standing and all actions that the insolvency representative may be



Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLJ/MLEGJ)	Purpose	Conditions	Safeguards
regarding the debtor commenced in the foreign State.		make in the foreign insolvency proceedings involving the debtor petitions, requests or submissions concerning issues such as protection, realization or distribution of assets of the debtor or cooperation with the foreign proceeding.	This provision is limited to giving the foreign representative standing and does not vest the foreign representative with any specific powers or rights. This standing is obtained only upon recognition of a foreign proceeding.	permitted to take as a result of the exercise of such a standing.
<ul style="list-style-type: none"> <li>Intervention by a foreign representative in any proceedings in the foreign State in which the debtor is a party (in addition to insolvency proceedings).</li> </ul>	Article 24 MLCBI	To avoid the denial of standing to the foreign representative to intervene in individual enforcement and other types of proceeding in the foreign State in which the debtor is a party, in addition to insolvency proceedings	Applies to foreign representatives of both main and non-main proceedings and to proceedings in the foreign State that may be instituted by the debtor against a third party and proceedings instituted by the third party against the debtor. Those proceedings may include extrajudicial proceedings (e.g., instituted by secured creditors with respect to the encumbered assets of the debtor). This standing is obtained only upon recognition of a foreign proceeding.	The requirements of the law of the foreign State are to be met in connection with intervention by the foreign representative to any such proceeding.

Description	Reference in UNCITRAL insolvency texts (the Guide/MLCBI/MLJ/MLECH)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>Access of foreign creditors to insolvency proceedings in a foreign State.</li> </ul>	Article 13 MLCBI	To ensure non-discrimination of foreign creditors. addressed in article 12 of MLCBI.	Foreign creditors have the same rights as local creditors regarding the commencement of, and participation in, a foreign proceeding.	The principle of non-discrimination does not affect the ranking of claims in the insolvency proceedings, including any provisions that might assign a special ranking to foreign creditors. Nevertheless, the provisions provide that the minimum ranking for claims of foreign creditors is the rank of general unsecured claims. The exception to that minimum ranking would be if an equivalent local claim would be ranked lower than general unsecured claims. Those special claims (e.g., claim for a penalty or deferred payment claim) may rank below the general unsecured claims for reasons other than the nationality or location of the creditors, as provided in the law of the foreign State. Special rules may apply to foreign tax and social security claims which may be excluded from the foreign insolvency proceedings altogether.
Recognition of a foreign insolvency proceeding	Article 15 MLCBI; articles 11 and 14 MLJ	To facilitate a coordinated, cooperative approach to cross-border insolvency and ensure effective	<i>Recognition</i> No requirement of legalization or other forms of diplomatic or consular communications apply. Instead, the court is entitled to rely on certain presumptions concerning recognition, including that documents submitted (e.g., a certified copy of the decision commencing the foreign	The application is to be decided at the earliest possible time. Some jurisdictions may require that the decision to recognize a foreign insolvency proceeding can only be made after issuing a notice of filing

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLII/MLEGI)	Purpose	Conditions	Safeguards
		protection of the assets of the debtor from dissipation and concealment through expediated action.	proceeding and appointing the foreign representative) are authentic whether or not they have been legalized. However, the court retains discretion to decline to rely on the presumptions and conclude that evidence to the contrary prevails. The foreign proceedings shall be recognized as a foreign main proceeding if it is taking place in the COMJ jurisdiction or as a foreign non-main proceeding if it takes place at the place of the establishment. No recognition of the proceeding on the basis of the location of assets is envisaged under MLCBI.	of an application for recognition, and after hearing the affected parties.
<ul style="list-style-type: none"> <li>Provisional relief</li> </ul>	19 and 22 MLCBI, 24 MLEGI	To provide urgent relief prior to a decision on recognition so as to protect the assets of the debtor or the interests of the creditors.	<p><i>Relief</i></p> <p>At the request of the foreign representative, from the time of application, Relief is provisional and terminates when the application for recognition is decided upon, unless extended. The court may modify or terminate the relief granted at the request of the foreign representative, a person affected by the relief or at its own motion.</p>	In granting or denying any relief, or modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons who would be directly affected by recognition or relief granted by the court, including the debtor, are adequately protected. Protection of all interested persons is linked to provisions on notification requirements; those may be general publicity requirements designed to notify potentially interested persons or requirements for individual notifications by the court.

Description	Reference in: UNCITRAL Insolvency Guide (the MLCBI/ MLGP/ MLRG)	Purpose	Conditions	Safeguards
<ul style="list-style-type: none"> <li>Automatic relief</li> </ul>	20 MLCBI	To avoid dissipation of assets of the debtor, to ensure orderly administration of insolvency proceedings concerning the same debtor in the foreign main proceeding	Automatic stay upon recognition of only a foreign main proceeding.  The scope, modification, termination and suspension of the stay is subject to the law of the foreign State.	The court may refuse to grant relief if it would interfere with the administration of a foreign main proceeding. It may subject relief to conditions it considers appropriate.  The stay does not affect the right to commence individual actions or proceedings to the extent necessary to preserve a claim against the debtor and the right to request the commencement of insolvency proceedings in the foreign State or the right to file claims in such a proceeding.
<ul style="list-style-type: none"> <li>Discretionary relief</li> </ul>	21 and 22 MLCBI	To protect the assets of the debtor or the interests of the creditor, to aid the foreign proceeding, to supplement automatic stay effective upon recognition of the foreign main proceeding	Upon recognition of a foreign proceeding, whether main or non-main. At the request of the foreign representative, Discretion is given to the court to grant any listed relief and add other relief available to the local insolvency representative under the law of the foreign State. Some jurisdictions provide for the possibility to grant other relief to the foreign representative, not found in their laws.	The distribution of all or part of the debtor's assets located in the foreign State to the foreign representative or another person designated by the court may be entrusted to the foreign representative only if the court is satisfied that the interests of local creditors are adequately protected. IN granting relief under this article to a representative of a foreign non-main proceedings, the court must be satisfied that the relief relates to assets that under the local law should be administered in the foreign non-main

Description	Reference in UNCITRAL Insolvency texts (the Guide/MLCBI/MLR/MLEG)	Purpose	Conditions	Safeguards
				<p>proceeding or concerns information required in that proceeding.</p> <p>In granting or denying any relief, or modifying or terminating relief, the court must be satisfied that the interests of the creditors and other interested persons who would be directly affected by recognition or relief granted by the court, including the debtor, are adequately protected.</p> <p>It may subject relief to conditions it considers appropriate.</p>
<ul style="list-style-type: none"> <li>Courts</li> </ul> <p>These provisions provide the courts with the ability to communicate "directly," and to request information and assistance "directly" from foreign courts or foreign representatives and is intended to avoid the use of time-consuming procedures such as letters rogatory. Cooperation is often the best way to prevent dissipation of assets, to maximize the value of assets or to find the best solutions for the reorganization of the enterprise.</p>	<p>Articles 25 and 27 of the MLCBI and 9-15 of the MLEGI</p>	<p>To encourage cross-border cooperation and to enable courts from two or more countries to work efficiently and achieve optimal results.</p>	<p><i>Direct communication and cooperation</i></p> <p>Communication and cooperation may be initiated by courts at its own motion or upon request of any party in interest where:</p> <ul style="list-style-type: none"> <li>Assistance is sought in the State by a foreign court or a foreign representative in connection with a foreign proceeding;</li> <li>Assistance is sought in a foreign State in connection with the local insolvency proceedings;</li> <li>A foreign proceeding and a local insolvency proceeding in respect of the same debtor are taking place concurrently;</li> </ul>	<p>The implementation of cooperation is subject to any mandatory rules applicable in the foreign State; for example, in the case of requests for information, rules restricting the communication of information (e.g., reasons of protection of privacy) would apply.</p>

Description	Reference in UNCITRAL insolvency texts (the Guide/MLCB/MLL/MLGG)	Purpose	Conditions	Safeguards
• Insolvency representatives	Articles 26 and 27 of the MLCBI	To encourage cross-border cooperation and to enable insolvency representatives from two or more countries to work efficiently and achieve optimal results.	<p>Creditors or other interested persons in a foreign State have an interest in requesting the commencement or participating in a local insolvency proceeding.</p> <p>The courts are granted flexibility and discretion in cooperating with foreign courts or foreign representatives.</p> <p>Communication and cooperation may be initiated by the insolvency representative in exercise of its functions and under supervision of the court where:</p> <ul style="list-style-type: none"> <li>- Assistance is sought in the State by a foreign court or a foreign representative in connection with a foreign proceeding;</li> <li>- Assistance is sought in a foreign State in connection with the local insolvency proceedings;</li> <li>- A foreign proceeding and a local insolvency proceeding in respect of the same debtor are taking place concurrently;</li> <li>- Creditors or other interested persons in a foreign State have an interest in</li> </ul>	In the exercise of its functions and subject to the supervision of the court.

Description	Reference in UNCITRAL Insolvency texts (the Guide/ MLCBI/ MLCI/ MLEGI)	Purpose	Conditions	Safeguards
			requesting the commencement or participating in a local insolvency proceeding.	
Coordination of concurrent proceedings				

## ANNEX II

### ATR Toolbox

#### C. Civil litigation ATR tools

Description	Purpose	Conditions for use	Safeguards
<p><b>Pre-litigation gathering of evidence</b> (party-centered discovery or disclosure of evidence in common law countries/court-centered evidence gathering in civil law countries)</p>	<p>Gathering of evidence from parties and non-parties in anticipated litigation, pending or planned, to secure evidence of the defendant's assets and past transactions and the persons involved in those transactions.</p>	<p><i>Tracing tools</i></p> <p>If, in anticipation of litigation, planned or pending, there is a danger that the evidence could disappear, be lost or significantly changed before litigation is commenced or before litigation has moved to the evidence-gathering stage.</p> <p>In some jurisdictions, pre-litigation gathering of evidence is also available for a potential litigant to evaluate relevant evidence as a means to decide on whether to litigate and thus as a means to promote settlement out of court.</p> <p>If these requirements are met, the court will order the pre-litigation gathering of evidence, which usually proceeds the same way as the gathering of evidence during litigation. However, in some jurisdictions, the means of evidence gathering may be limited (for example, to depositions of witnesses or not allowing for the inspection of documents). During the evidence-gathering, a record is made and preserved for potential future use.</p> <p>As in evidence-gathering during litigation, pre-litigation evidence gathering is usually available only with regard to relevant evidence, sometimes is subject to a proportionality requirement and may not be made into matters protected by privilege (such as the attorney-client</p>	<p>The counterparty (or counterparty to be) has a right to appropriate notice, a right to participate in the decision and a right to be heard. In cases of <i>ex parte</i> decisions due to urgency and danger of removal, significant change, or destruction of the evidence in question, the defendant and other affected persons have the right to be heard on the measure later.</p> <p>The counterparty may have a right to appeal the court order.</p>

**Commented [SM1]:** For illustration and discussion of some queries raised below, not complete, to be aligned with the narrative part once it is finalized.



Description	Purpose	Conditions for use	Safeguards
		<p>privilege) and materials prepared by attorneys in anticipation of litigation. There are also different forms of protection of other sensitive information, such as trade secrets. Especially banking secrecy is treated differently across jurisdictions, but often receives no protection if the litigants are required to reveal information about their own accounts.</p> <p>In cross-border cases, an order for pre-litigation evidence gathering may be obtained in the jurisdiction in which the evidence or the person having control of the evidence is located. Cross-border evidence gathering often involves diplomatic channels or, where the Hague Evidence Convention or the EU Evidence Regulation applies, a letter of request to the competent authority in the foreign jurisdiction.</p> <p>In most jurisdictions, pre-litigation evidence gathering is available to foreign as well as to domestic litigants. The rules of judicial jurisdiction usually require that the court have jurisdiction in the pending or anticipated litigation on the merits or, in common law jurisdictions, that the court have jurisdiction over the defendant. In some jurisdictions, judicial jurisdiction is also available if the evidence to be gathered is located within the jurisdiction. A few jurisdictions specifically provide for jurisdiction of their (federal) courts to gather evidence for use in litigation in a foreign or international tribunal, planned or pending.</p>	
Gathering of Evidence During Litigation	Gathering of evidence from parties and non-parties in litigation to secure evidence of the defendant's assets and post transactions and of the persons involved in those transactions.	Same as for the pre-litigation gathering of evidence. However, there is no requirement to show the need to preserve evidence, since the purpose of litigation is to evaluate the claims of the plaintiff, evidence gathering is part of the process and needs no additional justification. Moreover, unlike for the pre-litigation gathering of	Sensitive information, such as information covered by banking confidentiality or banking secrecy, can be treated differently across jurisdictions.

Description	Purpose	Conditions for use	Safeguards
		<p>evidence in some jurisdictions, the entire paucity of evidence-gathering measures is available. The same limitations as for pre-litigation gathering of evidence apply.</p> <p>If litigation is pending in one jurisdiction and some of the evidence needed in support of that litigation is located in another jurisdiction, the use of a letter rogatory procedure or procedure available under the Hague Evidence Convention or the EU Evidence Regulation may be necessary. Unlike in the context of pre-litigation evidence gathering, however, the choice instead to obtain an order for the gathering of evidence directly from the court within the jurisdiction where the evidence or the person with control of the evidence is located may be limited. Some jurisdictions provide for possibility of local evidence gathering by a foreign tribunal or any interested person for use in litigation abroad (in planned and pending litigation, without limitation as to how far the foreign proceeding has progressed).</p>	
<b>Disclosure orders<sup>1</sup></b>	To obtain information concerning the debtor, its assets, liabilities and past transactions.	<p>Conditions depend on the measure, requesting party and context of ATR. They may vary across jurisdictions. Examination, for example, may take place orally or in writing, publicly or privately, on oath, before the court or otherwise. The order may be issued if in the interests of the insolvency process, but not for gaining an unfair advantage in litigation. Disclosure orders are available before, during, and after litigation on the merits.</p>	<p>Safeguards depend on the measure, who will use it, against whom and in which context of ATR. The measure should not be oppressive or unfair. No right to refuse testimony and no protection against self-incrimination and other privileges, including on confidentiality grounds, may apply, although statements cannot be used in later criminal proceedings. The applicant must demonstrate that there is a serious question to be tried at the proceeding and that the issuance of the measure is</p>

<sup>1</sup> UNIDROIT draft recommendations on Best Practices regarding Enforcement by way of Authority deal with the disclosure of the debtor's assets in the context of Section V: Recommendation 1 - *Necessity of sufficient information mechanisms*. (I) Proportionate and effective mechanisms shall be established for assessing information on all the debtor's assets that could be subject to enforcement. (II) The debtor and all natural persons, private entities and public authorities that may have knowledge of or control over relevant information shall have a duty of cooperation with the enforcement organs. (III) This duty of cooperation includes formal depositions or oral statements [under oath], production of

Description	Purpose	Conditions for use	Safeguards
		<p>In common law jurisdictions, disclosure orders are injunctions that derive from the equitable powers of common law courts. Therefore, courts retain a certain flexibility with respect to them.</p> <p>As orders <i>in personam</i>, disclosure orders can theoretically be directed against anyone over whom the court has personal jurisdiction, no matter whether that person happens to be located abroad or the evidence involved is to be found in another jurisdiction. However, most courts are reluctant to grant disclosure orders against persons located abroad. Additional requirements may need to be met for that purpose. Moreover, extraterritorial disclosure orders may not be recognized and enforced abroad.</p>	<p>just and equitable in the circumstances of the case. Disclosure orders operate <i>in personam</i>. That is, the person ordered to disclose certain documents or information is personally obligated to obey the order. If not, the person may be subject to contempt of court, which may entail sanctions such as fines and imprisonment. In some circumstances, the interested party, or someone that the party trusts, should be present during the inspection and the applicant must pay security to cover possible damages that may arise during the procedure.</p>

documents or electronically stored information, or responsible information by public authorities (like the social security administration, national revenue service, or other administrative organs like motor vehicle or ship registration authorities, land register and commercial register authorities or bank or insurance supervision authorities and the like). (IV) Competent enforcement organs should use free access to all completely public registers but also apply for access to registers where access is granted upon demonstration of special justifying interests only. (V) Third persons shall have the right to claim all recognized privileges of civil procedural law. [The debtor shall have the right to claim the privilege against self-incrimination if the execution court does not grant immunity to the use of information given by the debtor in criminal proceedings.] Recommendation 2 – *Communication of disclosure* (I) To activate these information mechanisms it should be, in principle, sufficient to provide the enforceable instrument on which the enforcement is based. (II) The competent enforcement authorities shall not use very invasive measures of disclosure if there is good reason to assume that known assets may suffice to permit full execution of the enforceable instrument (including the costs of execution) or if the debtor proposes the seizure or attachment of a suitable asset.

Description	Purpose	Conditions for use	Safeguards
Specifically: Norwich Pharmaceutical	Action filed in court to obtain information possessed by an innocent third party and which is needed in order to trace and recover assets in the possession of a defendant or a third party that does not have a right to retain such assets. Where bank account information is to be disclosed, this could include: (a) the signature card to the account; (b) the account opening information; (c) copies of deposits or wire transfer receipts; (d) copies of checks or outgoing wire transfer details; (e) the current balance in the account; (f) e-mails or correspondence involving the account and other relevant information.	There should be strong evidence that the innocent third party was involved in the furtherance of the transaction identified as the relevant wrongdoing (i.e., the order is not available against a person who has no other connection with the wrong other than they were a spectator or have some document relating to it in their possession.)	The Norwich Pharmaceutical order cannot be: (i) obtained against persons who are likely to be witnesses or are <i>prima facie</i> defendants in any proceeding instituted on the basis of an alleged wrong and vice versa; (ii) used to obtain evidence as opposed to information; and (iii) used to aid a foreign proceeding if the foreign jurisdiction has a statutory regime through which evidence from overseas must be obtained.
Specifically: Bankers Trust	Requires a financial institution to disclose generally confidential information between a bank and its customer based on strong evidence that the funds at issue were fraudulently obtained and that delay in disclosing the information may result in the funds being dissipated or transferred.	If ordered by the court, this discovery will supersede common law duties of confidentiality owed, for example, by a bank to its customers. In circumstances of confidential company ownership or banking information, it is possible to seek assistance of the courts both prior to and after the institution of any proceedings. The applicant may be correspondingly bound to undertake that such	[to be added]

Commented [SM2]: Experts' inputs are required

Description	Purpose	Conditions for use	safeguard
<b>Specifically: Bankers Book Evidence Act</b>	Allows a party to use the Act as a basis to introduce a bank's records as <i>prima facie</i> evidence. A copy of any entry in a banker's book shall in all legal proceedings be received as <i>prima facie</i> evidence of such entry and of the matters, transactions and accounts therein recorded. This tool can be used in applications, hearings and trials to greatly simplify the evidentiary burden of proof.	Information would be used only for the purposes of the action to trace the funds [to be added]	[to be added]
<b>Specifically: Disclosure orders in aid of foreign proceedings</b>	To obtain evidence (including request for information from/to witnesses and national/foreign creditors) in order to provide a basis to bring an action in a foreign jurisdiction. Such an application can provide substantial relief to an insolvency representative needing to obtain discovery to pursue assets in a foreign proceeding. Assistance is not confined to proceedings before courts.	A party, such as an insolvency representative, can file an application to obtain discovery from third parties in support of pending or contemplated foreign litigation. A reasonable basis that information reasonably calculated to lead to admissible evidence in respect of pending or anticipated foreign litigation is located within the territory of the State in the form of documents or witness testimony must be demonstrated.	[to be added]
<b>Search orders<sup>2</sup> (e.g., <i>Anton Piller</i> orders)</b>	To search the defendant's premises and find and preserve evidence.	The order permits the applicant to search the premises of the counterparty to search for and take control of certain	The search orders are intrusive in nature and are usually granted <i>ex parte</i> so as to ensure the respondent does not hide, transfer, or destroy the

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Commented [SM4]: Experts' inputs are required.

<sup>2</sup> UNIDROIT draft recommendations on Best Practices regarding Enforcement by way of Authority deal also with *search for assets* (I). The search for assets without the debtor's consent during night-time, on Sundays or legal holidays, in locked buildings, or locked furniture keeping items secret, shall only be permitted upon court order affirming the proportionality and appropriateness of the search measure. (II) The same shall apply to search measures without the debtor's consent in the offices of lawyers, auditing firms, tax advisers, medical practitioners and hospitals, journalists, media publishers, digitized platforms or other communication providers and the offices of other professions that typically have knowledge or control of essential professional secrets. (III) Search for information about enforcement items or for digital assets stored in computers that are locked by secret codes should be permitted only upon court order. The court shall order that the debtor must give information about the access code or that an expert may enter the computer, keeping information about data not suitable for enforcement secret.

Description	Purpose	Conditions for use	Safeguards
	<p>The applicant takes immediate control of documents and other evidence, including regarding the defendant's assets and can thus take steps necessary to protect and preserve those assets, including preventing unauthorized disposal of those assets and records.</p>	<p>defined evidence. The order does not permit the applicant forced entry.</p> <p>As an injunction in common law jurisdictions, the order must be complied with by the counterparty, otherwise it may find itself in contempt of court. Where the relevant evidence may be kept on computers or other electronic devices, access must be given to all such devices on the premises so that they can be searched.</p> <p>Where the order is based on the equity powers of common law courts, the court retains a certain flexibility to achieve justice in the particular case. Despite some differences from jurisdiction to jurisdiction, the order usually requires (a) a very strong <i>prima facie</i> case of wrongdoing on the part of the defendant, (b) strong evidence that the damage to the applicant arising from the respondent's conduct is serious; (c) clear evidence that the respondent has in its possession incriminating documents or evidence; and (d) a showing that there is a real possibility that the respondent may destroy such evidence before discovery or before all parties can be heard.</p>	<p>evidence sought. They are thus accompanied by a number of safeguards. For example, the applicant usually has an obligation of full and frank disclosure, that is, the applicant must set forth the arguments the respondent would likely make, would it be heard. Moreover, the order must be limited in scope to what is strictly necessary and may include a number of further safeguards, such as stating that the search must take place during ordinary business hours and that a list of all items removed during the search be made. It is usually executed in the presence of an independent solicitor, who must ensure that there is no abuse and who can resolve any issues regarding the execution of the order that might arise. If the respondent wishes to apply to discharge the order as having been improperly obtained, they must be allowed to do so. Moreover, if the respondent refuses permission to enter or to inspect, entry must not be forced (instead it must be accepted, and the refusal brought to the court's attention). A list of all evidence seized should be prepared and provided to the respondent for inspection and verification at the end of the search, and before the removal of the evidence. If a list of evidence cannot be provided to the respondent at the time of the search, the documents seized should be placed in the custody of the independent lawyer.</p> <p>Courts can require a bond to protect the affected party against potential damages derived from the preventive measure.</p> <p>In sequestration, the judge sets the amount of the security at their discretion, taking into account the value and nature of the assets to be sequestered. In securing evidence, evidence should be kept in</p>

Description	Purpose	Conditions for use	Subparagraphs
Post-trial discovery	To find the defendant's assets. Upon finding assets, the necessary further steps can be taken, including, among others, attachment and garnishment [see below].	Post-trial discovery requires that the plaintiff have obtained a judgment obligating the defendant to pay the plaintiff a sum of money. Post-trial discovery is quite permissive and includes the use of all discovery devices against the defendant and other persons. Discovery from third persons, however, is ordinarily limited to the assets of the debtor, unless the third party has close ties to the debtor, in which case the third party's assets may also be discovered.	safeguarding to ensure that it is not damaged as a result of poor handling, lost or altered. Post-trial discovery must be relevant to finding the judgment debtor's assets, may not delve into matters protected by privilege or the rule against discovery of material prepared by an attorney in anticipation of litigation. Moreover, the court may grant an order protecting the person from whom discovery is sought from annoyance, embarrassment, oppression, or undue burden or expense.
<i>Interim measures of protection and preliminary orders</i>			
General	Include all kinds of orders, directed at the defendant or at third parties, to do or not to do something. This may include orders not to remove a particular thing from a certain place; not to transfer property to a particular person or to any person or to encumber it with a security right; to place a thing into custody of a trusted third person or the court; to put a hold on further transactions on a particular piece of property. They usually operate <i>in personam</i> and their violation may result in indirect enforcement action, including imposition of civil and criminal fines and imprisonment.	Since these measures are usually available before or during litigation to secure the defendant's assets for possible enforcement of a future judgment, requirements tend to be variants of (1) <i>ius boni iuris</i> , that is, certain minimum evidence that the plaintiff has a claim against the defendant and (2) evidence that, without the measure, enforcement of the judgment would be impossible or significantly impaired. Sometimes, an additional proportionality requirement is imposed. In common law jurisdictions, requirement (2) is usually couched in terms of the irreparable injury rule, that is, the plaintiff must show that, without the injunction, it is likely to suffer an injury not reparable by a claim for damages against the defendant – though this test is applied differently across jurisdictions. In addition, since the power to issue an injunction is based on the equitable powers of the court, the requirements of issuing a preliminary injunction are flexible and may vary, depending on the order in question and the purpose for which it is sought.	The defendant generally has a right to appropriate notice and a right to be heard, though the measure may be ordered <i>ex parte</i> . In that case, the defendant must be heard promptly after imposition of the measure and have an opportunity to challenge it and request that it should be discontinued. Where litigation on the merits or enforcement proceedings are not pending, the plaintiff has an obligation to file a complaint or bring enforcement proceedings within a relatively short period of time. Plaintiff may be liable to defendant for any damage due to the unjustified imposition of the measure and the plaintiff may have to post security to satisfy such a claim as a condition for granting the measure.

Description	Purpose	Conditions for use	Safeguards
		Judicial jurisdiction to order measures usually lies with the court that has jurisdiction over the defendant or that would have jurisdiction over the defendant in the proceeding on the merits. In some jurisdictions, the courts at the place where the relevant assets are located may also have jurisdiction to order these measures.	
<b>Specifically: Attachment, garnishment, sequestration, and similar orders<sup>3</sup></b>	To secure and preserve the defendant's assets before, pending, and – in some jurisdictions – also after litigation.	As above. Also, sequestration is carried out through a petition to the judge hearing the case. The applicant may request, before or after filing the claim or at any stage of the proceeding, that a receiver appointed by the court be given custody of the assets.	As above. Also, certain assets for the personal use of the defendant are usually exempt from attachment or garnishment.

<sup>3</sup> In the context of third party debt orders, Section VI (Modes of Enforcement) of the draft recommendations of the UNIDROIT Best Practices regarding Enforcement by way of Attachment reads as follows: "Recommendation 1 – *Scope and subject of the attachment.* (I) The scope of the attachment shall be determined by the specification of the claim to be attached, by the name of the third-party debtor, the ground of the claim and its contents and by the amount denominated in the enforceable instrument plus interests and costs of execution. (II) The attachment of reasonably specified future claims and future balances of accounts shall be admissible. Recommendation 2 – *Third party declaration.* (I) The third-party debtor shall be obliged to give a declaration regarding the correctness of the assertion of the claim subject to attachment, its state of fulfillment and other circumstances decisive for future satisfaction of the creditor. (II) If the third-party debtor does not answer, refuses to answer or gives an incorrect declaration, they should be liable for damages of the creditor caused by their failure to fulfil their duty of cooperation. Recommendation 3 – *Increased effectiveness of third-party debt orders (garnishment proceedings).* (I) In commercial cases, a third-party declaration that does not contest the third-party debtor's obligation shall be considered an acknowledgement of the claim attached. If the third-party debtor does not answer in commercial cases the creditor may apply for sanctions according to section V Recommendation 4. (II) The attachment order (garnishment decision) shall permit direct enforcement against the third-party debtor. If the claim attached is not a monetary claim the attachment order should be considered an enforcement instrument against the third-party debtor. [...] Recommendation 4 – *Opposition of the third-party debtor against the attachment of the claim and its enforcement against the third-party debtor.* (I) Upon opposition of the third-party debtor regarding the legal validity of the asserted claim attached, the execution court shall stay the enforcement proceedings against the third-party and set the creditor a deadline to lodge a claim against the third-party with the competent court. (II) The execution court shall levy the attachment order upon expiry of the deadline without the creditor having filed a suit or upon rendition of an unfavourable final judgment against the creditor. [...] Recommendation 6 – *Computerisation of garnishment proceedings.* (I) Legislators should promote the computerisation of the garnishment procedure. (II) An electronic platform shall enable creditors to request, in person or represented by a lawyer, the commencement of enforcement, controlling the personal identity of the applying creditor or law firm and identifying the enforceable instrument recorded in the central electronic register of enforceable instruments. (III) The automated garnishment procedure should be able to verify that the enforceable instrument has been previously served on the debtor and to ensure its electronic service on the debtor in case it has not been already served. (IV) The automated garnishment procedure shall (i) automatically generate a garnishment order, (ii) automatically serve it



Description	Purpose	Conditions for use	Safeguards
	<p>These measures generally operate <i>in rem</i> (although they may additionally operate <i>in personam</i> in some civil law jurisdictions), that is, any transfer or encumbrance is generally void and has no effect. In the case of garnishment, the third-party debtor may not make a valid payment on the debt to the defendant.</p>	<p>To the extent these measures are available to secure an already existing enforceable judgment, the requirement of <i>fumus boni iuris</i> is usually replaced by the requirement to provide the court with a copy of the judgment. In some jurisdictions, the plaintiff must provide information, sometimes with some particularity, with regard to the assets to be attached, garnished, or sequestered. In others, it is the task of the enforcing authority to find assets to attach.</p> <p>In a number of jurisdictions, judicial jurisdiction to order attachments and the like is limited to the courts in the jurisdiction in which the assets are located, since this is generally an <i>in rem</i> measure. In others, judicial jurisdiction lies with the court that has jurisdiction over the defendant or that would have jurisdiction over the defendant in the proceedings on the merits. In yet other jurisdictions, the courts at the place where the relevant assets are located may also have jurisdiction to order one of these measures.</p> <p>In the latter two types of jurisdiction, however, the enforcement of the attachment, garnishment and other order is limited to an authority at the place in which the assets are located.</p>	<p>An attachment does not create a right of priority.</p> <p>The order must provide for the objectives and period of the measure.</p> <p>Any bond must take into consideration the type of the measure, the potential damages that could result from its imposition, and the costs.</p>

electronically on the third-party debtor and the debtor, and (iv) automatically communicate it to the central electronic register of execution liens. (V) In the absence of an opposition or challenge within a reasonable time limit or an application of the creditor, the automated garnishment procedure shall – insofar as possible – allow for automatic enforcement through the transfer of the attached amounts to the creditor. (VI) The automated procedure shall permit electronic oppositions or withdrawals and amendments and, in the event of an opposition or an application of the creditor, it shall say the automated enforcement process until a decision of the execution court or the court competent to determine the dispute on the claim seized is issued. (VII) The law should provide for an automated procedure, which finishes or resumes the digitalized process according to the courts' decisions. (VIII) In appropriate cases the use of computerised garnishment proceedings shall be facilitated by replacement of the right to oppose and to stop automated decision making by claims for damages in case of small claims enforcement or upon security given by the creditor. Recommendation 7 – *Freezing Orders*: In so far as appropriate and according to the special circumstances of the case, attachments of receivables and especially of accounts should be combined with freezing orders upon application of the creditor.

Description	Purpose	Conditions for use	Safeguards

Description	Purpose	Conditions for use	Safeguards
<b>Specifically: Conservatory attachment</b>	A victim of fraud can file an <i>ex parte</i> petition to the attachment judge to obtain conservatory attachment of the property.	Victim of the fraud should demonstrate: (i) the urgency, (ii) that the debt cannot be reasonably contested; (iii) that the debt is due; and (iv) the amount of the debt has been determined or is capable of being evaluated provisionally. After judgment, the debtor cannot sell or encumber the assets but continues to be the owner and to possess the attached assets. In practice, a fraud victim will normally obtain permission to seize the assets of the alleged fraudster if a detailed complaint has been previously lodged with request for civil damages and provided urgency is demonstrable. Conservatory attachment is also possible for bank accounts (third party attachment) and may not require a judge authorization if the creditor is in possession of authentic or private documents (for example, a foreign court judgment or arbitration decision).	Conservatory attachment does not in itself give rise to a beneficial position of the creditor in case of the debtor's insolvency. In granting the order, the court will specify a time limit for commencing a proceeding under which an enforceable title can be obtained. Debtor can appeal or oppose the attachment. An appeal stops the execution of the measure.
<b>Specifically: Judicial intervention</b>	A form of judicial intervention that allows control of the debtor's enterprise and its cash flow.	A court will summon both parties before ordering the judicial intervention so that they voluntarily agree to and appoint the individual that will carry out the intervention. If no agreement is reached between the parties, the court will name the person. The person carrying out the intervention will be paid by the petitioner, or for the court and the costs.	Any order granting the intervention must provide for the objectives and period of the intervention. A bond must be posted by the petitioner that takes into consideration the type of intervention, the potential for damages that could result from the intervention, and the costs.

Description	Purpose	Conditions for use	Safeguards
Specifically: Recording of complaint	Allows a court to order the recording of a general prohibition on the performance to do certain legal acts and enter into contracts. For registrable assets, registration of the complaint in the relevant registry should follow.	The court must order the recording as well as its publication in the official gazette. The order must include the names of the parties to the dispute and must identify the assets.	In some jurisdictions, the judge can order such measure at the request of the public prosecutor or the injured party.
Specifically: Freezing Orders (also known as <i>Mareva</i> injunctions)	To freeze and thus secure the defendant's assets pending or after litigation.  This helps to ensure that the defendant does not transfer its assets. The order operates <i>in personam</i> and can be directed at the defendant and/or at third persons. Third persons, such as banks, who are informed of the order are also bound by it.  In cases of cyber fraud, in which the defendant may be unknown because of the pseudonymous nature of blockchain transactions, some jurisdictions permit a freezing order against unknown persons.  Contempt of court sanctions, including fines and imprisonment, may be imposed for violation of the order.	Precise requirements vary across jurisdictions and on case-by-case basis. A court may issue a freezing order, if one is appropriate given all the circumstances, when the applicant (a) has obtained a judgement against the defendant or prior to judgement, is able to make a good arguable case to succeed on the merits; (b) shows that the defendant has assets within the jurisdiction; and (c) shows that the judgement or future judgement is in danger of remaining unsatisfied in whole or in part because there is a real risk of dissipation of assets.  As orders <i>in personam</i> , freezing orders can be directed against anyone over whom the court has personal jurisdiction, no matter whether that person happens to be located abroad or the evidence involved is to be found in another jurisdiction. However, freezing orders are usually limited to assets within the jurisdiction. Nevertheless, if necessary, a freezing order may be available with regard to all assets of the defendant, anywhere in the world (so-called World-Wide Freezing order (see further below)). Additional requirements may need to be met for this purpose, including that the domestic assets of the defendant will not suffice to cover a potential judgment against the defendant.	To be most effective, the freezing order will usually be issued <i>ex parte</i> . Thus, the right to be heard must be granted soon upon serving the order. Where the order is granted <i>ex parte</i> , the applicant, at least in some jurisdictions, has an obligation of full and frank disclosure; that is, the applicant must set forth the arguments the respondent would likely make, would it be heard.

Description	Purpose	Conditions for use	Safeguards
Specifically: Worldwide Freezing Order ("WFO");	As above but operates on a worldwide basis.	<p>The grant of the permission should be just and convenient for the purpose of ensuring the effectiveness of the WFO as well as not oppressive to the parties to the proceedings or to third parties who may be joined to the foreign proceedings. All the relevant circumstances and options need to be considered including: (i) granting relief on, for example, terms such as requiring an undertaking to compensate for costs incurred as a result of the WFO and the type of proceedings that may be commenced abroad; (ii) the proportionality of the steps proposed to be taken abroad and, in addition, in the form of any order; and (iii) the interests of the applicant should be balanced against the interests of the other parties to the proceedings.</p> <p>Permission should not be given in terms that would enable the applicant to obtain relief in the foreign proceedings which is superior to the relief given by the WFO. The evidence in support of the application for permission should contain all the information (so far as it can reasonably be obtained in the time available) necessary to</p>	<p>The applicant must show that there is a real prospect that such assets are located within the jurisdiction of the foreign court in question and evidence of a risk of dissipation. Normally, the application should be made on notice to the respondent, but in cases of urgency, where it is just to do so, the permission may be given without notice to the party against whom relief will be sought in the foreign proceedings. The respondent has the right to be heard at the earliest practicable opportunity and has the right to challenge the imposition of the measure and request that it should be lifted.</p> <p>The WFO will prevent the defendant from dealing with its assets wherever they happen to be. The WFO will usually contain an undertaking by the party who obtained it not to commence proceedings against the defendant in another jurisdiction without permission of the court that granted WFO, main reason for</p>

Description	Purpose	Conditions for use	Safeguards
		enable the judge to reach an informed decision (including evidence as to the applicable law and practice in the foreign court; evidence as to the nature of the proposed proceedings to be commenced; evidence as to the assets believed to be located in the jurisdiction of the foreign court; and, the names of the parties by whom such assets are held).	requiring such an undertaking is to protect the defendant from a multiplicity of suits.
Specifically: Measures to limit the defendant's ability to move about, including arrest	This measure involves the seizure of a passport and other government-issued document or an order to the defendant not to leave a particular place. This limits the ability of the defendant to move about. It is usually used to either force the defendant to divulge information about its assets or to ensure that the defendant does not leave the jurisdiction with certain assets.	Since this can be quite an intrusive measure, it usually requires that the defendant's assets cannot be secured with another measure, such as attachment or garnishment. Moreover, the measure ordered must usually be proportional, that is, the least intrusive measure that can achieve the objective must be chosen. Finally, the measure must be ordered for as short a period of time as is necessary.	The defendant generally has a right to appropriate notice and a right to be heard, though the measure may be ordered <i>ex parte</i> . In that case, the defendant must be heard promptly after execution of the measure and has the right to request that the measure should be lifted. Where litigation on the merits or enforcement proceedings are not already pending, the plaintiff has an obligation to file a complaint or bring enforcement proceedings within a relatively short period of time. Plaintiff may be liable to defendant for any damage due to the unjustified imposition of the measure and the plaintiff may have to post security to satisfy such a claim as a condition for granting the measure.
Ancillary tools			
Gag and seal orders	A gag order is an order barring public disclosure of information about a case. It can be used in the ATR context to order the respondent of a disclosure order, such as a bank, not to reveal to its customer that it has been ordered to disclose information about that customer's assets.	Gag and seal orders require a strong evidentiary basis.	Those measures are ordered only where strictly necessary and are limited in time. They are lifted once they have served their purpose.

**Commented [SM5]:** Is this term appropriate? Any tool may become ancillary to the main ordered by the court.

Description	Purpose	Conditions for use	Safeguards
	A seal order is an order to the court staff to keep the court file or certain records within it under seal, which may also be helpful to prevent the debtor from learning about orders used to trace or recover assets before they can take effect.		
<i>Multipurpose tools</i>			
<b>The European Account Preservation Order (EAPO)</b>	<p>To obtain information on the debtor's accounts located within any EU member State and to attach bank accounts in (within-EU) cross-border cases.</p> <p>The EAPO does not replace attachment under the member State law, but instead supplies an additional and uniform tool that allows a creditor quickly to attach a defendant's bank account in the EU-cross border context before, during, and after litigation on the merits.</p>	<p>The EAPO is an attachment order issued by the court that has, will have, or had jurisdiction in the proceedings on the merits. Creditor should demonstrate that there is a real risk justifying the need to freeze the debtor's account. As this is an attachment order, the requirements are similar to those of other attachment orders (see attachment, garnishment, sequestration and other orders above). For specifics, see articles 7-8 of the EU Account Preservation Order Regulation.</p> <p>If the bank account is located within another EU member State than the State in which the EAPO was issued, the EAPO is automatically recognized and enforceable and must be enforced in that other member State upon request.</p> <p>One of the requirements for issuing the EAPO is that the applicant provide information on the accounts to be attached. If the applicant is unable to do so but has reason to believe that the defendant holds one or more bank accounts within a particular EU member State, the</p>	<p>The EAPO operates <i>ex parte</i>, with the defendant receiving notice and having the right to be heard promptly upon implementation of the attachment. Where litigation on the merits is not already pending, the plaintiff has an obligation to file a complaint within 14 days of the order. The plaintiff is liable to the defendant for any damage due to the unjustified imposition of the measure and the plaintiff may have to post security to satisfy such a claim as a condition for granting the measure.</p>

**Commented [SM6]:** it is to be decided how to deal with this type of tools that may be too specific and may be subject to change overtime. The text may become soon outdated.

Description	Purpose	Conditions for use	Safeguards
MLATs (civil and commercial matters)	To obtain assistance in civil and commercial matters from foreign States	<p>applicant may file a request for account information pursuant to article 14 of the Regulation in conjunction with the application for the EAPQ. If granted, the competent authority in the requested member State is then requested to obtain the information about the defendant's bank account(s).</p> <p>[to be added]</p>	<p>[to be added]</p>

Commented [SM7]: Experts' inputs are required



ANNEX II  
ATR Toolbox

D. Tools Related to Criminal Proceedings

Description	Purpose	Conditions for use	Safeguards
Joining as civil party in criminal proceedings	To obtain: (a) limited access to some information; and (b) limited number of rights such as (i) the right to request access to the criminal file in order to examine the pieces of evidence; and (ii) the right to request from the judge additional investigating measures (searches). This can be used to gain access to evidence on where the debtor's assets are located and may permit the civil party to obtain an order to freeze these assets.	<p>Most civil law jurisdictions allow for the victim of an economic crime (bribery, fraud, breach of trust, unfaithful management, money laundering or organized crime) to participate in the criminal proceedings as a <i>partie civile</i> in order to secure the conviction of the perpetrator and/or to sue them for restitutionary damages before the criminal court or before a civil court. In some jurisdictions, strong interest in the matter may suffice for person to join as a <i>partie civile</i>.</p> <p>Depending on the jurisdiction, a <i>partie civile</i> may be permitted to propose avenues of inquiry and access the criminal investigation file or at least certain records of the investigation.</p> <p>The arrests, attachment, forfeiture and confiscation are usual parts of criminal proceedings. They may concern objects of the criminal offence, good/assets produced by the criminal offence, property benefits resulting directly from the criminal offence or their equivalents (for example, assets cannot be identified among the suspect's assets or are mixed up with lawfully obtained assets), with exception of assets that may not be subject to attachment, forfeiture and confiscation. Since the objectives of these measures are different from those of ATR, these measures may have impact on recovery of assets for creditors in insolvency proceedings.</p>	<p>The accused is protected by the safeguards of criminal procedure. E.g. criminal attachment safeguards include: (i) attachment should be necessary for the investigation (e.g., pieces of evidence at risk of disappearing) or (ii) the attached goods are able to be subject to forfeiture.</p> <p>Investigating judge does not have to grant all requests (although an appeal is still possible if the request is denied).</p>

Commented [SM1]: For illustration, not complete, to be aligned with the narrative part once it is finalized.

Description	Purpose	Conditions for use	Safeguards
Access to records of criminal proceedings	A victim may apply to use the criminal file for civil proceeding purposes by, for example, demonstrating the urgency in the framework of attachment proceedings.	In some jurisdictions, the insolvency representative is allowed to obtain records and documents in the possession of investigative authorities ("preliminary" or in connection with a judicial proceeding"). It is important that the insolvency representative's request be intended to seek records for their intrinsic value with the sole scope to trace the funds. The need for disclosure should outweigh the need for continued secrecy. An application must be filed and heard before the court conducting the criminal	The victim may use the information obtained provided that the following rights are respected: (i) the presumption of innocence of the accused; (ii) the rights of defence of third parties; and, (iii) the right of privacy.  Use of information aiming at or resulting in obstructing the criminal investigation or infringing the privacy, the personal or moral integrity of the

Description	Purpose	Conditions for use	Safeguards
		proceedings. The criminal court judge is in the best position to determine granting such an application to ensure that it will not interfere or disrupt the proceeding. If the request is granted, the court administers production of information so as to protect criminal investigation.	assets of the people mentioned in the criminal file is punishable by criminal law.
Mutual Legal Assistance Treaties (MLAT)	Mutual Legal Assistance. Treaties are available in a case involving fraud or diversion of assets.	Subject to certain preliminary procedures: an information request is made to a foreign jurisdiction pursuant to a treaty with the respective State to obtain information or documents from the foreign jurisdiction. Certain States enable the bankruptcy trustees to prepare an MLAT request with the eventual approval and consent of relevant State bodies. Once the MLAT request is granted by the country to which the request is being submitted to, documents are available to the bankruptcy trustee for their use to effectuate the recovery of assets.	[To be added]

Commented [SM2]: Experts' inputs are required.

# Faculty

**Christopher J. Redmond** is the founder and principal of the Redmond Law Firm, LLC in Overland Park, Kan., and his practice is focused on complex international litigation, asset-tracing and recovery, and cross-border insolvency proceedings. He has been a delegate at UNCITRAL Working Group V (Insolvency) since 1999, first as a delegate for the American Bar Association and for the last 11 years as a member of the U.S. delegation. He continues to also serve as chair of the ABA UNCITRAL Task Force. Mr. Redmond also served as a U.S. delegate to UNODC (United National Office of Drugs and Crimes), addressing issues of commercial fraud on a worldwide basis and coordination between the public and private sectors. As a U.S. member of ICC FraudNet (ranked as a Band One International Group in Asset Recovery by *Chambers USA*), he is counsel in a number of international cases, including acting as counsel for the joint liquidators in the Stanford International Bank proceeding. Mr. Redmond is an experienced trial counsel in both jury and civil trials, including a number of chapter 15 proceedings, and he has served as a joint liquidator in the Isle of Man and the Channel Islands. He has served as a panel trustee in Kansas since 1978 and has handled more than 12,000 insolvency cases, from consumer cases to business cases. In addition, he has served as a chapter 11 trustee in a number of business cases and as counsel for the official unsecured creditors' committee in a number of billion-dollar insolvency cases. Mr. Redmond is a Fellow of the American College of Bankruptcy, a Fellow of the International Insolvency Institute, has been listed in *The Best Lawyers in America* for over 30 years and is also recognized by *Who's Who Legal International* as one of the top five recovery lawyers in North America. He received his undergraduate and law degrees from the University of Kansas.

**Martin Trott** is a partner at R&H Restructuring in Camana Bay, Grand Cayman, Cayman Islands, and specializes in corporate restructuring and insolvency. He also is a qualified accountant with nearly 30 years of experience and heads up R&H Restructuring's insolvency and restructuring team in Cayman, the BVI and Bermuda. Mr. Trott has broad experience in leading complex, cross-border administrations, liquidations and receiverships across a number of industry sectors. A few of his notable court appointments are HQP, AquaPoint, Madison Asset and Platinum Partners. Mr. Trott is co-chair and treasurer of RISA and a member of the Cayman Islands' Insolvency Rules Committee. He also is a Fellow of both the Association of Chartered Certified Accountants and the Association of Business Recovery Professionals, and a member of RISA and the Cayman chapter of INSOL, for which he has served on its board of directors. Mr. Trott is a member of the Cayman Islands' Insolvency Rules Committee and ABI. In addition, he spent 12 months seconded to the workout and recoveries team of a major U.K. clearing bank. Mr. Trott received his degrees from Eastbourne College and the Britannia Royal Naval College.

**Spencer Vickers** is a partner in the Litigation & Restructuring practice of Conyers Dill & Pearman in George Town, Grand Cayman, Cayman Islands. He has experience advising clients on a range of insolvency, restructuring and commercial litigation matters, including regulatory disputes. Mr. Vickers appears frequently before the Grand Court and Court of Appeal of the Cayman Islands. Following his appointment to the board of directors in 2022, he was appointed co-chair of RISA Cayman, INSOL's Cayman Islands chapter. Mr. Vickers is an author, presenter and course coordinator of the

INSOL Introductory Certificate in Insolvency Law and Practice in the Cayman Islands. He received his LL.B. and B.Comm. in finance in 2010 from the University of Auckland.

**Jessica Williams** is co-head of Litigation & Insolvency and Restructuring at Harneys in George Town, Grand Cayman, Cayman Islands. Her practice focuses on insolvency and restructuring, trust and estate litigation, shareholder disputes, and asset-tracing and enforcement. Ms. Williams's clients include financial institutions, HNW individuals, insolvency practitioners, trustees, court-appointed administrators and other officeholders. Before joining Harneys, she spent four years at AO Hall (now Walkers) in Guernsey. Prior to that, she was a litigation lawyer at the Office of Fair Trading and was involved in the bank charges test case. Ms. Williams received her B.A. with honors and her LL.B. from the University of Otago in 2004.