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Cross-Border Avoidance Transactions

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CROSS BORDER INSOLVENCIES AND AVOIDANCE ACTIONS UNDER CHAPTER 15

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I. AVOIDANCE ACTIONS UNDER CHAPTER 15

Overview

Administration of Avoidance Actions

- Chapter 15
- European Insolvency Resolution
- Canadian Insolvency Law

Avoidance Actions and Chapter 15

Before foreign representatives may try to avoid preferential or fraudulent transactions, they must obtain recognition of the foreign proceeding in the U.S. Bankruptcy Court. The representative of a foreign debtor may file a petition in a U.S. bankruptcy court to seek "recognition" of a "foreign proceeding." 11 U.S.C. § 1515(a).

Avoidance Actions and Chapter 15 (cont.)

A "foreign proceeding" is "a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23).

Avoidance Actions and Chapter 15 (cont.)

A foreign proceeding may be either a "main" proceeding, which is pending in the country where the debtor's "center of its main interests" ("COMI") lies; or a "nonmain" proceeding pending outside from the debtor's COMI but where the debtor at least has an "establishment." 11 U.S.C. § 1502(4)-(5).

Upon recognition of a foreign proceeding, certain relief is automatic (§ 1520) and certain relief may be granted at the request of foreign representative (§ 1521)

Examples of Automatic Relief:

- Adequate Protection (Bankruptcy Code § 361)
- Automatic Stay (Bankruptcy Code § 362)
- Sale of Estate Property (Bankruptcy Code § 363)
- Postpetition Transfer (Bankruptcy Code § 549)

Discretionary Relief:

Bankruptcy Code § 1521 allows the bankruptcy court to grant "any appropriate relief" in a recognized foreign proceeding, such as:

- Providing for examination of witnesses, taking of evidence or delivery of information concerning the debtor's assets, affairs, right, obligations or liabilities
- Extending discretionary relief that may be granted upon filing of petition

But Discretionary Relief Has Its Limits…

Bankruptcy court may not grant relief set forth in Bankruptcy Codes §§ 522, 544, 545, 547, 548, 550 and 724(a)

AVOIDANCE ACTIONS UNDER CHAPTER 15

So…

§ 1521(a)(7) Prevents plaintiffs from asserting Bankruptcy Code avoidance actions in Chapter 15 proceedings.

But, what about avoidance actions based on non-bankruptcy law?

Laspro Consultores LTDA v. Alinia Corp. (In re Massa Falida Do Banco Cruzeiro Do Sul S.A., 567 B.R. 212 (Bankr. S.D. Fla. 2017)

- Central Bank of Brazil placed Brazilian Bank, Banco Cruzeiro Do Sul S.A. into extra-judicial liquidation
- Debtor filed a Petition for Recognition of Foreign Main Proceeding in U.S. Bankruptcy Court for the Southern District of Florida

- Foreign Representative filed an adversary proceeding against 2 BVI Companies alleging diversion of funds from Bank used to purchase New York apartments and furnish them with valuable art.
- Court ruled that § 1521(a)(7) does not prevent a Foreign Representative from asserting state-law fraudulent conveyance claims

Under Brazilian law, a *"Massa Falida"* comes into existence, similar to a bankruptcy estate under U.S. Bankruptcy law

Under Massa Falida, plaintiff has a duty to represent interests of *Massa Falida* **and its creditors**

- Under New York Debtor and Creditor Law ("NYDCL"), a creditor may pursue a fraudulent conveyance claim against a subsequent transferee without pursuing the initial transferee
- Plaintiff therefore had standing to bring claim against defendants under New York fraudulent conveyance law

If a Foreign Representative has a cause of action that is not dependent on claims that only a bankruptcy trustee could assert, then the Foreign Representative could pursue these actions

Not so fast…

Hosking v. TPG Capital Management, L.P., et al. (In re Hellas Telecommunications (Luxembourg) II SCA), 524 B.R. 488 (Bankr. S.D.N.Y. 2015)

- Two private equity firms (TPG Capital and Apa Partners) acquired Hellas Telecommunications, the third largest wireless telecommunications company in Greece, through a leveraged buyout

Two years later, after taking on more than €1 billion in additional debt and payments to entities controlled by the PE firms from proceeds of those loans, Company commenced UK insolvency proceedings, and eventually was placed in liquidation

Liquidators commenced Chapter 15 cases in the SDNY and later brought suit against TPG, Apa and other defendants to avoid and recover approximately €1 billion in transfers made two years prior to commencement of insolvency pleadings under NYDCL

- Defendants argued that under applicable NYDCL, only "creditors" had standing to bring fraudulent conveyance claims

Bankruptcy Court reasoned that liquidators' standing to bring NYDCL claims depended on whether applicable UK insolvency law authorized liquidators ruling claims on behalf of debtors' creditors

Bankruptcy Court held that, although UK law allowed liquidators to bring claims on behalf of insolvent debtors, it did not confer that standing to bring claims on behalf of creditors and dismissed the NYDCL action for lack of standing

Pushing the envelope?

Application of international avoidance actions by U.S. bankruptcy courts?

Fogerty v. Petroquest Resources, Inc. (In re Condor Ins. Ltd.), 601 F.3d 319 (5th Cir. 2010)

5th Circuit held that bankruptcy court had authority to grant relief under foreign avoidance law – in this case the law of Nevis – pursuant to § 1521(a)(7)

Foreign debtor allegedly fraudulently transferred $313 million in assets to an affiliate with U.S. locations.

- Defendant moved to dismiss the proceedings arguing that avoidance actions are only available through chapter 7 or 11 proceedings.
- 5th Circuit disagreed with defendant. Under § 1527(a)(7), Congress allowed for Court to grant "any additional relief" other than under §§ 522, 544, 545, 547, 548, 550 and 724(a).
- If Congress wanted to bar all avoidance actions – regardless of type – it could have done so in the statute.

In re Fairfield Sentry, Ltd., 458 B.R. 665 (S.D.N.Y. 2011)

- Limits to application of foreign avoidance laws pursuant to § 1521(a)(7) – assets must be located within territorial jurisdiction of the U.S. – Otherwise, the Bankruptcy Court does not have jurisdiction under § 1521(a)(7)

II. AVOIDANCE ACTIONS AND EUROPEAN INSOLVENCY REGULATION

II. Avoidance Actions and European Insolvency Regulation

1. Automatic recognition of European insolvency proceedings, Art. 19 EIR

Article 19.Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all other Member States from the moment that it becomes effective in the State of the opening of proceedings. The rule laid down in the first subparagraph shall also apply where, on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States.
2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

II. Avoidance Actions and European Insolvency Regulation (cont.)

- **2. lex fori concursus**

1. Application of lex fori concursus, insolvency law of commencing member state, Art. 7 EIR

Article 7 Applicable law
Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the "State of the opening of proceedings").

II. Avoidance Actions And European Insolvency Regulation (cont.)

- **2. lex fori concursus**

Art. 7m including which transactions are void, voidable

Exemption: Art. 16 – unless transaction governed by law of another member state and not challengeable under that law

Jurisdiction Art. 6 – vis attractive concursus: courts of commencing member state

II. Avoidance Actions And European Insolvency Regulation (cont.)

- **2. lex fori concursus**
  - **Which transaction are void, voidable**

Article 7 Applicable law

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the "State of the opening of proceedings").

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

(m) The rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

II. Avoidance Actions And European Insolvency Regulation (cont.)

- **2. lex fori concursus**
  - **Exemption: Article 16**

Article 16 Detrimental acts

Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a) The act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) The law of that Member State does not allow any means of challenging that act in the relevant case.

II. Avoidance Actions And European Insolvency Regulation (cont.)

- 2. **lex fori concursus**
  - **Art.16 Common denominator**

Look back period
Form
Insolvency test
Knowledge
Limitation period

II. Avoidance Actions And European Insolvency Regulation (cont.)

- **2. lex fori concursus**
  - **Jurisdiction Art. 6 – vis attractive concursus**

Article 6 Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them

1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

III. GERMAN INTERNATIONAL INSOLVENCY LAW

III. German International Insolvency Law (cont.)

1. Automatic recognition of non-European insolvency proceedings, incl. US bankruptcy, § 343 German Insolvency Code

Section 343
Recognition

(1) The opening of foreign insolvency proceedings shall be recognized. This shall not apply

1. if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;

2. where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights.

III. German International Insolvency Law (cont.)

2. Application of lex fori concursus, § 335

Section 335

Principle

Unless otherwise provided, the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which the proceedings have been commenced.

III. German International Insolvency Law (cont.)

- 2. lex fori concursus

Insolvency law of commencing state applicable for voidability / voidness

Exemption: § 339 – unless transactions governed by law of another member state and not challengeable under that law

III. German International Insolvency Law (cont.)

- 2. lex fori concursus
  - 2. Exemption

Section 339

Avoidance in Insolvency

A legal act may be avoided if the requirements for the avoidance of legal acts in insolvency under the law of the state where the proceedings were commenced are met, unless the opposing party proves that the law of another state is applicable to the legal act and the legal act is not open to challenge in any way under this law.

III. German International Insolvency Law (cont.)

- **2. lex fori concursus**
  - **2. Exemption**

Look back period
Form
Insolvency test
Knowledge
Limitation period

IV. Example: US Chapter 7 case, pending in Florida (Case 9:08-bk-04360-MGW)

IV. Example

a) German fraudster set up Ponzi Scheme in Cape Coral

b) Investors mainly in Germany

c) Fictitious profits and provision paid to German investors and broker salers

d) Chapter 7 case recognised / US bankruptcy law applicable + § 339

IV. Example

e) Avoidance actions brought in German courts under §§ 548, 550 BC + Florida Fraudulent Transfer Act

f) German court judgment against German investors / broker salers enforceable directly in Germany or anywhere in Europe due to European Judgments Regulation (Brussels IA)

g) Issue in the US: territoriality: § 541 BC "property wherever located" ? →"ORDER CONFIRMING AUTHORITY TO ACT IN A FOREIGN COUNTRY ON BEHALF OF THE DEBTORS' BANKRUPTCY ESTATES NUNC PRO TUNC TO THE PETITION DATE PURSUANT TO 11 U.S.C. § 1505"

V. CANADIAN INSOLVENCY LAW

A. The Canadian Legal Landscape

1. Federal vs. Provincial Spheres of Power
   a) Division of Powers
   b) Avoidance Laws Mostly Within Provincial Sphere
   c) Bankruptcy and Insolvency is Federal

2. The Court System in Canada

A. The Canadian Legal Landscape

3. Provincial Avoidance Laws – Examples:
   a) Each province has its own laws – similar but not identical
   b) In Ontario – Fraudulent Conveyances Act and Assignments and Preferences Act
   c) In BC – Fraudulent Conveyance Act and Fraudulent Preference Act
   d) In Alberta – Fraudulent Preference Act and Statute of Elizabeth

A. The Canadian Legal Landscape (cont.)

4. Federal Avoidance Laws
   a) Bankruptcy and Insolvency Act – S.95 and 96 (and S. 101)
   b) Companies' Creditors Arrangement Act – S. 36.1
5. Push to Uniformity – Harmonization Efforts

Fraudulent Conveyances Act – Ontario

Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.

Assignments and Preferences Act – Ontario

(1) Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.

Assignments and Preferences Act – Ontario (cont.)

(2) Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

Assignments and Preferences Act – Ontario (cont.)

Presumption of Intention

(3) Subject to section 5, if such a transaction with or for a creditor has the effect of giving that creditor a preference over the other creditors of the debtor or over any one or more of them, it shall, in and with respect to any action or proceeding that, within sixty days thereafter, is brought, had or taken to impeach or set aside such transaction, be presumed, in the absence of evidence to the contrary, to have been made with the intent mentioned in subsection (2), and to be an unjust preference within the meaning of this Act whether it be made voluntarily or under pressure.

Bankruptcy and Insolvency Act

Preferences

95 (1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person

- (a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

Bankruptcy and Insolvency Act (cont.)

– (b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

Bankruptcy and Insolvency Act (cont.)

Preference presumed

95 (2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

Bankruptcy & Insolvency Act (cont.)

Transfer at undervalue

96 (1) On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

Bankruptcy & Insolvency Act (cont.)

(a) the party was dealing at arm's length with the debtor and

- (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,
- (ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and
- (iii) the debtor intended to defraud, defeat or delay a creditor; or

Bankruptcy & Insolvency Act (cont.)

(b) the party was not dealing at arm's length with the debtor and

- (i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or
- (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
  - (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or
  - (B) the debtor intended to defraud, defeat or delay a creditor.

Companies' Creditors Arrangement Act

36.1 (1) Sections 38 and 95 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

B. Procedural Options Available to Creditors

1. Direct Creditor – Debtor Litigation
   a) Utilizing provincial avoidance legislation directly
   b) Pros and Cons
2. Receivership
   a) Federal vs. Provincial Court Appointed Receivers Pros and Cons
3. Bankruptcy Application
   a) Using a bankruptcy proceeding and trustee to void transactions, s. 38 proceedings
   b) Pros and Cons
4. Cross – Border Insolvency Proceedings

C. Enforcement of Foreign Judgments

1. How to Enforce
   a) Steps to be Taken
   b) The "Real and Substantial Connection" Test: Re-Litigation Risk
   c) Security for Costs
2. Risk/Reward and Costs
3. Consider suing in Canada instead

D. Avoidance Proceedings Within Insolvency Proceedings

1. Two Insolvency Statutes: The Bankruptcy & Insolvency Act and the Companies' Creditors Arrangement Act
   a) Part XIII of the BIA and S. 272(1), including (c) and (d), S. 275
   b) Part IV of the CCAA and S.49(1) and S.52

2. The Foreign Representative
   a) Powers and Limitations

Bankruptcy & Insolvency Act

Bankruptcy & Insolvency Act

272 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, imposing the prohibitions referred to in paragraphs 272(1)(a) to (c) and specifying the exceptions to those prohibitions, taking subsection 271(3) into account;
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, debts, liabilities and obligations;

Bankruptcy & Insolvency Act (cont.)

- (c) entrusting the administration or realization of all or part of the debtor's property located in Canada to the foreign representative or to any other person designated by the court; and
- (d) appointing a trustee as receiver of all or any part of the debtor's property in Canada, for any term that the court considers appropriate and directing the receiver to do all or any of the following, namely,
  - (i) to take possession of all or part of the debtor's property specified in the appointment and to exercise the control over the property and over the debtor's business that the court considers appropriate, and
  - (ii) to take any other action that the court considers appropriate.

Companies' Creditors Arrangement Act

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

- (a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
- (b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and
- (c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

E. Practical Considerations

Choosing the Best Option

a) quantum of claim
b) burden of proof/evidence/strength of case
c) which provinces involved (different laws, exemptions)
d) cost efficiency

ABI's Cross-Border Insolvency Program, New York, 7 November 2017

Panel: Cross-Border Avoidance Transactions

Material submitted by Annerose Tashiro, Schultze & Braun

Excerpts from Schultze & Braun's commentary on the German Insolvency Code and the European Insolvency Regulation

Author: Annerose Tashiro

I. European Insolvency Regulation

Article 6

Jurisdiction for actions deriving directly from insolvency proceedings and closely linked with them

1. The courts of the Member State within the territory of which insolvency proceedings have been opened in accordance with Article 3 shall have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them, such as avoidance actions.

Article 7

Applicable law

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened (the "State of the opening of proceedings").

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. In particular, it shall determine the following:

(a) The debtors against which insolvency proceedings may be brought on account of their capacity;

(b) The assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) The respective powers of the debtor and the insolvency practitioner;

(d) The conditions under which set-offs may be invoked;

(e) The effects of insolvency proceedings on current contracts to which the debtor is party;

(f) The effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits;

(g) The claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings;

(h) The rules governing the lodging, verification and admission of claims;

(i) The rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;

(j) The conditions for, and the effects of closure of, insolvency proceedings, in particular by composition;

(k) Creditors' rights after the closure of insolvency proceedings;

(l) Who is to bear the costs and expenses incurred in the insolvency proceedings;

(m) The rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

1. Purpose of the Provision

Article 7 correlates with Article 20, in accordance with which in the appropriate field of activity of the main and secondary insolvency proceedings (Article 3(1) in conjunction with Article 20(1) and Article 3(2) in conjunction with Article 20(2)) these proceedings and their effects shall be governed by the insolvency law of the Member State in which the insolvency proceedings were opened *(lex fori concursus)*.

Pursuant to Article 20(1), for the main insolvency proceedings this means that the *lex fori concursus* also produces the same effects in any other Member State. For secondary insolvency proceedings, this means in accordance with Article 20(2) and Article 35 that the insolvency law of the State of the opening of secondary insolvency proceedings is applicable to these proceedings and should be recognised by the other Member States, particularly when the insolvency practitioner in secondary insolvency proceedings in accordance with Article 21(2) enforces attachment of the insolvency estate with respect to the secondary estate.

Article 7 does not conclusively describe which situations are decided by the *lex fori concursus (secundarii)*. In principle, the provision names the two large areas of procedural matters and the effect of the opening of proceedings on the debtor's legal circumstances.

Since the effect of insolvency proceedings that have been opened lies in the application of the *lex fori concursus* in accordance with Articles 20 and 7, certain repercussions on the COMI discussion are unavoidable. However, there was no doubt about the scope and shape of Article 7 during the reform process; in fact, it is the definition of the COMI that should be put into more concrete terms.[1]

Even if Article 7 is much more detailed, the content of this provision corresponds to that of section 335 of the German Insolvency Code. The content of Article 7 was not changed by the reform.

[1] Evaluation Report, p. 244 et seq.

2. Lex fori concursus. Lex fori concursus secundarii

The effect of the respectively parallel applicability of the lex fori concursus and lex fori concursus *secundarii* is that in the event of secondary insolvency proceedings different legal systems for insolvency apply to the same debtor in different proceedings.

In addition to the general provision in Article 7(1), Article 7(2) gives more concrete form to the application of the insolvency law of the State of the opening of proceedings to the conditions for the opening of those proceedings, their conduct and their closure. Article 7(2) adds an illustrative[2] list of the relevant situations for these three particular aspects (opening, conduct and closure).

Provisions such as Article 7 that specifically make reference to the law of a Member State are not subject to autonomous European interpretation; instead, the conditions and effects of the respective rules should be decided on in accordance with the applicable national lex fori concursus.3

4. Conduct of Proceedings

The key to determining the application of the *lex fori concursus* is formed by the provisions as to how the insolvency proceedings should actually be handled.

a) Voidness, Voidability or Unenforceability of Legal Acts (Article 7(2)(m))

It is a common feature of almost all insolvency regimes that acts by the debtor that are detrimental to creditors are reversed and equal treatment of creditors is thus enforced. Insolvency practitioners thus regularly have at their disposal instruments to effect the voidness, unenforceability or **voidability** of such acts in insolvency proceedings. Within the scope of Article 7, these instruments are determined in accordance with the *lex fori concursus*, whereby the opposing party may if necessary rely on Article 16 which has now been developed in detail by extensive case law.[4] The insolvency statute also determines the specific legal consequences of the instrument.

Claims to reimbursement due to infringement of the capital maintenance rules, for example in accordance with sections 30, 31 of the Limited Liability Companies Act or section 82 of the Austrian Limited Liability Companies Act, should not be characterised as falling under insolvency law[5] and are not covered by Article 7(2)(m). The same applies to creditors' avoidance actions on the basis of the Creditors' Avoidance of Transfers Act or similar individual creditor avoidance rules that are independent of insolvency and fall under Regulation (EU) No 1215/2012.[6]

In some instances it is also advocated that liability cases on the basis of impairment to the distributable estate should fall within the scope of application of this rule.[7] There is little credibility in a situation in which managers who damage the future insolvency estate are to benefit from the right of defence that

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[2] CJEU, case C-444/07, published in BeckRS 2010, 90058, commented by Tashiro in FD-InsR 2010, 297071.
[3] CJEU, case C-396/09, published in BeckRS 2011, 81518; CJEU, case C-116/11, published in BeckRS 2012, 82462.
[4] On the jurisdiction of the courts in the COMI state, see Article 6 paragraph 9; on avoidance actions with third-country reference see Article 6 paragraph 34.
[5] BGH NZI 2011, 198 (decision of the Federal Court of Justice as reported in the NZI journal); Reinhart, MüKoInsO [Munich Commentary on the Insolvency Code], Article 4 European Insolvency Regulation (1346/2000) paragraph 5.
[6] CJEU, case C-213/10, published in BeckRS 2012, 80740; BGH BeckRS 2015, 19668 (decision of the Federal Court of Justice as published in the BeckRS online case reports).
[7] K. Schmidt/Brinkmann, InsO [German Insolvency Code], Article 4 of European Insolvency Regulation (1346/2000) paragraph 39; Paulus, Article 4 of European Insolvency Regulation (1346/2000) paragraph 36. Even if the enforcement of such claims for damages or reimbursement were to benefit all creditors, a liability claim is not a matter of voidness, unenforceability or voidability within the meaning of Article 7(2)(m).

protects legitimate expectations pursuant to Article 16. Such claims should instead be subject to the general provision of Article 7(1). It would be useful to include an additional standard example universally in the list in Article 7(2).

Article 16

Detrimental acts

Point (m) of Article 7(2) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:

(a) The act is subject to the law of a Member State other than that of the State of the opening of proceedings; and

(b) The law of that Member State does not allow any means of challenging that act in the relevant case.

1. Purpose of the Provision

Article 16 is a provision whose objective is to protect legitimate expectations and the certainty of transactions in Member States other than the State of the opening of proceedings (recital 67).

Consequently, Article 16 provides the recipient of avoidable performance with an opportunity to demonstrate that the avoided act is subject to the law of a Member State other than that of the State of the opening of proceedings and that the law of that Member State *(lex causae)* does not allow any means of challenging that act.

Article 7(2)(m) in conjunction with Article 16 corresponds to section 339 of the Insolvency Code.

2. Avoidance Pursuant to the *lex fori concursus*

The insolvency practitioner's authority to avoid acts that preceded the opening of insolvency proceedings and were detrimental to the creditors arises initially from Article 7(2)(m). In addition to voidness and unenforceability (see paragraph 6 et seq.), avoidance in insolvency is undoubtedly the significant aspect of the provision.

The conditions for effective avoidance in insolvency in accordance with the *lex fori concursus* must therefore first of all be met.

3. Acts Prior to the Opening of Proceedings

The aspects that are the aim of Article 16, i.e. protecting legitimate expectations and the certainty of transactions, do not require the application of this exception to the rule for acts following the opening of proceedings within the meaning of Article 2(8).[8] However, this does not exclude application if a right in rem that was acquired prior to the opening of proceedings is not enforced until after the opening of proceedings (Article 8(1) and (4)).

The uncertainty that previously existed regarding the opening of preliminary proceedings has now been resolved by the definition in Article 2(8), (7) and (5): As soon as a preliminary insolvency practitioner in accordance with Annex B has been appointed or protective measures pursuant to section 21(2)(1) and

[8] CJEU, case C-557/13, published in BeckRS 2015, 80511, on Article 5(1) and (4) , Article 13 of European Insolvency Regulation (1346/2000), commented by Schulz in EuZW 2015, 429.

(2) of the Insolvency Code have been ordered the insolvency proceedings are regarded as having been opened. This is now, at any rate from the German perspective, the reference point for Article 16.

4. Detriment Being Suffered by Creditors due to Voidness, Voidability or Unenforceability

Since Article 7 is concerned only with the effects of insolvency law, unenforceability is meant to signify a set of circumstances known to German law in section 88 of the Insolvency Code. Section 88 of the Insolvency Code and similar foreign rules regarding the unenforceability of previous compulsory enforcement measures are subject to this provision.

The Court of Justice of the European Union[9] confirms this for section 88 of the Insolvency Code at any rate insofar as the protection obtained by means of compulsory enforcement is a right in rem pursuant to Article 8(1). The unenforceability prescribed by law then falls within the scope of application of Article 7(2)(m) in conjunction with Article 8(4) and is logically subject to Article 16.

The objective of Article 16 is to protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened; this article should be narrowly interpreted as an exception to Article 7.

5. Authoritativeness of the *lex causae*

The recipient of avoidable performance must firstly assert in its defence that the avoided act is subject not to the *lex fori concursus* but instead to the law of another state *(lex causae)*.

If the parties have not made a choice of law, the *lex causae* arises from Article 4 et seq. of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). In particular, the law to be used for acts in performance, transfers and declarations of set-off can be inferred from Articles 12, 14, 15 and 17 of Rome I.

It is of little importance here that the recipient of avoidable performance himself/herself has his/her general place of jurisdiction in another Member State. Indeed, even a recipient of avoidable performance from the State of the opening of proceedings may also raise the defence pursuant to Article 16 provided that the *lex causae* derogates from the *lex fori concursus*.

6. Acts not Open to Challenge pursuant to the *lex causae*

In addition to the question of the applicable law, the recipient of avoidable performance is also obliged to explain that the relevant act is not subject to avoidance pursuant to the *lex causae* having regard to all the circumstances of the case and not merely abstractly.

Following a certain period of time during which the scope of the *lex causae* defence was not entirely clear, it has now been clarified[10] that the permissible *lex causae* defences under Article 16 include all limitation periods.or other time-bars relating to actions to set aside transactions as well as procedural requirements. Article 16 does not distinguish between the substantive and procedural quality of these defence provisions

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[9] CJEU, case C-557/13, published in BeckRS 2015, 80511, on Article 4 and Article 5(1), (4) and Article 13 of European Insolvency Regulation (1346/2000), commented by Tashiro in FD-InsR 2015, 369013.
[10] CJEU, case C-557/13, published in BeckRS 2015, 80511, on Article 13 of European Insolvency Regulation (1346/2000), commented by Tashiro in FD-InsR 2015, 369013.

In order ultimately to succeed with the avoidance, the most stringent requirements are authoritative in each case (cumulative solution).

a) No Restriction on Avoidance in Insolvency Law

All the provisions and general principles[11] of the *lex causae* should be considered.

b) Objective and Subjective Avoidance Requirements

With respect to the objective and subjective avoidance requirements, comprehensive consideration of the *lex causae* means complete accumulation of the factual criteria. Accordingly, there is a possibility of avoidance regarding the detrimental act on the scale of the lowest common denominator of the two legal systems.

c) Time Limits for Avoidance

The accumulation of the avoidance time limits of the *lex fori concursus* and *lex causae* results in the shortest time limit overall.

d) Limitation Periods

It was initially unclear whether the cumulative solution related only to the purely substantive requirements, but it has now been clarified by the case law of the CJEU that all limitation periods and other time-bars under the *lex causae* must be considered. While in Germany the limitation periods are very long (section 146 of the Insolvency Code), in other Member States the limitation periods frequently begin not at the end of the year but at the time of the opening of insolvency proceedings, or the limitation periods are set by the insolvency court and are also considerably shorter.

e) Procedural Requirements

The same applies to procedural requirements regarding the effective declaration of avoidance. Whereas in countries such as Germany an informal declaration suffices in principle, other legal systems require that an avoidance action be brought. The administrator will therefore have to be guided by the most stringent requirements here too.

7. Defence Obligation and Burden of Proof

The recipient of avoidable performance is obliged to demonstrate and prove[12] that the avoided act is not subject to avoidance pursuant to the *lex causae* having regard to **all the circumstances** of this case and not merely abstractly. The proof that the act is not subject to avoidance must be provided in concreto and covers the entire *lex causae*. The court before which the matter is brought shall not examine the *lex causae* defence ex officio.

The more specific procedural aspects are subject to the procedural law of the court before which the matter is brought. This includes the form in which the defence must be effected and the procedural step by which the defence must be effected in accordance with Article 16.[13] However, the application of national procedural provisions should not result in an appeal to Article 16 being made virtually

[11] CJEU, case C-310/14, published in BeckRS 2015, 81357, on Article 13 of European Insolvency Regulation (1346/2000), commented by Ehret in FD-InsR 2015, 374035.
[12] CJEU, case C-310/14, published in BeckRS 2015, 81357, on Article 13 of European Insolvency Regulation (1346/2000), commented by Ehret in FD-InsR 2015, 374035.
[13] Apelativen sad Sofia (Sofia Court of Appeal, Bulgaria), judgment of 8.10.2014, [2014] EIRCR(A) 497.

impossible or being made excessively difficult, in particular with respect to the negative proof of the non-existence of certain circumstances.

If the recipient of avoidable performance provides sufficient submissions and produces sufficient evidence, there may be a reversal of the burden of proof; the arrangements for obtaining evidence shall be effected on the basis of the relevant rules of procedure.

8. Legal Consequences

However, in the case of the legal consequences no accumulation of the *lex fori concursus* and *lex causae* is foreseen. Instead, the legal consequences depend on the *lex fori concursus*. From the perspective of a German insolvency practitioner, the relevant provisions are those of sections 143 et seq. of the Insolvency Code.

9. Vis attractiva concursus

The insolvency practitioner may only[14] bring such avoidance actions before the courts of the State of the opening of proceedings (Article 6(1)). The recipient of avoidable performance is thus under pressure to provide the defences of the *lex causae* before foreign courts and in a foreign language.

The judgment obtained in a party's home country is enforced in another Member State in accordance with the simplified provisions on recognition and enforcement pursuant to Article 32.[15]

10. Secondary Insolvency Proceedings

Article 7(2)(m) may be exercised by insolvency practitioners in either main or secondary insolvency proceedings. The relevant recipient of avoidable performance may then refer to Article 16. The powers of the secondary insolvency practitioner also to make his avoidance claims in another Member State provided that the assets involved are moveable property forming part of the secondary insolvency estate are laid down in Article 21(2) sentence 2.

The Federal Court of Justice[16] takes the view that an avoidance claim belonging to the secondary estate can be asserted by the insolvency administrator in the main insolvency proceedings after the conclusion of the secondary insolvency proceedings if the claim in question was no longer pursued by the secondary insolvency administrator.

11. Practice Notes

As a result of the accumulation of the *lex fori concursus* and *lex causae,* in the case of legal acts at a time of crisis the creditor could by way of a choice of law press for the application of a *lex causae* that recognises a law on avoidance in insolvency that is as "weak" as possible. In referring to recital 4, which

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[14] Until the introduction of Article 6 it was unclear whether the case law of the CJEU in case C-339/07 was intended to result in exclusive jurisdiction: *Varhoven kasacionen sad* (Supreme Court of Bulgaria), judgment of 18.1.2013, [2013] EIRCR(A) 313, and judgment of 28.1.2013, [2013] EIRCR(A) 314: Bringing an action in the place of jurisdiction of the recipient of avoidable performance remains permissible despite CJEU, case C-339/07, published in BeckRS 2009, 70146. The judgment is otherwise in *Rechtbank* Amsterdam (Court of First Instance), 17.2.2010, [2010] EIRCR(A), 233: Courts of the State of the opening of proceedings should have exclusive jurisdiction.

[15] CJEU, case C-328/12, published in BeckRS 2014, 80037, on Article 13 of European Insolvency Regulation (1346/2000), commented by Tashiro in FD-InsR 2014, 354993.

[16] BGH BeckRS 2014, 22641 (decision of the Federal Court of Justice as published in the BeckRS online case reports), commented by Tashiro in FD-InsR 2015, 365157.

says that it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position, in its decision of 12.2.2009[17] the CJEU attempted to counter abuse of these circumstances. However, it is difficult to judge where to draw the line.

Article 19

Principle

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.

The rule laid down in the first subparagraph shall also apply where, on account of a debtor's capacity, insolvency proceedings cannot be brought against that debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

II. German International Insolvency Law

Section 335

Principle

Unless otherwise provided, the law applicable to insolvency proceedings and their effects shall be that of the state within the territory of which the proceedings have been commenced.

1. Purpose of the Provision

Section 335 sets out the basic rule. It gives expression to the principle of universality and establishes that the legal system of the state in which proceedings have been commenced applies to the insolvency proceedings and their effects. Proceedings which have commenced in a foreign country and are also recognised in Germany will be conducted according to the laws of that country provided that these laws themselves make provision for this. Section 335 corresponds to Article 4 (1) of the European Insolvency Regulation (EIR).

Sections 336, 337, 339, 340, 351 (2) and 354 (3) derogate from this principle.

2. Definition of Insolvency Proceedings

[17] CJEU, case C-339/07, published in BeckRS 2009, 70146, on recital 4 of European Insolvency Regulation (1346/2000), commented by Tashiro in FD-InsR 2009, 276473.

This provision applies to insolvency proceedings conducted according to the laws of a foreign country, i.e. proceedings whose objectives are the same as section 1 of the Insolvency Code. Both main as well as secondary and territorial insolvency proceedings within the meaning of sections 354 and 356 fall into this category. In the case of secondary insolvency proceedings, the applicable law is that of the state in which the secondary proceedings were commenced (*lex fori concursus secundarii*). The question of whether the scheme of arrangement provided for in English law qualifies as insolvency proceedings within the meaning of sections 343 and 335 has not yet been clarified by the Federal Court of Justice.[18]

Sections 335 to 358 also apply to consumer insolvency proceedings.

3. Effects of Insolvency Proceedings; *lex fori concursus*

The law of the state in which proceedings recognised under section 343 have been commenced is known as the *lex fori concursus*. This law governs the insolvency proceedings and their effects internationally. This includes their commencement, implementation and termination as well as the application for the commencement of insolvency proceedings.

The commencement of insolvency proceedings relating to the debtor's assets worldwide under the law of the state in which proceedings have commenced gives the insolvency administrator wide room for manoeuvre. The insolvency administrator has the power to use all the rights granted him/her by the order commencing proceedings to the same extent both in Germany and abroad. This includes the right to relocate assets from other states to Germany.[19]

The principle of *lex fori concursus* applies both to procedural law and substantive insolvency law. The rule thus encompasses all provisions of insolvency law. A more difficult issue is determining what provisions come under insolvency law. Those which do not are instead governed by the general conflict-of-laws rules (private international law).

This issue is resolved by determining whether the rule also applies outside insolvency or constitutes a provision specific to insolvency. A rule does not have to be contained in the Insolvency Code to be part of insolvency law. The law on equity substitution is located in the Insolvency Code without regard to legal form. The obligation to apply for insolvency proceedings must be classified as part of insolvency law.[20] This obligation is contained in section 15a of the Code and is worded without regard to legal form. Section 64 of the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, GmbHG) also belongs to insolvency law (Article 4 (1) of the EIR).[21]

Section 335 plays an important role in Germany's legal relations with the United States[22] and Switzerland in particular.[23] Both Chapter 7 and Chapter 11 proceedings are recognised in Germany. The same holds for the Swiss arrangements of debt moratorium, debt restructuring liquidation and

[18] BGH NZI 2012, 425 (regarding an insurance case) (decision of the Federal Court of Justice as reported in the NZI journal).
[19] On the powers of the preliminary insolvency administrator, see section 344.
[20] On section 64 GmbHG (old version), see OLG Jena NZI 2013, 807 (decision of Jena Higher Regional Court as reported in the NZI journal).
[21] Court of Justice of the European Union (CJEU), judgment of 10 December 2015, case C-594/14, published in BeckRS 2015, 81978. Articles 49 and 54 TFEU (freedom of establishment) do not preclude this.
[22] BGH DZWIR 2010, 287 et seq. (decision of the Federal Court of Justice as reported in the DZWIR journal); BAG NZI 2008, 122 (decision of the Federal Labour Court as reported in the NZI journal).
[23] Recently OLG Hamm BeckRS 2013, 14286 (decision of Hamm Higher Regional Court as published in the BeckRS online case reports).

bankruptcy liquidation. Thus, the consequences under substantive law following a Swiss reorganisation procedure and debt restructuring agreement entered into with creditors are determined by Swiss law.[24]

4. Ordre Public Objection to Section 335

It is possible to conceive of a violation of the German ordre public which would prevent the application in principle of foreign laws pursuant to the general conflict-of-laws rule (Article 6 of the Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuche*, EGBGB)). In any event, it must be borne in mind that the German legislators have created extensive conflict-of-laws rules through sections 336 to 342.

5. International Group Insolvency Law

The amended EIR (848/2015 – referred to as EIR 2015 for short; the original Regulation (1346/2000) is referred to as EIR 2000) established a European law on group insolvency proceedings.

With a view to the future law, it should be considered whether, in addition to the provisions on the coordination of groups or parts thereof located in Europe pursuant to Article 56 of EIR 2015, provisions which enable coordination and cooperation in the insolvencies of a group with undertakings in Germany and outside the EIR area would also appear necessary. In 2014, UNCITRAL Working Group V[25] was instructed by the Commission to draw up further model regulations on the treatment of cross-border insolvencies of multinational undertakings to supplement the existing UNCITRAL Model Law. With a view to the future law, the question arises whether Germany will adopt parts of these model regulations to deal with group insolvencies outside Europe.

Nevertheless, consolidation of the insolvency estates of several group undertakings which has occurred in other jurisdictions, particularly in the case of insolvency due to fraud, can be recognised through sections 343 and 335.[26]

Section 339

Avoidance in Insolvency

A legal act may be avoided if the requirements for the avoidance of legal acts in insolvency under the law of the state where the proceedings were commenced are met, unless the opposing party proves that the law of another state is applicable to the legal act and the legal act is not open to challenge in any way under this law.

1. Purpose of the Provision

The aim of avoidance in insolvency is to make it possible, in the **interest of the equal treatment of creditors**, to reverse movements of assets made while the debtor is in difficulty and after the application for commencement of insolvency. Avoidance therefore encroaches on contractual legal acts that are otherwise lawful. Such encroachment can only be justified if the parties to the contract are aware of the risk in the insolvency. In purely national situations, checking the relevant law on avoidance in insolvency will allow this. If for proceedings commenced abroad, however, the *lex fori concursus* were also to apply to the law on avoidance in insolvency in accordance with section 335, it would no longer be possible to predict what law will apply for acts taken in advance of a possible insolvency. It would be just as difficult to determine when the conditions for avoidance will be met, since it is almost

[24] BGH BeckRS 2014, 15813 (decision of the Federal Court of Justice as published in the BeckRS online case reports).
[25] http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.
[26] Munich Higher Regional Court, decision of 16 May 2012, case 5 U 394/12.

impossible to anticipate in what state main or even secondary insolvency proceedings could be commenced. This problem is addressed by section 339, which creates legal certainty by adopting a cumulative solution.

2. Avoidance under the *lex fori concursus*

The conditions for avoidance must be met under law of the state in which the proceedings have commenced.

a) Definition of Law on Avoidance

The first task is to define what is meant be the law on avoidance within the meaning of section 339.

aa) Avoidance in Insolvency by the Insolvency Administrator

Avoidance is avoidance in insolvency by the insolvency administrator after commencement of insolvency proceedings, as governed in German law by **section 129 et seq.** It is irrelevant whether main or secondary insolvency proceedings have been commenced. Application to avoidance under the Creditors' Avoidance of Transfers Act (*Anfechtungsgesetz*, AnfG) is not required. The possibility of avoidance under section 313 (2) and section 280 for self-administration is covered. Foreign avoidance laws must also be qualified based on whether they comprise provisions relating to insolvency law. The recognition of the US law on avoidance has now been implemented by some courts on the merits.[27]

For example, in the United States, in addition to the federal law on avoidance found in the Bankruptcy Code, there are also avoidance provisions in the laws of each Federal State. Some of these lay down different requirements for avoidance alongside those of the Bankruptcy Code and may be equally asserted by a debtor's undertaking in insolvency proceedings. These too are applicable through sections 335 and 339.[28]

A further prerequisite is the commencement of insolvency proceedings.

bb) Reversal of Enforcement pursuant to Section 88

Outside of the German law on avoidance in insolvency, section 88 contains a similar rule for compulsory enforcement measures in the period leading up to insolvency. Its purpose is to counteract a reduction in the assets of a debtor in crisis in the interests of the creditors in their entirety. The objective of section 88 is similar to that of section 131 (1) No. 1. For that reason it is appropriate to include section 88 and equivalent provisions in foreign law within the scope of section 339. This ensures that the necessary legal certainty that section 339 aims to create for legal relations is not circumvented by section 88. The Court of Justice of the European Union (CJEU)[29] has confirmed this for section 88 at least insofar as the security obtained by compulsory enforcement is a right in rem pursuant to Article 5 (1) of the EIR.

cc) Avoidable Set-off pursuant to Section 96 (1) No. 3

The admissibility of a set-off in cross-border insolvency proceedings is governed by section 338. In this regard, the connection between the law governing set-off and that governing avoidance is nuanced. If the question of the admissibility of the set-off is linked to the question of avoidance (as in German law

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[27] Munich Higher Regional Court, judgment of 14 March 2013, case 24 U 1053/12; Berlin Regional Court, judgment of 23 January 2012, case 6 O 207/10.
[28] Memmingen Regional Court, judgment of 3 February 2012, case 24 O 633/10; Traunstein Regional Court, judgment of 22 December 2011, case 2 O 1408/10.
[29] CJEU judgment of 16 April 2005, case C-557/13, ECLI:EU:C:2015:227; followed by the Federal Court of Justice, judgment of 15 October 2015, case IX ZR 265/12.

in section 96 (1) No. 3), under section 339 it must first be examined to what extent there is an avoidable legal act. The possibility of a set-off must then be assessed pursuant to section 338. Section 96 (1) No. 3 employs the international law on avoidance of section 339 as a preliminary question.

b) Examination pursuant to the *lex fori concursus*

In cross-border situations, it must first be examined whether there is a possibility of avoidance under the law of the state where proceedings were commenced. A **thorough examination of the law on avoidance** must be undertaken for both objective and subjective facts concerned.

Section 339 is relevant only if the legal act is avoidable under the *lex fori concursus*.

3. Validity of Another Legal System

Avoidance that is possible under the *lex fori concursus* could be excluded again if the legal act to be avoided is governed by the law of another state **(*lex causae*)**. This is determined by private international law and is not a matter for international insolvency law. Examination of the possibility of avoidance under section 339 is only relevant at all if the *lex fori concursus* and *lex causae* diverge.

4. "Not open to challenge in any way"

An accumulation of requirements for avoidance is involved when assessing the *lex fori concursus* and the *lex causae*. A court is not permitted to conduct a review *ex officio*. Rather, the opposing party must **assert in its defence** (see point 5. below) that the avoided legal act is not substantively open to challenge in any way under the *lex causae*.

a) No Restriction on Avoidance in Insolvency Law

The assessment is not based only on the law on avoidance of the *lex causae*. The **inability to be "challenged"** means that the legal act may neither be avoidable nor void nor otherwise invalid. This covers all rules that could affect the inviolability of the legal act, such as rules of substantive law regarding lack of intention or unethical conduct in general civil law.

b) Accumulation for Calculating Time Limits

Not only must the substantive avoidance requirements of the *lex causae* be met, but the time limits for avoidance must also be complied with. Where the requirements are otherwise identical, the accumulation of the *lex fori concursus* and *lex causae* always works in favour of a shorter time limit for avoidance than the lowest common denominator.

c) No Accumulation of Procedural Requirements

However, there is no protection of legitimate expectations where, contrary to the *lex causae*, the requirements for commencing insolvency proceedings are met under the *lex fori concursus*.

d) No Accumulation for the Limitation Period

There is debate about what limitation rule applies in case of accumulation of *lex fori concursus* and *lex causae*. Some take the view that the accumulation of limitation periods leads to the application of the shorter period. The majority view bases the limitation period only on the *lex fori concursus*. In terms of European law, the Federal Court of Justice, referring to Article 12 (1a) of Rome I, has already

pronounced in favour of the need to take account of the rules on the limitation period of the *lex causae*.[30] The CJEU[31] has since ruled that the admissible *lex causae* defences under Article 13 of EIR 2000 include all limitation periods or other time-bars relating to actions to set aside transactions as well as procedural requirements. Article 13 of EIR 2000 does not distinguish between the substantive or procedural nature of these provisions. Because this article is analogous to section 339, it must be taken for granted that previous German rulings make the same assumption for section 339.

e) No Accumulation of Legal Consequences

The legal consequences of avoidance are not subject to accumulation.

5. Burden of Proof and Argument

Section 339 contains a **reversal of the burden of proof and argument.** The recipient of avoidable performance must argue and prove that a legal system other than that applicable under the *lex fori concursus* applies to the legal act and that the legal act would not be open to challenge under the *lex causae*.[32]

6. Relation to Other Reference Rules

The law on avoidance is a central element in insolvency proceedings. It affects subjects of highly different nature and may encroach on contracts or security rights or affect immovable property. It makes no difference whether immovable property is affected or security rights were granted. The conflict of laws relating to avoidance pursuant to section 339 therefore takes precedence over section 336 or section 351, for example.

7. Vis attractiva concursus

The jurisdiction of the insolvency court for all disputes relating to insolvency proceedings, and hence also for any avoidance proceedings, is subsumed under the expression *vis attractiva concursus*. The main question that arises is whether the insolvency administrator may conduct avoidance proceedings at the location of the insolvency court rather than at the court where the recipient of avoidable performance is domiciled.

The CJEU[33] interprets Article 3 (1) of the EIR as meaning that the courts of the Member State in which the insolvency proceedings were commenced have jurisdiction to decide an action to set aside a transaction by virtue of insolvency that is brought against a person whose registered office is in another Member State. International jurisdiction to hear and determine actions that derive directly from the insolvency proceedings and are closely connected with them is conferred on the Member State in which proceedings were commenced.

The same applies to actions to have a transaction set aside by virtue of insolvency that are brought against persons in a third (non-EU) country.[34] The EIR's scope of application is restricted to Member States within the geographical area covered by the EIR only where this is explicitly stated, such as in

[30] BGH BeckRS 2013, 18559 (decision of the Federal Court of Justice as published in the BeckRS online case reports), commented by Tashiro in FD-InsR 2013, 352745.
[31] CJEU judgment of 16 April 2005, case C-557/13, ECLI:EU:C:2015:227.
[32] Munich Higher Regional Court, judgment of 14 March 2013, case 24 U 1053/12.
[33] CJEU judgment of 12 February 2009, case C-339/07, ECLI:EU:C:2009:83.
[34] CJEU judgment of 16 January 2014, case C-328/12, ECLI:EU:C:2014:6; commented by Tashiro in FD-InsR 2014, 354993.

Article 5 of EIR 2000/Article 8 of EIR 2015. Otherwise the EIR also applies to third states even if only the debtor's COMI as defined in Article 3 of EIR 2000/Article 3 of EIR 2015 is located in a Member State. Implementation in the third county could be achieved through bilateral agreements. Enforcement in respect of assets in another Member State is also conceivable.

When the new EIR enters into force in 2017, jurisdiction for ancillary proceedings will be explicitly governed by Article 6 of EIR 2015.

The Federal Court of Justice[35] has found in this regard that section 19a of the Code of Civil Procedure (*Zivilprozessordnung*, ZPO) does now indeed apply on a subsidiary basis in avoidance actions by the insolvency administrator in both cases in proceedings pursuant to Article 3 (1) of EIR 2000/Article 3 of EIR 2015.

The question of whether the analogous application of section 19a ZPO affects proceedings located completely outside the EIR geographical area has not been specifically resolved.[36] It would surely be logical for previous German rulings, following previous rulings by the CJEU, to understand that it does.

8. Difference from the EIR

Article 4 (2)(m) in conjunction with Article 13 of EIR 2000/Article 7 (2)(m) in conjunction with Article 16 of EIR 2015 correspond to section 339. European law was the model for the German legislators.

9. Practice Notes

a) Review of Foreign Legal Systems

Section 339 requires undertaking an extensive review of the avoidance laws of foreign legal systems. This applies to the drafting of contracts outside the insolvency and the examination of avoidance claims in the insolvency proceedings. **Consultation of foreign lawyers** will therefore be hard to avoid during a proper review of avoidance in insolvency law.

However, the courts themselves are also facing new challenges when applying foreign law. Contrary to current practice, it may therefore make sense also to seek advice from other types of experts in the relevant jurisdiction. The sometimes less than satisfactory quality of translations and expert reports presents an additional problem.

b) Structuring Possibilities

Section 339 undoubtedly provides structuring possibilities for drafting contracts in the period leading up to insolvency, particularly when the debtor is in crisis. As a result of the accumulation of the *lex fori concursus* and *lex causae*, selection of the *lex causae* makes it possible to impose a law on avoidance in insolvency that is as "weak" as possible **(forum shopping).**

c) Problems in Legal Practice

The reversal of the burden of proof in particular makes it easier for the insolvency administrator to secure avoidance in cross-border situations. Nonetheless, problems still arise in practice whenever there are always two legal systems to be reviewed in avoidance proceedings with an international dimension and the court hearing the proceedings is liable to have difficulties in applying the relevant legal system.

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[35] BGH ZIP 2009, 1287 (decision of the Federal Court of Justice as reported in the ZIP journal); BGH BeckRS 2014, 10775 (decision of the Federal Court of Justice as published in the BeckRS online case reports).
[36] This is rejected in OLG Frankfurt BeckRS 2013, 02536 (decision of Frankfurt Higher Regional Court as published in the BeckRS online case reports), commented by Toussaint in FD-ZVR 2013, 342807.

The reversal of the burden of proof does not change this. Avoidance disputes will therefore continue to be protracted. Added to this are difficulties with enforcement.

Section 343

Recognition

(1) The opening of foreign insolvency proceedings shall be recognized. This shall not apply

1. If the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law;

2. Where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights.

(2) Subsection (1) shall apply mutatis mutandis to preservation measures taken after the request for the opening of insolvency proceedings, as well as to judgments handed down to implement or terminate recognized insolvency proceedings.

Avoidance Actions and Enforcement of Foreign Judgments in Canada: A Brief Primer

Collecting debts from unwilling debtors is rarely an easy task. So when a debtor actively tries to make it more difficult for a creditor to recover a debt or when the debtor is in another country (or both), debt recovery becomes significantly more challenging and expensive. Thankfully, there are means available in Canada to help creditors (both domestic and foreign) overturn transactions aimed at putting assets out of reach and to allow creditors to enforce foreign judgments. This brief primer will set out the legal regime in Canada and the main options available to creditors and their counsel[1].

I. BACKGROUND

Canada has a federal system – with a federal government and 10 provinces (and 3 territories). The powers of government are divided between the federal government and the provinces/territories. Bankruptcy and insolvency is within the federal sphere of powers while "property and civil rights", which includes creditor-debtor law, is within the provincial/territorial sphere. For creditors, this means that there are both federal and provincial laws to which they my look for relief.

With respect to the court system in Canada, there are respective provincial courts and the Federal Court of Canada. Most matters, whether they flow from federal laws or provincial laws, are dealt with in the provincial courts. Creditor-debtor disputes and bankruptcy and insolvency law matters are dealt with in the provincial courts.

I.i At the Provincial/Territorial Level

Each province and territory has its own set of transaction avoidance legislation and foreign judgment enforcement regimes. While they all are similar in principle, they are not identical.

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Foreign creditors and their counsel must know and understand, therefore, that the options that are available, the procedural requirements, the likelihood of success in court, and the associated costs, will differ from province to province. For example, in Ontario, there are two main statutes dealing with the avoidance of fraudulent transactions - the Fraudulent Conveyances Act[2] (the "**FCA**"), and the Assignments and Preferences Act[3] (the "**APA**"). In British Columbia, the main statutes are the Fraudulent Conveyance Act[4] and the Fraudulent Preference Act[5]. In Alberta, the key statutes are the Fraudulent Preference Act[6] and the "Statute of Elizabeth"[7]…from 1571 England! All similar but not identical in breadth and scope.

These laws and those in the other provinces/territories are available to aggrieved creditors (and trustees and court appointed receivers) and provide the means to void or overturn transactions meant to either put assets out of reach or to prefer one creditor over another.

Enforcement of foreign judgments is governed solely by provincial legislation and which differs greatly across the country. Foreign judgments require a court order in Canada in order to be enforceable – meaning a creditor will have to absorb the cost of another court proceeding, and the risk of another challenge to the obligation to pay the debt. That said though, recognition of court orders from the US, the UK, and most other EU countries are regularly recognized and the procedures quite streamlined.

I.ii At the Federal Level

Notwithstanding debtor-creditor law being within the provincial/territorial sphere, where debtor-creditor law intersects bankruptcy and insolvency law (i.e. where an insolvency proceeding has been commenced under a federal statute), there may be remedies available to creditors under the federal statutes as well.

There are two main insolvency statutes in Canada – the Bankruptcy and Insolvency Act[8] (the "**BIA**"), which deals with bankruptcy liquidations and restructurings of both individuals and corporate entities, and the Companies' Creditors Arrangement Act[9] (the "**CCAA**"), which deals

[2] R.S.O. 1990, c. F.29
[3] R.S.O. 1990, c. A.33
[4] R.S.B.C. 1996, c.163
[5] R.S.B.C. 1996 c. 164
[6] R.S.A. 2000, c. F.24
[7] 13 Eliz 1, c.5
[8] R.S.C. 1985, c. B-3
[9] R.S.C. 1985, c. C-25

with larger corporate restructurings. Once a proceeding has been commenced under the BIA, trustees in bankruptcy (and in certain circumstances, creditors[10]) have access not only to provincial legislation, but also federal preference and fraudulent conveyance remedies found in the BIA. These BIA remedies are incorporated by reference into the CCAA.

II. THE KEY PROVINCIAL AND FEDERAL AVOIDANCE STATUTES AND PROVISIONS

II.1 Provincial and Territorial Legislation

As mentioned, each province and territory has its own set of avoidance laws. In Ontario, fraudulent conveyances are dealt with under both the FCA and the APA:

> i) S.2 of the FCA provides: *Every conveyance of real property or personal property and every bond, suit, judgment and execution heretofore or hereafter made with intent to defeat, hinder, delay or defraud creditors or others of their just and lawful actions, suits, debts, accounts, damages, penalties or forfeitures are void as against such persons and their assigns.*
>
> ii) S. 4(1) of the APA provides: *Subject to section 5, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels or effects, or of bills, bonds, notes or securities, or of shares, dividends, premiums or bonus in any bank, company or corporation, or of any other property, real or personal, made by a person when insolvent or unable to pay the person's debts in full or when the person knows that he, she or it is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice creditors, or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.*

As can be seen, the two sections are not identical, with the APA being significantly more expansive. They may be used together or separately – though they are usually used together when possible.

Preferences in Ontario are dealt with in S. 4(2) of the APA, which provides:

> *Subject to section 5, every such gift, conveyance, assignment or transfer, delivery over or payment made by a person being at the time in insolvent circumstances, or unable to pay his, her or its debts in full, or knowing himself, herself or itself to be on the eve*

[10] S.38 of the BIA allows creditors, in circumstances where a trustee in bankruptcy declines to take action, to take an assignment of the trustee's rights, including the right to sue to recover assets or over turn preferences.

of insolvency, to or for a creditor with the intent to give such creditor an unjust preference over other creditors or over any one or more of them is void as against the creditor or creditors injured, delayed, prejudiced or postponed.

One of the more difficult elements to prove is the *intention* to defeat or prefer creditors. Proving intent is never easy. Some provincial statutes, such as the APA (s. 4(3) to be exact), provide certain periods whereby intention is presumed, and thereby making the case easier to prove[11]. In the absence of such presumptive provisions, creditors are left with proving intent (actual evidence of the debtor's mindset) or circumstantially proving it (by proving "badges of fraud"[12]). These "badges of fraud" and the importance thereof vary from province to province but are generally similar across all provinces and common law jurisdictions throughout the word.

II.ii Federal Legislation

At the federal level, s. 95 and s. 96 of the BIA, respectively, deal with preferences and fraudulent conveyances (called transfers at under value in the BIA), as follows:

i) S.95 provides: *(1) A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person*

(a) in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and

(b) in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec,

[11] See also s. 95(2) of the BIA.

[12] "Badges of fraud" as a legal term has been around since the early 1600s – if not earlier – see Twyne's Case (1601) 76 E.R. 809. Examples of badges of fraud recognized in Canada include, amongst many others: i) the transaction was secret; ii) the transfer was made in the face of threatened legal proceedings; iii) the consideration is grossly inadequate; iv) there is unusual haste in making the transfer; v) some benefit is retained under the settlement by the settlor; vi) a close relationship exists between parties to the conveyance; and vii) the debtor kept the power to revoke the conveyance.

may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.

(2) If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

(ii) S. 96(1) provides that: *On application by the trustee, a court may declare that a transfer at undervalue is void as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if*

- *(a) the party was dealing at arm's length with the debtor and*
    - *(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and that ends on the date of the bankruptcy,*
    - *(ii) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, and*
    - *(iii) the debtor intended to defraud, defeat or delay a creditor; or*
- *(b) the party was not dealing at arm's length with the debtor and*
    - *(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or*
    - *(ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and*
        - *(A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it, or*
        - *(B) the debtor intended to defraud, defeat or delay a creditor.*

In addition to ss. 95 and 96, s. 101 of the BIA deals with the situation where shareholders are effectively given a preference over creditors in the form of dividends or redemption of shares in circumstances where the corporation was insolvent or the transaction rendered it insolvent prior to

a bankruptcy. To the extent that the court determines there was such an event, the directors and/or shareholders may be held personally liable.

These provisions are incorporated into the CCAA by reference as set out in s. 36.1(1), as follows:

> *Sections 38 and 95 - 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.*

Together, they provide creditors, trustees and other insolvency professionals appointed under the respective statutes with significant statutory tools to attack fraudulent transactions and seek recovery for the creditors of the estate.

III. PROCEDURAL OPTIONS AVAILABLE TO CREDITORS

Creditors in Canada have a number of procedural options available to them. These options are equally available to foreign creditors. The options and their practicability depends on the province in which they are being employed. There are three (3) main options available to creditors: i) creditor driven litigation; ii) court appointed receiverships; and iii) involuntary bankruptcy applications. Each of these is discussed briefly in this section along with the general pros and cons of each.

III. i Creditor Driven Litigation

Creditors may sue directly utilizing provincial avoidance legislation, such as the FCA and the APA in Ontario. Creditors may also be able to sue directly utilizing the remedy set out in s. 38 of the BIA[13] (or potentially, under s. 36.1(1) of the CCAA), if a proceeding has been commenced under the respective federal statute. Creditors may act individually or they can band together to spread the cost. They will have to satisfy the particulars of the provincial statute under which they are proceeding, including the gathering of all of the required evidence.

One of the key benefits is the cost savings of not commencing additional insolvency proceedings and not paying for insolvency professionals and counsel for them (i.e. not seeking the

[13] See note 9, above.

appointment of a receiver). Moreover, it is possible to move more quickly than a trustee or receiver because insolvency professionals once appointed tend to move more cautiously. Creditor driven options tend to work best where there is one large transfer of an easily recoverable asset (such as the transfer of real property within the province) or there is a fairly straight-forward preference, such as payments to principals or related parties (i.e. a spouse or children).

There are three main downsides: cost, burden of proof/evidence gathering, and debtor defences. Any creditor or group of creditors that commences a proceeding bears all of the cost until completion. There is no way during the proceedings to spread the cost to all creditors even though practically speaking all of the creditors of the debtor will benefit from a positive result. Cost is usually the single greatest obstacle to an avoidance action in Canada. Even a moderately complex or fact confusing case may cost more in "legals" than the avoidance action is worth and certainly often more than the creditor client is ready to invest. Secondly, the burden of proof is on the creditor meaning that it is up to the creditor to gather the evidence. In the face of a fraudulent transfer where records are spotty or non-existent, it may be too difficult or costly to obtain or assemble the necessary evidence. And thirdly, there are defences (such as the debtor needing to prefer a critical supplier in order to stay in business) that can be raised by the debtor or the counter-party recipient of the benefit, which could defeat the creditor action.

III. ii Court Appointed Receiverships

In more complex fraudulent transfers or preference situations, creditors often look to the appointment of a receiver by the courts. Receivers can be appointed by secured creditors under the BIA[14] and by secured and unsecured creditors under provincial legislation[15]. The receiver, at its appointment hearing or at any time thereafter, may be given the power to review transactions and seek to overturn the transactions.

The main benefits of using a court appointed receiver are that the receiver is usually given the powers necessary to properly and fully investigate, to examine parties, and to procure the necessary evidence in order to determine the strength of a case and then seek relief from the court, if warranted. Court appointed receivers, because they are appointed by the court, are usually

[14] S. 243 of the BIA
[15] For example, in Ontario, under s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, allows any creditor to seek the appointment of a receiver where it is "just or convenient".

afforded certain deference that ordinary litigants are not and therefore may be granted more leeway to pursue fraudulent transactions by the court.

The main con, not surprisingly is cost. There is a cost to seeking the appointment of a receiver and then the cost to carry the receivership - both in terms of the professionals and in terms of the add-on costs, such as the receiver having to prepare reports each and every time it reports to the court. As such, court appointed receiverships to pursue fraudulent transactions tend to be reserved for more serious cases, which require more investigations and more use of the courts and of course where more is at stake.

III. iii Involuntary Bankruptcy Applications

An alternative to a court appointed receiver is a bankruptcy trustee via an involuntary bankruptcy proceeding (called a bankruptcy application or an application for a bankruptcy order). Any unsecured creditor owed at least $1,000 may apply for a bankruptcy order against an insolvent debtor. While it is possible in some circumstances for one (1) creditor to apply, usually it will require proof of more than one (1) unpaid debt and requires the commission of an "act of bankruptcy"[16]. Involuntary bankruptcies are quite common in Canada and greatly assist creditors unable or unwilling to act on their own.

The main benefit of a bankruptcy is that the bankruptcy trustee has significant investigatory powers[17] and is granted great deference in voiding preferences and overturning transfers at under value. Trustees may also be able to seek criminal sanctions against fraudulent bankrupts.

The main downside is cost, albeit most likely far less than the cost of a court appointed receivership – because there are usually fewer obligations to return to court. A second downside is that a trustee is a creature of statute and is limited to what the BIA provides, whereas a receiver though also a creature of statute, derives its powers for the most part from the common law, meaning receiverships are more customizable to meet the needs of the particular case.

[16] An "act of bankruptcy" is a specified list of acts or omissions by an insolvent person as set out in s. 42(1) of the BIA.
[17] S. 163 of the BIA, for example.

III. iv Avoidance Proceedings within Insolvency Proceedings

Where a proceeding is commenced under Part XIII of the BIA or Part IV of the CCAA (the respective equivalent of a Chapter 15 proceeding), a foreign representative may be able to commence or pursue avoidance proceedings as part of the ancillary proceeding. S. 272(1) of the BIA, specifically s. 272(1)(c) affords the foreign representative the opportunity to seek an order allowing it to pursue fraudulent transactions. While s. 49(1), the CCAA equivalent to s. 272(1), is not identical and lacks an equivalent to s. 272(1)(c), the court is granted the power to make "any order that it considers appropriate", suggesting that where appropriate, a foreign representative may be able to seek similar relief under the CCAA.

III. v Which to Choose

There is no right answer. Choosing the best procedure in each case will depend on the unique factors of the case. Complexity and cost usually tend to drive which option is chosen. As well, the location of the assets (i.e. are they in one (1) province, or spread out across the country or across national borders) or the disappearance of assets and/or records may affect the decision on which to use. Utilizing local counsel to advise on the best option is therefore advisable.

IV. ENFORCEMENT OF FOREIGN JUDGMENTS

Foreign judgments can be pursued in Canada but they cannot be enforced on their own – they need to be recognized in some form. There are two ways: either they are covered by a statute (derived from a treaty) that allows for their enforcement or an action must be commenced in the local jurisdiction with the foreign judgment as its grounds for relief and therewith obtain a local order on the foreign judgment. While Canadian courts tend to be respectful of foreign judgments from most countries (certainly from the U.S., Western Europe, Japan, and most Commonwealth countries), there is a risk that the debtor will challenge the foreign order or judgment, most often on the grounds that the foreign court did not have jurisdiction to make the original order.

Procedurally, where there is a statute recognizing a particular foreign state's court rulings[18], obtaining recognition is notionally easier. In the absence of any such statute, foreign creditors may

[18] For example, in Ontario, the Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990. C. R.6 in Ontario and Rule 73 of the Rules of Civil Procedure.

commence an action and seek judgment based on the foreign judgment. The more common method is to do so by way of a summary judgment motion[19] as opposed to a trial.

The main risk, as noted, is that the debtor will challenge the jurisdiction of the foreign court which made the original order. There is a wide body of law on point starting with a case referred to as "Morguard"[20]. In that case the Supreme Court of Canada court set out a "real and substantial connection" test – effectively asking, is there a real and substantive connection between the underlying case and the court/jurisdiction from which the order was obtained. That test has been interpreted and applied in hundreds of subsequent cases, and the "test" has ebbed and flowed over the years and across provincial jurisdictions. More recently, in "Van Breda", a clearer test for jurisdiction was set out by the Supreme Court of Canada – reducing the many factors used in previous court decisions effectively to four (4) factors: i) the domicile or residency of the defendant; ii) where the defendant carried on business; iii) where the tort was committed; or iv) if there is a contract, where it was made.[21] Of course since Van Breda", many courts have interpreted the ruling and as a result, what was a once clear test, has again been made less clear across the country. But at least notionally, the basic test remains: is there a real and substantive connection to the foreign court? If there is, a Canadian court will most likely recognize a foreign order and thereby make it enforceable in Canada.

V. CONCLUDING THOUGHT

Looking to come to Canada to pursue fraudulent transactions or enforcing a foreign judgment? Seek local counsel to advise on the available options – there are a number of options and each one has pros and cons.

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[19] In Ontario, Rule 20 of the Rules of Civil Procedure sets out the procedure for a summary judgment motion.
[20] Morguard Investments Ltd. v. De Savoye, [1990] S.C.J. No. 153. See also Beals v. Saldanha, [2003] 3 S.C.R. 416
[21] Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572