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Work programme

Proposal by the United States of America

Note by the Secretariat

The United States of America has submitted to the Secretariat a proposal to call a colloquium and thereafter commence work on the development of model legislative provisions on civil asset tracing and recovery in both common law and civil law systems. The proposal was received by the Secretariat on 13 May 2019. The text received by the Secretariat is reproduced as an annex to this note in the form in which it was received with minor editorial and formatting changes.



Annex

Future work of UNCITRAL – insolvency law

Proposal by the United States to call a colloquium and thereafter commence work on the development of model legislative provisions on civil asset tracing and recovery in both common law and civil law systems

The pending proposal

At the fifty-second session of Working Group V, the United States submitted a proposal for future work on the development of model legislative provisions on civil asset tracing and recovery.¹ That proposal outlined the importance of creating tools to enable insolvency representatives to obtain the maximum recovery for creditors, both in the context of insolvency and more generally, and particularly in the aftermath of commercial fraud or the fraudulent diversion of assets.²

We recognize that some jurisdictions primarily use the processes of the criminal law to attempt to recover assets that have been fraudulently acquired or diverted, and that some therefore view the process of recovery as primarily a matter for the criminal law. Nothing in our proposal is designed to impede the use of criminal laws to recover assets, but experience has shown, in our view, that it can be also useful to employ civil, non-governmental processes alongside those that may be available to government officials whose goals are often aimed at criminal prosecution, and not on the recovery of assets for creditors.

Our proposal also noted that, while some jurisdictions had in place a variety of judicial and legislative mechanisms to allow for asset tracing and recovery in the civil context, many did not.³ In our view, all jurisdictions would benefit from the development of a “toolbox” that offered options from which they could choose some or all of the elements to enact, either in the insolvency context or more generally.⁴

The proposal recommended that future work draw on existing mechanisms already available in some jurisdictions⁵ and recommended that the Working Group be given a mandate for preliminary exploration of the topic so that work could proceed alongside work on MSME insolvency issues “once the current projects on enterprise groups and insolvency-related judgments have been substantially concluded.”⁶

Commission mandate

UNCITRAL, at its fifty-first session, endorsed our proposal “in the area of insolvency” and instructed the Secretariat to “prepare a background study on the relevant issues, taking into account work undertaken by other organizations, in order to avoid duplication and overlap.”⁷

In the process of carrying out this mandate, information has been collected to facilitate the development of a background study, expanding on the examples submitted in support of the future work proposal. An inventory of these existing mechanisms is included at the annex to this proposal. Other institutions, such as United Nations Office of Drugs and Crime (UNODC) and the World Bank’s Stolen Asset Recovery Initiative (StAR) have examined some of these mechanisms in the criminal context,

¹ Proposal for future work submitted by the United States of America, A/CN.9/WG.V/WP.154.

² *Id.*, para. 1.

³ *Id.*, para. 3.

⁴ *Id.*

⁵ *Id.*, paras. 4–7.

⁶ *Id.*, para. 9.

⁷ *Official Records of the General Assembly, Seventy-third Session, Supplement No.17 (A/73/17)*, para. 253(d).

particularly with respect to corruption.⁸ Likewise, the International Institute for the Unification of Private Law (Unidroit) has examined some of these mechanisms in the context of its transnational civil procedure project with the American Law Institute (ALI).⁹

Colloquium

The United States believes that, to complete the background study, a colloquium of one to two days would be helpful to expand the examples of existing mechanisms in common law and civil law jurisdictions and to delineate the scope of work to develop a “toolbox” of options so as to avoid duplication and overlap with existing work being done to facilitate asset tracing and recovery in the context of criminal matters. The format of a colloquium would allow the Secretariat to collect this additional information efficiently because it could bring together relevant experts and other international organizations that do not necessarily attend the regular Working Group sessions. For example, given the existing work by other organizations, such as UNODC, StAR, and Unidroit, a colloquium would provide an opportunity to review this existing work, both to avoid duplication of effort and to consider the complementary roles of civil and criminal law. In obtaining input from these other sources, the Secretariat would be well-situated to focus its background study squarely on the development of tools for civil asset tracing and recovery, complementary to but not in the criminal context. Once completed, the background study’s inventory of existing legislative proposals can serve as the basis for the Working Group to begin work on model legislative provisions.

The United States therefore requests that the Commission: (a) authorize a colloquium to facilitate the completion of the background study mandated at its fifty-first session, with the goal of expanding the inventory of asset tracing and recovery tools to include examples from civil law as well as common law jurisdictions, and delineate the relationship between civil and criminal procedures; and (b) authorize the Working Group to begin work developing a “toolbox” of model legislative provisions in the context of insolvency proceedings.

⁸ See, e.g., *Digest of Asset Recovery Cases* (2015); *Guidelines for Efficient Recovery of Stolen Assets* (2017) (“Lausanne Guidelines”); *Asset Recovery Handbook* (2011); *The Puppet Masters: How the Corrupt Use Legal Structures To Hide Stolen Assets and What To Do About It* (2011).

⁹ See, e.g., *ALI/UNIDROIT Principles of Transnational Civil Procedure* (2004).

Annex

Inventory of existing judicial and legislative mechanisms for asset tracing and recovery

Background and rationale

The opening of insolvency proceedings may provide additional tools to facilitate the tracing and recovery of assets that would not be otherwise available, but many systems provide for asset-tracing remedies that are not dependent upon the formal opening of such proceedings. The inventory below includes remedies to facilitate the tracing and recovery of assets internationally. Many of these remedies emerged in response to the efforts of individuals and companies to transfer assets out of jurisdictions when their creditors sought to seize these assets. The context in which these remedies emerged has changed with the advent of the internet, which makes the ability to transfer assets quickly out of and into multiple jurisdictions far easier than it once was. This change highlights the need for tools to be available in multiple jurisdictions to facilitate tracing and recovery where such tools do not currently exist.

While the initiation of insolvency proceedings can allow the insolvency office holder or professional appointed to manage the company's affairs to have many of the same powers as the company's directors with regard to access to a company's information, a particular challenge for an insolvency representative is to quickly and economically undertake actions to recover the diverted assets to a particular jurisdiction for the benefit of creditors that may be in another jurisdiction. Having remedies in place in the jurisdiction to which the assets have been transferred can reduce the cost and time required to trace and recover such assets recovery, which is a key element in the successful operation of insolvency proceedings. These remedies enhance civil liability of corporate leaders and others, such as law firms and accounting firms, that facilitate these types of transfers. Even if criminal prosecution of such malfeasance remains a primary means of punishing and deterring this type of conduct, tools developed in the civil law reinforce criminal proceedings by imposing financial consequences for such malfeasance.

Overview of existing mechanisms

Cross-border requests for information related to insolvency proceedings currently takes place against the backdrop of The Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("The Hague Convention"). The Hague Convention provides for evidentiary information to be exchanged by jurisdictions through the issuance of letters rogatory. While this framework is a useful and appropriate tool for obtaining information in many situations, in the context of the tracing and recovery of assets, the procedures do not allow for expedited relief, thus permitting the information or assets to be transferred or dissipated before they can be recovered or an effective stay can be put in place.

The existing framework thus would benefit from supplemental or alternative measures, such as model legislative procedures identified below. The inventory reflects preliminary work prepared in the context of the Commission's mandate at its 51st session to "prepare a background study on the relevant issues" related to asset tracing and recovery in the insolvency context and more generally. It is designed to highlight the types of mechanisms that can inform the development of model legislative provisions.

The inventory below is divided into judicial measures and legislative measures and includes examples from both civil law and common law jurisdictions. It also notes where civil procedures may build on the existence of a criminal proceeding, but in a manner that does not encroach on the jurisdiction of the authorities conducting the criminal proceedings. A colloquium would be especially helpful to canvass the tools available in different judicial systems to develop a fuller picture of the possibilities for model legal tools.

Judicial mechanisms:

- Norwich Pharmacal application: action filed in court to obtain information, possessed by an innocent third party, such as a bank, that cannot otherwise readily be obtained from the third party and which is needed in order to trace and recover assets in the possession of a defendant or a third party that does not have a right to retain such assets, including unknown tortfeasors. Based on *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] A.C. 133 and recognized by common law courts in the British Commonwealth, Canada and in other jurisdictions. Types of information that a bank may be required to disclose include: (a) the signature card to the account; (b) the account opening information; (c) copies of deposits or wire transfer receipts; (d) copies of checks or outgoing wire transfer details; (e) the current balance in the account; and (f) emails or correspondence involving the account and other relevant information.
- Bankers Trust disclosure order: action filed in court with a financial institution in order to locate or trace assets to which the applicant asserts a proprietary claim through the financial institution's disclosure of confidential financial information between a bank and its customer, where strong evidence exists that any funds at issue were fraudulently obtained and a delay in disclosing the information may result in the funds being dissipated or transferred. Based on *Bankers Trust Co. v. Shapiro* (19080 B.N. 3116), and elaborated in *USC BTA Bank v. Fidelity Corporate Services Limited*, HCVAP 2910 635. A *Bankers Trust* order supersedes common law duties of confidentiality owed, for example, by a bank to its customers, and, in the context of confidential company ownership or banking information, it is possible to seek assistance of the courts in common law jurisdiction, both before and after the institution of any proceedings.
- Anton Piller order: an action filed in court to request the appointment of a custodian to take control of, protect, and preserve evidence as to which the applicant has demonstrated a strong prima facie case that a defendant or third party may destroy or dissipate. Based on *Anton Piller KG v. Manufacturing Processes LTD. And others*, 1975 A No. 6292 (UK Court of Appeal).
- Mareva injunction: action filed in court by creditor, before a judgment is issued, seeking a freeze order in that jurisdiction, in order to protect assets from being dissipated, when the creditor has demonstrated its right to paid from those assets. Based on *Mareva Compania Navier SA v. International Bulcarriers SA*, paras. 48–49, 1 All ER 213 (UK Court of Appeals).
- Worldwide freeze order: derived from the *Mareva* injunction procedure but operates on a worldwide basis, subject to balancing of various interests. Based on *Dadourian Group International Inc. and others v. Simms and others* [2006] 2 All ER 48 (UK Court of Appeals), it can be issued when a multifactor test is met and requires consideration of the “oppressiveness” of joining foreign parties to a proceeding; the availability of other options to preserve the assets; the balance of the interests of the applicant and any parties to be joined to the proceeding; the strength of the evidence provided regarding the risk of dissipation of the assets; also requires notice, where possible, to the defendant/respondent.
- “Gag and Seal” orders: used in conjunction with other orders listed above to obtain information about or to freeze assets, an action filed in court either (i) to direct the relevant court staff to prohibit public access to the application and order granting a disclosure, freezing or attachment order (“sealing order”); or (ii) to prohibit a third party, such as a bank, from disclosing to its customer that the bank was required by a court order to disclose information as to the bank account and where the funds that were placed into the account were transferred to and by whom (“gag order”). Such orders require strong evidence of the need for confidentiality but can be important tools to facilitate recovery by permitting

the pursuit of assets in or transferred to other jurisdictions before defendants can move them.

Legislative mechanisms:

- Bankers Book Evidence Act of 1879 (United Kingdom): allows a party to introduce a bank's records as prima facie evidence and is still used today in applications, hearings, and trials to simplify the evidentiary burden of proof required in asset tracing and recovery actions.
- 28 U.S.C. § 1782 (United States): allows an individual, or a foreign or international tribunal, to obtain evidence in the United States in order to facilitate initiating and conducting proceedings in a foreign jurisdiction, where the applicant can show a reasonable basis to believe that "information reasonably calculated to lead to admissible evidence in respect of pending or anticipated foreign litigation is located within the territory of a U.S. District Court in the form of documents or witness testimony."
- UNCITRAL Model Law on Cross-border Insolvency (UNCITRAL Model Law) (adopted in 43 jurisdictions): under the UNCITRAL Model Law and the case law developed in jurisdictions that have adopted it, foreign insolvency representatives are eligible to be recognized in foreign jurisdictions by following the Model Law's procedures. Once recognized as a "foreign representative," the insolvency representative has standing to maintain and initiate litigation in that state and, subject to the scope of the order recognizing the foreign representative, is able to obtain bank records, company ownership records, company ownership documents, and the turnover of assets.

Civil actions allowed as part of a criminal proceeding

Certain criminal investigations and other proceedings allow private individuals, with a requisite relationship to the criminal proceeding, to obtain information gathered during the criminal investigation. These types of mechanisms can facilitate the tracing and recovery of assets in the insolvency context, but must be administered in a way that does not interfere with the underlying criminal investigation. Several examples of successful mechanisms used in the insolvency context include:

- Participation as a "parte civile": In certain civil law jurisdictions, such as Switzerland and Belgium, victims, creditors, and insolvency representatives can participate in an ongoing criminal investigation, such as money-laundering, as a *parte civile*, and be granted access to secret financial information, and other asset recovery-related records obtained by a prosecutor, and seek orders to freeze assets or request their restitution, with the assistance of local investigating magistrates.
- Federal Rule of Criminal Procedure 6(e)(3)(E)(1) (United States): action filed in court to obtain information gathered during a grand jury proceeding for use in another judicial proceeding; it constitutes an express exception to a general prohibition of release of information gathered during a criminal investigation. Court administers production of information so as to protect criminal investigation.
- Information obtained through mutual legal assistance treaty request: in context of ongoing criminal investigation, request made via treaty to seek cooperation of another jurisdiction to obtain evidence relevant to the criminal investigation for use in related insolvency proceedings.