

Asset tracing and recovery in insolvency contexts: An UNCITRAL approach?

Héctor Sbert reports on the recent colloquium in Vienna aiming to kick off a process of debate and analysis among practitioners and academics of different jurisdictions



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Introduction

On 6 December 2019, the UNCITRAL held, in its Vienna Headquarters, a Colloquium on Asset Tracing and Recovery, under the auspices of its Working Group V (Insolvency Law). More than one hundred professionals dealing with asset tracing and recovery were in attendance (See *Paul Omar's report of the wider meeting in our News section of this edition*).

The purpose of the Colloquium was to kick off a process of debate and analysis among practitioners and academics of different jurisdictions.

They were to assist UNCITRAL in its decision as to whether or not to engage in the preparation of legal instruments dealing with asset tracing and recovery on an international level.

If yes, another important aspect to be determined was the angle that should be used in approaching the problem, in view of its complexity and its different ramifications.

After this first session, it is expected that the debate will continue in future meetings of the Working Group V, the next one being scheduled in New York during the course of 2020.

Asset tracing and recovery: what is it?

Asset tracing generally refers to a legal process of identifying and locating assets or their proceeds; *asset recovery* follows the asset tracing process and can be understood as the process of returning the asset to its legitimate claimant.¹

While the concepts of asset tracing and recovery are used with respect to fraud and misappropriation conducts, the available instruments and the existing challenges are the same, whether the element of fraud exists or not.

As such, asset tracing and recovery tools are used in different jurisdictional backgrounds in criminal, insolvency or civil proceedings (e.g. family and succession matters), as well as in the enforcement of judgements and arbitral awards, among others.

Challenges arising out of asset tracing and recovery

In spite of being essential for the actual effectiveness of the rule of law, there are great disparities among jurisdictions on the regulation of asset tracing and recovery.

Significantly, many jurisdictions lack the proper tools for asset tracing and recovery.

Also, existing regulations show a stark contrast among civil law and common law traditions on some aspects of asset tracing and recovery, like, e.g., the obligations of the parties, the role of the court, discovery and evidentiary means, third-party obligations, the availability and efficiency of sanctions for non-compliance, etc.²

As a consequence, the extraterritorial effect of some asset tracing and recovery measures may prove challenging, and tools used in some jurisdictions may oppose to basic legal principles in others.

Finally, the issues arising around *digital assets* and *digital tracing of assets* (two concepts that need to be differentiated) must also be addressed in our current era of explosive technological change. In this respect, blockchain technology presents huge barriers for tracing and recovering certain digital assets (ad ex., cryptocurrency).

The work of international organisations' asset tracing and recovery tools already existing in current international legal instruments

A highlight of the Colloquium was the opportunity to get to know the work being performed by several international organisations active in the different fields where asset tracing and recovery is relevant.

The presentations conducted made clear how the different tools of asset tracing and recovery existing in different contexts intertwine with each other in practice.

In fact, several of UNCITRAL's existing Model Laws already refer to measures that can be used in asset tracing and recovery in insolvency, arbitration and public procurement contexts, including its ongoing work on issues of beneficial ownership.

For example, Article 21 (1) (d) of the Model Law on Cross-Border Insolvency lists among possible relief available to a foreign representative, upon recognition of foreign proceedings, the examination of



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witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

Also, the publications of the *StAR (Stolen Assets Recovery Initiative)* - a partnership between the United Nations Office on Drugs and Crime (UNODC) and the World Bank Group - are of utmost significance in order to spread the knowledge around the best potential combined use of civil, criminal and insolvency asset tracing and recovery tools.

Those publications have such expressive titles as *The Asset Recovery Handbook* (2011), *The Puppet Masters: How the Corrupt Use Legal Structures to Hide Stolen Assets and What to Do About It* (2011), *Public Wrongs, and Private Action: Civil Lawsuits to Recover Stolen Assets* (2015) and *Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery* (2020),³ the latter being presented during the Colloquium as a means to exemplify how insolvency proceedings can be used for asset tracing and recovery purposes, in combination with civil and, especially, criminal actions.

In addition, for civil and commercial law matters, the work of UNIDROIT and of the Hague Conference on Private International Law (HccH) was also discussed during the Colloquium.

In particular, the *2001 Convention on International Interests in Mobile Equipment* (known as the “Cape Town Convention”) and its Protocols, covers asset tracing and recovery tools aimed at seizing the leased or financed equipment and arranging for its de-registration and export.

Also, the *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970* (the “Hague Evidence Convention”) allows for evidentiary information on asset tracing to be exchanged by jurisdictions through the issuance of letters rogatory. Practical experiences based on the use of

the Hague Evidence Convention were discussed during the Colloquium.

Furthermore, a number of European Union (EU) regulations enable taking evidence and other asset tracing and recovery measures in civil or commercial matters across EU Member States, i.e.,

- *Regulation (EC) No 1206/2001* on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters;
- *Regulation (EU) No 805/2004* creating a European Enforcement Order for uncontested claims;
- *Regulation (EC) No 1896/2006* creating a European order for payment procedure;
- *Regulation (EC) No 861/2007* establishing a European Small Claims Procedure; and
- *Regulation (EU) No 655/2014* establishing a European Account Preservation Order.

However, a uniform approach in the EU-wide application of the measures foreseen in such instruments remains a goal seemingly difficult to attain in some cases.

All in all, the Colloquium offered a comprehensive panorama of instruments currently available and of the common challenges faced in several jurisdictions, particularly in cross-border matters.

The Colloquium also gave the chance to discuss potential ways to move forward in the legal treatment of the topic at an international level with the support of UNCITRAL.

The way forward

The Colloquium finished with a general encouragement by attendees to UNCITRAL to continue its analysis of the topic, in view of undertaking future work in the field of civil asset tracing and recovery.

An electronic survey was



answered by attendees at the end of the Colloquium, whereby the majority of them considered that possible work should start in the area of insolvency, and should subsequently be expanded to other areas, like those addressed during the Colloquium.

It will be interesting to observe future developments and specific activities performed in the near future, to be most likely announced at the next meeting of UNCITRAL's Working Group V in New York in July 2020. ■

Footnotes:

- 1 See “Uncitral Colloquium on Civil Asset Tracing and Recovery (Vienna 6 December 2019)”, *Concept Note*, p. 2, available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/concept_note_20191127.pdf, last accessed 20 February 2020.
- 2 *Id.*, p. 4
- 3 Generally available at https://star.worldbank.org/publications?keys=&sort_by=score&sort_order=D ESC&items_per_page=10, last accessed on 20 February 2020.



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