

**UNCITRAL COLLOQUIUM
ON CIVIL ASSET TRACING AND RECOVERY
(Vienna, 6 December 2019)**

CONCEPT NOTE

I. Mandate for holding the Colloquium

1. The Colloquium is being held pursuant to the request of the Commission at its fifty-second session, in 2019, following the consideration of proposals submitted by the United States of America.¹ Based on the observation that many jurisdictions currently lack adequate tools for asset tracing and recovery and that jurisdictions that do have tools in place may not have uniform procedures that can easily be accessed by foreign parties, the proposals suggested that model legislative provisions should be developed by UNCITRAL that could be enacted as domestic law in jurisdictions that have an interest in enhancing cross-border cooperation in this area. It was suggested that this work would draw inspiration from a variety of procedures already available in some jurisdictions.
2. In giving the mandate to the Secretariat to hold the Colloquium, in cooperation with other relevant international organizations, the Commission requested the Secretariat to further clarify and refine various aspects of the Commission's possible work in this area for consideration by the Commission at its fifty-third session, in 2020. The Commission was of the view that the Colloquium should consider the elements of a possible toolkit on civil asset tracing and recovery and collect more information on civil law jurisdictions practices. The Colloquium should also: (a) examine both criminal and civil law tracing and recovery with a view to better delineating the topic while benefitting from available tools; (b) consider tools developed for insolvency law and for other areas of law; and (c) discuss proposed asset tracing and recovery tools and other international instruments.²
3. By shedding light on those issues, the Colloquium would complement the research work conducted by the Secretariat thus far. The conclusions of the Colloquium would be transmitted to the Commission in a report, which should allow the Commission to conclude whether work on civil asset tracing and recovery is feasible and desirable by UNCITRAL and if so, the form, scope and modalities of that work.³

II. Issues for the Colloquium

A. General overview of legal issues arising from asset tracing and recovery

4. Asset tracing and recovery takes place in various contexts, most commonly in criminal law proceedings, insolvency proceedings, tax law, family law, the law of succession, mergers and acquisitions and enforcement of judgments and arbitral awards in the context of commercial

¹ A/CN.9/WG.V/WP.154 and A/CN.9/996. For deliberations of the Commission on those proposals in 2018 and 2019, see A/73/17, paras. 250 and 253(d), and A/74/17, paras. 200-203 and 221(a).

² A/74/17, para. 203.

³ E.g., whether work should be limited to insolvency proceedings from the outset or throughout the project, whether model legislative provisions or another type of text should be prepared and whether the work should be referred to a working group or undertaken by the Secretariat in close coordination with experts. The Commission, at its forty-sixth session, in 2013, agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (1) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (2) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (3) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or unification of the international trade law; and (4) whether duplication might arise with work being undertaken by other international organizations (A/68/17, paras. 303-304).

dispute settlement. Effectiveness of asset tracing and recovery has a direct impact not only on those areas of law and contexts. It contributes more broadly to the objectives of the rule of law, good governance and sustainable development.⁴

5. While there is no common definition of asset tracing and recovery, asset tracing generally refers to a legal process of identifying and locating misappropriated 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. “Assets” being traced and recovered may encompass anything of value to its legitimate claimant.
6. Irrespective of the context in which asset tracing and recovery take place, common challenges may arise, in particular because of the lack of the general enabling environment, because of sector-specific regulations (e.g., bank secrecy laws) and because of open issues in the legal treatment of certain aspects in asset tracing and recovery (e.g., third-party claims, intermingled public and private claims, the rights of subsequent transferees and third-party financing). Additional challenges arise in the cross-border context because of conflict of laws, jurisdictional issues and differences in procedural rules and legal traditions. Extraterritorial effect of some asset tracing and recovery measures may be questioned, and measures widely used in some jurisdictions to prevent illicit transfer of assets (e.g., *ex parte* procedures and “gag and seal” orders) may create tension with fundamental norms in other jurisdictions (such as those related to open justice, due process and human rights).
7. Although digital means for asset tracing and recovery, modern investigative methods and forensic technology facilitate tracing assets, including across jurisdictions, additional challenges arise from their use. They include those related to identity management, electronic evidence and personal data and other sensitive data processing. In addition, the involvement of intermediaries (e.g., e-platform operators or cloud service providers) that may be in possession of relevant information or assets being traced adds another layer of complexity. Decentralized, anonymous, autonomous and irrevocable processes involved in distributed ledger technology pose unique challenges for tracing and recovering certain digital assets (e.g., cryptocurrency).
8. Participants of the colloquium are invited to address those and other challenges commonly encountered in domestic and cross-border asset tracing and recovery.

B. Perspectives of international organizations

9. Asset tracing and recovery is prominently featured in international and regional instruments addressing corruption, bribery, transnational organized crime and cyber-crime, e.g.:
 - a. **The United Nations Convention against Corruption (UNCAC)**, an almost universal treaty (186 States parties), covering corruption in both public and private sectors,⁵ explicitly recognizes asset recovery as a fundamental principle of the Convention (article 51) and provides for mechanisms for asset recovery, not limiting them to criminal law measures;⁶
 - b. **The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International**

⁴ See e.g., SDG target 16.4: “By 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime.” (<https://sustainabledevelopment.un.org/sdg16>).

⁵ E.g., bribery in the private sector is addressed in article 21 and embezzlement of property in the private sector is addressed in article 22 of UNCAC.

⁶ See chapter V of UNCAC. Article 53 of UNCAC concerns measures for direct recovery of property through civil action.

- Business Transactions** expressly prohibits refusal of mutual legal assistance on the ground of bank secrecy (article 9(3));⁷
- c. A similar provision may be found in the **Inter-American Convention against Corruption**, adopted by the Organization of American States in 1996, which also sets out a number of preventive measures⁸ and obliges States parties to provide the broadest assistance possible with the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offences under the Convention;
 - d. **The African Union Convention on Preventing and Combating Corruption**, adopted in July 2003, touches upon bribery in private sector (article 11) and highlights the necessity for legislative measures for asset tracing and recovery (article 16). It contains provisions that guarantee access to information (article 9) and the participation of civil society and the media in the monitoring process (article 12);
 - e. **The Convention on Cybercrime** of the Council of Europe (the Budapest Convention) refers to measures aimed at ensuring that data is not altered, removed or deleted while a request for mutual assistance between States to obtain the data is pending.⁹
10. Of relevance in that respect are the publications of the StAR initiative (the partnership between UNODC and the World Bank Group),¹⁰ including its latest publication “*Going for Broke – Insolvency Tools to Support Cross-Border Asset Recovery*”, that will be presented at the Colloquium.
 11. In civil and commercial law contexts, work of the International Institute for the Unification of Private Law (Unidroit), the Hague Conference on Private International Law (HccH) and UNCITRAL is of relevance to some extent, in particular:
 - a. The 2001 Convention on International Interests in Mobile Equipment (the Cape Town Convention) and its Protocols contain asset tracing and recovery tools aimed at seizing the leased or financed equipment and arranging for its de-registration and export.¹¹ In addition, Unidroit co-authored the Principles of Transnational Civil Procedure (2004) aimed at reconciling differences among various national rules of civil procedure. Its triennial work programme envisages work on principles of effective enforcement;
 - b. 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 to be exchanged by jurisdictions through the issuance of letters rogatory;

⁷ OECD implements various initiatives in pursuance of the objectives of that Convention, e.g., the Anti-Corruption Initiative for Asia-Pacific is implemented with the Asian Development Bank to enhance the cooperation on mutual legal assistance, extradition, and return of the proceeds of corruption in that region.

⁸ Some of them are relevant to asset tracing and recovery in the private sector, such as mechanisms aimed at ensuring that companies and associations maintain books and records which accurately reflect the acquisition and disposition of assets and have sufficient internal accounting controls to enable their officers to detect corrupt acts.

⁹ Those measures include expedited preservation of stored computer data, expedited preservation and partial disclosure of traffic data, production order, search and seizure of computer data, real-time collection of traffic data, and interception of content data (articles 16–21).

¹⁰ E.g., 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); and *Public Wrongs, and Private Action: Civil Lawsuits to Recover Stolen Assets* (2015).

¹¹ E.g., article 13 of the Cape Town Convention deals with relief pending final determination and refers in that context to such remedies as preservation of the object and its value, possession, control or custody of the object, immobilisation of the object, and lease or, management of the object and the income therefrom. Judicial and extra-judicial de-registration and export for repossession and sale of aircraft assets are also envisaged (see article 13 of the Cape Town Convention and articles XIII(2) and IX of the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Aircraft Protocol)). Articles X(6)(b) and XIII(4) of the Aircraft Protocol contain an obligation of the competent authority to cooperate expeditiously with and assist the creditor in the use of those remedies in conformity with the applicable aviation safety laws and regulations.

- c. UNCITRAL various instruments refer to measures that can be used in asset tracing and recovery.¹² Of relevance is also its ongoing work on electronic identity management and on formation of a limited liability organization touching, among others, upon issues of beneficial ownership;
 - d. 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,¹³ although excluding certain areas from their scope, such as insolvency proceedings.
12. Participants at the Colloquium are invited to assess whether work by international and regional organizations sufficiently addresses the needs of the professional community in **civil asset tracing and recovery**. In particular, they are invited to assess the extent to which the private sector corruption and civil actions for recovery of proceeds of corruption have been addressed through mechanisms for implementation of UNCAC and other relevant treaties, and how criminal and civil law measures for asset tracing and recovery complement each other. They are also invited to share their experience with the use of the Hague Evidence Convention and measures and tools found in other international instruments.

C. General overview and comparison of asset tracing and recovery tools used in different jurisdictions and in different contexts

13. Available tools for asset tracing and recovery are broadly divided into judicial measures and legislative measures.¹⁴ Regulated by procedural laws, they differ across jurisdictions, in particular civil law and common law traditions, on such issues as: (a) discovery, evidentiary means and standards; (b) the obligations of the parties and the role of the court; (c) the availability, efficiency and proportionality of sanctions for non-compliance; (d) the territorial effect of available relief; and (e) the interplay between criminal and civil law proceedings. In addition, some tools may be appropriate for use only in a specific context (e.g., criminal law measures).
14. Participants at the Colloquium are invited to identify: (a) the differences and similarities in tools used in asset tracing and recovery in different jurisdictions and in different contexts (e.g., insolvency proceedings, arbitral proceedings, family law and criminal law); and (b) tools that are easily transferrable across jurisdictions and those that are not with the underlying reasons and measures to overcome difficulties with their use globally.

¹² E.g., article 21 (1) (d) of the Model Law on Cross-Border Insolvency lists among possible relief available to a foreign representative upon recognition of a foreign proceeding, examination of witnesses, the taking evidence or the delivery of information concerning the debtor's assets, affair, rights, obligations or liability; article 20 of the same Model Law provides for automatic stay of all actions with respect to debtor's assets upon recognition of a foreign proceeding; other UNCITRAL insolvency texts are relevant as well, e.g., in parts addressing protection and preservation of the insolvency estate, avoidance provisions and actions against directors and other persons; the UNCITRAL Model Law on International Commercial Arbitration envisages provisional measures in the context of arbitral proceedings and enforcement of arbitral awards; security interests and business registry texts allow to trace certain type of information; and the Model Law on Public Procurement envisages measures in relation to fraud, misrepresentation, abnormally low tenders, corruption, unfair competitive advantage and conflicts of interest.

¹³ E.g., Regulation (EC) No 1206/2001 enables taking evidence in civil or commercial matters in the EU member States; Regulation (EU) No 805/2004 provides a procedural tool to creditors for enforcing uncontested cross-border claims without the need of any intermediate proceedings, such as exequatur; Regulation (EC) No 1896/2006 allows creditors to recover their uncontested civil and commercial claims according to a uniform procedure that operates on the basis of standard forms; Regulation (EC) No 861/2007 provides for a simplified procedure for recognition and enforcement of civil and commercial claims not exceeding €5,000 across EU; and Regulation (EU) No 655/2014 provides procedures for seeking a court order for freezing funds in banks accounts across EU.

¹⁴ See e.g., measures listed in A/CN.9/WG.V/WP.154 and A/CN.9/996.