Going for Broke: Insolvency tools to Support Cross-Border Asset Recovery in Corruption Cases
Measures for direct recovery of property

Each State Party shall:

- permit another to initiate civil actions to establish ownership of stolen assets
- permit courts to order compensation or damages for Party harmed by convention offences
Why civil actions? Limitations of other avenues

For criminal confiscation, the State must:

- obtain a criminal conviction (beyond reasonable doubt),
- link assets to the crime (except for value confiscation)
- use MLA (for investigations and enforcement of orders)
- Problems in case of death or absence of defendant

Non Conviction Based Confiscation is not always available.

Administrative Confiscation may not be recognized in foreign jurisdictions.

See figure 3-10 of StAR-OECD publication “Few and Far”: in 2010-2012, 19,1 Millions of dollars recovered using criminal confiscation, and 16 Millions using private lawsuits.
Advantages of insolvency actions

- In grand corruption cases, companies or businesses are often involved by holding assets, and conducting fraudulent transactions.

- Having insolvency proceedings commenced against these entities is frequently possible when they are insolvent, or in certain jurisdictions, for “just and equitable grounds”.

- In most jurisdictions, insolvency or winding up processes prevent dissipation or transfers of assets, and start with the appointment of an “insolvency representative” who manages the estate and its assets.

- The insolvency representative has access to all relevant documentation, accounting books and records and can audit all financial statements in case of fraudulent activity.

- Investigative measures requested by the insolvency representative can be authorized by courts, help find evidence of corrupt activities, and justify legal claims to recover assets.

- Claims can involve “piercing the corporate veil”, liability actions against Directors, Corporate officers, Agents and Third Party facilitators, breach of duty, transactions at undervalue, fraudulent trading.
New StAR publication: “Going for broke”

- Provide guidance to asset recovery practitioners and policy makers on how to use insolvency and private lawsuits to recover stolen assets in the context of UNCAC offences.

- Identify challenges and best practices,

- Step by Step approach

- Case examples show that it is a credible and effective avenue (ex: Maluf case, Tunisia..)
Steps to contemplate for a Civil Action

- Determine whether a corporate vehicle was used to hold corrupt assets or conduct money laundering of corrupt proceeds
- Decide where to file a case and request the appointment of an insolvency representative
- Study what kind of investigative measures and legal actions are available
- Collect evidence and secure assets
- Use international instruments to enforce investigative measures or freezing
- Estimate amounts to recover
- Enforce and collect judgments in another country
Steps for insolvency action to recover assets: Examples of Challenges and practices

- Which defendant? the corrupt actor as well as those who assisted in stealing, concealing or laundering the proceeds, and intermediaries and enablers.

- Collecting evidence and freeze assets: pre-trial disclosure, searches, seizure, freezing orders can be used in civil procedures, and sometimes coordinated with prosecutors or LEA.

- Ownership claim: not only on stolen or embezzled assets, but also on bribes paid to an official (Theory of “constructive trust”, See “Attorney General of Hong Kong”).

- Compensation claims and quantification of damages: compensation for damages is not based on specific assets, but often on the amount of damages and the harm caused by of corrupt activities.

- Invalidity of contracts and contractual remedies are sometimes a good alternative: to claiming ownership or damages.
For further information please consult: www.worldbank.org/publication/going-for-broke

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