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Civil asset-tracing and recovery in the insolvency context: New Initiatives by UNCITRAL

In this special IT&DA Column feature, Diana Rivera Andrade writes on the new initiatives by UNCITRAL to facilitate asset-tracing and recovery



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Within the agenda of the United Nations Commission on International Trade Law (UNCITRAL), the topic of asset-tracing and recovery (ATR) was not originally included. It was at Working Group V's 52nd session held in November 2017¹ that the United States proposed the development of a set of legislative model provisions for instruments facilitating asset tracing and recovery.

In order to analyse its origin and inclusion in the work programme, the Commission at its 52nd secretariat session (July 2019) instructed that priority be given to the organization of a colloquium² in December 2019 to examine aspects of the topic proposed by the United States. As a result of the Colloquium and the Commission's decision, during the Working Group V's 59th session in December 2021, the Secretariat presented the first working paper.³

Why Working Group V?

As to why the task approved by the Commission was entrusted to Working Group V, this is because the proposal was presented in the work programme of Working Group V and because the tools for ATR provided in the Legislative Guide on Cross-Border Insolvency as well as in the different model laws drafted by the working group⁴ can be used in legal fields other than insolvency. Moreover, to the extent that several countries have adopted the Model Law, there are already cross-border measures that facilitate the tracing and recovery.⁵

Determining appropriate measures in the Anglo-American and civil law systems

While in the Anglo-American system, there are discovery mechanisms such as interrogatories, document requests and depositions, to

compel parties and third parties to provide information and preserve evidence without court involvement, in civil law jurisdictions, under the general principle that no party is obliged to assist the opponent in supporting its case, parties cannot be compelled to be subject to information and discovery obligations in the pre-trial phase without the court's involvement. Thus, these legal systems differ as to the measures available under the ATR and therefore UNCITRAL's work will have to strike a balance between the creditor's interest in obtaining the most effective remedy quickly and the debtor's rights to privacy and other protections.

The background to asset-tracing and recovery⁶

The direct antecedent to the work being developed by Working Group V, as pointed out in the

United States proposal referred to above and discussed at the colloquium, is the issue of commercial fraud, which was raised during the Commission's 36th session in April 2003. This is defined as “*commercial conduct that seriously deviates from the acceptable range of commercial norms, using legitimate commercial forms illegitimately*”,⁷ and therefore it will be the degree of transgression of accepted commercial rules that will determine the existence of commercial fraud. It should be noted that according to PwC's latest Global Economic Crime and Fraud Survey report,⁸ 56% of companies globally are victims of commercial fraud or economic crime and the main risks that are materialised are behavioural,⁹ cyberspace¹⁰ and platform¹¹ related.

The relationship between commercial fraud and insolvency

The relationship can be summed up in this quote:

“Insolvency can be used both to hide the proceeds of commercial fraud and to commit commercial fraud. In the former situation, the fraudster declares itself insolvent in one jurisdiction but the proceeds of commercial fraud are hidden in various other jurisdictions or fraudulently transferred to other related persons... In the latter situation, the assets of a company that is about to declare itself insolvent are transferred or hidden, often to other jurisdictions, prior to the petition to commence insolvency proceedings and under the guise of payments made in the ordinary course of business in order to defraud creditors.”¹²

Why a civil law approach to ATR?

Both the Commission and Working Group V, at the time of agreeing to work on the issue of asset-tracing and recovery, insisted that the text to be accepted should be differentiated and separated from criminal and



even administrative matters, so as not to overlap with other regulations. In addition, the choice of the civil law approach is due to the fact that: “*Civil actions have certain advantages over criminal actions under some circumstances, including a different and usually lower standard of proof, greater speed in pursuing assets, and more flexibility in pursuing options*”.¹³ Although these civil law measures will usually coexist or precede a criminal action, they must be coordinated or harmonized, so as not to prejudice the payment possibilities of those affected.

The biggest challenges in ATR¹⁴

The greatest difficulties are in:

- obtaining information about the assets;
- obtaining control over digital assets;
- obtaining redress prior to the commencement of legal proceedings; and
- obtaining jurisdiction over the party in possession of the property.

Filling a major legal gap: Locating and recovering property in civil procedures

Issues that will need resolving by the work of international institutions will include mechanisms for:

- cross-border recognition of judicial decisions;
- cross-border recognition of the enforcement powers of receivers and liquidators to locate and recover assets; and
- addressing delays and other issues arising from the use of letters rogatory.

The relationship between ATR and insolvency

When a debtor approaches insolvency or becomes insolvent, creditors and stakeholders have strong incentives to ensure that the insolvency estate achieves the highest possible value to guarantee a better outcome for those affected. Therefore, one of the main objectives of insolvency is to preserve, protect, and maximize the value of the insolvency estate. This objective is



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[The purpose of] ATR is to identify, gather, and recover the greatest number of assets as quickly and effectively as possible

”

favoured by ATR since its purpose is to identify, gather, and recover the greatest number of assets as quickly and effectively as possible.¹⁵

Defining ATR

The term “asset-tracing” generally refers to a process of identifying and locating assets or their proceeds, while “asset recovery” follows the asset tracing process and can be understood as the process of returning the assets or their proceeds to their legitimate claimant(s). “Assets” being traced and recovered may encompass anything of value to its legitimate claimant(s).¹⁶

The difference between the two terms is explained as follows: “Following is the process of following the same asset as its moves from hand to hand. Tracing is the process of identifying a new

asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset in the hands of the new owner or to trace its value into the new asset in the hands of the same owner. Asset recovery [is the] process that follows the asset tracing in order to recover and return the assets of the debtor to the insolvency estate.”¹⁷

ATR tools and types in insolvency

Within the documents drafted by Working Group V, the following classification is found:

Domestic Context

- i. Preventive measures: To maintain regular accounting of businesses or rules of managerial liability in the event of non-compliance with the going concern assumption.

- ii. Provisional measures: Measures that could be taken between the application and admission, either because they generate immediate effects such as the inability to dispose of assets, or because the court so decides upon request of an interested party. These measures must be accompanied by safeguards such as guarantees or the possibility that affected parties can challenge the decision.
- iii. Measures upon commencement: Suspension of individual proceedings, execution of guarantees, termination of contracts, inability to dispose of assets without court approval, and interception of debtor/management communications, among others.
- iv. Obligations of the debtor and third parties: To provide all information about the company in an accurate, reliable, and complete manner.
- v. Powers of the insolvency representative: Request information from banks and public records.
- vi. Identification and preservation of the insolvency estate assets: The composition of the insolvency estate and preparation of an inventory.
- vii. Avoidance: Determination of the suspect period, voidable transactions, authority to file voidable actions, and consequences of avoidance.
- viii. Actions against directors, shareholders, and other persons that exerted control over the company.
- ix. Substantive consolidation.
- x. Procedural coordination and consolidation.

Cross-border context

The model cross-border insolvency law incorporates different measures, including:

- i. Access to the tools of the ATR in a foreign state, regardless of the recognition of the foreign process or foreign judgment.
- ii. Recognition of the foreign process or foreign judgment according to the model laws or

- even through an exequatur.
- iii. Grantable measures:
Provisional measures based on the request for recognition and grantable measures following recognition.
- iv. Direct communication and cooperation between courts and insolvency representatives.

General tool types

The following are considered general tools available for ATR:

1. Records;
2. Public archives;
3. Obligation to communicate information;
4. Evidence gathering in the context of the civil process; and
5. Provisional measures to protect assets and orders.

Digital ATR measures

As noted in WP.186, these aspects are still under development, but can initially refer to:

- (i) data as assets to be located and recovered;

- (ii) data as evidence;
- (iii) data as sources of information to recover physical or digital assets;
- (iv) data for notification practices related to ATR measures; and
- (v) data used to prevent fraud or for other reasons that make ATR necessary.

In each of these contexts, the role of artificial intelligence and Internet of Things (IoT) intermediaries and developers is discussed.

Conclusion

In conclusion, we believe that the work being done by Working Group V is very useful, as it will facilitate insolvency purposes through providing either a model law or a set of recommendations to improve the tools for ATR, including in relation to digital assets. These tools can obviously also be used in other fields of law. ■

Footnotes:

- 1 A/CN.9/WG.V/WP.154. All UNCITRAL documents referred to can be sourced at: <www.uncitral.un.org>.
- 2 A/CN.9/1008. The colloquium was called for the end of December 2019 at the end of Working Group V's 56th Session.
- 3 A/CN.9/WG.V/WP.175.
- 4 UNCITRAL Model Law on Cross-Border Insolvency (1997), UNCITRAL Model Law on Group Insolvency (2019) and UNCITRAL Model Law on the Recognition and Enforcement of Judgments in Insolvency Cases (2018).
- 5 A/CN.9/WG.V/WP.182.
- 6 A/CN.9/540.
- 7 A/CN.9/540.
- 8 See: www.pwc.com/co/es/publicaciones/cuestionario-crimen-fraude-economico/descargas.html?%Xhj=eqo1pbn
- 9 The way in which a company and its personnel conduct themselves.
- 10 Hacking, cyber-attacks, identity fraud, information theft, among others.
- 11 This refers to the software platform that incorporates payment facilitation into its offering, which faces three unique and complex types of risks, as its business is composed of three distinct parties: the platform itself, the vendors or service providers that accept payments through the platform, and the cardholders who pay those vendors or service providers. See: <<https://stripe.com/es-us/guides/introduction-to-risk-management>>.
- 12 A/CN.9/540, IV (The commercial law dimension of commercial fraud, item J, numeral 61).
- 13 A/CN.9/540.
- 14 Survey cited in the Colloquium working papers and in WP175/WP178 and WP182.
- 15 A/CN.9/WG.V/WP.186.
- 16 A/CN.9/1008; WP.186.
- 17 A/CN.9/WG.V/WP.178.
- 18 A/CN.9/WP.175/WP.178 and WP.182.

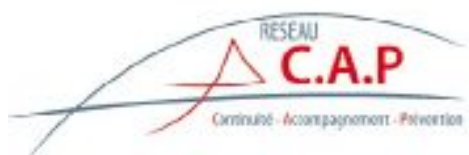


The work being done by Working Group V is very useful... including in relation to digital assets



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