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Proposal for future work submitted by the United States of America

Note by the Secretariat

The Government of the United States of America has submitted to the Secretariat of the United Nations Commission on International Trade Law (UNCITRAL) the following proposal for the development of model legislative provisions on civil asset tracing and recovery. The text of the proposal is reproduced as an annex to this note in the form in which it was received by the Secretariat, with formatting changes.



Annex

Proposal by the United States for the development of model legislative provisions on civil asset tracing and recovery

1. In the context of insolvency, the ability to trace and recover assets that have been moved across borders can be vital for enabling insolvency representatives to obtain the maximum possible recovery for creditors. This ability is particularly important when addressing commercial fraud, which is a significant concern both in the context of insolvency and more generally. The UNCITRAL Secretariat has previously identified commercial fraud as a “serious international problem” that causes “direct losses of billions” of dollars per year.¹ As cross-border commerce increases, so does the ability of the perpetrators of fraud to divert funds to multiple jurisdictions in an attempt to conceal the location of the assets.

2. Several past and ongoing UNCITRAL projects are relevant to these issues. The ongoing work on recognition and enforcement of insolvency-related judgments will significantly aid insolvency representatives trying to obtain control of assets in different jurisdictions, if they know where the assets are located. Similarly, UNCITRAL has previously done work on recognizing and preventing commercial fraud (i.e., a list of indicators of commercial fraud). However, UNCITRAL has not yet done any work to directly facilitate the ability of insolvency representatives and others to trace and recover assets that have been moved across borders, whether fraudulently or otherwise.

3. Currently, many jurisdictions lack adequate tools for asset tracing and recovery, and jurisdictions that do have tools in place may not have uniform procedures that can easily be accessed by foreign parties. To facilitate the broader availability of such tools, we propose that Working Group V develop model legislative provisions that could be enacted as domestic law in jurisdictions that have an interest in enhancing cross-border cooperation in this area. Rather than developing a complete model law that would seek to fully harmonize domestic law on these issues, a “toolbox” approach may be appropriate — i.e., providing a set of options from which jurisdictions could choose some or all elements to enact.

4. In developing such a toolbox, Working Group V could draw inspiration from a variety of procedures that are already available in some jurisdictions. Some jurisdictions have tools in place that facilitate parties’ efforts to seek information or documents to determine who a wrongdoer is. Other tools facilitate parties’ efforts to seek information or documents about the location or nature of an asset. A third group of tools enable the preservation of an asset while its proper destination is determined.

5. As one example, the United States has a measure in place (28 U.S.C. § 1782) that enables courts to provide assistance to foreign tribunals and to litigants before such tribunals. This statute allows parties participating in (or with an interest in) proceedings before a foreign or international tribunal to petition a United States court to compel the production of documents or testimony for use in that foreign or international proceeding.

6. We understand that some other jurisdictions also have a wide variety of tools available that should be considered by the Working Group. For example:

- Norwich Pharmacal orders allow victims of wrongdoing to obtain information or documents from third parties who have become involved in or facilitated the wrongdoing (even innocently) in order to determine what has happened to certain assets. Such orders can be used to determine whether fraud occurred or whether a cause of actions exists, to identify a proper defendant for a claim, and to find information that may need to be preserved. In granting these orders,

¹ See, e.g., [A/CN.9/540](#) (2003) at paras. 5–6.

courts take into account factors such as whether the information sought can be obtained through other means and whether the third party can be indemnified for costs incurred due to the order.

- Bankers Trust orders similarly compel third party banks to disclose information. However, for these orders, the applicant does not have to demonstrate that the bank was involved in wrongdoing. Rather, the applicant must show that it is tracing assets that were taken from it by fraud and that passed through the bank, and that the information might lead to the location and preservation of the assets.
- The Bankers' Book Evidence Act enables courts to order disclosure of information related to a bank account belonging to a defendant in civil or criminal proceedings. The applicant must show that the account likely has entries that are material to the issues in the litigation and that the information sought will be evidence at trial.
- Mareva injunctions are issued to freeze a defendant's assets within a jurisdiction pending determination of a claim, in particular to prevent the defendant from transferring the assets out of the jurisdiction after the claim is filed. The applicant must have a cause of action against the defendant and must show a risk of dissipation of assets. A Mareva injunction does not give the applicant any priority over other claimants or any proprietary interest in the assets, and the applicant may be required to provide security.

7. These tools and others available in various jurisdictions enable the tracing and recovery of assets and thus facilitate their eventual turnover for the benefit of the victims of commercial fraud or other creditors.

8. Given the particular relevance of these tools to the insolvency context — i.e., enabling insolvency representatives to recover diverted assets for the benefit of the insolvency estate — this topic would be an appropriate area for Working Group V to address. The Working Group could develop a set of model legislative provisions containing a menu of options from which states could select and enact tools that would facilitate the tracing and recovery of assets.

9. We therefore suggest that the Working Group request the Commission to grant a mandate to begin preliminary exploration of this 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.
