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Report of the Colloquium on Civil Asset Tracing and Recovery (Vienna, 6 December 2019)

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I. Introduction

1. The Colloquium on Civil Asset Tracing and Recovery was held at the Vienna International Centre, on 6 December 2019, after the fifty-sixth session of Working Group V (Insolvency Law).[1] It was organized by the UNCITRAL secretariat, in cooperation with other relevant international organizations, pursuant to the request of the Commission at its fifty-second session, in 2019.[2] At that session, following the consideration of proposals submitted by the United States,[3] the Commission agreed on the importance of the topic and on the usefulness of providing further guidance for States to equip themselves with effective tools for asset recovery. At the same time, it was considered essential to delineate carefully the scope and nature of the work that the Commission could undertake on that topic, and to avoid interference with existing instruments, for instance, those relating to criminal law.[4] For that purpose, the Commission requested the Secretariat to organize a colloquium, in cooperation with other relevant international organizations, to further clarify and refine various aspects of the Commission's possible work in asset tracing and recovery, for consideration by the Commission at its fifty-third session, in 2020. The Colloquium was expected to: (a) examine both criminal and civil law tracing and recovery, with a view to better delineating the topic while benefitting from the 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.[5]

2. The Colloquium was attended by more than 100 participants from 45 jurisdictions, of which approximately 10 jurisdictions represented the common law tradition and 35 jurisdictions represented the civil law tradition. Most participating experts specialized in asset tracing and recovery in a particular field of law. Due to the United Nations liquidity crisis, it was not possible to fulfil requests for financial assistance received by the Secretariat from experts from underrepresented regions. This measure did not allow the UNCITRAL secretariat to achieve as broad a geographical representation of experts as desired. Skype for Business was enabled for those who wished to participate remotely. In addition, an electronic audience interaction platform was available for registered participants to submit questions and comments and to participate in polls.[6]

3. The Colloquium was structured around four main themes: (a) main legal issues arising from asset tracing and recovery irrespective of the field of law where asset tracing and recovery took place; (b) whether work by international and regional organizations sufficiently addressed the needs of the professional community in civil asset tracing and recovery and if not, why not; (c) the differences and similarities in

[1] The web page of the Colloquium may be found at https://uncitral.un.org/en/assettracing.

[2] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 203 and 221(a))

[3] See A/CN.9/WG.V/WP.154 and A/CN.9/996. 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. For deliberations of the Commission on those proposals in 2018 and 2019, see *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), paras. 250 and 253(d), and ibid., *Seventy-fourth Session, Supplement No. 17* (A/74/17), paras. 200–203 and 221(a).

[4] *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 17* (A/74/17), para. 202.

[5] Ibid., para. 203.

[6] During the polls, the following questions were raised: (a) what is the biggest challenge in asset tracing and recovery? (b) what is the main legal gap that international organizations can fill in in order to facilitate civil asset tracing and recovery? (c) which asset tracing and recovery tool is the most effective across borders? (d) should UNCITRAL undertake work in the area of asset tracing and recovery? and (e) which other asset tracing and recovery issues not addressed in the Colloquium should be considered?

tools used in asset tracing and recovery in different jurisdictions and in different contexts, whether any of them were easily transposable across jurisdictions and if not, the underlying reasons and measures to overcome difficulties with their universal use; and (d) whether UNCITRAL work on civil asset tracing and recovery was feasible and desirable and if so, the form and scope that such work should take. In a concept note prepared prior to the Colloquium,[7] the UNCITRAL secretariat identified specific issues for discussion under each theme. Due to the limited time allocated to the Colloquium, it was not possible to discuss all of them in sufficient detail.

4. This report reproduces essential points made during the Colloquium, and those that were raised in written submissions by experts [8] and identified by the UNCITRAL secretariat during its exploratory work on the topic.

II. Summary of issues

A. General considerations

5. 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 dispute settlement. Effective asset tracing and recovery has a positive impact beyond those areas of law and contexts, contributing more broadly to the objectives of the rule of law and good governance, and ultimately creating an enabling environment for trade, business, investment and sustainable development.[9]

6. 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 assets to their legitimate claimant(s). "Assets" being traced and recovered may encompass anything of value to its legitimate claimant(s).

B. Main legal issues arising from asset tracing and recovery

7. The concept note prepared by the Secretariat highlighted that, irrespective of the context in which asset tracing and recovery took place, common challenges arose, in particular because of the lack of a general enabling environment, because of sector-specific regulations (e.g., bank secrecy laws) and because of unresolved issues in the legal treatment of certain aspects of 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 arose in the cross-border context because of conflicts of law, jurisdictional issues and differences in procedural rules and legal traditions. The extraterritorial effect of some asset tracing and recovery measures could be questioned, and measures widely used in some jurisdictions to prevent the illicit transfer of assets (e.g., *ex parte* procedures and "gag and seal" orders (see further para. 28 below)) could create tension with fundamental norms in other jurisdictions (such as those related to transparency, due process and human rights).

8. The tracing of assets, including across jurisdictions, has been facilitated through digital means and modern investigative methods and forensic technology. The use of digital means has brought new challenges, including those related to online identity

[7] Found at https://uncitral.un.org/en/assettracing.
[8] Ibid.
[9] 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).

management, electronic evidence and the processing of personal data and other sensitive information. In addition, the involvement of intermediaries (e.g., electronic platform operators or cloud service providers) that could be in possession of relevant information or assets being traced has added another layer of complexity. Decentralized, anonymous, autonomous and irrevocable processes involved in distributed ledger technology (DLT) has raised unique challenges for the tracing and recovery of certain digital assets (e.g., cryptocurrency).

9. Challenges identified by the Secretariat in the concept note were elaborated in presentations during the first panel. The first presentation highlighted that practitioners: faced similar issues in asset tracing and recovery irrespective of whether the context was civil or criminal; used the same sources of information (registries, defendant/debtor, third parties, Government agencies and Internet); had to take into account the same issues (due process, protection of property, data protection, national sovereignty, treaty obligations and other factors (e.g., inertia)); and had to confront additional challenges in the transnational context (e.g., some domestic sources of information and asset tracing and recovery tools might not be available to foreigners). Important principles throughout were probable cause and no speculative demands for information ("fishing expedition"). The first presentation also identified stages in the relationship between parties at which asset tracing and recovery would most likely take place: at the stage of due diligence (before concluding a contract); in anticipation of litigation; during litigation; for enforcement of a judgment; and during insolvency proceedings. In criminal law cases, the relevant stages would be pre-investigation, investigation, judgment and post judgment.

10. Another presentation during the first panel highlighted, on the one hand, contemporary challenges arising from tracing and recovering digital assets such as cryptocurrencies, air miles and virtual online game items, and on the other hand, contemporary opportunities for more efficient asset tracing using open sources of information such as social networks, online registries of immovable and moveable property and business entities, as well as databases of judicial and arbitral decisions. Although such techniques might lead to fragmented information and did not eliminate all obstacles to asset tracing (e.g., language and administrative barriers still existed, for example access to online registries might be available only to persons in possession of a national identity card), digital means of asset tracing assisted in overcoming some traditional challenges (e.g., those arising from the lack of cooperation of a party in possession of relevant information, inertia of State authorities that had to be involved in obtaining information related to assets or the need to apply unfamiliar procedural rules of foreign jurisdictions). It was suggested that in any work on the topic, UNCITRAL should aim at increasing awareness about existing tools, procedures and rules and harmonizing obligations of various parties involved, including creditors, in respect of assets being traced and recovered.

11. Another speaker elaborated on dynamic, smart and multifactorial tracing methods, underscoring the increasing relevance of data and of digital intermediaries (servers, cloud service providers and DLT) in the tracing and recovery of physical and digital assets. It was explained that data: may contain information required for identification of an asset and its holder, owner or beneficiary; could also contain information required to obtain control over the asset and for its recovery (e.g., passwords or control codes); and could represent the digital asset itself being traced and recovered. Asset tracing and recovery in the digital world raises unique challenges, in particular because of issues arising from vulnerability of data, technology dependence and interoperability (e.g., data existence, preservation, accuracy, replicability (original/copy), control, use and reversibility). In addition, data localization and data protection regulations may impose limits on extraterritorial access to data and on personal data collection and processing.

12. Issues of private international law (conflicts of law and conflicts of jurisdiction) were elaborated in another presentation during the first panel. That presentation highlighted challenges of recognition and enforcement of foreign orders and

suggested the preparation of a multilateral treaty that would ensure global recognition and enforcement of orders related to asset tracing and recovery.

13. In the ensuing discussion, participants cautioned against excessive reliance on registries, since many of them did not involve any verification of the information they contained, which was usually entered by parties themselves.

14. The online poll on the biggest challenge in asset tracing and recovery elicited the following responses: (a) difficulties with obtaining information about assets; (b) difficulties with obtaining control over digital assets; (c) barriers for obtaining relief before the commencement of legal proceedings; (d) difficulties with obtaining jurisdiction over the party in control of the asset; and (e) diverse regulations.

C. Perspectives of international organizations

15. Results of the exploratory work by the Secretariat showed that asset tracing and recovery featured prominently in international and regional instruments addressing corruption, bribery, transnational organized crime and cyber-crime, in particular:

(a) The United Nations Convention against Corruption (UNCAC), an almost universal treaty with 187 States Parties (on the date of this note), covered corruption in both the public and private sector,[10] explicitly recognized asset recovery as a fundamental principle of UNCAC[11] and provided for mechanisms, including civil, for asset tracing and recovery;[12]

(b) The African Union Convention on Preventing and Combating Corruption, adopted in July 2003, also addressed corruption in the private sector (art. 11) and highlighted the necessity for legislative measures for asset tracing and recovery (art. 16). It contained provisions that guaranteed access to information (art. 9) and the participation of civil society and the media in the monitoring process (art. 12);

(c) The Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions expressly prohibited refusal of mutual legal assistance on the ground of bank secrecy (art. 9(3));

(d) A similar provision was found in the Inter-American Convention against Corruption, adopted by the Organization of American States in 1996 (art. XVI), which also set out a number of preventive measures (art. III)[13] and obliged 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 (art. XV);

(e) A number of anti-corruption texts were adopted under the auspices of the Council of Europe, including the Civil Law Convention on Corruption of 1999 that provided for civil remedies for compensation for damage resulting from acts of corruption and in that context also addressed acquisition of evidence (art. 11), interim measures (art. 12) and international cooperation in matters relating to civil proceedings in cases of corruption (art. 13). Another treaty adopted under the auspices of the Council of Europe, the Convention on Cybercrime of the Council of Europe (the Budapest Convention), was in particular relevant to digital tracing and recovery

[10] 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.

[11] Article 51.

[12] See chapter V of UNCAC. Article 53 of UNCAC concerns measures for direct recovery of property through civil action. Article 54 addresses cooperation in matters related to non-conviction-based confiscation.

[13] Including mechanisms aimed at ensuring that companies and associations maintain books and records that accurately reflect the acquisition and disposition of assets and that they have sufficient internal accounting controls to enable their officers to detect corrupt acts (art. III (10)).

as it referred to expedited preservation of stored computer data, expedited preservation and partial disclosure of traffic data, production orders, search and seizure of stored computer data, real-time collection of computer data, and interception of content data (arts. 16–21);

(f) A number of relevant texts were adopted in the European Union, including on combatting fraud and corruption in the private sector and protecting the European Union's financial interests. For example, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union contained provisions relating to requests for information on bank accounts and on banking transactions and requests for monitoring of banking transactions (arts. 1–3).

16. In addition, the Stolen Asset Recovery Initiative (StAR), a partnership between the World Bank Group and the United Nations Office on Drugs and Crime (UNODC), produced several texts that provided guidance to asset recovery practitioners and policy makers on how to use various means, including insolvency and civil actions, to recover stolen assets in the context of UNCAC offences.[14]

17. In the context of civil and commercial law, aspects of the work of the International Institute for the Unification of Private Law (Unidroit), the Hague Conference on Private International Law (HccH) and UNCITRAL were of relevance, in particular:

(a) As relevant to Unidroit, the 2001 Convention on International Interests in Mobile Equipment (the Cape Town Convention) and its Protocols contained asset tracing and recovery tools aimed at seizing leased or financed equipment and arranging for its de-registration and export:[15]

(i) The Space Protocol to the Cape Town Convention contained a provision on the tracking, telemetry and control of space assets. It provided that parties to an agreement may specifically agree for the placement of command codes and related data and materials with another person in order to afford the creditor an opportunity to take possession of, establish control over or operate the space asset. Creditors may rely on the command codes and related data to determine the satellite's exact location. As a safeguard, however, laws and regulations of Contracting States can prohibit, restrict, or attach conditions to the placement of command codes with third parties (art. XIX);

(ii) A special feature of the Luxembourg Rail Protocol to the Cape Town Convention was a system for the allocation of identification numbers by the Registrar which enable the unique identification of items of railway rolling stock (art. XIV). The allocated number was maintained until the object was destroyed. The system coupled with modern technology had the potential to enable the global traceability of railway rolling stock items;

[14] 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); Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets (2015); and Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases (2019).

[15] 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 articles IX and XIII(2) 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.

(b) In addition, Unidroit co-authored the Principles of Transnational Civil Procedure (2004) aimed at reconciling differences of national civil procedure rules. Unidroit was currently working on a model law on civil procedure for Europe;[16]

(c) The Unidroit work programme for the triennial period 2017–2019 envisaged work on principles of effective enforcement;[17]

(d) As relevant to the HccH, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (the Hague Evidence Convention) enabled a judicial authority of a Contracting State to request, by means of a Letter of Request, the competent authority of another Contracting State to obtain evidence or to perform some other judicial act for use in judicial proceedings, commenced or contemplated. The Convention makes it clear that the expression "other judicial act" excludes the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced or orders for provisional and protective measures.[18] Thirty-nine Contracting Parties (out of 62 total, on the date of this note) have declared under article 23 of the Convention that they will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries (on pre-trial discovery, see further paras. 29–30 below);[19]

(e) Various UNCITRAL instruments referred to measures that could be used in asset tracing and recovery.[20] UNCITRAL's ongoing work on electronic identity management and on the formation of a limited liability organization touching, among others, upon issues of beneficial ownership were also relevant;

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[16] www.unidroit.org/work-in-progress-eli-unidroit-european-rules. See also https://europeanlawinstitute.eu/projects-publications/current-projects-feasibility-studies-and-other-activities/current-projects/civil-procedure/ and www.euciviljustice.eu/en/news/last-joint-meeting-eli-unidroit-european-rules-of-civil-procedure

[17] www.unidroit.org/work-in-progress/effective-enforcement

[18] Article 1 provides: "In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act. A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures."

[19] www.hcch.net/en/instruments/conventions/status-table/?cid=82 Article 23 provides: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

[20] E.g., paragraph 132 of the UNCITRAL Legislative Guide on Key Principles of a Business Registry (2018) addresses transparency in the beneficial ownership of businesses through registration of the identity of business owners as an important mechanism to help prevent the misuse of corporate vehicles for illicit purposes; provisions of the UNCITRAL Model Law on Secured Transactions (2016) on a Security Rights Registry enable the collection of information about assets, debtors and creditors subject to certain limitations (such as the types of assets covered, the available search criteria and provision for the notice filing system); the UNCITRAL Legislative Guide on Insolvency Law deals inter alia with avoidance and directors' obligations; in addition to the mandatory stay of proceedings under article 20, the UNCITRAL Model Law on Cross-Border Insolvency (1997) authorizes the court, following recognition of a foreign proceeding, to grant relief under articles 19 and 21 for the benefit of that proceeding such as enabling a foreign representative to examine witnesses, take evidence or information concerning the debtor's assets, affair, rights, obligations or liability (similar provisions may be found in articles 22 and 24 of the UNCITRAL Model Law on Enterprise Group Insolvency (2019); granting relief of a provisional nature is also envisaged in article 12 of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018)); the UNCITRAL Model Law on International Commercial Arbitration (1985) (with amendments adopted in 2006) envisages interim measures and preliminary orders; the UNCITRAL texts on public-private partnerships (2019) and the UNCITRAL Model Law on Public Procurement (2011) envisage measures in relation to fraud, misrepresentation, abnormally low tenders, corruption, unfair competitive advantage and conflicts of interest (see e.g., articles 20 and 21 of the UNCITRAL Model Law on Public Procurement).

(f) Several European Union (EU) regulations enabled the taking of evidence and other asset tracing and recovery measures in civil or commercial matters across EU member States,[21] although excluding certain areas from their scope, such as insolvency proceedings. The EU also provided reference tools such as the European e-Justice Portal[22] and the Compendium of European Union legislation on judicial cooperation in civil and commercial matters.[23]

18. Participants at the Colloquium were invited to assess whether work by international and regional organizations sufficiently addressed the needs of the professional community in civil asset tracing and recovery. In particular, they were invited to assess the extent to which private sector corruption and civil actions for recovery of proceeds of corruption had been addressed through mechanisms for the implementation of UNCAC and other relevant treaties, and how criminal and civil law measures for asset tracing and recovery complemented each other. They were also invited to share their experience with the use of the Hague Evidence Convention, as well as measures and tools found in other international instruments.

19. During the second panel, representatives of UNODC, StAR, HccH, Unidroit and the UNCITRAL secretariat presented their current and future work that was of relevance to asset tracing and recovery.

20. A UNODC representative explained UNCAC measures for prevention and detection of transfers of proceeds of corruption (art. 52), measures for direct recovery of property (art. 53), mechanisms for recovery of property through international cooperation (arts. 54–55) and measures for the return and disposal of assets (art. 57). It was emphasized that the Convention's primary focus was on criminal matters in the public sector, and the Convention required cooperation among States Parties to the Convention in criminal matters, including by enforcing foreign confiscation and freezing or seizure orders. The Convention also covered corruption offences in the private sector (e.g., bribery and embezzlement), and civil and administrative matters relating to corruption, although cooperation in civil and administrative matters was not mandatory.

21. States Parties to UNCAC were currently undergoing the second cycle of UNCAC implementation review, which also covered asset tracing and recovery provisions. Few States have reported experience in the use of civil measures in the context of international cooperation, especially for outgoing assistance requests. The main challenge reported was the lack of familiarity with such types of assistance and a reluctance to accept and process such requests outside of traditional channels of criminal law assistance. In particular, a practical challenge arose with the implementation of non-mandatory cooperation provisions of UNCAC in civil and administrative matters, where States would try to enforce their "civil" or "administrative" non-conviction-based confiscation or freezing order in a jurisdiction that followed the "criminal" non-conviction-based confiscation model. As a result, all aspects of the assistance process in the requesting and receiving States could be

[21] E.g., Council regulation (EC) No. 1206/2001 enables taking evidence in civil or commercial matters in the European Union member States; regulation (EC) No 805/2004 provides a procedural tool (a European Enforcement Order) 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 (a European order for payment procedure) that operates on the basis of standard forms; regulation (EC) No. 861/2007 provides for a simplified procedure for recognition and enforcement across the European Union of civil and commercial claims not exceeding 5,000 Euro (a European Small Claims Procedure); and regulation (EU) No 655/2014 establishes a procedure for seeking a court order for freezing funds in banks accounts across the European Union to facilitate cross-border debt recovery in civil and commercial matters (a European Account Preservation Order procedure).

[22] Available on the date of this note at https://e-justice.europa.eu/home.do. In particular, the European Judicial Atlas in Civil Matters as part of the platform is of relevance: https://e-justice.europa.eu/content_european_judicial_atlas_in_civil_matters-321-en.do.

[23] Available on the date of this note at https://op.europa.eu/en/publication-detail/-/publication/5e4bd05a-88d1-11e9-9369-01aa75ed71a1/.

subject to different substantive and procedural rules (e.g., different confidentiality standards applied in criminal and civil proceedings). Despite such differences, good practices were reported where receiving States gave broad interpretation to the essence and purpose of the proceedings underlying the requests for the enforcement of non-conviction-based confiscation judgments and freezing or seizure orders and accorded appropriate treatment to them under their domestic law.

22. A StAR representative launched at the Colloquium a new StAR publication, prepared in collaboration with the International Bar Association, entitled "Going for Broke: Insolvency Tools to Support Cross-Border Asset Recovery in Corruption Cases".[24] The publication focused on the use of insolvency tools to support cross-border asset recovery in corruption cases. It was explained that commencing insolvency proceedings provides several benefits for the purposes of asset tracing and recovery, including a stay on enforcement and the appointment of an insolvency representative with enhanced investigative powers and special legal rights to recover assets.

23. A Unidroit representative explained the relevance to asset tracing and recovery of the Cape Town Convention and its Protocols, Unidroit work on transnational civil procedure, and plans for future work by Unidroit on principles of effective enforcement (see para. 17(a) to (c) above). It was said that there was a notable gap in international uniform instruments relating to enforcement matters and that there is a need for global guidance.

24. A HccH representative explained how the Hague Evidence Convention (see para. 17(d) above) contributed to asset tracing by facilitating the process of obtaining documents or examining witnesses in civil or commercial matters. It was noted that the HccH Permanent Bureau was currently carrying out work on the use of electronic means under the Hague Evidence Convention to enable electronic transmission of documents, and examination of witnesses by video-link or videoconferencing, to expedite procedures.[25]

25. The final presentation of the second panel considered the links between UNCITRAL's work and the topic of asset tracing and recovery. It was noted that, although many UNCITRAL instruments touched upon some aspects of asset tracing and recovery (see para. 17(e) and the accompanying footnote above) there was no UNCITRAL text covering the topic as such.

26. The online poll on the main legal gap that international organizations could fill in in order to facilitate civil asset tracing and recovery elicited the following responses: (a) cross-border recognition of judicial decisions; (b) cross-border recognition of enforcement powers of receivers and liquidators to trace and recover assets; and (c) delays and other issues arising from the use of letters rogatory.

D. Overview of legal tools for asset tracing and recovery in common law and civil law jurisdictions

27. Results of the exploratory work by the Secretariat indicated that, regulated by procedural laws, asset tracing and recovery tools differed across jurisdictions, particularly as between civil law and common law traditions, on such issues as: (a) discovery, evidentiary means and standards; (b) the role and obligations of the parties and the role of the court (judicial or administrative authority) in the process; (c) the availability and efficiency of sanctions for non-compliance; (d) the territorial effect of available relief; (e) the interplay between criminal and civil law proceedings; and (f) the timing when such tools are available (pre-trial, trial,

[24] Available on the date of this note at https://star.worldbank.org/publication/going-for-broke.

[25] See e.g., www.hcch.net/en/instruments/conventions/specialised-sections/evidence; www.hcch.net/en/projects/post-convention-projects/evidence-videolinks; and https://assets.hcch.net/docs/1dfce8db-44c1-459e-b6b2-025954328dc0.pdf.

post-trial). In addition, some tools might be appropriate for use only in a specific context (e.g., some criminal law measures).

28. Asset tracing and recovery tools were commonly used to prevent defendants (or third parties) from destroying evidence or removing assets from a jurisdiction, and they were usually accompanied by certain safeguards, such as a requirement for a party requesting a particular asset tracing or asset recovery measure to demonstrate the urgency and the need for the measure (e.g., risk of destruction of evidence or dissipation of assets) and a reasonable possibility that the requesting party would succeed on the merits of the claim underlying the request. In urgent cases, such as commercial fraud, those measures might be granted *ex parte* without notice to the respondent, typically accompanied by orders, sometimes known as gag or suppression or "gag and seal" orders (see para. 7 above) that prevented third parties from disclosing those measures. The requesting party was usually required to provide appropriate security in connection with the measure and would be liable for any costs and damage caused by the measure if it should not have been granted. Other safeguards included requiring the requesting party to provide full and frank disclosure of all material facts and evidence in its possession, and to maintain confidentiality of the seized evidence (e.g., restricting access of third parties to the evidence obtained and limiting its use in other proceedings).

29. Some tools widely used in common law jurisdictions might not be found in civil law jurisdictions, such as pre-trial discovery tools. Those tools enabled the parties or their lawyers to collect evidence without the intervention of the court by means of discovery devices such as interrogatories, requests for production of documents, and depositions. Such tools were available in addition to a variety of judicial tools that might be employed by the court before and during the trial to compel parties and third parties to provide information and to preserve evidence, sometimes also in support of foreign civil or criminal proceedings.

30. In civil law jurisdictions, under the general principle that no party was obliged to assist the opponent in substantiating its case, parties in civil matters might not be made subject to information and discovery obligations in the pre-trial phase without the involvement of the court or enforcement authority. Any attempt to privately force pre-trial discovery on the other party might be penalized under civil and criminal law. The principle was reinforced by privacy, data protection and trade secrecy laws. For collection of information prior to the commencement of formal proceedings, a party might request a court or a bailiff to preserve or take evidence for litigation whether domestically or internationally. Other jurisdictions allowed an interested party, such as a creditor, to request the public prosecutor to commence criminal investigations or join the criminal proceedings as a civil party, and by this benefit from the results of criminal investigations.

31. The third panel demonstrated how some asset tracing and recovery tools worked in different jurisdictions and in different contexts. Examples of asset tracing and recovery in the context of the enforcement of contracts, arbitral awards and judgements were presented first. They illustrated ways of obtaining information about the debtor's assets from the private and public domain, including in support of foreign proceedings, and effectiveness of remedies, such as freezing orders (bank account freezing orders, in particular) that were enforceable in cross-border contexts involving civil and common law jurisdictions. It was explained that in many legal systems it was difficult to obtain information concerning debtor bank accounts, which was an essential pre-condition to obtain an order to freeze them. Further, attempts to obtain broad freezing orders could raise difficulties in terms of cross-border recognition. Efforts to address those challenges were discussed (e.g., the bank accounts registry in France (FICOBA – Fichier national des comptes bancaires et assimilés) and the European Account Preservation Order (EAPO; see para. 17(f) and the accompanying footnote above)).

32. Examples involving asset tracing and recovery in cross-border insolvency cases were presented next. They highlighted obstacles that existed to the recognition of

foreign proceedings, powers of a foreign insolvency representative and insolvency-related judgments, despite UNCITRAL texts addressing those issues. Unpredictable recognition outcomes were observed in countries that enacted the UNCITRAL Model Law on Cross-Border Insolvency. Varying experience with mutual legal assistance under the Hague Evidence Convention was reported, as well. Positive experiences with asset tracing and recovery in some jurisdictions emphasized the importance of enacting appropriate legislative measures and creating an enabling environment for successful cross-border recovery actions. Asset tracing and recovery worked efficiently in those jurisdictions where the judiciary was empowered to act quickly and where the sanctions regime was effective (e.g., failure to comply with court orders or assist with enforcement procedures led to significant monetary fines). The need for more efficient and rapid recognition of foreign proceedings and orders was also highlighted. In that context, promoting UNCITRAL texts in the area of insolvency law and preparing an UNCITRAL model law on asset tracing and recovery were considered useful.

33. In the ensuing discussion, issues of third-party financing were raised as an additional challenge usually encountered in asset tracing and recovery. Commercial fraud in insolvency was also highlighted as a common problem, and in that context prevention measures, in particular those based on artificial intelligence, were suggested.

34. Final examples addressed the role of criminal law tools in asset tracing and recovery, their interaction with remedies in civil proceedings and the importance of coordination of criminal and civil proceedings. It was said that criminal proceedings were often used instead of or in addition to civil proceedings in civil law jurisdictions that did not provide for effective civil asset tracing and recovery tools. Participation at an early stage of investigation, it was explained, allowed an interested party to obtain an easier and wider access to evidence and criminal law orders, e.g., freezing and production orders. A civil proceeding that built on the results of a criminal law investigation was often more effective, in particular in the recovery of assets.

35. In the ensuing discussion, it was acknowledged that opening a criminal proceeding might delay a civil proceeding, in particular because public and private claims and interests would closely interact in those cases and they all would need to be resolved before the civil proceeding could be closed. In the light of limitations of both civil and criminal proceedings, devising a separate proceeding to deal with commercial fraud cases with distinct rules and enhanced power of judges was suggested as a solution.

36. The concluding remarks emphasized that practical challenges in asset tracing and recovery arose not because of a lack of asset tracing and recovery tools but because of diversity of tools and their sources and because asset tracing and recovery worked differently across jurisdictions. There might be insufficient knowledge about existing tools and sometimes reluctance on the part of practitioners to learn about and use foreign tools. The feasibility of preparing an international instrument that would offer to States a toolkit of best asset tracing and recovery tools was questioned. It was acknowledged that more transparency and information sharing in this area were indeed necessary and would be helpful for practitioners but it would not be appropriate for UNCITRAL to embark on a project whose primary goal would be to increase awareness about existing asset tracing and recovery tools. It was suggested that, if any work were to be undertaken by UNCITRAL on the topic at all, in the light of the UNCITRAL mandate and scarce resources, UNCITRAL might more appropriately focus on resolution of specific issues arising from asset tracing and recovery in insolvency.

37. The online poll on which asset tracing and recovery tool was the most effective across borders elicited the following responses: (a) the answer would depend on the jurisdictions involved; (b) worldwide disclosure and freezing orders; (c) insolvency tools; and (d) mutual legal assistance treaties.

E. Possible work by UNCITRAL on civil asset tracing and recovery

38. Building on the preceding panels, the fourth panel addressed whether UNCITRAL should undertake work in the area of asset tracing and recovery and if so, the possible form and scope that such work might take. It was reiterated, in that context, that several past and ongoing UNCITRAL projects could be analysed through the prism of asset tracing and recovery, but that UNCITRAL had not yet undertaken any work specifically on asset tracing and recovery (see paras. 17(e) and 25 above).

39. A UNODC representative underscored the importance of increasing awareness among practitioners of both criminal law and civil asset tracing and recovery tools and mechanisms, including under UNCAC, and of their interaction. UNODC resources (databases and networks of relevant experts) were considered useful in that respect and also for promoting contacts among practitioners from various jurisdictions. UNODC welcomed a possible future work by UNCITRAL on issues arising from asset tracing and recovery in insolvency and expressed willingness to cooperate with UNCITRAL in that work, with the objective to complement the work of each organization. It was also considered necessary to involve courts and central authorities in the discussion of the topic with a view of identifying challenges that they faced in implementing and enforcing relevant international instruments and devising appropriate mechanisms for removing those challenges. It was emphasized that, in any future work by UNCITRAL on the topic, the respective mandates of UNCITRAL and UNODC should be taken into account. In that respect, it was noted that UNODC worked also on aspects of commercial fraud, on civil and administrative matters relating to corruption and on embezzlement and corruption in the private sector.

40. A World Bank Group representative explained the relevance of the topic to several areas of the World Bank Group work, in particular anti-money-laundering, countering the financing of terrorism and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes. Harmonizing and strengthening countries' abilities to trace and recover assets, including by means of civil tools, was considered beneficial. In the light of the UNCITRAL mandate, support was expressed for the work of UNCITRAL on the topic. As regards the scope of the work, focusing it on a narrow area of law was considered desirable in order to avoid duplicating agendas of other fora currently dealing with asset tracing and recovery; trying to standardize civil remedies across many areas of law was considered overly general. At the same time, it was recognized that, even if the work were limited to a narrow area, civil remedies were found in a variety of laws and interaction with other areas of law would therefore be unavoidable. In particular, irrespective of whether the work would focus on civil remedies in only one area of law (e.g., insolvency) or have a broader scope, experts in UNCITRAL would be expected to understand the interaction with criminal law processes. UNCITRAL's methods of work on the topic would thus need to ensure close coordination with experts in financial integrity and law enforcement authorities and other authorities involved in the recovery of proceeds of corruption so that criminal law issues relating to fraud and corruption would be properly factored in that work. The point was also made about the ultimate motive of the work by UNCITRAL on the topic – a UNCITRAL work product might provide only one side to the issue (recovery of assets) but it would not necessarily aim at assisting States to sanction criminals. As regards a possible form of an instrument to be prepared by UNCITRAL, standardizing civil asset tracing and recovery tools was considered challenging because they were jurisdiction-specific and rooted in domestic legal traditions. For those reasons, it was considered unfeasible to develop model legislative provisions acceptable to different jurisdictions; developing a softer instrument might be more appropriate.

41. The last presentation during the fourth panel supported UNCITRAL undertaking work on the topic but limiting it initially to the area of insolvency and avoiding interference with criminal law. It was noted that such work would address: (a) the rise of commercial fraud in insolvency proceedings; and (b) the lack of transparency and

predictability in cross-border cases where assets were moved to jurisdictions that did not provide any procedures to trace and recover assets. Work in this area could reduce cost, time and complexities in the tracing and recovery of assets in insolvency proceedings to maximise the value of the insolvency estate for creditors and deter debtors from committing fraud.

42. In the ensuing discussion, participants supported a future work by UNCITRAL on the topic. Views differed on the scope and form of such possible work.

43. Some participants acknowledged UNCITRAL's experience and expertise in various aspects of insolvency law, including cross-border insolvency. At the same time, the advisability of limiting any possible future work of UNCITRAL on the topic to that area of law was questioned. It was said that preparing a toolkit was conceptually a good idea, but a cautious approach should be taken because asset tracing and recovery involved civil procedure law, which had traditionally been perceived as difficult to harmonize. For that reason, a softer instrument was preferred to a convention or a model law.

44. Other participants supported UNCITRAL limiting work on the topic to the area of insolvency, explaining that taking that approach, at least initially, would not mean addressing only insolvency law measures. Taking a broader approach was considered undesirable since that would make work unmanageable, overly ambitious and less useful for States. Other participants were of the view that, although the primary focus of that work might indeed be insolvency, the work could in parallel acknowledge the relevance of some asset tracing and recovery measures used in insolvency proceedings to asset tracing and recovery in other areas of law.

45. Participants confirmed that close interaction with criminal law was unavoidable even if the UNCITRAL work on the topic were to be limited to a very narrow area (e.g., insolvency). It was explained that asset tracing and recovery in insolvency proceedings was usually triggered by allegations or confirmed cases of commercial fraud (fraud by the debtor might take place before the commencement of insolvency proceedings whereas fraud by the debtor in possession or by the insolvency representative, possibly also in collusion with the debtor or one or more creditor(s), might take place at the time of liquidation and distribution of assets).

46. The primary difficulty in asset tracing and recovery, in the view of other participants, was to quickly identify the location of the debtor assets and to freeze them. Legal systems differed considerably in the way they provided relief to those ends and the nature and extent of such relief. Approaches depended on policy choices and involved a delicate balance between the creditor interest to obtain fast the most effective remedy and the rights of the debtor to privacy and other protections.

47. The online poll on whether UNCITRAL should undertake work in the area of asset tracing and recovery, in which 33 participants took part, produced the following results: no (6 per cent); no, but asset tracing and recovery aspects should inform current and future work of UNCITRAL (12 per cent); yes, but the possible work should start in the area of insolvency and should subsequently be expanded to other areas (58 per cent); yes, but it should not have a narrow focus whether at the outset or subsequently (24 per cent).

III. Conclusions

48. The following main conclusions may be drawn from the Secretariat exploratory work on the topic and from the Colloquium:

(a) Asset tracing and recovery was affected by several parallel processes at the national, regional and international levels, in particular, on the one hand, by anti-money-laundering, anti-corruption, anti-terrorism financing and other anti-transnational organized crime or international crime instruments that required States to cooperate and better coordinate their asset tracing and recovery efforts, and on the other hand, by measures aimed at protecting personal data, individual privacy,

public policy and local interests, that might interfere with the effectiveness and efficiency of asset tracing and recovery;

(b) Digital aspects (both the use of digital means and data for asset tracing and recovery, and tracing and recovery of digital assets) should be taken into account;

(c) Several regional and international instruments addressed civil asset tracing and recovery tools. In particular, UNODC and UNCAC implementation review processes were relevant. The second cycle of review, which was expected to be completed by the end of 2020, would inform the international community about the status of implementation by States Parties of UNCAC chapter V, including its asset tracing and recovery provisions (see para. 15(a) above). UNODC maintained a database of States' reports on UNCAC implementation.[26] In addition, it was expected that, as was done after the first cycle of review,[27] UNODC might prepare an analytical study of findings of the second cycle;

(d) Domestic civil asset tracing and recovery tools were diverse. Depending on the legal tradition, they could be found in case law or in civil procedure law and in addition in sector-specific laws. Some jurisdictions in the civil law tradition, in the absence of the legislative base for civil asset tracing and recovery, gave unlimited discretion to courts to handle needs in civil asset tracing and recovery on a case-by-case basis, including in the cross-border context;

(e) Most challenges from civil asset tracing and recovery in the cross-border context arose because of: (i) lack of awareness about existing asset tracing and recovery tools in various jurisdictions; (ii) the absence of asset tracing and recovery tools in some jurisdictions; (iii) inefficiency of some existing asset tracing and recovery tools in other jurisdictions; (iv) difficulty in obtaining cross-border recognition and enforcement of asset tracing and recovery orders and powers of receivers and liquidators and other persons involved in asset tracing and recovery;[28] and (v) unavailability of some domestic asset tracing and recovery tools to foreign practitioners.

49. In light of the above, the Commission may wish to consider whether to undertake the work on the topic and if so, the form, scope and method of such work:

(a) *Form.* The Commission may wish to recall the diverse spectrum of texts that UNCITRAL has prepared (legislative texts (such as conventions, model laws, legislative guides and recommendations, as well as model legislative provisions), uniform contractual clauses and rules (such as the UNCITRAL Arbitration Rules) and explanatory texts (such as legal guides, informational notes and recommendations));

(b) *Scope.* The Commission may wish to consider whether any possible work on the topic should be limited to the area of insolvency law;

(c) *Method.* Any possible work on the topic could take place in a working group or in the Commission in plenary or undertaken by the Secretariat with the involvement of experts. The Commission may wish to recall that, at its forty-sixth session, in 2013, it agreed to use four tests to assess whether legislative work on a topic should be referred to a working group: (i) whether it was clear that the topic was likely to be amenable to international harmonization and the consensual development of a legislative text; (ii) whether the scope of a future text and the policy issues for deliberation were sufficiently clear; (iii) whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization, harmonization or

[26] www.unodc.org/unodc/en/treaties/CAC/country-profile/index.html.

[27] See, State of Implementation of the United Nations Convention against Corruption Criminalization, Law Enforcement and International Cooperation (2017), available at www.unodc.org/unodc/en/corruption/tools_and_publications/state_of_uncac_implementation.html.

[28] Interim measures of protection are usually excluded from the scope of recognition and protection under international instruments. See e.g., article 1 of the Hague Evidence Convention (footnote 19 above); article 3(1)(b) of the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters; and article 2(c) of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

unification of the international trade law; and (iv) whether duplication might arise with work being undertaken by other international organizations.[29] The Commission may wish to recall that all legislative texts and most non-legislative texts were prepared by UNCITRAL either through a working group or at annual sessions of UNCITRAL. Some non-legislative texts, although prepared by the UNCITRAL secretariat, were nevertheless subject to review and approval by UNCITRAL, which authorized their publications as a product of the work of the Secretariat.

[29] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), paras. 303–304.