



CHALLENGES OF ASSET TRACING/RECOVERY

Bettina Knoetzel and Philip Marsch, WolfTheiss Attorneys at law

CRIME MUST NOT PAY

In today's global economy, corporations make use of the mobility of assets and funds by channelling and directing them within, out of and to different jurisdictions.

While legitimate corporations aim at utilising legal benefits different jurisdictions have to offer, individuals with criminal energy capitalise on the gaps between individual jurisdictions to create their own systems for misconduct and – utilising the gaps in the systems of international judicial assistance – to hide the illegitimately achieved proceeds of their criminal actions, to the detriment of their victims. In short, such gaps hurt twice: first, by creating opportunity for fraudulent behaviour, and secondly, by complicating the recovery of assets for all individuals who are defrauded, as they, themselves, are committed to play by the rules (or in other words who are not ready to engage in “Mafia methods”).

The victim is – as nature would have it – always in second position and just “running after” the bad guys who are completely at home in the gaps.

Overall, it requires a lot of energy, commitment, cunning and allocation of resources in order to successfully recover damages caused by fraud. In addition to “good money” (deployed specifically to be invested in the recovery of the lost/bad money), recovery efforts demand a remarkable amount of time

“Modern communication tools as well as the easy mobility of assets and funds allow individual perpetrators to transfer their illicit proceeds around the globe”

and energy, experienced advisers who are knowledgeable about how to find, pursue, identify, attach, enforce and collect lost assets, and more. A most important element in pursuing the recovery is the support provided to fraud victims by individual jurisdictions that are involved in the chain of transferring and hiding misallocated assets. The above-mentioned gaps need to be closed. That requires a very close cooperation on a supra-national level. Secondly, laws in the relevant jurisdictions need to provide powerful tools to freeze assets, which are potentially proceeds of fraud.

There are more than enough reasons to improve these systems, both at the national and supra-national levels. The UN estimated that the total amount of criminal misallocation of

funds was approximately US\$2.1 trillion or 3.6 per cent of the global gross domestic product of that year (2009). Remarkably, less than 1 per cent of these proceeds was successfully recovered. When hidden outside the jurisdiction of their origin the recovery rate is even lower.

Moreover, it is not solely a matter of organised crime that operates in large-scale international networks. Because of globalisation, modern communication tools as well as the easy mobility of assets and funds allow individual perpetrators to transfer their illicit proceeds around the globe with ease, making it much more difficult for their victims to trace and recover their stolen funds and assets.

European Union Commissioner Cecilia Malmström identified a key success factor in the prevention of white-collar crime and corruption when she proposed new legislation for more effective asset tracing, that is the inter-jurisdictional tracing and recovery of funds and other property (generated or misallocated through crime): “We need to hit criminals where it hurts, by going after the money.”

With this, Mrs Malmström showed that a paraphrase of the old saying – that “crime must not pay” – is still a valid and important mantra. White-collar crime and corruption are, in essence, profit-driven. Consequently, a well-developed system of asset tracing or recovery is not merely a way – and the best hope – for victims to retrieve their stolen assets, but an important goal of governments and multinational interests as well. The threat of recovery of illicit proceeds is one of the most effective deterrents against such crimes and thereby helps to prevent them in the first place: if criminals cannot expect to find a safe haven for their funds and assets in or outside their jurisdiction, the key motivator for their actions is frustrated.

The international community has recognised the importance of asset tracing and recovery:

- The United Nations Convention Against Corruption considers the return of stolen assets one of its fundamental principles, and requires its signatories to provide a factual and legal framework for effective cross-border recovery of assets.
- The European Union has introduced several legal instruments aimed at simplifying asset recovery and tracing – considered to be a strategic priority – across the jurisdictions of its member states.

While the focus of asset tracing typically lies on proceeds from criminal offences (“white-collar crime”), the principles also apply – in most cases – to the pursuit of recovery on purely civil claims, when some or all of a debtor's assets and funds are located

outside the creditor's jurisdiction.

In the following, a brief description of typically applied steps of asset tracing should help to identify some of the barriers to asset recovery and tracing that practitioners are currently facing, while the recent developments and improvements in the field provide direction for the future.

STEPS OF ASSET TRACING/RECOVERY

Overview

Successful cross-border asset tracing and recovery will involve the following steps: (i) tracing and identifying; (ii) freezing; and (iii) taking possession and returning of assets.

While each of these steps critically relies on the previous one, they often require a different set of skills in the taking of each step. However, they have one guiding principle in common: each step taken towards a successful asset recovery requires detailed preparation on the basis of very specific knowledge about the local factual and legal conditions of every relevant jurisdiction. All these steps are – to a certain degree – interdependent and subject to local law and conditions. For instance, there is rather little use in freezing assets if, for example, export limitations will prohibit getting the assets out of the jurisdiction. In the worst-case scenario, the perpetrator becomes alerted to tracing and recovery efforts and thus becomes able to put himself in a better position to successfully complete the criminal action. As a general rule, it will be necessary to engage an experienced local legal counsel to provide local expertise and to liaise with local authorities. In some cases, lawyers from as many as 10 jurisdictions, or more, may be required to closely cooperate with each other: first in gathering facts; secondly, in devising a joint strategy, which is based on facts and viable legal options; and thirdly, landing the first strike in a way that affords only a minimal possibility of escape.

Step I: tracing and identifying

The process of tracing and identifying stolen assets may involve legal manoeuvring as well as practical investigative actions to determine (i) the location of the assets and funds (“follow the money”) and (ii) whether the assets and funds can be linked to the crime or to the offender, or both, since funds and assets are often held by third parties.

Such information may be obtained in a variety of ways, such as by directly accessing public registers or by way of judicial or administrative assistance – provided, of course, that the relevant jurisdiction maintains such registers and that they can be accessed. A thorough investigation may include accessing any or all of the following registers or databases: land registry, company register, company records, register of non-profit organisations, court records, tax records, vehicle registration register, criminal records, register of bank accounts, immigration records, border crossing and customs records, etc.

In many cases, private investigation (often including physical surveillance) can be of great value in order to achieve more precise hits; in particular, in cases where fraudsters had sufficient time (and criminal energy) to hide their assets in a previously designed way, often using a network of third parties and foreign jurisdictions (safe harbours), publicly accessible information

will soon exhaust its limits. The recommendation to engage a PI, should not be misunderstood: it is of utmost importance for any adviser on such a case, as well as such adviser's agents and operatives, to refrain from taking any illegal action. For its own benefit, the clients seeking recovery should insist on cooperation with only local advisers who have a solid, good reputation. If an unknown adviser is hired, a strict compliance due diligence on such new adviser has to be carried out to avoid further problems. Under no circumstances should crime lead to criminal actions on the part of the victim. The consequences of giving in to such temptation are generally far worse than the advantages sought.

Obviously, these restrictions put a huge practical and visceral limitation on the victim going after the criminal. However, besides the undesirable consequences facing a victim, itself, engaged in a crime, it is often the case that support of local criminal authorities can be utilised for the benefit of the victim seeking recovery. Depending on the circumstances, legal underpinnings and appetite for judicial assistance in criminal matters by local authorities, such assistance can be a very powerful tool to seek the criminal authorities' support. Engaging in unlawful practices on the part of the victim seeking recovery will jeopardise relationships that are critical in tapping into such power. The local asset recovery expert knows what kind of support (and within which time frame) can be expected in his jurisdiction.

This first step is, in most cases, the most difficult.

Freezing

If the first step shows positive results, and assets and funds can be traced, step two will consist of appropriate legal actions required to be taken in order to freeze them. Identifying jurisdictions where, in the circumstances of the specific case, freezing orders will (most likely) be granted – ideally with worldwide effect, and where the highest success rate can be achieved, especially regarding the timing of each single action in relation to all others, is usually a highly complex and difficult task.

With provisional measures such as freezing orders, injunctions and restraining orders in place to prevent assets and funds from being moved or spent, the recovery team can focus on the investigation or on the criminal or civil proceedings that may be ongoing and that may continue to go on for quite some time.

The legal actions, systems, and level of authority cooperation available locally, and the level of international cooperation of the jurisdiction in question usually give guidance to determining the proper course of action, including:

- initiating civil or criminal proceedings;
- in case of civil proceedings: proceeding in rem or in personam;
- employing preliminary measures or waiting for final judgment;
- proceeding locally or utilising judicial assistance; and
- initiating administrative proceedings.

An important consideration and critical determination to make at step two of asset tracing to be carried out before starting civil or criminal action is the enforceability of title. It is of utmost importance to start legal action there, where enforcement of the title is granted. For instance, if step one identified assets located

in Austria, while the opponent is domiciled in New York, it would make little sense to start legal action in the United States (only). The Austrian authorities might allow preliminary freezing measures. But final enforcement of a US judgment in Austria would be highly uncertain.

In most jurisdictions, preliminary measures will not allow the requester of such measures or the potential victim of a crime to take possession of the funds or assets until a final and locally

“Even when there is an international legal basis for cross-border judicial assistance, asset tracing and recovery may be complicated by local legislation”

enforceable decision has been rendered. Issues to consider are, for example, the timely and easy renewal of such provisional measures, the costs of management, marshalling and preservation of the frozen or seized assets, third-party interests, and so forth.

Taking possession and returning of assets

With a final and locally enforceable order, the requester of preliminary measures will be able to take possession of the frozen or seized assets.

Again, detailed knowledge of the local circumstantial and legal conditions and procedures regarding asset tracing and recovery is of vital importance. Issues to consider include: limitations for foreigners to be a shareholder in a corporation or to own real estate or other relevant asset classes, export limitations for pieces of art, precious metals, money, etc.

BARRIERS TO ASSET TRACING/RECOVERY

Budgetary restrictions

One important aspect to consider before initiating an asset tracing and recovery project is – as always – costs. The process of asset tracing and recovery often turns out to be quite cumbersome. It requires that additional local experts be employed, large volumes of documents may have to be translated, the costs of management and maintenance of frozen/seized assets or funds have to be considered, taking possession and returning the assets or funds may involve considerable costs, etc. Finally, the whole procedure can take a very long time, often many years.

Consequently, an economic decision will have to be made at the beginning of step one or two. The main question is: does the anticipated outcome justify the effort? In some cases, the soundest advice one can give is to avoid the pitfalls of the “sunk cost fallacy” – that is, what is often called “throwing good money after bad”.

Even if the expected outcome does justify the effort, one question remains: will the client be able – economically – to sit it all out and go all the way? Nothing is more frustrating – for

the client as well as for counsel – than to abort a promising course of action halfway.

Other factual and legal issues

The process of cross-border asset tracing and recovery is often complicated or even made impossible by a number of legal and practical problems. For a detailed analysis of the issue, the comprehensive study: “Barriers to Asset Recovery” by the Stolen

Asset Recovery Initiative is recommended (www1.worldbank.org/finance/star_site/documents/barriers/barriers_to_asset_recovery.pdf).

Most jurisdictions are committed to and often required to grant judicial and administrative assistance in cases of asset tracing and recovery through international conventions and multilateral or bilateral treaties. But some jurisdictions exclude themselves from these international efforts – even within the European Union, certain member state territories are (partly) exempt from relevant EU legislation (eg, the Channel Islands).

Even when there is an international legal basis for cross-border judicial assistance, asset tracing and recovery may be complicated by local legislation. In some cases, local legislation is not in line with the international commitments of the jurisdiction. Also, differences in legal traditions, legal processes, and legal terminology often make it hard to communicate effectively between and among jurisdictions. Anyone who has ever tried to have a UK freezing injunction (formerly known as a “Mareva injunction”) enforced in continental Europe will be able to explain one or two things about this problem.

Factual and legal problems regarding the local proceedings may include facing delays depending on the average length of proceedings in the relevant jurisdiction, procedural delays depending (appeals, notices, etc), local undue (but nevertheless real) influences, questions of national interest, etc.

Budget constraints and the lack of importance attributed by judicial assistance in the relevant jurisdiction often hinder asset tracing and recovery efforts in otherwise well-developed jurisdictions.

Other barriers practitioners are often faced with include the lack of clear competences, fractured and multiple local contact points (no “one-stop shopping”), blurry lines of communication and – more often than one might expect – language barriers.

Atmospheric problems often include a lack of mutual trust between authorities and private players in different jurisdictions and a lack of methods or lines of communication for low-threshold informal assistance and cooperation in preparation of the formal process of judicial assistance.

Lack of human resources

Aside from the notorious lack of human resources within most of the criminal investigative bodies around the world, the lack of highly experienced experts in private practice also create a barrier. There are comparatively few practitioners with significant, relevant and useful experience in cross-border asset

tracing and recovery.

While the monetary restrictions of governments leave little hope for improvement with respect to proper staffing of state authorities who are active in this legal field, recently developed and growing worldwide networks, such as the ICC FraudNet, are making strides towards extinguishing this type of restriction in private practice in the near future.

RECENT IMPROVEMENTS IN ASSET TRACING/RECOVERY

General observation

The international business, legal, and law enforcement communities have recognised the importance of asset tracing and recovery – not only in the prevention of crime but also to empower and support the victims of crime in pursuing their stolen funds and assets within and outside of their jurisdictions.

The commitment of mutual judicial and administrative assistance in cases of asset tracing and recovery is based on international, multilateral and bilateral treaties and conventions, many of which have been in effect for several years. Consequently, the intra-jurisdictional legal requirements specified therein are starting to sink in – as does the spirit of these conventions and treaties. In many cases, cross-border asset tracing and recovery has become standard practice for practitioners (lawyers and officials alike).

More networks have been established between jurisdictions that further the cause of cross-border asset tracing and recovery, that help building trust between local authorities and allow low-threshold contact in questions of cross-border asset tracing and recovery. These include not only private practitioners' networks but also networks of formal and informal cooperation between local authorities and practitioners (eg, Camden Asset Recovery Inter-Agency Network).

One example of this is the European Union requiring its member states to set up or designate national asset recovery offices as national points of contact. These local offices are not only obliged to assist in cases of asset tracing and recovery, but also to exchange information about best practices. With these offices, the European Union also intends to support other (global) networks of practitioners and experts in the field of cross-border asset tracing and recovery.

Naturally, certain relevant expertise has been developed over the past few years, not only among dedicated lawyers but also on the practical side of asset tracing and recovery. Lawyers are heavily relying on the services of, for example, forensic accountancy experts and risk-assessment specialists in the pursuance of stolen assets and funds.

This first-hand experience and developing expertise has led to numerous practical improvements that aid asset tracing and recovery efforts. Legal informatics is being used to bridge the gap between different jurisdictions providing technical aides such as the “Mutual Legal Assistance Request Writer Tool”. Compilations of case studies and step-by-step guides for asset tracing and recovery and judicial assistance in various jurisdictions are available online (in English) and allow practitioners to benefit from local experts as well as from their colleagues' first-hand experience.

Robust compliance systems further asset tracing/recovery

One of the most relevant vehicles for the prevention of crime and corruption is also a valuable tool in the pursuance of stolen assets and funds. Compliance systems – which are now compulsory in many jurisdictions and fields of industry – ensure (or seek to ensure) that an entity behaves in accordance with relevant laws and regulations and such behaviour is implemented and encouraged through specific internal bodies or functions (compliance management).

Aspects of successful compliance systems include, for example, clear decision-making competences within the corporation, keeping (accurate) records of relevant business transactions, employing the four-eye principle, control of, and adherence to internal procedures.

If a compliance system should fail in preventing a case of white-collar crime or corruption, a well-introduced system will still be able to help the tracing and recovering of assets or funds: accurate records and control mechanisms, for example, will make it easier to “follow the money” and establish an evidentiary link between assets or funds and the crime (see above, “Steps of asset tracing/recovery”).

OUTLOOK

It takes encouraged individuals who build on the latest developments and make remarkable improvement possible, despite the many – ongoing – frustrations arising out of the plentiful limitations. It is true: the victims will never be in pole position compared to the perpetrators, who naturally will be ahead of the “game”. However, if recent developments continue to gain strength – similarly as a tornado does – simply by dragging more interested parties into its focus and by continuous support of individuals and organisations, as in the past 10 years, a fair chance to a clear improvement of above-mentioned asset recovery rate exists. And the good news: even if the improvement can be recognised as a fraction of 1 per cent only, already such an improvement will contribute to a much better place, where victims can more often enforce their rights.

APPENDIX: USEFUL LINKS

- Austrian Asset Recovery Office: Federal Criminal Police (“Bundeskriminalamt Abteilung 7.2.1 Vermögensabschöpfung und Sicherheitsleistung”, www.bmi.gv.at/cms/bk/)
- CARIN Camden Asset Recovery Inter-Agency Network (www.europol.europa.eu)
- FATF Financial Action Task Force of the OECD (www.fatf-gafi.org)
- ICC International Chamber of Commerce, FraudNet (www.icc-ccs.org/home/fraudnet)
- International Centre for Asset Recovery (www.baselgovernance.org/icar/)
- OLAF European Commission European Anti-Fraud Office (http://ec.europa.eu/anti_fraud/index_en.htm)
- Stolen Asset Recovery Initiative (www1.worldbank.org/finance/star_site/)
- Tools and Resources for Anti-Corruption Knowledge developed by the United Nations Office on Drugs and Crime (www.track.unodc.org/Pages/home.aspx)