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# IMPACT STUDY ON CIVIL FORFEITURE



PROJECT ON CRIMINAL ASSETS RECOVERY IN SERBIA (CAR SERBIA)

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# IMPACT STUDY ON CIVIL FORFEITURE

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## INTRODUCTION AND CONTEXT

From the late 1980s onwards, the imperative for those (at both international and national levels) seeking to combat serious organised crime and other transnational offences (including corruption, economic crime and drug trafficking) has been to deprive those benefiting from such criminality of the financial rewards that they thereby obtain. As a result, one of the key changes in approach has been a shift in sentencing policy both nationally and as expressed in international instruments from the traditional aim which centred on penal measures up to and including imprisonment, rather than denying criminals of their illicit gains. Although confiscation had been available to courts in a number of jurisdictions from much earlier on, it tended to relate to confiscation of items such as seizure and destruction of drugs, or to weapons if used as instrumentalities to commit crimes.

To address the modern trend of increasingly acquisitive (and very often cross-border) criminality the traditional approach was found to be insufficient as the fruits of the offending were still available for a criminal's enjoyment at the end of a prison sentence. The criminal justice sector across regions came to recognise that, if the aim of sentencing policy was to be effective deterrence, then it needed to hit the true aim of such criminality: making a profit.

International instruments such as the 1988 Vienna Convention on Drug Trafficking, as the pioneering instrument, introduced the mechanism of confiscation for drug trafficking. This paved the way for extending confiscation to all other acquisitive crimes, including for bribery and corruption (first in a limited way in the UN Convention on Transnational and Organised Crime (UNTOC) and then, in 2003, more comprehensively in the UN Convention Against Corruption (UNCAC)). Meanwhile, in Europe, both the Council of Europe and the EU led the way in taking decisive steps to obligate their respective member states to put in place a framework for the restraint/seizure and confiscation of illicitly obtained assets. This was achieved through, in particular, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 (the Council of Europe 2005 Convention) and four key EU Framework Decisions (2001/500/JHA; 2003/577/JHA; 2005/212/JHA; 2006/783/JHA). It should be noted, however, that the international instruments, although seminal to the development of asset recovery, have focused on post-conviction confiscation/asset recovery and have not, generally, addressed the subject matter of this study, civil forfeiture (sometimes referred to as confiscation in rem). They have certainly not discouraged it and, to that extent, they have left the way open to states to introduce it, but they have not taken the concept forward in any concerted way. The exception, and a powerful indicator of the importance of civil forfeiture in countering corruption,

is UNCAC, which obligates each state party to consider whether civil forfeiture should be introduced within its jurisdiction<sup>1</sup>.

As a result of the (understandable and necessary) drive to establish a post-conviction confiscation framework in states, the reader is likely to be familiar with the legal mechanism for the recovery of illicitly obtained assets through criminal proceedings, where, at the end of a criminal trial, the Court, upon the application of the prosecution, or as a requirement of law, considers whether property derived from criminal activity should be forfeited so as to deprive the convicted person from enjoying the fruits of his criminality. This is the usual course of events and will, generally speaking, be the preferred option where the accused is found in the territory of a State and there is sufficient evidence to support a criminal prosecution. Indeed, this is, today, the position in most states.

However, there are instances when prosecution, and confiscation consequent on conviction, may not be available to the prosecuting agencies of a state. Those circumstances may be one or more of the following:

- the suspect has died;
- the suspect may have fled following the dissipation of his assets;
- jurisdictional privilege (sometimes referred to as ‘domestic immunity’) may be a bar to proceedings;
- there is insufficient evidence to mount a criminal prosecution;
- the investigation has been obstructed or frustrated;
- the suspect is abroad and a request for extradition either cannot be made (due to lack of bilateral/multilateral treaty or arrangement), or the requested State refuses to extradite;
- the defendant is acquitted following trial. (It is important to emphasise that civil forfeiture proceedings do not fall foul of the principle of double jeopardy or *res judicata*.)

The question therefore arises whether, in such circumstances, it would be sufficient to do nothing and simply to allow the proceeds of the criminal activity to be enjoyed by the suspect or associates abroad or permit its ‘inheritance’ by successors. If a state decides that it should have the mechanism to take some action, then civil forfeiture provides a framework by which, in the absence of criminal proceedings, the proceeds of criminal activity can be recovered so as to deprive the person of ill gotten gains. Importantly, the legal action in a civil forfeiture case is brought against the property that represents the benefit of the unlawful activity, and not against the person. As the alternative title (confiscation *in rem*) makes clear, the action is truly *in rem*, not *in personam*.

Civil forfeiture has been in place for some time in a number of states around the world; indeed it has, generally, been used as an effective tool to counter organised crime, drug trafficking and certain other crimes in Italy since 1956 and in the USA since 1970. Over the past ten to fifteen years, it has gained popu-

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1 UNCAC, Art 54(1)(c)

larity in a number of other jurisdictions (Australia, Canada, Fiji, Malaysia New Zealand, the Republic of Ireland, South Africa, –UK) and although very much a common law favourite initially, it has, more recently, come to be adopted by civil law countries (including Italy, the Netherlands, Columbia and the Philippines) as a means of recovering assets and instrumentalities (and in order to compensate victims for losses) where it is not possible to prosecute an individual for the underlying criminal conduct itself. Indeed, the latest state to adopt civil forfeiture is Mauritius (with its mixed civil law/common law system), which saw its law come into force in February 2012.

Each of the states mentioned above has put in place laws that make provision for the forfeiture of assets derived from criminal/unlawful activity or conduct without any requirement for a criminal conviction; such laws require the authority exercising the power (typically the public prosecutor, a dedicated assets recovery or an anti-corruption commission) to bring a case to establish that, on the balance of probabilities, the assets claimed derives from such activity or conduct. In doing so, that authority must also prove that a criminal offence was committed, and that the property derives from that offence. Evidence of a specific offence is unnecessary, but the authority must, at least, prove the class of crime said to constitute ‘unlawful conduct’ (for example theft, fraud, bribery etc). Civil forfeiture is not a civil variant of the criminal offence (in some jurisdictions) of illicit or unjust enrichment: Thus, it is not enough for the authority simply to demonstrate that a defendant has no identifiable lawful income.

Helpfully for state considering the introduction of civil forfeiture, there are both good practices to be drawn and lessons to be learnt from those jurisdictions with the legal and institutional framework in place. Moreover, those frameworks, and the challenges encountered in implementation, have tended to be very similar whether the jurisdiction has a common law or civil law tradition. Thus, for present purposes, the reader will be referred to a range of examples from both within and outside Europe.

Finally, by way of introduction, it should be emphasised that civil forfeiture should never be seen as an alternative or substitute for the institution of criminal proceedings when there is sufficient evidence to support such proceedings and where such proceedings would otherwise be justified.

## THE AVAILABLE ROUTES TO CONFISCATING CRIMINAL PROCEEDS

To give proper and appropriate consideration to civil forfeiture as a viable mechanism within the law of any given state for recovering illicit proceeds, it is important to have in mind the different ways in which confiscation is able to be effected by state authorities.

### POST-CONVICTION CONFISCATION

The starting point must be post-conviction asset recovery; in other words, conviction-based confiscation.

Post-conviction asset recovery, by a confiscation (in some states referred to as forfeiture) order, is, in reality, a pre-requisite for any state that wishes to address acquisitive crime effectively. Indeed, for those states that are members of the Council of Europe and/or the EU, or are parties to such international instruments as UNTOC or UNCAC, having in place a conviction-based system of asset recovery is a requirement. The rationale is obvious: Criminalising the conduct from which illicit proceeds or profits are made does not adequately punish or deter an offender. Even if arrested and convicted, an organised criminal or other offender will be able to enjoy the illicit gains, either personally, or through their families or associates. Without post-conviction confiscation, the perception would still remain that crime pays in such circumstances and that the criminal justice system is ineffective in removing the incentive for acquisitive crime.

Given the importance of asset tracing and recovery in organised crime and corruption cases in particular, it should be noted that each state party to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism must, by virtue of Article 3 of that instrument, „adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to [the proceeds of crime] and laundered property”. Similarly, in accordance with Article 12 of UNTOC and Article 31 of UNCAC respectively, States Parties must, to the greatest extent possible under their national system of law, have the necessary legal framework to enable post-conviction confiscation.

A strong confiscation regime will provide for the identification, freezing, seizure and confiscation of the proceeds of crime, including illicitly acquired funds and property. In addition, given that crime is increasingly transnational, a state should also be able to request freezing and confiscation from other states,

and, in turn, to give effect to foreign freezing and confiscation orders and to provide for the most appropriate use of confiscated proceeds and property.

### How does post-conviction confiscation work?

As mentioned above, the approaches employed by different legal systems may be broadly split into three:

#### 1. Property-based system

A property-based system allows confiscation of property found to be proceeds or instrumentalities of crime, and the focus of this model is “tainted property”. The property-based is that traditionally found in civil law states and is, therefore, in operation in many European jurisdictions; it is the system in use in, for instance, Italy and Spain. To give an example; in Canada (another state that uses this system), the sentencing judge may order confiscation of property that constitutes proceeds of crime where the offence for which the conviction was obtained was committed in relation to those proceeds. In addition, under this system, even if not satisfied that the property relates to the specific offence, the court may also order forfeiture of property if satisfied beyond reasonable doubt that the property is proceeds of crime. As this basis for recovery is specific to property, if the property cannot be located, has been transferred to a third party, is outside the state, has been substantially diminished in value or has been mixed with other property, the court may order a fine instead.

#### 2. Value-based, or benefit system

The value-based or benefit system, which originated in the UK, allows the determination of the value of proceeds and instrumentalities of crime and the confiscation of an equivalent value. This approach is the one that has usually been favoured by common law states; although, it should be noted that both the Netherlands and Austria, although civil law states, have also adopted value-based confiscation. Under this system, the court calculates the „benefit” to the convicted offender of a particular offence. Having determined the accrued benefit, the court will then assess the defendant’s ability to pay (i.e. the value of the amount that might be realisable from the defendant’s assets). On the basis of those calculations, the court then goes on to make a „confiscation” order, in the amount of the benefit or the realisable assets, whichever is the lower. An additional period of imprisonment will, typically, also be determined, but will only be served by the defendant if he or she fails to pay the amount of the order.

#### 3. Combination system

Some states (e.g. Australia) adopt a combination of the two and permit value confiscation under certain conditions, for instance, when the proceeds have been used, destroyed or hidden by the offender.

Each of the above requires a criminal conviction as a prerequisite however, the proceedings following conviction are generally, but not always, of a civil nature,

employing, usually, the civil standard of proof (balance of probabilities). It should be noted, though, that in some States (such as Hong Kong SAR) the burden of proof is reversed, and falls on the defence, at the confiscation hearing stage.

## CIVIL PROCEEDINGS IN PERSONAM

States have another option when seeking to recover stolen assets: civil proceedings. In relation to foreign assets, a state will bring a private action in the civil courts of the foreign jurisdiction where corruptly acquired assets are located. This is the same process that would be used by private citizens or corporate entities with a claim against another, in the context of fraud for example, by a liquidator seeking to recover assets wrongfully diverted from an insolvent company.

This mechanism has been particularly successful in international cases involving public officials where a criminal conviction of corruption is difficult or impossible to obtain. The benefits of civil proceedings include a lower burden of proof („clear and convincing/balance of probabilities” instead of „beyond a reasonable doubt”) and the ability of the court to proceed in the absence of a defendant if he or she does not co-operate with the process. Although a defendant might be able to frustrate post-judgment execution of the judgment amount or payment of the damages quantum, it is difficult for him or her to prevent progress in the proceedings overall. Instead, a court is likely to be satisfied and willing to proceed so long as the defendant has been properly served notice of the proceedings. As an illustration, in the UK, the High Court has held that serving notice on a lawyer acting on behalf of a defendant in hiding is good service and no bar to the proceedings moving forward<sup>2</sup>.

Additionally, civil courts retain some of the benefits of a criminal action, for example the ability to freeze assets to prevent dispersal, pierce bank secrecy, issue gag orders to third parties to maintain the confidentiality of the investigation, and even order search/seizure actions. Many practitioners have found that effective programs to recover corruptly acquired assets often use a coordinated package of criminal and civil measures to secure and recover assets. Furthermore, where criminal mechanisms can go some way to freeze but not recover assets, civil proceedings may effectively intervene.

A civil action *in personam* is likely to prove particularly useful in recovering the proceeds/benefits of corruption and of theft or embezzlement of public assets. An action may be entirely domestic or, conversely, cross-border. The potential importance of the latter is reflected by Article 53 of UNCAC, which provides for measures for direct (civil) recovery and requires states parties to:

- permit another state party to initiate civil action in its courts to establish title to or ownership of property acquired through corruption offences (subpara a);

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2 Republic of Nigeria v Joshua Dariye (2005), QBD, High Court, London

- permit their courts to order corruption offenders to pay compensation or damages to another state party that has been harmed by such offences (subpara b); and
- permit their courts or competent authorities, when having to decide on confiscation, to recognise another state party's claim as a legitimate owner of property acquired through the commission of a corruption offence (subpara c).

### CIVIL PROCEDURES AGAINST PROPERTY (*IN REM*); commonly referred to as CIVIL FORFEITURE or CONFISCATION IN REM

This method is, of course, the principal subject of the present study and will therefore be discussed fully in the text hereafter. However, for present purposes by way of overview: A third tactic is the use of *in rem* actions (also known formally as Non-Conviction Based Asset Forfeiture (NCBF) or, for ease of reference, civil forfeiture or confiscation *in rem*) to recover assets directly. This legal action also takes place in a civil court. An advantage of an *in rem* action is that it does not require either a civil or criminal conviction against an individual in order to confiscate his/her assets. Instead, 'guilt' is assigned to the property and prosecutors must only prove that the property in question was involved in an illegal activity. Hence, a possible case name for an *in rem* action could be The State v 100,000 Euros in a Ford van or The State v Apartment no. 4, Main Road. The owner or beneficiary of targeted property must then prove that the property was not involved or be able to provide his/her an 'innocent owner defence' or similar (discussed in more detail, below).

*In rem* asset recovery is controversial in that the standard of proof required for the state to make its case is lowered and the burden (if a defence is mounted) is shifted to the assets' beneficiaries. While encouraged in UNCAC, adapting national law to create a legal basis for *in rem* recovery is not mandatory on states parties; however, consideration of whether to introduce it is. Examples of *in rem* legislation can be found in jurisdictions as diverse as Italy, the Netherlands, the United States, the United Kingdom, the Philippines, Australia, Canada and Colombia.

There is, increasingly, a body of expert opinion from around the world holding the view that *in rem* actions are, in many circumstances, the most effective way to counter many forms of corruption, economic crime and other transnational organised crime.

## PARTIE CIVILE/ACCION CIVIL RESARCITORIA/ THIRD PARTY CIVIL ACTION

In some civil law jurisdictions, there is a fourth mechanism which is a hybrid between conviction-based and *in rem* actions. *Partie civile* proceedings or „*accion civil resarcitoria*” is meant to redress victims of criminal offences and to expedite the process it takes place within the criminal court.

Such actions depend on the criminal proceedings in that it cannot be initiated unless there is a concurrent criminal investigation underway. Once the criminal proceedings proceed to trial, the *partie civile* proceedings/*accion civil resarcitoria* separates; in other words, forfeiture of property is not dependent on a criminal conviction of an individual. Unlike a criminal confiscation or an *in rem* action, such an action (if successful) recognises damages and awards a monetary sum as compensation.

As an example, in Switzerland, it is on this basis that foreign States seeking the return of corruptly acquired assets are often permitted to be a civil party to Swiss criminal investigations or proceedings concerning those assets. Such investigations or proceedings may be commenced by an investigating magistrate on receipt of a request for mutual legal assistance. The foreign State will have the ability to access documents on the Court file, to participate in the examination of witnesses, to make submissions to the investigating magistrate, and to seek the repatriation of the assets. This procedure produces an often efficient and effective combination of civil and criminal proceedings.



## DETAILED EXAMINATION OF THE NATURE OF CIVIL FORFEITURE (CONFISCATION *IN REM*)

To assist the reader, let us examine what civil forfeiture or confiscation *in rem* means and how it differs from criminal confiscation proceedings and civil proceedings.

Civil forfeiture is an action against the property (hence, *in rem*), not the person, and is the mechanism by which, in the absence of criminal proceedings, the proceeds of criminal activity can be confiscated so as to deprive a person of illicit gains.

However, there are instances when such a course of events may not be available to the prosecuting agencies of a State as the suspect may have fled following the dissipation of his assets, may be able to rely upon a jurisdictional privilege (sometimes referred to as „*domestic immunity*”) or may have died.

In such circumstances, the civil forfeiture of assets becomes a very useful remedial legal tool designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. Generally, the state brings a proceeding against property (*in rem*) rather than against individuals. In the case of proceeds of unlawful activity, the court is invited to inquire into the origin of property. If the provenance of the title lies in unlawful activity, and the state proves this to the court, then the court is empowered to transfer title to the state.

Some have tried to identify a jurisprudential theory in support of civil forfeiture as a concept; they put it thus: Property law abhors a void in title<sup>3</sup>. Forfeiture ensures there is no gap or lacuna by passing title to the state. Perhaps, though, it is more accurate to say that there are two underlying policy reasons for civil forfeiture:

- First, gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity. Those individuals ought not to be accorded the rights and privileges normally attendant to civil property law. In cases of fraud and theft, the proceeds ought to be disgorged and distributed back to victims;
- Second, the state as a matter of policy wants to suppress the conditions that lead to unlawful activities. Organised crime and drug profits also represent capital for more criminal transactions, which can further the harm to society. Leaving property that facilitates unlawful activity in an individual’s hands creates a risk that he or she will continue to use that property to commit unlawful activity.

As a state with civil forfeiture powers, the South African courts have, for instance, accepted a policy rationale based on the fact that:

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3 Jeffrey Simser, *Perspectives on Civil Forfeiture*, Hong Kong University publ. (2008), at p1

*„...it is often impossible to bring the leaders of organised crime to book, in view of the fact that they invariably ensure that they are far removed from the overt criminal activity involved.”<sup>4</sup>*

It is generally accepted that the modern growth of civil forfeiture laws as a method of crime control is certainly due to organised crime<sup>5</sup>. Two states in particular have been the pioneers: the US and Italy. The United States introduced the Racketeering Influenced and Corrupt Organisations Act 1970 („RICO”), which contained civil forfeiture powers. Whilst, in Italy, as early as 1956, in law 1423/56, powers were enacted to forfeit without conviction the property of persons connected to the Mafioso.

However it has to be said that for about twenty years, from the early 1980s onwards, the US has led the way and pressed ahead expanding asset forfeiture as a programme or policy both at state and federal level. There are over 100 statutes in the US authorising forfeiture, many without conviction. There are over 30,000 forfeitures in the US every year, mostly administrative. About 2,000 are civil claims decided by the Courts and most of them are based on drug trafficking and are made under law 21 USC 881. The remainder of the civil cases are under 18 USC 981 which empowers the District Court to order forfeiture in relation to certain other crimes, mostly white collar criminality and money laundering. To this, since 2001 under the Patriot Act, can be added property connected to terrorism.

Whilst recognising that civil forfeiture is still most prevalent in the US and has been entrenched for more than fifty years in Italy, more and more jurisdictions have introduced civil forfeiture legislation. Those states (with some examples of relevant legislation cited) include:

- Australia and its individual States (New South Wales being the first in 1990 –Criminal Assets Recovery Act 1990),
- Antigua and Barbuda and other Caribbean jurisdictions,
- Canadian Provinces of Ontario (the first province, with its Remedies for Organised Crime and Other Unlawful Activities Act 2001) Alberta, Manitoba, Saskatchewan and British Columbia,
- Columbia,
- Fiji,
- Ireland (Proceeds of Crime Act 1996),
- Malaysia,
- Netherlands,
- New Zealand (Criminal Proceeds (Recovery) Act 2009),
- The Philippines,

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4 NDPP v. Mohamed (2002), 4 SA 843 (CC) at 853

5 Kennedy Talbot, Civil Forfeiture: A Jurisprudence-Eating Monster (paper, April 2011), at p3

- South Africa (Prevention of Organised Crime Act 1998),
- United Kingdom (Proceeds of Crime Act 2002).

Although the majority of the states mentioned above have a common law tradition, it should be emphasised that civil forfeiture has shown itself to be equally effective in civil law jurisdictions. In addition, the experiences and challenges experienced by states appear to be markedly similar, irrespective of the legal system that is in place.

Given ever-increasing access to swift banking, the internet and accompanying technological advances, the quick removal of assets and disposal of property wherever it may be located is becoming all the easier to facilitate. It is this recognition by the international community and its desire to remove the profit incentive for serious, transnational and organised crime that continues to drive the notion of civil forfeiture. At the same time, however, it should be remembered that international co-operation will continue to prove pivotal in such instances.

But, of course, civil forfeiture **should not** be used as a mechanism of first resort where there is clear evidence of criminality and the suspect(s) can be prosecuted. Rather, the advantages of a civil forfeiture framework are as follows:

- As a criminal conviction is not a condition precedent, it cannot be thwarted by immunities, inability to extradite, the suspect who is beyond reach and insufficient evidence on the criminal standard.
- It allows for asset recovery where, because of the death or absence of the suspect(s), confiscation and return would not otherwise be possible.
- It allows for confiscation where an individual(s) has been tried before a criminal court but acquitted, perhaps through a perverse verdict or because the evidence, although probative, fell short of the criminal standard of proof.
- Where difficulties have been encountered in trying to mount a criminal prosecution (or in trying to secure extradition) because of political or high level interference in the criminal justice system. It is much more difficult to sabotage an application which only needs to be proved on the lower, civil standard.
- It complements the system of post-conviction confiscation and completes a comprehensive approach to asset recovery and repatriation.

Conversely, the disadvantages and objections to civil forfeiture, which are primarily founded in human rights considerations, include:

- Proceedings *in rem* are a return to a notion which had largely disappeared from the common law by the end of the 18th century (namely civil recovery based on property and not the individual) and might be viewed as archaic and lacking in the modern protections afforded to property holders.
- It contravenes at least the spirit of „*innocent until proved guilty*”, with few of the safeguards available to the defendant in the criminal court.

- The confiscation of ‘criminal’ property should necessarily involve a criminal finding of guilt against the person owning or holding the property in question.
- There is a danger that a person whose assets are confiscated via the civil route will be viewed as „*convicted*” by the public and the media, even though the finding will be that the property is ‘probably’ criminal property or proceeds.
- As a measure which is, in fact, punitive, it is not proportionate in the sense recognised by the ECHR and other international instruments which address human rights and fundamental freedoms.

It has to be recognised that civil forfeiture is not without difficulty, given the impact the seizure of property may have on an individual and the opening up of challenges based on constitutional and human rights considerations. It is, however, important to emphasise that the action is against property and not the individual so the presumption of innocence would not be relevant and would not amount to any finding of guilt or otherwise against the individual.

For states wishing to introduce *in rem* confiscation then, the discussion that should take place is likely to be focused on whether to introduce a legal framework to bring proceedings before the courts to recover property that represents either proceeds of unlawful activity or an instrumentality used in the unlawful activity in instances where it has not been possible to commence or continue with criminal proceedings. As already suggested, states should not intend that civil forfeiture proceedings be initiated where there is clear evidence of criminality and the prosecuting agency is able to bring criminal proceedings; although there may be instances where both sets of proceedings are brought „*in tandem*” Civil forfeiture will be an entirely new power available to the appropriate agency[ies]; it will rely on the civil standard of proof and be aimed at depriving a person of the benefits of unlawful conduct.

Although discussed in more detail below, it should be said that the objections mentioned already have been considered by national appellate and constitutional courts<sup>6</sup> in those states that permit civil forfeiture and by the European Court of Human Rights (ECtHR)<sup>7</sup> and the overarching consensus is that civil forfeiture is compatible with property protection and the right to own property contained in many constitutions and with, in human rights law, the right to property (under international and regional human rights instruments), on the basis that the right is a restricted, not absolute, right and is capable of being subject to interference, provided such interference is:

- provided by law (legality),
- pursues a legitimate aim (i.e. is necessary),
- proportionate.

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6 In *US v Ursery* (1996) 135 L Ed 2D549, In the Republic of Ireland: *Gilligan v CAB* [2001] IESC 82

7 See, eg, *Engel v The Netherlands* (No 1) (1976) 1 EHRR 647

## INTERNATIONAL INITIATIVES FOR CIVIL FORFEITURE

Internationally there is an increasingly widespread recognition that, in many circumstances, civil forfeiture is one of the most effective tools against acquisitive crime. At the same time, though, there are relatively few formal international initiatives on the point; those that there, it must be said, are nonetheless significant and are discussed below.

It should be noted that there is no international convention or multi-national treaty either requiring or forbidding civil forfeiture.

### WITHIN EUROPE

The 2005 Council of Europe Convention<sup>8</sup> requires states to implement confiscation regimes but is limited to confiscation following conviction.

EU instruments have been, similarly, silent; however, a Directive is being proposed by the European Commission which will include civil forfeiture provisions<sup>9</sup>. In its „Memo” of 12 March 2012, the Commission notes:

*„The existing EU legal framework (consisting of Framework Decisions 2001/500/JHA, 2003/577/JHA, 2005/212/JHA, 2006/783/JHA and 2007/845/JHA) has proven to be inadequate, unevenly implemented and under-used. As shown in the implementation reports published by the Commission, the existing rules are applied differently and confiscation and asset recovery activities are hindered as a result of substantial differences between Member States’ legislations.”*

With that in mind, the Commission is proposing a range of measures to strengthen restraint and confiscation of assets including:

*„Allow[ing] confiscation of criminal assets where a criminal conviction is not possible because the suspect is deceased, permanently ill or has fled (limited non-conviction based confiscation).”*

Prior to the Memo, the only express movement in respect of civil forfeiture was the 2008 „Communication from the Commission to the European Parliament and the Council”<sup>10</sup>, which recognises the need to extend the confiscation regime to include confiscation *in rem* with sufficient human rights safeguards. It states<sup>11</sup>:

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8 ETS No. 1989 - Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism

9 See [http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1\\_en\\_act\\_part1\\_v8\\_1.pdf](http://ec.europa.eu/home-affairs/news/intro/docs/20120312/1_en_act_part1_v8_1.pdf)

10 See 20.11.2008, COM(2008) 766 final, “Proceeds of organised crime, Ensuring that “crime does not pay”” at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0766:FIN:EN:PDF>

11 Ibid, at para 3.3

*„Based on the practice in Member States (MS), the following ideas could be considered for discussion:*

### *3.3.1. Confiscation without a criminal conviction (civil confiscation)*

*Under most MS jurisdictions confiscation is a sanction linked to a criminal conviction. However, a new legal instrument could introduce instances where confiscation takes place without a prior criminal conviction (thereby transposing FATF Recommendation 3<sup>12</sup> into EU legislation). For example:*

*(i) When there is a suspicion that assets are the proceeds of serious crimes, due to their disproportion with the declared income of their owner and to the fact that he/she has habitual contacts with known criminals. In this instance a case may be brought before a civil court (which may order the confiscation of assets) based on an assumption, on the balance of probabilities, that the assets may be derived from proceeds of crime. In these cases the burden of proof is reversed and the alleged criminal should prove the legitimate origin of the assets.*

*(ii) When the person suspected of certain serious crimes is dead, fugitive for a certain period of time or otherwise not available for prosecution.*

*(iii) In certain cases, when cash is seized by customs authorities in breach of the EC Regulation on Cash Controls. An administrative decision may empower authorities to detain the amounts above EUR 10 000 which were not declared when entering or leaving the EU. However, if these amounts need to be confiscated (for example as the proceeds from tax evasion) a court order is ultimately needed. As tax evasion is not prosecuted in all EU MS with criminal proceedings, this may be a further case of civil confiscation.”*

## GLOBAL REACH

The one international instrument that does address civil forfeiture in terms is UNCAC. It should be said, at once, that UNCAC’s impact in respect of asset recovery goes much further than corruption offences. It is UNCAC that, for the first time internationally, sets out comprehensive provisions on asset recovery. The legal and institutional frameworks that states parties to UNCAC are required to have in place will, of course, in most cases be equally applicable and useful to other forms of acquisitive crime.

To a very large extent, it is UNCAC’s Asset Recovery chapter (Chapter V) that is consolidating and further building the regime for confiscation and recovery of property internationally.

The relevant Articles of UNCAC for present purposes are:

- Article 31 (identical in terms to Article 12 of UNTOC, requiring states parties to have in place in their respective national law a comprehensive framework for the restraint and confiscation of criminal proceeds)
- Chapter IV: International co-operation (Articles 43 – 50)
- Chapter V: Asset Recovery (Articles 52 – 57)

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<sup>12</sup> From 2012 the Recommendation 3 has become Recommendation 4.

In considering civil forfeiture, the relevant provisions under Chapter IV are Articles 43 and 46.

Article 43 looks to create a system for international co-operation between State Parties that would be as permissive as possible. To that end it provides that:

*„1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.*

*2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.”*

This Article, and indeed Chapter IV as a whole, is a recognition that ease of travel, the international financial sector and greater ease, in many regions, of crossing borders provide more opportunity for offenders and their assets to avoid detection and prosecution, and that corruption and economic crimes have become increasingly transnational in both execution and effect. The otherwise comprehensive framework of UNCAC and its provisions on prevention, detection, investigation, prosecution, and asset recovery will, therefore, count for little without effective international cooperation.

The effect of Article 43, para 1 is that States Parties must co-operate in criminal matters in accordance with the measures and procedures set out in Chapter IV. The chapter addresses extradition, mutual legal assistance, the transfer of criminal proceedings, and co-operation between law enforcement, including joint investigations and the various forms of proactive and covert deployment referred to collectively as special investigative techniques. In addition, States Parties should consider concluding agreements or arrangements for the transfer of sentenced persons.

As a note of caution, however, Chapter IV must be read in conjunction with the provisions for asset tracing and recovery set out in Chapter V.

Article 43, para 1 also requires States Parties to consider international cooperation in investigations of, and actions in, those civil and administrative cases which relate to corruption. This, of course, includes civil forfeiture. By so providing, UNCAC recognises that there may be occasions when it will be appropriate and advantageous to a State to pursue civil proceedings. For instance, a State may claim ownership of property illicitly removed or seek compensation for damage caused to it by corrupt acts or misconduct in public office. Such an action may, of course, be pursued even when a criminal prosecution cannot take place; for instance, because of death, immunities from criminal suit or the absence of the defendant. However, States will need to ensure that domestic law allows such requests to be made and received.

Paragraph 2 addresses „dual criminality” in relation to international co-operation. Under this principle, for example, States are not required to extradite persons sought for acts they are alleged to have committed abroad if such conduct is not a criminal offence in their own territory. The effect of paragraph 2 is that, whenever dual criminality is necessary for international cooperation, States parties must deem this requirement fulfilled if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

However, even if the dual criminality is not fulfilled, the encouragement is for co-operation to take place. However, despite Article 44 (2) in relation to extradition (which provides that, if their law permits it, States may grant the extradition of someone sought for a corruption offence which is not punishable under its own law) it is unlikely in practice that a state would extradite in the absence of dual criminality being satisfied.

Conversely, in relation to mutual legal assistance, article 46 (9) allows for its extension in the absence of dual criminality, in pursuit of the aims of UNCAC, including asset recovery. In particular, State Parties are required to render mutual legal assistance if non-coercive measures are involved, even when dual criminality is absent. In addition, State Parties are invited to consider adopting measures as necessary to enable them to provide a wider scope of assistance pursuant to article 46 even in the absence of dual criminality (Art. 46 (9) (c)).

The UNCAC Legislative Guide<sup>13</sup> (at paragraphs 593–5) sets out the principal requirements (as relevant to the present discussion) of Article 46 as follows:

State Parties are required:

(a) To ensure the widest measure of mutual legal assistance for the purposes listed in article 46, paragraph 3, in investigations, prosecutions, judicial proceedings and asset confiscation and recovery in relation to corruption offences (art. 46, para. 1);

(b) To provide for mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences for which a legal entity may be held liable under article 26 (art. 46, para. 2);

(c) To ensure that mutual legal assistance is not refused by it on the ground of bank secrecy (art. 46, para. 8). In this respect, legislation may be necessary if existing laws or treaties governing mutual legal assistance are in conflict;

(d) To offer assistance in the absence of dual criminality through non-coercive measures (art. 46, para. 9, (b));

(e) To apply paragraphs 9 to 29 of article 46 to govern the modalities of mutual legal assistance in the absence of a mutual legal assistance treaty with another State party (art. 46, para. 7 and 9–29). In this respect, legislation may be necessary if existing domestic law governing mutual legal assistance is inconsistent with any of the terms of these paragraphs and if domestic law prevails over treaties;

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13 See at [http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf)



(f) To notify the Secretary-General of the United Nations of their central authority designated for the purpose of article 46, as well as of the language(s) acceptable to them in this regard (art. 46, para. 13 and 14);

(g) To consider entering into bilateral or multilateral agreements or arrangements to give effect to or enhance the provisions of article 46 (art. 46, para. 30).

Article 46, paragraph 3, sets forth a list of specific types of mutual legal assistance that a State party must be able to provide and should review their current mutual legal assistance treaties to ensure that these are broad enough to cover each form of co-operation listed above.

Turning to the asset recovery provisions set out in Chapter V; they contain the following:

Article 53

Measures for direct recovery of property

*Each State Party shall, in accordance with its domestic law:*

„(a) *Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;*

*(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and*

*(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.”*

Article 53 is addressing civil actions (and forfeiture) *in personam*, and requires States parties to:

- permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through corruption offences (subpara. a);
- permit their courts to order corruption offenders to pay compensation or damages to another State Party that has been harmed by such offences (subpara. b); and
- permit their courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of a corruption offence (subpara. c).

The implication for national law is that implementation of these provisions may require legislation, amendments to civil procedures, jurisdictional and administrative rules.

States have been unable to provide legal assistance in civil cases, even though there are certain advantages to this approach, particularly in the event criminal prosecution is not possible due to the death or absence of alleged offenders. Other advantages include the possibility of establishing liability on the basis of civil standards without the requirement of a criminal conviction of the person possessing or owning the assets, and the pursuit of assets in cases of acquittal on criminal charges where sufficient evidence meeting civil standards shows that assets were illegally obtained. Of course, it is important not to confuse civil litigation through which a party seeks to recover assets with the use of a non-conviction based system for asset confiscation. These must be kept separate, but the Convention recognizes the need to have a range of flexible measures available for the repatriation of assets.

Article 53 focuses on State Parties having a legal regime allowing another State Party to initiate civil litigation for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation. While such measures might not always be feasible for economic or other reasons, the Convention aims to ensure that there are various options open to States in each case.

Article 53 contains three specific requirements with respect to the direct recovery of property, in accordance with their domestic law.

Under subparagraph (a), States parties must take necessary measures to permit another State Party to initiate civil action in their courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention. In this instance, the State would be a plaintiff in a civil proceeding; it is a direct recovery. States may wish to review their current laws to ensure that there are no obstacles to another State launching such civil litigation.

Under subparagraph (b), States parties must take necessary measures to permit their courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences. National drafters may need to review existing laws on victim compensation or restitution orders to see whether appropriate amendments are necessary in order to cover this situation.

This provision does not specify whether criminal or civil procedures are to be followed. The States parties involved may be able to agree on which standard applies. It would be the responsibility of the concerned State to meet the evidentiary standard. In order to implement this provision, States parties must allow other State parties to stand before their courts and claim damages; how they meet this obligation is left to the States.

In essence, under subparagraph (a), the victimised State is a party in a civil action it initiates. Under subparagraph (b), there is an independent proceeding at the end of which the victim state must be allowed to receive compensation for damages.

Article 54 Mechanisms for recovery of property through international cooperation in confiscation and Article 55 International cooperation for purposes of confiscation

“Articles 54 and 55 set forth procedures for international cooperation in confiscation matters. These are important powers, as criminals will, of course, frequently seek to hide proceeds, instrumentalities and evidence of crime in more than one jurisdiction, in order to thwart law enforcement efforts to locate and seize them.

Article 55 contains obligations in support of international cooperation “to the greatest extent possible” in accordance with domestic law, either by recognizing and enforcing a foreign confiscation order, or by bringing an application for a domestic order before the competent authorities on the basis of information provided by another State Party. In either case, once an order is issued or ratified, the requested State Party must take measures to “identify, trace and freeze or seize” proceeds of crime, property, equipment or other instrumentalities for purposes of confiscation (Article 55). Other provisions cover requirements regarding the contents of the various applications, conditions under which requests may be denied or temporary measures lifted, and the rights of bona fide third parties.

Although there are parallels between these articles and provisions in the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the UN Convention against Transnational Organized Crime, this Convention introduces new requirements.

Article 54 recognises the challenges that States have faced in international confiscation cases and breaks new ground by encouraging the use of creative measures to overcome some of these obstacles. One of these measures is confiscation on the basis of money laundering as opposed to predicate offence convictions.

States Parties are also obliged to consider allowing the confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted (art. 54, para.1 (c)).

Finally, Article 54, paragraph 2 offers detailed guidance on measures designed to enhance mutual legal assistance relative to confiscation as required under article 55.

The Convention mandates the establishment of a basic regime for domestic freezing, seizure and confiscation of assets (Art. 31), which is a pre-requisite for international cooperation and the return of assets. A domestic infrastructure paves the ground for cooperation in confiscation matters, but it does not cover by itself issues arising from requests for confiscation from another State Party.

Article 54 provides for the establishment of a regime which enables a) the enforcement of foreign freezing and confiscation orders, and b) the issuance of

freezing/seizure orders for property eventually subject to confiscation, upon a request from another State Party. Paragraphs 1 and 2 of article 54, thus, provide for the mechanisms that are necessary, so that the options offered in article 55 (paragraph 1, subparagraphs a and b) can be exercised in such requests. In essence, article 54 enables the implementation of article 55.

In relation to Articles 54 and 55, State parties must

- permit their authorities to give effect to an order of confiscation issued by a court of another State Party (art. 54, para.1 (a));
- permit their authorities to order the confiscation of such property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law (art. 54, para.1 (b));
- permit their competent authorities to freeze or seize property upon a freezing or seizure order issued by a competent authority of a requesting State Party concerning property eventually subject to confiscation (art. 54, para. 2 (a));
- permit their competent authorities to freeze or seize property upon a request when there are sufficient grounds for taking such actions regarding property eventually subject to confiscation (art. 54, para. 2 (b)).

Article 54 (1)(c), in effect, recommends that states parties adopt measures to allow the confiscation of proceeds of corruption offences committed abroad and diverted to its jurisdiction even when neither the State Party where the alleged or actual offence was committed nor the State Party where the assets are located, have obtained a criminal conviction against the offender(s). It does this by making it mandatory that states parties consider whether to introduce civil forfeiture into national law.

The implementation of this recommendation depends on the punitive or restorative character that each State Party assigns to the concept of confiscation. While several States consider confiscation of proceeds of crime to be exclusively a punitive sanction, many others have also approached confiscation as a remedial, restorative sanction which under some circumstances applies as a non-criminal remedy.

The effect of this provision is to recommend, *de minimis*, ensuring remedial action for those cases in which a criminal conviction cannot be obtained by reason of death, flight or absence. In case of death, as it is an established principle that criminal sanctions cannot be passed to heirs, states parties may portray confiscation as remedial or reparative action on the premise that transfer or conversion cannot alter the illegality of the assets, nor the right of the victim state party to reclaim them.

Generally, on the basis of Article 55, states parties that receive from another state party requests for confiscation over corruption offences must, to the greatest extent possible, submit to their competent authorities

- the request to obtain an order of confiscation and give effect to it; or (art. 55, para.1(a))
- an order of confiscation issued by a court of the requesting State Party in accordance with articles 31 (1) and 54 (1 (a)) of this Convention insofar as it relates to proceeds of crime situated in their own territory, with a view to giving effect to it to the extent requested (art. 55, para.1 (b)).

Upon a request by another State Party with jurisdiction over a corruption offence, States parties must take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities (see art. 31 para.1) for confiscation by the requesting State or by themselves (art. 55, para.2).

States parties must apply the provisions of article 46 of the Convention (mutual legal assistance) to article 55 *mutatis mutandis*. In case of a request based on paragraphs 1 or 2 of this article, States parties must provide for the modalities of article 55 (para.3, subparas. a-c) in order to facilitate mutual legal assistance.

States parties must also consider

- allowing confiscation of property of foreign origin by adjudication of money-laundering or other offences within their jurisdiction or by other procedures under domestic law without a criminal conviction, when the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases (art. 54, para.1 (c));
- taking additional measures to permit their authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property (art. 54, para. 2 (c)).<sup>14</sup>

It is important to note that the combined effect of Articles 46, 54 and 55 is to encourage states parties to provide MLA in civil forfeiture cases. This is vital in circumstances where evidence and/or assets are located abroad. It is discussed in more detail in the section of this work on MLA, below.

The United Nations, through UNODC, has developed a ‘model’ civil forfeiture law. Although designed, in the first instance, for common law states, it forms a useful basis (with state-specific adaptation) for civil law jurisdictions as well<sup>15</sup>.

## OTHER INTERNATIONAL INITIATIVES

An important proponent of civil forfeiture has been the Commonwealth and its 53 member states (including, from Europe, Cyprus, Malta and the UK).

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14 From UNODC’s Legislative Guide to UNCAC, paragraphs 718 – 731, at [http://www.unodc.org/pdf/corruption/CoC\\_LegislativeGuide.pdf](http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf)

15 See at [http://www.imolin.org/pdf/imolin/Model\\_Provisions\\_Final.pdf](http://www.imolin.org/pdf/imolin/Model_Provisions_Final.pdf)

Commonwealth Heads of Government, in their Aso Rock Declaration of December 2003<sup>16</sup> urged Commonwealth states to sign, ratify and implement UNCAC; to assist that process, they directed that an Expert Working Group be established to examine UNCAC's provisions and, where possible, to make recommendations for model laws. The Group met in 2004 and produced a thorough report with 10 key recommendations which were adopted by the Heads of Government at their 2005 meeting. In relation specifically to confiscation, both conviction and non-conviction based civil forfeiture, Heads of Government endorsed the following actions:

- Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died. Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.
- Mutual legal assistance between Commonwealth countries should be available on the basis of the Harare Scheme without a requirement for a bilateral treaty. Commonwealth countries that currently require a treaty for mutual legal assistance should consider removing such a requirement.
- Commonwealth countries which have yet to provide for restraint and confiscation of assets in response to a foreign request should promptly adopt legislation which establishes a direct enforcement system...If the current law does not provide for the enforcement of non-conviction based orders, it should be amended to do so.

A second Expert Group was established in 2005, this time to look specifically at asset recovery and repatriation. Amongst its Recommendations were two already highlighted by the previous Expert Group:

- Commonwealth countries that have yet to do so should promptly put in place strong and comprehensive legislation and procedures for criminal conviction based asset confiscation. This should include a power to confiscate in circumstances where the accused has absconded or died.
- Commonwealth countries should also put in place comprehensive laws and procedures for non-conviction based asset confiscation.

Following such recommendations, the Commonwealth produced a set of draft model legislative provisions on civil forfeiture which are capable of being adapted for both civil law and common law systems<sup>17</sup>.

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16 [http://www2.ohchr.org/english/law/compilation\\_democracy/aso.htm](http://www2.ohchr.org/english/law/compilation_democracy/aso.htm)

17 Commonwealth model legislative provisions on the civil recovery of criminal assets including terrorist property at [http://secretariat.thecommonwealth.org/shared\\_asp\\_files/uploadedfiles/21B7788D-F604-4FB6-85A1-AB8370566AFC\\_COMMONWEALTHMODELLEGISLATIVEPROVISIONSONTHECIVILREC.pdf](http://secretariat.thecommonwealth.org/shared_asp_files/uploadedfiles/21B7788D-F604-4FB6-85A1-AB8370566AFC_COMMONWEALTHMODELLEGISLATIVEPROVISIONSONTHECIVILREC.pdf)

Another international body that has addressed the issue of civil forfeiture, albeit in a noticeably equivocal manner, is the Financial Action Task Force (FATF). As the leading anti-money laundering body, and being generally regarded as internationally authoritative, it rather neutrally provided in its Recommendation 3 of its original 40 Recommendations:

*„Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction...”*

In FATF’s new 40 Recommendations (February 2012), a similar provision is contained in Recommendation 4:

*„Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”*

## PRINCIPAL CONSTITUTIONAL CHALLENGES

Challenges on the basis of international human rights law will be addressed in the next section of this work; for the present, we will focus on likely constitutional arguments. However, it will be seen, in due course, that the challenges made before, for instance, the ECtHR, largely mirror those made in relation to a state's constitution.

The two most important potential constitutional challenges<sup>18</sup> are likely to be:

1. The civil forfeiture proceedings are, in fact, criminal proceedings and/or amount to a penal sanction

Depending on the state, a finding that what purport to be civil forfeiture proceedings are, in reality, criminal proceedings, if made, will have different results. It may make the law unconstitutional *per se* in that the legislative body may not have power to create a criminal law of this type. It may engage excessive fine provisions or raise issues of double penalty if there already have been (or might be) criminal proceedings. It may mean the procedural safeguards are inadequate or that the standard of proof is unconstitutionally low.

2. A forfeiture order would interfere with property rights

Most constitutions guard against interference by the state with the right to ownership of property. But, it is not an absolute right. The question likely to arise in a court in a given case is: Was the interference with property justified?

Many aspects of the potential constitutional arguments are addressed in detail, below, in the context of human rights/ECHR challenges. However, the following should be had in mind on the constitutionality question:

### Are the proceedings criminal proceedings?

Civil forfeiture is attractive to governments as it is easier to prove than criminal offences. It is easier to prove not just because the standard of proof is lower. It is also easier because none of the civil forfeiture laws enacted (so far) require proof of a particular crime. Further, as with most civil procedures, the government and the person resisting forfeiture are subject to the same rules. Usually, both parties have to set out their case in advance and usually each has to disclose documents which are adverse to his case.

But, as against that, the argument will run that civil forfeiture actions of this type have as their core an allegation of criminality. And the consequences

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18 Kennedy Talbot, *Civil Forfeiture: A Jurisprudence-Eating Monster* (paper, April 2011), at p6



may be harsh. For example, if the national law allows civil forfeiture of property used in the commission of crime, a house might be forfeited on the basis that an occupier used a greenhouse or outbuilding to grow drugs. This might be properly seen as a penalty for transgression of the criminal law and so a criminal proceeding.

However, the reality is that, in respect of civil forfeiture, no jurisdiction has found that the proceedings are, in reality, criminal. In the UK, in the case of *Charrington* [2005] EWCA Civ 335, the Court of Appeal explained that there was no charge, arrest, conviction, penalty or criminal record. In the absence of such hallmarks, the proceedings were civil. These issues were recently revisited in the UK Supreme Court which heard argument on whether the proceedings enjoyed the criminal protections in Article 6(2) of the European Convention on Human Rights in *Gale v SOCA* UKSC 2010/190. It concluded that Article 6(2) is not engaged.

In Ireland in *Gilligan v CAB* [2001] IESC, the Supreme Court explained that the Irish civil forfeiture law:

*„... concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use.”*

Similarly in Canada, the Supreme Court of Canada recently examined the same issue in *Chatterjee v Ontario* 2009 SCC 19. The issue arose in the context of whether Ontario had the power to make laws which interfered with sentences which were regulated as part of federal law. If the Ontarian civil forfeiture laws were in reality criminal and imposed a sentence, they would be *ultra vires*. The Supreme Court made it clear that civil forfeiture laws were indeed civil and imposed no penalty.

In the US, the importance of categorisation between criminal and civil has principally arisen in the context of the double jeopardy prohibition in the Fifth Amendment. The leading case is *US v Ursery* (1996) 135 L Ed 2D549. The defendants had already been prosecuted, yet faced civil forfeiture proceedings. The Fifth Amendment double jeopardy clause prohibits a second prosecution for the same offence. The issue was therefore whether a civil forfeiture action amounted to a second prosecution. The Supreme Court held it did not<sup>19</sup>. In national law *in rem* civil forfeitures did not amount to punishment. All members of the Court were clear that forfeiture of proceeds could not amount to punishment for a criminal wrong. It was merely the removal of property to which the owner had no right. In respect of things used in the commission of crime, instrumentali-

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19 With one dissenting opinion.

ties, the majority held that this too did not amount to punishment. The statute is directed to owners who are culpable for the misuse of their property, whether or not they have committed a criminal act.

### Breach of Constitutionally Protected Property Rights?

By definition, civil forfeiture laws interfere with property rights. Indeed such rights will be specifically overridden; however, the issue will be whether the interference with the right is, in a given case, a justified one. On that note, although states with written constitutions invariably protect property rights, it is important to note that such protections are not absolute.

The ECHR issues are discussed explicitly below, but, in the constitutional context, Article 1 of Protocol 1 of the European Convention on Human Rights is a good starting point as to the nature of the right. It provides for a general protection prohibiting the state from interfering with property rights but then qualifies that right:

*„Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*

The ECHR approach to all qualified rights, including Article 1 of Protocol 1, is to apply the three-pronged test to constitutional compliance:

- Is the measure lawful (i.e. provided for by domestic law),
- Is it directed towards a legitimate aim (necessity),
- Is the measure proportionate to that aim?

Plainly civil forfeiture laws created by statute are provided for by law. The jurisprudence of the ECtHR is that forfeiture of proceeds or instrumentalities is legitimately directed towards the legitimate aim of crime prevention by controlling the use of property. The issue therefore is one of proportionality.

The Court has applied this test consistently in holding asset forfeiture laws in general to be compliant with Article 1 of Protocol 1. This does not mean that the Court in such cases has decided that the law cannot be non-compliant with Article 1 of Protocol 1, merely, that, on the facts before the Court, forfeiture struck a fair balance between the interests of the community and the interests of the person suffering the forfeiture.

Proportionality is also the test under the national constitutions of many states. It is far more likely to arise in instrumentalities cases. For example in South Africa in *Mohunram v NDPP* [2007] 2 ACC 4, the Constitutional Court

quashed a forfeiture order in respect of a factory which housed 57 unlicensed gaming machines. The factory owners ran a legitimate business, but the gaming machines were not licensed contrary to the criminal law. The Supreme Court explained that the purposes of the forfeiture order were properly directed towards removing incentives for the commission of crime, deterring persons from allowing their premises to be used for crime, and preventing the commission of crime. However, forfeiture of the factory was out of proportion to those aims. The criminal law had ample powers to deal with the criminality and forfeiture was not appropriate. The Court issued an important reminder to its own asset forfeiture agency, which will be equally relevant to all states:

„[The Agency’s] manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the Asset Forfeiture Unit spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of the Prevention of Organised Crime Act (POCA).”

In addition, the South African Constitutional Court has made it clear that forfeiture of a car driven by a drunk driver is, in the absence of “exceptional circumstances”, disproportionate and unconstitutional (*NDPP v Vermaak* (1996) 386/06). It is worthy of note that in North America, in particular, New York State and the provinces of Canada, legislators have, in just the recent past, made specific provision for these often controversial forfeitures by statute<sup>20</sup>. However, it still remains to be seen whether these laws, arguably widening the conceptual parameters of the categories of property liable to forfeiture, will survive constitutional challenge within jurisdictions introducing them. On any reading, it is an aspect of the present topic where public policy considerations may be in tension with the protections which, it has been traditionally believed, a constitution will invariably offer to a citizen.

Similarly in the UK, the courts have held that, properly applied, the civil forfeiture laws do not arbitrarily interfere with property rights (see *R v He and Chen* [2004] EWHC 3021 Admin). The UK laws like most other laws contain numerous statutory exceptions to forfeiture, principally where the property is traceable to crime but the owner acquired the property in good faith, for full value, without notice of the crime. Indeed the scope of the exceptions and the ability of the Court to protect innocent person’s interests mean that in practice it is almost impossible for a forfeiture order to operate in a disproportionate way. Even if such an order could do so, the UK specifically provides that an order cannot be made if it is incompatible with ECHR rights. Therefore, the proportionality test remains as a long stop protection.

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20 Talbot, Civil Forfeiture: A Jurisprudence-Eating Monster (paper, April 2011), at p11. A striking example is the specific legislation in Ontario, Canada, providing for forfeiture of motor vehicles following certain road traffic violations, entitled ‘The Safer Roads for a Safer Ontario Act’.

Other jurisdictions have similar protections. Canada has „interests of justice” and „legitimate owner” defences. The US now (and since 2000) has legitimate owner defences (either the property has been used unlawfully without the knowledge of the owner or the owner is a good faith purchaser without notice of the crime). New Zealand and Australia have „undue hardship” defences. Ireland has a „serious risk of injustice” provision as a protection. Such safeguard provisions, conferring discretions on the courts are one effective way to ensure the correct balance is struck between the various interests in a civil forfeiture case.

## HUMAN RIGHTS CHALLENGES AND ECHR JURISPRUDENCE ON CIVIL FORFEITURE

The objections to civil forfeiture, which are primarily founded in human rights considerations, have been considered by national appellate and constitutional courts<sup>21</sup> in those states that permit civil forfeiture. In addition, for those states that are party to the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) has considered the legality of confiscation (both conviction and non-conviction based) in a number of cases<sup>22</sup>. The overarching consensus of both the national courts and the ECtHR is that civil forfeiture is compatible with human rights law. However, although what appears below is an examination, primarily, of the approach of the ECtHR, it must be remembered that the development of non-conviction based confiscation has been very much a national initiative, therefore, an examination of the decisions of national courts as to the protection of an individual's fundamental rights is equally relevant and important.

### Nature of in rem proceedings: criminal or civil?

Although criminality is at the core of this type of proceedings, they have not been found to amount to the bringing of criminal proceedings. How does a court determine if such proceedings are indeed civil proceedings? The ECtHR in *Engel v The Netherlands (No 1) (1976) 1 EHRR 647* laid down 3 principal criteria for civil proceedings:

1. the manner in which the domestic state classifies the proceedings; this is a starting point and not a determinative one. Simple classification of the proceedings as civil proceedings is not sufficient; courts will need to examine the true nature of the proceedings;
2. the nature of the conduct in question classified objectively;
3. the severity of any possible penalty.

In *Walsh v UK*<sup>23</sup>, the applicant (W) had been the subject of a recovery order in the UK and complained to the ECtHR on the following grounds:

- the recovery proceedings are criminal proceedings and fall within Article 6(1),
- the proceedings were in breach of Article 6(2) and the presumption of innocence had been denied to him as the civil standard, not the criminal standard, applied,

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21 E.g. in *US v Ursery* (1996) 135 L Ed 2D549, *In the Republic of Ireland: Gilligan v CAB* [2001] IESC 82

22 *Engel v The Netherlands (No 1) (1976) 1 EHRR 647*

23 Application no. 43384/05 (November 2006)

- the proceedings may be conducted entirely upon affidavit evidence which was contrary to Article 6(3)(d),
- he was subject to a penalty imposed in respect of conduct that predated the entry into force of POCA (retrospectivity),
- the recovery order violated Article 1 of Protocol No. 1.

In 2003, the applicant (W) was tried, together with his co-defendants for offences of dishonesty and a restraint order was placed on his property so that, if convicted, a confiscation order could be made. W was acquitted and the restraint order was discharged.

The Asset Recovery Agency (then the body responsible for asset recovery in England) commenced recovery proceedings for £70,250 (said to have been paid to his solicitor in 2001 to buy a house) and £5,969.10 held in a bank account, on the grounds that the monies were the proceeds of unlawful conduct within the meaning of the Proceeds of Crime Act 2002 („POCA”).

At an interlocutory hearing, W contended that the proceedings for recovery of his assets were not „civil” but criminal in nature and, therefore, the guarantees of Articles 6 (1) and (2) applied, in particular, the standard of proof. The High Court and Court of Appeal, based on an examination of domestic and Strasbourg authority (*Engel* criteria), rejected his claim and concluded that the proceedings were not criminal in nature:

*„The essence of Article 6 in the criminal dimension is the charging of a person with a criminal offence for the purpose of securing a conviction with a view to exposing that person to criminal sanction. These proceedings are obviously and significantly different from that type of application. They are not directed towards him in the sense that they seek to inflict punishment beyond the recovery of assets that do not lawfully belong to him. As such, while they will obviously have an impact on the appellant, these are predominantly proceedings in rem. They are designed to recover the proceeds of crime, rather than to establish, in the context of criminal proceedings, guilt of specific offences. The cumulative effect of the application of the tests in Engel is to identify these clearly as civil proceedings.”*

The House of Lords refused leave to appeal, and in 2006 a civil recovery order was made against W based on his earlier convictions (and not for the offences for which he had been acquitted) and criminal lifestyle and that the property had been obtained through unlawful conduct.

The ECtHR in dismissing his complaint, made some important observations. In applying the three guiding criteria<sup>24</sup> set out in *Engel and Others v. the Netherlands*, above, it held that the recovery proceedings did not amount to a determination of a criminal charge and, therefore, fell outside Article 6(1):

*„According to domestic law, recovery proceedings are regarded as civil, not criminal. The proceedings may have followed an acquittal for specific criminal of-*

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<sup>24</sup> The classification of the matter in domestic law, the nature of the charge and the penalty to which the person becomes liable.

fences but were separate and distinct in timing, procedure and content (cf. *Phillips v. the United Kingdom*, no. 41087/98, §§ 32 and 39, ECHR 2001 VII).

The domestic courts considered that the purpose of the proceedings was not punitive or deterrent but to recover assets which did not lawfully belong to the applicant (see also *Butler v. the United Kingdom (dec.)*, no. 41661/98, ECHR 2002 VI).

There was no finding of guilt of specific offences and that the High Court judge in making the order was careful not to take into account conduct in respect of which the applicant had been acquitted of any criminal offence.

The recovery order was not punitive in nature; while it no doubt involved a hefty sum, the amount of money involved is not itself determinative of the criminal nature of the proceedings (see *Porter v. the United Kingdom, (dec.)*, no. 15814/02, 8 July 2003, where the applicant was liable to pay some GBP 33 million in respect of financial losses to the local authority during her mandate as leader)."

In respect of the two other remaining grounds, the Court in dismissing those came to the view that Article 7 (retrospectivity) was inapplicable as the proceedings did not involve the determination of a criminal charge, and as W had not previously complained (before the domestic courts) that there had been an interference with his property rights under Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) he had failed to exhaust domestic remedies on this ground.

### Presumption of innocence: Article 6(2) of ECHR

*Butler v UK*<sup>25</sup>: The case concerned a cash seizure of £239,010. The Government alleged that there was no evidence to substantiate his claim that he had won the money from betting since 1994 and at the time of the forfeiture he was on social security. The court can consider circumstantial evidence to satisfy itself, to the civil standard, that the money was related to drug trafficking.

The applicant challenged the forfeiture on two grounds. First, that his right to a presumption of innocence under Article 6(2) had been violated because he had been compelled to prove that the money was not related to drug trafficking to the criminal standard. The true nature of such proceedings is that they are criminal and must, therefore, have the necessary safeguards.

Secondly, the order deprived him of the enjoyment of his property (Article 1 Protocol 1) without the safeguards applicable to the criminal process and with no public interest justification for such forfeiture.

The ECtHR observed that cash forfeiture was a preventive measure and cannot be compared to a criminal sanction. It is designed to take money out of circulation and Article 6 did not apply to such proceedings

In relation to Article 1 of Protocol I, the Court applied the test for restrictive rights and considered whether the measure in this case was proportionate.

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25 41661/98, 27th June 2002

The Court concluded that as drug trafficking is of serious concern in member states, its policy must be capable of balancing the rights of the individual with the wider community interest. The Act gave clear powers to the officers and there was no unfettered discretion to seize and forfeit. Furthermore, the actions of the officers were subject to judicial scrutiny, and the courts weighed the evidence before ordering seizure. The interference with his property rights was not, therefore, a disproportionate interference bearing in mind the balancing exercise between community and him.

In *Geerings v The Netherlands*<sup>26</sup>, the applicant (G.) had been tried and convicted in The Netherlands for offences of dishonesty (theft, handling stolen goods, attempted burglary and membership of a criminal organisation). On appeal, the court quashed his conviction in relation to some of the offences on the basis of insufficient evidence. In separate proceedings, the prosecutor sought a confiscation order in respect of the offences for which he had been acquitted on the grounds that „*although the Court of Appeal had acquitted the applicant of most of the offences he had been charged with, there remained sufficient indications that he had committed them*”. The applicant objected to the order in so far as it related to the offences for which he had been acquitted.

The Regional Court refused the confiscation order, but on appeal, the Court of Appeal granted the confiscation order on the basis that the property had been derived from criminality. The Supreme Court in upholding the confiscation order set out its reasons:

*...consequently, offences included in a criminal charge that have resulted in an acquittal can still form the basis for the imposition of a (confiscation) measure. Also in such a case, the court will have to determine either that there exist sufficient indications that a similar offence or similar offences, referred to in Article 36e § 2 of the Criminal Code for which a fine of the fifth category may be imposed, has/have been committed by the person concerned, or that it is plausible that the other similar offences, referred to in Article 36e § 3 of the Criminal Code, have in some way resulted in the illegal obtaining of advantage by the person concerned. Such a determination is preceded by the procedure regulated in Articles 511b et seq. of the Code of Criminal Procedure. This serves as a guarantee that the court which must determine a request for a confiscation order filed by the prosecution department will only do so after having examined whether, and has found that, the statutory conditions, ... have been met.*

*...It follows from the above that the circumstance that the suspect has been acquitted of specific offences does not automatically constitute an obstacle for considering those offences, in the framework of the confiscation procedure, as “similar offences” or “offences for which a fifth-category fine may be imposed” as referred to in Article 36e § 2 of the Criminal Code.*

*....The Supreme Court would add that this is not incompatible with Article 6 (2) of the Convention...”*

The ECtHR upheld G’s complaint that the confiscation order violated his right to be presumed innocent under Article 6 (2) given that he had been ac-



quitted. The Court emphasised that whilst the presumption of innocence does not apply to confiscation proceedings, a confiscation order granted in relation to those charges for which the applicant had been acquitted amounted to a „determination of the applicant’s guilt without the applicant having been „found guilty according to law”.

The Court drew a distinction between those cases where a confiscation order may be granted where an applicant was unable to provide an adequate explanation for the provenance of his assets (*Phillips v. the United Kingdom*<sup>27</sup> and *Van Offeren v. the Netherlands*<sup>28</sup>), and the present case where „the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2 (compare, mutatis mutandis, *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141 A, pp. 15–16, § 28).”

Since the above decision of the ECtHR, the UK Supreme Court in 2011 in the case of *Gale and another v SOCA*<sup>29</sup> examined the application of the presumption of innocence in civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002.

The Serious and Organised Crime Agency (SOCA) had obtained a recovery order under Part 5 of the Proceeds of Crime Act 2002 (civil forfeiture) in the sum of some £2million as property derived from criminal activity by either David Gale or his former wife Teresa Gale.

David Gale had been prosecuted and acquitted in Portugal for offences of drug trafficking, money laundering and tax evasion; similar proceedings in Spain had been discontinued.

Gale appealed the grant of the recovery order on the basis that it infringed his right to a fair trial under Article 6 of ECHR as the standard of proof („balance of probabilities”) was lower than that which would be applicable in a criminal trial (beyond reasonable doubt) and that notwithstanding the language of the Act, the courts should adopt the higher criminal standard. Furthermore, in granting the recovery order, the underlying presumption was that defendant was guilty of criminal conduct and this ran counter to the presumption of innocence, particularly as defendant had been acquitted in Portugal.

The Supreme Court considered the application of article 6(2) after a person has been acquitted in criminal proceedings, and civil proceedings are instituted as in the present case.

The Court examined the decisions of the ECtHR where civil proceedings (for example for costs, compensation etc.) have been instituted following an ac-

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27 no. 41087/98, § 35, ECHR 2001 V

28 (dec.), no. 19581/04, 5 July 2005

29 [2011] UKSC 49

quittal, and found that there was some inconsistency in the Strasbourg decisions on the application of Article 6(2) in such proceedings. A number of decisions clearly indicate that Article 6(2) is not engaged, whilst other decisions point to an infringement of Article 6(2), which makes it difficult for national courts to distil the principle. The Supreme Court described it as „*a confusing area of Strasbourg law that would benefit from consideration by the Grand Chamber... Before the decision of the ECtHR in Geerings v The Netherlands (2007) 46 EHRR 1222 and the decision of the House of Lords in R v Briggs-Price [2009] AC 1026 the law was not in doubt. Confiscation proceedings that proceed on the basis that property in the hands of a convicted criminal was derived from other criminal activity did not involve the defendant being 'charged with a criminal offence' in relation to the other offending, or engage article 6(2).*”

The Supreme Court distinguished the case from *Geerings*; the recovery order in the present case was not founded entirely on the Portuguese prosecution but was much wider, therefore, the „*procedural link between the criminal prosecution and the subsequent confiscation proceedings*” as identified by ECtHR in *Geerings* was not present.

Lord Dyson was of the view that neither the *Geerings* case nor *R v Briggs-Price* (UK decision) had any application to the present case, and found that „*there is no sufficient link between civil recovery proceedings under Part 5 of SOCA and any criminal proceedings to justify the application of article 6(2) to the Part 5 proceedings. Indeed, there is no link at all. The Part 5 proceedings are not a 'direct sequel' or 'a consequence and the concomitant' of any criminal proceedings. They are free-standing proceedings instituted whether or not there have been criminal proceedings against the respondent or indeed anyone at all.*”

Lord Dyson rejected the application of Article 6(2) to the recovery proceedings on the *Engels* test that the proceedings were civil and the „*respondent... is not charged with any offence. He does not acquire a criminal conviction... at the conclusion of the Part 5 proceedings... These include the express provision that the standard of proof is on the balance of probabilities. The nature of the proceedings is essentially different from that of criminal proceedings. The claim can be brought whether a respondent has been convicted or acquitted, and irrespective of whether any criminal proceedings have been brought at all.*”

However, whilst he shared some of the concerns of the lack of clarity in the ECtHR decisions, he was of the view that Strasbourg jurisprudence identified two situations in which Article 6(2) would be engaged in subsequent civil proceedings. The first is where the civil and criminal proceedings are „*so closely connected... that the Convention protections available in the criminal proceedings should also be available in the civil proceedings. If the outcome of the criminal proceedings is decisive for the 'civil' proceedings, then there is a sufficiently close connection for article 6(2) to apply.*”

Secondly, where the nature of the proceedings (the *Engels* test) are not the determining factor, and neither is there a close link between the criminal and

civil proceedings, but where the decision of the court has the effect of „imputing the criminal liability of the [applicant], that of itself will be sufficient to create the necessary link for article 6(2) to apply in those proceedings”.

### Interference with the right to property

The right to the peaceful enjoyment of property<sup>30</sup> „comprises three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule,...covers deprivation of possessions and subjects it to certain conditions; the third rule, ...recognises that the Contracting States are entitled, *inter alia*, to control the use of property in accordance with general interest...”<sup>31</sup>

As a restricted right it is, therefore, capable of being subject to interference, provided such interference is:

- provided by law (legality)
- pursues a legitimate aim (necessity)
- proportionate

In *Raimondo v Italy*<sup>32</sup>, the prosecutor commenced criminal proceedings against R for being suspected of belonging to a mafia-type organisation and applied for a restraint order in respect of his assets (land, buildings and cars). R was subsequently acquitted. In the interim the district court had discharged the restraint order in respect of some of his assets, but ordered the confiscation of the remaining on the basis that the assets had not been acquired lawfully. R appealed and the Court of Appeal ordered restitution of the property confiscated.

R applied to the Commission and complained, *inter alia*:

- a. breach of Article 6(1) (length of restraint/confiscation proceedings),
- b. Interference with property (Article 1, Protocol 1),
- c. damage to property arising out of negligence.

The ECtHR found that there had been no violation of Article 1 of Protocol 1, and made the following observations:

- seizure did not purport to deprive the applicant of the property but to prevent his using it,
- a provisional measure was intended to ensure that property which represents proceeds is available for confiscation, if necessary,
- In the present case, it related to ‘mafia’ related offences,
- Temporary seizure cannot be said to be disproportionate,
- Confiscation pursued a legitimate aim and served a general public interest; that of depriving the person convicted of illegitimate property,

30 Contained in Article 1 of Protocol 1 of ECHR

31 Paragraph 28, *Ismayilov v Russia* (Application no 30352/03), 6 April 2009

32 12954/87, 22<sup>nd</sup> February 1994.

- Confiscation is an „*effective and necessary weapon*” in such cases,
- Seizure/confiscation invariably includes some damage, and there was no evidence adduced to show that the damage was exceptional,
- However, there was a breach of Article 1 Protocol 1 in respect of some of the assets on the basis that they had remained on the register long while after the court had ordered their discharge. This interference was not provided by law and neither was it necessary to „*control the use of the property...*”.

Similarly in *Arcuri v Italy*<sup>33</sup>, Arcuri was suspected of being a member of a criminal organisation engaged in drug trafficking. The prosecutor applied for preventive measures and sought seizure of his assets on the basis of the discrepancy between his assets<sup>34</sup> and financial position when compared with his legitimate business/income. Arcuri had transferred a number of his assets to his wife and children.

The special division of the court in Turin came to the view that the evidence pointed to „*at least part of the first applicant's considerable fortune had been unlawfully acquired...*”

The Turin Court of Appeal upheld the decision and also came to the view that the family's fortunes had been amassed through proceeds of criminal offences. The relevant law in Italy permits a court to issue a preventive order where there is „*sufficient circumstantial evidence ...to show that the property concerned forms the proceeds from unlawful activities or their reinvestment. Together with the implementation of the preventive measure the District Court shall order the confiscation of any of the goods seized...*”

The complaint of the Arcuris' rested on two grounds:

1. the preventive measure infringed his right to the peaceful enjoyment of his possessions (Article 1 of Protocol 1),
2. the proceedings were inherently unfair and in breach of Article 6(1) and (3) of ECHR.

The ECtHR recognised that confiscation does indeed amount to an interference with the right to peaceful enjoyment of possessions, however, Article 1 of Protocol 1 permits Member States to adopt „*such laws as it deems necessary to control the use of property in accordance with the general interest, provided the interference was prescribed by law, is necessary and proportionate. Therefore, where the 'impugned measure forms part of the crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem....and the appropriate way to apply such measures. The Court further observes that in Italy the problem of organised crime has reached a very disturbing level. The enormous profits made by*

33 52024/99, 5th July 2001.

34 The assets included 8 vehicles, several plots of land and flats, 2 private company shares and a number of documents.

*these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted...particularly the confiscation measure...may appear essential..."*

The Court re-emphasised the preventive nature of such proceedings which do not make any determination of guilt or otherwise and are, therefore, not criminal proceedings.

## Proportionality

As a general rule, confiscation laws are generally held to be proportionate, but where they impose an excessive burden on the citizen<sup>35</sup> or where high value assets are the subject of an order and there is a tenuous or weak connection to the criminal conduct (usually in relation to instrumentalities), the courts have found such confiscation *in rem* actions to be disproportionate. Examples include:

- forfeiture of a car because it was being driven by a drunk driver. (*NDPP v Vermaak* (1996) 386/06 (South Africa); however in Canada and the US, the courts were of the view that forfeiture of the car in similar instances was not disproportionate;
- an order forfeiting a factory running a legitimate business simply because unlicensed gaming machines were in the rest-room used by the workers (*Mohunram v NDPP* [2007] 2 ACC 4 (South Africa);
- *Director of ARA v John and Lord* [2007] EWHC 360 (UK): the court found that it was doubtful that monies received from unlicensed street trading would amount to property obtained through unlawful conduct as the penalty for unlicensed trading is set by Parliament, and the sentence must be proportionate to the offender's culpability. The court was of the view that „*it cannot have been the intention of parliament that a breach of regulatory statute for which, on conviction, a fine of £50 is appropriate should automatically result in a civil recovery order in respect of all the money he received in making lawful sales while committing that offence*”.

### Can civil recovery powers be used retrospectively?

There are two separate parts of the answer. The rule of retrospectivity is offended if civil recovery is sought for conduct that was not a criminal offence at

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35 *Jucys v Lithuania* 5457/03, 8<sup>th</sup> January 2008: Mr Jucys was arrested in December 1995 on suspicion of smuggling mink furs. He was ultimately acquitted in 1997. The applicant's complaint was about the excessive length of the civil proceedings (over eight years and six months) to obtain compensation for the furs which had been auctioned by the State during the criminal proceedings against him. The Court held unanimously that there had been a violation of Article 1 of Protocol No. 1 (protection of property) and he was awarded 25,000 euros (EUR) in respect of pecuniary and non-pecuniary damage and EUR 810.94 for costs and expenses.

the time that the property was obtained. However, if the conduct is criminal at the time the property is obtained but there is no enforcement authority to take the action, then when the state creates such a body or empowers a body to take such action, this is mere procedure and the defence cannot say that the body has no power to take action (civil recovery) in respect of offences committed prior to the establishment of the body<sup>36</sup>

### Overall position

The human rights jurisprudence recognises that confiscation *in rem* can be an effective remedy where prosecuting agencies are unable to proceed with criminal proceedings for the reasons set out above. However, any confiscation *in rem* framework must meet the three criteria contained in the ECHR; namely legality, necessity and proportionality. In addition, to work effectively and ensure, insofar as one can, that human rights challenges are appropriately met, the following international standards should be included:

- The authorities must prove its case on a balance of probabilities;
- Interim and final orders should be made by a court. Although no particular crime need be identified or proved, the court must be required to satisfy itself that the property is the proceeds of, or traceable to, crime;
- Any owner and any person claiming ownership must be allowed to participate in proceedings;
- Consideration should be given to whether an innocent owner defence should be provided for.

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36 Walsh v UK (ECtHR) see above; 2 UK cases that address this point: Jia Jin He [2004] EWHC 3021 (Admin) and The Director of ARA v Szepietowski and others [2007] EWCA 766.

# EXPERIENCES AND LEGAL CHALLENGES FROM OTHER JURISDICTIONS

## AUSTRALIA

All Australian states and territories, except Tasmania, have different, albeit similar, proceeds of crime schemes that cover both conviction and non-conviction based (civil forfeiture) confiscation, and the Commonwealth Director of Public Prosecutions (CDPP) is the agency responsible for confiscation<sup>37</sup>.

The non-conviction based confiscation scheme is governed by Proceeds of Crime Act 2002<sup>38</sup> in relation to federal crimes, and is similar to the regime in other countries. The Act extended the confiscation regime to include civil forfeiture at a federal level to allow for a wider recovery of assets. The Act creates four methods of recovery: restraining orders, forfeiture orders<sup>39</sup>, pecuniary penalty orders (PPO)<sup>40</sup> and literary proceeds order (LPO).

Details of Australian cases are set out below as they provide general points of guidance and approach for a state considering the introduction of a civil forfeiture framework.

The need to protect the rights of the innocent owner, as well as the person who may be the subject of an interim order led the Supreme Court of Queensland in *Re Criminal Proceeds Confiscation Act 2002 (Qld)* [2003] QCA 249 to „strike out” a provision (section 30) of the Criminal Proceeds Confiscation Act 2002 of Queensland as „constitutionally invalid” on the grounds that it removed the „essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially”.

The Act provides for the application of a restraining order which ‘may be made without notice to any person to whom it relates’ under section 28. The wording of section 28 does not, therefore, exclude the possibility of an *inter partes* or an *ex parte* application.

However, section 30 of the Act<sup>41</sup> mandates that the Supreme Court hear the application „in the absence of anyone other...” (it identifies a number of representatives from the enforcement authority) and that it „must hear the ap-

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37 According to the CDDP Annual Report for 2012 A\$ 195 million was recovered between January 2003 and 31 July 2012, see [www.cddp.gov.au](http://www.cddp.gov.au)

38 Came into force in January 2003

39 Forfeiture orders apply both to proceeds and instrumentalities of crime.

40 This relates to the recovery of proceeds of crime (benefit based).

41 Section 30 of the Queensland legislation was unique and at odds with other States and the Commonwealth addressing non-conviction based confiscation.

*plication (a) in the absence of a person whose property is the subject of the application; and (b) without the relevant person having been informed of the application.”*

The wording of section 30, therefore, not only went beyond the regime envisaged by section 28 or any *ex parte* application regime, but required the court to exclude any person affected by the order (the person who may be the subject of the interim order or the innocent property owner).

Section 31(2) of the Act provides that the court may refuse the restraining order where it deems it is not in the public interest or the State fails to provide an undertaking for damages or costs. In the present case, the State had not provided any undertaking and neither had the first instance court provided any reasons for not requiring such an undertaking. The Act does, however, make provision for a person affected by the order to apply for a variation etc.

The issue before the Supreme Court was *„whether section 30, by commanding the court to hear the application for a restraining order in the absence of any interested party when the State elects to proceed without notice, so interferes with the essential character of the exercise of judicial power as to make the provision invalid”*.

Clearly the effect of a restraining order necessarily involves an interference with the property rights of the person concerned (including the innocent owner) but the Act expressly excluded affected parties from the procedure which in the view of the Supreme Court was:

*„.... clearly to give a restraining order (and also a confiscation order) the aura of respectability and public acceptance which ordinarily attaches to an order of the Supreme Court made in the exercise of an independent judicial process.....Asking a judge to make a decision on such issues in those circumstances makes a mockery of the exercise of the judicial power in question. The statutory provision removes the essential protection of the citizen inherent in the judicial process. Effectively the provision directs the court to hear the matter in a manner which ensures the outcome will be adverse to the citizen and deprives the court of the capacity to act impartially.....the direction or command to the judge hearing the application to proceed in the absence of any party affected by the order to be made is such an interference with the exercise of the judicial process as to be repugnant to or incompatible with the exercise of the judicial power of the Commonwealth. Then, because the Supreme Court of Queensland is part of an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth, such a provision is constitutionally invalid.”*

### ***Meredith v State of Queensland [2006] QCA 465***

In 2003, a restraining order was made under the Criminal Proceeds Confiscation Act 2002 against M. The Act which set up the non-conviction based confiscation regime allows for restraining and confiscation orders where a *„person is suspected of having been engaged in one or more serious crime related activities”* but has not been convicted of any crime.



Following the grant of a restraining order, the court must decide, on a balance of probability, whether the person engaged in the „defined form of criminal activity” before a forfeiture order is made.

In September 2003, M was ordered to attend for examination before the court under section 38(1) (c) which provides as follows:

- (i) an order (examination order) requiring a person whose property is restrained under the restraining order or a stated person to attend for examination on oath before the court or a stated officer of the court about the following:
  - the affairs of any person whose property is restrained under the restraining order;
  - the nature and location of any property of a person whose property is restrained under the restraining order;
  - the nature and location of any property restrained under the restraining order that the applicant for the order reasonably suspects is serious crime derived property.

At the hearing, the State of Queensland sought to ask questions about M’s engagement in the commission of drug related offences on the grounds that s.38(1)(c)(i) employed the term „affairs” which must be wider than just his financial circumstances. M maintained that the State cannot enquire into, and oblige him to answer questions on „*matters that have nothing to do – even indirectly – with financial circumstances or property. These contentious questions relate solely to whether [the respondent] committed serious drug offences*”

The judge ruled in M’s favour and stated:

*„‘Affairs’ in s 38(1)(c)(i) comprehends such activity as ventures with a potential to lead to the identification and preservation of interests in property that are or might [be] comprehended by forfeiture orders. As the New South Wales Court of Appeal has said (DPP v Chidiac (1991) 25 NSWLR 372, 380) of a counterpart to s 38(1)(c), an examination about ‘affairs ...’ may cover ‘an ambit wider than a mere inquiry as to the location of real or personal property’. But an examination order does not permit an interrogation that could not possibly touch upon the identification of proprietary interests that are or might be affected by restraining, forfeiture or proceeds assessment orders.*

*It is not necessary to recall that ‘statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect’ (The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543, 553. .... of the legislative provisions concerning an examination order, ‘affairs ...’ in s 38(1)(c)(i) does not extend to matters that have nothing to do with property or financial circumstances and instead relate exclusively to involvement in ‘serious criminal activity’ (Incidentally, this view accords with that taken in respect of an examination order under s 48(1)(c) of the Proceeds of Crime Act 1987 (Cth) in Director of Public Prosecutions (Commonwealth) v Beljajev, No 37 of 1989, 10 June 1992, Supreme Court of Victoria...”*

The State of Queensland appealed to the Supreme Court on the grounds that the judge had erroneously given a narrow construction to the meaning of ‘affairs’ in section 38(1)(c) to mean just „*financial affairs*”, and that M should be required to answer questions relating to his criminal activities „*independently of the financial consequences of such activities for the suspect*”.

The Supreme Court in dismissing the appeal set out object and purpose of the Act,

*„It is important to bear in mind that the main object of the legislation is, as s 4(1) of the Act declares, ‘to remove the financial gain and increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity’. There is no hint in s 4 of the Act of any legislative intention to facilitate inquiries into criminal activity on the part of an examinee where that criminal activity has nothing to do with financial gain or financial loss. Nor is there any hint of such an intention in the Explanatory Notes to the Criminal Proceeds Confiscation Bill (...)*

*In the conduct of an examination under s 38(1)(c) of the Act, an examiner should, no doubt, be allowed a proper opportunity to explore the possible connection between illegal activity and property so as to prevent the frustration of an order made under s 38(1)(c), and the frustration of the substantive objects of the Act which such an order is intended to serve. (...) The prospect that such questions may arise for determination in the course of an examination under s 38(1)(c)(i) of the Act cannot be so disturbing as to incline a court to read the expression ‘affairs’ as ‘activities’ if such a construction were open on the language....”*

### ***Director of Public Prosecutions v Xiao Xuan Xu and Anor*** **[2010] NSWSC 842**

In September 2009, The Commonwealth DPP sought a forfeiture order for a property which is said to be the proceeds of crime following a restraining order which had been granted in 2004. A forfeiture order, under s.47 of the 2002 Act, is granted if:

- the DPP applies for the order; and
- the property has been restrained for at least 6 months; and
- the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more serious offences

The second defendant, Ms Ng, in whose name the property was held submitted that ‘*clear and cogent proof is required before the DPP can discharge the onus of proof*’ (the standard of proof being the civil standard of balance of probability). The DPP placed reliance on documentary evidence obtained from the People’s Republic of China, one of which stated that the first defendant (X) had received money in 1997 and 1998 from a commercial transaction of communication technology and from which the property, the subject of the restraint order, had been bought.

Ms Ng was the subject of compulsory examination under the Act and provided an explanation of how she came to acquire the property, and that she believed that X was engaged in „lawful, successful, business dealing”.

The Court was of the view that the DPP had failed to show that:

- the money (\$US9million) was the proceeds of an indictable offence and an offence against the law of the Commonwealth; neither could the DPP show that the facts (which occurred outside Australia) would amount to an indictable offence if it had occurred in Australia,
- the DPP had not adduced any evidence that X had obtained the money through „dishonesty, deception or fraud and the requisite state of mind...”,
- the DPP had identified, but failed to adduce evidence. of equivalent offences under Australian law („hypothetical offences”).

## CANADA

The Canadian experience shows that, since 2003, there have been over 170 civil forfeiture cases in Ontario Province alone. In total, Canada’s civil forfeiture laws have led to the recovery, as of 2011, of some C\$80 million, of which more than C\$30 million has been awarded in grants for victim related projects<sup>42</sup>. The initiative for civil forfeiture was led by the province Ontario followed by the adoption of similar legislation in other provinces and federal buy-in. However, there was a concerted constitutional challenge to *in rem* proceedings in Ontario [in 2005] which was dismissed, with the Ontario Superior Court of Justice finding that civil forfeiture does not infringe the Charter of Rights and Freedoms.

As with most legislative schemes, the Canadian legislation, in its various forms, starts with a proceeds provision: with the underlying definition capable of being relatively narrow or broad, depending upon a state’s particular concerns and needs. Under Part II of Ontario’s *Civil Remedies Act, 2001*, for example, the Attorney General may commence *in rem* proceedings against the proceeds of unlawful activity. A proceed is any property „acquired directly or indirectly, in whole or in part, as a result of unlawful activity.” The statute makes specific provision to protect legitimate owners. The statute permits an interlocutory preservation order; this allows assets to be frozen and held for litigation. In the forfeiture proceeding itself, where the court finds that the property is a proceed of unlawful activity it shall be forfeited except where it would clearly not be in the interests of justice to do so. The statute has retrospective application. The *in rem* nature of the proceeding offers a viable device to attack difficult problems, particularly for issues such as corruption in the developing world. If looted money from a developing state is in Ontario, as long as the corruption (or fraud/theft) would have been an offence in Ontario, the courts can take jurisdiction over the property (notwithstanding that the unlawful activity occurred in another state).

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42 „Civil Forfeiture in Ontario” (Ministry of the Attorney General, Ontario)

British Columbia is the other of the two provinces that pioneered the use of civil forfeiture in Canada to deter unlawful activity by taking away instruments and proceeds of it. Today, seven provinces have civil forfeiture programmes.

Since 2006, British Columbia's Civil Forfeiture Office has operated under the authority of the Civil Forfeiture Act. The Civil Forfeiture Act and accompanying Regulation allows the Director of Civil Forfeiture to initiate civil court proceedings against property believed to be the instruments or proceeds of unlawful activity. In 2011, amendments were made to the Civil Forfeiture Act. These amendments allow the Director of Civil Forfeiture to commence administrative proceedings against property valued at \$75,000 or less that is not real estate (see Part 3.1 of the Civil Forfeiture Act, Administrative Forfeiture of Subject Property). These proceedings are not commenced in court, they are an administrative process. Whether proceedings are initiated in court or administratively, they are not reliant on criminal charges or convictions arising from the alleged unlawful activity.

## ITALY

The application of non-conviction based confiscation (civil forfeiture) has been recognised, in Italy, as being capable of having a substantial impact on organised crime. The application of non-conviction based confiscation provisions to a dead suspect's heirs allowed the Italian authorities, in 2010, to freeze, in a single case, assets estimated to be worth at least € 700 million. In that case, a businessman suspected of being the „fiduciary person,, of an important organised crime group, died from unknown causes. He had been convicted of participation in a criminal organisation by a first instance criminal court, but an appeal was pending. The assets frozen included 136 apartments, 11 warehouses, 75 land estates, 8 shops, 2 villas, 51 garages, company shares and bank accounts, for a total value estimated between € 700 million and € 2 billion. In 2008 Italy had passed legislation which could prevent the heirs from a deceased defendant, whose assets have been frozen, from legally inheriting the assets and having them released. The businessman's relatives were not able to explain the legal origin of all these assets, nor the huge disproportion between their declared revenues and the frozen assets<sup>43</sup>.

As have been seen from the section, above, on human rights challenges, it is fair to say that some of the leading jurisprudence has arisen from Italian civil forfeiture cases. For instance, it was an Italian court that first had to grapple with the argument that a restraining order is a preventive measure, leads to a temporary seizure of an individual's assets, and, therefore, amounts to a substantial interference with the owner's property rights and may cause him significant damage<sup>44</sup>, for example, his property may be sold, etc.

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43 EC Memo 12/179, March 2012. Proposal for a new Directive.

44 See for e.g. case Raimondo v Italy, 12954/87.

## THE PHILIPPINES

The case law that has developed in the Philippines can be of particular use and relevance to the authorities planning to introduce civil forfeiture. In particular, the nature of civil forfeiture as a truly civil, and constitution-compliant procedure, has been confirmed in detail by its national courts

The Philippines is, in a true sense, a mixed legal system, with a civil law codification approach, much influenced by Spain, co-existing with case law precedent and common law features that developed during the period of heavy US influence (from 1900 to 1946).

The Philippines themselves have benefited from the civil forfeiture powers of Switzerland and have received an estimated \$2 billion of the \$5 billion (some estimates are \$10 billion) stolen by Ferdinand Marcos<sup>45</sup>.

There is civil forfeiture and, through, reported cases, it has developed as follows:

***Mariano G. Almeda, Sr., and Valeriana F. Almeda  
(petitioners) v The Hon. Jesus Y. Perez, Judge of the  
Court of First Instance of Manila, and the Republic of the  
Philippines, respondents  
(G.R. No. L-18428), August 30, 1962***

Mariano G. Almeda, Sr served as the Assistant Director of the National Bureau of Investigation for some 9 years (1950 – 9) during which he acquired a number of properties. A criminal complaint was filed against him, and preliminary investigations confirmed that there were „reasonable grounds to believe that from 1950 to 1959, Mariano G. Almeda, Sr. acquired properties manifestly out of proportion to his salary as Assistant Director of the National Bureau of Investigation, and to his other lawful income” (illicit enrichment).

As a result of the preliminary investigation, the Solicitor General instituted civil proceedings against him and his wife (Valeriana F. Almeda) for forfeiture of the properties. The Solicitor General later sought to amend the civil petition to include Mr Almeda’s son and to add further „counts” which increased the amounts allegedly received from „unexplained sources” without any further preliminary investigation.

Almeda objected to the proposed amendments; the first instance judge allowed the additional „counts” but refused the application to include Mr Almeda’s

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<sup>45</sup> The Swiss have shown that civil forfeiture can address a variety of problems, including corruption, which is particularly challenging for developing states that can ill-afford to have their treasuries looted. Vladimiro Montesinos, the former head of the Peruvian National Intelligence Service, fled Peru in September 2000. Within two weeks, Swiss prosecutors began freezing \$113.6 million (USD) in corruption related proceeds. The government of Nigeria, meanwhile, has received back, through civil forfeiture, \$1 billion of the \$5 billion looted by late dictator Abacha, who took bribes and stole directly from the Central Bank of Nigeria.

son. The judge found that as these were civil proceedings and the purpose of the preliminary investigation was „to determine whether or not there is probable cause that respondents have acquired properties beyond their means..... The mere fact that a preliminary investigation is required to be held in a proceeding of this nature does not make the same a criminal proceeding”.

Almeda and his wife petitioned the Supreme Court for prohibition and certiorari to set aside the orders of the judge. First, that the Republic Act No. 1379 upon which the Solicitor General placed reliance for the civil action was „penal in substance and effect” and any amendment must be made after a preliminary investigation. Secondly, as Almeda had already pleaded no amendment should be allowed that goes to the „substance” of the action.

The Supreme Court, in refusing the order for prohibition and certiorari, examined the relevant provisions of the Republic Act No. 1379 and held that the forfeiture proceedings were civil and not criminal in nature for the following reasons:

- the forfeiture was not penal in nature and related to „properties illegally acquired”;
- the procedure that governed forfeiture in the law is civil and includes „petition, answer and hearing”;
- (ciii) although the preliminary investigation prior to the filing of the civil action is similar to that conducted in a criminal case, the remaining procedural steps are civil as there is no „reading of information, a plea of guilty or not guilty, and a trial thereafter, with the publication of the judgement in the presence of the defendant. But these proceedings ...are not provided for in the law’ and, therefore, ‘it stands to reason that the proceeding is not criminal”.

***Republic of the Philippines v Alejandro Katigbak  
and Mercedes K. Katigbak (G.R. No. L-19329),  
22 December 1989***

The Solicitor General brought two civil actions under the Republic Act No. 1379 against Alejandro Katigbak, a former public official, and his wife for forfeiture of properties acquired by them. It was alleged that the properties had been „unlawfully acquired” by Katigbak (K) when he was employed in various government departments.

The first instance court granted the order for forfeiture and rejected K’s submissions that Republic Act No. 1379 was unconstitutional and, in any event, should not be applied retrospectively (the properties having been acquired prior to the coming into force of the Act). In addition, properties acquired after K left public service should also be excluded from the forfeiture proceedings. The court refused the application for a retrial but reduced the amount for forfeiture.

Both Katigbaks lodged an appeal, and the Court of Appeals certified the question of the constitutionality of the Republic Act No. 1379 for consideration by the Supreme Court.

The Supreme Court, in reversing the decision of the trial court, held that the forfeiture of property under the Republic Act No. 1379 is by its nature penal, and cannot, therefore, have retrospective application and that „*such a disposition is, quite obviously, constitutionally impermissible*”.

***Republic of the Philippines (represented by the Anti-Money  
Laundering Council) v Glasgow Credit and Collection  
Services, Inc. and Citystate Savings Bank, Inc.,  
(G.R. No. 170281), 18 January 2008***

The Supreme Court was petitioned to review the decision of the Regional Trial Court which dismissed the application by the Anti-Money Laundering Council for civil forfeiture of assets held in bank deposits on behalf of Glasgow Credit and Collection Services, Inc. (Glasgow) and Citystate Savings Bank, Inc. (CSBI) on the grounds that the summons (following the grant of a preliminary injunction in 2003) had not been served on Glasgow and CSBI and no return had been entered by them.

Namely, in 2002, the Office of the Solicitor General received a motion to dismiss on behalf of Glasgow on three grounds:

- the court had no jurisdiction over its person as summons had not yet been served on it;
- the complaint was premature and stated no cause of action as there was still no conviction for „estafa” or other criminal violations implicating Glasgow and
- there was failure to prosecute on the part of the Republic.

The Republic opposed the application to dismiss on the grounds that the action was for *in rem* forfeiture and not *in personam* and therefore there was no requirement for the court to exercise jurisdiction ‘*over the person of the defendant*’, there was no requirement for a prior conviction, and the complaint was sufficient to establish a cause of action.

In 2004, the trial court reinstated the proceedings and directed that the summons be served on both entities within 15 days. In July 2004, the summons were returned as ‘unserved’ as Glasgow was no longer based at the address provided.

The trial court dismissed the case and „*direct CSBI to release to Glasgow or its authorized representative the funds in CA-005-10-000121-5*” (the account) on the following grounds:

- improper venue as it should have been filed in the RTC of Pasig where CSBI, the depository bank of the account sought to be forfeited, was located;
- insufficiency of the complaint in form and substance and
- failure to prosecute.

The Republic petitioned the Supreme Court on the grounds that the decision of the trial court raised important questions of law and whether the complaint for civil forfeiture was „correctly dismissed on grounds of improper venue, insufficiency in form and substance and failure to prosecute”.

The Supreme Court, issued a temporary restraining order against Glasgow and CSBI in relation to the monies held in the account, and made the following findings:

- the trial court was the correct and proper venue;
- the test for sufficiency of the complaint is „whether or not, admitting the facts alleged, the court could render a valid judgment upon the same in accordance with the prayer of the complaint.... Whether or not there is truth in the allegation that account no. CA-005-10-000121-5 contains the proceeds of unlawful activities is an evidentiary matter that may be proven during trial. The complaint, however, did not even have to show or allege that Glasgow had been implicated in a conviction for, or the commission of, the unlawful activities of estafa and violation of the Securities Regulation Code. A criminal conviction for an unlawful activity is not a prerequisite for the institution of a civil forfeiture proceeding. Stated otherwise, a finding of guilt for an unlawful activity is not an essential element of civil forfeiture”;
- the trial court was wrong to find that the Republic had failed to prosecute the case, ‘nothing could be more erroneous’ as the whereabouts of Glasgow were unknown and there had been no delay on the part of the Republic;
- the summons can be served by publication where service could not be effected as „such mode of service is allowed in actions in rem and quasi in rem.... this Court declared that the rule is settled that forfeiture proceedings are actions in rem. While that case involved forfeiture proceedings under RA 1379, the same principle applies in cases for civil forfeiture under RA 9160, as amended, since both cases do not terminate in the imposition of a penalty but merely in the forfeiture of the properties either acquired illegally or related to unlawful activities in favour of the State.....As an action in rem, it is a proceeding against the thing itself instead of against the person...In actions in rem or quasi in rem, jurisdiction over the person of the defendant is not a prerequisite to conferring jurisdiction on the court, provided that the court acquires jurisdiction over the rem...”.



## THE REPUBLIC OF IRELAND

It is widely recognised by criminal law and asset recovery practitioners that the Republic of Ireland has become one of Europe's leading jurisdictions in this field. Their non-conviction based forfeiture scheme developed out of a particular series of events. In 1995, campaigning reporter, Veronica Guerin, began to compile a story on a local crime figure, John Gilligan. She went to his house and interviewed him; he attacked her violently, punching her in the head and threatened to kill her. A complaint was launched and an assault prosecution commenced. On June 26, 1996, a day after the prosecution had been adjourned, Guerin was shot dead in her car as she drove back to Dublin from County Kildare where she had contested a traffic ticket.

There was an outpouring of grief and anger across Ireland. This was compounded by the fact that, weeks earlier, an IRA gang (so called Provisional IRA) had shot dead a policeman, Jerry McCabe, and wounded his partner during an attempted robbery. The government reacted quickly, using portions of a private member's bill lowering the standard of proof for forfeiture and addressing a longstanding tension between the police and customs by introducing the *Proceeds of Crime Act, 1996* and by creating a new agency, the Criminal Assets Bureau (CAB). It was the work of CAB that attracted the interest of officials in the UK and led to the passing of civil forfeiture provisions in the UK in 2002.

Ireland's contribution to the jurisprudence on civil forfeiture includes the case of *Gilligan v CAB*<sup>46</sup>, cited in respect of constitutional arguments, above, in which the Supreme Court explained that the Irish civil forfeiture law was truly civil, not criminal, procedurally and in nature and effect.

## SOUTH AFRICA

South Africa introduced civil forfeiture in The Prevention of Organised Crime Act (POCA) of 1998 and is seen as one of the states in the vanguard of the development of non-conviction based recovery. The 1998 Act provides that property tainted by criminal activity may be forfeited to the state through a civil, *in rem*, action (without, of course, any need to obtain a criminal conviction against the owner/person in possession of the property).

The process under the 1998 Act is that an application by the National Director of Public Prosecutions (NDPP) is made to the High Court, which can make an order forfeiting property to the state if the court, on a balance of probabilities, finds the property to be „an instrumentality” of a crime, or the „proceeds of unlawful activities”. It should also be emphasised that in South Africa (as elsewhere) the validity of a forfeiture order would not be affected by the outcome of subsequent criminal proceedings. Thus, a suspected criminal who had possession or was the owner of property subject to a civil forfeiture order and who is

subsequently acquitted in a criminal court (where, of course, the prosecution has to prove its case beyond a reasonable doubt) will still have his property forfeited to the state. This is because the *in rem* action is against the property itself (not the owner) and is to the lower (civil) standard of proof.

The office within the NDPP that has responsibility for both criminal confiscation and civil forfeiture is the Asset Forfeiture Unit (AFU). It was established in mid-1999 after a series of consultations with national and international legal and law enforcement experts firmly indicated that a specialist unit was needed to ensure that forfeiture is used effectively. That lesson is one which is particularly important and has been similarly drawn by most, if not all, states. If civil forfeiture is to be introduced in a state, a concentration of expertise and a creation of a cadre of specialists is required.

Since its inception, there have been various criticisms of the AFU; some have considered it ineffective, others have regarded it as too successful. Indeed, there came a time in 2011, with the increasing politicisation of anti-corruption efforts in South Africa, when it seemed that it was at risk of being dissolved. However, it has established itself as an international model for forfeiture in general and for civil forfeiture in particular.

Other states have shown a keen interest in the set of priorities that the AFU was set for its first year and for the period thereafter. The motivation for prioritisation was the range of international experience that had shown that civil asset forfeiture laws and procedure were often implemented poorly because law enforcement and prosecutors tended to focus their activities on conducting trials and achieving convictions rather than adopting a strategic and learning approach to asset recovery. In addition, the South African authorities took on board that *in rem* forfeiture inevitably involves often complex civil law about which most law enforcement officers and prosecutors knew very little.

With all that in mind, the AFU was created to be a dedicated unit able to build up the necessary expertise and specialisation to address the difficulties and challenges of forfeiture. Importantly, the performance of the AFU has always been measured simply in terms of forfeiture. From the outset, it adopted a multi-disciplinary approach, recruiting as an in-house capability not just criminal and civil lawyers, and financial investigators, but also analysts and forensic accountants.

The initial priorities which were regarded as key to its success and sense of direction were:

- To take the initial 'seizure' actions, where suspected criminals' assets were merely frozen, to the next stage in the legal process: i.e. to be forfeited to the state. This priority was intended to raise expectations (and, amongst criminals, to compound their fears) and to permit the proceeds to be paid into the Criminal Assets Recovery Fund;
- To initiate some 100 forfeiture cases over the next year. This was to give a clear sense of direction, to motivate staff and to provide a discernible 'measure' of success;

- To target some of the major crime figures and syndicates who are on the 'most wanted' list of the NDPP. This reflects the recognition that the top level of criminality has to be actively targeted and yet it is that level that is often able to escape criminal prosecution. However, it was accepted that such cases often require complex investigation and a long-term approach and investigative strategy;
- To be willing to fight test cases in the courts to obtain greater clarity on the courts' position on civil asset forfeiture. This was to allow the AFU to obtain a definitive legal position on each of the main challenges it was likely to face: time-consuming in the short term, but invaluable thereafter. The AFU, by so doing, was able to justify engaging high-calibre lawyers who would also assist and develop South Africa's prosecutors on the issue of forfeiture;
- To broaden the focus and use of forfeiture. The underlying objective was consistency in approach, a full national coverage and an expectation by all that forfeiture would be sought in acquisitive crime cases. Being mindful of the objective sought to be achieved, the AFU opened regional offices in Cape Town and Durban to give full territorial reach. Thereafter, it was intended (and proved to be the case) that additional offices would be opened in other parts of South Africa.

It was determined when the 1998 Act was drafted that the monetary value realised by the assets/sale of assets forfeited should be deposited into a fund known as the 'Criminal Assets Recovery Fund' and used to provide financial assistance to law enforcement agencies involved in combating organised crime, money laundering, criminal gang activity and general crime, as well as assisting victims of crime. That earmarking of funds mirrors the approach of the US, where a similar fund presently distributes about US\$500 million a year to law enforcement and crime prevention.

From the outset, the AFU also set itself, and worked towards, longer term goals. In addition to a territorial presence, it has placed forfeiture specialists in the offices of the provincial Directors of Public Prosecutions to work with and assist prosecutors on forfeiture related work, to make sure forfeiture opportunities (both criminal and civil) are not missed due to the lack of expertise and to encourage forfeiture proceedings to be viewed and expected as an integral part of the criminal justice system.

One of the principal lessons from South Africa is that the authorities were prepared to face, head on, challenges and litigation from wealthy and powerful criminal figures anxious to retain their illicitly obtained wealth. It was accepted that this would entail legal wars of attrition against those lawyers retained to expose any weakness or lack of clarity in the civil forfeiture provisions.

Another lesson has been as to the nature of the legal challenges to be faced. The AFU expected to argue, and indeed had to, that civil forfeiture was a civil, not criminal process and that it was consistent with the South African Constitution. Such challenges proved readily surmountable. However, it did face real

difficulty on the issue of whether the forfeiture law should apply retrospectively (i.e. the question of whether the 1998 Act applied to illicit assets accrued before the Act came into force. Early decisions on the point went against the AFU, with it losing three of the initial six cases that came before the courts on the point. However, the issue was eventually settled in the AFU's favour and, since then, it has been successful in obtaining civil forfeiture orders in about 80% of its applications.

If there are overarching, long-term, lessons to be drawn from South Africa on civil forfeiture, they are:

- It will take some time for a new law, such as civil forfeiture provisions, to be understood and appropriated. A 'gestation' period is particularly important for those prosecutors and investigators seeking to combat organised crime: the investigations tend to be lengthy, complex and intricate in any event and the added dimension of the availability of civil forfeiture will take some time to get used to. Training, targeted and practical, is therefore vital;
- A properly resourced, specialist capability must be built up and given clear, and measurable, objectives. Consistency and national coverage are required;
- There must be a will, at both the strategic and operational levels, to meet the inevitable challenges: legal, societal and political;
- The civil forfeiture unit or capability should work in co-operation and co-ordination with the wider prosecutor's office or authority;
- Properly developed and deployed, civil forfeiture powers are capable of being one of the most effective tools against organised crime, corruption and other serious criminality.

## UNITED STATES of AMERICA (US)

In the US<sup>47</sup>, a form of civil asset forfeiture was passed into law by the first U.S. Congress in 1789. Until the 16th Amendment granted the power in 1913 to levy income taxes, forfeiture was used to protect the national economy and fiscal position of the U.S., which relied heavily on the imposition of tariff duties. Civil forfeiture was also a vital sanction used to protect U.S. shores from piracy.

One of the seminal U.S. Supreme Court decisions was rendered in 1827; a ship chartered by the King of Spain, the *Palmyra*, was captured as a pirateering vessel. The ship's captain argued that, as the King was not culpable, his ship ought not to be forfeited. The court ruled that the *in rem* proceeding was brought against the thing, the ship, and the culpability of the owner was not relevant. The ship, worth \$10,228 in 1827 dollars, was forfeited.

Following the advent of income tax, civil forfeiture was little used in the U.S. until the 1970s and 1980s, although there were some interesting prohibition

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<sup>47</sup> Jeffrey Simser, *Perspectives on Civil Forfeiture*, Hong Kong University publ. (2008), at p51

cases. In 1970, Congress focused on organised crime with the passage of the well-known *Racketeer Influenced Corrupt Organization Act*; a lesser-known statute was passed at the same time, the *Continuing Criminal Enterprise Act*. However, it was not until 1984, with the passage of the *Comprehensive Crime Control Act*, that civil forfeiture began to be used extensively across the United States. Forfeiture attracts 8th Amendment protection, which constitutionally prohibits excessive fines; in 2000, this and a number of other issues, were addressed by the *Civil Asset Forfeiture Reform Act, 2000*. In the federal system alone, \$1.2 billion (USD) was recovered in 2006, \$1.6 billion in 2007 and incremental growth up to and including an estimated \$2.8 billion in 2011. Only one-third of that money will be recovered through conviction-based forfeiture. The balance will be recovered through civil asset forfeiture cases.

In the US, prosecutors found that *in rem* proceedings allowed for the seizure of property in a number of instances where it would not be possible to confiscate proceeds held by others who were not a party to the criminal proceedings, where the defendant is dead, the 'criminal' is unknown or where the interests of justice do not require a prosecution or where a prosecution is held in a foreign state but the property is located in the US.

The two principal US laws, 18 USC and 21 USC, follow the same structure<sup>48</sup>. The action is a civil *in rem* action and brought against the asset to be forfeited on the fiction it is guilty (*US v \$1,240*; *US v 1243 3rd Avenue* etc.). Until 2000 all the government had to show was "probable cause" that the property was the proceeds of or used in the relevant crime, probable cause meaning something between reasonable grounds to suspect and reasonable grounds to believe. Then a person with an interest in the property could defeat forfeiture by showing that the property did not have that connection. Generally, there was no defence of innocent owner.

Thus, the US civil forfeiture system was, traditionally, at odds with other jurisdictions in that the burden to initiate a forfeiture case was very low (probable cause) with the burden then shifting to the claimant or owner to show the property is not connected to crime. But in 2000 the position changed when the US implemented the Civil Asset Forfeiture Reform Act. This Act brought about 2 principal changes to the civil forfeiture regime. First, it raised the burden on the government requiring it to prove its case on the standard civil burden, the balance of probabilities. Second, it established an „*innocent owner*” defence – an owner had to establish that he/she had no knowledge that the property had been used in a crime or in a proceeds case, that he/she had acquired the property in good faith at full value without notice of its criminal origin. Interestingly the catalyst for change was not adverse court decision but political and public pressure. With that change to US law, one can say, with some confidence, that each of the civil forfeiture frameworks around the world is broadly alike, one to the other.

The reported case law assists in putting the US approach, as the main international civil forfeiture „driver”, into context:

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48 Relying on an analysis of those provisions by Kennedy Talbot, Barrister, London, 2011

***US v Hosep Krikor Bajakajian***  
**(No 96 – 1487), 22 June 1998**

B and his family were at Los Angeles International Airport for departure to Italy. The customs officers, through the use of sniffer dogs, found some \$230,000 in their checked-in luggage. The family was approached by the officers and informed that they were required to report all money in excess of \$10,000. Under US Federal law there is a requirement to declare if the amount carried by an individual exceeds \$10,000; failure to do so is an offence and the money can be forfeited.

B and his wife said they had \$15,000 between them. A search was then conducted and a total of \$357,144 was found on them. The authorities seized the entire amount of \$357,144. B pleaded to the failure to report and the District Court found that the full amount fell to be forfeited but as the funds were ‘not connected to any other crime’, was to be used to repay a lawful debt, and owing to the „*cultural differences*”, forfeiture of the entire amount would be „*extraordinarily harsh...and grossly disproportionate to the offence in question*”. The District Court made a forfeiture order in the sum of \$15,000.

The US Authorities appealed the decision and sought forfeiture of the full amount (\$357,144). The Court of Appeal for the Ninth Circuit held (by majority) that the money was not an instrumentality of the crime as the failure to report is the crime and not the possession or transportation of the money. Secondly, „*the Excessive Fines Clause did not permit forfeiture of any of the unreported currency*” but the Court did not have jurisdiction to set the order aside.

This finding by the Court of Appeal had the effect of holding the Act invalid. The US Supreme Court ruled that forfeiture of the entire amount was ‘*grossly disproportional to the gravity of his offence*’, and made the following findings:

- the forfeiture can only be made if a person is convicted of the underlying offence of failing to report;
- the forfeiture provision constituted punishment for these purposes; if deterrence is the „*goal of punishment*” then forfeiture in these circumstances does not meet that aim, „*Although the Government has asserted a loss of information regarding the amount of currency leaving the country, that loss would not be remedied by the Government’s confiscation of respondent’s \$357,144...*”;
- the Court had not hitherto set out the standard for determining when forfeiture would be excessive, „*We now hold that a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offence....it is unconstitutional.*” (In B’s case the crime was a reporting offence, and had he reported it, he could legitimately have taken the money out of the US).

The Supreme Court rejected the submission of the US Authorities that forfeiture in this case was akin to „*forfeitures of property tainted by crime*” (in

rem forfeiture) as in rem forfeiture was „directed against guilty property rather than against the offender... the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime”. In the present case, B had been convicted of the underlying offence and it „...cannot be imposed upon innocent owners”, it is therefore an *in personam* order.

***United States v. Ursery***  
**no. 95–345 and 95–346), 24 June 1996**

This should now be regarded as the leading US case. The US Authorities commenced *in rem* civil proceedings against a property (house) owned by Ursery (U). It was alleged that the property was used for drug dealing. Before the conclusion of the civil proceedings, U was indicted and convicted of manufacturing marijuana and sentenced to a term of imprisonment. In relation to the forfeiture, U paid \$13,250 to settle the claim.

In a separate matter, *in rem* proceedings were lodged against a number of properties belonging to Arlt and Wren or Payback Mines (a company controlled by Arlt) and said to represent proceeds of drug related offences and used for money laundering. The *in rem* proceedings were adjourned as both Arlt and Wren were facing criminal charges for drug related matters and money laundering. Both men were convicted of the offences and the District Court granted the forfeiture orders.

On appeal, the US Court of Appeal for the Sixth Circuit and Ninth Circuit reversed U’s conviction and the forfeiture orders against Arlt and Wren (respectively) on the basis criminal and civil proceedings (forfeiture) in relation to the same offence violated the double jeopardy clause.

The US Authorities petitioned the Supreme Court on a writ of certiorari, which reversed the decisions of both Courts of Appeal and held that *in rem* proceedings were not criminal proceedings and civil forfeiture did not amount to ‘punishment’ for the purposes of the double jeopardy clause.

The Supreme Court, in earlier cases had considered and rejected the application of the double jeopardy clause to civil forfeiture... „consistently concluding that the Clause does not apply to such actions because they do not impose punishment... [This] forfeiture proceeding... is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted, and punished. The forfeiture is no part of the punishment for the criminal offence. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply.”<sup>49</sup>

In a subsequent case, *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232 (1972) (per curiam) the Supreme Court once again rejected the applica-

49 Various Items of Personal Property v. United States, 282 U.S. 577 (1931)

tion of the double jeopardy rule as „for no other reason the forfeiture is not barred by the Double Jeopardy Clause of the Fifth Amendment because it involves neither two criminal trials nor two criminal punishments”.

The Court emphasised the clear distinction between *in rem* forfeiture and *in personam* penalties; the former were clearly civil proceedings and the focus of which was the property and not the individual. The Court examined the statutory framework and was of the view that.

„There is little doubt that Congress intended these forfeitures to be civil proceedings. ‘Congress intent in this regard is most clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute[s].’ 465 U. S., at 363. Both 21 U.S.C. § 881 and 18 U.S.C. § 981 which is entitled ‘Civil forfeiture’, provide that the laws ‘relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws... shall apply to seizures and forfeitures incurred’...Congress specifically structured these forfeitures to be impersonal by targeting the property itself. ‘In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object.’”

Apart from the characterisation of the proceedings as ‘civil’ in the relevant statutes, the proceedings did not have the hallmarks of a criminal trial: the standard of proof is the civil standard (balance of probability), there is no element of punishment, no need to show any connection between an individual and the property in question, measure is preventive rather than punitive.

### **Brian J. Degen, petitioner v. United States** (no. 95–173), 10 June 1996

Degen, a dual US-Swiss national was indicted for drugs related offences and money laundering; at the same time the US authorities sought forfeiture orders against a number of properties located in California, Nevada and Hawaii (worth approximately \$5.5million) said to be the proceeds of drugs offences and/or instrumentalities.

D, in the meantime, left the US and returned to Switzerland and could not be extradited in relation to the criminal charges as he is a Swiss national. D, however, responded to the forfeiture proceedings and challenged the proceedings on two grounds: first, that the proceedings were caught by the statute of limitations and secondly, the authorities had applied the forfeiture laws retrospectively.

The District Court was invited to strike out D’s response and grant the order; it did so. The court held that D „was not entitled to be heard in the civil forfeiture action because he remained outside the country, unamenable to criminal prosecution”. Two years later, the District Court granted the final order and the properties were forfeit. The US authorities submitted that the right under the Due Process Clause was not available to a person who deliberately remained outside the jurisdiction as a fugitive („fugitive disentitlement doctrine”) and the court was entitled, therefore, to strike out his claim.



The question before the Supreme Court was: „*whether the ‘fugitive disentitlement doctrine’ should be extended to allow a court in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution*”.

The Supreme Court held that whilst courts must govern their own proceedings, its „*inherent powers....may be controlled or overridden by statute or rule*”. In its more recent decision<sup>50</sup>, the Supreme Court had re-assessed the earlier principle of „fugitive disentitlement doctrine”, and whilst it had not ruled out the possibility of courts placing reliance upon it, such reliance could not be applied as a blanket rule and must be justified in each case. In the present case, the Supreme Court found that the doctrine was unjustified for the following reasons:

- there was no risk of delay or frustration in determining the merits of the forfeiture claim as the Government had already discharged its burden of proof, it was for D to show cause why the property should not be forfeit. The property had been restrained and, therefore, there was no risk;
- the different discovery regimes between civil and criminal proceedings, and although the Government was concerned that the wider discovery regime in civil proceedings may compromise its criminal case, that in itself was not sufficient to forbid „*all participation by the absent claimant*”;
- If D thereafter failed to co-operate by submitting pleadings, discovery etc. then he would be in the same position as ‘any other uncooperative party’ and liable to the same sanctions, including dismissal;
- in the present case, a „*dismissal would be premature...The existence of these alternative means of protecting the Government’s interests, however, shows the lack of necessity for the harsh sanction of absolute disentitlement. Consideration of some of Degen’s defences, such as the statute of limitations, appears to require little discovery. If they have merit, the Government should not prevail; if they are groundless, the Government’s interests will not be compromised by their consideration*”.

## UNITED KINGDOM (UK)

In the UK, it was the Proceeds of Crime Act 2002 (POCA) that introduced civil forfeiture, or confiscation *in rem*. It is referred to as „*civil recovery*”. The UK’s law enables civil action to be taken by the appropriate authorities to restrain and recover assets and instrumentalities that represent the proceeds of crime.

It should be noted that, in the UK, the law was specifically developed with Articles 53 and 54 of UNCAC in mind. It enables prosecutors to seek to recover assets using the civil, not criminal, standard of proof. The UK was anxious to en-

50 Ortega Rodriguez

sure that the proceeds of crime could be pursued without the need to secure a criminal conviction in cases where a suspected person had died, fled the jurisdiction or where he or she had an immunity from prosecution and/or from civil suit.

When POCA was introduced in 2002, the responsibility for civil forfeiture was given to a newly created body, the Assets Recovery Agency (ARA). However, ARA only existed for five years before it was closed and its power is transferred to other agencies; in particular, to the Crown Prosecution Service (CPS), the Serious Fraud Office (SFO) and the Serious and Organised Crime Agency (SOCA). During its existence, ARA recovered some £8.3million. Its powers were transferred from 1st April 2008.

It is always difficult to speculate on such a closure of a specialist agency, such as ARA, from the outside. However, it appears, from what was said in the UK Parliament, that ARA failed to recover sufficient value of assets to justify its on-going existence. It must be remembered that it is expensive to maintain a dedicated unit or body in such a way. It has been said that, during the entirety of its short lifespan, ARA had recovered just £35 for every £100 spent. In total, its asset recovery effort cost ARA £65 million.

The policy position of the UK is that the reduction of serious crime is best achieved by means of criminal investigations and prosecutions. But civil forfeiture is important: although civil recovery is not intended as a substitute for post-conviction confiscation; rather, it is to be sought where criminal confiscation is not possible. The practice is that such recovery is not pursued below a threshold of £10,000.

ARA did not tend to seek civil recovery in the absence of a conviction or a criminal investigation. However, the position has now changed. Particularly in relation to corruption cases, civil recovery is being increasingly used in order to bring about settlements with legal persons; particularly in circumstances where a legal person has self-reported instances of corruption within its corporate structure.

To give an overview of the UK law: Under Part 5 of POCA, the prosecution can pursue civil claims in respect of ‘recoverable property’ and can seek the forfeiture of ‘cash’. Both of these terms have specific meanings in this context.

„*Recoverable property*” is defined by sections 304 to 310, but the essence is that it is either direct proceeds of crime (or, as the legislation puts it, property obtained through unlawful conduct) or property representing the proceeds of crime (namely, direct proceeds converted to another asset). So, for e.g. if a person steals a valuable painting that painting is direct proceed of crime (first type of ‘recoverable property’). If that person then sells the stolen painting, the money or asset which is obtained from the sale is also ‘recoverable property’ but second type – property representing the proceeds. „*Cash*” is defined in s289 (6) and (7). It includes not only notes and coins but also cheques, traveller’s cheques, bankers’ drafts and bearer shares (but not bank balances).

The definition of property for civil recovery purposes is deliberately wide and includes (a) money; (b) all forms of property, real or personal, heritable or moveable; and (c) things in action and other intangible or incorporeal property<sup>51</sup>.

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51 S316(4)

A person obtains property through unlawful conduct (either his/her own conduct or that of another) if he/she obtains property by, or in return for, that conduct. Thus, for example, property obtained by specific conduct such as stealing or fraud and property obtained as a reward for, or in anticipation of, unlawful conduct (such as the acceptance of a bribe) will each be covered. In circumstances where property is alleged to have been obtained through conduct of one of a number of kinds, each of which would be „unlawful”, it will not be necessary to show that the conduct was of a particular kind.

An action for civil forfeiture is brought in the High Court by one of the agencies designated as „enforcement authorities” under POCA (SOCA, the CPS and the SFO). It is specifically provided for<sup>52</sup> that proceedings can be brought even though there have not been any criminal proceedings in connection with the property. It is also the case that proceedings may be brought where criminal proceedings have been instituted and have, for example, resulted in the acquittal of the defendant. In essence, indeed, civil recovery may be resort where criminal proceedings have been unsuccessful for whatever reason, even in a case where a defendant has been convicted but subsequently has his conviction quashed<sup>53</sup>.

These are civil, not criminal, proceedings and the standard of proof is ‘the balance of probabilities’. The key point in proceedings under Part 5 is that the prosecution does not have to show that anyone has been convicted of any criminal offence in order to succeed. Nor does the prosecution have to show that the person from whom the asset is being taken is himself/herself the perpetrator of an offence, he or she may simply be holding an asset which was obtained by the criminal conduct of someone else (although a *bona fide* purchaser for value is protected). The prosecution does not even have to identify a specific offence by which the money or asset was obtained. (In civil recovery proceedings the prosecution need not allege the commission of any specific criminal offence but must specify the kind or kinds of unlawful conduct involved.)

Indeed, in relation to cash, the prosecution may succeed simply by showing that the cash was intended for use in a future crime (s298(2)). But, apart from that, what the prosecution does have to do is satisfy the Court, on the balance of probabilities, that the money or asset in question has been derived from criminal conduct (by somebody who may, or may not, be identified). In the case of ‘cash’ the Magistrates’ Court may then order the cash to be forfeit to the Crown. In relation to other assets the High Court (in England and Wales) may order the property to be vested in a civil trustee who will realise the property for the benefit of the enforcement authority (for example SOCA, the SFO or the CPS).

The burden of proof rests with the enforcement authority, but the standard is the civil one (the balance of probabilities). A practical difficulty experienced in the UK (and, no doubt, in other jurisdictions) is that courts are often reluctant to order forfeiture of property on a strict 51%/49% test (which is, of course, the reality of the balance of probabilities standard).

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52 S240(2)

53 E.g., SOCA v Olden [2009] EWHC 610

However, the reality is that it is just such a strict application that Part 5 of POCA seeks. At the same time, the experience of the UK is that judges will, at least, demand what is often described as ‘cogent evidence’ before being willing to declare themselves satisfied that it is more probable than not that a piece of property represents the proceeds of unlawful activity or conduct. The leading UK case on the point is *R (on the appln of the Director of ARA) v Jia Jin He and Dan Dan Chen*<sup>54</sup>; there, Collins J stated:

*„As a general rule, no doubt, criminal conduct may be regarded as less probable than non-criminal conduct. But where there is evidence from which a court can be satisfied that it is more probable than not that criminal conduct has been involved, it does not seem to me that that is something so improbable as to require a gloss on the standard of proof. However, I recognise, and it is no doubt right, that since it is necessary to establish that there has been criminal conduct in the obtaining of property, the court should look for cogent evidence before deciding that the balance of probabilities has been met. But I have no doubt that Parliament deliberately referred to the balance of probabilities, and that the court should not place a gloss upon it, so as to require that the standard approach is that appropriate to a criminal case...It is plain that Parliament deliberately imposed a lower standard of proof as the standard appropriate for these proceedings.”*

It should be noted, though, that in every jurisdiction with civil forfeiture powers, the court will expect the applicant agency or authority to identify, with as much particularisation as possible, the property in the question and the conduct or activity that is said (in a given case) to be unlawful. As to the question of conduct or activity, the UK courts have made it clear that there must be sufficient evidence adduced to enable the court to decide *„...whether the conduct so described was unlawful under the criminal law of the UK”*<sup>55</sup>. One should, of course, also add the gloss that, in the case of a transnational matter, the issue will be unlawfulness under the law of the UK and/or the foreign state(s).

It is instructive to consider some of the UK cases in that regard. In April 2005 the Serious Fraud Office (SFO) began an investigation into Balfour Beatty plc, an engineering and construction company listed on the London Stock Exchange. The investigation was into payment irregularities concerning a subsidiary that had been engaged in securing contracts as part of a UNESCO project to rebuild the Alexandria Library in Egypt. The project was worth a total of US\$130 million and the activity by the subsidiary spanned the period 1998 to 2000. The investigation was brought about because Balfour Beatty self-reported the payments in question to the SFO, having carried out themselves an internal investigation. It be emphasised that Balfour Beatty denied that the payments in question were bribes. It is to be noted that the SFO did not discount criminal proceedings entirely; rather, the SFO and Balfour Beatty

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54 (2004) EWHC Admin 3021

55 *Director of ARA v Jeffrey David Green* [2005] EWHC Admin 3168

agreed that the subsidiary would plead guilty to the offence of failing to maintain accurate business records (as set out in section 221 of the Companies Act 1985). For its part, the SFO agreed not to prosecute for corruption. Instead, it pursued civil forfeiture and obtained a civil recovery order from the High Court in London in the sum of £2.25 million on the basis that the sum represented the proceeds of unlawful conduct. In corruption terms, that figure may be seen as low; however, it reflects the co-operation given by Balfour Beatty, its agreement to introduce new internal control mechanisms and that neither Balfour Beatty, nor any individual employee, had obtained a commercial advantage from what had taken place.

A similar case took place at about the same time and involved an engineering and project management company called AMEC plc. Again, that company self-reported internal accounting irregularities concerning both payments received and payments made in relation to a project managed by several years earlier. As in the Balfour Beatty case, the company pleaded to the failing to maintain records offence (section 221 of the Companies Act 1985) and a civil recovery order in the sum of £5 million, plus the SFO's costs, was made. Again, it seems that there was no commercial advantage or financial benefit to the company or to any employees involved.

The Attorney General issued guidance to prosecuting authorities on 5 November 2009, which included useful comments on civil forfeiture. The guidance states that, although criminal investigations and criminal proceedings are the best way of reducing crime as a general principle, non-conviction based asset recovery powers are also able to make an important contribution to the reduction of crime where: it is not feasible to secure a conviction, a conviction has been obtained but a confiscation order is not made, or a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal. The guidance gives a number of examples of situations in which a civil recovery may be the appropriate route.

Some important UK case law has already been set out, above, in respect of those sections addressing constitutional and legal challenges. There are, however, cases that should be highlighted here in order to provide more general lessons to states.

### *ARA v Jeffrey David Green*<sup>56</sup>

The Court stated: „...it was plain that Parliament intended that in civil recovery proceedings the Director would identify that matters alleged to constitute unlawful conduct in sufficient detail to enable the court not to decide whether a particular crime had been committed by a particular individual, but to decide

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56 [2005] EWHC (Admin) 3168

*whether the conduct so described was unlawful under the criminal law of the UK (or UK and a foreign state)”.*

### Retrospectivity of civil forfeiture powers

If the Enforcement Authority seeks civil forfeiture in respect of proceeds, instrumentality or terrorist property prior to its establishment but in relation to the conduct that is already classified as criminal, it is still possible to seek a recovery order as the establishment of the authority is procedural rather than substantive. Support for this view can be found in *Jia Jin He* [2004] EWHC 3021 (Admin), Collins J held:

- no question of any penalty,
- no conviction of a criminal offence,
- of course, property cannot be recovered unless at the time it was acquired it was obtained through unlawful conduct. The conduct must have been criminal at the time. To that extent, the prohibition against retrospectivity will apply.

Also, in *The Director of ARA v Szepietowski and others*<sup>57</sup>, the Court found that the powers can be used prior to the creation of the enforcement authority subject to the 12 year limitation – provided the property is recoverable, the identity of the enforcement authority is irrelevant.

### Presumption of innocence

*Director of ARA v Walsh*<sup>58</sup>: proceedings under POCA were civil proceedings to which Art 6(2) did not apply. The Appeal Court applied the *Engel* test and concluded:

- all the available indicators point strongly to recovery cases being classified as a form of civil proceedings – appellant not charged, not liable to imprisonment etc.,
- the nature of the proceedings do not impute guilt and no prosecutorial function,
- primary function of the Act is to recover proceeds of crime and not punish the appellant.

*R (on the appeal of Director of ARA) (Paul) v Ashton*<sup>59</sup>: imposition of a civil recovery order was not punitive and could not therefore violate Article 7 (no punishment without law) and that such orders had a compensatory aspect and the fact that deprivation of property is involved does not constitute a pen-

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57 [2007] EWCA 766

58 [2004] NIQB 21

59 [2006] EWHC (Admin) 1064

alty because the holder of the property was not entitled to the property in the first place.

### Restraining order and property of legal entity

It may be worth bearing in mind when applying for a restraining order there must be a real risk of assets being dissipated even though the Act is silent on this: *Re AJ and DJ* (1992) and *Jennings v CPS* (2005).

The Enforcement Authority must not seek a restraint order over assets having a value substantially in excess of the amount by which defendant is alleged to have benefitted.

Delay: restraint orders do have a real impact on defendant and others affected by it, therefore, prosecutors are expected to proceed expeditiously and without undue delay. Of course, what constitutes „reasonable time” is a question of fact for each case.

Full and frank disclosure: duty on the applicant to provide full and frank disclosure of all material facts, including disclosure of any weaknesses in his case; but Court of Appeal in *Jennings* (see above) said courts should be slow in discharging restraint orders.

The position of companies must be considered separately from the defendant as they enjoy a legal personality of their own and it does not necessarily follow that the assets of company fall to be considered as „realisable” assets unless:

- defendant gives a gift to the company
- Company is under the control of the defendant and it has been used to facilitate the commission of the offence in question (common in money laundering or carousel frauds) – here the court may lift the corporate veil and treat the assets of the company as the assets of defendant *Re H (Restraint Order: Realisable Property)* (1996), „*the corporate structure had been used as a device or facade to conceal criminal activity...*” (the real question is whether assets of the company amount to realisable property).

*R v Seager and Blatch*<sup>60</sup>: The court was of the view that the corporate veil can only be lifted in 3 instances (in the context of a criminal case):

- If an offender attempts to shelter behind a corporate facade or veil to hide his crime and his benefits,
- Where he does acts in the name of the company which constitute a criminal offence which leads to defendant’s conviction,
- Where the transaction or business structures constitute a „device” „cloak” or „sham”, i.e. an attempt to disguise the true nature of the transaction or structure so as to deceive a third party or court.

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60 (2009) EWCA Crim 1303

## International co-operation: Restraint issues (applicable to civil forfeiture cases)

Turning to mutual legal assistance, it must be borne in mind that there is a distinction between the powers of court when dealing with incoming requests and outgoing requests. This is illustrated by *King (Respondent) v Director of the Serious Fraud Office (Appellant) (On appeal from the Court of Appeal Criminal Division)*<sup>61</sup> (a request from South Africa).

K, a British national residing in SA was charged with large scale fraud. South Africa sent a LOR to England and Scotland for a restraint order and disclosure order. The disclosure order required K to swear an affidavit setting out all his assets including those over which he has the power, directly or indirectly, to dispose of or deal with as his own, wherever located.

LOR set out a schedule of bank accounts of these companies which it stated were believed to be „held in England and Wales”. The LOR had a draft order attached to it.

The issue raised at this appeal was whether the Crown Court had jurisdiction to include within the ambit of the Restraint Order and the Disclosure Order property outside England and Wales.

The power of the Crown Court to make a restraint order is derived from the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) („the Order”), and article 8 provides that the Crown Court may make a restraint order if **either** of the two conditions in article 7 is satisfied. The two conditions in article 7 are as follows:

„(2) *The first condition is that –*

(a) *relevant property in England and Wales is identified in the external request;*

(b) *a criminal investigation has been started in the country from which the external request was made with regard to an offence, and*

(c) *there is reasonable cause to believe that the alleged offender named in the request has benefited from his/her criminal conduct.*

(3) *The second condition is that –*

(a) *relevant property in England and Wales is identified in the external request;*

(b) *proceedings for an offence have been started in the country from which the external request was made and not concluded, and*

(c) *there is reasonable cause to believe that the defendant named in the request has benefited from his/her criminal conduct.”*

Having examined the statutory regime, the Crown Court issued the restraint order for property **wherever situated**. On appeal, the Court of Appeal narrowed it to property located in England and Wales.

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61 [2009] UKHL 17



House of Lords held that on the natural meaning of the Order (both restraint and disclosure):

*„The object of a restraint order is to preserve relevant property that may be needed to satisfy an order for the recovery of specified property or a specified sum of money. Jurisdiction to make an external restraint order only arises where the external request ‘concerns relevant property in England or Wales’ – article 6. The relevant property must be ‘identified in the external request’ – article 7. The Crown Court may then make a restraint order which prohibits ‘dealing with relevant property which is identified in the external request’ – article 8. The Order then makes provision for the seizure of any property which is specified in the Order to prevent its removal from England and Wales – article 12, and for a receiver to take possession of such property – article 16.”*

These provisions amount to a clear and coherent scheme. From first to last, the powers conferred by that part of the Order that relates to England and Wales can only be exercised in relation to property in England and Wales. Furthermore, no machinery is provided for exercise of those powers outside England and Wales. In this respect there is a significant distinction between POCA, which deals with domestic orders, and the Order, which deals with external orders.

The 2002 Act brought together the regimes, hitherto distinct, originally established by the 1986 and 1988 Acts, and provided for the making of confiscation orders against those found to have a criminal lifestyle. Thus under section 6(4)(a) of this Act the court must first decide whether the defendant has a criminal lifestyle. If so, the court must decide (section 6(4)(b)) whether he/she has benefited from his general criminal conduct. If not, it must decide (section 6(4)(c)) whether he/she has benefited from his/her particular criminal conduct:

- a person benefits from conduct if he/she obtains property as a result of or in connection with the conduct;
- if a person obtains a pecuniary advantage as a result of or in connection with conduct, he/she is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

The answering of this last question is a very important stage in the procedure for making confiscation orders since, however great the payments a defendant may have received or the property he/she may have obtained, he/she cannot be ordered to pay a sum which it is beyond his means to pay. In many cases the assessment of the realisable amount poses complex and difficult problems for the trial judge.

The Court emphasised 6 broad principles to be followed by the trial judge:

- The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren

and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.

- The court should proceed by asking the three questions posed above:
  - Has the defendant benefited from relevant criminal conduct?
  - If so, what is the value of the benefit defendant has so obtained?
  - What sum is recoverable from defendant?

Where issues of criminal life style arise the questions must be modified. These are separate questions calling for separate answers, and the questions and answers must not be elided.

(3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive.

(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining, under the 2002 Act, whether defendant has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of defendant at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) Defendant ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.

Similarly the Court of Appeal in *R v Sivaraman*<sup>62</sup> set out a number of principles derived from May, Jennings and Green:

- The legislation is intended to deprive defendant of the benefit gained from the conduct within the limits of their available means;

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62 [2008] EWCA Crim 1736

- Benefit = total value of the property or pecuniary advantage and not net profit;
- In considering the value of the benefit obtained, the court must focus on the language of the statute and apply its ordinary meaning;
- Obtained = obtained by relevant defendant (R v Jennings: one of the principles is that the defendant cannot be deprived of what he/she has never obtained because that is a fine; obtained must be read as 'obtained by him/her');
- A defendant's acts may contribute significantly to property or pecuniary advantage with defendant obtaining it;
- Where 2 or more defendants obtain property jointly, each is to be regarded as obtaining the whole of it – this depends on the facts of each case.

## NATURE OF AGENCY/POWERS NEEDED FOR CIVIL FORFEITURE

### Asset Recovery Agencies: Variations from state to state

Given the importance of liaison and the building of networks, those making or receiving MLA requests in relation to asset recovery cases and financial investigations should remember that there are essentially four models of asset recovery agency competence:

- A dedicated assets recovery body/agency (ARB) established and has the competence to address asset recovery (criminal and confiscation *in rem*) in relation to all acquisitive crime/unlawful activity.
- A dedicated ARB established and has the competence to address only confiscation *in rem*; with individual prosecutorial/law enforcement entities having the conduct of post-conviction confiscation proceedings.
- A dedicated ARB established, but its competence is confined to managing assets that have been restrained/frozen; with individual prosecutorial/law enforcement entities having the conduct of both post-conviction and *in rem* confiscation proceedings.
- Powers of asset recovery (including asset management) are given to each existing entity to be used in accordance with present areas of competence.

When liaising with such an agency from another state, do ascertain (in accordance with the above) what competence it exercises.

The tracing of assets may, in a given civil forfeiture case, encompass the piecing together of an audit trail, the utilisation of a range of investigative and forensic tools (including court orders for production of documents or records), and identifying property as it passes through different manifestations (for instance, cash used to purchase antiques that are then sold and cars bought with the proceeds).

In the context of tracing assets that represent the proceeds of corruption, sophisticated financial crime or serious organised crime, it is important to remember that a legal person, for instance, a sham or shell company, is likely to be used as a conduit for the movement of assets. In that regard, the objective should always be to identify the natural person who is the beneficial owner/has a beneficial interest in the assets in question. It is not enough simply to identify the legal person beneficiary; attention should be focused on the natural person or persons behind the legal person.

When considering tracing, particularly in the context of conducting cross-border investigations and utilising the MLA process, the investigator and prosecutor will be aware that the intention of the suspect(s) will be to 'turn' illicit proceeds into apparently legal assets, or, at least, to so disguise the movement of

such proceeds that they become incapable of being traced. To bring that about, the suspect(s) will, regardless of the nature of the underlying crime, have recourse to the classic money laundering three-stage process of:

- Placement;
- Layering; and
- Integration.

In essence, those stages comprise the initial placement of illicit assets into, for instance, a financial system (perhaps through a financial institution, or through conversion into financial instruments), followed by the second stage of converting into assets of a different type or moving them to another institution (perhaps involving movement across jurisdictions and/or to a shell company); and then the final stage (integration) where the assets or proceeds are then moved or mixed into the legitimate economy, perhaps through purchase of real property, investment in business opportunities or the purchase of other financial assets.

The practitioner seeking to make a request for administrative assistance or MLA in such a case must have regard to, and understand, such methods and should construct his/her request accordingly.

It is the request for assistance to another state that will be one of the principal tools available to the prosecutor or investigator when seeking to identify and/or trace assets. After all, almost any economic, financial or serious organised crime will involve transnational asset movement.

Tracing is not simply an asset recovery exercise, though. By systematically following an asset trail, a fuller picture of the extent and breadth of the underlying criminality may be obtained, along with identification of others involved, and, of course, of the victims and their loss.

A tracing investigation should ask (and seek answers to) the following, initial, questions:

- Has there been purchase of real property or high value goods?
- Are assets hidden offshore?
- Have associates / third parties been used to assist? Is there a link with other criminals?
- What 'lifestyle' evidence is there?
- Have there been, for instance, prison visits to associates?
- Have financial transfers been made?
- What do the communications patterns of those involved/suspected demonstrate? (e.g. telephone billing).

## Intelligence

Before examining what is likely to be involved in a transnational tracing investigation and possible evidence to be obtained, the attention of the reader is drawn to intelligence and intelligence development.

Intelligence or information in a financial crime case or similar might relate to the underlying substantive crime itself (e.g. corruption or embezzlement), to consequent crimes (such as money laundering activity following the commission of the substantive/predicate offence), or to aspects of later asset activity that do not, in themselves, fully disclose a crime having been committed.

The importance of such intelligence or information in such circumstances will lie in it forming the basis for one or more of the following:

- Opening an investigation file;
- Making a request for administrative assistance from another state;
- Making an MLA to another state (after the opening of the investigation file);
- The requested state itself opening an investigation file.

In each of the above instances, it may be that the intelligence or information assists with identifying or tracing assets. Sometimes the initial intelligence will be sufficient for the prosecutor and investigator to move to the evidence-gathering stage; on other occasions the intelligence material will need further development before being acted upon. In addition, there will, of course, be times when aspects of a case are still subject to intelligence development even though an investigation file has been opened and evidence is being gathered.

In financial crime and related cases, intelligence or information is likely to arise as a result of:

- Another on-going criminal investigation;
- A financial investigation following a criminal conviction;
- A suspicious activity report;
- An incoming mutual legal assistance (MLA) request;
- Human Sources;
- Product/recordings from surveillance/interception of communications;
- Financial Profiling (Land Registry, financial institutions, utilities and telephone billing);
- Account Monitoring Order or similar (will require banks etc. to provide details of specific transactions over specified period). The information can be in 'real time' e.g. ATM.
- Customer Information Order or similar.

## The Investigation and Tracing

A generic plan for an asset identification/tracing exercise is unhelpful, as different cases will give rise to different demands and different avenues of enquiry. However, the techniques and approaches that should be considered for deployment are:

- Background checks on natural persons;
- Companies record/registry checks on legal persons;
- Interviews with witnesses/sources;
- Banking/financial records;
- Telephone billing/communication records and data;
- Ancillary records/evidence of „lifestyle” spending, travelling etc;
- Government agency records (including border entry, licensing applications etc.);
- Real property records/registers;
- Covert monitoring of accounts/transactions;
- Special investigative means and general covert methodology, including covert searches, electronic surveillance/wiretap and undercover agent deployment.

When an enquiry is required in another state, each of the above techniques are capable of being deployed through either administrative assistance or MLA (which of the two routes will depend on the nature of the request, whether it is for intelligence or evidence, whether coercive powers are required, and on the general principles for seeking assistance).

As for the techniques and approaches set out above, what sort of evidence might they yield?

The answer is a wide range, with each type of evidence having the potential to assist financial investigations in general, and asset tracing in particular:

- Circumstantial evidence;
- Accomplice/co-accused evidence;
- Admissions by the suspect;
- Financial and document audit trails;
- Expert evidence;
- Assets such that there is an unlikelihood of legitimate origin;
- Unusual or inexplicable business dealings (e.g. a ‘bad deal’ / losing money);
- Unusual business structures (including shell companies);
- Evidence of the role of agents/intermediaries whose conduct/business structure/lack of relevant expertise is itself questionable;
- Evidence of bad character;
- Physical contamination of cash;
- Corroboration by lies (sometimes and in certain legal systems);
- Inferences from silence (sometimes and in certain legal systems);
- Evidence of movement and association from covert surveillance;
- False identities, addresses and documentation.

When intending to make a request (as part of a civil forfeiture case) to another state in respect of asset identification/tracing, or other financial investigations, consideration should be given to seeking advice and guidance from a forensic accountant or other financial analyst in framing the nature and extent of the request and in considering material obtained following the execution of a request.

Forensic accountancy input has played a significant role in financial/asset recovery investigations in many jurisdictions, and should not be overlooked in any civil forfeiture investigative strategy that includes cross-border activity in the context of economic or organised crime.

The forensic accountant, or financial analyst, should be asked to:

- Trace transactions back to the money/asset,
- Explain transactions to the Court,
- Analyse international money flows,
- Conduct a full analytical review,
- Aid the court's understanding of the industry/business,
- Identify unexplained turnover and consultancy fees,
- Link related parties to transactions,
- Focus on likely areas of misstatement,
- Explain accounting standards,
- Provide recognition of income,
- Review balance sheet, profit and loss account,
- Conduct sampling exercises to distinguish between, for instance, statistically possible, and likely fraudulent/dishonest, behaviour.

His/her involvement will also assist in relation to:

- Recording the full extent of financial transactions,
- Use of all the information available,
- Tracing in both directions,
- Use of IT resources,
- Use of insolvency, civil, criminal routes,
- Understanding different jurisdictions.



## INTERNATIONAL CO-OPERATION: MLA REQUESTS IN CIVIL FORFEITURE CASES

Mutual legal assistance (MLA), sometimes known as „judicial assistance” is the formal way in which states request and provide assistance in obtaining evidence located in one state to assist in criminal investigations or proceedings in another state. The state making the request is usually referred to as the „requesting state”, whilst the state to whom the request is made is the ‘requested state’. Mutual legal assistance is designed for the gathering of evidence, not intelligence or other information.

### MLA for the purposes of restraint/confiscation in criminal cases (*in personam*)

In the context of international asset recovery, using criminal convictions to recover stolen assets is usually only possible when a legal basis exists between states, such as a bi-lateral or multilateral agreement. If no other arrangement is in place, states parties to, e.g. UNTOC or UNCAC, may use the instruments themselves as a legal basis for enforcing confiscation orders obtained in a foreign criminal court. Specifically, Article 54 Section 1A of the UNCAC provides that:

*„Each State Party (will)... take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another state party.”*

Indeed, UNCAC Sec also provides for the provisional freezing or seizing of property where there are sufficient grounds for taking such actions in advance of a formal request being received. Generally, dual criminality must also exist between the jurisdictions, whereby the predicate offence must be recognised as a crime by both the requested and requesting state.

MLA is vital to this process, and, although there remain states that are reluctant to enforce a court order from another jurisdiction without some form of pre-existing treaty, there is no bar in principle on it being done on a reciprocity or comity basis. MLA requests can also generate vital evidence in the early stages of an investigation in tracing, identifying, and temporarily freezing the accounts linked to crime.

### MLA in civil forfeiture cases

If State introduces civil forfeiture it will inevitably need to make MLA requests in respect of such cases. Its MLA rules will have to be amended, or supplemented, accordingly. Even if the State does not introduce civil forfeiture, it

might still get a request from a state that has it, seeking assistance in respect of a civil forfeiture case. The prevailing permissive approach to MLA means that any state should do its utmost to assist in such circumstances.

Of course, a civil action may arise from a criminal investigation. If it does, such a circumstance may make it easier to make and execute an MLA request for civil forfeiture. Almost certainly, MLA practitioners will be asked to make or to execute an MLA request for such a case. Some states will provide MLA for civil forfeiture cases, others will not. Above all, it is, therefore, important to liaise if the issue arises.

Consideration of MLA in a civil forfeiture case leads on to this consideration: There may be occasions, particularly in relation to corruption cases, where, in a state where there is a prosecutorial discretion, a decision has to be made whether to proceed down a criminal post-conviction confiscation route or via the civil process.

The following considerations should be borne in mind:

- The different mechanisms (of confiscation) each have advantages and disadvantages;
- Package of criminal and civil measures is often required to recover assets laundered internationally;
- Chosen mechanism often fact-dependant;
- Various issues will be weighed when deciding what is the most suitable mechanism:
  - How efficient and speedy are civil and criminal mechanisms in the jurisdiction in which assets are located?
  - How easy and costly is it to freeze assets in the jurisdiction in which they are located using criminal or civil powers?
  - Can an enforceable confiscation order be obtained (e.g. against dead or absconding defendants, or foreign companies/trusts)?
  - Can a confiscation order be enforced against the entity holding the assets?
  - What opportunity will a defendant have to challenge a foreign confiscation order?
  - What is the standard of proof? „Beyond reasonable doubt” v „Balance of probabilities”;
  - What are the rules on admissibility of evidence?
  - What are the rules on jurisdiction?
  - What individuals and entities can be defendants?

For all states that are part of global initiatives against organised crime, corruption and other forms of economic crime, there is an impetus to co-operate as much as practical. Many states will decide that they should be able to make and/or execute MLA requests in civil forfeiture cases (and will amend existing

laws accordingly); others may be in a position to execute a request through another means (depending upon their own civil procedure and disclosure rules).

Importantly in relation to corruption and related offences, under Article 54(1)(c), in order to provide MLA pursuant to Article 55 with respect to property acquired through or involved in the commission of an offence established in accordance with UNCAC, states parties must, in accordance with their national law, consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Importantly in that regard, the Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption indicate that, in this context, the term „offender” might in appropriate cases be understood to include persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question<sup>63</sup>

### Tracing of assets and financial investigations: What will be needed and what the law should allow in civil forfeiture cases

A civil forfeiture case may begin life as a criminal investigation. That will, of course, make it much easier, as information and evidence may have been gathered (perhaps by informal assistance and MLA respectively) before the investigation was closed. However, that will not always be the case. As we have seen, some states will assist in civil forfeiture cases, others will not.

It is, therefore, important to have in mind what investigative actions are likely to be needed to be carried out in an investigation for a civil forfeiture case. Those are set out in the preceding section.

The practitioner seeking to make a request for administrative assistance or MLA in a civil forfeiture case must have regard to, and understand, such methods and should construct his request accordingly.

It is the request for assistance to another state that will be one of the principal tools available to the prosecutor or investigator when seeking to identify and/or trace assets. After all, almost any civil forfeiture claim arising from economic, financial or serious organised crime will involve transnational asset movement.

A request to a foreign state to restrain or confiscate assets will involve the exercise of a coercive power by the court in the requested state and will, therefore, invariably require the request to be made formally by a letter of request. Similarly, the supply of material needed in the tracing process will also, in the usual course of events, require such a letter to be issued.

The general principles governing MLA requests apply equally when seeking co-operation specifically to freeze or confiscate assets.

As we have seen in the discussion of UNCAC, above, it now provides the key international framework for restraint and confiscation in bribery, public sec-

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63 A/58/422/Add.1, para. 59

tor embezzlement and abuse of office cases. It should therefore always be considered (and cited) when making MLA requests in such cases. In a civil forfeiture case, it should be emphasised in a request that UNCAC focuses heavily on cross-border recovery and envisages a range of criminal and civil mechanisms to restrain and recover the proceeds of corruption. In particular:

- Confiscation orders consequent on criminal conviction;
- Non-conviction based civil forfeiture proceedings (known in some jurisdictions as civil recovery, civil asset forfeiture or *in rem* confiscation);
- Criminal restraint orders in support of domestic or foreign criminal investigations or prosecutions, and interim receiving orders in support of domestic civil recovery proceedings;
- Enforcement of foreign criminal or civil forfeiture orders;
- Private civil proceedings brought by the claimant state (including the ability to obtain injunctions freezing assets pending outcome of the proceedings).

In the context of MLA, it should be remembered that international co-operation takes into account the fact that different states have different ways of complying with requests. Thus, routinely, states with a value-based system will request a state with a property-based system to obtain (or enforce) a confiscation order and, in such a circumstance, if one is obtained in a court of the requested state it will be on a property-based approach. The same principle will, of course, be applied if the roles are reversed and it is a state with a property-based system making the request to a value-based state. In either case, providing that the requesting state's authorities liaise with their counterparts, ascertain what evidence and material needs to be produced, and understand the basis and effect of the order sought, there should be no practical difficulty.

## A „BLUEPRINT” FOR INTRODUCING *IN REM* CONFISCATION

The following features should be put in place for a legal framework for effective civil forfeiture and thus are necessary in the development of any law or policy in order to meet the international standards:

- (1) The authorities must prove its case on a balance of probabilities, and not the higher criminal standard;
- (2) Interim and final orders should be made by a court;
- (3) No particular crime need be identified or proven, but the court must be satisfied that the property is the proceeds of or traceable to crime;
- (4) Rights of all owners or claimed owners to participate in proceedings;
- (5) Innocent owner defence.

Plainly, any further power to make permanent confiscation orders (whether a value based post-conviction confiscation order power or an independent non-conviction based civil forfeiture power) must be accompanied by powers to make temporary freezing or seizure powers. In addition, a freezing order power should be available as soon as an investigation is underway.

The experiences of other states and the international instruments should be seen as the basic guide on which to build the responses of the state. For the purposes of civil forfeiture legislation, the basic requirements are:

- Definition of the proceeds to be forfeited,
- Provision for forfeiture of instrumentalities,
- Is a predicate offence necessary?
- Forfeiture of proceeds of crimes committed outside the jurisdiction,
- Proof of the underlying criminality and removal of the need to prove the crime,
- Retrospectivity,
- Time limits in which civil proceedings must be commenced,
- Tracing, following and mixing of proceeds,
- Standard of proof,
- Freezing of assets and duration of order,
- Powers of investigation following a freezing order,
- Powers to secure evidence for investigation such as production orders etc.,
- Extra-territorial application in respect of property located abroad,
- International co-operation – direct enforcement/indirect enforcement,

- Information/intelligence sharing nationally and internationally,
- Appointment of receivers,
- Enforcement of order,
- Legal expenses of the owner of the property,
- Which body will be responsible for investigating and instituting such proceedings,
- Compensation for owner in the event proceedings are terminated
- Third party rights,
- Any other safeguards deemed necessary by a state such as the threshold level,
- Criminal sanctions.

There are, also, other optional provisions to be considered:

- Financial threshold for commencement of proceedings,
- Availability of civil forfeiture where an individual has gained from the crime through for example publication or selling the story to journalists etc.,
- A presumption that the increase in wealth must be derived from criminal activity, unless the person proves otherwise.

## THE COMPONENTS OF A COMPREHENSIVE CIVIL FORFEITURE LAW

(including the requisite investigative and legal tools, but recognising that these may form either part of the Civil Forfeiture Law itself or inserted, as amendments, into other (existing laws))

Part I: Restraint/preservation orders

Part II: Forfeiture orders

Part III: Tracing etc

Part IV: Investigation powers

Part V: International co-operation

Part VI: Recovered property and expenses

Part VII: Civil proceedings

Part VIII: General provisions

Part IX: Definitions

### PART I: PRESERVATION (RESTRAINT) ORDERS

This Part should provide for a private application to be made by an agency to the Court to prohibit a person from dealing with property (which it is said

represents either the proceeds of unlawful activity or an instrumentality used in the unlawful activity) in any way until there has been a final determination.

An Article should set out the procedure for obtaining a preservation order and the duties/responsibilities of the appropriate agency. Upon an application for a preservation order, the Court must be satisfied that there ‘are reasonable grounds to believe’ (or equivalent wording) that the property is the proceeds and/or an instrumentality of unlawful activity whether or not any criminal proceedings have been brought. A preservation order will usually have two aspects to it:

- Preservation of the property,
- Appointment of a suitable qualified person to manage the property, where this is deemed necessary.

The first purpose is to preserve the property and the Court has the power to make ancillary orders which it considers necessary for the discharge of the order. Under an express provision, the Court must be able to vary or rescind the order if it is deemed to be in the interests of justice or if the proceedings against the person have been concluded. Any party affected by the preservation order must be able to apply to the Court for variation or rescission of the order.

The need to appoint a suitably qualified person to manage property may not arise in every situation and, therefore, it is left to the agency, in the first instance, to assess the need for a manager or receiver. Generally speaking, such a need will arise where the property which is the subject of the preservation order is for example an on-going business, complex investments, hotels, livestock etc. and the officers of the law enforcement agency in question do not have the necessary expertise to handle such assets. The key function of the appointed person is to ensure that the value of the asset is maintained so as to meet any subsequent confiscation order or, where such an order is not made, to hand over the asset in a suitable condition to the person from whom it has been seized

A person appointed to manage the property is an officer of the court, having been appointed by the court. Therefore, if he/she is to discharge his/her duties he/she must have adequate powers to do so and these must be provided for by an express provision in such terms as:

„(1) A preservation order may authorise or require the manager or receiver to take any other steps the court thinks appropriate for the purpose of securing the detention, custody or preservation of the property to which the order applies or to take any other step which the Court thinks necessary.

(2) A Court making a preservation order may, when it makes the order or at any time thereafter, make any ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order.”

The Law must also set out in clear terms what amounts to „managing property”.

The powers and duties of the appropriate person in respect of the management of assets should be set out and should recognise the following key functions:

- The appointed person is an officer of the court and is appointed on application,
- The requirement to maintain the value of the property,
- The fees of the appointed person,
- Protection of legal proceedings against the appointed person.

However, the Court may, in its discretion, grant any powers that it thinks are necessary for the discharge of the order. The list above identifies the key functions which must be included, as a minimum if the order is to be effective.

The terms property, proceeds of unlawful activity or an instrumentality used in the unlawful activity must be defined (see Part IX, below).

As a safeguard for those who may be affected by the making of a preservation order, the Law should provide that the Agency notify those affected by such an order, if their identity is known to the agency. If, however, the agency is unable to identify those affected, there is a requirement to publish the notice in, for instance, two national daily newspapers or a similar outlet.

It is suggested that the Law provides for reasonable living expenses to be made available to those who have an interest in the property that is subject to the preservation order and also makes allowance for reasonable legal expenses to be met in relation to the person whose property has been preserved.

There should also be express provision for the expiration of the preservation orders after, for instance, 90 days unless a forfeiture order is made.

It should be made a criminal offence if a person contravenes the preservation order.

Specific provision should be made in respect of immovable property. A preservation order against immovable property may require endorsement of any of the restrictions contained in the order and the steps to be followed in such circumstances will need to be set out.

## PART II: FORFEITURE ORDERS

Following the grant of the preservation order, Part II, it is suggested, will address the procedure for the final forfeiture of the property.

The Court shall make an order if it is satisfied on the balance of probability that the property subject to the preservation order is the proceeds and/or an instrumentality of unlawful activity. As in the case of the preservation (restraint) order, the Court may make any ancillary order that it considers appropriate to meet the discharge of the forfeiture order. A provision should be inserted to confirm that the validity of the forfeiture order remains unaffected by the outcome



of any criminal proceedings or an investigation. The order must be final before it can take effect, i.e. after any appeal hearings in relation to the order.

There should also be a safeguard provision for those who may be affected by the making of a forfeiture order and the Court should have a discretion to ‘exclude certain interests in property’ where it finds that, on the balance of probability, the person has acquired the interest in the property legally and neither knew nor had reasonable grounds to suspect that the property is proceeds and/or instrumentality of the unlawful activity.

A person affected by an order but who had not received notification of the forfeiture order should be able to apply to the Court within 45 days of the order to exclude his/her interests from the property concerned so that the order does not affect their interest. Where such an application is made, the Court will endeavour to have the matter listed within 30 days. The person affected may adduce evidence or call witnesses on his/her behalf. As this should not be an *ex parte* hearing, or the equivalent, the agency will also be represented. The Court may make an order in the favour of the applicant if it finds that, on the balance of probabilities the person has acquired the interest in the property legally, and neither knew nor had reasonable grounds to suspect that the property is proceeds and/or an instrumentality of the unlawful activity. There will be a provision for the offence of perjury where false testimony is provided in such proceedings.

Upon the conclusion of any appeal, the order becomes effective and the property affected is forfeited to the State and it vests in the Agency, which holds it on behalf of the state. The Agency then takes possession of the property from any person holding the property that is subject to the order and it must dispose the property by sale or any other means as directed by the Court and the proceeds of the sale or any money forfeited must be deposited into an account after any costs in relation to the seizure, maintenance etc. are defrayed.

### PART III: TRACING ETC

Part III is aimed at tracing property obtained through unlawful activity but which, since acquisition, has been disposed of. The tracing process enables the original property to be identified and to become recoverable by the agency, even after an earlier disposal. It also allows for property to be traced to any subsequent „owner” to allow recovery, except where the person acquires such property in good faith.

A provision will assert the position that property is recoverable if it is obtained through unlawful activity and the basic principle of tracing the original property where it has been transferred or passed to another person will be set out.

An Article will allow for the tracing of property which has been disposed of and the person holds property that is derived from the original property. For

example, if a stolen car is subsequently sold then the cash from the sale or any other property acquired from that sale is deemed to be tainted and can be the subject of recovery.

An Article will address „mixing property”, i.e. mixing the proceeds and/ or instrumentalities of unlawful activity with property that is legitimately held, for example cash held in a bank account may include money that is lawfully obtained as well as proceeds/instrumentalities either held by the person or someone on his/her behalf. The section allows for the recovery of that part of the asset that represents the value of property obtained through unlawful activity or is an instrumentality.

An Article will permit the recovery of any profits derived from the original property obtained through unlawful activity or an instrumentality. The additional or further property is also treated as recoverable property. Thus, for example property is held in an account and it attracts interest, the interest earned would also be capable of being forfeited.

A further provision will set out the circumstances when the proceeds/instrumentalities cease to be recoverable and includes situations where the property is acquired by another in good faith, or it is subject to a forfeiture order under the provisions of this Bill or the value of the property obtained has been taken into account for a confiscation order following conviction etc.

## PART IV: INVESTIGATION POWERS

This Part will provide a number of investigation powers relating to a civil forfeiture investigation and creates offences to reflect actions that prejudice the investigation.

The investigation powers include the following:

- Production orders
  - Computer information
  - Material held by Government Ministries
- Search and seizure warrants
- Disclosure orders
- Customer information orders
- Account monitoring orders

**Production orders:** the agency responsible for the civil forfeiture investigation may make an *ex parte* application to a court for a production order requiring a person who may be in possession or control of material to produce it to an Agency within the period stated in the order. The Court must, prior to the grant of such an order be satisfied of the conditions which will be separately set out and that there are reasonable grounds to believe that the person appears to be in possession or control of the material which is to be the subject of the order.

The Court may, if it considers appropriate make an order requiring the person to give access to material on premises.

Where the material is held on a computer, the Court may require the person to „produce the material to an Agency officer for him/her to take away, it has effect as an order to produce the material in a form in which it can be taken away by him/her and in a form in which it is visible and legible. Where the order relates to access to the material, this must also be ‘visible and legible’”.

**Material held by Government Ministries:** A production order may also be made in relation to material which is in the possession or control of a government department and must be served on the relevant department. The government department must take all reasonable steps to ensure that the material is served on the appropriate agency. Where the department does not comply with the order, it is required to submit a report with the reasons for non-compliance to the court.

A provision will be needed to ensure that the agency or any person affected by the order may apply to the court for a variation or discharge of the order.

The position in relation to privileged material is to be preserved.

Search and seizure warrants

The appropriate agency may apply for search and seizure warrants on an *ex parte* hearing. Given the intrusive nature of search warrants, the circumstances will be set out in which such a warrant may be granted.

A search and seizure warrant may only be considered where:

(a) a production order made in relation to material has not been complied with and there are reasonable grounds for believing that the material is on the premises specified in the application for the warrant, or

(b) the agency is unable to communicate with any person entitled to grant entry to the premises and entry to the premises will not be granted unless a warrant is produced and the investigation would be prejudiced unless the agency is able to secure entry to the premises

The application for a search and seizure warrant must state that the property specified in the application is subject to a civil forfeiture investigation.

A search and seizure warrant is a warrant authorising an Agency or its authorised officer:

(a) to enter and search the premises specified in the application for the warrant, and

(b) to seize and retain any material found there which is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the application is made.

A search and seizure warrant does not permit seizure of any privileged material.

**Disclosure orders:** An agency may apply for a disclosure order requiring any person to answer questions, provide information specified in the order or produce documents in relation to the investigation. A disclosure order must be served on the person from whom the information is sought. The Court must be satisfied that there are reasonable grounds for believing that the information which may be provided under the order is likely to be of substantial value to the investigation and that it is in public interest that the information be provided.

As with the other measures, the position in relation to privileged material is preserved.

**Customer Information order** is an order that a financial institution provide the information to the appropriate agency in such manner and a such time as the agency requires the information and customer information is information whether the person holds or has held an account(s) at the financial institution.

A provision will set out the information that can be the subject of such an order.

#### **Account monitoring orders**

A court can make an account monitoring order following an *ex parte* application by the appropriate agency. An account monitoring order relates to the obtaining of account information from a financial institution in relation to an account for a specified period.

Account information must be defined; for instance, as:

(1) Account information is information relating to an account or accounts held at the financial institution specified in the application by the person so specified (whether solely or jointly with another).

(2) The application for an account monitoring order may specify information relating to:

- all accounts held by the person specified in the application for the order at the financial institution so specified,
- a particular description, or particular descriptions, of accounts so held, or
- a particular account, or particular accounts, so held.

(3) An account monitoring order is an order that the financial institution specified in the application for the order must, for the period stated in the order, provide account information of the description specified in the order to an [appropriate/authorised] officer in the manner, and at or by the time or times, stated in the order.

Given the intrusive nature of all these powers, there will be strict criteria for the application of such orders and the factors that the court must consider in the grant of such applications are included in the respective sections.

## PART V: INTERNATIONAL CO-OPERATION

In order to give effect to any foreign preservation or forfeiture orders, a Law must provide for such assistance to be given and should seek to follow the measures encouraged by UNCAC. Accordingly, it is important to note that other Laws (e.g., on Mutual Legal Assistance) will have to be revisited in the light of a draft Civil Forfeiture Law.

Articles 51–59 which are contained in Chapter V of UN Convention Against Corruption [UNCAC] emphasise and provide for international co-operation mechanisms to recover stolen assets in cases of corruption and provide for the following measures in relation to the recovery of assets across national borders:

- direct recovery of property by civil proceedings
- indirect and direct enforcement of overseas orders

### ***Direct enforcement of overseas orders***

In order to give effect to foreign orders and the return of assets, the Convention requires the establishment of a basic regime for domestic freezing, seizure and confiscation of assets in the national law of member states. The push is for direct enforcement rather than the more onerous and resource intensive indirect enforcement (where the requested State may find itself having to marshal a large amount of evidence in order to present an application). An Article will provide for direct enforcement of foreign civil forfeiture orders.

Similarly, there should be provision for the transfer of the proceeds or instrumentalities to the foreign State following the enforcement of the foreign forfeiture order.

***General co-operation:*** There should also be provision for the agency to enter into agreements with other agencies, nationally and internationally. The agreements relate to the sharing of information within agencies and are not intended to allow for the agency to enter any other international agreements, those being the remit of the Ministry for Foreign Affairs.

## PART VI: RECOVERED PROPERTY AND EXPENSES

Part VI will address the procedure following forfeiture of property. The property forfeited reverts to the State and where the property is money there is a requirement to deposit such money into a separate interest bearing account.

Clearly the expenses of the agency will have to be met and the Law will, therefore, provide for payments of the costs incurred by the agency to be reimbursed from the property forfeited.

This Part will also provide for compensation payments to be made or assist victims.

A decision will be needed, in due course, on whether there should be a requirement for the responsible Ministry to report to Parliament on a regular basis the amounts credited to the Fund, along with the disbursements and any investments that may have been made.

## PART VII: CIVIL PROCEEDINGS

This Part will include a provision in accordance with Article 53 of UN-CAC, which focuses on State Parties having a legal regime allowing another State Party to initiate civil litigation for asset recovery or to intervene or appear in domestic proceedings to enforce their claim for compensation. The Convention aims to ensure that there are various options open to States in each case and Part VII will permit civil proceedings to be brought by a State.

## PART VIII: GENERAL PROVISIONS

The Law will, presumably, be intended to apply to any proceeds or instrumentalities, even if those were obtained prior to the coming into force of the Law, provided the activity was unlawful at the time. This approach should not offend the Constitution and does not offend the non-retrospectivity rule, as the conduct would have been unlawful at the time in any event. For example, if X acquires proceeds from criminal activities prior to the coming into force of the Law, and it was not possible to commence criminal proceedings, the property that has been acquired can still be forfeited, as long as the criminality in question is an offence under the State law at present; in such circumstances the property would have been acquired from an unlawful activity.

In this Part, a provision should be included to confirm that all the proceedings under the Law are civil proceedings *in rem* and not *in personam* and it is the civil standard of proof, namely the balance of probabilities or equivalent, that is applicable for any proceedings under it.

As the actions under this Law will be *in rem*, i.e. against the property and not an individual, it would not be possible for a person to submit that they enjoy immunity or jurisdictional privilege of any sort. Provided the property is proceeds of unlawful activity or an instrumentality, action can properly lie against it.

Any agency which commences an investigation or civil forfeiture proceedings is protected from any liability provided the agency acted in good faith.

## PART IX: INTERPRETATION

This Part is intended to set out the interpretation (i.e. definition) provisions in respect of the key terms that will be used in the Law.



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