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# PARTICIPANTS' AND COURSE COUNSELLORS' PAPERS

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## MEASURES TO IDENTIFY, TRACE, FREEZE AND CONFISCATE THE PROCEEDS OF CRIME - THE PHILIPPINE SETTING

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### I. INTRODUCTION

Confiscating the proceeds of crime is an effective way to curtail economic crime. Indeed, precluding criminals from enjoying the proceeds of their criminal activities serves as a strong deterrence to would-be offenders since the incentive to engage in economic crime is diminished if the likelihood of gaining profit is reduced.

In the same way, forfeiture is a form of incapacitation, in that the tools or instruments of the crime are removed from circulation so that they may no longer be used, either by the criminal once he or she regains freedom, or by the members of his or her criminal organization.

Moreover, in cases where the crime involves innocent victims, such as swindling and other types of fraud, asset forfeiture is an effective means of recovering property that may be used to compensate the victims.

In the Philippines, penal laws - the Revised Penal Code and some special criminal laws - include the forfeiture of instruments and proceeds of crime as a form of accessory penalty. But while criminal forfeiture aims to dissuade people from committing crimes, it does not prove as effective as it should since it is dependent on the conviction of the accused in a criminal prosecution. And more often than not, unless the authority is able to place the proceeds of the crime in the custody of the authorities at the initial stage of criminal prosecution, by the time a conviction is obtained, the said proceeds are gone.

In contrast, civil forfeiture requires neither conviction nor prior initiation of a criminal prosecution.

While criminal forfeiture is as old as the Revised Penal Code<sup>1</sup> in the Philippines, civil forfeiture is relatively new.

This paper focuses on the civil forfeiture regime in the Philippines, its legal framework, the progress the government has made since its adoption, and the direction it takes towards a more successful confiscation of proceeds of crime.

### II. GENERAL SITUATION IN TERMS OF IDENTIFYING, TRACING, FREEZING AND CONFISCATING PROCEEDS OF CRIME IN THE PHILIPPINES

#### A. Identifying and Tracing Assets

##### 1. Submission of Covered Transaction Reports (CTRs) and Suspicious Transaction Reports (STRs) by Covered Institutions

Under Republic Act (R.A.) No. 9160, otherwise known as the Anti-Money Laundering Act of 2001 (AMLA), as amended, covered institutions<sup>2</sup> are required to submit to the Anti-Money Laundering Council

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<sup>1</sup> The Revised Penal Code took effect on 1 January 1932.

<sup>2</sup> Under Section 3(a) of the AMLA, as amended, "covered institutions" refer to: (1) banks, non-banks, quasi-banks, trust entities, and all other institutions and their subsidiaries and affiliates supervised or regulated by the Bangko Sentral ng Pilipinas (BSP); (2) insurance companies and all other institutions supervised or regulated by the Insurance Commission (IC);

(AMLC)<sup>3</sup> covered transaction<sup>4</sup> reports (CTRs) and suspicious transaction<sup>5</sup> reports (STRs) within five working days from the occurrence of the transactions.

The primary purpose of requiring covered institutions to submit CTRs and STRs is to provide the AMLC with “leads” in the investigation of possible money laundering, as well as to enable it to profile transactions to trigger alerts and track assets of persons or entities suspected of committing money laundering.

CTRs and STRs submitted to the AMLC are, under the law, strictly confidential and may not be disclosed to any person; neither may they be used as evidence in any proceedings. The AMLC, being the government agency empowered to investigate money laundering offences, makes use of the information contained in the STRs as a jump-off point for the investigation of possible money laundering offences. CTRs, on the other hand, are used to track other assets of a person being investigated.

However, to be able to share the information with other law enforcement agencies that are tasked to investigate unlawful activities (predicate crimes), the AMLC has entered into a Memorandum of Agreement (MOA) with relevant law enforcement agencies (LEAs) and other investigative bodies. Under the MOA, the parties may, on their own initiative or upon request, share with each other any information that may aid in their respective investigations subject to the provision of confidentiality. To date, the AMLC has entered into MOAs with 13 LEAs and investigative bodies in the Philippines. The AMLC has likewise an existing Memorandum of Understanding (MOU) with 27 foreign FIUs by virtue of which exchange of information is facilitated.

The submission of CTRs and STRs being mandatory, the law authorizes the AMLC to impose an administrative penalty (in the form of fines) upon any covered institution which fails to comply with the reporting requirement.

## 2. Bank Inquiry as an Investigative Tool

In the past, the difficulty of identifying and tracing proceeds of crime was aggravated by the fact that law enforcement agents could not look into the bank deposits of individuals, particularly those who were suspected of committing crimes, due to the bank deposit secrecy law in the country. Indeed, the strict bank deposit secrecy law used to be an obstacle in tracing assets, particularly assets in the form of bank deposits.

However, with the enactment of R.A. No. 9160, the bank deposit secrecy law has been relaxed. Under the AMLA, if there is probable cause that a particular bank deposit or investment is related to an unlawful activity or a money laundering offence, the AMLC may inquire into or examine such bank deposit or investment. As a general rule, the AMLC needs to get an order from the proper court to enable it to examine a bank deposit. However, if the investigation being conducted is in relation to the unlawful activities of kidnapping for ransom, illegal drug activities or terrorism, the AMLC may exercise its authority to examine a particular bank deposit without the necessity of a court order.

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and (3)(i) securities dealers, brokers, salesmen, investment houses and other similar entities managing securities or rendering services as investment agent, adviser, or consultant; (ii) mutual funds, close-end investment companies, common trust funds, pre-need companies and other similar entities; (iii) foreign exchange corporations, money changers, money payment, remittance, and transfer companies and other similar companies; and (iv) other entities administering or otherwise dealing in currency, commodities or financial derivatives based thereon, valuable objects, cash substitutes and other similar monetary instruments or property supervised or regulated by the Securities and Exchange Commission (SEC).

<sup>3</sup> The AMLC is the financial intelligence unit (FIU) of the Philippines.

<sup>4</sup> A covered transaction is any transaction in cash or other equivalent monetary instrument involving a total amount in excess of five hundred thousand Pesos (PhP500,000.00, or approximately US\$10,000.00) within one banking day (Section 3[b]) of the AMLA).

<sup>5</sup> A suspicious transaction is a transaction, regardless of the amount involved, where any of the following circumstances exist: (i) there is no underlying legal or trade obligation, purpose or economic justification; (ii) the client is not properly identified; (iii) the amount involved is not commensurate with the business or financial capacity of the client; (iv) taking into account all known circumstances, it may be perceived that the client’s transaction is structured in order to avoid being the subject of reporting requirements under the AMLA; (v) any circumstance relating to the transaction which is observed to deviate from the profile of the client and/or the client’s past transactions with the covered institutions; (vi) the transaction is in any way related to an unlawful activity or offence under the AMLA that is about to be, is being or has been committed; or (vii) any transaction that is similar to any of the foregoing (Section 3[b-1] of the AMLA).

Through a bank inquiry, the AMLC is able to obtain relevant documents and information pertaining to the financial transactions of a person suspected of committing money laundering. Such transactions may include purchases of properties, which may lead to the discovery of other assets acquired by the subject to investigation. Unlike an STR, any bank document or records obtained pursuant to an order of the court may be used in evidence once a criminal case for money laundering or a civil forfeiture case has been filed in court.

### 3. Investigation of Ill-gotten Wealth of Government Officials and Employees

The authority to investigate ill-gotten wealth of government officials and employees pertains to the Office of the Ombudsman. The investigation is usually initiated upon complaint of either a known complainant or an anonymous complainant. A complaint filed by a known complainant is validated in a preliminary conference and by gathering supporting documents, getting sworn statements of the witnesses and conducting ocular inspection. Thereafter, the Field Investigation Office (FIO) of the Office of the Ombudsman conducts an independent investigation.

On the other hand, if the complaint has been filed by an anonymous complainant, the FIO acts as the nominal complainant, and at the same time, conducts investigation. The investigation includes establishing the personal circumstances of the respondent, particularly his or her being a public officer, and verification of the allegations in the anonymous complaint.

In the investigation of ill-gotten wealth, the Office of the Ombudsman resorts to two important documents which are required to be filed by all public officials and employees: these are the Statement of Assets Liabilities and Net Worth (SALN) and the Disclosure of Business Interests and Financial Connections. Under R.A. 6713 or the Code of Conduct and Ethical Standards for Public Officials, all public officials and employees shall file under oath their Statement of Assets, Liabilities and Net Worth and a Disclosure of Business Interests and Financial Connections and those of their spouses and unmarried children under 18 years of age living in their households. The two documents shall contain information on the following:

- (a) real property, its improvements, acquisition costs, assessed value and current fair market value;
- (b) personal property and acquisition costs;
- (c) all other assets such as investments, cash on hand or in banks, stocks, bonds, and the like;
- (d) liabilities, and;
- (e) all business interests and financial connections.

The documents must be filed:

- (a) within 30 days after assumption of office;
- (b) on or before 30 April of every year thereafter; and
- (c) within 30 days after separation from the service.

All public officials and employees required to file the aforesaid documents shall also execute, within 30 days from the date of their assumption of office, the necessary authority in favour of the Ombudsman to obtain from all appropriate government agencies, including the Bureau of Internal Revenue, such documents as may show their assets, liabilities, net worth, and also their business interests and financial connections in previous years, including, if possible, the year when they first assumed any office in the Government.<sup>6</sup>

The FIO verifies the contents of the SALN from the records of relevant government agencies such as the Land Transportation Office (LTO), the Registry of Deeds, Assessor's Office, Securities and Exchange Commission, Department of Trade and Industry, Bureau of Licenses and Permits, Bureau of Internal Revenue (to determine other sources of income), and the Bureau of Immigration (for travel records).

The FIO then analyses the respondent's income, compensation and other benefits received from the government vis-à-vis all his or her declared and undeclared assets. The FIO also conducts ocular inspection and surveillance whenever applicable and/or if necessary.

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<sup>6</sup> Section 8, R.A. 6713.

In case of discrepancy between the totality of all known sources of income and acquired assets, the Office of the Ombudsman files either a criminal complaint for violation of R.A. 3019 (Anti-Graft and Corrupt Practices Act) and/or a civil case for forfeiture of ill-gotten wealth under R.A. 1379.

## **B. Freezing of Assets**

Prior to the enactment of the AMLA in 2001, the Government had no mechanism to freeze a property or asset that was deemed related to criminal activities. With the passage of R.A. No. 9160, however, freezing of assets that are deemed related to unlawful activities or money laundering offence became an available remedy to the Government.

### 1. Petition for Freeze Order is filed with the Court of Appeals

In the Philippines, freezing of property or assets is a judicial function. This is the express provision under Section 10 of R.A. 9160, as amended.

A verified petition to freeze is filed *ex parte* with the Court of Appeals. It is filed in the name of the Republic of the Philippines, as represented by the AMLC.

To ensure the confidentiality of a petition for freeze order, the petition is filed directly with the Presiding Justice<sup>7</sup> of the Court of Appeals who shall enter the same in a logbook specifically designed for the purpose, and assigned a docket number. The logbook and the entries therein are kept strictly confidential and maintained under the responsibility of the Presiding Justice.

### 2. Action by the Court of Appeals; Effectivity of the Freeze Order

Within twenty-four hours after the filing of a petition for freeze order, the Court of Appeals shall immediately act thereon. If the Court is satisfied that, based on the allegations of the petition, there exists probable cause that the monetary instrument, property, or proceeds subject of the petition are in any way related to an unlawful activity, it shall issue *ex parte* a freeze order directing the respondent, or any person acting on his or her behalf, to desist from transacting, withdrawing, depositing, transferring, removing, converting, concealing, or otherwise disposing of the property subject to the freeze order.

The freeze order shall be effective immediately for a period of 20 days. Within the twenty-day period, the Court shall conduct a summary hearing, with notices to the parties, to determine whether or not the freeze order should be modified or lifted, or its effectivity extended. On motion filed by the petitioner (AMLC), the freeze order may, on good cause, be extended for a period not exceeding six months.

The proceedings relating to petitions for a freeze order are governed by the Rule of Procedure on Civil Forfeiture which was adopted by the Supreme Court in 2005.

## **C. Forfeiture of Assets**

### 1. Criminal Forfeiture

Under Article 25 of the Revised Penal Code, forfeiture or confiscation of the instruments and proceeds of an offence is classified as an accessory penalty which may be imposed upon conviction of the accused, in addition to the penalty of imprisonment. Article 45 thereof provides that every penalty imposed for the commission of a felony shall carry with it the forfeiture of the proceeds of the crime and the instruments or tools with which it was committed. Such proceeds and instruments or tools shall be confiscated and forfeited in favour of the Government, but those articles which are not subject of lawful commerce shall be destroyed.

Section 9 of the Anti-Graft and Corrupt Practices Act (R.A. No. 3019)<sup>8</sup> imposes, in addition to imprisonment and perpetual disqualification from public office, the penalty of confiscation or forfeiture in favor of the Government of any prohibited interest and unexplained wealth manifestly out of proportion to the salary and other lawful income of the public officer or employee.

The law penalizing the crime of plunder (R.A. No. 7080) likewise provides that in the imposition of penalty, the court shall declare any and all ill-gotten wealth and their interests and other incomes and assets

<sup>7</sup> The Presiding Justice is the administrative head or chief executive officer of the Court of Appeals.

<sup>8</sup> R.A. No. 3019 took effect on August 17, 1960.

including the properties and shares of stock derived from the deposits or investment thereof forfeited in favour of the State.<sup>9</sup>

A similar provision on forfeiture of instruments and proceeds of crime is provided in R.A. No. 9165, otherwise known as the Comprehensive Dangerous Drugs Act of 2002.<sup>10</sup> Section 20 thereof provides that every penalty imposed for the unlawful importation, sale, trading, administration, dispensation, delivery, distribution, transportation or manufacture of any dangerous drug and/or controlled precursor and essential chemical shall carry with it the confiscation and forfeiture, in favour of the government, of all the proceeds and properties derived from the unlawful act, including, but not limited to, money and other assets obtained thereby, and the instruments or tools with which the particular unlawful act was committed, unless they are the property of a third person not liable for the unlawful act, but those which are not of lawful commerce shall be ordered destroyed without delay pursuant to the provisions of Section 21 of the Act.

## 2. Civil Forfeiture

The Philippines has, at present, two civil forfeiture statutes that allow recovery of proceeds of crime without a criminal conviction. First is R.A. No. 1379 which was signed into law on 18 June 1955, and second is R.A. No. 9160, otherwise known as the Anti-Money Laundering Act (AMLA) of 2001, as amended.

### (i) *Republic Act (R.A.) No. 1379*

R.A. No. 1379 was the first civil forfeiture statute in the Philippines. It provides for the proceedings for the forfeiture of property found to have been unlawfully acquired by government officers and employees. It covers property that a public officer or employee has acquired during his or her incumbency which is manifestly out of proportion to his or her salary as such public officer or employee and to his or her other lawful income and the income from legitimately acquired property.<sup>11</sup>

The proceedings for forfeiture under R.A. No. 1379 is initiated by the Office of the Ombudsman.<sup>12</sup> The petition for forfeiture shall describe the approximate amount of property that the public officer or employee has acquired during his or her incumbency in his or her past and present offices and employments, a description of said property, the total amount of his or her government salary and other proper earnings and incomes from legitimately acquired property, and such other information as may enable the court to determine whether or not the respondent has unlawfully acquired property during his or her incumbency.

The respondent shall have a period of fifteen days within which to present his or her answer. Thereafter, the Court shall set a date for a hearing, which may be open to the public, and during which the respondent shall be given ample opportunity to explain, to the satisfaction of the court, how he or she has acquired the property in question.

If the respondent is unable to show to the satisfaction of the court that he or she has lawfully acquired the property in question, then the court shall declare such property forfeited in favour of the State, and by virtue of such judgment, the property aforesaid shall become property of the State.

As earlier stated, R.A. No. 1379 covers only unexplained wealth of those working in the government. Proceeds of crime acquired by a private individual may not be forfeited under this law.

While the law on forfeiture of unexplained wealth has been in existence since 1955, much is to be desired in terms of the number of cases filed and successfully prosecuted pursuant to R.A. 1379. To date, there have been two cases won, 13 dismissed or lost, and nine still pending before the *Sandiganbayan*.<sup>13</sup>

<sup>9</sup> Section 2, R.A. No. 7080, as amended by R.A. No. 7659.

<sup>10</sup> R.A. No. 9165 took effect on 4 July 2002.

<sup>11</sup> Section 2, R.A. No. 1379.

<sup>12</sup> Under the original provision of R.A. No. 1379, the authority to file a petition for forfeiture against unexplained wealth is vested in the Solicitor General. However, subsequent legislation vested such authority in the Office of the Ombudsman.

<sup>13</sup> A petition for Forfeiture pursuant to R.A. 1379 is filed either with the *Sandiganbayan* (special anti-graft court) if the respondent occupies a position in government with at least salary grade 27, or with the ordinary court (Regional Trial Court), if the respondent occupies a position below salary grade 27. As of this writing, only statistics on forfeiture of assets filed with the *Sandiganbayan* had been obtained.

(ii) *Republic Act No. 9160*

The FATF<sup>14</sup> 40 Recommendations provide that countries may consider adopting measures that allow proceeds and instrumentalities of crime to be confiscated without requiring a criminal conviction, 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.<sup>15</sup>

In compliance with the FATF 40 Recommendations, on 28 September 2001, the Philippine Congress enacted R.A. No. 9160, otherwise known as the Anti-Money Laundering Act (AMLA) of 2001. The law took effect on 17 October 2001. On 5 March 2003, R.A. No. 9160 was amended by virtue of R.A. No. 9194 which took effect on 23 March 2003.

R.A. No. 9160 created the Anti-Money Laundering Council (AMLC), the financial intelligence unit (FIU) of the Philippines. The AMLC is the government agency that is primarily responsible in the implementation of the AMLA, as amended.

R.A. No. 9160 criminalized money laundering in the Philippines and, at the same time, introduced civil forfeiture as an appropriate remedy for the seizure and forfeiture in favour of the State of monetary instrument, property or proceeds involved in or related to an unlawful activity or money laundering offence as defined in the law, without the necessity of conviction or prosecution in a criminal case.

Under Section 7 of the AMLA, the AMLC is vested with the authority to institute civil forfeiture proceedings and all other remedial proceedings against assets or properties that are deemed related to unlawful activities and/or money laundering offences. Relative thereto, Section 12 of the AMLA provides that:

“SEC. 12. *Forfeiture Provisions.*—

(a) Civil Forfeiture. – When there is covered transaction report made, and the court has, in a petition filed for the purpose ordered seizure of any monetary instrument or property, in whole or in part, directly or indirectly, related to said report, the Revised Rules of Court on civil forfeiture shall apply.”

### III. RULE OF PROCEDURE ON CIVIL FORFEITURE

While Section 12 of R.A. No. 9160 speaks of the Revised Rules of Court on civil forfeiture. At the time R.A. No. 9160 was enacted, in 2001, there was no Rule on Civil Forfeiture in the Philippines. Thus, in January 2005, upon the request of the AMLC, the Supreme Court directed the Committee on the Revision of the Rules of Court to draft the Rule on Civil Forfeiture.

On 15 November 2005, the Supreme Court adopted the Rule prescribing the procedure in cases of civil forfeiture including applications for asset preservation orders and petitions for freeze orders against assets or properties involved in or related to an unlawful activity or money laundering offences. The Rule of Procedure on Civil Forfeiture took effect on 15 December 2005.

#### A. Salient Provisions of the Rule of Procedure on Civil Forfeiture

##### 1. Applicability of the Rule

The Rule of Procedure on Civil Forfeiture shall govern all proceedings for civil forfeiture, asset preservation and freezing of monetary instrument, property, or proceeds representing, involving, or relating to an unlawful activity or a money laundering offence defined under R.A. No. 9160, as amended.

Under R.A. No. 9160, the term “unlawful activity” is defined as any act or omission or series or combination thereof involving or having direct relation to the following:

1. Kidnapping for ransom;
2. Drug Trafficking and other violations of the Comprehensive Dangerous Drugs Act of 2002;
3. Graft and Corruption under R.A. No. 3019, as amended;

<sup>14</sup> Financial Action Task Force.

<sup>15</sup> FATF Recommendation No. 3

4. Plunder (R.A. No. 7080 as amended);
5. Robbery and extortion;
6. Jueteng and Masiao (illegal gambling under Presidential Decree [PD]1602);
7. Piracy on the high seas (Revised Penal Code [RPC] & PD 532);
8. Qualified Theft under Art. 310, RPC;
9. Swindling under Art. 315, RPC;
10. Smuggling under R.A. 455 & 1937;
11. Violations of Electronic Commerce Act of 2000;
12. Hijacking, destructive arson and murder, including those perpetrated by terrorists against non-combatant persons and similar targets;
13. Fraudulent practices and other violations under the Securities Regulation Code of 2000 (RA 8799);
14. Felonies or offences of a similar nature that are punishable under the penal laws of other countries.

The foregoing offences are among the many crimes that are motivated by economic gain and generally generate huge criminal proceeds.

## 2. Petition for Civil Forfeiture is filed in the Name of the Republic of the Philippines

Under Section 2 of the Rule of Procedure on Civil Forfeiture, a petition for civil forfeiture should be filed in the name of the Republic of the Philippines, through the AMLC, as represented by the Office of the Solicitor General.

The AMLC is the sole authority that may institute actions for civil forfeiture and all other remedial proceedings in favour of the State. Considering, however, that the AMLC was not vested with legal capacity to sue and be sued, the Rule requires that the action be instituted in the name of the Republic of the Philippines.

The Solicitor General is the statutory counsel of the Republic of the Philippines and all its agencies and instrumentalities, and any action filed in the name of the Republic, if not initiated by the Solicitor General, shall be summarily dismissed.<sup>16</sup>

## 3. Where to File Petition for Civil Forfeiture

Section 3 of the Rule on Civil Forfeiture provides that a petition for civil forfeiture shall be filed in any Regional Trial Court of the *judicial region*<sup>17</sup> where the property is located. Where all or any portion of the property is located outside the Philippines, the petition may be filed in the *Regional Trial Court in Manila* or of the *judicial region* where any portion of the property is located.

## 4. Direct Filing with the Executive Judge; Confidentiality of the Action

A petition for civil forfeiture shall be filed directly with the Executive Judge of the regional trial court.<sup>18</sup> The Executive Judge is designated by the Supreme Court to exercise administrative supervision over lower courts. Normally, the function of an Executive Judge relates only to the management of the first and second level courts within his or her administrative area with a view to attaining prompt and convenient dispatch of its business. However, in the case of actions for civil forfeiture, the Rule has vested solely in the Executive Judges the judicial function and authority to act on, hear and decide petitions for civil forfeiture.

To ensure confidentiality in actions for civil forfeiture, the Rule requires the Executive Judge with whom the petition is filed to enter the petition in a separate logbook which shall be kept strictly confidential and maintained under the responsibility of the Executive Judge.<sup>19</sup> This is to prevent leakages or disclosures of information to unauthorized persons that may jeopardize the case and render it ineffectual.<sup>20</sup>

<sup>16</sup> *Republic vs. The Register of Deeds of Quezon*, Volume 314, Philippine Reports, page 473.

<sup>17</sup> A judicial region consists of several cities or municipalities.

<sup>18</sup> Section 5, Rule of Procedure on Civil Forfeiture.

<sup>19</sup> Sections 6 and 7, *ibid.*

<sup>20</sup> Justice Jose Vitug, Justice Oscar M. Herrera and Justice Bernardo P. Pardo, *A Summary of Notes and Views on the Rule of Procedures in Cases of Civil Forfeiture*, 2006 Edition, page 19.

### 5. Service of Notice to the Respondent

Under the Rule on Civil Forfeiture, the respondent shall be given notice of the petition in the same manner as service of summons in ordinary civil actions, i.e., personally, or by any other means prescribed in the Rules of Court. Where the respondent is designated as an unknown owner or whenever his or her whereabouts are unknown and cannot be ascertained with diligent inquiry, service may, by leave of court, be effected by publication in a newspaper of general circulation in such places and for such time as the court may order.

The notice shall inform the respondent that if no comment or opposition to the petition is filed within the required period (i.e., 15 days from service of notice or 30 days from the publication of notice), the court shall hear the case *ex parte* and render such judgment as may be warranted by the facts alleged in the petition and its supporting evidence.<sup>21</sup>

A civil forfeiture is an action *in rem*, that is, action against the property subject thereof, and not against the person known to be the owner or possessor of the property. That being the case, notice of the petition is required to be served to the respondent, not for purposes of acquiring jurisdiction over the person of the respondent, but for purposes of satisfying the requirements of due process.<sup>22</sup> In fact, the Rule allows the institution of civil action even if the owner of the property is unknown, or his or her whereabouts could not be ascertained. In such cases, notice of the petition may be served by publication. Indeed, the institution and prosecution of a civil forfeiture are not dependent on the prosecution or conviction of the respondent in a criminal proceeding.

### 6. Provisional Remedies available in a Petition for Civil Forfeiture

#### (i) Ex-parte issuance of Provisional Asset Preservation Order (PAPO)

Within 24 hours upon the filing of a petition for civil forfeiture, the Executive Judge shall, *ex-parte*, act thereon. Based on the allegations of the petition and the supporting documents, the Executive Judge shall determine whether probable cause<sup>23</sup> exists that the property subject to the petition is in any way involved in or related to an unlawful activity or a money laundering offence as defined in R.A. No. 9160, as amended. If the Executive Judge finds probable cause, he or she shall issue a Provisional Asset Preservation Order (PAPO) effective immediately for a period of 20 days from the date of service thereof to the respondent forbidding any transaction, withdrawal, deposit, transfer, removal, conversion, concealment or other disposition of the subject monetary instrument, property or proceeds.<sup>24</sup> The term “provisional” means temporary, preliminary or tentative.

#### (a) Summary hearing for the issuance of an Asset Preservation Order (APO)

During the twenty-day effectivity of the PAPO, the court shall conduct a summary hearing at which the respondent may, for good cause, show why the PAPO should be lifted. The court shall determine during that hearing whether the PAPO should be modified or lifted, or whether an asset preservation order (APO) should be issued.<sup>25</sup>

During the summary hearing, the burden of evidence is shifted to the respondent to show why the PAPO should be modified or lifted. He or she must adduce preponderance of evidence to overcome the court’s earlier finding of probable cause.

Should the respondent fail to present preponderance of evidence, the court shall issue an asset preservation order (APO) which shall be effective until the case is finally decided.

The provision on the hearing for the issuance of an APO is intended to satisfy the requirements of due

<sup>21</sup> Section 8, *ibid*.

<sup>22</sup> *Gomez vs. Court of Appeals*, Vol. 425, Supreme Court Reports Annotated, page 98.

<sup>23</sup> The term probable cause is defined in the Revised Implementing Rules and Regulations (RIRRs) of R.A. No. 9160, as amended, as “such facts and circumstances which would lead a reasonably discreet, prudent or cautious man to believe that an unlawful activity and/or money laundering offense is about to be, is being or has been committed and that the account or monetary instrument or property sought to be frozen is in any way related to said unlawful activity and/or money laundering offense” (Rule 10.2 of the RIRRs).

<sup>24</sup> Section 11, *ibid*.

<sup>25</sup> Section 12, *ibid*.

process of law.

An asset preservation order is akin to a writ of preliminary injunction as an ancillary or preventive remedy that is resorted to by a litigant to protect or preserve his or her rights or interests and for no other purpose during the pendency of the principal action.<sup>26</sup>

*(b) Pre-trial, Trial and Judgment*

Pre-trial is mandatory in an action for civil forfeiture. If a comment or an opposition is filed, the court shall forthwith send notice of pre-trial conference to the parties.<sup>27</sup> Pre-trial is intended to clarify and limit the basic issues between the parties. Thereafter, trial shall proceed. Within 30 days from submission of the case for decision, the court shall render judgment, based on preponderance of evidence, declaring the property forfeited in favour of the State, or in appropriate cases, ordering the respondent to pay an amount equal to the value of the monetary instrument or property and adjudge such other reliefs as may be warranted.<sup>28</sup>

*(c) Factors to determine where lies preponderance of evidence*

In rendering judgment, the court may consider the following factors to determine where lies the preponderance of evidence:

- (a) That the monetary instrument, property, or proceeds are represented, involved, or related to an unlawful activity or a money laundering offence:
  - (1) If the value or amount involved is not commensurate with the business, financial or earning capacity of the person;
  - (2) If any transaction indicates a clear deviation from the profile or previous transactions of the person;
  - (3) If a person opens, maintains or controls an account with a covered institution not in his or her own name or registered business name unless authorized under existing law;
  - (4) If a person has structured transactions in order to avoid being the subject of reporting requirements under Republic Act No. 9160, as amended; or
  - (5) If any transaction exists that has no apparent underlying legal or trade obligation, purpose or economic justification;
- or
- (b) That the monetary instrument, property, or proceeds, the sources of which originated from or are materially linked to monetary instruments, properties, or proceeds used in the commission of an unlawful activity or money laundering offence, are related to the said unlawful activity or money laundering offence.<sup>29</sup>

*(d) Claims against Forfeited Asset (Third Party Claim)*

In order to protect the rights of innocent parties who may have legitimate claim on the property that has been ordered forfeited in favour of the State, the Rule provides for third party claims. Thus, where the court has issued an order of forfeiture, any person who has not been impleaded or has not intervened claiming an interest in the property may file a verified petition for the declaration that the same legitimately belongs to him or her and for segregation or exclusion of the property. The verified petition shall be filed with the same court which rendered the order of forfeiture within 15 days from the date of finality of the order of forfeiture. If nobody files such third party claim within the prescribed period, the order of forfeiture shall be executory and bar all other claims.<sup>30</sup>

The court may dismiss the (third party) claim outright if it is not sufficient in form and substance and is manifestly filed for delay.

Within 15 days after notice, the petitioner (AMLC) shall file a comment admitting or denying the claim

<sup>26</sup> *Republic vs. Evangelista*, 466 Supreme Court Reports Annotated, page 544.

<sup>27</sup> Section 22, *ibid.*

<sup>28</sup> Sections 29, 32, *ibid.*

<sup>29</sup> Section 31, *ibid.*

<sup>30</sup> Section 35, *ibid.*

specifically. The petitioner in its comment shall allege in offset any fees, charges, taxes and expenses due it.

Upon the filing of a comment contesting the claim, the court shall set the claim for hearing within 30 days with notice to all parties. The court shall, thereafter, issue a final order on the contested claim within thirty days from submission.

**B. Cases Filed under the Present Rule of Procedure on Civil Forfeiture**

As of 30 June 2010, the AMLC has filed a total of 41 cases for civil forfeiture, 12 of which have been decided in favour of the Government. The AMLC has forfeited bank deposits in the amount of Php 43,301,412.53, a big portion of which had been turned over to the National Treasury. The pending cases involve approximately Php 607,784,714.98 in cash, as well as four parcels of land with improvements; three parcels of land without improvements; one condominium unit; one vessel; 58 vehicles; and various pieces of jewellery of undetermined value.

One of these decided cases involved kidnapping for ransom committed against a Japanese national. Sometime in 2003, a Japanese national was kidnapped in the southern part of the Philippines. The kidnappers demanded from the family of the victim ransom money in the amount of six million yen. Wanting the safe release of her father, the victim’s daughter wire-transferred the amount of six million yen to a bank account in the Philippines as ordered by the kidnappers. Because of the sudden deviation from the usual transactions in the bank account to which the wire transfer was made, the bank submitted a suspicious transaction report to the AMLC which triggered an investigation. After its investigation, the AMLC immediately instituted a civil forfeiture proceeding against the bank account. A judgment was rendered in favour of the AMLC and the deposits in the bank account were ordered forfeited in favour of the State. Thereafter, the family of the victim was able to seasonably file a claim against the forfeited amount, which the court favourably granted. The entire amount forfeited was returned to the family.

While the civil forfeiture has long been decided, and the proceeds have been returned to the family of the victim, the criminal cases for kidnapping for ransom and money laundering offence are still ongoing.

Another terminated civil forfeiture case involved the predicate offence of swindling or fraud (the “ponzi scheme”) wherein a number of victims were inveigled to invest their money in a purported investment company with a promise of high yields. It turned out that the company did not have a secondary license to sell securities to the public. The company was shut down by the Securities and Exchange Commission. The AMLC was able to freeze and forfeit the remaining money in the bank accounts of the respondents amounting to more than twenty-one million pesos (Php21,000,000.00). At present, there is a pending claim against the forfeited amount filed by a victim-investor which is still being heard by the forfeiture court.

**IV. CHALLENGES OF THE PRESENT MEASURES TO IDENTIFY, TRACE AND CONFISCATE PROCEEDS OF CRIME**

Under R.A. No. 9160, in cases where the unlawful activity involved is not kidnapping for ransom, illegal drug activities, or acts of terrorism, the AMLC needs to file an application in court before it can exercise its authority to inquire into or examine bank deposits. In one case,<sup>31</sup> however, the Supreme Court ruled that the filing of an application for bank inquiry by the AMLC in such cases cannot be made *ex parte*. In other words, there should be a notice to the respondent and hearing before an order allowing bank inquiry can be granted. This procedure has hampered the expeditious conduct of bank inquiries on the part of the AMLC.

Moreover, under the present law, the unlawful activities (or predicate crimes to money laundering) are limited to just 14 types of offences. Thus, the authority of the AMLC to institute civil forfeiture proceedings is likewise limited to cases that are related to the aforementioned unlawful activities and money laundering offences. For other crimes that are not considered “unlawful activities” or predicate crimes, forfeiture of criminal proceeds may be obtained only in criminal proceedings, that is, subject to the conviction of the accused.

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<sup>31</sup> *Republic of the Philippines vs. Eugenio*, G.R. No. 174629, 14 February 2008.

Another challenge that the AMLC faces in the asset recovery regime is the lack of provision in the law for asset management. There is no special fund for that purpose. Neither is there a provision in the law allowing the AMLC to retain a portion of the forfeited funds to defray the necessary expenses incurred in forfeiting assets. Thus, while the AMLC spends its own budget for the litigation expenses, everything that is forfeited goes to the National Treasury.

#### V. FUTURE DIRECTION

In order to make identifying, tracing and confiscating proceeds of crime more efficient, the AMLC has proposed to the Legislature further amendment of R.A. No. 9160. Among the proposed amendments are: (i) inclusion of additional offences in the list of unlawful activities or predicate crimes to money laundering, against which the AMLC may invoke the authority to file petition to freeze, conduct bank inquiry, and institute civil forfeiture proceedings; (ii) giving the AMLC administrative power to freeze assets; (iii) making the application for bank inquiry *ex parte*; and (v) establishment of a special fund out of the forfeited assets that would defray the AMLC's expenses in litigating civil forfeiture cases. The amendatory bill is still pending with the Legislature.

#### VI. CONCLUSION

The generally lower standard of evidence in civil forfeiture actions, which are available in the absence of criminal conviction, makes civil forfeiture an attractive option. Indeed, while the criminal cases for the unlawful activities and money laundering offences have been dragging in both the preliminary investigation and prosecution stages, the AMLC has been successful in all the civil forfeiture cases that had been decided by the courts.

The present asset recovery regime in the Philippines has its own share of weaknesses and strengths. But with a strong determination on the part of the AMLC, a sustained co-operation among all concerned law enforcement agencies, both domestic and international, and a constant vigilance on the part of the civil society, it is believed that civil confiscation could become the most effective mechanism to prevent the laundering and proliferation of the proceeds of crime.