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**APPLICABILITY AND EFFECTIVENESS ANALYSIS OF MODERN LEGAL INSTRUMENTS FOR THE DISPOSAL
OF SEIZED AND FORFEITED ASSETS**



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**APPLICABILITY AND EFFECTIVENESS ANALYSIS OF MODERN LEGAL
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GELAVEX AND PROJECT BIDAL SUB-
WORKING GROUP ON FORFEITURE

CICAD/OAS

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INTRODUCTION

Currently, the emergence of agencies specialized in asset administration throughout Latin America represents a push on the part of States to comply with the different international recommendations promulgated by the Financial Action Task Force (FATF)¹, the CICAD/OAS Model Law², the United Nations Model Law on Forfeiture³, as well as the studies and analyses carried out by the BIDAL Project within CICAD/OAS in the documents titled “Best Practices Document on the Administration of Seized and Forfeited Assets” and “Normative Aspects for the Creation and Development of Specialized Agencies in the Administration of Seized and Forfeited Assets”.

In this sense, asset administration by efficient and transparent specialized agencies has been promoted; and that the care, custody and management of the assets does not constitute a cost for the States, but rather a matter of responsible administration that could generate resources in the search for a self-sustaining forfeiture system and guarantee in this way the conservation and value of the assets until a corresponding Court decision is made.

Therefore and as a response to this goal, parallel to the initiative to create and develop asset administration agencies, some countries have created modern judicial instruments to facilitate the disposition of seized and forfeited assets, among them asset abandonment and advanced sale stand out, which would permit improved management of national asset administration systems.

On the other hand, designing and building procedures for auction or sales of forfeited assets by judicial order, also constitutes an important part of the procedure and a way of allocating obtained resources, in accordance with the domestic laws of each State for the strengthening of law enforcement institutions, the treatment and prevention of the drug addiction phenomenon, and crime prevention, which additionally constitute an important source of funding for the maintenance of the asset management system.

¹ Specifically those referred to in Recommendations 4 and 38

² Article 7, Administration of Seized Assets

³ Chapter VII, Asset Administration and Destination

OBJECTIVE

On the basis of the above, the GELAVEX Subgroup on Forfeiture raises the importance of identifying those countries that have modern legal instruments for disposing of assets, in order to analyze factual budgets in implementation and measure efficiency and the problems associated with the effective application of the above.

The feasibility and effectiveness study for these modern instruments will enable analysis so that countries that are in the process of developing domestic asset administration systems are provided with a reference document to create and improve internal procedures for proper implementation.

METHODOLOGY

The Coordination of the Subgroup on Forfeiture and International Cooperation, in coordination and collaboration with the BIDAL Project Director, will analyze the legislation of each of the countries that have modern legal instruments for the disposal of seized and forfeited assets. A questionnaire will be sent that is designed to identify and analyze information related to budget requirements that must be met for its proper implementation and the problems associated with the effective implementation of the legal instruments, such as compliance with guarantees to *bona fide* third parties and the originator/competent authority of the measure whether it be administrative or jurisdictional, among other questions.

Nevertheless; this document will develop these issues in a general manner, from the perspective offered by various studies and international instruments in order to generate the questions that will be circulated and so that countries may have a guide to be able to answer the aforementioned questionnaire.

ANALYSIS

In the XXXIX Meeting of the Group of Experts for the Control of Money Laundering, held in September 2014 in Uruguay, the Sub-Working Group on Forfeiture and International

Cooperation, within the framework of the group's strategic planning, defined the development of the theme "Disposal Processes for Seized and Forfeited Assets" as one of its lines of actions. In order to work in this line of action, the "Creation of a reference to support the seized and forfeited asset administration offices in the processes of disposing such assets" was included as part of the 2014-2015 Work Plan.

The general theme of asset administration has been treated in various documents within GELAVEX, and these offer important recommendations available to all member States, such as the "*Document on Best Practices in Seized and Forfeited Asset Administration*" and the document "*Normative Aspects for the Creation and Development of Specialized Entities in the Administration of Seized and Forfeited Assets*" which also includes the "*Normative Guide for the Creation and Development of Asset Administration Entities*", among others.

The recommendations outlined in these documents become fundamental tools for asset administration, for example; the necessity of having a competent body for asset management, the importance of having specific legislation for the administration and management of assets and procedures, planning prior to the embargo, having sufficient resources for asset administration, implementing information systems for registering and tracking assets, respecting the rights of third parties in the proceedings, forecasting to assume responsibility for damages to be paid, after legal action by a person for loss or damage to property, among others. Some of these topics have also been addressed within the framework of the disposition of seized and forfeited assets or have an impact on that topic.

For the foregoing reasons, it is considered important to give a concrete overview and delimit the work, in order to design this "reference" but focused on identifying and analyzing modern legal instruments for the disposition of seized and forfeited assets.

In this regard, it is first important to define the term "**disposition**" which in a legal sense implies the transfer of a [right in rem](#) (real right) of one patrimony to another⁴.

⁴ According to Wikipedia; The Free Encyclopedia.

Thus, disposition can be understood in a broad or strict sense, ultimately inclusive of all the ways in which property can be transferred, but for the effects of the present analysis the term disposition is understood as a sale.

Assets coming from organized crime that are seized by competent authorities are varied, and in many cases criminal proceedings may extend over many years, generating problems related to the management, administration, and conservation of the assets.

“..., as changes take hold, the number of assets seized, either preventively or definitively, also increases. When the forfeiture of assets is ordered through a final judgment, which dictates the definitive forfeiture of the assets and the transfer of ownership to the State, the State disposes of the assets in accordance with the law. Assets seized preventively create more problems, and their growing numbers have seriously challenged many countries that do not know what to do with them...”⁵

Faced with this situation, in order to recover administrative costs and to ensure that assets maintain their value, or at the very least do not depreciate, the competent authorities who administer these assets require special and specific legislation related to the management and administration of these assets. Accordingly and in a concrete way, they need legal, administrative, and procedural tools to facilitate their work, in order to offer efficient and transparent management in the stages of seizure and forfeiture.

Therefore, some of these authorities have begun to strengthen their domestic systems, incorporating ways of making assets available from the seizure stage, such as implementing abandonment and integration in different systems of sales under certain assumptions; as well as the sale or auction of assets in the forfeiture stage.

1) Abandonment

In 2009 through GELAVEX, the Inter-American Drug Abuse Control Commission reformed article 9 of the Model Law on Money Laundering Crimes, related to Illicit Drug Trafficking and other serious crimes, including abandonment, stressing the importance of establishing

⁵ Asset Management Systems in Latin America and Best Practices Document on the Management of Seized and Forfeited Assets, Isidoro Blanco Cordero and General Secretariat of the OAS, pp. 14 and 15.

clear legal procedures related to ordering asset forfeiture in cases where legal notification has been provided to a person but he/she does not appear in time to protect his/her property interests.

Article 9 establishes. On Forfeiture of assets, products or instruments, in paragraph 4, the assumptions on which the legally competent authority could order final forfeiture:

- a) If, after a reasonable period of time has elapsed since the seizure of the asset, the identity of the owner, author or participant in the fact cannot be established, they have abandoned the property;*
- b) When a reasonable period of time has elapsed, after finalizing or closing the criminal proceedings without those who could claim a legitimate legal interest in the assets having made some attempt to remove them.*

In addition, let it be clarified that compliance with due process is necessary so that any interested party can assert their rights.

On one hand, the document on Best Practices on Seized and Forfeited Asset Management, BIDAL Project, in Chapter III, since 2009, incorporated abandonment, in point **2. Forfeiture of abandoned or unclaimed assets in the process** and gives it the same treatment as that described in the Model Law, i.e., recommending the same budgets.

On the other hand, the Normative Guide for the Creation and Development of Asset Management Agencies, presented at the November 2012 meeting of the Group of Experts for the Control of Money Laundering, also addressed the issue “**Of assets abandoned or unclaimed in the process.**”; in the following manner:

“... . The competent judicial authority shall declare the abandonment of assets and, therefore, forfeiture, extinction, loss or deprivation of the domain in favor of the State, in the following circumstances:

- 1. When a rebellion by default in the process of extinction, loss or deprivation of domain is declared.*

2. *When a rebellion in the criminal proceedings by a competent judicial authority is declared.*
3. *When more than three months of finalizing or closing criminal proceedings have passed without those who may have a legitimate legal and economic interest in the assets having made any attempt to claim them. The action of the interest party to bring any claim will expire, and the asset management agency will be able to dispose of the assets, subject to the previous authorization of the competent authority who heard the case.*
4. *When three months have passed after the seizure or confiscation of the asset and the identity of the author or participant of the crime cannot be established or has effectively abandoned the assets, resources, elements and utilized transportation means. In this case, prior to the declaration of abandonment, a publication in an official journal with national circulation is required to the effect that any interested party may present themselves in the process to assert their rights.”*

The Normative Guide raises one more assumption;

“Bienes no reclamados. *Ordenada judicialmente la devolución de los bienes afectados con medidas cautelares, y no habiendo sido reclamados en el plazo de un mes, estos serán declarados en abandono por el juez o tribunal competente a favor del Organismo de Administración de Bienes en forma definitiva, cuyo producto ingresara al Fondo Especial y destinado conforme a la ley.”*

From the foregoing, it is clear that in any of these presuppositions, it is necessary that for asset abandonment to be ordered, the competent authority should determine that the person entitled to claim such assets has not presented him/herself in the process of removing the assets, and even when the authority knows that the assets have been seized in a criminal proceeding or *in rem* forfeiture; the above, in order to not become indefensible.

Additionally it is noted that a coincidence between that which the Model Law establishes and the Document on Best Practices may exist, with the difference that the latter specifies a time period. It is very important to emphasize that both documents include in the first assumption, *the owner of the asset* as the interested party.

The Normative Guide includes an additional assumption, which extends the “court order for return if the assets are not claimed within a reasonable period” and requires a *declaration of abandonment* prior to the decree of forfeiture.

As a result, abandonment forms a fundamental tool in so much as it provides asset management agencies with the availability of assets without having to wait until the criminal or *in rem* forfeiture proceedings have finalized, for those instances of criminal cases where the author or participant is unknown or in those in which rebelliousness is decreed during the proceedings, as well as those cases where assets related to some illicit activity are found and whose belonging is unknown.

Compared to the other assumptions, this is also fundamental, because even if and when there is judgment, if the same are not withdrawn in a determined period of time in the domestic legal system, they will not indefinitely be left as a burden to the competent authority but rather, following a period of time, be able to be declared abandoned and may proceed with their disposal.

2) Advanced sale

Considering that in many cases judicial proceedings extend for a long period of time and generate their own problems related to management, administration and maintenance of the seized assets, a best practice among some specialized agencies has been to implement the practice of advanced sale of the seized assets under certain previously-defined assumptions.

In that regard; the Document on Best Practices in Asset Forfeiture from the Financial Action Task Force (FATF), establishes as a recommendation for an ideal asset forfeiture regime, the following;

“g) The law grants the Courts the authority to order the sale, even in cases where the assets are perishable or depreciate quickly.

h) There exists a mechanism which allows the sale of assets with the consent of the owner.”

For its part, the document “Asset Management Systems in Latin America and Best Practices Document on the Management of Seized and Forfeited Assets”, cites the following:

“It bears reiterating that the general rule must be the preservation of seized assets during the length of the proceedings. However, there are exceptions and the sale of the assets may be authorized in special cases. In fact, once the assets have been entered in the inventory, and if they can be legally sold, their transfer or sale may be authorized even before a judgment has been issued, as long the assets meet a number of conditions which we will analyze in the next paragraph. To accomplish this, there should be an asset transfer process based on the principles of transparency, speed, productivity, economy and honesty (Art. 5 Decree 1461 of 2000, Colombia; Art. 31 Mexico Law)”⁶

The Model Regulations on money laundering offenses related to illicit drug trafficking and other serious crimes, in its article 6, regulates “*Precautionary measures on assets, products or instruments*” indicating that the order of seizure or preventive confiscation will be dictated in order to preserve the availability of the asset, product or instrument.

Then, article 7 of the same Regulation, which is composed of various points, designates the specialized administrative authority as the responsible party in the administration and reasonable preservation of the economic value of assets subject to precautionary measures and in a specific manner indicates, in point 4.:

“The specialized administrative authority may order the liquidation of assets that are perishable or susceptible to near-term deterioration; assets whose maintenance or administration may be excessively onerous; and assets whose maintenance would cause a significant diminution in their value”.⁷

For its part, the *Document on Best Practices on Seized and Forfeited Asset Management*, in Chapter III *The Loss of an Object Product or Instrument of crime*, point 1. *Powers of*

⁶ Reference p. 56.

⁷ Reference p. 146.

disposition and auction over assets seized in advance has treated the advanced sale or auction of seized assets, perishable or moveable, with the authorization of the competent authority.

This document also indicates that the authorization for advance sale is based on the fact that the action will preserve the value of assets to prevent their deterioration and the loss of their commercial value, or in the case that there is the possibility of loss or destruction of the property because of its excessive or burdensome administration.

The G-8, group of industrialized countries with major influence around the world, in its document on best practices for forfeited asset management, has also incorporated the topic of advanced sale. This document establishes, *“that there should be legislation to regulate procedures that allow, under conditions laid down in domestic law, the sale of perishable rapidly depreciating assets, such as ships, planes, cars, animals, and farm crops. States have to assess, also, the possibility of authorizing the sale prior to the trial of the assets that are too expensive to maintain. ...”*⁸

As can be seen, various international organizations have recommended that domestic legal systems establish the possibility of selling assets in advance under special circumstances, even expressly defining the types of assets in this regard. But they have also introduced other parameters that can be valued to justify the approval of the advance sale, such as occurs when it is determined that the assets can depreciate rapidly, deteriorate, be destroyed, or are costly to maintain. '

However, the implementation of this measure involves a number of aspects that must be considered, because if left unaddressed, could mean limitations such that this important tool is not effective or even subject to acts of corruption and abuse of the measure.

3) Sale of forfeited assets

⁸ G8 Best Practices for the Administration of Seized Assets. Lyon G-8 / Rome Group. Criminal Subgroup on Judicial Affairs. The final version is from April 27, 2005. Cited in Normative Aspects for the Creation and Development of Specialized Agencies in the Management of Seized and Forfeited Assets. GELAVEX. Pp. 9 and 10.

Different internal systems can define the forms of having assets seized, with one of the options being disposal by sale, as well as determining the fate of the proceeds from the sale of those goods.

Through the sale of forfeited assets the State can recover administration costs and in some cases, profit from the proceeds of the sale, which can be transferred in accordance with provisions, to benefit of the preventive and active system against money laundering, drug trafficking and in the fight against organized crime in general.

On the subject, the previously-mentioned Model Regulation on crimes of money laundering, in article 11, subparagraph (b) establishes:

“Any time that assets, products or instruments are seized in accordance with Article 9, that should not to be destroyed and are not harmful to the public, the court or the competent authority may, in accordance with the law:

- c) Sell them and transfer the product of that disposition to any public entity that has participated directly or indirectly in its confiscation or preventive seizure or forfeiture. ...”*

The Document on Best Practices and the Normative Guide for the Creation and Development of Asset Management Systems previously-mentioned, has also signlated the “auction or sale” as a form of disposition of forfeited assets.

QUESTIONNAIRE

ABANDONED ASSETS

1. Do your country's domestic legal regulations provide for the abandonment of assets?

YES	
NO	

List the legal norm: _____

Date of implementation: _____

2. Under what assumptions can your country declare the abandonment of assets?
- a) When after a given period has elapsed since the seizure of the asset, it is not possible to establish the identity of the owner of the asset, author or participant of the fact; (cases of finding)
 - b) When after a given period has elapsed since the seizure of the asset, the owner of the asset, author or participant of the fact, has abandoned the asset; (cases of absconding or rebellion of the criminal process)
 - c) When after a given period has elapsed, after the criminal process or *in rem* forfeiture process is finalized or closed without those who could claim any legitimate legal interest on the assets having made no effort to withdraw them; (
 - d) When the assets have been legally ordered to be returned yet remain unclaimed after a given period.
 - e) None of the above, explain: _____

3. Does your legislation incorporate the possibility of declaring abandoned REAL ESTATE assets?

YES	
NO	

4. What is the given period of time that your domestic legislation defines in order to declare REAL ESTATE assets as abandoned?

ONE MONTH	
THREE MONTHS	
SIX MONTHS	
ONE YEAR	
MORE THAN ONE YEAR	
OTHER	

5. Does your legislation incorporate the possibility of declaring the abandonment of MOVABLE assets?

YES	
NO	

6. What is the given period of time that your domestic legislation recognizes after which abandonment of MOVABLE assets can be declared?

ONE MONTH	
THREE MONTHS	
SIX MONTHS	
ONE YEAR	
MORE THAN ONE YEAR	
OTHER	

7. Does your legislation incorporate the possibility of declaring the abandonment of MONEY?

YES	
NO	

8. What is the given period of time that your domestic legislation defines after which abandonment of MONEY can be declared?

ONE MONTH	
THREE MONTHS	
SIX MONTHS	
ONE YEAR	
MORE THAN ONE YEAR	
OTHER	

9. The competent authority that manages or or handles the beginning of the declaration of abandonment is:

The asset management entity	
A judge	
The police	
Other	

10. The competent authority that verifies the fulfillment of these requirements and declares an asset abandoned is of which of the following types:

ADMINISTRATIVE	
JUDICIAL	
POLICE	
OTHER	

11. Is it necessary, during the process of declaring an asset abandoned, to distribute any notification through mass media for an interested or affected party to reclaim their assets?

YES	
NO	

Explain: _____

12. What period of time do affected third parties have to present themselves in the process of reclaiming abandoned assets?

ONE MONTH	
THREE MONTHS	
SIX MONTHS	
ONE YEAR	
MORE THAN ONE YEAR	
OTHER	

13. In cases where abandoned assets are registered into the corresponding public record, is it necessary to notify the owner?

YES	
NO	

14. In relation the previous question, what type of notification is required? More than one selection is allowed.

PERSONAL	
IN OFFICIAL RECORD	
IN AN OUTLET WITH NATIONAL CIRCULATION	
OTHER	

15. Does the declaration of abandonment of assets come from those which carry security guarantees?

YES	
NO	

Explain: _____

16. What are the difficulties associated in your country with ordering a declaration of abandoned assets?

Explain: _____

17. What have been the benefits of incorporating abandonment into your domestic legislation?

Explain: _____

18. Has implementing tools on abandonment contributed to the administration of seized assets in your country?

YES	
NO	

19. Can the number of cases in your country that have applied abandonment legislation been quantified?

YES	
NO	

Number of cases: _____

ADVANCED SALE

1. Does the domestic legal system of your country provide for the advanced sale of seized assets?

YES	
NO	

Copy the legal norm: _____

Date of implementation: _____

2. Does your legislation incorporate the possibility of declaring the advanced sale of REAL ESTATE assets?

YES	
NO	

Explain: _____

3. Does your legislation incorporate the possibility of declaring the advanced sale of MOVABLE assets?

YES	
NO	

Explain: _____

20. The competent authority that manages or or handles the authorization of advanced sales is:

Asset administration authority	
--------------------------------	--

Judge	
Police	
Other	

4. Under what assumptions is it possible to advance sell? (Multiple options can be selected)

- a) In the case of perishable assets.
- b) In the case of livestock.
- c) In the case of assets which can depreciate or be quickly destroyed.
- d) In the case of assets subject to deterioration.
- e) In the case of assets with costly maintenance.
- f) In the case of assets with difficult administration.
- g) Other assets, Explain: _____

5. The competent authority that verifies the fulfillment of these requirements authorizes advanced sales is of which of the following types:

ADMINISTRATIVE	
JUDICIAL	
POLICE	
OTHER	

Explain: _____

6. Can an affected party oppose advanced sales?

YES	
NO	

Explain what effects the opposition has: _____

7. Is the consent of the affected party needed to proceed with advanced sales?

YES	
NO	

Explain: _____

8. What authority executes the process of advanced sales?

The asset administration authority	
A judge	
The police	
Other	

9. How is the value from the sale of the assets determined?

Appraisal by the State	
Market value	
Through a specialized third party	
Other	

10. Once the advanced sale occurs, how is the transfer of ownership at the registry level carried out?

By means of a court order	
By means of an act awarding the asset	
By means of a particular notary public	
By means of a State notary public	
Other	

Explain: _____

11. Can *bona fide* third parties with liens or mortgages oppose the advanced sale?

YES	
NO	

Explain what effects third party opposition has: _____

12. Is the consent of the *bona fide* third party with liens or mortgage interest required to proceed with the advanced sale?

YES	
NO	

Explain: _____

13. Can they cancel or pay the lien or mortgage insurances on seized goods subject to advanced sale?

YES	
NO	

Explain: _____

14. In order to participate in an advanced sale of assets is it necessary to comply with the established requirements in the legal system?

YES	
NO	

Indicate the participation requirements: _____

15. Is it a requirement in your country for participants in an advanced sale of assets to disclose criminal and judicial backgrounds?

YES	
NO	

Explain: _____

16. Is there any record of bidders to participate in the processes of advanced sale of assets?

YES	
NO	

Explain: _____

17. What is the form in which an advanced sale should take place?

Public auction	
Internet auction	
Direct sale	
Through a specialized third party	
Other	

Explain: _____

18. The proceeds from an advanced sale are intended to:

Be desposited in the seized money account until the appropriate procedural moment	
Be distributed according to domestic legislation	

Other. Explain:	
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19. Which specific difficulties can be identified in your country to exercise the processes of advanced sale of assets?

Explain: _____

20. Has implementing advanced sale mechanisms in your country contributed to the administration of seized assets?

YES	
NO	

SALE OF FORFEITED ASSETS

1. Which of the following procedures is used in your country for the sale of forfeited assets? (More than one selection is allowed)

Public auction	
Internet auction	
Direct sale	
Through a specialized third party	
Other	

Explain: _____

2. The authority that carries out the sale of forfeited assets is:

Asset administration authority	
A state agency	
Jurisdictional	
Police	
Specialized third party	
Other	

Explain: _____

3. How is the value of the forfeited assets to be sold determined?

Appraisal by the State	
Market value	
Through a specialized third party	
Other	

4. Can the lien or mortgage insurances on forfeited assets be canceled or paid?

YES	
NO	

Explain: _____

5. Once the sale of a forfeited asset occurs, how is the transfer of ownership at the registry level carried out

By means of a court order	
By means of an act awarding the asset	
By means of a particular notary public	
By means of a State notary public	
Other	

Explain: _____

6. In order to participate in a forfeited assets sale is it necessary to comply with the established requirements in the legal system?

YES	
NO	

Indicate the participation requirements: _____

7. Is it a requirement in your country for participants in asset forfeiture sales to disclose criminal and judicial backgrounds?

YES	
NO	

Explain: _____

8. Are there any records of bidders to participate in the processes of the sale of forfeited assets?

YES	
NO	

Explain: _____

9. What is the destination of the money from the proceeds of the sale? (Multiple selections allowed)

Crime prevention	
Drug consumption prevention	
Drug consumption rehabilitation programs	
Social programs	
Institutional law enforcement strengthening	
National interest projects	
Other	

10. Does the competent authority who administers the seized and forfeited assets monitor and control the correct use of the resources?

YES	
NO	

Explain: _____