

International Asset Recovery – Background Material¹

Introduction

1. Corruption cases and most complex money laundering cases generally require asset recovery efforts beyond domestic borders.
2. The proceeds can be moved quickly—often instantly— with the help of such tools as wire transfers, letters of credit, credit and debit cards, automated teller machines, and mobile devices.
3. In contrast, asset tracing and recovery by law enforcement officials and prosecutors may take months or years because the principle of sovereignty restricts domestic authorities' ability to take investigative, legal, and enforcement actions in foreign jurisdictions.
4. The international community has concluded a number of multilateral treaties or instruments requiring State parties to cooperate with one another on investigations, production of evidence, provisional measures, confiscation, and asset return.
5. International cooperation is “mutual”: not only will the jurisdiction that has been plundered of its assets be requesting assistance from the foreign jurisdiction(s) where the assets are hidden, but it may need to provide information or evidence to these jurisdictions to obtain the most effective recovery of assets. In addition, practitioners must be proactive in seeking international cooperation, as well as in alerting their counterparts in foreign jurisdictions to potential corruption offences.

¹ Refer to *Asset Recovery Handbook: A Guide for Practitioners* published by the STaR/the World Bank (December 2010).

What Assistance can be Requested of a Foreign State?

6. The information, evidence, or judicial measures that can be requested vary from jurisdiction to jurisdiction and ultimately depend on treaty agreements and domestic laws.
7. In addition, jurisdictions differ on whether requests may be addressed through informal assistance or whether an MLA request is required. For example, some jurisdictions permit the possibility of emergency provisional measures using informal assistance channels—through a financial intelligence unit (FIU), ministry of justice, prosecutor, or an investigating magistrate.
8. At the same time, there are general areas of agreement on what can be requested and the process through which it is achieved. Non-coercive investigative techniques, for example, can usually be obtained through informal assistance; coercive investigative techniques and judicial measures typically require an MLA request.

Legal Basis for International Cooperation

9. To proceed with an MLA request, there must be a legal basis for cooperation. This must be specified in the request. This legal basis may come through:
 - a. Multilateral conventions, treaties, or agreements containing provisions on MLA in criminal matters;
 - b. Bilateral MLA treaties and agreements;
 - c. Domestic legislation allowing for international cooperation in criminal cases; or

- d. a promise of reciprocity through diplomatic channels (referred to as “letters rogatory” or “comity” in some jurisdictions).

10. In summary:

- a. Domestic confiscation proceedings may be enforced in a foreign jurisdiction through a mutual legal assistance request and the assets returned to the requesting jurisdiction, pursuant to international agreements, treaties, or other agreements
- b. Foreign confiscation proceedings may return the proceeds of the confiscation to the jurisdiction harmed by corruption offences by means of direct recovery or a sharing agreement.
- c. Both domestic and foreign confiscation proceedings may be pursued in tandem.

11. It should be noted that the above-mentioned legal avenues are not mutually exclusive and an MLA request may use one or more of these avenues, depending on the subject matter of the case and the expected outcomes.

Multilateral Conventions, Treaties or Agreements

12. Multilateral conventions, treaties, or agreements contain binding provisions that oblige signatories to provide MLA under international law. The provisions define areas of co-operation and contain governing procedures, thereby bringing clarity and predictability to the process.

13. These agreements often permit more extensive forms of cooperation than the traditional promise of reciprocity or letters rogatory, such as communication between central authorities (rather than through formal diplomatic channels).

14. UNCAC is the most applicable multilateral treaty for recovery of the proceeds of corruption and the MLA required for success. It has been ratified by more than 140 jurisdictions and obliges states parties to afford one another the widest measure of assistance in investigations, prosecutions and judicial proceedings concerning corruption matters.
15. In addition to UNCAC and other United Nations treaties, a legal basis can be provided through some regional MLA treaties or agreements—such as the Southeast Asian Mutual Legal Assistance in Criminal Matters Treaty and the Inter-American Convention against Corruption.
16. One issue that practitioners must consider with international conventions, treaties, and agreements is how, if at all, their relevant obligations have been incorporated into domestic legislation in the other jurisdiction—a process referred to as “domestication.”
17. In theory, MLA requests submitted under a multilateral treaty (such as UNCAC, UNTOC, or the United Nations Convention against Narcotic Drugs and Psychotropic Substances) can be applied directly, as long as both jurisdictions have ratified the treaty.
18. However, the mandatory provisions of these treaties are typically formulated in a general manner, leaving room for interpretation and uncertainty. For example, the treaty may not specify the channels for communication, the procedures and documents for enforcement, or the particular types of evidence or procedures requiring judicial authorisation. Some jurisdictions enact detailed domestic legislation to provide the specifics; others have limited or no legislation domesticating the treaty and rely on direct application through existing criminal laws and procedures, with modifications based on the treaty.
19. Because some authorities will prefer that the requested jurisdiction have domesticated the treaty, it will be important for practitioners to

consider this issue and to look to domestic laws for details on the implementation of multilateral treaties.

20. In addition, there may be voluntary arrangements with other jurisdictions or regional groups (such as the Commonwealth Secretariat's Scheme on Mutual Assistance in Criminal Matters [Harare Scheme], which is a commitment of the Commonwealth Law Ministers). Although not a binding legal instrument or treaty, parties are expected to implement the provisions in domestic legislation; and assistance is rendered through these provisions.

Bilateral Mutual Legal Assistance Treaties and Agreements

21. Similar to the multilateral treaties, bilateral MLA treaties contain binding provisions that oblige the signatories to provide assistance and define the procedures for practitioners to follow. In addition, they may provide forms of cooperation that are not available under other arrangements, such as direct contact between the practitioners, competent authorities, and members of the judiciary (with limited central authority involvement).

Domestic Legislation

22. A number of jurisdictions have passed legislation that provides an MLA process for jurisdictions without a bilateral treaty, often on the condition of reciprocity (that is, the requesting jurisdiction will provide MLA in similar situations). Unlike a treaty arrangement, there is no international obligation to provide requested assistance; such inflexibility makes it uncertain that the request will be acceptable.

Promise of Reciprocity through Diplomatic Channels (Letters Rogatory)

23. This traditional form of assistance may be useful if there is neither an existing treaty between the jurisdictions nor domestic legislation in the requested jurisdiction (although some jurisdictions require the reciprocity undertaking even when using a multilateral or bilateral treaty as a basis for the request). It permits formal communication among the judiciary, a prosecutor or law enforcement official of one jurisdiction, and his or her counterpart in another jurisdiction. It is a longer process because it requires the inclusion of an additional party, the ministry of foreign affairs, and diplomatic formalities.

General Requirements

24. Each jurisdiction will have a number of legal requirements that requesting jurisdictions must meet in submitting an MLA request.

Nature of the Matter

25. Generally, the request must be related to a criminal matter, although some jurisdictions will provide assistance on Non-Conviction Based ['NCB'] confiscation requests (because they usually arise in connection with a criminal investigation) and in civil and administrative cases.

26. Jurisdictions differ as to the point in criminal investigations or proceedings when assistance can be provided. Although most jurisdictions will permit requests during the investigation stages, others will have more onerous requirements for the provisional seizure or restraint of assets (such as requiring that charges have been filed or final confiscation has been ordered). Many jurisdictions will not provide assistance if the criminal proceedings have been concluded.

Dual Criminality

27. Many jurisdictions require some showing of dual criminality (or dual confiscation if confiscation assistance is sought), meaning that the conduct underlying the request for assistance is criminalised in both jurisdictions. Some jurisdictions will waive the requirement in certain circumstances.
28. Some jurisdictions may apply this in a more restrictive matter (that is, requiring a match in the names or essential elements of the offence). However, jurisdictions more frequently apply a conduct-based approach (that is, they look behind the terminology to the conduct and require that the conduct is a criminal offence under the laws of both jurisdictions).
29. In any event, the use of informal assistance is paramount to discuss, identify, and overcome (if possible) any potential barriers that the dual criminality requirement may pose.

Assurances and Undertakings (Reciprocity, Confidentiality, Limits on Use [Specialty], and Commitment to Pay Costs or Damages)

30. Many jurisdictions require a reciprocity assurance, a written statement that the requesting jurisdiction will provide the requested jurisdiction with the same type of cooperation in a similar case in the future. Further, many jurisdictions require the requesting jurisdiction to specify if it wishes the request to be treated as confidential. In addition, jurisdictions may require an assurance that the requesting jurisdiction will use the information supplied only for the case described in the request for assistance—not as evidence in another case and not disclosed to a third party. Finally, some jurisdictions may require a commitment to pay any costs and damages incurred by the requested party during the course of executing the request.

31. These assurances may be waived on a case-by-case basis, but waivers must be discussed with the other jurisdiction. Some practitioners hesitate or refuse to provide these assurances because they are not used in their own jurisdiction (many civil law jurisdictions do not use them), and the practitioner is unsure whether he or she has the authority to provide them. However, these assurances are often not optional, and assistance may be refused if they are not provided or addressed prior to the submission of the request.

Reasons for Refusal

32. In addition to the general and evidentiary requirements, most MLA arrangements will allow the requested jurisdiction the discretion to refuse assistance in certain circumstances, on a case-by-case basis. Some treaties (including United Nations conventions) elaborate prohibited grounds for refusal, such as the involvement of fiscal offences or bank secrecy.

33. A note for Prosecutors: one should address these potential obstacles proactively and before the request is sent (if possible) because it becomes much more difficult to overcome a refusal when it has been issued. Consulting with foreign counterparts will be important in this regard.

Confiscation

34. Ultimately, prosecutors must submit an MLA request for confiscation of the assets. Similar to orders for provisional measures, a confiscation order may be enforced directly through registration and enforcement of the order in the requested jurisdiction, or indirectly through an application for a domestic order in the requested jurisdiction whereby the evidence submitted by the requesting jurisdiction is used to support an application for a domestic confiscation order.

Civil Proceedings

35. There are advantages for the State in taking civil proceedings:

- a. **[Domestically]** Upon an inability to obtain criminal confiscation in either jurisdiction, a NCB civil claim for recovery (under the Proceeds of Crime Act 2002) may be best.
- b. **[Overseas]** If, for some reason, a criminal conviction or recognition of a NCB civil recovery order is impossible to achieve, the State may be able (or have no option but) to commence action as a claimant in the subject's jurisdiction.

36. Procedural advantages (Applicable to State and Private citizens/corporate bodies):

- a. Civil proceedings may take place in the absence of defendants who have been properly notified;
- b. [At least in Common Law jurisdictions] cases will be adjudicated on a lower standard of proof (balance of probabilities);
- c. Proceedings against 3rd parties: intermediaries, professionals who facilitated, participated in, or assisted in the reception, transfer, or management of suspicious assets;
- d. Civil actions can be commenced more easily than criminal cases in most jurisdictions should such a choice be made (it is sometimes easier to prove civil liability than criminal intent to participate in conspiracy);
- e. In cases that cross borders, a civil action (both domestically and in a foreign Court) affords a jurisdiction seeking to recover

assets a greater control of the process, compared with criminal proceedings in foreign jurisdictions by that State's Prosecutor.

37. Disadvantages:

- a. The inherent difficulties in pursuing a claim in a foreign Court;
- b. The possibility of the State being struck out on the basis that any civil action is, in fact, akin to prosecution thereby falling foul of the very reason why criminal proceedings could not take place;
- c. The cost of tracing assets;
- d. Fees in obtaining court orders;
- e. Time to recover; cases can take many years;
- f. Investigators: if foreign-state investigative assistance is not available, private investigators do not typically have the range of investigative tools or access that is available to law enforcement.

Civil Actions for Bribery in this Jurisdiction [Corporate Claimants]

38. The jurisdictional reach of the English Civil Courts might be considered in private remedies of bribery and corruption. A claim form could be served on a company with a 'UK presence' and, in certain circumstances, may be served outside of the jurisdiction. The ability to recover consequent upon the corrupt act of competitors has been settled and recognised in English Civil Law for many years.

39. Advisors need to think whether:

- a. A Company ought to bring an action against a competitor who has secured a corrupt advantage ('Victims of External Bribery').
- b. A Company who suffers bribery by one of its own agents ('Victims of Internal Bribery') ought to consider proceedings in the UK.

External Bribery

40. Such an action in the Civil Courts would be based on a claim for unlawful means conspiracy if it can be established that:

- a. There was a combination or understanding between two or more people (e.g. the contract winning company and the corrupt individual involved in the tendering process);
- b. The acts are aimed at or directed towards an individual or separate legal entity (e.g. the exclusion of the non-corrupt company);
- c. There was a concerted action, consequent upon the combination or understanding;
- d. Unlawful means were used as part of the concerted action resulting in damage being caused to the target of the conspiracy.

41. Advisors ought to consider using this remedy in the English Courts to "level the playing field" in favour of companies who have acted ethically and in accordance with the law in obtaining business.

Internal Bribery

42. Such a claim may be brought and there is no need to show that the payment has been made corruptly.² The cause of action has been

² *Industries & Gen. Mortgage Co. Ltd. v. Lewis* [1949] 2 All E R 573 at 575G-577A (per Slade, J).

described as a ‘special form of fraud’ where there is no representation made to the principal of the agent (let alone reliance).³

43. Damages can be against both the briber and the bribed agent. There is a strong presumption that the price is ‘loaded against the principal at least by the amount of the bribe’⁴.

Remedies Against the ‘Bribed Agent’

44. Contractual damages: where there is a contract between principal and agent there is likely to be a remedy for damages arising out of the breach of the express or implied terms of contract or (in the case of employment contracts) the duty of good faith and loyalty incumbent on the employee by reason of the employment contract.

45. Recoupment of the bribe from the bribed agent: The amount of the bribe may also be recoverable from the bribed agent. Such remedy is personal and does not require the claimant to show that there was a fiduciary duty owing from the bribed agent to him. Nor does it require the claimant to show that he has suffered loss by reason of the bribe.

46. If the bribed agent has a fiduciary relationship with the claimant at the time of the bribe, then on the basis that a person is in a fiduciary capacity that cannot allow a conflict to arise between his interest and duty, and cannot therefore make a profit from his position, the court will compel the bribed agent to ‘disgorge’ the amount of the bribe. This remedy does not depend on the claimant showing any loss.

47. In addition, the principal can claim for any further losses he has suffered. For example, if the principal can show that the agreement negotiated by his bribed agent is less advantageous to him than an agreement negotiated by an honest and prudent agent then he can claim damages to the extent he has been so disadvantaged.⁵

³ Petrotrade Inc. v. Smith [2000] 1 Lloyd’s Rep.486 at 490 (per Steel, J.).

⁴ Industries and Gen. Mortgage *ibid.* at 577B.

⁵ Fyffes Group Limited v. Templeman and other [2000] 2 Lloyd’s Law Rep. 643 at 660 (per Toulson, J).

48. There is no defence of contributory negligence.⁶ The mere fact that the claimant had the opportunity to discover the dishonesty and failed to take it would not serve even as a partial defence.

Remedies Against the ‘Briber’

49. Rescission: In instances where the bribe is given in connection with a contract between the claimant and the briber the claimant may have an equitable right to rescind the contract and to recover any money paid or property transferred under the contract.

50. Recoupment of the bribe: A claimant may also seek the recovery of the bribe from the briber⁷; there is a presumption that the briber who sells the goods to the principal has inflated the price of the goods by the amount of the bribe and hence his wrongful profit is at least the amount of the bribe.

Enforcement

51. If the location of the Defendant requires it, any judgment may be enforced in foreign jurisdictions with relative ease if that jurisdiction is:

- a. A signatory to the Brussels Convention
- b. A signatory to the Lugarno Convention

52. The fact that a party is resident outside a Convention county is not fatal to any enforcement action. Mance LJ put it best in Amy Nasser v United Bank of Kuwait [2001] EWCA Civ 556 (an application for CPR Part 25 Security to Costs against a party resident in the US):

“...the entire rest of the world cannot be regarded as beyond the legal pale. For example, the United Kingdom has reciprocal arrangements for recognition and enforcement with many Commonwealth and

⁶ *Corporacion Nacional del Cobre de Chile v. Sogemin Metals Ltd* [1997] 1 WLR 1396 at 1404E-d (per Carnwath, J.).

⁷ *Salford Corporation v. Lever* [1891] 1 QB 168 at 175 (per Lord Esher, MR).

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common law countries which have introduced legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920), and which have highly sophisticated and respected legal systems. Many other countries have well-established procedures for recognising English judgments.”

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April 14, 2011