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INTERNTAIONAL ASSET RECOVERY

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A SUMMARY

Corruption cases cross borders

- The corrupt acts
- The proceeds of any corruption

There are (multi-lateral) treaties and instruments

- Signatories must co-operate:
  - Investigations
  - Production of evidence
  - Asset seizure and confiscation

International co-operation is mutual

- Agreements are to assist one-another, not delegation of prosecution

WHAT CAN ONE STATE GET FROM ANOTHER?

Depends on the treaty and domestic law

- Non-coercive investigative techniques (help from a counterpart FIU)
- Coercive: needs an MLA request; judicial assistance

A solution can be (and often is) a combination of the two

LEGAL BASIS

MLA requests need a legal basis

- **Multilateral conventions**, treaties, or agreements containing provisions on MLA in criminal matters;
- **Bilateral MLA treaties** and agreements;
- Domestic legislation allowing for international cooperation in criminal cases; or
- **A promise of reciprocity through diplomatic channels** (referred to as “letters rogatory” or “comity” in some jurisdictions).

LEGAL BASIS IN MORE DETAIL

Multilateral Conventions, Treaties or Agreements

- Paragraph 12-20

Bilateral Mutual Legal Assistance Treaties and Agreements

- Paragraph 21

Domestic Legislation

- Paragraph 22

Promise of Reciprocity through Diplomatic Channels (Letters Rogatory)

- Paragraph 23

GENERAL REQUIREMENTS

Nature of the Matter

- Paragraph 25-26

Dual Criminality

- Paragraph 27-29

Assurances and Undertakings

- Paragraphs 30-31

REFUSALS

Non-conformation of general/evidentiary requirements

Most MLA agreements contain discretion to refuse

Some treaties elaborate prohibited grounds for refusal

- Bank secrecy
- Fiscal offences

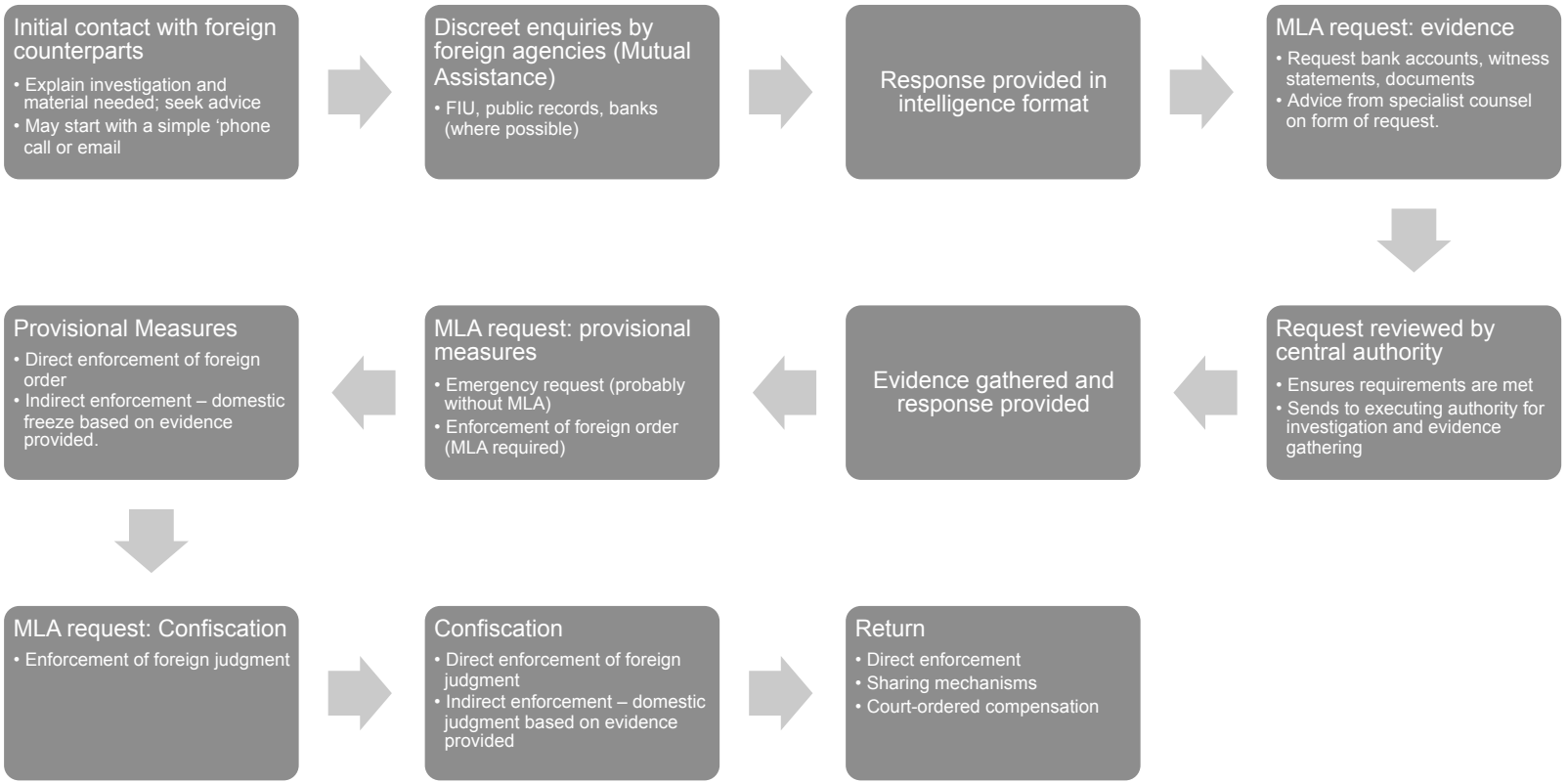
CONFISCATION

Must submit an MLA request

Confiscation orders may be enforced:

- Directly through registration/enforcement of order
- Indirectly through application for a domestic order in requested jurisdiction
  - Evidence submitted by requesting state is used to support an application for domestic order
- There may be ‘asset sharing’ agreements/treaties/ conditions

FLOW CHART OF INTERNATIONAL COOPERATION



CIVIL ACTIONS

STARTING CIVIL PROCEEDINGS HERE AND ENFORCEMENT OVERSEAS

WHY AM I EVEN TALKING ABOUT CIVIL REMEDIES?

How many AB&C prosecutions are there *really* going to be?

- Four or five major cases a year?
- The idea of the Act is to get firms to 'put their house in order' – they are probably going to do that

How much external compliance advice do clients *really* need?

- Multi-nationals are usually FCPA compliant already
- Most have internal compliance professionals already in situ
- The act is not *that* difficult to understand
- The market is saturated already: everyone's an expert…

Multi-National Firms have Established Client-Lawyer Relationships

- Most if not all Magic Circle firms have compiled their own bribery act guidance and have delivered it
- Although criminal in nature, Commercial firms appears to keen to advice and act on AB&C Matters (hence new formidable competition)
- FCPA representation has yielded significant fees for US firms for years; they have a significant head-start/demonstrable experience in AB&C compliance monitoring, litigation and client training.

ARE CIVIL ACTIONS A MISSED OPPORTUNITY?

Why should client suffer a commercial disadvantage when competitors are prepared to bribe?

- Consider bringing civil actions for damages suffered by submitting a tender for a contract which would never have been fairly won;
- Perhaps an effective way of putting an end to foreign bribery customs: both the giver and receiver of a bribe are potential defendants, irrespective of domestic criminal law.

External Bribery

- Paragraph 40

Internal Bribery

- Paragraph 42-42

Remedies against the Bribed Agent

- Paragraph 44-47

Remedies against the Briber

- Paragraph 49-50

ISSUES TO THINK ABOUT

Forum non-conveniens (common law legal doctrine: courts may refuse to take jurisdiction over matters where there is a more appropriate forum available to the parties).

- As a member of the European Union, the United Kingdom signed the Brussels Convention.
- The Civil Jurisdiction and Judgments Act (1982) & (1991)
  - *"Nothing in this Act shall prevent any court in the UK from staying, sisting [staying or stopping a process, or summoning a party], striking out or dismissing any proceedings before it on the ground of forum non conveniens or otherwise, where to do so is not inconsistent with the 1968 [Brussels] Convention or, as the case may be, the Lugano Convention."*
- Owusu v Jackson and Others [Referral to the ECJ by CofA] held:
  - *"the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State…"*
- Moot point as to whether FNC rules apply to cases where the other proceedings are not in a Member state. However, cases need individual scrutiny; where bribery is alleged that in itself may be persuasive as to whether the case ought to be heard here!

ENFORCEMENT

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

- A signatory to the Brussels Convention
- A signatory to the Lugarno Convention

See paragraph 55: 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).

SOME EXAMPLES

(Mainly of other States using the London High Court to obtain judgment…)

FEDERAL REPUBLIC OF NIGERIA V. SANTOLINA INVESTMENT CORP., SOLOMON & PETERS, AND DIEPREYE ALAMIEYESEIGHA (2007)

In December 2007, the London High Court held that Nigeria was the true owner of three residential properties in London and of the credit balances of certain bank accounts.

The properties and funds were officially held by two companies incorporated in the Seychelles and the Virgin Islands.

These companies were controlled by Diepreye Alamieyeseigha, the governor of Nigeria's Bayelsa State from May 1999 until his impeachment and dismissal in September 2005.

In separate proceedings in Nigeria, the two companies, represented by Alamieyeseigha, pleaded guilty to money laundering charges related to bribes obtained for the awarding of government contracts.

Based on this Nigerian proceeding and other circumstantial evidence, the London High Court inferred that the bank balances and real estate investments held by the two companies controlled by Alamieyeseigha were bribes and secret profits must be returned to the government of Nigeria as the legitimate owner of those assets.

FEDERAL REPUBLIC OF NIGERIA V. SANTOLINA INVESTMENT CORP., SOLOMON & PETERS, AND DIEPREYE ALAMIEYESEIGHA (2007)

The case was adjudicated in the absence of defendants who were notified of the proceedings.

To explain its conclusion, the court mentioned several elements that served as circumstantial evidence:

- There was a huge discrepancy between assets and income officially declared by Alamieyeseigha and the funds deposited in foreign bank accounts.
- The defendant held these foreign bank accounts in breach of a constitutional prohibition.
- The defendant could not give any plausible and legitimate explanation of his ability to acquire such amount of assets outside Nigeria.
- Funds were transferred by government contractors in separate transactions and held by offshore corporate vehicles
- Residential properties were purchased with transfers or loans from those corporate vehicles.

ATTORNEY GENERAL OF ZAMBIA V MEER CARE & DESAI & OTHERS (2007)

The London High Court found sufficient evidence that $25 million was misappropriated or misused, and that there was no legitimate basis for Zambia's payments of approximately $21 million pursuant to an alleged arms deal with Bulgaria.

The defendants were held liable in tort for these actions.

They were also found to have broken the fiduciary duties they owed to the Zambian Republic or had dishonestly assisted in such breaches.

As a result, they were held liable for the value of the misappropriated assets.

ATTORNEY GENERAL OF ZAMBIA V MEER CARE & DESAI & OTHERS (2007)

The action brought in the United Kingdom was against the former president of Zambia, Frederick Chiluba, and his associates.

Because the terms of bail required the defendants to remain in Zambia, the court made special arrangements to address the situation.

These arrangements included sitting in Zambia as a special examiner to hear evidence and, for proceedings in London, setting up a live video link between London and Zambia and recording daily transcripts.

The London court held in favour of the attorney general of Zambia, who then registered the judgment in the Lusaka High Court in Zambia.

The former president applied to set aside the judgment on the basis that he was not able to participate in the hearings in London and was not afforded the opportunity to be heard by the National Assembly (which had stripped him of his immunity against criminal prosecution in Zambia).

In 2010, Zambia's Supreme Court rejected Chiluba's appeal on the basis that sufficient actions had been taken.

FYFFES V TEMPLEMAN AND OTHERS (2000)

Fyffes, a company involved in the banana trade, claimed that an employee who negotiated a service agreement with a shipping contractor took bribes amounting to more than $1.4 million between 1992 and 1996. The bribes were revealed when the U.S. Internal Revenue Service was tipped about undeclared payments that the employee received in the United States from a company incorporated in Cyprus.

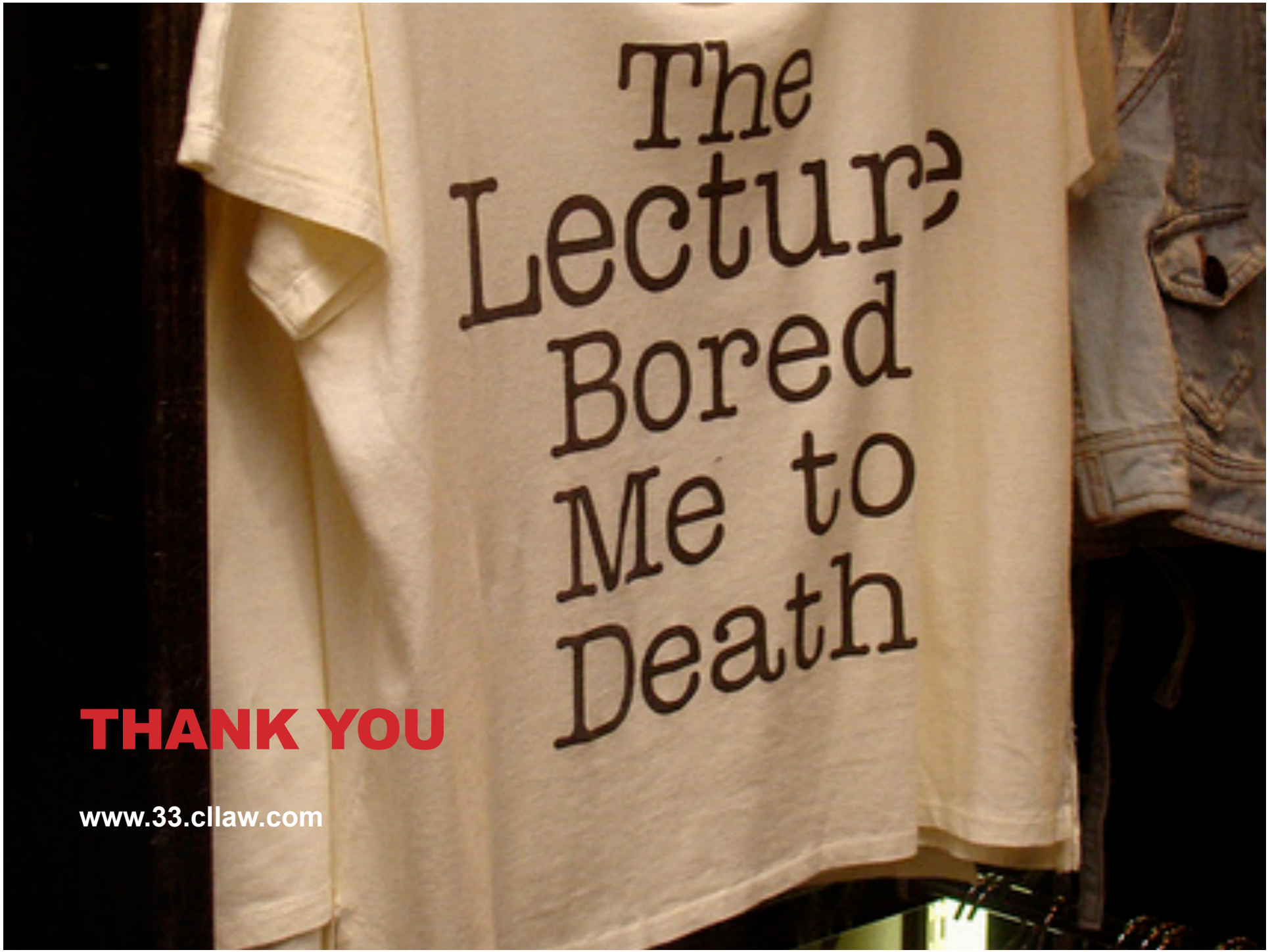
Fyffes sought to recover damages from the employee, the shipping company, and its agents.

All defendants were found jointly liable for the value of the bribes.

The court ruled that *"there can be no dispute that they were taken into account by the contractor in agreeing the amount of the freight for each year, which would have been correspondingly less for Fyffes if they had only had to pay the net sum which the contractor were prepared to accept."*

The shipping company and its agents were liable to pay additional compensation for the loss that Fyffes suffered from entering into the contract under unfavourable terms. For each year, the court determined what Fyffes would have normally agreed to pay if it had been represented by a prudent and honest negotiator. There was no evidence that actual payments would have been different in 1992, 1994, and 1995. But the court ruled that payments were inflated by $830,022 in 1993 and by $1.1 million in 1996.

An account of all profits made by the contractor was rejected because it was *"highly probable that Fyffes would have entered into a service agreement with the contractor if the employee had not been dishonest."* As a result, "*ordinary*" profit from the contract was not caused by bribery, but by *"the provision of services for which there would have been a contract in any event."*



THANK YOU

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