

10TH IAP ASIA & PACIFIC REGIONAL CONFERENCE

TARGETING TRANSNATIONAL CRIMES IN THE ASIA-PACIFIC REGION

The Current Challenges of Asset Recovery: Judicial Practitioners Perspective

This presentation discusses challenges in the field of international asset recovery linked to criminal proceeds from an operational and practical perspective. The views expressed are those of the author.¹

Situation Report

Despite international efforts in the last 10 to 20 years to enhance the effectiveness of asset recovery in criminal matters, through instruments such as the United Nations Convention Against Transnational Organized Crime (UNTOC) and the United Nations Convention Against Corruption (UNCAC), successful cases of asset recovery between governments are still relatively few and far between when measured against the size of illicit proceeds circulating in the open and underground economies.

Why is this so?

Translating Policy into Action

The over-arching goals are set at high policy level. States who have had their treasury coffers raided by their own politicians should be reimbursed when those illicit proceeds find their way to foreign jurisdictions in bank accounts or other forms of investment or property. The same applies to individuals who have been seriously deceived by organized criminal groups, these days operating through the internet across a multitude of jurisdictions. The justice in such an approach is clear. Not only attempt to prosecute and convict the offenders, but also recover the assets and return them to their rightful owners.

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These asset recovery policy goals, however, first need to be translated into laws in requesting and requested jurisdictions to provide the necessary legal framework.

Equally as important, those laws need to be effectively implemented through effective institutions and agencies. This requires the investment of significant resources, including trained and competent personnel at the law enforcement and practitioner level.

Then high barriers to effective cooperation may need to be overcome in each case. Political interference is possible in more sensitive cases. Different systems of law will need to be reconciled and be made to work together. Expectations have to be managed. Court processes, which can be lengthy, need to be pursued. Property has to be preserved. Patience and perseverance is required...

At once, it becomes apparent that the high policy goals contained in international instruments and bilateral treaties or agreements can become difficult to achieve in practice.

Legal Framework

The existence of a solid legal framework is fundamental to any asset recovery work. This will include relevant laws in both requested and requesting jurisdiction and mechanisms for mutual legal assistance between governments.

Obtaining the Confiscation Order

First, the requesting jurisdiction will usually need to have effective laws to obtain an order confiscating or forfeiting property not only located in its own jurisdiction but located outside the jurisdiction. The confiscation order may be based upon a criminal conviction in that jurisdiction (in personam proceedings), or be a non-conviction based order in limited cases (e.g. dead or absconding defendants) or it may be a civil forfeiture order linked to criminal conduct and aimed at the property itself (in rem proceedings). The order may be a value based order (i.e. to pay a certain sum of money) or it may direct confiscation or forfeiture of certain identified property traced to the criminal conduct.

Freezing the Foreign Property

In any event, the requesting jurisdiction will take time to obtain its own final order and in the meantime may seek certain preservation measures, such as requests to freeze or restrain property located abroad pending the completion of its own investigation and prosecution.

Requests to identify and freeze property are therefore often the first point of contact for the legal practitioner. Law enforcement may have exchanged prior information through their own networks such as Interpol and the Egmont Group for Financial Intelligence Units. But once a request to freeze is received legal mechanisms will normally be required in the requested jurisdiction to give effect to the freeze.

Until relatively recently, a number of jurisdictions around the world did not have (and some still do not have) a clear legal mechanism to give effect to foreign requests to freeze proceeds of crime based upon an on-going investigation criminal investigation or prosecution in a foreign jurisdiction. Obviously, if there is no law to preserve the assets in the first instance in the foreign jurisdiction in a timely fashion the assets will be at serious risk of dissipation.

But even when there is a law, action upon a request to freeze may be problematic depending upon the legal thresholds in the requested jurisdiction. For example, is the foreign matter still at the investigation stage or have proceedings commenced in which a final confiscation order may be made? Are requirements of dual criminality met? For example, breach of foreign exchange controls in one jurisdiction may not constitute an offence in another jurisdiction. Is the property sufficiently identified or identified at all in the request?

Matters of high State interest may arise from the request to freeze which will impact foreign affairs relations between the two governments. Are there allegations of persons being investigated or prosecuted for political reasons? Has there been a regime change in the requesting jurisdiction which brings into play a number of sensitive issues concerning dealings with the previous government and future dealings with the current government?

Mutual Legal Assistance Mechanisms

Requests to freeze (and confiscate) property also require the effective use of bilateral and international instruments including mutual legal assistance agreements. Is there an applicable instrument for international cooperation in this particular case? Many jurisdictions continue to negotiate bilateral MLA treaties or agreements but their coverage is far from universal. May assistance be provided without an applicable legal instrument? Do both requested and requesting jurisdictions have domestic MLA laws which enable them to process such requests for assistance?

Each question is a step along the way which will need to be answered by the practitioner. And there are not always timely and effective answers. Often practitioners are working through foreign language translations in a system of law whose requirements they are not familiar with. They may not be working directly with their counterpart in the foreign jurisdiction but through Central Authorities. MLA requests may be many of which this asset recovery request is just one. Should it have priority over all other work?

Managing and Preserving the Property

Assuming the request to freeze gets the go-ahead from the requested jurisdiction, a court phase will usually commence in the requested jurisdiction. Does this court have the necessary tools to give effect to the request? If the property consists of real property or other investments in non-cash form can a management receiver be appointed to manage and preserve the assets? Are there rules to determine who pays the costs of management? Will the requesting jurisdiction be required to provide an indemnity to the requested jurisdiction to protect it against costs in the event of a shortfall in realized assets?

The process once commenced and a freeze order is put in place, will take time. Assuming there is a legal framework to give effect to a foreign request to freeze, how long should that freeze be maintained for? Should there be a time limit? What if the requesting jurisdiction is no longer actively pursuing a final confiscation order in its own jurisdiction or the matter has become seriously delayed for years?

Challenges to the Freezing Order

Meanwhile, a court order to freeze assets in the requested jurisdiction will give affected parties including the defendants in the foreign jurisdiction immediate rights to challenge the order. This may mean the court in the requested jurisdiction will be asked to resolve questions of law or fact arising in the requesting jurisdiction. How is the court to handle this? How is the practitioner to defend a case which is based on foreign law in another jurisdiction, when it is not his case and when he is not too familiar with the underlying proceedings in the foreign jurisdiction?

Nevertheless, once property has been frozen it is likely challenges in the requested jurisdiction will arise and will have to be resolved through litigation in the courts of the requested jurisdiction. Most courts will not allow a re-litigation of the criminal claims that are being dealt with in the requesting jurisdiction however the court in the requested jurisdiction giving effect to the freeze request is not a rubber stamp either. How should it achieve the right balance between preserving property pending the outcome of the proceedings in the foreign jurisdiction and hearing legitimate claims by defendants and third parties going to possible issues of due process, breach of human rights protections and other fundamental constitutional considerations? Contested proceedings in such cases can very quickly become complex cases.

Enforcing the Foreign Confiscation Order

Assuming the freeze order is maintained and the asset preserved and managed pending the making of a final confiscation or forfeiture order in the requesting jurisdiction, that order will then need to be enforced in the requested jurisdiction. Many jurisdictions now have legal mechanisms to recognize and enforce foreign confiscation orders. There is no need to re-litigate the matter under the law of the requested jurisdiction and obtain a domestic confiscation order in that jurisdiction. Such registration or direct enforcement mechanisms are to be preferred and are recognized in instruments like the UNCAC. However, requirements will still need to be met to enable registration and enforcement of the foreign order. These will vary from jurisdiction to jurisdiction but they usually focus on minimum procedural protections such as that the foreign order must be final and not subject to appeal and that the defendants or persons whose property is ordered confiscated were duly notified of the

foreign proceedings in order for them to have the opportunity to defend them before the confiscation order was made.

These rules may sound like fairly simple requirements but in practice they can also become complex. For example, how is a person who has been tried and convicted in absentia to be proved under foreign law to have had notice of the proceedings? What if the judgment is final but under the law of the requesting party a person may apply to its constitutional court at any time to have the judgment set aside? Is it necessary under the law of the requested jurisdiction to trace the property ordered confiscated in the requested jurisdiction to the criminal offending? Resolution of such issues will again take time and may be heavily litigated in the court of the jurisdiction where the foreign confiscation order is sought to be enforced.

Sometimes the court of the requested jurisdiction will retain an overall discretion whether or not to enforce the foreign confiscation order. For example, it may decide not to enforce it if to do so would be contrary to the interests of justice. How is such a general rule to be applied on a case by cases basis, while giving due comity to the courts of the requesting jurisdiction. Very quickly issues of mistrust or at best misunderstanding can arise when one jurisdiction is asked to enforce and 'trust at face value' the court judgment of another jurisdiction.

Sharing and Repatriating Assets

Once the order is enforced and assets realized, there should be legal mechanisms in place to repatriate or share the confiscated funds. This is a mandatory requirement for certain cases under the UNCAC and is also encouraged under the UNTOC when victims of crime are involved. But does each jurisdiction have the domestic mechanisms in place to enable it to transfer funds back to a foreign country in satisfaction of the confiscation order? Some do not. How are the funds to be shared and on what basis? The requesting jurisdiction is seeking to recover property under its own court order but after all, the requested jurisdiction will also have devoted much time and resource to the recovery effort. Should they not be compensated for this as well? Is there a bilateral asset sharing agreement between the two places? Otherwise, on what basis will this sharing be resolved? Possession is often said to be

9/10ths of the law and it is difficult for the requesting jurisdiction to insist on certain sharing or repatriation arrangements when it is not in possession of the property. Most requested jurisdictions nowadays should have put in place legal procedures and policies to enable full repatriation of assets when appropriate and for sharing in other cases.

Finally what mechanisms are in place in the requesting jurisdiction to ensure that funds repatriated or shared back are properly used by their governing authorities, by either going into the general revenue or being used for designated and approved projects for the public good? There are concerns in international forums that developing countries which may have systemic corruption problems may not be able to safeguard the returned funds and that they may be “re-stolen” one more, thus defeating all efforts.

No practitioner wishes to see his or her efforts go to waste.

Effective Implementation

This is the most difficult problem.

Nowadays many jurisdictions have legal mechanisms in place to promote cooperation between States for recovery of proceeds of crime. The most difficult task is effective implementation of these mechanisms in individual cases. There is no point in having a legal framework if it is not put to effective use.

These problems are well recognized and international efforts through bodies such as the UNODC/World Bank StAR (Stolen Asset Recovery) Initiative and the ICAR (International Centre for Asset Recovery) have been dedicating resources in assisting victim states recover funds through specialized training programmes and case by case assistance.

But what are some of the problems faced by the practitioner?

The Requesting State

The problems vary to a certain extent depending upon whether the requesting jurisdiction is developing country or a developed country.

For the developing country, whose coffers have been raided by its politicians or whose citizens have been subject to widespread scams, the problems will likely be significant. There may be an insufficient pool of legal practitioners in the country with the requisite skill and knowledge to effectively implement a confiscation order made by its own courts in another jurisdiction bearing in mind that other jurisdiction is likely to be first world country or a financial centre with a sophisticated legal system. It may be completely under resourced in its staffing needs and not able to meet the many demands likely to come from the requested jurisdiction in order to effectively implement the confiscation order. Communications are therefore likely to very quickly break down and a standoff reached, with each side harbouring some degree of mistrust for the other. If the requesting country cannot resource itself to facilitate the making of such requests, and if the case is important enough, it might consider for example enlisting the support of StAR or ICAR, or even hiring a law firm to assist in its dealings with the government of the requested jurisdiction. But in many cases, the request may lapse and ultimately fail.

If the requesting jurisdiction is a developed country with a mature and efficient legal system backed by well trained and resourced personnel, then the problems are likely to be less fundamental. However, problems still arise. If civil and common law systems are engaged there can be failures to understand each other's requirements. In some jurisdictions there is a need to trace the confiscated funds to the alleged offending or connect it in some way, which is not a requirement for other jurisdictions. In the case of internet scams, the requesting jurisdiction may not be able to identify a person to prosecute and there may be no possibility of a confiscation order. Serious delays may arise following numerous exchanges and requests for more information between both sides. These queries may not always be dealt with in a timely fashion due to other work pressures faced by the practitioner or a lack of adequate priority given to the case. Most domestic prosecutors in the requesting jurisdictions are focused on their own domestic caseloads and may not have the time or patience to continually provide information to the requested jurisdiction in support of their request to confiscate property. Likewise, prosecutors in the requested jurisdiction have their own domestic cases and the foreign request may be treated as a poor second cousin because the prosecutor does not regard it as his or her own case.

Requested States

Requested States more often than not are mature economies or financial centres with sophisticated legal systems. Thus while they will often have a solid legal framework in place to facilitate requests for asset recovery and their government will strongly espouse at each available opportunity its serious commitment to return stolen assets to victims states / citizens, in practice the mismatch between what it demands of the requesting state and what the requesting state provides will seriously hamper its efforts. For example, if the requesting State believes assets subject to the confiscation order are in the requested State, but it does not or cannot identify them or their particular location in the requested State, the request will not move forward. Assistance may be offered at the law enforcement level to assist, but again the mismatch between the degree of information required by the requesting and requested parties may cause an impasse.

Most requested jurisdictions will require a mutual legal assistance request which fully complies with all the requirements of their own law. Whilst country guides to asset recovery, templates and contact points (through such bodies as CARIN / the Camden Asset Recovery Inter-Agency Network and its regional off-shoots) are increasingly available to advise on particular requirements of each requested jurisdiction, the gap between what is required and what is provided is still significant in many cases. Some jurisdictions, such as Switzerland, are now using innovative measures to confiscate funds if the MLA process breaks down completely and the requested jurisdiction cannot provide what is required due to its status as a more or less systemically failed State.

However, there is a real need to make the existing processes work if at all possible.

The purpose of this presentation is not to offer solutions (rather to reflect on the challenges) but dialogue is important. Both parties should keep the dialogue going, respond when requested, enlist third party support if necessary, engender a sense to trust and joint effort, forge a team and aim for a victory. Face to face meetings are strongly encouraged. It can actually be fun working with foreign counterparts, and extremely rewarding when the process works well.

Overcoming High Barriers

What then are some of the common barriers which prevent the process working well? There are some below listed in no particular order:

- Inability to trace and identify assets
- Failure to prepare an adequate MLA request which meets the requirements
- Strict implementation of dual criminality requirements
- Failure of courts to recognize orders in a foreign jurisdiction
- Interference at the political level
- Failure to understand the procedures or requirements of foreign law
- Complicated procedural requirements in the requested jurisdiction
- Delay, including by the courts
- Onerous demands for more and more information
- Mismatch between the law of the requested and requesting jurisdiction.

There are many more barriers to effective cooperation in asset recovery cases. And there is a repeated refrain in international forums, between developing and developed countries. The developed country says “...all my assets have gone to your country through corrupt means and you have to give them back to me. You are not giving them back to me. We are both parties to the UNCAC”. The developed country says “...my friend, we want to give them back to you but first you have to meet our minimum legal requirements and conditions. You have not given us sufficient information to meet our minimum requirements”.

This is where trust breaks down. The practitioner may become disillusioned, even give up or walk away. After all, a practitioner can do only what he can within his remit. The practitioner in the requesting jurisdiction can only make the request and give what he has within the limitations of his own system and resources. Likewise the practitioner in the requested jurisdiction can only apply the law to the request once received and if matters fall short what can he or she do?

Which leads back to high policy considerations. There must be renewed and continued efforts at high government, diplomatic and international levels to solve the problem. The UNCAC with its

provisions on international cooperation for asset recovery is not the answer. It is the start. Governments on all sides must ensure that those and like provisions work effectively in particular by devoting adequate resourcing to the problem. And they must also be creative. For example, are there additional or alternative means to effective asset recovery? Within the European Union a framework has been put in place obliging members to promptly recognize and register freezing orders over property issued by one member court to another. The use of financial sanctions against persons has become common in recent times, particularly targeting property of terrorists and in the United States targeting property of organized crime groups. Is it possible to envisage an internationally acceptable sanctions or registration system operating across the criminal asset recovery sphere, by which designated persons have their property immediately frozen by States with a view to confiscation. It may be unlikely to work in the context of low level asset recovery cases, but it may be possible in those higher profile cases of corrupt politicians and their sidekicks who have done harm to their own economy and breached the trust of their people.

Conclusion

The challenges for judicial practitioners engaged in asset recovery work are many. While some progress has been made, and many countries now have a legal framework in place to meet the demands of international instruments such as the UNCAC, there is still a long way to go. This will require renewed efforts for effective implementation, some creative thinking, and good will all around.

It will also require high level commitment by governments to adequately resource and give priority to such efforts as part of their national agendas to effectively address the challenges. Hopefully, this is not too much for the practitioner to ask.