

“The 2nd EU–Macao Cooperation Programme in the Legal Field – Conference on International Judicial Cooperation”

Topic: International Cooperation in Recovering Proceeds of Crime

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Introduction

The title of this paper assumes the existence of legal cooperation at the international level i.e. of, or relating to, two or more nations; between nations¹. However, this concept posed some novel challenges for Hong Kong upon reversion of the territory to Chinese sovereignty in 1997. Under British rule, bilateral agreements involving legal cooperation in the criminal law field to which the United Kingdom was a party had been in many cases extended to Hong Kong². Following reversion of sovereignty and under the principle of “one country two systems”, Hong Kong would become competent at the international level to negotiate and sign its own bilateral arrangements for reciprocal juridical assistance under authorisation of the Central People’s Government (CPG) of the People’s Republic of China (PRC). International agreements to which the PRC was or became a party might be also applied to the Hong Kong SAR.

This paper is divided into two parts. The first part discusses the constitutional arrangements underpinning the competency of the Hong Kong SAR as a non – state actor to participate in international legal cooperation, including for the recovery of proceeds of crime, as well as implementation of relevant domestic laws for recovery of proceeds of crime. The second part discusses themes, issues and problems which have emerged in Hong Kong’s own recent experiences in dealing with cases involving international asset recovery which may or may not be common to experiences in other jurisdictions.

The Constitutional Arrangements

In 1984 the Chinese and British Governments signed the Joint Declaration on the Question of Hong Kong, affirming that the People’s Republic of China would resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997³.

Upon resumption of sovereignty in 1997, a Hong Kong Special Administrative Region was established in accordance with the provisions of Article 31 of the Constitution of the People’s Republic of China under the principle of “one country, two systems”⁴.

The Basic Law of the Hong Kong Special Administrative Region was enacted in

accordance with the Constitution prescribing the systems to be practiced in the Hong Kong Special Administrative Region⁵.

Article 13 of the Basic Law provides that the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. It also provides that the Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with the Basic Law⁶.

Several provisions in the Basic Law relate to the maintenance and development of relations by the Hong Kong Special Administrative Region at the international level, the application of international agreements to the Region both before and after 1997, and arrangements for reciprocal juridical assistance with foreign states.

First, Article 151 of the Basic Law provides that the Hong Kong Special Administrative Region may on its own, using the name "Hong Kong, China" maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in appropriate fields. Article 152 permits the Region to participate in international organizations and conferences limited to states but affecting the Region in appropriate fields using the same name. Thus the Region continues to hold membership of a number of international organizations and initiatives under its own name Hong Kong, China.

Second, Article 153 of the Basic Law provides that the application of international agreements to which the People's Republic of China is or becomes a party shall be decided in accordance with the needs and circumstances of the Region and after seeking the views of the government of the Region. It also provides that international agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region.

Third, Article 96 of the Basic Law provides that with the assistance or authorization of the Central People's Government, the Government of the Hong Kong Special Administrative Region may make appropriate arrangements with foreign states for reciprocal juridical assistance. Accordingly, the Region has concluded a number of bilateral Agreements for mutual legal assistance in criminal matters with foreign states and it has implemented these Agreements under its domestic law. These Agreements, which follow a fairly standard model, include mechanisms for international asset recovery.

Fifteen years have passed since the resumption of Chinese sovereignty over Hong Kong, and it is fair to say that the system envisaged under the Joint Declaration and Basic Law for the application of international agreements to the Region and the

provision of international cooperation in criminal matters to foreign jurisdictions has withstood the challenge of time and is, by and large, working well.

However, there have been issues along the way arising from Hong Kong's status as a non-state actor at the international level. These issues have mostly arisen in the context of extradition cases when fugitives have sought to challenge the validity of the applicable bilateral treaty or agreement between Hong Kong SAR and the country concerned i.e. to challenge the validity of an international treaty or agreement between one sovereign state and part of another sovereign state⁷.

More recently challenges have emerged under multilateral conventions to which the PRC is a party and which have been applied to Hong Kong, particularly as to whether the Hong Kong SAR Government is competent to make requests, albeit with CPG authorization, to other State parties under these conventions such as the United Nations Convention Against Corruption⁸.

International Agreements: Multilateral⁹

A number of multilateral agreements which apply to the Region (hereinafter referred to simply as 'Hong Kong') and which include general provision for mutual legal assistance in criminal matters are as follows :

- (a) The Convention for the Suppression of Unlawful Seizure of Aircraft 1970
- (b) The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation 1971
- (c) The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973
- (d) The International Convention Against the Taking of Hostages 1979
- (e) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
- (f) The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988
- (g) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation 1988 and the Fixed Platform Protocol 1988
- (h) International Convention for the Suppression of Terrorist Bombings 1997
- (i) International Convention for the Suppression of the Financing of Terrorism 1999

- (j) United Nations Convention Against Transnational Organized Crime 2000
- (k) United Nations Convention Against Corruption 2003

The last two Conventions in particular have specific provisions governing cooperation in the recovery of proceeds of crime.

International Agreements: Bilateral¹⁰

To date, Hong Kong has signed bilateral Agreements for mutual legal assistance with the following 29 jurisdictions :

Australia, Belgium, Canada, Czech Republic (not yet in force), Denmark, Finland, France, Germany, Indonesia, India, Ireland, Israel, Italy, Japan, Malaysia, Netherlands, New Zealand, Philippines, Poland, Portugal, Singapore, South Africa, South Korea, Spain (not yet in force), Sri Lanka, Switzerland, Ukraine, United Kingdom, United States of America.

All of these agreements contain provisions for tracing, restraining, confiscating and sharing proceeds of crime.

Domestic Law

Requests for mutual legal assistance in criminal matters, including those for asset recovery, are processed under the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525 (“MLAO”). This Ordinance was enacted in 1998 and is a purpose-built legal mechanism to facilitate and regulate the provision and obtaining of assistance in criminal matters between Hong Kong and places outside Hong Kong, and for matters incidental thereto or connected therewith¹¹.

Assistance can be rendered pursuant to “arrangements for mutual legal assistance” (e.g. bilateral or multilateral agreements which have been made the subject of an order under the Ordinance), or based on the principle of reciprocity. As regards the latter, the Ordinance provides that the appropriate authority of the requesting place may give an undertaking to Secretary for Justice which satisfies Secretary for Justice that the place will, subject to its law, comply with a future request by Hong Kong to that place for assistance in a criminal matter. It is therefore not a prerequisite that a bilateral or multilateral agreement be in existence before assistance can be rendered under the Ordinance.

The types of legal assistance available include :

- (a) taking of oral evidence and production of things before a magistrate (including by live TV link)¹²;
- (b) search and seizure of things under search warrant¹³;

- (c) obtaining of material under production orders (e.g. on banks to produce documents)¹⁴;
- (d) arranging the travel of a person to another place to assist in criminal investigation or proceedings¹⁵;
- (e) enforcement of external confiscation orders and restraining of dealing in property which may be subject to external confiscation orders¹⁶; and
- (f) service of process¹⁷.

Assistance can only be provided in relation to a “criminal matter”, which is defined in the Ordinance¹⁸ to be :

- (a) an investigation;
- (b) a prosecution; or
- (c) an ancillary criminal matter.

Of particular relevance to requests for asset recovery, “ancillary criminal matter” is defined¹⁹ to mean the restraining or dealing with, or the seizure, forfeiture or confiscation of any property in connection with an external offence, or the obtaining, enforcement or satisfaction of an external confiscation order.

“External offence” means an offence against the law of a place outside Hong Kong, and “external serious offence” means an external offence the maximum penalty for which is death or imprisonment for not less than 24 months.

External confiscation order, which is a key term in relation to requests for asset recovery, is defined²⁰ as :

“... an order, made under the law of a place outside Hong Kong, for the purpose of -

- (a) recovering (including forfeiting and confiscating) -
 - (i) payments or other rewards received in connection with an external serious offence or their value;
 - (ii) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
 - (iii) property used or intended to be used in connection with an external serious offence or the value of such property; or

- (b) depriving a person of a pecuniary advantage obtained in connection with an external serious offence,
- and whether the proceedings which gave rise to that order are criminal or civil in nature, and whether those proceedings are in the form of proceedings against a person or property.”

It can therefore be seen that the law permits action to be taken in Hong Kong to restrain, forfeit or confiscate property in relation to a foreign offence punishable by at least 24 months imprisonment in the requesting jurisdiction. This can be done whether the foreign proceedings are criminal or civil in nature, and whether the proceedings are against persons or property. That is, the procedure allows for action in cases of confiscation following a criminal conviction, or action based on civil “in rem” proceedings against identifiable property arising from criminal conduct but not necessarily requiring a criminal conviction.

Additional Considerations in Asset Recovery Cases

An external confiscation order may be registered and enforced in Hong Kong through an application made by Secretary for Justice, on behalf of the requesting place, to the Court of First Instance in Hong Kong²¹.

An application to the Court must contain sufficient information to satisfy it that :

- (a) at the time of the registration, the order is in force and not subject to appeal;
- (b) the person in respect of whom, or in relation to whose property, the order was made received notice of the proceedings and had the opportunity of defending the proceedings; and
- (c) the enforcement of the order in Hong Kong would not be contrary to the interests of justice.

The Secretary for Justice may also apply to the Court of First Instance for an order prohibiting dealing in property (restraint order)²². The Court will make an order if is satisfied that :

- (a) proceedings have been instituted in a place outside Hong Kong;
- (b) the proceedings have not been concluded; and
- (c) either an external confiscation order has been made in the proceedings or there are reasonable grounds for believing an external confiscation order may be made in them.

An order restraining dealing in property may also be obtained where the court is satisfied that proceedings are to be instituted in a place outside Hong Kong and it appears that in those proceedings an external confiscation order may be made.

To simplify proof of evidentiary matters, the Ordinance allows for proof of certain facts by a certificate issued by the appropriate authority of the requesting place²³. In particular, such a certificate shall be admissible of as evidence of the facts so stated. The facts that can proved by the certificate are as follows :

- (a) that a proceeding has been instituted and has not been concluded, or that a proceeding is to be instituted, in the place;
- (b) that an external confiscation order is in force and not subject to appeal;
- (c) that all or a certain amount of the sum payable under an external confiscation order remains unpaid in the place, or that other property recoverable under an external confiscation order remains unrecovered in the place;
- (d) that any person has been notified of any proceeding in accordance with the law of the place; or
- (e) that an order (however described) made by a court in the place has the purpose of -
 - (i) recovering (including forfeiting and confiscating)
 -
 - (A) payments or other rewards received in connection with an external serious offence or their value;
 - (B) property derived or realised, directly or indirectly, from payments or other rewards received in connection with an external serious offence or the value of such property; or
 - (C) property used or intended to be used in connection with an external serious offence or the value of such property; or
 - (ii) depriving a person of a pecuniary advantage obtained in connection with an external serious offence.

In addition, a statement contained in document which purports to have been received

in evidence or summarises evidence given in proceedings in a court in a place outside Hong Kong is admissible as evidence of any fact stated therein if duly certified²⁴. A document is duly certified if it purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong concerned, or by or on behalf of the appropriate authority of the place.

The Ordinance also allows for proof of foreign court orders if the order bears the seal of the court in the place outside Hong Kong or is signed by any person in his capacity as judge, magistrate or officer of the court in the place outside Hong Kong²⁵. Certified copies may also be put in proof if the copy purports to be certified by a judge, magistrate, or officer of the court in the place outside Hong Kong concerned, or by or on behalf of the appropriate authority of the place²⁶.

Processing of Asset Recovery Requests in Hong Kong

The Mutual Legal Assistance Unit of the International Law Division, Department of Justice, discharges the responsibilities of the Central Authority in Hong Kong for the purpose of mutual legal assistance in criminal matters²⁷.

Foreign authorities may seek advice from the Unit on the preparation of requests to Hong Kong, and draft requests may be forwarded to the Unit for comment, to ensure compliance with Hong Kong's statutory requirements.

All requests for legal assistance under the Ordinance, including asset recovery cases, should be addressed to the "Secretary for Justice", who is the head of the Department of Justice. It is not necessary for requests to be sent through the diplomatic or consular channel²⁸. Instead, requests may be sent directly to :

The Mutual Legal Assistance Unit
Department of Justice
47/F High Block
Queensway Government Offices
66 Queensway
Hong Kong
Fax number : (852) 2523 7959

Sharing of Recovered Assets

Hong Kong does share and if appropriate repatriate in full recovered assets. The standard provision on sharing in Hong Kong's bilateral agreements provides that proceeds confiscated shall be retained by the requested party unless otherwise agreed upon between the parties. This allows for a presumption that the assets will remain with the requested party but provides for flexibility and sharing on a case by case basis.

Once funds are realised at the enforcement stage the court will hold the funds for a period of 5 years pending an application by or on behalf of the government of a “prescribed place” for sharing²⁹. “Prescribed places” are places with which Hong Kong has prescribed “arrangements for mutual legal assistance”³⁰ under the Ordinance, that is arrangements which have been made the subject of an order under the Ordinance³¹. All of Hong Kong’s bilateral agreements for mutual legal assistance in criminal matters have been made the subject of orders under the Ordinance so there does exist a legal mechanism to share with such places. Orders have also been made under the Ordinance to apply the United Nations Convention Against Corruption and the United Nations Convention Against Transnational Organized Crime so to enable sharing or repatriation of recovered assets with other parties to the Convention in accordance with convention obligations³².

If a foreign jurisdiction does not have a bilateral agreement with Hong Kong or is not a party to a relevant multilateral agreement which has been applied under the Ordinance, there is no statutory basis for sharing. Jurisdictions are encouraged to enter bilateral agreements for mutual legal assistance with Hong Kong because, amongst other things, these agreements contain asset sharing mechanisms which may not otherwise be available to requesting parties.

Hong Kong has an established track record of sharing assets with foreign jurisdictions in cases of substantial value, historically in drug related cases. Increasingly, Hong Kong is repatriating proceeds of crime in corruption cases and to compensate victims of crime in serious fraud cases. Hong Kong has established a flexible policy framework to share or repatriate funds according to the merits of each case.

Common Issues, Themes and Problems

Those practitioners who have worked in the area know that serious obstacles can arise in achieving effective recovery of proceeds of crime located abroad. Despite public adherence by governments to full cooperation between States in the recovery of ill-gotten assets, there are considerable hurdles to overcome and there is general room for improvement by most jurisdictions – both as victim States and as receiving States holding proceeds of crime.

The subject has taken on international significance in the wider political arena, and recent multilateral instruments such as the United Nations Convention Against Corruption now contain detailed provisions on asset recovery (Chapter V) to facilitate effective cooperation between States. The United Nations Office on Drugs and Crime together with the World Bank has established the Stolen Asset Recovery (StAR) Initiative as a platform to improve capabilities of countries for effective international asset recovery. International bodies such as the Financial Action Task Force Against Money Laundering (FATF) have recently strengthened their standards on international cooperation for asset recovery to encourage more effective

implementation and outcomes in practice.

But serious problems persist, and some of these are now discussed below.

The Absence of an Adequate Legal Framework

An adequate domestic framework to execute international requests for recovery of proceeds of crime is fundamental to any successful system. Foreign requests for recovery of assets invariably involve the use of coercive measures, such as restraint and confiscation of property, and countries receiving such requests must have adequate legal powers to give effect to these requests.

Traditionally jurisdictions have relied upon their own powers of investigation to commence a local investigation or prosecution with a view to restraining or confiscating the assets based on offences committed abroad. However, this local procedure is sometimes ill-suited to foreign requests where most of the criminal activity has taken place abroad, where the evidence is also mostly located abroad and where jurisdictional issues concerning the right to prosecute can arise.

In more recent times, jurisdictions have begun enacting specific legislation which enables their own courts to recognize and enforce confiscation or forfeiture orders obtained abroad but covering proceeds of crime located in their own jurisdiction. This procedure has the great benefit of ensuring the merits of the confiscation order are more or less determined in the State where the crime or predicate offence occurred. The courts in the requested State where the assets are located then simply ensure certain fundamental thresholds are met for registration and enforcement of the order without re-litigating the merits of the order obtained in the requesting State.

Claims for recovery of assets may also be pursued through the civil courts of the State in possession of the ill-gotten gains. These are essentially private actions between plaintiffs and defendants based on civil law claims and remedies.

But whatever the case, it is essential that States have some legal framework in place to execute international requests for recovery of proceeds of crime effectively and efficiently. Ideally the framework should be supported by bilateral treaties between States for mutual legal assistance in criminal matters, specifically covering asset recovery. Without a suitable legal framework, efforts in public law enforcement action when a request is received will be seriously hampered.

Inadequate Implementation of the Law

However, even if an appropriate legal framework is in place to make and process requests for asset recovery serious problems remain in the effective implementation of these procedures.

Effective implementation depends upon sufficient provision of personnel and resources to deal with requests for international cooperation. Most resources in any criminal justice system are allocated to domestic cases, and foreign requests for assistance have sometimes been treated with less priority. This mindset is changing and it is increasingly common for countries to have dedicated units within justice and law enforcement agencies to deal with foreign requests for legal assistance including asset recovery. This trend is to be encouraged and should continue.

However, it is equally important to ensure that personnel are adequately trained and sufficiently expert in the work they must undertake. Success in this area depends very much upon motivated personnel who seek results and who do not simply act as link in a chain of bureaucratic paper-shuffling with no true engagement in the substantive outcomes. There must be a system, but the system must be operated by the right people and be as simple as possible notwithstanding the sensitivities sometimes involved e.g. in requests concerning current or past political figures in the victim State.

The legal and judicial system in the requested State must also have integrity and be functioning effectively and efficiently. If the request is fed into a dysfunctional court system with systemic delays or lacking integrity of process then effective implementation will not be achieved at all.

Developing and Developed States

The divide between developed states and developing states can be very much an issue in asset recovery work. However, it's more a divide between developed financial centres (e.g. London, New York, Hong Kong, Zurich) which by their very nature tend to receive or have proceeds of crime routed through their banking systems and developing nations who may be the victim of large scale larceny by persons in positions of power or privilege who have deposited their ill-gotten gains abroad.

Serious issues arise between what the financial centre may require from the requesting jurisdiction in order to effectively restrain or confiscate property in its jurisdiction and what the requesting jurisdiction is able to give. Financial centres usually have sophisticated and well-developed legal systems which require minimum legal thresholds and evidential requirements to be met before requests can be processed. Some less developed jurisdictions do not operate at such a sophisticated level and cannot provide the necessary levels of information or detail required. Some may even have difficulty in formulating a request for assistance in the first place.

The StAR Initiative is working on issues such as this in an attempt to bridge the divide and remove barriers to effective asset recovery. Is the problem with financial centres which set their thresholds too high in processing requests, or is the problem with requesting jurisdictions that do not adequately and sufficiently pursue

requests and provide the necessary information requested by the financial centres?
Is it a combination of both?

Common Law versus Civil Law

This is another divide than can cause problems – different procedural requirements between common law and civil law legal systems. Common law jurisdictions find it relatively easy to communicate between themselves and to understand the requirements of the other jurisdiction in processing requests. The requirements are often very similar. Civil law jurisdictions likewise may operate smoothly between themselves. But when a civil law jurisdiction seeks assistance from a common law jurisdiction, or vice versa, immediate procedural barriers to communication can arise. Procedures which a civil law jurisdiction seeks in a common law jurisdiction may simply just not be available, and procedures that a common law jurisdiction asks a civil law jurisdiction to follow in making a request for assistance may be simply impossible to comply with.

This can sometime cause misunderstandings or even resentment between parties that the request is either not being acted upon or pursued in good faith. For example, requests for additional information by the requested jurisdiction in an attempt to ‘fit’ the request to its own procedural system may be regarded by the other as a way of somehow refusing or delaying the request.

But put simply, powers and procedures between the two systems are different. In civil law jurisdiction investigating magistrates or prosecutors may be able to freeze bank accounts by administrative action, whereas in common law jurisdictions a more formal procedure of court orders is usually involved. Common law jurisdictions may ask for evidence “on oath or affirmation”, which may be a concept unknown to some civil law jurisdictions. Investigating magistrates from civil law jurisdictions may ask common law jurisdiction to “take over the inquiry and take all steps as necessary to locate and confiscate proceeds of the crime”, whereas common law jurisdiction usually act upon specific instructions such as “restrain all funds in bank account xxx”.

Delay

The most common complaint and problem associated with requests to recover proceeds of crime is delay. The procedures to make formal requests are often regarded by law enforcement as cumbersome and time-consuming, involving formalities in their own jurisdiction before the request is issued, further formalities in transmission of the request, and yet further formalities in execution once received by the other jurisdiction.

Lack of adequate legal frameworks, ineffective processing, communication and resource gaps (see above) all add sometimes to a sense of frustration that the system is

not working, or if it is it is working then only very slowly. In some cases, countries eventually give up pursuit of the request due to lack of progress in the requested State.

But this is something of a two-way street. The requested States may equally say the delay is caused by the requesting State not providing the additional information required so to execute the request. The requested jurisdiction may have obtained an initial restraint order at the request of the other jurisdiction but may not be able to enforce confiscation and realize the assets in its own jurisdiction because the requesting jurisdiction has not obtained a final confiscation order that can be enforced abroad.

The fact remains that requests for international legal cooperation between different countries involving the exercise of compulsory powers over persons and property will of necessity involve a certain degree of formality, time and effort to achieve. Countries and practitioners should work together to improve cooperation, overcome identified problems and reduce delay in individual cases.

The question remains how?

Some Suggested Solutions

There are no easy or instant solutions. From a practical perspective, there are a variety of forces at play which may inhibit effective cooperation, ranging from over-arching political considerations to systemic failures in criminal justice systems to individual lack of action in particular cases.

However, experience suggests that some immediate progress can be made by focusing in particular on operational imperatives regardless of the wider political or legal context.

Partnerships

Identify major partners for asset recovery. At the domestic level these are likely to be law enforcement agencies, justice ministries, financial sector players such as banks where assets may be held, and private sector entities such as accounting firms which may provide experts to assist in tracing or managing assets. Work with each other to establish procedures and protocols that each is familiar when making or receiving international requests for asset recovery.

At the international level, identify which jurisdictions are key jurisdictions for asset recovery work. If bilateral treaties or agreements have not been established, work to establish them. Identify counterpart players and agencies within those jurisdictions, so that when an actual case happens the channels of communication are already established and known.

Develop and maintain a network of contacts. This may be achieved by regular case consultations with more important partners on an annual or biennial basis. Attend international conferences and seminars when asset recovery issues are being discussed in multilateral forums. Sign up to relevant networking groups, such as the Asset Recovery Experts Network (www.aren.assetrecovery.org).

Case Communication

Keep talking, talking, and talking. Set up an easy line of communication, including by email if possible. Be responsive. Requests received should be acknowledged and a way forward offered. If further information is required, it should be supplied expeditiously. Avoid a stalemate situation – the requesting party complains the request is not being processed; the requested party complains it needs more information before it can do so.

If necessary, convene face-to-face meetings in important cases by travelling to the other jurisdiction. Have information available upon request in booklets or on your website about how to make requests for asset recovery, including contact details. Offer to review foreign requests in draft before they are formally sent to ensure that they are compliant and may be executed. Build trust.

Resources

Political commitments by governments to ensure effective recovery of proceeds of crime must be backed by adequate provision of funding to establish and maintain the agencies which are engaged at the operational level.

In some jurisdictions specialized agencies have been established to recover proceeds of crime, both domestically and at the international level. But for most jurisdictions the work is assumed by existing law enforcement and criminal justice system agencies within a broader platform of other work. Whatever approach is used, trained personnel including financial investigators and lawyers must be made available and given opportunity to focus on international asset recovery work. Personnel should not be too junior or rotated too quickly. Experienced operators are required to ensure effective outcomes. Specialization is required.

Central Authorities

Central authorities can perform an important role in achieving effective outcomes. They are usually the first point of contact with the foreign requesting party and are the gateway for execution of the request domestically. However, central authorities should not simply act as a post-box. They should add value wherever possible.

Central authorities may advise on the adequacy of the request. They can provide direct contact details of the responsible officer within the central authority, as well as contact details of other officers or agencies responsible for executing the request.

They should oversee execution of the request on a pro-active basis, if not by directly executing themselves then by at least overseeing its timely execution.

Some central authorities receive large numbers of requests for international assistance, not just limited to asset recovery work. They should give priority to cases as necessary and have in a place an effective electronic case management system to track cases and their progress towards effective execution.

Anti-Corruption Efforts

However, the best work at the operational level is not going to be good enough if systemic corruption or criminal justice failures pervade either the State making the request or the State receiving the request.

Some of the more high-profile international asset recovery cases have involved political leaders who have stolen from the coffers of the State they have been elected to lead, sometimes aided or at least unchecked by a corrupt political system. After regime change, their ill-gotten gains have become the target of recovery by the new regime. But the existing systems in the country may have become corrupted to such an extent that they cannot effectively manage pursuit of these assets abroad. And when they can, questions may still arise concerning the return and disposal of these assets to a system which remains fundamentally corrupted. Will ill-gotten assets only be returned to end up in some-one else's own pocket?

It is only when both requested and requesting States have in place fundamentally fair institutional systems that operate relatively free of corrupt interference that this problem will be alleviated. Of course the scope of such reform goes far beyond measures for effective asset recovery.

However, recent instruments such as the United Nations Convention Against Corruption are leading the way for systemic reform. The provisions of the Convention rightly go beyond the standard criminalization and asset recovery measures to include detailed provisions on corruption prevention measures in both the public and the private sector, aimed at ensuring the integrity of institutions operating within each State.

Conclusion

Hong Kong is a major financial centre. The Department of Justice regularly processes requests for mutual legal assistance in criminal matters in relation to the production of bank records for the tracing of funds and other property. It also regularly applies to the courts for restraint orders and to register external confiscation/forfeiture orders in relation to property in Hong Kong at the request of foreign jurisdictions.

Hong Kong has the necessary constitutional and legal framework in place to enable it to enter international agreements and relationships under its own name, Hong Kong China. It can participate in relevant international organizations and initiatives and can enter into relevant bilateral agreements. Multilateral agreements to which the People's Republic of China is a party may also be applied to Hong Kong.

The Mutual Legal Assistance in Criminal Matters Ordinance provides a purpose-built framework to provide mutual legal assistance, including asset recovery. The legal framework is reinforced by a proactive Central Authority: the Mutual Legal Assistance Unit, International Law Division of the Department of Justice.

Thus, the necessary legal and operational framework exists in Hong Kong for the processing of requests in asset recovery cases. Foreign jurisdictions are encouraged to work with the relevant authorities in Hong Kong on a case by case basis to achieve desired results. Jurisdictions which do not have existing bilateral agreements for mutual legal assistance in criminal matters with Hong Kong are encouraged to enter negotiations for such agreements³³.

May 2013



Figure 1: DLO(IL) attends Conference on International Judicial Cooperation in Macao (English only)

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¹ Definition of “international”, Collins English Dictionary.

² For example, prior to reversion over 160 UK extradition arrangements applied to Hong Kong.

³ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Beijing, 19 December 1984.

⁴ Article 31 provides: “The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in light of specific conditions”.

⁵ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by Order No. 26 of the President of the People's Republic of China on 4 April 1990, effective as of 1 July 1997.

⁶ Article 13 and all subsequent references to articles of the Basic Law may be found in the Basic Law (<http://www.legislation.gov.hk>).

- 7 Constitutional challenges to the validity of arrangements for international agreements between Hong Kong, China (a non-sovereign entity) and other sovereign states have been mounted in the appellate courts in both Australia and the United States of America in the extradition context post 1997 reversion : Attorney-General (Cth) v Tse Chu-Fai (1998) 193 CLR 128; United States v Cheung 213 F.3d 82. For a discussion of the issues raised, see : “Judicial Independence: Attorney General (Cth) v Tse Chu-Fai”, Australian Law Journal, Volume 74 page 707, October 2000. In both jurisdictions, the challenges were ultimately unsuccessful.
- 8 In February 2013 the Spanish Constitutional Court ordered the release of a fugitive wanted for prosecution in Hong Kong SAR for embezzlement of client funds. A request was made by Hong Kong to Spain for his surrender under the United Nations Convention Against Corruption. Although the Constitutional Court was satisfied that Hong Kong SAR was competent to make the request under the authorisation of the CPG, it was not satisfied on the facts of the case that there was sufficient evidence of CPG authorisation before the lower courts when the extradition order was made : Government of the Hong Kong SAR v Ricardo Dias-Azedo Gabriel Case No. 4759/2011, Constitutional Court 2012/232.
- 9 A full list of all multilateral treaties applicable to Hong Kong, China may be found on the government website (<http://www.legislation.gov.hk/choice.htm#mf>).
- 10 A full list of all bilateral Agreements between Hong Kong, China and other parties may be found on the government website (<http://www.legislation.gov.hk/choice.htm#bf>).
- 11 The Ordinance may be found on the government website(<http://www.legislation.gov.hk>).
- 12 Section 10, MLAO.
- 13 Section 12, MLAO.
- 14 Section 15, MLAO.
- 15 Section 23, MLAO.
- 16 Section 27, MLAO.
- 17 Section 31, MLAO.
- 18 Section 2, MLAO.
- 19 Section 2, MLAO.
- 20 Section 2, MLAO.
- 21 Sections 27–28 and Schedule 2, MLAO.
- 22 Section 27 and Schedule 2, MLAO.
- 23 Section 30(1), MLAO.
- 24 Section 30(2)&(3), MLAO.
- 25 Section 29(1), MLAO.
- 26 Section 29(2), MLAO.
- 27 The Secretary for Justice, who heads the Department of Justice, is named as the Central Authority in all of Hong Kong’s bilateral agreements for mutual legal assistance in criminal matters. The Mutual Legal Assistance Unit of the International Law Division has operational responsibility within the Department to act as Central Authority.
- 28 The authorities in Hong Kong appreciate that in some cases it will be a requirement of the requesting jurisdiction to submit its formal request through the consular/diplomatic route. In such cases, the request should be sent through the consular representative of the requesting jurisdiction in Hong Kong to the Mutual Legal Assistance Unit.
- 29 Section 10(7) of Schedule 2, MLAO.
- 30 See section 2 MLAO for relevant definitions.
- 31 See section 4 MLAO.
- 32 The Mutual Legal Assistance in Criminal Matters (Corruption) Order and the Mutual Legal Assistance in Criminal Matters (Transnational Organized Crime) Order, MLAO page W1 and X1 respectively.
- 33 An approach to discuss the possibility of negotiations may be made in the first instance to Law Officer, International Law Division or to Deputy Law Officer(MLA), Department of Justice.