

MUTUAL LEGAL ASSISTANCE AND RECOVERY OF PROCEEDS OF CORRUPTION IN THAILAND

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I. INTRODUCTION

The world in the 21st century is the world of globalization. Increasing various transportation infrastructures makes easy ways to do business transnationally. However, it also makes easier ways for criminals to move their wealth across borders. It is difficult for law enforcement agencies to find proceeds of crime because the proceeds will often be out of the agency's jurisdiction. Therefore, international cooperation is needed in order to fight against these modern crimes, including corruption. The objective of this work is to prevent the criminals from making a profit from their corruption.¹

II. STEPS OF RECOVERING AND RETURNING PROCEEDS OF CORRUPTION²

1. Tracing and identifying proceeds of crime — exchanging information among cross-border authorities is needed to identify the trail of the asset or money. Useful information may be bank records or witness statements.

2. Freezing or seizing — when the asset is located, it needs to be preserved for possible forfeiture. A restraining or freezing order of law enforcement or judicial authorities may be necessary, subject to the laws of each domestic jurisdiction.

3. Judicial processing for making confiscation orders.

4. After confiscation, the asset may be returned to the victim or requesting State.

The tool which is normally used within the asset recovery process when it touches upon the international characters is known as mutual legal assistance (MLA). But the domestication of the request from state to state is needed under the domestic law concerned. The matter of how to enforce MLA requests in Thailand will be talked about below.

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¹ Pereira, Pedro Gomes, "Mutual Legal Assistance and Asset Recovery," The Sixth Regional Seminar on Good Governance for Southeast Asian Countries, Tokyo: UNAFEI, 2013, p. 28-29

² ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases, Jakarta: the ASEAN Secretariat, 2010, p. 92-97.

III. INTERNATIONAL COOPERATION IN THAILAND

There are two main channels of international cooperation:

1. Informal Channels

Informal channels facilitate the provision of informal assistance from one law enforcement agency to another. Assistance is conducted bilaterally agency to agency, through the Interpol cooperation mechanism, and networks among anti-corruption agencies. Most of this channel is for obtaining information from foreign agencies to collect preliminary data, providing public records, such as company documents, locating persons, etc. It is much faster than using formal channels because requests and responses are sent directly.

Under the Counter Corruption Act (No.3) B.E. 2558 (2015), the National Anti-Corruption Commission of Thailand (NACC) has power to provide informal assistance to any foreign authorities in the field of fighting against corruption.³ Therefore, in July 2015, NACC established the Thailand Anti-Corruption Coordination Center (TACC) which acts as the Stolen Asset Recovery (StAR) and INTERPOL Global Focal Point on Asset Recovery and as the International Center for Asset Recovery (ICAR), in compliance with a Memorandum of Understanding between the Basel Institute on Governance and the NACC.

2. Formal Channels (MLA)

Under the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992) (MLA Act), Thailand can provide both on treaty-based and non-treaty-based Mutual Legal Assistance (MLA) to foreign countries. Assistance may be granted even if no treaty exists between Thailand and the requesting state, provided that such state commits to assist Thailand in a reciprocal manner upon the request. In this case, the request should be submitted through diplomatic channels.

However, if the request for assistance was sent from the State parties of Thailand's bilateral or multilateral treaty, commitment of reciprocity and submission through diplomatic channels will be waived. Moreover, the request shall be made directly to the Attorney General, as the Central Authority of Mutual Legal Assistance as prescribed by the law.

Thailand has bilateral MLA treaties with 14 countries. In addition, Thailand ratified the United Nations Convention against Corruption in 2011 and ratified the Treaty on Mutual Legal Assistance in Criminal Matters among liked-minded ASEAN Member Countries (ASEAN MLAT) in 2012.

IV. TYPES OF ASSISTANCE UNDER THE MLA ACT

In order to recover proceeds of crimes, some kinds of assistance provided by the MLA Act, 1992 can be useful:

³ Article 19 (14/1) of the Counter Corruption Act (No.3) B.E. 2558 (2015).

1. Identifying or tracing proceeds, including taking statements of persons or gathering evidence located in Thailand⁴ or providing documents or information in the possession of any State agency⁵ or located person⁶.

2. Asset forfeiture by freezing, or seizing, and, finally confiscating proceeds of crime.⁷ However, the assistance will be provided under the following conditions:

- Assistance requested should be conviction based;
- Assets should be related to the crime;
- The freezing, seizing or confiscation order from the court is needed⁸;
- Asset sharing is not regulated in the MLA Act 1992.

To correct these challenges, the Office of the Attorney General and the Ministry of Justice propose to revise the MLA Act. Under the new law, a non-conviction-based forfeiture measure and asset sharing could be implemented. However, the draft law is still under the parliament's consideration.

V. ASSET RECOVERY CASE

A. Facts of the Case

In 1992, a talented financial investment expert called "Mr. R" started a relationship with Mr. K., a CEO of a famous commercial bank in Thailand. Firstly, Mr. R was Mr. K's private financial advisor and, later on, Mr. K appointed Mr. R to be his bank's advisor in 1995. At that time, Mr. R recommended the bank to grow in a new business market by giving a loan to investors who want to take over weak companies. After restructuring and the business could be run normally, the investors would sell the company and the loan would be paid off in full to the bank. The bank expected to earn a lot of fees from this business.

Mr. R established 60 small companies by nominating his driver to be the fake owner. These companies were alleged to acquire other business. Actually, they did not do any business and their assets were too low to be a guarantee of the loan. He requested Mr. K to approve massive loans to his "paper companies." Mr. K gave him a loan directly without doing financial scrutiny. After that Mr. R siphoned the funds, around 300 million dollars, into his various overseas accounts, mostly in Switzerland. He also gave cheap loans to various politicians and public officials in several countries.

⁴ Article 15 of the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992).

⁵ Article 18 of the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992).

⁶ Article 30 of the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992).

⁷ Article 32 of the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992).

⁸ Article 33 of the Act on Mutual Legal Assistance in Criminal Matters, B.E. 2535 (1992).

The bank collapsed in 1996 and the central bank of Thailand took it over. Mr. R fled to Prague, Zurich, and resided in Canada. He never came back to Thailand.

B. The Case

Thai authorities investigated the case and found that Mr. R, Mr. K and others embezzled 2.2 billion dollars which was a criminal offence under the Stock Exchange Commission Act. Thai authorities requested Canada to extradite him. Mr. R fought against the extradition for 13 years. Finally, the Canadian court decided to extradite him back to Thailand in 2009. The court found Mr. R guilty and sentenced him to 10 years' imprisonment and a fine of 41 million dollars.

C. Recovery of Assets

The central bank of Thailand and office of the Attorney General followed Mr. R money's trail to Guernsey Island (near the United Kingdom) and froze Mr. R's land which was valued around 6.4 million dollars. They also found some assets in the United Kingdom valued at around 4 million dollars and they froze them, too. The assets in Switzerland were valued at around 54 million dollars, were frozen and, later on, the central bank sued Mr. R and won the civil case. After that, they executed the judgement and the money was returned to Thailand to cure the damages that Mr. R had caused.