

INTERNATIONAL RECOVERY OF ILL-GOTTEN ASSETS

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I. PROCESSING REQUESTS FOR INTERNATIONAL RECOVERY OF ILL-GOTTEN ASSETS IN HONG KONG, CHINA (INCLUDING RESTRAINT ORDERS, CONFISCATION AND RECOVERY OF ASSETS)

A. The Legal Framework

On 1 July 1997 the People's Republic of China resumed the exercise of sovereignty over Hong Kong and many of the international arrangements previously applicable to Hong Kong under British rule fell away. At the same time, the Basic Law of the Hong Kong Special Administrative Region ("HKSAR") of the People's Republic of China ("PRC") became part of Hong Kong law. Under the principle of "one country, two systems", the Basic Law prescribes the system to be practised in the HKSAR under which the Government of the HKSAR is given a high degree of autonomy.

In the area of international co-operation in criminal matters, Article 96 of the Basic Law provides that with the assistance or authorization of the Central People's Government, the Government of the HKSAR may make appropriate arrangements with foreign states for reciprocal juridical assistance. Under Article 153 of the Basic Law, international agreements to which the PRC is or becomes a party may be applied to the HKSAR and international agreements to which the PRC is not a party but are implemented in HKSAR may continue to be implemented in HKSAR.

According to Article 152 of the Basic Law, representatives of Government of the HKSAR may, using the name "Hong Kong, China", participate in international organizations and conferences not limited to states.

Under these principles, HKSAR negotiates with foreign states for bilateral agreements for co-operation in criminal matters, such as mutual legal assistance, and is made subject to relevant international agreements such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption. Hong Kong, China also participates as a member of certain international organizations and conferences using its own name, such as the Financial Action Task Force Against Money Laundering.

On the domestic front, HKSAR enacted legislation in 1997 to implement the new international arrangements for co-operation in criminal matters, including the Mutual Legal Assistance in Criminal Matters Ordinance, Cap. 525. This is an Ordinance to regulate the provision and obtaining of assistance in criminal matters between Hong Kong and places outside Hong Kong. It includes measures for the taking of evidence from witnesses (including by live TV link), search and seizure of things, production of material (such as bank records), service of documents, transfer of persons to give assistance in relation to criminal matters, and restraint and confiscation of proceeds of crime.

1. Mechanism for Restraint and Confiscation of Proceeds of Crime

Mechanisms provided under domestic legislation, such as the Organised and Serious Crimes Ordinance, Cap. 455, enable Hong Kong authorities to apply for restraint and confiscation measures during the course of their own criminal investigations or prosecutions in Hong Kong. This includes cases of money laundering against defendants in Hong Kong when the predicate offence may have occurred abroad. Local confiscation

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is generally conviction based, although some powers of forfeiture exist absent a conviction. For example, should an offender abscond, the court may confiscate his or her criminal assets. Confiscation is value-based, that is, an assessment of the value of the defendant's criminal gains, and may attach to any identified assets belonging to him or her or under his or her control.

However, international requests for restraint and confiscation of proceeds of crime based upon foreign investigations and prosecutions are processed under the Mutual Legal Assistance in Criminal Matters Ordinance. This Ordinance provides for a system of registration of external confiscation orders by the Hong Kong court provided certain threshold criteria are met. These are:

- At the time of registration the foreign order is in force and not subject to appeal;
- The person against whom or in relation to whose property the foreign order was made received notice of the proceedings in the foreign place in sufficient time to enable him or her to defend them;
- The Hong Kong court is of the opinion that enforcing the order in Hong Kong would not be contrary to the interests of justice.

This mechanism recognizes the principle that the proper forum for determination of the confiscation order on its merits is the court of the foreign place seeking enforcement and that Hong Kong courts should not relitigate the foreign order on its merits.

The mechanism is available whether the proceedings in the foreign jurisdiction giving rise to the confiscation or forfeiture order are criminal or civil in nature, so long as they are connected to a criminal matter. This means Hong Kong courts can give effect both to "in personam" and "in rem" confiscation or forfeiture orders, including orders made in the absence of a criminal conviction.

The Hong Kong court can also make a restraint order where an external confiscation order may be made in a proceeding which has been or is to be instituted in the foreign place, to restrain dealing in property against which the order may be eventually enforced. The restraint order, if made, normally remains in force until conclusion of the foreign proceedings and the registration of any external confiscation order.

In cases involving property which must be managed or sold to realize funds for payment into court, a receiver is to be appointed. All funds paid into court are held for five years pending a request from the government of the foreign place that any or all of the proceeds be repatriated. After that, the funds are paid into general revenue.

It is not a legal prerequisite that a bilateral mutual legal assistance agreement exist before assistance can be given under the Ordinance, provided the requesting party gives a reciprocity undertaking that it would in future provide similar assistance if requested by HKSAR. However, there must be a bilateral or multilateral arrangement in place under the Ordinance before any sharing of confiscated assets can take place.

2. Mechanism for Sharing

Under the Mutual Legal Assistance in Criminal Matters Ordinance, the Secretary for Justice may direct the court to pay to a foreign government such proportion of the realized funds held as specified in the direction. Payments may only be made to foreign governments that have bilateral agreements with the HKSAR for mutual legal assistance in criminal matters or are party to other multilateral agreements such as the United Nations Convention against Corruption which specifically provide for repatriation of assets.

HKSAR has adopted a policy on asset sharing and repatriation in such cases to take account of recent international initiatives in this area. Sharing of realized assets is considered in all cases net of actual expenses incurred, and the usual starting point is fifty-fifty sharing. However, each case will be considered on its own merits. For example, where there are identified victims of fraud in the foreign jurisdiction restitution will be addressed. In cases coming within Article 57 of the United Nations Convention against Corruption, the full amount may be repatriated.

B. The Operational Framework

The Mutual Legal Assistance Unit of the Department of Justice works with Hong Kong law enforcement to assist foreign jurisdictions in the tracing and restraint of proceeds of crime, as well as the registration of

external confiscation orders.

The Mutual Legal Assistance Unit acts as Hong Kong's Central Authority under international arrangements for co-operation in criminal matters and is staffed by qualified lawyers. The Unit acts not only as the Central Authority: it also executes the request by way of obtaining court orders and supervising law enforcement.

Hong Kong law enforcement agencies are Hong Kong Police, Hong Kong Customs and Excise Department, and the Independent Commission Against Corruption. Depending on the nature of the offending in any particular case, officers from one of these agencies will work with the Mutual Legal Assistance Unit to execute the foreign request for assistance.

In cases where not all assets may have been identified by the foreign jurisdiction, Hong Kong law enforcement may work with their foreign counterparts initially at the law enforcement level to trace and identify assets. The Joint Financial Intelligence Unit in Hong Kong is staffed by officers from Police and Customs and Excise Department, and this Unit may also provide assistance.

Once the formal request for assistance is finalized, it should be sent by the Central Authority of the requesting jurisdiction direct to the Mutual Legal Assistance Unit, Department of Justice HKSAR. There is no need to route the request through embassies in Beijing or consular representatives in Hong Kong. This only wastes time.

The request for restraint will be assigned to a lawyer in the Mutual Legal Assistance Unit who will consider its contents and reply to the requesting authority. If the request does not comply with minimum legal requirements, advice will be given. Once the request meets minimum legal requirements, it will be processed. In cases of restraint and registration of external confiscation orders, this will necessitate Secretary for Justice acting for the government of the requesting place to apply to Hong Kong courts for orders.

Restraint orders are usually applied for on an *ex parte* basis i.e. without notice to the defendants or other affected parties. The application will be supported by a detailed affidavit setting out all factual and legal circumstances of the cases. If the application is granted, the court will appoint a return date several months later by which time the defendants and other parties must be served notice of the proceedings and be given the opportunity to oppose the continuation of the restraint order in Hong Kong. At the return date, if there is no opposition, the court will usually order the restraint until further order i.e. until completion of the proceedings in the foreign jurisdiction and the making of any final confiscation order there. If the application is opposed, a full hearing will be held and the court will make its decision depending upon the arguments raised.

In cases where funds are held in bank accounts, the accounts will be frozen with interest continuing to accrue. In cases of other property such as apartments or shares, receivers may be appointed to manage the property. The costs of receivers will be paid from the property under management. The defendants may also apply to the court for release of funds for legal and living expenses, but only if the court is satisfied they have no other available funds or means worldwide.

If no final confiscation order is obtained in the requesting jurisdiction, the restraint order in Hong Kong will be discharged. On the other hand, if the requesting jurisdiction does obtain a final confiscation order in its own courts over proceeds of crime in Hong Kong, the foreign jurisdiction should make a request to the Mutual Legal Assistance Unit for registration of the order in the Hong Kong court. Again, counsel will act on the request if the minimum legal requirements are met and will apply to the court to register the order. The defendant and affected parties must be given notice of the registration and will have the opportunity to apply to have it set aside. If the registration is not set aside, it will be enforced. In case of funds held in banks, the funds will be paid into court. In case of other property, receivers may be appointed to realise the property and pay the realized funds, net of expenses, into court.

The Mutual Legal Assistance Unit will keep the foreign jurisdiction informed of progress at all times. Once all funds are paid into court, the requesting jurisdiction will be given an opportunity to apply for a

share of the realized funds. This process will be determined by Secretary for Justice in consultation with Hong Kong law enforcement and the authorities of the requesting jurisdiction on a case by case basis.

C. Minimum Legal Thresholds for Assistance

The Mutual Legal Assistance in Criminal Matters Ordinance contains minimum legal thresholds that must be met by the requesting place before assistance can be rendered.

The general thresholds common to all requests for mutual legal assistance, including restraint and confiscation procedures, comprise the following grounds of refusal:

- The granting of the request would impair the sovereignty, security or public order of the PRC or any part thereof;
- The request relates to an offence of a political character;
- The request relates to a purely military offence;
- The request was made for the purpose of punishing a person on account of race, religion, nationality or political opinions;
- The request gives rise to double jeopardy;
- The granting of the request would seriously impair the essential interests of Hong Kong;
- Dual criminality is not met.

In addition, specific conditions apply for registration of an external confiscation order. The offence to which the order relates must be punishable by imprisonment for not less than two years. The purpose of the order must be for recovering payments or others rewards received in connection with the offence, property derived or realized from such payments or rewards, or property used or intended to be used in connection with the offence. The order may also be for the purpose of depriving a person of a pecuniary advantage obtained in connection with the offence.

These conditions are broad and are easily met in most cases.

II. EFFECTIVE INTERNATIONAL CO-OPERATION (IN PARTICULAR, MUTUAL LEGAL ASSISTANCE) IN CASES OF RECOVERY OF ILL-GOTTEN ASSETS

A. Some of the Problems

Those practitioners who have worked in the area of mutual legal assistance know that serious obstacles can arise in achieving effective recovery of proceeds of crime located abroad. Despite public adherence by governments to full co-operation between States in the recovery of ill-gotten assets, many practitioners know 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 co-operation 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 in effective international asset recovery. International bodies such as the Financial Action Task Force Against Money Laundering (FATF) are currently working on reviews to strengthen their standards on international co-operation for asset recovery to encourage more effective implementation and outcomes in practice.

But serious problems persist.

1. 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.

More recently, jurisdictions have begun enacting 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 that 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. It is even better if the framework is supported by bilateral treaties between States for mutual legal assistance in criminal matters, specifically covering asset recovery. Without a suitable legal framework, nothing much is really possible when a request is received.

2. Inadequate Implementation of the Law

However, even if an appropriate legal framework is in place to make and process requests, serious problems remain in the effective implementation of these procedures in actual casework. Many jurisdictions now have laws including purpose-built laws for mutual legal assistance, but what good is the law if it is not effectively implemented?

Effective implementation depends upon sufficient provision of personnel and resources to deal with requests for international co-operation. 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. 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 overall legal and court 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.

3. North versus South

The old north/south divide between rich nations and under-developed nations 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 tend to receive or have proceeds of crime routed through their 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?

4. Common Law versus Civil Law

This is another divide than can cause problems – the different procedural requirements between common law and civil law legal systems. Common law jurisdictions find it relatively easy to communicate between themselves 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 by both 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 simply put, 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 cumbersome procedure of formal 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".

5. 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 1 - 4 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 co-operation 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

co-operation, overcome identified problems and reduce delay in individual cases.

The question remains: how?

B. 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 co-operation, 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.

1. Partnerships

Identify your 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 arises the channels of communication are already established and known.

Develop and maintain your network of contacts. This may be achieved by regular case consultations with your 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).

2. 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.

Don't stop talking to each other. This can be difficult, particularly if foreign language issues are involved. But keep working at it. If necessary, convene face-to-face meetings in important cases by travelling to the other jurisdiction to discuss.

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.

3. 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 needed.

4. 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 place an effective electronic case management system to track cases and their progress towards effective execution.

5. 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.

C. Asset Management and Retention - Who Gets the Money?

Finally, to deal with the question of what happens to the ill-gotten gains if and when recovered.

Many jurisdictions have in place a scheme to protect and manage proceeds of crime pending enforcement of a final confiscation order. The funds remain under restraint in the jurisdiction where they are located, and depending upon the nature of the asset under restraint, receivers are sometimes appointed to manage the property. If these are private sector receivers they may be paid from the assets under management.

Once the final confiscation order is enforced and all property realized, where do the funds go – to the jurisdiction in which they were seized, the jurisdiction requesting seizure, or are they shared? Bilateral or multilateral agreements may regulate such issues. Under the United Nations Convention against Corruption, in certain types of cases all funds must be repatriated to the victim State. Under the United Nations Convention against Transnational Organized Crime, restitution of victims of fraud is strongly encouraged.

If the funds or a portion of the funds are retained by the jurisdiction in which they were seized, they may be paid into general revenue. Some jurisdictions operate asset forfeiture funds into which recovered proceeds are paid. The funds are then used for to pay for domestic law enforcement initiatives and other

related purposes.

Whatever the case, proper asset sharing and repatriation of ill-gotten gains must be the cornerstone of a successful system. Law enforcement and criminal justice agencies will not usually be willing to expend considerable time and effort to pursue ill-gotten gains abroad if they know, even when successfully recovered, the ill-gotten gains will not be repatriated or at least shared.