

FORFEITING THE PROCEEDS OF CORRUPTION

A Seminar on Asset Forfeiture and Money Laundering for Member States of the Organization of American States

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International Co-Operation against Money Laundering and Assistance In The Forfeiture Of The Proceeds Of Corruption

Enforcement of Judgments In Practice

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PAPER FOR SEMINAR ON THE RECOVERY OF THE PROCEEDS OF CORRUPTION

PART ONE

1. INTERNATIONAL CO-OPERATION AGAINST MONEY LAUNDERING AND ASSISTANCE IN THE FORFEITURE OF THE PROCEEDS OF CORRUPTION

I speak to you from the Cayman Islands perspective which, although not unique, will certainly provide useful insights having regard to our particular experiences in international co-operation against money laundering, including some notable cases which involved official corruption.

Of all the predicate offences to money laundering, none can be more pernicious and devastating than official corruption. Once stimulated and indulged, the acquisitive instincts of corruption know no bounds. The world has witnessed the notorious cases in which tens, hundreds of millions and even billions of dollars have been mercilessly embezzled – in some cases the near equivalent of the GDP of some victim states. In these cases, international co-operation can be about more than law enforcement or the punishment of crime – important as that is – it can become a quest to restore the very livelihood of nations and the economic survival of their citizens.

In today's globalised economy, in which money can so easily move across international boundaries and legal systems, the crime of official corruption also gives urgency to the beatitude that teaches us to be our brothers' keepers.

Where the recovery of a nation's resources can depend upon urgent international co-operation, tardiness can itself become the enemy.

It is most especially in this context of its obligations to grant assistance in the fight against serious international crime, that the Cayman Islands is steadfast in its policy that bank secrecy and confidentiality must not be obstacles to the grant of assistance.

Accordingly, there are several avenues of assistance available from the Cayman Islands in respect of the investigation and prosecution of serious crimes, including official corruption. The existing legal

mechanisms are by no means comprehensive and so are soon to be enhanced by domestic legislation to give effect to the 2002 *U.N. Convention against Corruption* and the 1997 *OECD Convention*¹. To both of these Conventions, the United Kingdom, which is responsible for the international relations of the Cayman Islands, subscribes.

This will mean that all Convention States will be able to send requests for assistance pursuant to the Conventions directly to the Cayman Islands.

As to the present state of the law, because official corruption at the domestic level has long been criminalized in the Cayman Islands by the adoption there of United Kingdom legislation², a wide range of legal assistance can already be given in response to requests from any country in the world, based on principles of comity, reciprocity and dual criminality.

These existing measures for legal assistance include:

- ❖ **Letters Rogatory**: These can be acted upon where criminal proceedings are already instituted before the foreign Court which seeks the assistance.³ Requests go from Court to Court through the Diplomatic Channels based on Comity and so can be granted, even in the absence of a Treaty arrangement. Assistance by this means may include the seeking and obtaining of documentary or other form of evidence and the taking of testimony. In an exceptional case, a Judicial Letter of Request from Peru was acted upon to get orders of restraint upon certain bank accounts alleged to contain the proceeds of official corruption. This was achieved by invoking the powers given to the Cayman Grand Court under the *Proceeds of Criminal Conduct Law* (to be further discussed below). These proceeds of official corruption were frozen and repatriated to Peru pursuant to the request from that country in 2001 in the *Montesinos-Torres* matter; also to be more fully discussed below. Assistance is also available in aid of civil cases pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, 18 March 1970.

- ❖ **The Confidential Relationships (Preservation) Law (“the CRPL”)**: This is sometimes referred to as the “Secrecy Law” – which is something of a misnomer because while the CRPL criminalizes the unauthorized disclosure of confidential

information of the kind which professionals would be obliged to protect; it also legislates gateways through which information may be obtained by the local police on behalf of the police of any other country where information is needed for the investigation or prosecution of serious crime.⁴

Such requests are fairly frequently and routinely received through **Interpol**. The CRPL also provides that any one who is required to give into evidence information which is defined as confidential under the Law, may apply to the Court for directions allowing him to do so.⁵

So, for instance, if a Cayman professional were to be subpoenaed by the Court of a foreign country to give evidence there in criminal proceedings, the professional may apply for directions whether or not to do so and if so, on what, if any, conditions.⁶

The Law provides the Cayman Court with the widest discretion in such cases, requiring only that the giving of the evidence be before a Court or tribunal and that it be shown to be in the “interests of justice”. Those interests have been declared by the Courts to include the enforcement of the criminal laws of any country of the world.⁷

❖ **The Proceeds of Criminal Conduct Law (“The PCCL”)**.

This is the law that criminalizes the laundering of the proceeds of crime (apart from the proceeds of drug trafficking which are dealt with under a separate statutory scheme)⁸.

The PCCL also enables the restraint or freezing of the proceeds of crime, the disclosure of information about them and ultimately for their confiscation or forfeiture.

The Financial Reporting Authority (*CAYFIN*) a member of the **Egmont Group**⁹, is established under the PCCL. The *CAYFIN* is enabled, with the consent of the Attorney General, to make onward disclosure of reports of suspicious activities to its overseas counter-part agencies of other countries which are listed in a Schedule to the PCCL of which there are 30 at present¹⁰ (ie: other member states of the Egmont Group).

By Section 28(1) – persons disclosing confidential information to the *CAYFIN* are given immunity from prosecution under the CR(P)L and from civil suit.¹¹

When in receipt of information pointing to the laundering of the proceeds of crime or when requested on reasonable grounds to do so by an overseas counterpart agency, the *CAYFIN* is allowed by the PCCL¹² to apply to the Court for an order restraining the proceeds pending investigation within the Islands or pending the institution of proceedings in the designated foreign country¹³ which may lead to the confiscation and forfeiture of those proceeds.¹⁴

This is a mechanism that allows also for informal requests (in response to which information can be shared leading to a formal request).

We will come to discuss the measures of restraint, forfeiture and confiscation as they relate to the enforcement of judgments in practice in more detail on this afternoon's panel.

❖ **The Criminal Justice (International Co-operation) Law 2003.**

As already mentioned, this Law was originally passed as the Misuse of Drugs (International Co-operation) Law to give legal effect within the Islands to the U.N. Convention Against Illicit Traffic of Narcotic Drugs and Psychotropic Substances (“the 1988 Vienna Convention”). It has since been re-enacted so as to provide the similar measures in respect of the investigation, prosecution and confiscation of the proceeds of all serious crimes. Thus, international assistance can be given to all member states of the 1988 Vienna Convention, not only in respect of drug trafficking but in respect of all serious crimes, including official corruption and other types of transnational crime.

Under this Law, the Attorney General is the Central Authority and is authorized to seek orders of the Court where necessary to give effect to requests for assistance from any member state listed in the Schedule to the Law.

❖ **The Mutual Legal Assistance Treaty (MLAT) with the United States of America.**

This MLAT, agreed between the parties as long ago as 1986, was one of the very first in the world.

Since its implementation in 1990, the United States/Cayman MLAT has proven to be highly effective in practice. More than 300 requests and supplemental requests have been granted and processed, many involving not only the provision of evidence, but also the restraint and forfeiture of the proceeds of crime; as well as the repatriation of assets to the United States for restitution to victims of crime. Significant sums of money have also been confiscated outright by both Governments but means of assistance given under the MLAT and shared by means of an asset sharing agreement.

Later we will come to examine some of the various types of orders used to achieve these results.

❖ **Extradition**

To the extent that a country has an extradition arrangement with the United Kingdom, it will likely also have that arrangement with the Cayman Islands. The long standing arrangements within the Commonwealth of Nations also apply the Cayman Islands. Within extradition arrangements there are certain limited provisions for the repatriation of assets.

❖ **Conclusions**

The foregoing outlines the different primary measures by which international co-operation and assistance against all serious crimes, including that of official corruption, can be obtained from the Cayman Islands.

They demonstrate that Cayman Islands law is in substantive compliance with present international norms for the interdiction of official corruption and for the recovery of the proceeds. However, the Laws need to be modernized and bolstered in order to give effect to the very comprehensive requirements of the U.N. and OECD Conventions, which largely encompass the same objectives as the Inter-American Convention. For instance, the penalties, what are at present a maximum of three years imprisonment under Cayman law, need to be increased. Further for instance, is the need specifically to legislate to criminalise the bribery of foreign officials; for the criminal liability of corporations (non-natural persons) involved in official corruption and for the criminalization of the fraudulent trading in influence (Article 18 of the U.N. Convention). Consideration must also be given to the requirements of Article 57 for the Return and Disposal of the Proceeds of Official

Corruption and to the G8 Principles which give rise to the sensitive but opposing issues of sovereignty over claimed assets and the conditionality of transparency over their return and disposition.

These matters, as well as a statutory scheme dedicated to the freezing and confiscation of the proceeds of official corruption,(hopefully from the writer's point of view to include in rem process) are expected soon to be addressed in the legislation which will give effect to the Conventions.

In the meantime, there are however, and as part two of this paper demonstrates, already in practice several different means by which the proceeds of corruption can be recovered.

PART TWO

2. ENFORCEMENT OF JUDGMENTS IN PRACTICE

Time is always of the essence of an international request for the restraint or forfeiture of the proceeds of crime. It is crucial of course, that one should be able to respond as soon as possible and decisively to a request for the recovery of criminal proceeds. In the age of electronic transfer in which we live, the slightest delay or hint to the criminal can result in the flight of the proceeds.

The Cayman Islands experience has shown that a willingness to cooperate and to innovate in appropriate circumstances to meet the justice of the case, can secure a just outcome, provided only that the requesting state can substantiate its claim.

This will of course involve, in the case of a formal request, a full description of the circumstances of the crime, of the law(s) under which it is indicted (to allow for an assessment whether the conduct would be criminal if committed within the Cayman Islands) and the reasons for believing that there is a connection with the Cayman Islands (eg: that there is relevant information to be obtained or assets to be restrained and ultimately confiscated).

There are as yet no provisions in the Laws for temporary or provisional restraint orders and this is another matter that will need to be addressed to give full effect to the anti- Corruption Conventions. At present an order of restraint will only be made where it is shown that there are already proceedings instituted which will lead to an outright confiscation order or that such proceedings will be instituted within 21 days of the restraint being obtained.

As some examples to be discussed will illustrate, there are exceptions for instance where the Cayman authorities out of concern that the local anti-money laundering laws are being violated, commence their own proceedings (even if based on information obtained from a foreign request), obtain a restraint order and later get its discharge to allow assets to be repatriated. Or as other cases will show, where a foreign Government starts its own civil action in the Cayman Islands and gets a restraint order indefinitely until the case is finalized.

Where the request is for the enforcement of of a foriegn forfeiture order, ther will need to be an affidavit confirming that it is a final order, in the sense that no further steps need to be taken in the requesting state to make it conclusive.

The following examples will hopefully be illustrative of the principles and mechanics of enforcement in practice:

In the matter of Re Codelco an early warning to the bank putting it on notice that it may hold accounts which contained the proceeds of official corruption visited on a large scale upon the State-owned copper producing enterprise of the State of Chile, caused the bank voluntarily to freeze the accounts. In responding as it did, the bank's primary early concern was to avoid its own civil liability as a constructive trustee¹⁵; but this allowed the Chilean Government time to get discovery orders against the bank for disclosure of information about the accounts and ultimately to freeze the accounts and recover the proceeds¹⁶. This resulted also in information being disclosed for use in proceedings in other jurisdictions to recover other assets and by the **U.S. Commodity Futures Trading Commission** in proceedings taken against some of the co-conspirators, employees of a large futures brokerage firm and who were regulated by the **CFTC**.

Once a judgment is obtained against the perpetrator, there are a number of ways in which it might be enforced within the Cayman Islands, depending, among other things, on the nature of the action which was taken leading to the judgment.

In certain circumstances a judgment in rem against the funds or assets to be recovered, can also be enforced.

Some actual cases will illustrate the law and procedure, including that related to in rem judgments.

In the **Codelco** matter mentioned earlier, the plaintiff was a Chilean state-owned copper mining, refining and selling company, which traded in futures. D, the head of its futures trading department was investigated for improper trading activities. During the investigation, it was discovered that he had received very large sums of money by way of bribes in respect of trading which he had carried on contrary to Codelco's interest and involving employees of two of the world's largest metals brokerage firms. He had accepted bribes in some millions of dollars for having entered Codelco into metals futures contracts which were very favourable to the co-conspirators but highly unfavourable to Codelco.

When prosecuted in Chile, D was convicted of fraud, imprisoned and ordered to pay damages to Codelco.

Codelco brought proceedings in a number of jurisdictions including the Cayman Islands, to recover the damages owed to it – some USD 180 million.

In the Cayman proceedings, it sought and succeeded in obtaining a declaration that moneys frozen in bank accounts within the Cayman Islands (as the result of the proceedings described earlier) and which were connected to D, were actually held by D on trust for it. Under Cayman law, D could not be permitted to profit from his wrongdoing, by receiving bribes or other unlawful payments. In Equity, D had not only immediately become a debtor to Codelco (his employer to whom he owed a fiduciary duty) for the sums received, but also a constructive trustee of the unlawful payments or any property acquired with them. D was therefore liable to account to Codelco for all sums received.¹⁷

A different approach was taken, but with an equally successful outcome, by the **Kuwaiti Investment Authority** (“the K.I.A.”) in its worldwide quest to recover a judgment worth USD 800 million from its former director. The director, a Sheik, a member of the Royal Family, had been put in charge of the K.I.A. established circa 1990, with the mission of diversifying Kuwaiti investments under the looming threat of Iraqi invasion at the time. In gross breach of his duty of faith to his country and people, The Sheik set about, with the assistance of others, to defraud the K.I.A.

Some of the hundreds of millions defrauded made its way into trusts in the Channel Islands, the Bahamas, and the Cayman Islands and into properties in England.

Early restraint orders were obtained freezing the trust assets in Cayman. Orders were also made requiring early disclosure of information about them.

Eventually the K.I.A. succeeded in its main action brought in England (the K.I.A. was based in London and the fraud primarily committed there). The judgment was obtained in the amount of USD 800 million and the K.I.A. sought its enforcement. It elected to seek early recourse in the Bahamas where the Sheik is domiciled and there obtained an order of the Bahamian Court adjudging him to be a bankrupt on the basis that the judgment liability of USD 800 million exceeded his known assets.

The K.I.A. next sought and obtained orders from the Grand Court of the Cayman Islands in recognition and enforcement of the Bahamian bankruptcy judgment.¹⁸ Trusts which had been maintained by him in the Cayman Islands were made to surrender their assets – more than \$30 million – in partial satisfaction of the English judgment.

*In Canadian Arab Financial Corporation (trading as Kilderkin Investments Grand Cayman) and others v Player*¹⁹, the plaintiffs were

trust companies incorporated in Ontario who had been the victims of a series of speculative property deals. They had been persuaded by the defendants to finance these deals. The plaintiffs instituted proceedings in the Supreme Court of Ontario to recover their investment when it appeared that they had become illusory. A receiver and manager was appointed by the Ontario Court over one of the defendant companies which had apparently made substantial deposits in banks in the Cayman Islands.

The plaintiff subsequently applied to the Cayman Court for the recognition and enforcement in the Cayman Islands of the appointment of the Receiver and this was granted thereby enabling the Receiver to recover the monies which had been placed in the Cayman Islands banks.

As a further illustration of the manner in which the action to be taken can depend upon the nature of the judgment to be enforced, a recent case involving ships registered in the **Cayman Islands' Registry of Ships** can be instructive.

These were ships registered in the names of companies which were in turn owned or controlled by persons alleged to be implicated in the largest fraud in Turkish banking history. In its effort to recover the assets of the bank, the Turkish Government brought an action in the Cayman Islands to prevent any transactions involving the ships being recorded on the Registry – in effect to restrain any dealings whatsoever with the ships; notwithstanding that the ships have been at all material times, in Turkish territorial waters. The allegations were that the proceeds of the fraud were used, among other things, to fund the purchase of the ships.

Orders, temporarily restraining all dealings in the Register were made in favour of the Turkish Government Banking authorities and further orders were eventually made allowing the ships to be de-registered to enable the Banking authorities to sell the ships by exercise of their lien over them in Turkey.²⁰

The ***Montesinos-Torres*** matter, mentioned earlier, was yet another example of the importance of a legal system which is flexible and amenable to inventive ways of recovering the proceeds of crime.

Effective results were achieved because of the willingness on the part of the Cayman authorities, to take recourse to restrain the money itself in rem out of concern that the local laws were also being violated, instead of awaiting a judgment in personam which may never have been forthcoming because of the fugitive status of the perpetrator and which

would have to be also enforced to recover the proceeds which would have no doubt taken flight without the restraint.

Thus, what began simply as a letter of request to “lift the bank, financial and stock market secrecy procedures, as well as to execute a preventive attachment in the form of a restraining order” on all and any bank accounts held in Grand Cayman in the name of Vladimiro Montesinos-Torres or in the name of several other related parties; ended in the repatriation of some \$44 million dollars to Peru, without a trial between the parties having to take place.

This happened because in urgent response to the Judicial Request from Peru, a restraint order was obtained from the Cayman Court, freezing the bank accounts which could be identified. This afforded the Peruvian Government the time it needed to prepare and present its case for the ultimate declaration of its ownership over those accounts as containing the proceeds of the crime.

Montesinos-Torres, a member of the Directorate of the Peruvian National Intelligence Service (SIN) was alleged to have carried out acts “contrary to his functional duties in exchange for high economic benefits”. He was a fugitive at the time of the request, thereby rendering to be unlikely, the prospect of a conviction and a civil trial to recover the proceeds, based on his proven guilt. However, because the accounts had been frozen and would likely have remained so indefinitely while he was at large, others, including his wife, whose names were linked to the accounts; agreed to the repatriation of the funds to Peru.

In effect, what the Peruvian Government sought and obtained, was an order enforcing the Preventive Seizure Warrant which had been issued by the Peruvian Court in the same matter.

There have been proceedings before the Courts of the Cayman Islands which have resulted in orders which directly enforced warrants in rem issued by the United States Courts against the proceeds of drug trafficking. These were proceedings taken in furtherance of requests from the United States under the MLAT with that country.

- In the matter of *Cruz Londono* the MLAT request originally sought the restraint of Cayman Islands bank accounts in the name of that member of an infamous Columbian cartel on the basis that there were intended to be criminal proceedings instituted against him for drug trafficking in which a confiscation order over the proceeds (some potentially held in the bank accounts) was likely

to be made. In the event, no criminal proceedings were instituted against him since he was believed to be in Columbia, which had no extradition arrangement with the United States. In May 1994, the U.S. Government obtained instead an external confiscation order from the New York court, in which the defendant was named in rem as being “all funds on deposit in any accounts maintained by persons known to be linked to L or in his name”. Funds were stipulated as located in, among other places, London and Grand Cayman.

Pursuant to similar statutory regimes in both places,²¹ the English and Cayman Islands courts made orders restraining the respective accounts and ultimately enforcing the in rem order of the New York court by the forfeiture of the accounts.

- ***In re Londono*** was subsequently followed and applied in ***Re Leon and Four others*** and in subsequent cases to the same effect resulting in the forfeiture in rem of the proceeds of drug trafficking.

In the latter case, the persons involved were Columbian businessmen who had received US dollars illegally through the Columbian pesos black market currency exchange in circumstances which showed that the money also represented the proceeds of drug-trafficking operations in the United States and Europe.

Although the named persons were not themselves involved in the drug trafficking, the U.S. Department of Justice had obtained a warrant of arrest in rem against the proceeds in their accounts and the Cayman authorities were requested to “arrest, seize and restrain the defendants’ property” to prevent its dissipation pending criminal proceedings in the United States against certain named drug-traffickers. The property was described as “all funds in all foreign accounts representing proceeds of narcotic drugs and money laundering” and the relevant Cayman accounts and the drug money in each were listed.

The Cayman Court, in granting the restraint order reaffirmed the jurisdiction to enforce the in rem warrant.²²

Not all foreign requests for orders for the recovery of the alleged proceeds of crime and official corruption in particular, have been successful.

In *In the matter of Falcone*²³ a request from the French Government (and an earlier request from the Swiss Government) based on allegations against Mr. Falcone for having corruptly obtained arms contracts from the Angolan Government and for having paid bribes to Angolan officials, were refused.

One reason for the refusal was legal and jurisdictional: it was that there were no proceedings instituted in France against Mr. Falcone which could lead to his conviction and the Court could only grant a restrain order where such proceedings have been (or will be within 21 days) instituted and which could lead to a confiscation order.

It seems then, that unlike under the Misuse of Drugs regime, the Court here did not see the Proceeds of Criminal Conduct Law as enabling a restrain in rem and it is not clear whether or not that point was fully argued.

Given that decision the outcome in the **Montesinos** matter must all the more be regarded as exceptional and there is currently being prepared draft legislation which will clearly spell out the Court's jurisdiction to enforce foreign in rem warrants in all matters involving the proceeds of serious crime.

The other reason for the refusal of assistance in the *Falcone* matter and which involved the earlier letter of request of the Swiss Investigating Magistrate, seeking evidentiary assistance, was the failure to satisfy the requirements of the Evidence Order²⁴ to the effect that there must already be proceedings instituted.

CONCLUSIONS

While the due process of the law, especially that created to ensure a fair trial and to protect the interests of innocent third parties, must be observed; experience has shown that the same process can be manipulated to the advantage of the guilty.

It is therefore difficult to over-emphasize the importance of an urgent response to a request for assistance for the recovery of the proceeds of serious crime and of official corruption in particular. Equally, with the proceeds of drug trafficking, the funding of terrorist activities and large scale fraud, there is a strong case to be made for enabling the recovery of the

proceeds of corruption by means of in rem civil procedures which do not depend upon obtaining a criminal conviction.

ANNEX TO PART TWO

Specific further issues to note arising from

U.S./Cayman MLAT experience

1. Based on the relationship of good faith and credit which has developed over the years, early informal assistance has sometimes been given for the early provision of information about suspected proceeds of crime which led to a full formal request for assistance. This included requests for the freezing and, ultimately, the forfeiture of the proceeds. This kind of assistance can be given once the Central Authority is satisfied that the MLAT threshold requirements are satisfied and the disclosure can be made without breaching any other provision of Cayman law. Such a situation would most likely arise where a suspicious activity report had been filed with *CAYFIN* by a Cayman Service Provider and *CAYFIN* brings it to the attention of the Central Authority.
2. There must be a willingness to act at the earliest possible stages, including before the requesting State can fully set out its case for restraint and forfeiture, once the reasonable basis for suspicion is presented and once sufficient information is given to enable the subject account or other assets to be identified.

An example of this which was recently successfully concluded by forfeiture orders, arose from restraint orders put in place in 1999 based upon an informal letter to the Cayman Island Authorities from the U.S. Attorney for the Middle District of Florida. The defendants, having been successfully prosecuted on an indictment charging them with securities fraud and money laundering, the forfeiture order was enforced and the proceeds of the account returned to the victims: **In re: United States of America v Abramo et al** Case No. 99-215 Cr. T. 23A, Middle District of Florida. A similar outcome was achieved in the much more litigious matter of **In Re McCorkle**, another request from Florida: ***See 1998 CILR 224.***

3. It follows from some of the earlier cases discussed, (e.g. **In Re Codelco**) that it is often very helpful to put the bank or other

institution on notice, even before a formal request has arrived or proceedings instituted, of the allegation that they may be holding the proceeds of crime. The custodian will then often be advised to impose a voluntary freeze on the assets in order to avoid civil liability to the true beneficial owner or to avoid liability for money laundering.

Under Cayman Islands legislation, “tipping off” is also an offence and the U.S./Cayman MLAT is enforced by legislation which prohibits an assistor from informing a client that a request has been referred for assistance, once advised not to do so by the Central Authority.

This helps to ensure that the subject-matter is still present when a formal order for restraint is available or later when a judgment is obtained which can be enforced.

4. Costs implication: recent jurisprudence in the Cayman Islands indicates that the Courts will not make an order for costs against the Government where it has unsuccessfully brought proceedings on behalf of a foreign state to restrain and confiscate assets within the Cayman Islands: ***In the Matter of Falcone [2004-05] CILR Note 4 and In re Sandejford’s Courts’ Request (Norway) [2002] CILR Note 7.***

This is a welcome trend but one which is by no means universally followed and it may be advisable to discuss the costs implications of a request for restraint and secure the negotiation of funds with the requesting state before proceeding, especially at the early stages where civil or criminal proceedings are not yet concluded or commenced in the requesting state.

5. In a similar vein, it is prudent to remember that a defendant may well be entitled to access to the restrained assets for his living expenses and/or legal expenses. As one extra-ordinarily protracted request has shown, without a quick, decisive result being obtained in the Courts of the requesting state; the very assets alleged to be the proceeds of crime could become the war chest from which the criminal is able to fight his claim over the proceeds.
6. **Protocols:** It is advisable to develop a written protocol to be followed setting out the procedures for requests. This is useful both for the making of informal and formal requests.

The protocol will explain the circumstances under which an informal request can be made and acted upon. It will stipulate the matters to be set out in a request and will specify the procedure for instance, for the

taking of depositions under oath from witnesses. A template for requests is a useful tool to develop

Such a protocol has been developed between the Cayman Islands and U.S. Central Authorities around our shared experiences in dealing with MLAT requests and has proven to be beneficial in practice in eliminating confusion and in saving time, effort and costs.

7. Disposition: in keeping with the United Kingdom legislation on which it is based, the PCCL requires that when assets are ordered by the Courts to be forfeited, they are to be paid to the public revenues. This would of course, be inappropriate where the assets are the proceeds of official corruption and the judgment is one owed to a foreign State. Thus this as already noted, will be an issue to be addressed when the legislation to give effect to the anti-corruption Conventions is enacted.

In the past we have been able to overcome this difficulty in order to repatriate assets for the victims of large scale fraud in meeting our obligations under the MLAT with the United States. In such cases, we invite our U.S. colleagues to seek judgments as part of the plea bargaining or sentencing process of the fraudster, which require that the proceeds be repatriated for the victims. Our Court is then asked to make an order, not of outright forfeiture, but giving effect to the U.S. Court's judgment by directing the custodian (typically the bank) to pay over to the Cayman Court's Fund Office for onward payment to the U.S. Court. This is done on notice to the Cayman Islands Government which has acknowledged the moral obligation to retribute the victims of fraud where the assurance has been given by the United States Government that the funds will be applied in that way.

An alternative recourse also used in the past, involved obtaining restraint orders once the MLAT requirements were met and later the discontinuation of those proceedings in favour of allowing the victim to file its own civil recovery action in the Cayman Islands. This was done for instance where ArcherDanielMidlands, the giant United States food processor/ manufacturer, was the victim of an invoicing fraud carried out by one of its senior executives. He had set up companies in the Cayman Islands and used them to issue several millions of dollars of false invoices to ADM for purchases which he never made on its behalf. That money which was initially restrained through an MLAT request because there were criminal investigations, was eventually returned when ADM's civil action succeeded.

¹ Full Title – “**The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Transactions.**”

² See Sections 88-91 of the **Penal Code** which respectively provide:

Whoever –

88. (a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly solicits, receives or obtains, or agrees or attempt to receive or retain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of the duties of his office; or
- (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, upon, or for any person employed in the public service, or to, upon, or for any other person, any property or benefit of any kind on account of such act or omission on the part of the person so employed.
- is guilty of an offence and liable to imprisonment for three years
89. Whoever being employed in the public service, takes or accepts from any person for the performance of his duty as such officer, any award beyond his proper pay and emoluments, or any promise of such reward is guilty of an offence and liable to imprisonment for three years.
90. Whoever being employed in the public service, receives any property or benefit of any kind for himself, on the understanding, express or implied, that he shall favour the person giving the property or conferring the benefit, or any one in whom that person is interested, in any transaction then pending or likely to take place, between the person giving the property or conferring the benefit, or any one in whom he is interested, and any person employed in the public service, is guilty of an offence and liable to imprisonment for six months.
91. Whoever being employed in the public service, and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character, and having acquired or holding, directly or indirectly, a private interest in such property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade or business in which he has such interest or with respect to the conduct of any person in relation thereto, is guilty of an offence and liable to imprisonment for one year.

³ See Section 5 of the **Evidence (Proceedings in Other Jurisdictions)(Cayman Islands) Order 1978.**

This Order-in-Council was promulgated primarily for the purpose of giving effect to the **Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters** and so evidence can be obtained under it also in aid of civil proceedings which may be instituted for the purpose of recovering the proceeds of crime. Instances of this are also discussed below.

⁴ Section 3(2)(b)(iii) which provides that:

“This Law has no application to the making, developing, or obtaining of confidential information

....

By or to

...

a constable of the rank of Inspector or above, specifically authorized by the Governor in that behalf, investigating an offence committed or alleged to have been committed outside the Islands which offence, if committed in the Islands, would be an offence against its laws;”

⁵ See Section 4.

⁶ These may include, if information about the affairs of innocent third parties is involved, a requirement that the identities of those third parties are protected, even while the information relevant to the crime is disclosed: See *In Re Ansbacher* 2001 CILR 214, in which it was confirmed that Cayman Islands public policy, as codified in the Law, permitted disclosure in the interests of criminal law enforcement and the administration of justice. This was in response to a request from the Irish High Court investigating irregularities in the banking systems of the Republic of Ireland including allegations of official corruption involving a former Prime Minister.

⁷ See *In Re Ansbacher* ibid pp 236-237.

⁸ The **Misuse of Drugs Law** and the **Misuse of Drug (International Co-operation) Law** (now reenacted as the **Criminal Justice (International Co-operation) Law 2003**, to allow international assistance to be given for the investigation, prosecution and confiscation of the proceeds of all serious crimes, not just drug trafficking). The Law also gives effect to the **United Nations Convention against Illicit Traffic in Narcotics Drugs and Psychotropic Substances 1988** (The Vienna Convention).

⁹ The World Organization of Financial Reporting Authorities – named after the Egmont – Arenberg Palace in Brussels where the first meeting of the Group was held in 1995.

¹⁰ This list is however expanded upon by cross-reference to those countries listed in the Schedule to the **Criminal Justice (International Co-operation) Law**, that is, all the countries which are signatories to the Vienna Convention – 152.

¹¹ Section 33 of the PCCL.

¹² Section 23 of the PCCL.

¹³ Listed in the Schedule.

¹⁴ Time limits are imposed so that if proceedings are not commenced within 21 days, the Court may discharge the order.

¹⁵ Under Cayman law, a bank put on notice that it holds the proceeds of a fraud, becomes liable as constructive trustee to account to the rightful owner for those proceeds. A public official who accepts corrupt payments in breach of his fiduciary duties is also deemed to hold those payments on behalf of the Government that employs him (See *In Re Codelco* at endnote 16 below).

¹⁶ *Deutsch-Südamerikanische Bank A.G. v Corporacion Nacional Del Cobre de Chile* 1996 CILR 1 and *In Re Codelco* 1999 CILR 42.

¹⁷ *Codelco v Interglobal Inc. et al* 2002 CILR 298.

¹⁸ *In the matter of Sh. Fahad Al Sabah* 2002 CILR 148 upheld on appeal to the Privy Council 2004-2005 CILR 373.

¹⁹ 1984 CILR 63.

²⁰ Grand Court Cause 478 of 2005 reported at TMSF V Wisteria, Utterton and others – 2008 CILR 231.

²¹ See also S.L. *In re (Restraint Order: External Confiscation Order)* [1996] QB 272; [1995] 4 All E.R. 159; *sub nom. Re Londono* [1995] 139 Sol. Jo. (L.B.) 166.

²² See *In the matter of Leon and Four others* 2000 CILR 336. Consideration is being given adopting legislation based on the U.K. Proceeds of Criminal Conduct Act 2002 to allow a broader basis for *in rem* proceedings and orders. It should be noted however, that the U.K. Act is considered not to allow for temporary restraint orders pending the enforcement of foreign *in rem* judgments, only for their immediate enforcement – a shortcoming which modern legislation should seek to avoid.

²³ 2003 CILR Note 30.

²⁴ See endnote 3 above.