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**Money-laundering:
Hong Kong's laws and International cooperation.**

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This paper considers some Hong Kong laws to combat money-laundering of the proceeds of crime and particularly outlines international assistance available under recent legislation. It is the author's contention that to combat money-laundering any criminal jurisdiction must have the capacity to offer as well as to obtain mutual legal assistance.

Money-laundering - an overview

"Money-laundering" is part of the criminal's effort to cover-up evidence of his offences by concealing the proceeds¹.

There are now a number of sophisticated analyses of the process but it generally involves 3 elements :

- (i) hiding the origin, identity and whereabouts of the funds, ("placement")
- (ii) re-investing them in ways that bring further gains, and
- (iii) moving or transforming those funds so that they are outside the range of, or unrecognisable to, enforcement authorities.("layering" and "integration")

These operations involve movement, disguise and legitimization - disguising the source or nature of the criminal benefit and then converting it into some safe or ostensibly legitimate form.

This technique is being applied to large money transactions in a great variety of criminal or unlawful contexts which range from concealing the profits of tax evasion , fraud, drug trafficking and organised crime to masking the fruits of corruption, arms sales, smuggling and embezzlement of government funds. In situations as varied as unlawful election funding, market manipulation and terrorism, where participants may be primarily concerned with anonymity, this process concentrates on the means to keep activities secret, the movement of monies may nevertheless be connected with common crime.

In a world where capital is moved at speed by electronic transfer the gargantuan proportions which recycling and re-employment of illegitimate monies now attains is well recognised.

My topic concerns effective means of combatting this menace in the field of serious crime. A few years ago this would have been expressed as depriving the wrongdoer of the benefits of his crime. That answer is no longer satisfactory. There is opinion among investigators that modern-day criminals engaged in this type of work accept a high level of write-offs. Their lucrative activities may be temporarily halted by intervention and seizures - only to be resumed again, presumably with greater care and refinement. To be effective the prime objective must remain to bring the criminal to justice wherever he is, that is to take him *and* his proceeds out of circulation. Furthermore effective steps need to be taken to deny the money-launderer use of legitimate services and to dismantle unlawful structures, wherever they are situated.

Hong Kong - Domestic provisions

Hong Kong has been described variously as villain and hero in this context. Most accounts of Asian money-laundering cite cases connected to Hong Kong and it has featured as a target jurisdiction in various international fora. It is not surprising that this strategically placed city with such sophisticated services, over 400 banks, numerous insurance houses and brokers and a highly developed non-bank money transfer system, should be favoured by the "laundrymen". But it would be quite untrue to suggest that this challenge has been met by inaction and cynicism on the part of the Hong Kong authorities.

William Gilmore in his book "Dirty Money" after dealing with the anti-money-laundering record of regional partners in the Financial Action Task Force says "Of these Hong Kong has the longest experience, has been the most innovative and effective, and the least conservative."ⁱⁱ He was writing in 1995 in light of two pieces of Hong Kong legislation which criminalised money-laundering and associated activities, respectively the Drug Trafficking (Recovery of Proceeds), and the Organised and Serious Crimes Ordinances.

Drugs Trafficking (Recovery of Proceeds) Ordinance DTRPO.

First in time was the Drugs Trafficking (Recovery of Proceeds) Ordinance. The Ordinance provides for the tracing, confiscation and recovery of the proceeds of drug trafficking and creates the money-laundering offence of dealing with such proceeds.

The legislation introduced two important weapons in the shape of production and restraint orders. The first gives authorised officers engaged in investigating drug trafficking the right to obtain orders for production of, or access to, relevant materialsⁱⁱⁱ. Primarily financial records are targeted. Section 20(9)(b) protects the record holder eg a bank, from any action brought by its customer for breach of the duty of confidentiality as a result of producing such information to investigators. If necessary officers may apply for a search warrant in relation to such material. Further it is an offence punishable by up to 3 years imprisonment for any person without reasonable excuse to disclose that such investigation is taking place.

Of considerable practical effect is the restraint order. Where a drug trafficking case is to be brought in Hong Kong application may be made to the Court of First Instance for a “freeze” order over assets representing alleged proceeds. These orders may cover all realisable property held by a specified person, whether the property is described in the order or not. This is a most effective procedure as the alleged trafficker’s entire property including real property, bank accounts, personal jewellery and possessions may be made subject to an order similar in many respects to civil proceedings known as a Mareva injunction in the British system. The initial application brought by a specialist prosecutor can be made *ex parte* in chambers. Once the funds are subject to the provisional domestic restraint order, arrangements can be made for an inter-partes hearing where objections can be heard and if appropriate funds necessary for reasonable living expenses and legal fees released. If the defendant/suspect is subsequently convicted of a drug trafficking offence, assets representing the benefit from his crime may be confiscated^{iv} and a receiver appointed to trace and get in that sum .

Money-laundering.

The Ordinance makes it an offence for any person to *deal* with property that he knows or has reasonable grounds to believe is the proceeds of drug trafficking^v. Dealing itself is defined in the widest terms to mean receiving, concealing, disguising, disposing of or converting property, or using it as security to borrow money, and includes bringing it into or removing it from Hong Kong ; the drug trafficking offence concerned may be carried out in Hong Kong or elsewhere and include an offence punished by a corresponding law. That foreign offence may itself be money-laundering. The offence of dealing currently attracts a penalty of a fine up to \$5 million or 14 years imprisonment. The legislation also introduces reporting requirements together with protections for those who believe their services are being used for questionable money or other property. The Ordinance requires any

person, including financial institutions, to report suspicious transactions to police or other authorised officers.^{vi} The legislation declares that disclosure to the authorities is not to be treated as a breach of contract or breach of any “enactment, rule of conduct or other provision.”^{vii}

The Organised and Serious Crimes Ordinance OSCO

The Organised and Serious Crimes Ordinance follows the scheme of the DTRPO in respect of the investigation of an extensive list of scheduled offences. Suffice it to say that most serious crime is included and the Ordinance has been especially employed to freeze proceeds of fraud and large-scale theft. The radical departure in regard to the money-laundering offence under this Ordinance is that it covers dealing with the proceeds of *any indictable offence*. Some indication of how wide implications go in the business world is that examples of indictable offences include tax evasion and creating false markets on the stock exchange.^{viii}

The Ordinance also has provision for enhanced powers to combat organised crime, which is defined to include scheduled offences connected with the activities of a triad society, or of 2 or more persons pursuing such offences in a manner that involves substantial planning and organisation.

At present a review of the two ordinances is being conducted in light of FATF recommendations to consider how their provisions may be strengthened.

The 2 Ordinances have spawned considerable case law in Hong Kong which demonstrate that their ‘draconian’ purpose is acknowledged and implemented by the local courts^{ix}. Their effectiveness can be seen in the fact that suspicious transaction reports grew from 1,798 in 1995 to 4,227 in 1997.

Up to January 1998 nearly \$169 million has been restrained pending DTRPO confiscation proceedings and over \$54 million for the OSCO equivalent.

In the same period nearly \$216 million was confiscated and paid to Hong Kong government under DTRPO, but only \$111,334 under OSCO.

One explanation for the disparity in respect of OSCO proceedings is that where there is an identifiable victim of crime (eg in a fraud case) the criminal *restraint order* may be discharged so as not to deplete the fund available to meet a civil judgment. Until the point at

which civil action takes over the criminal freeze order has nevertheless had the effect of protecting the assets from dissipation.

International Co-operation

The first phase of the international effort has been to ensure that domestic laws criminalise activities associated with 'money-laundering'. But *methods* to combat 'money-laundering' must be seen in a wider context. They involve the enforcement side, investment in training, resources and specialist measures .

At the initial stage, - the so-called 'placement' of funds, - criminals are constantly inventing new responses to escape detection. For instance the reporting conditions placed on financial institutions have been countered by drug traffickers using runners, already commonly called 'smurfs', to deposit sums smaller than the amount at which reports are triggered. An obvious counter-measure is police under-cover operations to mark currency notes handed over. The cat-and-mouse game continues developing new techniques and counters.

However at the secondary 'layering' and 'integration' stages the focus changes. The main task for prosecutors shifts to securing reliable data about the money trail capable of being later transformed into admissible evidence on the basis of which a relevant jurisdiction can take appropriate action. This information will often consist of documentation and financial records or of available testimony.

Since the evidence is often spread over a number of countries, laws must allow for effective cooperation between different jurisdictions. There are parallels to be drawn with the rationale behind "controlled delivery" of dangerous drugs through a number of jurisdictions on the grounds that joint action can provide more comprehensive and compelling evidence. Inherent in such co-operation is the prospect of reciprocal assistance should the need arise.

Formal assistance pre-February 1998

Formal assistance from Hong Kong in the investigation and prosecution of criminal matters, apart from regulatory co-operation, was until recently limited to extradition, the enforcement of orders for the confiscation of drug trafficking proceeds and the often cumbersome system of court to court letters of request.

Extradition.

Money-laundering is now a listed offence in all Hong Kong's agreements for the surrender of fugitive offenders; conduct of this nature will be extraditable if the offence in the requesting jurisdiction attracts a penalty of one year's imprisonment or more.

Confiscation of drugs assets

The DTRPO provides for the registration of the confiscation orders of 147 countries or territories currently party to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and designated under Schedule 1 of the relevant Order^x. They may request assistance from Hong Kong to^{xi},

- (i) enforce external confiscation orders made by courts in designated countries in respect of the proceeds of drug trafficking and
- (ii) restrain property in Hong Kong which may be the subject of an external confiscation order. Drug trafficking includes the laundering of its proceeds in Hong Kong or elsewhere.

Letters of request

This court to court procedure is widely available and obligatory under the 1970 Hague Convention on the Taking of Evidence Abroad, to which Hong Kong remains party. However it does involve somewhat bureaucratic procedures.

The limitations of the assistance available to foreign jurisdictions described above led Hong Kong authorities to study the provisions of the UK Criminal Justice (International Co-operation) Act 1990 as a model for their proposals.

The Mutual Legal Assistance Ordinance Cap.525. MLA

The MLA became fully operative^{xii} on 20 February 1998. This has greatly enhanced Hong Kong's capacity to assist foreign criminal law enforcement agencies in the investigation and prosecution of crime. It is also a powerful tool to combat money-laundering, especially where Hong Kong is or has been used as a conduit or hiding place for those monies.

The Ordinance covers 6 heads of assistance all relevant to the task of investigating and prosecuting such activities. They are

- (1) Taking of oral evidence.
- (2) Search and seizure of evidence where a serious external offence is involved.
- (3) Production of documents.
- (4) Transfer of persons to give assistance in respect of criminal matters.
- (5) Restraint of property and enforcement of confiscation orders.
- (6) Service of documents for the purposes of process in another jurisdiction.

Furthermore arrangements between the Hong Kong Special Administrative Region and other jurisdictions may provide for additional assistance.

Significant features of assistance under the Ordinance are that

- (1) It is based on government to government (rather than court to court) requests. In the case of Hong Kong , the responsibility is that of the Secretary for Justice and all requests are routed through the Mutual Legal Assistance unit in the Department of Justice. It is a governmental process. It cannot be initiated by private firms of lawyers or individuals as is the case with Letters of Request.
- (2) Provision is made for 'arrangements' [agreements involving binding obligations] between Hong Kong and another jurisdiction. At present agreements have been signed with UK, USA, Australia, France, New Zealand Switzerland, Philippines and Italy. But assistance is available in the absence of arrangements on a discretionary basis^{xiii} upon an undertaking of substantial reciprocity.

- (3) The Ordinance maintains *informal* assistance of the type routinely provided between enforcement agencies in the past. Additionally assistance available under other ordinances such as the Evidence Ordinance (court to court requests) and the DTRPO , briefly outlined above, continues.
- (4) Once the Secretary for Justice is satisfied the request is eligible evidence gathering is carried out under court summons which may impose a requirement of confidentiality.

Assistance under the Ordinance is subject to a number of limitations.

- (5) Private individuals cannot use the MLA Ordinance,^{xiv} either for their own purposes or to seek information to impede a request.
- (6) At present the Ordinance excludes the application of its provisions to the mainland jurisdictions of the People's Republic of China^{xv}.
- (7) It also does not extend to taking evidence about, and production or search and seizure of 'tax documents' as defined by the Ordinance^{xvi}

Taking of evidence^{xvii}

Whilst statutory provision for court to court letters of request requires that criminal proceedings are likely to be instituted, the new legislation allows requests for taking of evidence for the purpose of investigations. Thus an appropriate authority in a foreign country may send a request to the Secretary for Justice to obtain oral or documentary evidence from identified witnesses for use in an ongoing investigation or a criminal proceeding instituted before a court. The information sought must be shown to be of substantial value to an investigation. A witness cannot be compelled to give evidence or produce anything that he would not be compelled to give or produce in the requesting jurisdiction.

Representatives from the appropriate authority of the requesting jurisdiction may be present in court when the evidence is taken from witnesses.

Search and Seizure^{xviii}

Where evidence is located in Hong Kong which is relevant to the investigation or prosecution of an offence attracting a minimum two-year sentence (an external serious offence), the Secretary for Justice may nominate an authorised officer to apply to a magistrate for a search warrant.

It should be pointed out that the purpose of this provision is to make evidence available, not to secure recovery of stolen goods or criminal proceeds, as a condition may be imposed for its return.

Production of materials^{xix}

Hong Kong courts now have the power to order production of certain classes of documents, albeit that these 'classes' must be identified with sufficient particularity. This widens previous powers which required that the request was for specific items. Nevertheless the exercise cannot be used as a 'fishing expedition' to find out what things are in someone's possession or control.

Registration of an external confiscation order^{xx}

Where the criteria of the Ordinance are met, powers to enforce foreign confiscation orders covering the proceeds of a wider category of offences (an external serious offence) are now available. This expands pursuit of money-laundering into a wider context than drug trafficking. Restraint orders can also be obtained to protect funds from dissipation.

Transfer of persons^{xxi}

The law includes a number of measures to facilitate the transfer of persons to give assistance in respect of criminal matters abroad. A prisoner transferred to render assistance enjoys immunity in respect of any offences alleged to have been committed prior to transfer and to any civil action the subject-matter of which pre-dates his arrival. Furthermore statements he makes in relation to the criminal matter to which the request relates cannot render him liable to an offence other than perjury or contempt of court

Service of documents

Service of documents for the purposes of process in another jurisdiction is available. Failure to comply with the process concerned is not punishable in Hong Kong .

Experience so far

A dedicated MLA unit was set up within International Law Division of the Department of Justice in March 1998 and presently comprises a team of 12 experienced lawyers together with support staff. It has already received a large number of enquiries on which advice has been given and, where appropriate, processing of requests is under way. The majority of MLA requests so far received concern the tracing of funds connected with crime abroad and in the main focus on banking records and obtaining evidence from banking officials about the individuals and organisations involved. Some requests concern funds that have passed through Hong Kong and on into other jurisdictions. Where funds remain in Hong Kong restraint action may be considered.

In the course of handling these enquiries MLA counsel have often had recourse to relevant enforcement agencies in a position to give informal assistance. Conversely the information supplied from other enforcement bodies tracing funds into or through Hong Kong reveals local money-laundering offences distinct from the foreign crimes being investigated.

The process of assistance has thus numerous side-effects for co-operation, and in the detection of crime and patterns of behaviour as well as a growing understanding of other systems. The essential component for speedy and effective collaboration is the assurance and experience of substantial reciprocity.

Despite the fact that the procedure to present and implement a formal request is demanding, initial results are encouraging. The unit is learning to cope with issues such as language, diversity of legal concepts and the reluctance of authorities to comply with requirements different from their own. There are some great prizes within our grasp.

ⁱ A working definition of proceeds is to be found in the 1990 Council of Europe Convention on laundering, search, seizure and confiscation of the proceeds of crime. Art.1.

a. "proceeds" means any economic advantage from criminal offences. It may consist of any property as defined in sub.para. b.

b. "property" includes property of any description, whether corporeal or incorporeal, moveable or immoveable, and legal documents or instruments evidencing title to, or interest in such property.

ⁱⁱ Dirty money, The evolution of money-laundering counter-measures. At p.215

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ⁱⁱⁱ DTRPO section 20.

^{iv} In *Ko Chi-yuen*, CA 298/93 the assumptions about benefitting from drug trafficking and assessment of the value of proceeds in s.4 DTRPO were ruled proportionate to the danger posed to society in a challenge under the Bill of Rights Ordinance.

^v Section 25.

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- ^{vi} Section 25A.
- ^{vii} Section 25A limits the application of the well-known duty of confidentiality established in the case of *Tournier v. National Provincial and Union Bank of England* (1924) 1KB 461 see *Price Waterhouse (a firm) v. BCCI Holdings (Luxembourg) SA* (1992) BCLC 583.
- ^{viii} Respectively s.82 Inland Revenue Ordinance and s.135 Securities Ordinance.
- ^{ix} Hong Kong has implemented the ICCPR in a local Bill of Rights Ordinance. In the case of *LO Chak-man and another*, the money-laundering provision was challenged as a breach of the presumption of innocence. That claim was ultimately rejected in the Privy Council 19 May 1993.
- ^x Schedule 1 to the DT(RP) Designated Countries and Territories (Amendment) Order LN 308 of 1997
- ^{xi} Sections 28 & 29 DTRPO
- ^{xii} except for sections 3, 11 & 15 of Schedule 3, MLA.
- ^{xiii} Section 6.
- ^{xiv} Section 2(7).
- ^{xv} Section 3.
- ^{xvi} Sections 10, 12 and 15.
- ^{xvii} Section 10.
- ^{xviii} Section 12.
- ^{xix} Section 15.
- ^{xx} Sections 27 & 28.
- ^{xxi} Sections 23 & 24.,