Civil forfeiture without borders: Bangladesh shows that where there’s political will there’s a way

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Introduction

At the end of the first Multi-Agency Program on asset recovery in Bangladesh on 27 August 2013, a dummy cheque in the amount of US$956,387.40 was presented to the Minister of Law, Justice and Parliamentary Affairs representing the most recent civil recoveries returned by the Attorney-General’s Office of Singapore to Bangladesh earlier in August of this year.

This recovery follows the repatriation by Singapore to Bangladesh in February 2013 of approximately US$1.6 million following the enforcement of a US civil forfeiture order. The cheque concludes a significant effort by the US Department of Justice and the Attorney-General’s Office of Singapore working in conjunction with Bangladesh’s Anti-Corruption Commission to repatriate funds held in Singapore which were alleged to be the proceeds of bribes received by Arafat Rahman “Koko” (Mr Rahman), the youngest son of the former Prime Minister of Bangladesh, Khalida Zia.

The legal mechanisms used by the US and Singapore in this case demonstrate the sorts of powerful tools available to enforcement agencies to help repatriate corrupt assets to a victim state but does highlight the patience and diligence required to achieve the eventual successful outcome.

Background

This particular asset recovery initiative has had a very long tail, with the initial investigation commencing as far back as 2007 and arising out of the well publicised Siemens affair. On 15 December 2008, Siemens AG and three subsidiaries including Siemens Bangladesh Ltd pleaded guilty to violations of the Foreign Corrupt Practices Act and agreed to pay a US$450 million criminal fine in connection with bribes paid in Bangladesh and Venezuela to win Government contracts. Ancillary investigations revealed that from 2001 to 2006 Siemens facilitated its bribery scheme by engaging local “business consultants” whose sole function was to launder bribe money and pay various Bangladeshi officials and family members. It was alleged that such bribes included payments to Mr Rahman who it was claimed by one of the business consultants was paid off because his position of influence would otherwise mean Siemens’ potential business opportunities in Bangladesh could be thwarted.

The bribe money ended up in bank accounts in Singapore held by corporate vehicles incorporated in that jurisdiction. The corporate vehicles were ultimately owned by Mr Rahman. The existence of the company accounts in Singapore led to the investigation widening. This led to further allegations of bribery committed by a Chinese company called China Harbor Engineering Company in relation to bidding on a project to build the largest new mooring container terminal in Bangladesh.

It is worth noting that the individual that assisted in setting up the companies in Singapore and acting also as nominal director and shareholder for those companies, Mr Lim Siew Cheng, pleaded guilty in court in Singapore to two counts of failing to report suspicious transactions, offences under the Corruption, Drug Trafficking and other Serious Crimes (Confiscation of Benefits) Act; he was fined US$12,000.

The endeavour to repatriate the assets to Bangladesh was not, however, formally kick-started in Singapore where the assets were located. The initiative was in fact taken in the US in July 2009 when the US Department of Justice issued civil forfeiture proceedings against the monies held in the Singapore bank accounts owned by the corporate vehicles. The US was able to do so, even though the assets were held outside of its jurisdiction, by virtue of the wide reach of Title 18, United States Code, Section 981(a)(1)(A) and (C) which states that any property, real or personal, involved in a transaction or an attempted transaction in violation of federal money laundering laws or specified unlawful activity (such as bribery) is subject to forfeiture. The fact that the money held in the accounts were paid in US Dollars and therefore would have moved through the US financial system was enough to provide the US with jurisdiction under the US’ anti-money laundering laws. The full complaint filed by the US Department of Justice is available via the following link:


At the time the US authorities made it clear that:

“This action shows the lengths to which U.S. law enforcement will go to recover the proceeds of foreign corruption, including acts of bribery and money laundering. Not only will the Department, for example, prosecute companies and executives who violate the Foreign Corrupt Practices Act, we will also use our forfeiture laws to recapture the illicit facilitating payments often used in such schemes.”

The subsequent arrest warrants in rem issued by the US courts were served upon the corporate defendants, bank accounts and relevant potentially interested individuals, including Mr Rahman, through mutual legal assistance requests. None of the defendants or any potentially interested parties filed a challenge to the forfeiture. As a result, the Department of Justice was able to obtain the civil forfeiture order against the assets on 7 April 2010 from the US courts by way of default judgment: http://star.worldbank.org/corruption-cases/sites/corruption-cases/files/documents/arw/Rahman_DDC_Default_Order_Apr_7_2010.pdf

We understand that in order to enforce the US confiscation order a joint MLA issued by the US and Bangladesh was issued in respect of monies held in the corporate accounts of a company called Zasz (ultimately owned by Mr Rahman) which were returned to Bangladesh earlier this year.

In between the US civil forfeiture process being commenced and the return of the first tranche of funds, Mr Rahman was convicted in absentia in 2011 to serve six years in prison in relation to “…earning money illegally and laundering money through Singapore” according to Mosharaf Hossain, the state lawyer who represented the government in the case. Mr Rahman was fined US$5.2 million and certain assets were made subject to a confiscation order namely funds parked with another company in Singapore called Fairhill also set up with the help of Mr Cheng, and ultimately owned by Mr Rahman.

As we understand that Mr Rahman’s conviction appears to have been partially based on the offence of illicit enrichment, the usual method of enforcement through the mutual legal assistance procedure was not available in Singapore. Illicit enrichment is an offence in some countries where a public official gains a significant increase in his assets which he/she cannot reasonably explain in relation to his/her lawful income. This is a crime that is generally not considered punishable in many countries like the UK and Singapore, making enforcement of a confiscation order based on such an offence complicated. Further, Singapore does not have a (non-conviction based) civil forfeiture procedure. Despite these hurdles, Singapore was nevertheless able to return the funds in the Fairhill account by using a legal tool called the ‘disposal
inquiry’ mechanism. It would be prudent to add that one suspects that this particular mechanism was only viable because of the specific facts of this case.

Comments

The joint Bangladesh, US and Singapore initiative demonstrates that the civil forfeiture route to recover the proceeds of corruption is a major weapon provided some of the perceived traditional hurdles to the use of this mechanism can be overcome. On the facts of this recovery exercise the following observations can be made:

- the political will was there on the side of the victim state, Bangladesh, to assist the authorities in the US and Singapore – where there is little political will and appetite to assist foreign authorities, for example, by providing necessary evidence and information, the use of civil forfeiture can be very difficult;

- sometimes the reluctance of the victim to assist a foreign country seeking to effect civil forfeiture is due to suspicions that ultimately the tainted money will not be returned - in this case, there seems to have been a recognition early on that the proceeds would be returned to Bangladesh thus removing that mental block;

- foreign states may be unwilling to engage in a civil forfeiture process where there is a perception that any money returned will be misused – here we have a very public declaration that Bangladesh will hold the monies in a designated stolen asset recovery account and use it in a virtuous circle for the purpose of funding anti-corruption training and related initiatives starting with the first Multi-Agency Program in Bangladesh;

- the potential difficulties of ‘dual criminality’ appear to have been overcome with innovative thinking on the part of all stakeholders, and use of a variety of available legal avenues.

Ultimately, whether it be civil forfeiture, the use of domestic or foreign criminal proceedings or civil proceedings to recover the proceeds of corruption, this case scenario demonstrates that where there is political will there is usually a way to target corrupt money – it is a matter of finding the right solution for each case.