Civil and criminal mechanisms to recover the proceeds of corruption laundered to foreign states: a guidance note by Edwards Wildman

Overview and introduction

Corruption cases are typically international and multi-jurisdictional. Bribes for the award of public contracts or stolen public funds may be paid into foreign accounts or used to acquire foreign properties or other assets; the proceeds of corruption may be laundered through a number of countries, usually major financial centres or offshore havens.

This Guidance Note considers the broad options open to states seeking to locate, freeze and recover the proceeds of corruption laundered to foreign states, and the advantages and disadvantages of each. Procedures and remedies will, of course, vary between jurisdictions as will, in consequence, the relative importance of the advantages and disadvantages identified in this note.

The available recovery mechanisms are criminal or civil; or, in the case of non-conviction based forfeiture by law enforcement agencies, a hybrid of the two. The United Nations Convention Against Corruption (UNCAC) identifies all as routes to recover the proceeds of corruption.

However, one does not have to discuss asset recovery with too many practitioners to encounter polarised opinions as to which of the available mechanisms should be preferred. Some criminal practitioners are wedded to the view that it is only criminal, or perhaps non-conviction based forfeiture mechanisms, that are an appropriate response to the criminal behaviour of bribery and corruption, sometimes deriding civil mechanism as expensive and ineffective to obtain evidence.

Equally, some civil practitioners assert that criminal proceedings are too slow, cumbersome and prone to failure. Supporters of competing mechanisms will usually point to individual examples said to support their contentions.

1 Edwards Wildman Palmer UK LLP, contact details and link to asset recovery blog at end of the note
In our experience, the "correct mechanism" for an individual case is very much dependent on its particular facts. There are some circumstances in which the criminal route is the most likely to achieve meaningful recoveries in a sensible time-frame, and others where the civil route is more likely to do so. There are some circumstances where either criminal or civil mechanisms are unavailable, and the choice is between a particular route or no recovery at all.

Consideration of what is the most “effective” mechanism will often also involve the need for reflection on what is meant by “effective” in that case: how much can actually be recovered and at what speed can a recovery be made?

An effective asset recovery strategy is likely to make use of a combination of criminal and civil mechanisms, with the flexibility in individual cases, where possible, to switch between mechanisms if changing circumstances warrant it. Careful consideration of the circumstances is required before decisions are made as to the right route for a particular case. There will always be difficult cases where reasonable people can quite properly disagree, often on incomplete information, as to which is most likely to be the most effective recovery route.

But there are also plenty of cases where the correct route is reasonably obvious on open-minded analysis.

**Recovering the proceeds of corruption: the options**

A victim state has the following broad options when seeking to identify, freeze and recover corruptly acquired assets that have been laundered to foreign countries:

- mutual legal assistance to support domestic criminal investigations or prosecutions;

- enforcing, in a foreign country and again through mutual legal assistance, domestic confiscation orders, obtained following criminal conviction, for the payment to the state of assets representing the benefit of the defendant's criminal conduct or the proceeds of corrupt activities;

- enforcing, in a foreign country, domestic non-conviction forfeiture orders (or civil forfeiture or civil recovery orders) for the payment to the state of assets representing the proceeds of corrupt activities;

- foreign criminal or non-conviction forfeiture proceedings brought by a foreign law enforcement agency to recover assets in its own country deriving from corrupt activities elsewhere, followed by the repatriation of those assets;
private civil proceedings brought, usually in a foreign country where the assets are located, by the victim state against former or current public officials, or associates or financial institutions that have assisted the public officials to launder the proceeds of corruption, or against bribing companies.

**Mutual legal assistance in criminal proceedings**

Mutual legal assistance is the formal mechanism by which countries request and provide assistance in obtaining evidence in one country to assist in criminal investigations or proceedings in another, and in enforcing criminal and perhaps non-conviction based forfeiture orders. It offers various benefits in an asset recovery programme:

- Evidence that is only available abroad can be obtained to assist a domestic investigation or prosecution, or to trace assets;

- A Joint Investigation Team may be established, offering closer co-operation in the investigation and prosecution of the criminal conduct, and the recovery of assets;

- Foreign States can be asked to freeze assets believed to represent the proceeds of crime at the outset of, or during, criminal investigations. Mutual legal assistance can therefore be an effective and cheap method of securing assets at an early stage, pending later attempts to recover those assets;

- It is typically the mechanism through which domestic confiscation or forfeiture orders are enforced in a foreign country;

- Evidence gathered through mutual legal assistance can be used in civil claims. This usually requires the permission of the foreign state providing it. Some states are unable legally to consent to the use in civil proceedings of evidence obtained through mutual legal assistance. Countries that can consent vary in their willingness to grant permission, and defendants will usually challenge a positive decision.

- More information about the process is contained in our publication "Mutual Legal Assistance in Corruption Cases: a Guidance Note".

- Enforcing domestic confiscation or non-conviction forfeiture orders abroad
• Most jurisdictions have legislation permitting assets derived from criminal conduct, or sometimes untainted assets to the value of the benefit obtained from criminal conduct, to be confiscated following criminal conviction.

• Many jurisdictions have also given their law enforcement agencies power to bring proceedings to recover the proceeds of crime (including corruptly acquired assets) in the absence of criminal conviction through non-conviction based forfeiture proceedings\(^2\).

Some countries deploy a non-conviction based forfeiture mechanism only where criminal proceedings cannot take place, for example, because of the death or serious illness of the accused, or where the accused is a fugitive.

Other countries permit its use whenever it is considered to be a more effective mechanism than criminal proceedings to recover corrupt assets. Usually, non-conviction mechanisms have a lower burden of proof than criminal proceedings, with the case being proved on, for example, the “balance of probabilities” test often used in private civil proceedings.

UNCAC requires signatories to enforce foreign confiscation orders consequent on criminal conviction, and permits signatories to allow enforcement of non-conviction based forfeiture orders.

Most jurisdictions require specified criteria to be fulfilled before enforcement of an overseas confiscation order. For example, criteria in the UK for enforcement of foreign criminal confiscation orders\(^3\) include:

• the order must specify the assets against which enforcement is sought (although the asset can be traced if converted, for example, enforcement is available against the proceeds of sale of a property named in the confiscation order);

• the order must be based on a finding that the assets were obtained as a result of or in connection with criminal conduct (being conduct which would be an offence if committed in the United Kingdom);

• the order and the underlying conviction from which it derives must be in force and not subject to any appeal;

\(^2\) Variously termed civil forfeiture, or civil recovery, or non-conviction based forfeiture (but all are distinct from private civil proceedings)

\(^3\) Similar criteria apply to non-conviction based confiscation orders, although defendants are given more opportunity to challenge enforcement.
the order must be compatible with the European Convention on Human Rights, which can provide scope for defendants to cause delay pending determination of false claims that they were not given a fair trial.

**Foreign criminal or civil forfeiture proceedings**

Foreign authorities may be willing to bring criminal proceedings against offenders within their jurisdiction, for example, corrupt public officials that have placed funds or acquired assets within the jurisdiction, advisers and banks that have helped to launder the proceeds of corruption, or contractors and suppliers that have paid bribes to win contracts.

As part of those criminal proceedings foreign authorities may also freeze corruptly acquired assets within their jurisdiction, sometimes at an early stage of an investigation. Most foreign states can, following conviction, confiscate assets obtained through corruption or, where those assets have been hidden or spent, sometimes other assets to the value of the benefits obtained from the corrupt activity.

Non-conviction based forfeiture powers may also be available to recover the proceeds of corruption in the absence of a conviction. Recoveries can usually be repatriated to the victim state, or the defendants can be ordered to pay compensation.

In some jurisdictions (for example Switzerland and other civil law systems) the foreign state seeking to recover assets can become a party to the criminal proceedings. On conviction an application can be made for damages or the recovery of corruptly acquired assets. Where available this is a powerful procedure: the foreign state usually has access to all of the evidence that has been gathered by the Court, is present when the Court questions suspects and witnesses, will be able to ask its own questions, and can itself apply for the recovery of the proceeds of corruption.

Some Governments are willing to enter into bilateral asset sharing agreements with foreign countries. The terms are individually negotiated, but typically provide that assets misappropriated from one state party and recovered by the agencies of another are shared in an agreed proportion.

**Civil proceedings**

Private civil proceedings are a separate recovery mechanism. They are not dependent on Government to Government co-operation. A state engages lawyers to bring a claim in the civil courts of a foreign jurisdiction, just as a wronged private citizen would do.
One important distinction between most criminal and civil mechanisms is their differing burdens of proof: beyond reasonable doubt or similar language in criminal systems and a test such as "on the balance of probabilities" in civil cases.

The nature of available civil claims will vary across jurisdictions, although usually they can be formulated in a variety of ways. Many jurisdictions permit a state, in civil proceedings, to recover bribes and misappropriated assets, or their value, as well as damages for losses caused by corrupt activities. Some legal systems permit a victim state to recover the profits that public officials, and others, have obtained from corrupt activities or even from investing the proceeds of corruption.

Potential defendants to civil claims include corrupt public officials and the companies or other legal entities used to receive, hold, launder and conceal the proceeds of corruption; associates of public officials that have participated in corruption or assisted with the laundering of funds; or banks, solicitors, financial advisers and other professionals that have assisted public officials or other defendants with corrupt activities or have knowingly laundered the proceeds of that corruption. Civil proceedings therefore can sometimes offer a wider range of targets than criminal alternatives.

Civil proceedings typically offer a range of weapons to assist in tracing, freezing and recovering the proceeds of corruption. These include mareva or freezing injunctions to preserve assets pending the outcome of the case, and orders requiring defendants or third parties to provide information and documents to assist the tracing, freezing and recovery of the proceeds of corruption. In corruption cases, these may initially be obtained without warning to the defendants.

Factors to weigh when considering criminal and civil asset recovery mechanisms

As noted above, a successful asset recovery strategy involving cases against a range of defendants and assets is likely to make use of a variety of mechanisms. The prospects of making successful recoveries will be enhanced by early evaluation of the most appropriate mechanism for a particular case, and regular review of the decision that is reached as circumstances change. Co-ordination and co-operation between criminal and civil teams, if and to the extent legally permissible, can be a vital factor in ensuring overall success.

Deciding which recovery mechanism to deploy in a particular case requires a victim state, at the outset, to consider and weigh answers to all or some of the following questions:
• Is the imperative to prosecute a particular offender, or to recover his corruptly acquired assets?

• What asset recovery mechanisms are legally and practically available?

• Is further evidence necessary to win or bolster a case, and how can it most effectively and expeditiously be obtained?

• What is the most effective method of freezing assets?

• What is the most effective method of recovering the assets?

• Are there significant differences as to how compensation, damages or confiscation are calculated between the available mechanisms?

• What is the cost, or range of possible costs, of an action to recover assets, and how will this be funded?

• Is the imperative to prosecute a particular offender, or to recover his corruptly acquired assets?

Ideally, of course, offenders will be prosecuted, and corruptly acquired assets confiscated following conviction. Where prosecution is both desirable and available in a sensible time-frame, asset recovery may have to await the conclusion of the criminal process, although assets should typically be secured at an early stage through criminal restraining orders.

Prosecution of other offenders may not be possible or undesirable for a number of reasons, including death, flight, immunities or political influence or interference. In addition, particularly where resources are scarce, a decision may be made that minor participants in corruption should not be prosecuted but their corruptly acquired assets should be recovered.

In all of these circumstances, the choice of asset recovery mechanism will be between non-conviction based forfeiture and civil proceedings.

What asset recovery mechanisms are legally and practically available?

There is no point investing time in a mechanism which cannot lead to success, or in obtaining a judgment that does not meet the criteria of a relevant foreign state for enforcement.
At the outset of a case it is necessary to assess what asset recovery mechanisms are legally and practically available to obtain a judgment or order that assets should be returned to the state and, critically, to enforce that judgment or order over the assets in question.

It is also necessary to consider the impact of immunities and statutes of limitation, if applicable. Their presence may mean one mechanism is more attractive than another. UNCAC envisages, as one asset recovery mechanism, that victim states can obtain confiscation or forfeiture orders in their own countries, which are then enforced in foreign countries where assets are located. Too often, it is simply assumed that this means a domestic order will be enforced in foreign countries, without an understanding of the criteria for doing so and the circumstances in which this will not be possible or can be disputed by defendants.

Enforcement is intended to be a streamlined procedure, with limited grounds for challenging enforcement. To date, however, the enforcement abroad of domestic judgments has been a rare mechanism in corruption cases for a variety of reasons. Domestic confiscation or forfeiture orders may not be obtainable due to the ability of the defendant to influence his domestic courts, or where the defendant absconds, or where criminal proceedings (including appeals) take many years, not least because defence teams engineer endless adjournments and appeals.

Further, assets may be held in the names of foreign companies and trusts. These may not be susceptible to domestic confiscation or forfeiture proceedings, or to judgments or orders made against the owners or beneficiaries personally. Foreign jurisdictions may not allow enforcement of confiscation orders against trusts and companies that did not themselves participate in the proceedings.

Finally, defendants may challenge enforcement, alleging for example that judgments against them are politically motivated or obtained without due process, meaning delay as the issues are litigated for a second time.

Civil proceedings in the courts of the country where assets are located may be a necessary or more efficient recovery solution where it is impossible or difficult to obtain, and then enforce abroad, domestic confiscation or forfeiture orders. This is particularly where the foreign state cannot or will not bring its own criminal or non-conviction based forfeiture proceedings to recover assets. However, there are a few countries that may not permit civil proceedings by foreign states. UNCAC requires signatories to do so.

Where contemplated, advice will be required at an early state as to whether civil proceedings are available, and whether the foreign court has jurisdiction to determine a claim to the relevant assets. Courts will invariably have jurisdiction to deal with disputes over assets in
their own country, and will typically hear those disputes even where the corrupt activities giving rise to the assets have occurred elsewhere.

**Is further evidence necessary to win or bolster a case, and how can it most effectively and expeditiously be obtained?**

Mutual legal assistance in support of a criminal investigation or prosecution is usually the most effective method, in international cases, of obtaining evidence of corrupt activities and linking those activities to particular assets, provided that timely and meaningful assistance can be obtained.

This is because law enforcement agencies often have a range of powers to require the disclosure of evidence and information, particularly from third parties such as banks, often before proceedings need to be brought and often without the knowledge of the alleged wrongdoers. Exceptions to banking secrecy laws are more likely to apply in the criminal context.

If sufficient evidence simply does not exist to bring or win a case, criminal mechanisms may be the only way of obtaining it. The position will be more complex where there is already sufficient evidence to bring a civil claim, recognising the lower burden of proof discussed below, but there is more evidence to obtain that could bolster a case or lead to claims in relation to other assets.

On the other hand, mutual legal assistance has, for a variety of reasons, proved in some cases to be a slow and ineffective process.

Civil proceedings do offer various mechanisms to obtain evidence, including disclosure from third parties, although generally they are more cumbersome than their criminal equivalents and usually require that proceedings have commenced or are imminent.

However, particularly in common law jurisdictions, defendants to civil proceedings are required, or can be required, to disclose relevant documents, which is not always the case in the criminal process. A failure to disclose documents can lead to adverse inferences against the defendants that documents have been withheld as they would demonstrate corrupt activities, or even judgments in default of compliance with Court orders.

**What is the most effective method of freezing assets?**
Where available, mutual legal assistance is often the most effective method of securing assets. Foreign authorities often have an easier test to satisfy when freezing assets: they do not have to demonstrate a claim to the asset, merely that an investigation has commenced and there is evidence (e.g. often nothing more than a reasonable suspicion) that the assets represent the proceeds of crime. Assets are frozen at their cost.

Sometimes, however, foreign authorities are unable or unwilling to freeze assets at an early stage through criminal mutual legal assistance mechanisms, or cannot do so sufficiently quickly.

Civil proceedings in most states, but not all, allow a state to freeze or attach assets in circumstances where defendants may conceal them to avoid later enforcement. Where available, states seeking to freeze assets in civil proceedings often face more onerous obligations, including a duty to disclose all relevant known information to the Court, whether helpful or unhelpful, and the need to provide an undertaking to meet a defendant's losses and costs if the injunction is later discharged. In addition, the state will be expected expeditiously to issue and progress its claim at the point that the injunction is obtained.

There is no invariable rule as to whether civil or criminal mechanisms should be deployed to secure assets. The relative ease and speed of obtaining civil and criminal freezing orders will vary between jurisdictions, and on the circumstances of the particular case.

**What is the most effective method of recovering the assets?**

Determining which mechanism is more likely to recover assets quickly and cheaply itself involves a number of questions, including: How much is recoverable under each mechanism? How long will the process take, including appeals? Is the standard of proof relevant? Are claims available against third parties? Are waivers, amnesties, settlements and plea-bargains available and desirable?

As a general rule, assets are more likely to be recovered quickly when proceedings to recover them, whether criminal or civil, are taken in the jurisdiction where they are located. This is because the alternative is to take proceedings in another jurisdiction, and then to have separate enforcement proceedings in the state where the assets are located.

This creates a risk that the issues are effectively litigated twice over, causing substantial delay. Exceptions to this general rule include enforcement between countries that through treaty or other agreement have ensured mutual and efficient enforcement of judgments. A notable example is the enforcement arrangements between the states of the European Union. Another is the arrangements between some Commonwealth states.
How much is recoverable?

When deciding which recovery mechanism to deploy, consideration needs to be given as to which mechanism is likely to lead to the most money or valuable assets being recovered. Civil proceedings for corruption often offer a range of different legal theories as to how claims can be formulated. These theories may lead to claims for different amounts. Further, civil judgments for damages can usually be enforced against any assets belonging to the defendants, including assets which derive from legitimate business activities or whose source is unknown.

Criminal or non-conviction based forfeiture mechanisms are sometimes limited to assets which can be specifically demonstrated to have been obtained through corruption. The relevant laws of other states either contain rebuttable presumptions, where a defendant is shown to be corrupt, that his assets derive from corruption, or permit enforcement of judgments or orders against untainted assets.

How much time are proceedings likely to take, including appeals?

The length of time it takes to conclude criminal and civil cases vary significantly from jurisdiction to jurisdiction, depending for example on the resources given to the Courts, the number of cases assigned to Courts, and the efficiency of the legal process. Timetables can be heavily influenced by the willingness of Courts to grant adjournments and permit procedural battles, and whether it is open to defendants to appeal any decision, procedural or substantive, to higher courts.

Is the standard of proof relevant?

The quality of the existing evidence, and of the evidence that can reasonably be obtained, may be an important consideration in some cases. Criminal charges must typically be proved beyond reasonable doubt, or to a similar standard. Civil proceedings and non-conviction based forfeiture must be proved on the balance of probabilities, which is usually a significantly easier task. There are often cases where the strength of evidence is insufficient to have a high, or even reasonable, level of confidence of conviction, but where there can be confidence that the burden of proof for non-conviction based forfeiture or civil proceedings will be met.

The relative difference in the civil and criminal tests may be important where there are gaps in the evidence, and inference of corruption may play an important role. The difference in the
standards of proof may be of lesser or no importance where the evidence of corruption is overwhelming.

The standard of proof will also be relevant in jurisdictions that will make criminal confiscation and civil forfeiture orders only on proof of a link between the assets that are claimed and a specific offence.

Are claims available against third parties?

There are sometimes barriers or reluctance about prosecuting those that have assisted the principal wrongdoers to obtain and launder corruptly acquired assets, perhaps because of resource or evidential concerns. Civil claims may be available to a state against those third parties for damages for their participation in corruption, or the return of assets they hold for the principal wrong-doers.

Are waivers, amnesties, settlements and plea-bargains available and desirable?

The availability of ways to settle a case may be a relevant consideration. Settling corruption cases is often, quite understandably, a controversial topic. After all, settlements may lead to a corrupt official avoiding conviction or prison, or returning only some of his corruptly acquired assets.

However, settlements are often an important part of any asset recovery programme. Fighting corruption cases, whether through criminal or civil routes or both, can be time-consuming and expensive. Settlements achieve the pragmatic outcomes of avoiding prolonged and expensive litigation, ensuring the return of funds to the public purse, and helping to fund further cases. The attractiveness of any deal will depend on the terms of offer.

Settlements may be of particular interest in relation to those that have assisted the principal wrong-doers. They may be used, for example, to encourage junior civil servants, bank officials, and company employees to provide valuable evidence and information to assist with prosecutions and civil proceedings against the principal wrongdoers.

What is the cost, or range of possible costs, of action to recover assets, and how will this be funded?

It is imperative to ensure that costs of a particular mechanism are reasonable and proportionate to the amounts in dispute.
Generally, criminal mechanisms are cheaper for the victim state, although this is not always so. Enforcement of domestic confiscation orders is usually carried out by the foreign state in which the assets are located, and at its cost, although expenses may be deducted from recoveries or assets may be shared in accordance with bilateral arrangements.

Funding lawyers to bring civil claims can be expensive⁴, particularly when claims need to be advanced or assets secured in several jurisdictions. Costs are sometimes difficult to predict as much depends on the manner in which claims are defended by the defendant.

In some jurisdictions a Government’s lawyers may be retained on contingency arrangements, meaning they will be paid only following success and from recovered funds. In addition, where funding is legally available, commercial investors may fund cases in return for a share of the recoveries.

Under either approach, a state would not have to fund its legal team unless and until recoveries have been made. The cash-flow benefit is obvious. However, states need to ensure success fees are appropriate and reasonable, and need carefully to weigh whether contingency or funding arrangements really do offer “value-for-money”: the amount paid on success may well be greater than costs paid under the traditional model of paying the lawyers for the amount of work undertaken at agreed hourly rates.

An assessment should be undertaken at the outset as to the likely costs and recoveries, with the conclusions kept under review as circumstances change. However, one objective of a successful asset-recovery programme should be to ensure that funding is a short-term difficulty, with the programme moving into profit as early as reasonably possible. This will allow the virtuous cycle of recoveries being used in part to fund future action. Grants or loans may sometimes be available to fund cases.

**Conclusion**

As this note demonstrates, there may be a significant number of factors to take into account and weigh when assessing what asset recovery mechanisms are likely to lead to the most efficient and largest recovery of corrupt assets.

Much will depend on the particular circumstances of the cases that arise, and the chosen route may change as those circumstances change.

---

⁴ As well as the usual fees and disbursements, the state may also have to meet the costs of third parties such as banks providing documents under a Court Order.
However, careful consideration of the options at the outset of each case, and a willingness to consider all of the alternatives, will give a state the best opportunity to make meaningful recoveries in an appropriate time-frame.

© Edwards Wildman Palmer UK LLP
James Maton, Laurence Harris Jamie Humphries

James Maton contact details:
jmaton@edwardswildman.com
T +44 207 557 4547

Blog: www.anticorruptionlaw.com
Web-site: www.edwardswildman.com
Twitter: @assetrecoverlaw