



GENERAL PRINCIPLES OF INTERNATIONAL CO-OPERATION: MUTUAL LEGAL ASSISTANCE

Arvinder Sambei & Mick Allen

HISTORICAL CONTEXT

- The Primacy of Sovereignty
- The Challenge to Sovereignty

BASES OF ASSISTANCE

- Exercise of Sovereignty
- Universal/Multi-lateral Conventions
- Regional conventions/protocols e.g. CoE MLA Convention
- Bilateral treaties
- Domestic Law
- Comity

TYPES OF ASSISTANCE THAT CAN BE PROVIDED

- Location and identification of persons and objects;
- Examination and taking of testimony of witnesses;
- Production of-
 - (i) documents and other records, including judicial or official records; and
 - (ii) other articles;
- Making of arrangements for persons to give evidence or assist investigations;

TYPES OF ASSISTANCE THAT CAN BE PROVIDED (contd)

- Temporary transfer of persons in custody for the giving of testimony
- Carrying out of search and seizure;
- Service of documents;
- Restraining of dealings in property, or the freezing of assets that may be forfeited or that may be needed to satisfy pecuniary orders
- Tracing, seizure and forfeiture/confiscation of property.

TYPES OF ASSISTANCE THAT CAN BE PROVIDED (contd)

- Transfer of Proceedings
- Asset repatriation
- Such other matters as may be included in an agreement or arrangement between States.

MLA: 'RULES OF ENGAGEMENT'

- Assistance in Criminal Matters
- Comity
- Reciprocity
- Rule of Specialty
- Dual Criminality
- Preservation of Informal Agreements
- Minimising of bases of refusal

THE MECHANICS OF MLA

- The Central Authority
- Competent Authorities
- Methods of Transmission
- Conflict of Laws/Systems
- Informal Requests (MA)
- Formal (MLA)

MUTUAL ASSISTANCE: PRINCIPLES

- Evidence can lawfully be obtained informally in both requesting and requested States
- Requested State should have no objection
- Where necessary, should be used to identify information or intelligence that can inform formal requests
- Routine Inquiry not engaging coercive powers (e.g. obtaining public records)

MUTUAL ASSISTANCE: PRINCIPLES (contd)

- Contacting potential witnesses to see if willing to assist voluntarily, & if so taking voluntary witness statement
- Previous convictions/basic telecom subscriber details where court order not required

MLA: FORMAT OF LETTER OF REQUEST

- Establish legal authority under which Request made (International/Domestic)
- Establish Authority of Issuer of Letter
- Brief Summary of Facts (must establish evidential link to and relevance of assistance requested)
- Relevant Law in Requesting State (satisfies dual criminality and relevance test)
- Assistance Requested (Rule of Specialty)
- Statement of Reciprocity
- Signature

MLA: SOME PRACTICAL CHALLENGES

- Delay
 - General
 - Some States complain MLA process seemingly weighted against small/developing States
 - Resort to use of Civil process (more expensive and undermines Criminal MLA)
- Jurisdictional differences. (e.g. Civil forfeiture/Evidence from Civil Jurisdictions)
- Resource implications/Costs
- Sharing of Forfeited Assets—need to have law outlining how Assets are to be shared

PRACTICAL CHALLENGES IN HIGH PROFILE CASES

- Subject of Request may be powerful, influential and dangerous
- Requests for financial information to countries where subject of request may appeal against sharing of information
- Requests for search/seizure and obtaining of biometric data

PRACTICAL CHALLENGES IN HIGH PROFILE CASES (contd)

- Sensitive Information contained in Letter of Request
 - Globally MLA system relatively insecure
 - Tension between providing sufficient information and protecting investigations & witnesses from disclosure (E.g. case Jamaica/Bahamas)
- Possible Solution: Generalised LOR perhaps supplemented by visit or conditional Request

AND FINALLY

- Crime is now largely transnational and often based on co-operation between criminals
- The only hope States have of combating international crime is through:
 - adequate domestic co-ordination; &
 - timely and effective international co-operation based on mutual respect and understanding between States