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#17 Recovering the stolen sweets of fraud and corruption

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RECOVERING THE STOLEN SWEETS OF FRAUD AND CORRUPTION

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>> ÍNDICE

>> **RESUMO**

Fraude e corrupção são crimes cujo motivo é o lucro. Este artigo analisa os rendimentos gerados por estes crimes, onde esses rendimentos se escondem, como esses rendimentos podem ser descobertos e, principalmente, recuperado.
Palavras-chave: Fraude, corrupção, branqueamento de capitais, recuperação de activos, confisco de activos.

>> ABSTRACT

Fraud and corruption are profit motivated crimes. This paper examines how proceeds are generated from these crimes, where those proceeds can be hidden, how those proceeds can be found and most importantly, recovered.
Keywords*: Fraud, corruption, money laundering, asset recovery, asset forfeiture*

… being smarter than the law enforcement agencies required the cooperation of many people. And a lot of money. Each person who dealt with the merchandise [cocaine] got a nice cut. At some point, for example, because so many people had to be paid, the minimum amount we could transport on each flight was three hundred kilos [then worth $12 million], anything less would result in a loss.[1]

[1] A kilo of cocaine sold at that time for around $40,000, meaning a 300 kilo shipment could be worth $12 million (Escobar, 2009) at pp. 59-60 (quotation) and p. 134 (price of cocaine).

>> 1. INTRODUCTION

Fraud and corruption are crimes largely motivated by profit.

The lucre is typically "laundered" or moved; the wrongdoer wants to place the illicit wealth beyond the reach of victims, rivals and law enforcement. Corrupt officials need a safe haven for their money (which is typically not the society they've stolen from); kleptocracies are notoriously unstable (Glenny, 2008). Money laundering is a technique that converts proceeds of crime into wealth with a patina of legitimacy. Recovering proceeds of crime is a very challenging enterprise. This paper examines fraud and corruption and asks: how do you recover the proceeds for victims?

>> 2. FRAUD AND CORRUPTION COMBINED: ALLEN STANFORD

Allen Stanford was at the centre of a massive "Ponzi" fraud, whereby investors were promised huge returns through safe investments; in fact investments were scant and most investor returns came from the money of other investors. On March 6, 2012, Stanford was convicted of fraud and sentenced to 110 years. Gone were the days when "Sir" Allen Stanford, knighted by Antigua in 2006 for his work with the sport of cricket, enjoyed private jets and a lavish lifestyle (Roston, 2012). As with notorious convicted fraudster Bernie Madoff, Stanford's fraud was exposed following troubles in the markets. In the 2008 market meltdown, "investors" in the Ponzi sought safer positions, causing a run on the fund. There wasn't enough money to keep victims fooled (SEC, 2009).

The roots of the scheme first appeared in 1988: Stanford hired his college roommate, James M. Davis, to be the controller of his Guardian International Bank. When bank regulators in Montserrat, where Guardian was chartered, imposed heightened scrutiny Stanford closed shop and moved on to Antigua, along with Davis, creating the Stanford International Bank, Ltd. (SIB). SIB's main product was the "CD" or certificate of deposit, marketed particularly to investors in North and South America. The consumer gives their money over in exchange for a financial instrument, usually with fixed rates and fixed periods for redemption. Generally, CDs enjoy the reputation of a "safe" investment.[1] Stanford was a good salesman. By 2008, investors held $7 billion in SIB CDs. Investors were given various promises: they were told that Antigua's regulator, the Financial Services Regulatory Commission (FSRC) had oversight over SIB and that SIB's financials were subjected to outside audits (Davis Plea, 2009). One victim testified that SIB claimed, falsely, that their investments were insured by Lloyd's of London (Kaufmann, 2011). Stanford's sales pitch claimed that non-existent Antiguan income tax and the absence of an American brick and mortar operation allowed his CDs' to return 200 to 300 basis points higher than competitors (Rawl Testimony, 2011).

In fact, money invested in a "CD" was segregated by SIB into three tiers. Tier I consisted primarily of cash on hand. Tier II consisted of largely legitimate investments, but by 2008 they made up a mere 10% of the SIB portfolio. Tier III assets, illiquid and without much value, made up 80% of the portfolio

[1] Obviously this is not always so, see the SEC Bulletin on High Yield CDs at http://www.sec.gov/investor/pubs/certific.htm (last viewed June 11, 2012).

and at least $2 billion in undisclosed personal loans to Stanford were hidden on the books as investments. Indeed those books were, as they say, cooked. Davis, the controller would work with Stanford on a desired revenue number, a return on investment that would attract investors (without scaring them too much); then Davis would create false reports that backed into (or reverse engineered) those returns. As with all Ponzi schemes, an ever-widening gap between the true holdings and the lies developed: by 2008, SIB claimed $7 billion in assets, but their actual position was less than $2 billion (Davis Plea, 2009).

Stanford's scheme needed more than fraud. Stanford had left Montserrat when regulators heightened their scrutiny. Antiguan corruption made the Ponzi feasible. Leroy King, a former ambassador and bank executive, was an auditor and later CEO of Antigua's regulator, the FSRC. In 2003 King performed a "blood oath" brotherhood ceremony with Stanford: in exchange for payments, SIB would be largely left alone by the regulator. The bribes were transferred from a numbered Swiss account to an account in Antigua. Given billions in victim losses, the bribery was cheap, costing Stanford just over $200,000. King performed for his money: he removed two FSRC employees who showed too much interest in SIB; he sent Stanford two separate confidential investigative requests from the U.S. Securities and Exchange Commission (SEC).[1]

In 2012, James Davis pled guilty and Allan Stanford was convicted on all but one of the fourteen criminal counts that he faced (AP, 2012). Just prior to being sentenced to 110 years (Madoff received 150 years), Stanford insisted that he had not defrauded any one of the purported 28,000 victims (Rushe, 2012). There are a number of aspects of the Stanford case that are beyond the scope of this paper. For example, there was clear regulatory failure. The SEC had reason to believe in 1997 that Stanford was operating a Ponzi scheme. SEC examiners were unable to convince their colleagues in enforcement to open an investigation. Apparently American diplomatic personnel were told for three years not to be photographed with Stanford, information not imparted to victims (Rushe, 2012).

[1] The bribery included other things like Superbowl tickets and accommodations, worth about $8,000, for King and his girlfriend (Davis Plea Agreement 2009)

>> 3. SUSPECT NUMBERS

Fraud and corruption are a subset in a larger grouping of unlawful activity, crime motivated by illicit profit.

Profit motivated crime is inherently difficult to quantify. Data on criminal activities and profits undermines a criminal's goal of avoiding detection. There are various attempts to quantify profit-based crime, although some numbers might be considered somewhat suspect. The global retail market for cocaine is estimated to be worth $88 billion and the opiate retail market is worth $65 billion. Trafficking in persons garners $32 billion and firearms a mere $1 billion (UNODC, 2011). A study on "occupational" fraud estimated, on a very rough measure,[1] that annual losses to companies globally could be in the order of $2.9 trillion (ACFE, 2010). One estimate suggests that each year between $1 trillion and $1.6 trillion in public assets are stolen; corrupt officials, particularly in developing countries, loot as much as $40 billion a year (Greenberg et al, 2009). Irrespective of the precise quantum, one thing links drugs, trafficking, weapons, fraud and corruption: money laundering. Money laundering is a technique used to disguise the origin of tainted property, shielding that property from law enforcement, victims and criminal predators. Estimates suggest that global money laundering involves between $500 billion and $1 trillion a year. One commentator has suggested that the most authoritative estimate is a decade old and has a massive deviation between the high and low end of the scale (Demetis, 2011).

[1] This number is premised on the estimate that businesses lose 5% of their revenue to fraud.

>> 4. FRAUD

Fraud is a dishonest deception designed to enrich a criminal at the expense of a victim. Fraud can be understood from several different perspectives. For example, one can focus on the type of victim (individual, corporation, public bodies and so on) or one can focus on the type of fraud. Conversely, one could focus on the technique like telemarketing or the vehicle like social engineering (Rusch, 2011).[1] There are an infinite number of possibilities for a fraudster ranging from someone with insider information defrauding the securities market through to telemarketing fraud[2] and garden-variety tax fraud. This paper will look at three types of broadly practiced fraud: the advance fee scam, identity theft and Ponzi schemes.

4.1 The Spanish Prisoner: Advance Fee Scams

The "Spanish Prisoner" is a confidence trick or fraud that dates back to the 16th Century. An English "con artist" would approach a victim (or mark) with the tale of an extraordinarily wealthy person who has been imprisoned in Spain under a false identity. The mark will be told that they have been chosen judiciously for their discretion and upstanding nature. Secrecy is paramount: the prisoner's family might be embarrassed if his identity was revealed. The notion of secrecy is an element of many frauds: the victim is made to feel part of the money making enterprise; more importantly, the victim is less likely to tell others about the scam and may even be too embarrassed to call law enforcement once the scam is revealed. The con artist promises various inducements to the victim (you will share in a reward, you will marry the prisoner's beautiful daughter) and seeks money to secure the prisoner's release. In time, the mark will be told that complications have arisen; more money is needed. Once the victim's money dries up, the con artist disappears (New York Times, 1898). There are numerous modern day variations on this scam. Last a year a friend and colleague sent me an urgent email: while travelling in Wales, all of his possessions were stolen. The American embassy told him he could fly without a passport, but the bank was really slow in producing a replacement credit card. Could I call him at the hotel and sort out a method

[1] Social engineering refers to the application of psychological techniques intended to influence a victim in a social setting. The fraudster identifies and then takes advantage of a vulnerability seen in the victim.

[2] One research body suggests that the majority of scams, 34.9%, are implemented through the web, followed by the telephone (29.2%), email (20.4%) or post (12.2%) (FRC, 2012).

by which I could wire him some money? My friend's email account had been hacked, a fairly common occurrence (Fallows, 2011). Social media websites, like Facebook and the like, can similarly be manipulated by a fraudster.

In advance fee frauds, "419" scams[1], victims are invited to "invest" their money on a promise of significant return. While the invitation is unsolicited, victims are told that they were personally selected to take part in an exclusive, profitable and most importantly secret deal. Once the victim is committed to the fraud, the scammer will seek more of their money to solve unexpected problems that have arisen.[2] A typical advance fee fraud can include:

- A victim contacted by email - the fraudster often claims to represent a government agency or a solicitor;
- The email has grammatical errors and spelling mistakes; the mistakes are intended to make the victim feel superior, as though they will take advantage of the fraudster;
- A pot of gold - the victim's assistance is needed to move substantial amounts of money (inconveniently caught up by things like civil war or currency restrictions);
- Easy profit - the victim is promised an eye-popping percentage of that massive amount of money and all they need to do is allow the cash to flow through their bank account;
- Eventually a wrinkle - money is needed up front to pay taxes, storage or banking charges; and,
- A loss - the victim pays the up front fees; when they run out of money, the con artist disappear.

While advance fee scams are popularly associated with Nigeria and West Africa, they originate in all corners of the world, including the UK, Hong Kong, Malaysia and the United Arab Emirates (Austrac, 2011).

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1 A reference to the Nigerian Penal Code prohibitions on advance fee fraud.

2 In ***Mokelu*** (see Table of Cases), the victim, a consultative surgeon, was asked by email to assist in moving $300 million from Africa to the UK. In return for her assistance, she would receive between 40 and 50 percent of the money. The victim was told that money was needed for brokers' fees, legal fees, indemnity bonds, taxes and late payment penalties. She paid the fraudster £352,937. One of the three fraudsters was caught as he withdrew £20,000 from his account; his internal notes listed the victim as "miracle".

4.2 Identity Theft

Identity theft can encompass a broad range of activities, but generally consists of the appropriation of someone's identity or the creation of a fictitious identity to facilitate fraud. The Federal Trade Commission estimates that as many as 9 million Americans have their identities stolen each year (FTC 2012). Identities are stolen in a number of different ways:

- **Rummaging the rubbish**: fraudsters looking through garbage can find bills and other pieces of information with one's personal identity;
- **Skimming**: information on credit and debit cards can be stolen at automated teller machines or point of sale devices. The fraudster may use a skimming device which literally catches the data from the card, often in conjunction with a pinhole camera that will capture one's personal identification number or PIN. Alternatively, a bogus terminal can be used at the point of sale.
- **The Internet**: there are numerous online techniques to steal an identity. Hackers can gain access to a system using valid but stolen credentials; malware is a tool that provides remote access or control of someone's system (malware can be designed to collect information, including passwords and user names from the victim). Phishing is a social engineering technique where a fraudulent communication, often an email, is used to lure the victim into divulging information (e.g. the email purports to come from your bank seeking to correct problems with your accounts).
- **Mail Diversion**: the fraudster gives the post office a "change of address" notice and then collects the victim's mail.
- **Theft**: wallets or purses are stolen.
- **Pretexting**: false pretences are used to collect information from an unknowing third party, like a financial institution (also referred to as a social engineering technique).

Once in possession of the stolen identity, thieves have any number of options: credit card fraud, phone or utilities fraud, finance or bank fraud or government document fraud.

4.3 Ponzi Schemes

In the 1920's, Charles Ponzi induced thousands to invest in his arbitrage program involving European currencies and international reply coupons issued by European governments. In fact there was no arbitrage program. Ponzi used

money from newer "investors" to pay returns to older investors. Ponzi didn't invent the scam but his name has long been associated with it. A Ponzi is fragile. There is no "real" business producing spectacular returns. This type of fraud is exposed when the fraudster cannot bring a sufficient number of new investors or when the current investors withdraw in large numbers (Smith, 2011). In scams, investors are not the only victims. For example, J.P. Morgan Chase is vigorously defending a $19 billion lawsuit launched by the trustee in the Madoff fraud (AP, 2011). A broker recently settled a lawsuit launched by the New York Attorney General, agreeing to pay over $400 million to victims of Madoff (Friefeld, 2012).

Unlike the Spanish Prisoner scam, the victim is not encouraged to adopt secrecy. Fraudsters want victims to share information and look for early marks who will influence others. Later marks invest in the Ponzi not because of the fraudster, but because their friend or neighbour or relative, who they have every reason to trust, is in fact getting paid with handsome returns. Some victims often lack the wherewithal to properly identify risk. However, very sophisticated victims can incur losses (institutional investors and sophisticated banks had money in companies like Enron).

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>> 5. CORRUPTION

The Turks and Caicos Islands (TCI) is a small archipelago of islands at the eastern edge of the Caribbean (Auld, 2009).[1] TCI is also a British Overseas Territory, meaning that Westminster retains some control over the affairs of the islands. In 2008, the UK House of Commons identified concerns with corruption on TCI and a commission of inquiry was appointed. The Commissioner, Sir Robin Auld, reported on dishonesty and corruption in TCI:

- Questionable disposals of public land and payments from developers warranted criminal investigations;
- Wealthy developers donated to politicians, often through third party lawyers, without any public oversight or regulation;
- Public contracts were let in a questionable fashion;
- Assets, like jet airplanes, may have been misappropriated for personal use;
- Concessions were made where the government did not fully collect revenue and tax; and,
- Some pupils received government scholarships outside of the regular process.

The Commission made a number of observations about corruption. First, the invisibility and secrecy inherent in corrupt acts "defies discovery of proof." Second, TCI structural difficulties contributed to the problem: the economy had a narrow economic base;[2] the governance structure, between TCI and the UK did not provide for the requisite checks and balances to prevent corruption; finally, the "power and poison of politics" particularly in a system with virtually no oversight on political donations, allowed corruption to flourish unseen. Efforts to derail the inquiry through the courts were not successful.

The Commission made a number of recommendations, which included criminal investigations into a number of TCI public figures, including the former Premier. The Commission also recommended that both criminal and civil asset recovery units be created to chase down and recover the proceeds of corruption. Dedicated and independent units within the Attorney General are needed to bring cases before the courts. The Commission noted that while

[1] Sir Robin Auld *Turks and Caicos Islands Commission of Inquiry 2008-2009* (Cockburn Town: Turks and Caicos, 2009) referred to herein as the "Auld Report" at p. 17. The report can be found online at: http://turksandcaicosislands.fco.gov.uk/resources/en/pdf/2011/commission-of-inquiry/inquiry-report.pdf (last viewed June 5, 2012).

[2] Currently tourism forms the economic base of TCI; past industries included salt extraction.

the notion of corruption seems "simple enough," proving corruption is very difficult to achieve. As a result of the Commission report, Britain suspended the constitution and placed TCI under direct rule.[1]

5.1 Types of Corruption

There are many forms of corruption including:

- **Bribery**: money flows from a private enterprise to a politically exposed person in exchange for a government concession (a contract, access to mineral resources and so on);
- **Extortion**: a politically exposed person demands an equity position or the split of profits from offshore investors in exchange for influence (failure to pay dooms the venture);
- **Self Dealing**: an official has a financial interest in the entity doing business in the corrupt jurisdiction; and
- **Embezzlement**: Sani Abacha, the former president, stole significant amounts of money from Nigeria's treasury. He'd issue false funding authorizations and money by the "truckload" was removed from the country's central bank (FATF, 2011).

[1] Related litigation and orders in council are listed in THE Table of Case (Hoffmann…).

>> 6. MONEY LAUNDERING

For a corrupt official or a fraudster, stealing the money is only a first step. Wrongdoers need to keep their money away from victims, rivals and law enforcement. Money well laundered accomplishes that objective. Laundering is process whereby dirty money is converted into apparently clean money with a difficult to trace provenance. Generally, money laundering is thought to have three steps: one, money enters the financial system, a step often referred to as placement (sometimes called loading); the launderer then takes steps, commonly known as layering, to obfuscate the source of the money; finally the apparently cleansed money is organized under the patina of legitimacy, a step known as integration. As we shall see, these steps are not always followed or even present. A fraudster will often take victim money from within the financial system (the victim writes a cheque or transfers money from account-to-account) and needn't worry about placement.[1]

6.1 A Sampling of Money Laundering Techniques

There are an infinite number of techniques used to hide illicit wealth. Techniques include:

- **Loading Cash**: anti-money laundering systems in many countries require reporting of large cash deposits (Simser, 2012). Evasion techniques include "smurfing" whereby a series of cash deposits below the reportable threshold are made by nominees (Welling, 1989). The money may be moved through a series of accounts, institutions and/or countries to obfuscate its source. Drug dealers typically transact in cash. By contrast, corruption and fraud corrode a system from the inside and don't necessarily involve cash payments (Simser, 2010).
- **Nominees**: practitioners of fraud and corruption often employ nominees and intermediaries, typically someone they can trust like a family member, to launder money. Following that money can be difficult for two reasons. First, the nominee will protest in the face of an inquiry that they are simply an honest business person beyond reproach. Secondly, sophisticated laundering makes following the money difficult. Consider this example: victims of an American telemarketing fraud sent cheques to a fraudster; the fraudster in turn sold

[1] That said, converting money to cash, smuggling it and then depositing it in a jurisdiction with lax enforcement is an effective way for terrorists and criminals to obfuscate the source of cash. As long as money moves within the financial system there is a trail to follow.

the cheques at a discounted rate to a Montréal restaurant owner, who in turn sold them on to a broker, who in turn sold them to a money exchanger in Jerusalem. Following a series of further exchanges, the cheques ended up with a money exchange business in Ramallah, who presented them to U.S. financial institutions to be honoured. While law enforcement eventually unravelled the case, it was a difficult task; further there was an immense of time and space placed between the fraudster (who got his money in Montréal) and the Ramallah money exchange (Simser, 2008).

- **Trusts and Corporate Entities**: a legal trust is another nominee technique. A trust is a legal relationship: property is held by one person, generally called a trustee, for the benefit of another, generally called a beneficiary. A third person, sometimes called the settlor, can fund the trust. So for example, I could set aside money for my daughter through my personal lawyer: the lawyer is the trustee (and to the outside world may appear to be the "owner") while the daughter is the beneficiary and I am the settlor. This kind of arrangement is perfectly legitimate; however, it is not hard to see how a launderer could abuse this form of transaction. In a "peek-a-boo" trust, when the trustee is contacted by law enforcement or a litigant (e.g. a victim or an ex-spouse), the trustee is instructed to automatically move the residue of the trust to another jurisdiction, placing one more border between the money and the victim (Simser, 2011).
- **Asset Stripping**: financial instruments and business entities can be structured to allow value to move between and amongst parties over a range of transactions. The overwhelming majority of these transactions are perfectly legal and form of the backbone of our modern economy. A clever launderer can manipulate seemingly innocuous transactions. For example, money can be moved between a business entity and the launder through dividends or loan repayments. Money can flow out of the country to pay a fictitious invoice and then be integrated back when that company "lends" money to the launderer or pays off his credit card bills. [1]
- **Insurance**: a launderer can take out a life insurance policy based on substantial initial payments and then surrender the policy later for early redemption or cash it out during the "cooling off" period. While the transaction does not make economic sense, given the penalties in the policy, the insurance company cheque appears to be a clean source of funds (FATF, 2005).

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[1] For example, a man named Holliday had a series of Atlanta escort agencies; he created a company in Nevada and another on the Isle of Man. Holliday had the offshore entities bill his Atlanta escort agency for fictitious services; after the invoices were paid, Holliday borrowed the money under a promissory note and used a credit card paid off by the offshore entities (Simser, 2008).

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- **Trade-Based Money Laundering**: a launderer uses imports and exports to move value from party to another. By under-invoicing (or over-invoicing) the price of goods, the cash differential between the real price and the fictional price cleanses the money.

>> 7. ASSET RECOVERY

Recovering assets, particularly those secreted across borders, is a challenging enterprise. From the early 1970s to 1999, Nigeria had lost over $75.18 billion to corruption, $65 billion of which was transferred abroad (Adekoya, 2007). Only a tiny portion of those losses have been recovered. The Swiss, for example, recovered $70 million of the money stolen by the Abacha kleptocracy which was eventually repatriated to pay for healthcare, education, and infrastructure costs (Delco, Marugy, 2004). Nigeria is the world's eighth largest oil producer, but it has a crumbling infrastructure, most Nigerians lack access to basic medical treatment and education, and "poverty cripples most of the country's 140 million people" (Herskovits, 2007). Recovering assets can be a complex business. This section of the paper looks at two questions. First, how is the requisite information about the location and nature of the assets obtained? Second, what technique can be used to recover the asset?

7.1 Information Gateways

Secrecy is a key element in the crimes of fraud and corruption. The fraudster does not want their scam discovered, which can occur if the victim to goes to a friend or to the police. Individuals offering bribes want to avoid prosecution. Even if the bribe is directed at an official in the developing world, the person offering the bribe can be prosecuted in their developed world home. Corrupt officials may operate in a weakened rule of law environment, thus not fearing prosecution. However, they very much desire the façade of legitimacy, to ensure that they continue to receive things like foreign aid (Spahn, 2010). Obtaining information, particularly across borders, is an inherently complicated endeavor. Without information and evidence, prosecuting those who bribe and more importantly recovering assets stolen through corruption or fraud, is impossible. Generally speaking there are several methods of procuring information, or information gateways:

- **UNCAC**: the United Nations Convention Against Corruption (UNCAC) is a global and comprehensive anti-corruption treaty. Article 56 places an affirmative duty on signatories to initiate corruption investigations without waiting for a formal request from the other country. Chapter V of UNCAC has a number of provisions respecting asset recovery. For example, states should allow other countries to bring civil recovery proceedings in their national courts and should recognize judgments from other jurisdictions. While widely subscri-

bed, UNCAC has not been fulsomely implemented. States that are the victims of corruption often lack the wherewithal to gather information and chase assets; states that host purloined assets generally have public bodies facing growing demands and diminishing resources (Vlasic, 2010).[1]

- **MLATs**: mutual legal assistance treaties, MLATs, are bilateral treaties between nations that facilitate the gathering of involuntary evidence for use in prosecutions. So for example, a central authority in the American government could request information from their northern counterpart under their treaty with Canada. The Canadian Minister of Justice must approve the request, which is then transmitted to the requisite authority, often a provincial Attorney General, who in turn can seek a court order to compel the evidence. MLATs are generally available only to prosecuting authorities; for example, a government that brings non-conviction forfeiture proceedings cannot access the MLAT process (Podgor and Clark, 2008).
- **Letters Rogatory (letters of request)**: a party to litigation in one country can seek the assistance of the courts in another country to obtain evidence. For example, the defendant in a criminal proceeding or the plaintiff in a civil case might use this process. A letter rogatory is a formal request from the court in one country, seeking the assistance of a foreign court in taking evidence. Unlike MLATs, there is no requirement for a bilateral treaty; letters rogatory are premised on the notion of comity of nations (Blakes, 2011).
- **Hague Convention**: the Hague convention embeds the letters rogatory process for signatory countries; a litigant transmits a letter of request to a central authority in another country, which in turn can transmit same to the court for evidence taking proceedings (like a discovery). For non-compelled evidence, a litigant can ask for evidence to be gathered through a request to the diplomatic or consular office of the other country, or they can ask the court their own courts to appoint a commissioner to take evidence in the other state (Reufels and Kelly, 2001).
- **Civil Court Orders**: in the common law world, civil courts have devised a number of remedies that can be particularly useful in fraud and corruption cases:
  - An **Anton Piller** order can issue against a defendant and in effect act like a private search warrant. Courts will only grant such an order rarely and only on clear and convincing evidence. The plaintiff must show (i) a strong

[1] UNCAC came into force in 2005 and can be found online (last viewed June 15, 2012) at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf . There are other conventions, like the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as well as efforts by multilateral organizations including the World Bank, the U.N., and the African Union.

prima facie case, (ii) serious damage (or potential damage) to the plaintiff as a result of the defendant's misconduct, (iii) convincing evidence that the defendant possesses incriminating documents or objects and (iv) a real possibility that such material will be destroyed before the normal court process (discoveries and so on) can operate.

- A **Norwich Pharmacal** order can be used to obtain documents, records and information from third parties (like financial institutions). The applicant must have a bona fide and reasonable claim; the respondent must somehow be involved in the acts complained of and be the only practicable source of the information; the respondent must be indemnified for the disclosure and the interests of justice must favour disclosure.
- Finally a **Mareva Injunction** is not an information gathering tool, but can be used to freeze assets. A plaintiff must: make full and frank disclosure of all facts; give particulars of their claim (including points that could be made by the defendant); provide grounds to show the assets are in the jurisdiction; give an undertaking as to damages; and show a real risk that assets will be removed or dissipated.[1]

- **NGOs and the Press**: there are a number of NGOs, including groups like Transparency International, that play an important role in publicly identifying information about corruption and hidden assets (Carr and Outhwaite, 2011). The press and websites like Wikileaks can also be sources of information.
- **MOUs**: civil asset forfeiture cases are non-conviction based proceedings brought by public bodies. For cross border cases, the MLAT process which applies to the criminal law, is not available. While letters rogatory are available, they are time consuming and resource intensive. Information can be shared bilaterally between public bodies through a memorandum of understanding.
- **FIUs**: many countries have created financial intelligence units or FIUs as part of their anti-money laundering regime. While each country is unique, generally an FIU collects information from financial institutions on transactions suspected of money laundering; that information is put to analysis and where appropriate it is shared with law enforcement and in some cases FIUs in other countries (often under bilateral MOUs).

7.2 Civil Lawsuits – the Example of Zambia

Zambia brought a lawsuit in England to recover stolen assets, culminating in a 2007 judgment of the High Court. The litigation focused primarily on the

[1] See Table of Cases below for legal citations.

former President of Zambia, a former director of the Zambian Security and Intelligence Services and a senior officer at the Ministry of Finance. The Presidents' official salary was roughly $10,000 per annum; prior to becoming President, he held positions in the trade union movement. He had no legitimate means of amassing wealth, yet he was very wealthy. The President would take money from just about anyone, he even demanded (and received) a £30,000 kickback from his solicitors in the UK. He bought $1.2 million in clothing, a $450,000 property, and received cash payments of well over $1 million. Clothing seized from him included 349 shirts, 206 jackets and suits, and 720 pairs of shoes; most items were monogrammed.

The lawsuit against the officials highlights the complexity inherent in civil recovery litigation; that complexity also applies to the other forms of asset recovery discussed in the sections which follow. There were three main prongs to the case:

1. The "Zamtrop Conspiracy" centred around $52 million (US) that had been transferred to the Zambian National Commercial Bank in London. While some of the money was spent to meet legitimate state obligations, the court found that $25 million had been misappropriated.
2. The "MOFED" claim centered around a breach of trust; an individual, Atan Shansonga, was given a £100,000 per annum consulting contract for letting a property owned by Zambia. Ultimately, that claim was dismissed.
3. Finally, the "BK Conspiracy" involved $20 million to be paid to an arms dealer with connections to Bulgaria. The miscreants invoked the shroud of national security and used the power of the national security apparatus to hide their theft. The court ruled that there were no genuine arms sales and that the money had been misappropriated.[1]

The case required a stalwart and determined plaintiff. There were numerous complex motions. In 2005, a number of defendants argued that the UK proceedings should be stayed and reconvened in Zambia, at least against the Zambian defendants. The court denied the motion finding that the assets were in the UK and that UK solicitors had laundered funds on behalf of the Zambian defendants. The Zambian defendants then argued that prosecutors could use the evidence from the civil proceeding in a prosecution. The court responded by ordering a "ring fence" in the English proceedings; the hearings

[1] Invoking national security provides an additional weapon for a defendant trying to avoid judgment. For example, a New York defendant in a bribery case claimed that the American security establishment authorized his actions. No doubt seeking discovery and threatening to make public classified material was part of his legal strategy.(Spahn, 2010).

were held in private and the evidence not to be used without prior court consent; as the Attorney General of Zambia was the plaintiff, he could (and did) give undertakings respecting prosecutions. Ironically, the main defendant broke the ring order himself by issuing a press release with documents attached to it. The Zambian defendants also moved to stay or dismiss the case on the grounds that they could not get a fair trial; some of the defendants had been arrested and as a condition of bail, they could not leave the country. The court responded in two innovative ways: the court allowed participation by video link and the trial was bifurcated, with a portion of the hearing conducted in Zambia under the oversight of a special examiner. In the trial, the initial video link was temporarily severed; the Zambian defendants refused to attend the backup link at the British High Commission and discontinued their participation in the trial.

Once the motions were dispensed with, a complex trial ensued. The judge tightly case managed the trial to a 51-day window over 2 years. Moving back and forth between Zambia and the UK required the transfer of "110 level arch files." There were expensive video links, which in the end were ignored by the Zambian defendants. Forensic accountants were retained by the Attorney General to trace funds into the London accounts and then on into various disbursements. In a civil fraud trial, like this one, the standard of proof is civil; however, as there are allegations of fraud, strong and cogent evidence is required. The court found that the evidence was overwhelming. The Zamtrop Conspiracy, for example, consisted of the Security Services running a London bank account almost exclusively for the purpose of stealing. From the plaintiff's perspective, the Attorney General of Zambia, their job was made particularly difficult by the refusal of Zambian defendants to participate. In civil trials, the plaintiff is generally permitted to disclosure from defendants. The court noted that the defendants had "nothing to say against AGZ's claim of any worth." While there were gaps in the evidence procured by the Attorney General, the court ruled that filling these gaps would not have changed the result. Finally, the litigation was grueling. One participating defendant that wanted to delay proceedings brought motions without merit (which they lost) and their "correspondence approached blizzard like proportions on occasions." All of this wrangling culminated in a massive judgment. The Zambian closing submissions on legal issues ran 1300 pages long. Legal issues ranged from the tort of conspiracy, fraud and breach of trust, through to joint and several liability issues, through to complex limitation issues.[1]

[1] For citations, see Table of Cases (Zambia).

7.3 Bringing Civil Lawsuits

A number of elements are needed to successfully chase a fraudster or a corrupt official through a civil suit:

- **Deep pockets** – litigation is expensive to conduct. The Zambian case could easily have cost the plaintiff millions of pounds in legal fees;
- **Tough Decisions** – outcomes in civil litigation are never guaranteed. A judicial finding against a judgment proof defendant is a pyrrhic victory. Victims therefore need to carefully consider whether the litigation is likely to recover their losses. If it is not, they'll be spending good money to no effect;
- **Information** – some fraudsters simply dissipate their unlawful earnings through extravagant lifestyles, drugs and gambling. As a plaintiff, you need to know if the fraudster has hidden money in a nest egg. As discussed above in section 7.1 (Information Gateways) orders like an *Anton Piller* and *Norwich Pharamacal* are available but difficult to obtain. Ironically the plaintiff must have adequate evidence to put before the court in order to get an order for information;
- **Dishonourable Defendants** – rules, like an Anton Piller order, were created out of judicial recognition that the normal rules of disclosure in civil litigation don't always work. In a garden variety civil suit both sides honourably disclose their information and ultimately the court rules on the merits. As the Zambian decision shows, corrupt officials are not always forthcoming with information required by the plaintiff;
- **Speed** – if the money is secreted away somewhere, the plaintiff needs to freeze it before it can be moved or dissipated. Some assets, like real estate, take time to move; others, like bank accounts, can be moved over borders with the stroke of a key. As noted in Section 7.1 (Information Gateways), a litigant can access a *Mareva Injunction* in some cases to freeze assets. While the orders are neither easy nor inexpensive to obtain, they can be granted on a worldwide basis;
- **Fortitude** – fraudsters suffer from the conceit that they can scam and fool anyone. They will try and bully and scam their way through the court system as well; and,
- **A Remedy** – can the assets be reached? Can a judgment be enforced?

7.4 Criminal Proceedings to Recover Money

Many countries have criminal confiscation measures whereby in addition to charging and prosecuting an individual for a crime, like fraud or corruption, the state can seek forfeiture of the criminal's assets, typically as part of sentencing following a conviction. As noted above, the MLAT process allows states to cooperate on cross border criminal matters. Alternatively UNCAC calls upon nations to initiate corruption investigations and inquiries without the need for a formal request. In other words, rather than investigating at the request of the victim country, an entirely domestic investigation and prosecution might occur where the wealth has been secreted. These processes generally work, although at times cooperation can be difficult to achieve (often because of resource scarcity) or slow. There are also gaps.

Consider, for example, Augusto Pinochet Ugarte, who seized power in Chile in a 1973 coup, remained as President until 1990 and Commander in Chief until 1998. A U.S. Congressional report noted:

> Since the first days of his regime, Mr. Pinochet has been accused of involvement with human rights abuses, torture, assassinations, death squads, drug trafficking, arms sales, and corruption but never convicted in a court of law (US Senate, 2004).

In fact, the Spanish government had indicted Pinochet and sought his extradition from the UK in a widely publicized case. In 2000, the extradition was dropped and Mr. Pinochet returned to Chile. Even if Pinochet had been extradited and convicted in Spain, it is highly unlikely that a large portion of his money would have been touched.

Pinochet kept some of his money with an American financial institution, Riggs Bank. Their private banking arm accepted millions in deposits from Pinochet without any serious inquiry as to the source of funds. In 1996, Riggs established the "Ashburton Trust" in the Bahamas. While Pinochet settled the trust with his five children as beneficiaries, his name doesn't appear in the document. In 1998, the Althorp Investment Co. Ltd. was set up on a similar basis with his grandchildren as beneficiaries. Those trusts were established after the Spanish indictments were out. Following his arrest in London, Spanish courts issued an order freezing all of Pinochet's assets; Riggs Bank then moved $1.6 million of money from the UK to the U.S. Pinochet met with his Riggs bankers shortly after his return to Chile from London. He arranged a series of 38 cashier's cheques, $50,000 each, to be delivered to him in Chile between 2000 and 2002. While he told the bank he wanted to give money

to descendants before he died, Pinochet cashed all of the cheques himself. As American regulators placed Riggs under greater and greater scrutiny, the Pinochet accounts were closed and the money was retuned to him.

The Pinochet case revealed a number of flaws in the international system. First, there were regulatory flaws. His KYC, or "know your client," profile uncritically noted that he had family wealth in addition to his income (at $90,000 per annum). The cheques were delivered to Chile without the required regulatory filings to the US financial intelligence unit. The more fundamental flaw lies in the weakness of the criminal justice system. Spain tried to freeze his money; they also indicted him. At least a part of the money was secreted in the U.S., Bahamas, and UK; the freeze order had no effect. Further, Pinochet never faced a criminal trial, either in Spain or Chile. Even if prosecutors had managed the daunting task of convicting him, his money may not have been touched. A determined Congressional Committee, rigorously chasing down a rogue American financial institution, uncovered only part of his holdings, roughly $8 million of his estimated $50 to $100 million net worth. The family that controlled Riggs Bank agreed in 2005 to settle lawsuits by paying $9 million to victims of Pinochet (O'Hara, 2005). Pinochet's own fortune was untouched.

7.5 Civil Asset Forfeiture

Civil asset forfeiture is a statutory device that allows a state to bring a proceeding against tainted assets. In such a proceeding, the court can freeze and ultimately forfeit assets if the state proves that the provenance of the property, or its use, lies in crime. The court in essence extinguishes an unlawfully acquired title interest and forfeits that property to the state. Unlike criminal asset forfeiture, which generally requires the conviction of an individual, the defendant in a civil asset forfeiture case is the property itself. In corruption cases, which are notoriously difficult to prove, this tool can be very useful (Simser, McKeachie, 2012).

In 2011, the U.S. government launched a civil asset forfeiture case, asking the courts to seize, freeze and forfeit the assets of the son of the ruler in Equatorial Guinea ("EG"). EG is a small country on the west coast of the middle of Africa and has been governed by two men from the same family since 1968. The current ruler, President Obiang, dominates every aspect of EG life, controlling not only the government, but also key industries. In fact, this tiny, closely controlled country was considered by a group of malefactors as an ideal location in which to launch a *coup d'etat* with a small band of mer-

cenaries. The coup did not succeed and British mercenary Simon Mann was sentenced to 34 years for his role; in 2009 he was pardoned and returned to the UK (Tremlett, 2009). Since the 1990s, EG has been awash in oil wealth; in 1998 alone, Obiang is estimated to have pocketed $96 million of the country's $130 million in oil revenues. From 1997 to 2002, three out of four people suffered from malnutrition in a country where per capita health care spending is amongst the lowest on the continent (US Senate, 2004). Despite having the largest oil reserves in Africa, most of the half million citizens of this tiny country live in poverty. Riggs Bank held $700 million in EG accounts; following U.S. hearings, the accounts were closed and the money returned to President Obiang and his cohorts. EG remains in Obiang's control, meaning the state lacks wherewithal and institutions needed to stem the kleptocracy. The Obiang regime has denied that corruption exists and has accused those who suggest otherwise of racism. In litigation still underway at the time of writing in the United States, the Department of Justice has filed for a *lis pendens* on assets of Obiang's son: luxury properties, vehicles and Michael Jackson memorabilia including "one white crystal-covered "bad tour" glove."[1] NGOs like Transparency International and Human Rights Watch continue to follow and report on the Obiang regime, actions which have stirred interest in a number of places including France.[2]

7.6 Liquidations and Receivers

Bernie Madoff ran a Ponzi scheme similar to the Stanford scheme discussed at the beginning of this paper; the difference was largely one of magnitude. At one point Madoff told investors that his fund held investments totalling $57.2 billion. Investigators later discovered that no securities were purchased by Madoff. Madoff was treated at U.S. law as a security dealer (Stanford, by contrast, sold certificates of deposit).[3] That gave an American agency, the Securities Investment Protection Corporation (SIPC) jurisdiction. SIPC gives investors some coverage for losses. Further, SIPC commenced liquidation proceedings in respect of Madoff's fraud with a view to recovering assets and compensating victims. The liquidation was complex for a number of reasons. First of all, normally an investor recovers based on the status of their investments with a broker that has failed. In the case of Madoff, however,

1 See U.S. in Table of Cases.
2 See www.transparency.org and www.hrw.org.
3 In July 2012, the courts ruled that Stanford victims could not access the SIPC for recovery (see Table of Cases).

the investments were purely fictional. In the SIPC liquidation, victims were accounted for based on their investments, less any cash withdrawals. Further, the liquidator pursued people in the Madoff scheme who had withdrawn more than they'd invested. So for example, the owners of a New York baseball team, the Mets, settled with the liquidator agreeing to pay $162 million, which they hope to recover from their own lawsuit against Madoff (Rubin, 2012). The liquidation costs have been enormous. By October 2011, administrative costs had reached $452 million and were estimated to reach $1.094 billion by 2014. The bulk of those costs related to litigation fees, asset search and recovery costs, case administration and document review; 1,050 lawsuits had been launched to recover assets and more than 70 of the defendants were foreign. By the spring of 2012, those lawsuits had brought in recoveries of $8.7 billion (US GAO, 2012).

>> 8. OPPORTUNITIES

There are several opportunities to address cross border asset recovery. A number of preventative measures have and are being implemented. For example, there are efforts to generate transparency including specific proposals in the UK dealing with the extractive industry. As noted earlier, there are NGOs and investigative reporters who are dedicated to exposing stolen assets. Internationally there are various anti-money laundering initiatives, some of which are specifically designed to address politically exposed persons and discourage corruption. As the widely subscribed UNCAC becomes implemented, there will be more investigations into bribery and corruption, particularly in the developed world. There are some useful recommendations, particularly from the StAR initiative (Stolen Asset Recovery), to develop and build infrastructure, like civil asset forfeiture systems, which will improve our collective capacity to recover assets (Greenberg et al, 2009). Finally, a multilateral information gateway would strengthen that system.

8.1 Preventative Measures for Corruption

There are several strategies to recover assets. Simple transparency is critically important. In 2002, then Prime Minister Blair proposed the Extractive Industries Transparency Initiative ("EITI"), a voluntary program supported by the UK Department of International Development. The G8 supports the initiative, with 26 countries in the process of implementing it and seven reporting revenues. Nigeria was the first country to sign on to EITI and there's now interest, within Nigeria, on how oil revenues are spent. The G8, the IMF, and other multilateral organizations have all called for transparency in budgets. Non-governmental organizations have also promulgated a publish what you pay concept. If citizens in a country like EG, one of the top four oil producers in Africa, know how much money is diverted from Treasury, the legitimacy and power of the regime may be undermined. A second preventative measure is to gate-keep within Western financial systems for PEPs or politically exposed persons. Article 52 of UNCAC requires states and their financial institutions to take a number of steps to ensure that there is effective gate-keeping and record-keeping. A corrupted state is a weak one and not a desirable place to store money looted from Treasury; the money moves offshore. Reporting suspicious transactions and maintaining careful records which can be used to find the stolen money are important steps.

There are steps that private companies can take, both to comply with domestic criminal prohibitions against bribery and to recognize corporate social responsibility. Within any given company, risk assessments can be raised, identifying environments where bribery is likely to occur and internal controls can guard against bribery. For example, employee training on ethical values, a reporting system and punishment for rule breakers can all be established through company policy. Critics suggest, however, that social reporting suffers from high quantities of information that lack the requisite quality needed for action (Hess, 2012).

8.2 Anti-Money Laundering or AML Systems

Anti-money laundering or AML systems are designed with two primary goals. As noted above, attention on PEPs within most AML systems has been increasing over the past several years. Most AML systems have two pillars: prevention and enforcement (Levi, Reuter, 2006). Prevention measures are designed to deter dirty money from entering the system and to provide for transparency, through reporting, to discourage institutions from participating in money laundering. Enforcement measures are designed to investigate and punish those who manage to evade the AML barriers and launder their money. Prevention measures have four key elements: customer due diligence, reporting, regulation/supervision and sanctions. AML prevention relies on gate-keepers in the system, particularly financial institutions, to assess and disclose risks to the authorities, often through the financial investigation unit, or FIU, in the appropriate jurisdiction. Enforcement measures include disclosure to la enforcement authorities that can lead to asset recovery using civil or criminal forfeiture.

8.3 Capacity Building

The World Bank and UNODC have created the StAR or Stolen Asset recovery initiative. In 2009, they published a guide that makes a number of recommendations:

- Civil Asset Forfeiture, discussed in detail at 7.5 above, is recommended as an effective device through which stolen assets can be recovered;
- The report recommends the adoption of unexplained wealth provisions whereby public officials who have significantly increased their assets would be subjected to a rebuttable presumption of unexplained wealth; and,

- Finally, a civil forfeiture statute in and of itself does nothing. A dedicated, trained and properly resourced unit is required to put such a law into operational effect (Greenberg et al 2009).

>> 9. CONCLUSIONS

Fraud and corruption may start locally, but can quickly become global.

Inter-connected economies easily facilitate asset movement across borders. Further the issues of fraud, corruption and crime are, in some quarters, remarkably interlinked. One commentator has noted a trend toward "mafia states" or states in which criminals and corrupt politicians have fused their interests in places like Bulgaria, Guinea-Bissau, Montenegro, Myanmar, Ukraine and Venezuela (Naim, 2012). This paper has reviewed a number of techniques used by criminals to advance fraudulent or corrupt schemes. While a number of techniques have been listed as examples, in point of fact criminals will exploit vulnerabilities in an endless variety of creative ways. Committing the initial crime motivated by profit is merely a first step. A miscreant wants to enjoy their profits and present to the world as legitimate business person or government official. Money laundering is the technique used to advance this goal. Assets are transformed, through movement and transactions, from dirty money to apparently clean money. Recovering those assets is a challenge. Once the requisite information is obtained, there are a number of devices, ranging from court ordered forfeiture through to civil lawsuits, whereby assets can be recovered. Looking forward, there are a number of challenges to be answered. For example, how does one return assets when the kleptocrat remains in power, as Obiang does in EG? Returning recovered assets to EG today would be folly, placing them back in the pockets of the corrupt. There are opportunities as we look for better ways to prevent and deter fraud and corruption and as we seek to dispossess criminals of their loot and make victims whole.

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