

Chapter 7

Application of principles and solutions:

A case study

At the end of the seminar, the experts presented the participants with a hypothetical case study that included many of the obstacles to international cooperation discussed in the seminar. The experts then asked the participants for their views on how to seek international cooperation in the case. The following is the case study provided to the participants, followed by questions posed by the experts and the responses of the participants.

The Kingdom of Myland has decided to build a power plant to meet the country's energy needs. A state-owned corporation, Power Development, is responsible for the project. This company employs Mr. Engin, a former head of the main labor union in Myland, as Chief Engineer, and Mrs. Proc (P), a citizen of Bankland, as Procurement Manager. The contract for the construction of the plant, worth USD330 million, is awarded to Cheap Construction, a foreign company from the Republic of Techland.

Ten months into the construction, the roof of the main building of the plant, made of substandard material, collapses. An audit into the procurement exercise reveals that Mr. Engin rejected all other offers for the construction of the power plant as "technically unacceptable," even though some of the rejected offers met the requirements and were cheaper than the bid of Cheap Construction. Further, it turns out that the bid from "Cheap Construction" was hand-delivered through Mr. Lobby, a freelance lobbyist from the Republic of Techland. Mrs. Proc

accepted the bid 1 day after the deadline for the submission of bids, in violation of Myland's procurement rules.

Preliminary investigations reveal the following:

- Shortly after the contract was awarded, Mr. Engin bought—without a loan—a brand-new luxury car, worth USD400,000. Mr. Engin's income or legitimate assets do not by any means allow such a purchase.
- A search of Mrs. Proc's office reveals a record of a wire transfer from Mr. Lobby in the amount of USD2 million to an account at the Tricky Bank in the Republic of Techland. The account is identified by number and the recipient is listed as "Fly by Night Co." Shortly after the search is conducted, Mrs. Proc flees the jurisdiction to an unknown location.
- A search of Mr. Lobby's hotel room reveals a record of an account number at a bank in Bankland, an offshore financial center reputed to have strong bank secrecy laws. The document is incomplete and the bank where the account is held cannot be identified. The search also produces a document that appears to be a copy of a part of a contract between Mr. Lobby and the CEO of Cheap Construction. The contract mentions Mr. Lobby undertaking to represent the company in a commercial transaction in Myland, but the last two pages of the contract, including presumably details of the fees and the signature page, are missing.

Myland has no bilateral MLA treaties in force, while the laws of Bankland and Techland require a treaty for the rendering of MLA. Myland and Bankland are parties to the UN Convention against Corruption (UNCAC). The Republic of Techland is a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions but not to the UNCAC.

With the evidence gathered to date, an investigation has been opened in Myland with respect to Mr. Engin, Mrs. Proc, and Mr. Lobby for a range of offenses. You are working for the competent prosecuting authority of Myland on this case and you are responsible for the international evidence gathering and extradition issues.

1. In order to gather evidence of bribery and to trace assets, you need to obtain from Bankland records of the account number found in Mr. Lobby's hotel-room. How would you go after those records, and

what would be the key content of your request? Assume that, despite your hard efforts, the initial response from Bankland is a one-line refusal based on bank secrecy. What action would you take in response?

To determine the identity of the bank, it is advisable to first resort to informal channels of assistance. One approach is to ask the FIU in your country to inquire with its counterpart in Bankland. You should also make inquiries through the police channel and perhaps Interpol. If these methods fail, the next step may be to request formal MLA under the UNCAC.

Your request should include the relevant provisions of law in Myland, the partial account number, the dates and amounts of the transaction, and the facts of the case. You should also indicate that you are seeking all account and customer due diligence information involving Mr. Engin, Mrs. Proc, Mr. Lobby, Cheap Construction, and Fly by Night Co. Specify an appropriate time period for the records, bearing in mind that older records make take longer to be produced. It may be prudent to expressly ask Bankland to keep the request confidential and to instruct the bank to do the same. Specify also any requirements for certification and authentication that may be necessary to render the records admissible at trial. Finally, set a reasonable deadline for the production of documents.

On the other hand, there may be items that you should not include in the request. There is probably no need to specify whether the authorities in Bankland should obtain a search warrant or a production order; that is a matter that the authorities in Bankland should decide. It is also most likely premature to ask for the account to be frozen, unless it takes a long time for the documents to be produced.

In response to Bankland's one-line refusal based on bank secrecy, you could remind Bankland of its international obligations to provide MLA under the UNCAC, and possibly under other international instruments like the 40 Recommendations of the Financial Action Task Force. Refer as well to the prohibition against refusing to render MLA because of bank secrecy under art. 46(8) of the UNCAC. Finally, try to ascertain the precise extent of the bank secrecy provisions under Bankland's laws.

2. Mr. Engin leaves Myland and flees to Bankland. Subsequently his spouse (who was left behind) comes forward and provides a statement indicating that Mr. Engin received the money for the car

from a shady-looking character who identified himself as an official of Cheap Construction. As the statement from the spouse is not admissible under your legal system, you charge Mr. Engin with “unjust enrichment.” You are preparing a request for Mr. Engin’s extradition to Bankland (a common law country with traditional evidence requirements) on the understanding that an offense of unjust enrichment does not exist and in fact is constitutionally prohibited. You are still interested in pursuing extradition. What would be the content of your extradition request and how would you address the issue of dual criminality?

The contents of the extradition request should include information on Mr. Engin’s identity (name, description, photograph, fingerprints, etc.) and his whereabouts. It should also include all of the facts of the case and not only the evidence relevant to the offense of “unjust enrichment.” This is particularly important in the case because of the problem with dual criminality.

Concerning the statement of Mr. Engin’s spouse, you should try to find out the relevant rules of evidence in Bankland. It is possible that the statement may be admissible in an extradition hearing in Bankland. However, if you do include the statement in the request, it is advisable that you indicate that the statement is not admissible in your jurisdiction.

As for dual criminality, you could ask Bankland to waive this requirement. You should also ask the authorities in Bankland to determine whether the totality of the conduct underpinning the request amounts to a different offense in Bankland.

3. You need to obtain account-holder information and records regarding the account held in Tricky Bank under the name of Fly by Night Co. in Techland. How would you go after those records? Outline briefly the steps you would take and the key content of any request.

As there is no treaty between Myland and Techland, assistance will most likely be based on domestic legislation. Techland may require Myland to provide an assurance of reciprocity. One alternative is to hire a private document tracer to try to obtain the records.

The content of the request should again include all of the information concerning the case. You should again seek all account and customer due diligence information involving all of the actors in the case, not just Fly by Night Co.

4. You have just heard through intelligence channels that Mrs. Proc has been located in Bankland. You seek her provisional arrest and extradition on a passive-bribery charge. The authorities in Bankland tell you that Mrs. Proc is a national of Bankland and that Bankland's constitution forbids the extradition of nationals. What action might you pursue to ensure that Mrs. Proc is brought to justice?

Since there are no treaties between Myland and Bankland, you will again have to resort to domestic legislation as the basis for extradition. To overcome the obstacle presented by Mrs. Proc's nationality, you should ask Bankland to prosecute her domestically. Alternatively, Myland may offer to seek Mrs. Proc's extradition on the condition that, if she is convicted, she will be sent to Bankland to serve her sentence.

