

BY LIONEL TAY

ON THE ROAD TO ASSET RECOVERY

Those engaged in cross-border asset tracing need to know how to do certain things in a certain way to achieve maximum returns with least pain

FRAUD, by its nature, knows no boundaries. It permeates throughout all sectors of industry. The face of fraud is perpetually morphing, growing more sophisticated in an attempt to out-pace increasing technologies, vigilance and scrutiny. Singapore has spared no efforts to tackle this very real problem which regularly hits large multinational businesses as well as small and medium-sized enterprises (SMEs).

Apart from crime prevention and detection, the corollary to fighting fraud is the need to have an effective mechanism to claw back assets which have been dissipated out of Singapore. In the course of representing clients who have obtained judgments and orders seeking the return and recovery of assets wrongly appropriated by ex-employees, rogue directors or fraudsters, the constant frustration experienced has been the lack of teeth when attempting to enforce judgments and orders in countries outside Singapore.

Countries recognise the need to enter into bilateral or multilateral cooperation agreements tailored to ensure that judgments and orders obtained in any one of the member states would be seamlessly enforced in other member states pursuant to reciprocal arrangements.

While a formal framework of cooperation between the different states within Asia remains a work in progress, the respective law firms in each jurisdiction continue to work closely towards harmonising efforts to ensure that a judgment obtained from a superior court within each jurisdiction can be given effect to – whether by way of parties applying for judgment or enforcement orders based on the original judgment itself, and/or through efforts to speed up the judicial process while concurrently seeking assistance where possible from governmental agencies dedicated to fighting fraud or corruption and the like.

Apart from the legislative framework and formalities required to make cross-border asset tracing and recovery a success, a good knowledge of the human condition cannot be under emphasised. How a law is applied in each country does not always have a uniformity to it. Understanding the persons (and their respective mindset and cultures) who ultimately determine how successful enforcement efforts are in each country is a key weapon to an effective asset recovery programme.

Having a thorough knowledge of each other's counterparts in the different jurisdictions helps tremendously. The bureaucratic formalities, legislative obstacles, administrative challenges and other attendant obstacles can be largely surmounted by a real will and desire to assist in focused efforts at cross-border asset

recovery. Conversely, if efforts were to focus primarily, if not solely, on legislative framework and pedantic insistence on the enforcement of legal rights above all else, without an understanding of what works best and how that works in each jurisdiction, the experience thus far has been one of feet dragging, unhappy mutterings and ultimately tardy efforts at mutual cooperation.

While there is a host of anecdotal evidence demonstrating how “difficult” things can get in countries which do not always appear to subscribe to the same philosophy or ethic practised on our shores, I would certainly say that it is equally – if not more important – for those engaged in cross-border asset tracing to know how to do certain things in a certain way to achieve maximum returns with least pain.

Using a “softly softly” gentle approach can often mean that files and records miraculously present themselves in a short space of time compared with the brow-beating, thumping-on-table approach. The key to successful recovery efforts is forging an understanding of the human condition when dealing with fellow practitioners, law enforcement agencies and others involved in the asset recovery process.

With the goal of economic integration by 2015, the Asean Economic Community (AEC) can hopefully add to the momentum in achieving cooperation in both the public and private space in combating fraud and corruption. The AEC follows the Asean Economic Blueprint adopted by Asean leaders in November 2007 and has, as its genesis, the Asean Vision 2020 discussed by Asean leaders at their Summit in December 1997.

Among various aims, the AEC envisages a single market and production base, a competitive economic region and integration. Asean will be transformed with free movement of goods, services, investment and skilled labour. Against that context, it is logical and essential for developing, hand in hand, a harmonised system within Asean aimed at fraud detection and the

claw-back of ill-gotten gains seamlessly and expeditiously throughout the economic region.

Governmental efforts continue to focus on carefully thought out, reasoned systems to assist cross-border recovery efforts. These efforts implicitly recognise the fact that no country is an island, to modify a well known phrase. It would undoubtedly be a boost to business confidence if each of the many Asian nations (extending beyond Asean) can one day come together with a platform designed to assist and increase efficiency in cross-border asset recovery efforts, be it by way of legislation, treaties, forming of economic blocs and other means which assist.

With the various ongoing efforts and initiatives in place, we can hopefully expect to see corporate institutions with an Asean focus work closely to harmonise efforts in combating fraud, enhance corporate governance, and implement deepened efforts to improve local and international procedures (ranging from managing whistleblowing, crisis and reputational risk management, investigations and recovery of assets).

However, in the interim period while we await the day when a truly effective international system of fraud detection and cross-border asset recovery is finally established, the challenging area of cross-border tracing of assets remains a decidedly tricky area of legal practice, fraught with difficulties and sometimes very real danger. ■

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