

MUTUAL LEGAL ASSISTANCE IN BRUNEI DARUSSALAM

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The growing ease in mobility and enhanced technology have contributed to the cross-border nature of various criminal offences. This has inevitably led to multifaceted complexities in investigation and, to some extent, prosecution. Crimes such as corruption, financial crimes and money-laundering often involve significant amounts of cash and other valuable assets. These proceeds of crime can easily be transferred to another jurisdiction in order to impede the law enforcement agencies' efforts in investigating and identifying the assets to be confiscated. In pursuing investigations beyond the jurisdictional border and, therefore, stepping into the international realm, an individual country cannot act in isolation. It is incumbent on governments to cooperate with and assist one another to ensure criminals do not take advantage of any cross-jurisdictional loopholes and successfully escape justice.

In the spirit of cooperation, Brunei Darussalam employs both formal and informal channels in seeking assistance from and also giving assistance to foreign countries. Both channels are important tools in overcoming the problems posed by cross-border crimes. This paper intends to explore the process of formal cooperation between Brunei Darussalam and foreign countries through the Mutual Legal Assistance ("MLA") mechanism to support criminal investigations, prosecutions and related proceedings.

Brunei Darussalam has long recognized the need for international cooperation in combating cross-border crimes. It signed the United Nations Convention Against Corruption ("UNCAC") on 11 December 2003 and ratified it on 2 December 2008. The multilateral treaty contains a chapter encouraging State Parties to cooperate in criminal matters and to consider assisting one another in the investigations of, and proceedings in, civil and administrative matters relating to corruption. Brunei Darussalam's signing of UNCAC signals its unwavering commitment to combat transnational crimes and enhancing international cooperation. Within the ASEAN region, Brunei Darussalam signed the Treaty on Mutual Legal Assistance in Criminal Matters ("ASEAN MLAT") on 29 November 2004 and ratified the treaty on 2 February 2006. The ASEAN MLAT is aimed at enhancing law enforcement cooperation and facilitating the MLA process between the ASEAN Member States.

I. THE LEGAL FRAMEWORK

A. Mutual Assistance in Criminal Matters Order, 2005 ("MACMO")

MACMO is the primary legal framework for MLA in Brunei Darussalam which allows for the provision and obtaining of mutual legal assistance to and from other countries in criminal matters and for connected purposes. This includes assistance in a criminal investigation, any criminal proceeding or an ancillary criminal matter such as the restraining of dealing with, or the seizure, forfeiture or confiscation of, any property, and the obtaining, enforcement or satisfaction of a confiscation order. In acknowledging the

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sensitivity of the request sought in ongoing investigations, MLA requests in Brunei Darussalam are executed under the auspices of confidentiality where there is an explicit request to do so.¹

1. Forms of Assistance

Section 3 of MACMO provides for a vast range of assistance that can be provided or obtained by Brunei Darussalam as outlined below:

- a) Obtaining of evidence, documents, articles or other things;
- b) Arranging for persons to give evidence or assist in investigations;
- c) Confiscation of property in respect of an offence;
- d) Service of documents;
- e) Identification and location of persons;
- f) Search and seizure;
- g) Provision of relevant documents and records; and
- h) Any other types of assistance not contrary to Brunei Darussalam's domestic laws.

2. Conditions for Providing and Seeking Assistance

In promoting international cooperation, Brunei Darussalam can accept MLA requests from any foreign country not only based on a bilateral or multilateral treaty such as the UNCAC and ASEAN MLAT, but also under the principle of reciprocity. Under this principle, the requesting country gives an assurance that it will entertain a similar request by Brunei Darussalam for assistance in criminal matters.²

3. Grounds for Refusal to Accept MLA Requests

Though there are circumstances in which a request for MLA will and may be refused, the reasons for refusal as laid out in section 24 of MACMO are not unreasonable or unduly restrictive. An MLA request will be refused if the Attorney General is of the opinion that:

- a) the requesting country has, in respect of that request, failed to comply with the terms of any treaty, memorandum of understanding or other agreement with Brunei Darussalam;
- b) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Brunei Darussalam, would have constituted an offence under the military law applicable in Brunei Darussalam but not under the ordinary law;
- c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to that person on account of his colour, race, ethnic origin, sex, religion, nationality or political opinions;
- d) the offence to which that request relates is not of sufficient gravity;
- e) the article or thing requested is of insufficient importance to the investigation or could reasonably be obtained by other means;
- f) the provision of the assistance would be contrary to the interests of the public and prejudicial to the sovereignty, security or national interests of Brunei Darussalam;

¹ Section 23(3)(vi) of MACMO requires the request to contain a statement setting out the wishes concerning confidentiality and the reason for those wishes.

² Under section 20(1)(c)(i) of MACMO, the Attorney General shall consider any assurances given by the foreign country that it will entertain a similar request by Brunei Darussalam for assistance in criminal matters in deciding whether to deal with the request or otherwise.

- g) the requesting country has failed to undertake that the article or thing requested will not be used, except with the consent of the Attorney General, for a matter other than the criminal matter in respect of which the request was made;
- h) in the case of a request for assistance in obtaining evidence and in search and seizure, the requesting country has failed to undertake to return to the Attorney General, upon his request, anything obtained pursuant to that request upon completion of the criminal matter in respect of which the request was made;
- i) in the case of a request for assistance in arranging the attendance of a person in a foreign country, the person to whom the request relates is not prepared to give his consent to the transfer; or
- j) the provision of the assistance could prejudice a criminal matter in Brunei Darussalam.

On the other hand, the Attorney General may exercise his discretion to refuse a request for assistance in the following circumstances:

- a) pursuant to the terms of any treaty, memorandum of understanding or other agreement between Brunei Darussalam and the requesting country;
- b) if, in his opinion, the provision of the assistance would, or would be likely to, prejudice the safety of any person whether in Brunei Darussalam or elsewhere;
- c) if the request relates to the investigation, prosecution or punishment of any person in respect of an act or omission that, if it had occurred in Brunei Darussalam, would not have constituted an offence against the laws of Brunei Darussalam;
- d) if, in his opinion, the provision of the assistance would impose an excessive burden on the resources of Brunei Darussalam;
- e) if, in the case of a request for the attendance of a prisoner in Brunei Darussalam, the granting of that request would not be in the interests of the public or the person to whom the request relates; or
- f) the request does not comply with the form of request stipulated in section 23 of MACMO.

As apparent above, Brunei Darussalam does not consider dual criminality a prerequisite in fulfilling an MLA request. It is only a discretionary power of the Attorney General to refuse a request on this ground or if a treaty which forms the basis of the request requires dual criminality. To date, Brunei Darussalam has been able to accede to all MLA requests submitted to it by foreign jurisdictions.

B. Criminal Asset Recovery Order, 2012 (“CARO”)

Further to MACMO, CARO also enables international cooperation relating to property believed to be proceeds of a serious crime, which includes offences of bribery under the Prevention of Corruption Act, most if not all financial crimes, and money-laundering.³

³ Section 2 of CARO defines "serious offence" as an offence against a provision of – (a) any written law of Brunei Darussalam for which the maximum penalty is death, imprisonment for a term of not less than 6 months, fine of not less than \$1,000 or more severe penalty; (b) a written law of a foreign country, in relation to acts or omissions which, had they occurred in Brunei Darussalam, would have constituted an offence for which the maximum penalty is imprisonment for a term of not less than 6 months or more severe penalty including an offence of a purely fiscal character.

1. Requests by Brunei Darussalam

Brunei Darussalam, through its Attorney General, may request an appropriate authority of a foreign country to arrange for the enforcement of a confiscation or forfeiture order, a benefit recovery order or a restraining order made in Brunei Darussalam against property that is believed to be located in that foreign country. A request may also be made to obtain the issue of warrants, orders or other instruments necessary for the search, location, restraining and production of property suspected to be tainted property.

2. Requests to Brunei Darussalam

Similarly, Part V of CARO contains provisions for a foreign country to request the Attorney General to apply for a restraining order against property as well as enforcing foreign restraining, confiscation and benefit recovery orders against property located locally in Brunei Darussalam. A foreign country may also request assistance in locating property believed to be the proceeds of a serious crime committed in its country.

II. THE INSTITUTIONAL FRAMEWORK

A. **The Central Authority**

The Attorney General is the Central Authority of Brunei Darussalam for all MLA matters. Any request for assistance must be made to the Attorney General, and only the Attorney General is authorized to make MLA requests to foreign countries on behalf of the law enforcement agencies in Brunei Darussalam. However, the Attorney General's powers may be delegated to a public officer. As such, an MLA Secretariat consisting of officers of the Attorney General's Chambers was established in 2005 to assist the Attorney General in discharging his responsibilities, in particular to transmit and receive requests for assistance in accordance with the provisions of MACMO, CARO and any MLA treaties.

To facilitate a foreign country in making an MLA request, samples of request forms are available on the Attorney General's Chambers website. They can be used as a guideline of what the Central Authority requires. Where the request is particularly urgent, the request may be made orally but must be confirmed subsequently in writing either by post or by fax. In order to expedite a request, it is not necessary for requests to be sent through diplomatic or consular channels unless required to do so by a treaty, memorandum of understanding or other agreement. The MLA Secretariat also encourages informal consultations prior to the making of a formal MLA request by e-mail to allow it to evaluate and advise whether the request can be complied with otherwise.

B. **Authorized Officers**

Authorized officers are officials who execute the actions required following the Central Authority's acceptance of an MLA request. By virtue of section 2 of MACMO, an authorized officer means:

- a) the Director, Deputy Director and any other officer of the Narcotics Control Bureau appointed by legislation;
- b) the Director, Deputy Director, Assistant Director, Chief Special Investigator, a Senior Special Investigator and any other officer of the Anti-Corruption Bureau appointed by legislation;
- c) any police officer; or
- d) any other person or class of person appointed by the Minister.

In executing the request approved by the Central Authority, an authorized officer has the power to, inter alia,

- a) take a written statement from the person to whom the request relates to be transmitted to the requesting country;
- b) apply to the court for a search warrant to authorize entry into and search of a place;
- c) in executing a search warrant, seize and detain any article or thing specified in the warrant;
- d) locate or identify and locate the person to whom the request relates; and
- e) effect the service of process on a person to whom the request relates.

III. BRUNEI DARUSSALAM'S EXPERIENCE

In the last 5 years, Brunei Darussalam received one MLA request⁴ and made four requests for assistance. Where possible, law enforcement agencies have also used informal channels to seek information and move their investigations forward before engaging with the Central Authority to secure admissible evidence.

Most notable of the outgoing requests are the three that Brunei Darussalam made to different foreign jurisdictions pertaining to the prosecution of Ramzidah Abdul Rahman and Nabil Daraina Badaruddin.⁵ Investigations into the case began in January 2018 by the Anti-Corruption Bureau (“ACB”). What began as a suspected offence under the Prevention of Corruption Act unravelled as one of criminal breach of trust committed by a judicial officer in her capacity as a Deputy Official Receiver. The funds misappropriated by Ramzidah between 2004 and 2017 amounted to B\$15.75 million and were subsequently laundered by both herself and her husband, Nabil, within and outside of Brunei Darussalam. The Defendants were charged in July 2018, but the trial only began in September 2019 and concluded in November of the same year. In January 2020, Ramzidah was convicted of criminal breach of trust and both her and Nabil were convicted of various money-laundering offences. Prior to the trial, Brunei Darussalam made MLA requests as follows:

A. Request to the United Kingdom

The ACB's investigations into the local bank accounts held under the Defendants' names led to the discovery that during the period of Ramzidah's misappropriation, B\$1.3 million and £875,581.02 were transferred to their joint bank accounts in the United Kingdom (“UK”). It was also believed that they spent part of the embezzled funds on properties in the UK where their daughter was studying.

As such, an MLA request was sent to the UK Central Authority on 1 November 2018 for assistance in obtaining banking evidence and evidence of assets held or dissipated by the Defendants in the UK. In response to the request, documents containing evidence of properties leased by the Defendants in the UK were received and used as evidence in the

⁴ The requesting foreign country e-mailed the MLA Secretariat for a consultation. After providing information regarding the formalities of the request, Brunei Darussalam has not received any further documents pertaining to the request.

⁵ *Public Prosecutor v Ramzidah binti Pehin Datu Kesuma Diraja Kol (R) Hj Abdul Rahman and Hj Nabil Daraina bin Pehin Udana Khatib Dato Paduka Seri Setia Ustaz Hj Awang Badaruddin*, High Court Criminal Trial No. 11 of 2018.

trial against them. Two months after the trial concluded, a further response was received consisting of the banking evidence requested.

B. Request to Malaysia

From very early on in the investigations, Ramzidah's justification for having a lavish lifestyle included a claim that she was gifted B\$5 million by a Malaysian national for witnessing an extremely confidential agreement. She did not produce any evidence in support of her claim.

The ACB, through the informal channel, obtained assistance from its Malaysian counterpart to record a statement from the Malaysian national. In her statement, she denied the claims made by Ramzidah. To rebut Ramzidah's defence at trial, the Prosecution intended to secure the Malaysian national as a witness. On 16 March 2019, Brunei Darussalam made a formal request to Malaysia for assistance in arranging her attendance to give a sworn testimony in Court through live video or live television links. The official request was sent through the diplomatic channel but an advance communication by e-mail was established between officers of the Central Authority of both countries handling the matter. This form of communication made further clarifications and enquiries more efficient.

By 9 April 2019, the Brunei Darussalam Central Authority was notified that the Malaysian national was agreeable to testify through live video. However, by the time the witness was required to testify in September 2019, she could not attend, and the Prosecution chose to close its case without calling the witness. Although the witness's virtual attendance did not come to fruition, the assistance rendered by the Malaysian authorities throughout the process was encouraging.

C. Request to the Kingdom of Thailand

In a statutory declaration submitted to the ACB, Ramzidah revealed information of all properties under her name, her expenditures and liabilities. She claimed that she could maintain a lavish lifestyle partly on moneys derived from the investment returns received from her late brother who was residing in Thailand before his death. Investigations did not show any money trail from Thailand.

In order to verify her claims, the ACB sought the assistance of its counterpart in Thailand. Following confirmation through informal channels that Ramzidah's claim was untrue, Brunei Darussalam made an MLA request to Thailand on 3 August 2019 to trace any bank accounts, assets or businesses registered under the Defendants' names, Ramzidah's parents and her late brother. The MLA request was made in order to secure admissible evidence to be used in the trial and was sent through the diplomatic channel.

As practiced with Malaysia, Brunei Darussalam consulted with Thailand's Central Authority through e-mail correspondence. Unfortunately, the evidence requested was not received in time to be used during the trial. It was only in March 2020 that documents were received in relation to part execution of the request. In the following month, the MLA Secretariat was informed by e-mail that the suspension of commercial and official airmail services due to the Covid-19 pandemic meant that alternative delivery methods had to be used for the remaining documents requested. Subsequently in May 2020, the documents were sent through the Embassy of Brunei in Thailand. The documents received were in the Thai language and needed to be translated into English upon receipt. Though the evidence

was not used in the criminal trial, the documents received were still a useful consideration in the civil forfeiture proceedings which came afterwards.

IV. OVERCOMING CHALLENGES

Despite countries' inherent readiness to cooperate and assist, it is clear that there remain challenges in utilizing formal channels. In some cases, the procedures involved in executing a request are lengthy and overly bureaucratic, which can make the process ineffective in urgent cases. The unfamiliarity of a foreign country's legislation and criminal justice system may also pose a hurdle that needs to be overcome.

In facing such challenges, it is important that informal channels are fully utilized before formally engaging a foreign jurisdiction through the MLA mechanism. The speedy response received through informal channels helps in narrowing down the evidence needed in an MLA request, and in the case of a prosecution, the prosecutors are able to anticipate the evidence that can be obtained and whether the case can still go on if the evidence is not received in time.

Informal consultations between officers of the Central Authority in both jurisdictions handling a particular MLA request are equally important as they help smoothen the process. It also ensures that the requesting country is informed of the formalities to be complied with, which could save valuable time.

V. CONCLUSION

As criminals remain unhindered in hiding away or transferring evidence and proceeds of their crimes internationally, criminal justice officials will continue to face obstacles in procuring them from across borders. This further highlights the importance of MLA and the need for strengthened cooperation between governments. Seeking and providing assistance at an international level is not a new idea. While treaties and legislation already exist to facilitate MLA, countries should continue to review them to reduce any bureaucracy that can impede the effectiveness of the process and also work towards formulating efficient procedures in receiving and executing the requests. To this end, Brunei Darussalam is committed to continuously improving its processes and adopting best practices learned through experience.

Table 1: MLA requests sent

Year	No. of requests	Country	Offence type	Nature of request
2020	0	-	-	-
2019	2	Malaysia	Money-laundering, criminal breach of trust, possession of unexplained wealth	Request for assistance in arranging the attendance of a witness
		Thailand		Request for assistance to trace any bank accounts, assets or businesses registered under the Defendants' names and relevant family members
2018	1	United Kingdom		Request for banking evidence and obtained evidence of asset held/dissipation of criminal proceeds
2017	0	-	-	-
2016	1	Malaysia	Money-laundering, failure to declare cross-border cash movement	Request for Production Order for various documents from financial institutions to complete investigations against the Accused

Table 2: MLA requests received

Year	No. of requests	Country	Offence type	Nature of request
2020	0	-	-	-
2019	1	Country A	Bribery, criminal breach of trust, cheating, money-laundering	Request for obtaining evidence
2018	0	-	-	-
2017	0	-	-	-
2016	0	-	-	-