

CURRENT SITUATION AND COUNTERMEASURES AGAINST MONEY LAUNDERING: HONG KONG

*Sin Kam-wah **

I. INTRODUCTION

Money laundering is one of, if not the biggest, transnational crime facing us all today. Ever since the mid to late 1980s, it was accepted that to effectively fight the world drug trade, law enforcement needed not only to get culprits sentenced to long periods of imprisonment but also to confiscate their assets and proceeds of crime. With emphasis placed on taking their money the criminal has had to resort to laundering to hide it away or disguise its origin.

Given the ease with which money and assets can be moved around the world it is impossible for any one jurisdiction to effectively fight this battle on their own. Effective laws and co-operation amongst jurisdictions are a necessity for any successful action to be taken against the launderers and their activities. Hong Kong has been quick to recognise their responsibility in this regard and we joined the Financial Action Task Force (FATF) when it was first established in 1989. Subsequently we joined the Asian Pacific Group against Money Laundering (APG) when it was established in 1997.

The People's Republic of China is not a member of FATF but is a member of the APG. After the handover in 1997 when Hong Kong became a Special Administrative Region of the Mainland,

Hong Kong continued its membership of FATF, despite the mainland not being a member. Indeed in June 2001 Hong Kong will take up the Presidency of FATF for the one year term of office. This will be an important time for the organisation as it is planned to review the 40 recommendations.

This paper draws heavily on the experience of the Hong Kong Police, and will address the following areas:

- (i) The Current Laws in Hong Kong and their use
- (ii) Co-operation by banks and other sectors, including obstacles and the overcoming of them through legislation, education and regulation
- (iii) The functions and activities of the Joint Financial Intelligence Unit in Hong Kong
- (iv) Asset confiscation
- (v) Case examples
- (vi) International co-operation

II. THE MAGNITUDE OF MONEY LAUNDERING

It is almost impossible to put an accurate figure on the amount of money being laundered each year; criminals, after all, do not publish accounts. Estimates of the revenue generated from narcotics trafficking in the USA alone range from US\$40 billion to US\$100 billion¹.

* Senior Superintendent, Organized Crime and Triad Bureau, Hong Kong Police Force, Hong Kong

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The Financial Action Task Force (FATF) estimates that narcotics trafficking is the single largest source of criminal proceeds, followed by the various types of fraud². Smuggling, gambling and, increasingly nowadays, trafficking in human beings also generate significant amounts of criminal proceeds. Often overlooked, however, is the huge amounts of money generated by tax evasion. Many people do not think of tax evasion as being a source of criminal proceeds; indeed, in some jurisdictions tax evasion is not a crime per se. However one only has to consider the huge industry which has grown up around so called tax havens, or off-shore financial centres, to realise that tax evasion - and its legally ambiguous sibling, tax avoidance - is big business.

In summary, therefore, whilst it is not possible to accurately quantify the amount of money laundering going on in any one country or region, it is possible to conclude that the amount of money being laundered is huge.

III. THE CURRENT LAWS IN HONG KONG AND THEIR USE

A. Criminalisation of Money Laundering

For historical reasons, Hong Kong's money laundering laws are in two Ordinances. Firstly in 1989 came the Drug Trafficking (Recovery of Proceeds) Ordinance, Cap 405. Under section 25 the following offence was introduced :

“Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part,

directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.”

The main points to note are “Knowing or reasonable belief.” Obviously knowledge is a fairly straight forward concept, but it is difficult to prove other than through say - admissions, undercover officers, accomplices or technical assistance. Reasonable belief is however a much more difficult concept to show and it was considered by the Court of Appeal in HKSAR and SHING SIU MING and two others (CA415/97). SHING was a major drug trafficker between Hong Kong and Australia and he was sentenced to 30 years for trafficking and money laundering and the two others involved were also sentenced to 7 years each for money laundering. The two others were his wife and sister and the prosecution relied on reasonable belief. The Court of Appeal said :

“Knowledge if proved would simply resolve the matter. Difficulty, however, arises from the use of the words “having reasonable grounds to believe.” This phrase we are satisfied, contains subjective and objective elements. In our view it requires proof that there were grounds that a common sense, right-thinking member of the community would consider were sufficient to lead a person to believe that the person being assisted was a drug trafficker or had benefited therefrom. That is the objective element. It must also be proved that those grounds were known to the defendant. That is the subjective element.”

The Court of Appeal also later said :

“Here the judge was wrong as he was directing that it was incumbent upon the prosecution to prove either

¹ Financial Action Task Force Annual Report 1999-2000

² Financial Action Task Force Annual Report 1999-2000

knowledge or belief, which he characterized as “something less than knowledge”, in the minds of the defendants. The test is, in fact, not so high. The prosecution has to prove knowledge of trafficking or that a defendant had reasonable grounds to believe that there was trafficking. The prosecution is not called upon to prove actual belief. It would be sufficient to prove reasonable grounds for such a belief and that the defendant knew of those grounds.”

In this case the prosecution could prove huge sums of money coming from Australia to the relatives’ bank accounts which SHING told them to set up and that they withdrew the money in cash and gave it to SHING. They believed SHING was unemployed, they knew he had previously been convicted of drug offences and had visited him in prison. The prosecution could show they opened accounts for an unemployed person with previous drug convictions which received huge sums of money (HK\$47 million) which they withdrew in cash and gave to him and they knew all the above facts. A right-thinking member of society using common sense should have believed the money was from drugs. The applications were dismissed.

Similarly, - “Any property” is very wide and includes, everything you can think of such as cash, flats, jewellery, cars, stocks, shares etc, etc. “Represents any person’s proceeds” means if the criminal gets cash from trafficking and then buys a house with the cash and then sells the house and buys shares; the cash, house and shares all represent the proceeds. Also one should note it refers to “any person’s” which means that one can also launder one’s own proceeds of crime and be charged with both the substantive offence and money laundering, as Happened in SHING’s Case Mentioned Earlier.

“Drug Trafficking” under the law includes many serious drug offences such as manufacturing, importing, exporting etc. “Deals” is defined as :

- (a) Receiving or acquiring the property;
- (b) Concealing or disguising the property (whether by concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it or otherwise);
- (c) Disposing of or converting the property;
- (d) Bringing the property into or removing from H.K.;
- (e) Using the property to borrow money, or as a security (whether by way of charge, mortgage or pledge or otherwise).

The maximum sentence is 14 years and a \$5 million fine on Indictment and 3 years and \$1/2 million fine on summary conviction.

When FATF extended the money laundering recommendations to cover organized and serious crimes, Hong Kong introduced the Organized and Serious Crimes Ordinance, (OSCO), Cap 455 in late 1994 and it came into effect in mid 1995. Also at section 25, the money laundering offence is the same as the DT (ROP) offence except that it applies to proceeds of an indictable offence, rather than proceeds of drug trafficking. Basically all offences in Hong Kong are indictable, which means we have few problems over worrying whether the proceeds of crime are from a predicate offence or not, as in some other jurisdictions.

An interesting part of the OSCO offence is section 25(4), which reads:

“In this section and section 25A, references to an indictable offence

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include a reference to conduct which would constitute an indictable offence if it had occurred in Hong Kong.”

This means that the proceeds of crime from overseas are not welcome in Hong Kong and any attempt to bring them to Hong Kong constitutes an offence in the territory. For example a robber in Japan deposits the proceeds into a Hong Kong bank account in his own or another's name, he or the other persons are laundering in Hong Kong. Although with the other persons one would have to prove the knowledge or reasonable belief. However if someone remits money out of Japan through a remittance agent he commits an offence against the Japanese Banking Act, but there is no similar offence in Hong Kong and consequently dealing in the proceeds of that Japanese offence in Hong Kong is not money laundering.

It is of interest to note that tax evasion is an indictable offence in Hong Kong and therefore dealing in both local and overseas proceeds of tax evasion is an offence in Hong Kong.

To summarise, our laws in Hong Kong are far reaching in that it is an offence to launder the proceeds of nearly all offences, one can launder one's own proceeds and it does not matter if the predicate offence happened outside our jurisdiction.

B. Money Laundering Cases

The Hong Kong experience suggests that it is very hard to show “knowledge” or “reasonable belief” in money laundering offences. Consequently there is currently an amendment before our legislature to lower the mental element to “suspect”. Proving someone should have suspected property dealt with by them is the proceeds of crime will be easier.

Another problem with the HK legislation is showing that the property which was the subject of the transaction was, as a matter of fact, the proceeds of crime. This is often not easy, but it should be borne in mind that through the use of circumstantial evidence the Courts can be asked to conclude that the property must be the proceeds of crime.

Circumstantial evidence derives its main force from the fact that it usually consists of a number of items pointing in the same direction :

“It has been said that circumstantial evidence is to be considered a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link break, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight, but three standard together may be of quite sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit of.”

[R v. Exall (1866) 4 F&F 922]

Examples of the type of circumstantial evidence one can use are :

- (a) Expert Evidence
- (b) Audit Trails
- (c) Unlikelihood of Legitimate Origin
- (d) Absence of Commercial or Domestic Logic
- (e) Evidence of Bad Character
- (f) Contamination of cash
- (g) Packaging of Proceeds
- (h) Denomination of Banknotes

- (i) Lies by the Defendant
- (j) Inferences from Silence
- (k) Surveillance
- (l) False identities, addresses and documentation
- (m) Overall Criminal Enterprise
- (n) Accomplices Evidence
- (o) Admission regarding the suspicious and unusual circumstances in respect of the property in issue.

Hong Kong has become aggressive in seeking the use of circumstantial evidence to prove crime proceeds.

IV. THE INVOLVEMENT OF OTHER SECTORS IN THE FIGHT AGAINST MONEY LAUNDERING

As must be apparent when looking at the way proceeds are laundered law enforcement cannot hope to achieve any real success on their own. If one has a certain type of crime one can try and follow the proceeds and hope to identify the criminal and/or launderer, but the chances of success in this way is very limited. If one has a suspect or target one can look at his bank accounts, businesses etc. and try and identify the source, but one is starting at the integration stage and working backwards, consequently if the criminal has laundered his proceeds well it is difficult to get anywhere. Also this is time consuming and resource intensive.

However if the professionals along the way such as the bankers, accountants, lawyers, money changers, remittance agents, stockbrokers, estate agents, high value retailers etc. are helping the law enforcement agencies by reporting suspicious transactions then the task becomes much easier.

Consequently an important part of any successful money laundering regime is to get these sectors to help. Unfortunately

none of these sectors are going to help willingly for a number of reasons. The main obstacles to assisting and reporting to police that have been identified in Hong Kong through discussion with the various sectors are :

- (a) Client confidentiality
- (b) Distrust of the Police
- (c) Possible loss of business
- (d) Breach of restriction under law or otherwise
- (e) Fear of damages or liability for loss
- (f) Not knowing what to do or who to report to
- (g) Fear of the fact a disclosure was made will get out leading to a fear of retribution from the criminal, loss of business etc.
- (h) Discouraged by low level of police success and lack of feedback
- (i) Lack of awareness
- (j) Aware of the low risk of prosecution if they do not comply
- (k) Insufficient resources
- (l) High cost and lack of rewards
- (m) Belief that no or little laundering occurs in their sector

The obstacles have been overcome in a number of ways but primarily through the legislation, education and regulation.

1. Legislation

Section 25A of OSCO and DT(ROP) are basically the same, but Section 25A(1) of OSCO says:

“Where a person knows or suspects that any property -

- (a) in whole or in part directly or indirectly represents any person’s proceeds of;
- (b) was used in connection with; or
- (c) is intended to be used in connection with an indictable offence, he shall as soon as it is reasonable for him to do so disclose that

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knowledge, or suspicion, together with any matter on which that knowledge or suspicion is based to an authorised officer”.

The penalty for non-compliance is 3 months imprisonment and a fine of HK\$25,000 - \$50,000 but of course the real penalty is the stigma attached to a prosecution under this section and the damage to one's reputation. Many companies just would not deal with say a bank or accountants who have been convicted under this section.

Few points about this section are :

- (i) “Knows or suspects”, the requirement is suspects which is in legal terms low. One can assume the Courts will expect a level of professional standards from the person. That is to say it would be reasonable for a trained accountant to suspect something amiss having looked at the accounts but perhaps not reasonable for the account clerk.
- (ii) “is intended to be used in connection with”, this covers say the drug trafficker collecting money together to pay for his drugs before he receives them or say a rich businessman withdrawing cash from the bank to pay the kidnap ransom for the return of his son. In the latter example if the bank knew the money was being withdrawn by a victim to pay a ransom they clearly are under a duty to disclose.
- (iii) “soon as is reasonable” - would depend on all the circumstances, but a few days is not asking much.
- (iv) “an authorized officer” - this is defined in the Ordinance as any police officer, customs officer or anyone else authorised by the Secretary for Justice. In effect it

is JFIU - the Joint Financial Intelligence Unit. This is a unit in Narcotics Bureau manned by police and customs which will be covered in more detail later.

The bonus of the section is that if a person makes a disclosure in accordance with it, he cannot then be charged with Money Laundering. Section 25A(2) says that if the disclosure is made before any act in contravention of Section 25(1) and the disclosure relates to the act, one can still do the act with the consent of an authorised officer. Or if the disclosure follows the act providing the disclosure is made of his own initiative, as soon as it is reasonable to do so, then there is no offence against Section 25(1).

The key to Suspicious Transaction Reporting is ‘Know Your Customer’. If you know who you are dealing with then you can decide if it is suspicious or not. For example, if the managing director of a listed company puts HK\$5 million into his account then it is probably not suspicious, but if a building site labourer puts HK\$5 million in his account, it is definitely suspicious. Banks and other organisations need to know who their customer is, what he does, what his salary is, where he lives etc. For companies they need to know about the type of business, turnover etc. With this information they can identify suspicious or unusual transactions much more easily.

Most people disclose after the act and for them and those who disclose before, in 99.9% of the cases JFIU tell them that they can continue to deal with the account in question. Only very rarely will they be told that they cannot continue to deal. Such a notification effectively freezes the account and there are specific provisions to do this under the Restraint Provisions. Accordingly one is placing the person or

Institution in a difficult position by refusing and so it is rarely used.

In Section 25A(3), the law specifically says a disclosure shall not be treated as a breach of restriction imposed by contract, law etc. etc. It also says one cannot be liable for any damages which may result from having made the disclosure.

Section 25A(4) says that for people in employment providing they report to their compliance officer or supervisor they have fulfilled their duty and it is incumbent upon that person in accordance with the employer's procedures to make the disclosure. This effectively forces financial institutions and other such businesses to establish procedures and tell their staff. Section 25A(5) makes it an offence to tip the subject of the disclosure off. Section 26 also effectively restricts anyone, including the police, even during a trial, from revealing a disclosure has been made and by whom. This restriction is important if disclosure makers are to have any confidence in the system.

2. Education

As one can see through the legislation we have overcome a number of the obstacles. On the education front, Financial Intelligence Unit Officers and Investigators spend many hours giving presentations and lectures to people from different sectors and different levels - from bank tellers up to senior directors of stock brokering and accounting firms and even the law society as lawyers seem particularly ignorant of their responsibilities. This means that as a group money laundering investigators establish a very wide network of contacts in varied institutions and business.

In addition to direct education JFIU provide a series of regular feedback to institutions. Primarily to date we have

concentrated on the banks but we are slowly trying to involve other sectors. This feedback is considered very important by the banking sector. We tell them about money laundering methods and indicators we have come across and from these they can hopefully identify what is suspicious and what is not and educate their staff.

Additionally each disclosure maker is told of the result of every disclosure made which investigators classify in one of four ways:

- (a) positive
- (b) other crime
- (c) unresolved
- (d) no crime

Also when investigators do come across a money laundering case they review everything afterwards to see if anyone should have made a disclosure but failed to do so. They then discuss it with the Institution concerned. With the banks we are still very much at this stage rather than prosecution. Tied in with this the Financial Intelligence Unit has begun to examine banks' disclosures from both a quantitative and quality viewpoint. Based on this JFIU have been able to identify weaknesses in various banks compliance structures and encourage training of staff at appropriate levels on problem subjects.

3. Regulation

Regulation in this context means how various sectors can be pushed into complying. Probably the best example is the banks. The Hong Kong Monetary Authority (HKMA) have issued guidelines under Section 7(3) of the Banking Ordinance. These guidelines are not law but they do establish the minimum standards the HKMA expect licensed banks in Hong Kong to subscribe to. If local banks are found to be in breach of the guidelines the HKMA can order a Money Laundering Audit to examine the banks

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rules and compliance. If the HKMA were unhappy with the bank they could then withdraw its license until it complies with the guidelines. If we the police find banks in regular or deliberate breach of the guidelines we will involve the HKMA. If we go back to the background and history to this whole subject the HKMA must keep a strong grip on the banks on this issue as if it was felt that the Hong Kong banking system was being used for money laundering and banks were doing little to prevent it, Hong Kong would face international sanctions. Other sectors such as the Insurance Sector, Lawyers and Accountants also have their own guidelines.

One sector that was soon identified in Hong Kong as a problem and because it was unregulated was difficult to do anything about was Remittance Agents and Money Changers. There is a huge network of Remittance Agents working in Hong Kong. Some are run as actual businesses (like Western Union), while others operate as part of existing businesses, like goldsmith shops, apartment houses or whatever; whilst others operate out of peoples flats and homes. These agents have reciprocal agents, shops or relatives overseas. They will then arrange for the transfer of funds all over the world. Many of these agents use a counter-balance method and settle at irregular intervals so in many instances no money is actually sent. They often use cash courier, bank remittance and other methods that break the audit trail. All that is required to run such an Agency is a telephone, fax and bank account.

These remittance agents were clearly not keeping proper records, not identifying their customers and were totally unregulated and uncontrolled. They are particularly active in moving funds to and from China and are popular with launderers involved in drug activities,

human smuggling and fraud.

The police therefore decided they needed Regulating and earlier this year an amendment to OSCO was introduced. Unfortunately due to arguments over the cost of implementation and manpower Government eventually went for registration rather than licensing. It remains to be seen if this works. Anyway these remittance centres and money changers (not banks, who are governed by HKMA regulations) must now keep records for 6 years (just like the banks) and identify their customers and their transactions, over \$20,000HK. They must register with the Joint Financial Intelligence Unit and a copy of all registered money changers and remittance agents is now on the JFIU website (www.jfiuhk.com). The law came into effect on June 1st 2000 and there was a 3 month grace period. We are still trying to encourage people to register. Probably in the new year we will start charging people who are not complying. Obviously only time will tell how effective this will be in the fight against money laundering.

This threshold amount for remittance agents and money changers was to prevent money changers becoming bogged down with numerous records. It has led to some confusion about threshold reporting, but it is not a threshold reporting system, they merely have to keep records.

The legal requirements to make disclosures, obstacles to this and the involvement of other sectors are covered, but how are we doing? Disclosure figures by year are :

RESOURCE MATERIAL SERIES No. 58

Year	No. of Disclosures
1989	34
1990	125
1991	147
1992	267
1993	368
1994	550
1995	1,798
1996	4,141
1997	4,227
1998	5,570
1999	5,804
2000 (to 1/11/2000)	5,010

The disclosure figures by sector are:

Year	Banks	Law- yers	Account- ants	Financial Companies	Insurance Companies	Foreign Exchange Cos	Other	Total
1998	5524	1	4	24	8	5	4	5570
1999	5757	0	1	14	16	14	2	5804

Other than the retail banking sector it is quite true to say compliance in Hong Kong is not satisfactory. We are working hard to encourage greater response from other sectors, but probably only a few high profile prosecutions of lawyers and accountants will encourage these sectors to take the subject seriously. Currently police are heading a governmental committee to see what can be done to improve the situation in all sectors.

V. THE FINANCIAL INTELLIGENCE UNIT

In Hong Kong the FIU is manned by both Police and Customs Officers and is known as the Joint Financial Intelligence Unit. For historical reasons it is housed in our Narcotics Bureau. The primary role of the JFIU is the collection, collation and

dissemination of disclosures or suspicious transaction reports. The unit itself does not investigate any disclosures. They check the subjects against the Criminal and Intelligence Records as well as the previous disclosure history. Based on this the disclosures are distributed primarily to the Customs and Excise, Police Narcotics Bureau or the Organized Crime and Triad Bureau. If there are no indications as to who should investigate, the disclosure is allocated to any of the units so that each has roughly one third of all disclosures. If subsequent enquiries show another unit should be investigating the enquiry is passed across. From time to time some get passed to our Commercial Crime Bureau, Independent Commission against Corruption or Security Wing.

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Hong Kong are members of the Egmont Group and are committed to the exchange of information obtained through JFIU with overseas agencies. Any information obtained through disclosures can be passed overseas for intelligence purposes only. If the information is required for Court purposes then more formal channels, such as the MLA route needs to be followed, as the information needs to be obtained by a Production Order or Search Warrant.. By law we are not allowed to reveal to anyone, including the Courts that a disclosure has been made and by whom. Accordingly whilst information is supplied the source is always concealed. As far as HK is concerned enquiries can be made direct to the JFIU or through the normal Interpol channels.

As has been alluded to earlier in this paper an important part of the JFIU work also involves the provision of feedback and training to the disclosure makers. This is an often overlooked, but vital, part of an FIU duties. The effectiveness of a suspicious transaction reporting system relies on both the quantity and quality of the reports made. This in turn depends on how well staff of financial institutions (which in practice make the vast majority of reports) can identify transactions which are genuinely suspicious. Without proper training, both the quantity and quality of the reports will remain at a low level. Although banks and other financial institutions provide basic training to their staff, input from the FIU is vital if they are to be kept up to date on the latest trends and methodologies for laundering money. The following practices can be considered when planning training and feedback :

- (i) lectures to bank compliance officers and front line staff;
- (ii) provision of training material or vetting of a bank training material to ensure it is up to date and covers

- all relevant legislation;
- (iii) provision of real life sanitised cases to illustrate particular methods of money laundering and highlight suspicious activity indicators;
- (iv) working groups consisting of members of both financial institutions and the FIU to highlight best practices;
- (v) an FIU web site to increase public awareness of the legal requirements to report suspicious transactions;
- (vi) qualitative and quantitative analyses of suspicious transaction reports made by individual institutions.

In addition, makers of suspicious transaction reports should be informed, whenever practical, of the progress and ultimate outcome of the investigation generated by their report, particularly where the report has led to a successful case.

VI. RESTRAINT AND CONFISCATION

During this paper restraint and confiscation have been mentioned and after all this is the main reason why criminals have to launder their funds. Accordingly we will mention the law in this regard in Hong Kong and also see how we are doing.

Hong Kong restraint orders are made ex-parte and hence we are able to obtain them and serve them prior to arrest or subsequent to arrest without the defendant becoming aware of our intention beforehand. This is obviously important to prevent the proceeds from disappearing. There has been some problems over continuing a restraint order where the defendant is not charged straight away. An amendment to the law is before the legislature to overcome this allowing the

restraint of assets to continue for a “reasonable period” whilst police investigate prior to charging. The Courts will assess what is a reasonable period in all the circumstances of the particular case.

There are confiscation provisions in both DT (ROP) and OSCO. In DT (ROP) and OSCO investigators can seek confiscation of a person’s assets in three sets of circumstances :

- (a) upon conviction
- (b) upon death
- (c) has absconded

Normally it is upon conviction and so it will be covered from that perspective. Upon conviction in the District or High Court the prosecution will apply to confiscate the proceeds. Firstly the offence must be in Schedule 1 of DT(ROP) or Schedule 1 or 2 of OSCO. These schedules in fact include most major or serious crimes. The court must then determine if the person has benefitted from the crime and under OSCO the proceeds must be at least HK\$100,000. The court will then assess the extent of the person’s proceeds of crime. Under section 2 (6) of OSCO proceeds are defined as :

- (a) Any payments or other rewards received by him at any time in connection with the commission of the offence;
- (b) Any property derived or realised, directly or indirectly by him for any of the payments or other rewards; or
- (c) Any pecuniary advantage obtained in connection with the commission of that offence.

This means that in a loansharking case the proceeds include the initial deduction made by the loanshark and all subsequent repayments including the principal or actual loan. In drug cases the court can

assess the proceeds from the quantity of drugs involved and/or the amount passing through his accounts.

The police will put forward a statement to support their assessment of the proceeds for the court to consider and the court will then give a ruling on its assessment of the proceeds of crime.

When the case is an Organized Crime under section 9 of OSCO the police may ask the court to assume that any assets acquired in the last six years by the person are the proceeds of crime. It is incumbent upon the person to refute this and show the assets were lawfully obtained. If the court sides with the police, the value of the assets, so assessed, can be added to the value of the defendants proceeds of crime.

The next step is that the police will put forward details of the person’s assets, which have normally been restrained or charged (a restraint or charging order is used depending on the type of assets). There may be some debate here over say the spouse’s assets and whether they are entirely theirs. Anyway the court will then rule on the value of the person’s assets. *Note there is no need for any link between the Assets and the Proceeds.*

Finally the court will then make a confiscation order up to the value of the proceeds they have assessed, but it cannot be greater than the assets available. That is to say if the proceeds of a drug trafficker are assessed at HK\$10 million, but the police have only identified assets of HK\$5 million, then the order will be for \$5 million. If the police locate more assets in the next 6 years they can return to Court to seek an amendment of the confiscation order up to the assessed proceeds. If the defendants assets are held outside Hong Kong and he refuses to realise them and pay the confiscation order he can be given an extra

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sentence.

If the police cannot find any assets they can seek the confiscation of a nominal sum, say \$1 and then they have up to 6 years to find the assets and return to court to get the confiscation order varied.

To date \$461 million HK has been confiscated in Hong Kong, mostly drug money and a further \$163 million HK is under restraint. Concerning confiscation under OSCO, we have not had the success we hoped for. Why not? There are a number of reasons :

- (a) Some scheduled offences which should be included are not. Examples are :
 - (i) Aiding and Abetting Illegal Immigrants for human smuggling cases.
 - (ii) Carrying on the business of lending money without a licence.
 - (iii) Sale and Production of Pornographic material.
- (b) Many offences have victims where the prosecution have to step aside to allow compensation of the victim from the assets.
- (c) Persuading the prosecutors to put certain offences in higher courts. Traditionally bookmakers, illegal casino operators and loansharks have received relatively small sentences (under 3 years) and hence these case are heard in the Magistracy where it is not possible to seek confiscation. Prosecutors are proving very reluctant to put cases in higher courts merely so confiscation of assets can be sought. Dialogue between the police and the prosecutors is continuing on the subject.

Given the trans-national nature of organized crime criminals will often keep assets overseas. HK laws have provisions

to allow for the enforcement of overseas restraint and confiscation orders and sharing of confiscated assets. These will be touched upon again later.

VII. CASE EXAMPLES

Some case examples are now given to illustrate some of the points raised earlier and are considered useful experience to share:

(a) *US Fraud Case*

A small bank in the USA was defrauded of several million USD by the President (Mr.A) and Vice-President assisted by two other men, one of whom we will call Mr. B. The bank eventually went into liquidation and the four men were all tried and convicted.

Enquiries showed that Mr. A & B laundered much of their money through a solicitor in Hong Kong, Mr. C. Mr. C set up various companies and opened bank accounts for those companies, used his client account and also obtained a Belize passport for Mr. A in a false name.

Mr. A & B moved their proceeds into either Mr. C's client account in Hong Kong or into another Hong Kong account in the name of Co. K. Co. K was set up by Mr. C in Hong Kong for Mr. A & B. Mr. C opened the account in Hong Kong and Mr. B opened an account in Guernsey. Much of the money received into Co. K's HK account was by way of structured remittances (i.e. amounts less than \$10,000 in order to by-pass US reporting requirements). Money from Mr. C's client account was remitted to Co. K's account in Guernsey. Money from the two Co. K account's in Hong Kong and Guernsey was then remitted to another Guernsey account in the name of Co. L, a BVI Company set up by Mr. B. Mr. B then moved his share on to a Swiss Bank account, Mr. A moved

his share to Co. M's account in Guernsey. Co. M had been set up by the solicitor Mr. C in Hong Kong for Mr. A who used a false name - Mr. D. Mr. C also assisted Mr. A to get a Belize passport in this false name 'D'. Mr. C had also opened a bank account in Guernsey for the Company. Some of A's share was remitted back to C's client account. Some of this was further remitted to a Company N in Mexico and the remitter was shown as one of C's nominee companies he used in establishing companies for his clients. This was apparently done at D's request so that Company M's name was not shown on the remittance.

'C' was interviewed and claimed client privilege and refused to answer any questions. However he then decided after the police visit and on receiving correspondence from the US that 'A' had used a false identity and that 'A' & 'D' were in fact the same person and he 'co-operated' with police. He claimed not to have realised this up to that point. He denied knowing that the money from Company K which went to Co. L was the same money which then went to Co. M. As such he did not know Co. K & M were connected. He denied making the transactions from the Co. 'K' account in Guernsey to the Co. 'L' account. Unfortunately we have a chicken and egg case with the Channel Islands laws in that we are not allowed warrants to check the banking records unless we charge 'C'. We cannot charge 'C' unless we get these banking records or other evidence.

When asked about the movement between all the Companies and what was the point of them all, the solicitor said that it was common for him to do this for American clients. The US had a worldwide tax system and many Americans like to put a little nest egg away from the reach of the tax authorities. He did it all the time and what he meant but did not say was "and what is wrong with that". He spoke of

opening companies for one transaction and closing them out afterwards in order to make it more difficult to trace the flow of funds and claimed that was alright and that putting someone else's name on a remittance was acceptable. These are classic money laundering indicators and yet he spoke of them as normal business practice. Regarding the Belize passports for which he accepted a birth certificate as proof of identity from an American visiting Hong Kong he felt this was alright and saw no reason why he should have taken the passport.

'C' has not been charged as there were insufficient evidence to show he knew or should have reasonably believed the funds were the proceeds of crime.

Whether or not the solicitor was culpable in this case, a number of issues are raised:

- (a) C met A & B through an intermediary he trusted. Professionals must be wary of Intermediaries.
- (b) 'C' should have asked why the client wanted to open these accounts and move money around. 'C' possibly suspected tax evasion an indictable offence in Hong Kong, but chose not to do anything or he knew of the fraud.
- (c) If one operates a bank account for a company one has set up one must be aware of structuring and transaction reporting conditions in other countries.
- (d) Solicitors should not allow remittances to come through their client accounts when the client can move money in other ways, unless there is a very good reason to do so.

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(e) Solicitors should not hide the identity of a remitter for their client unless there is a very good reason to do so.

(f) If one is asking overseas clients for identification get their passports. Birth certificates which have no photograph do not prove someone's identity. It is in most countries easy to obtain a copy of anyone's birth certificate. The obvious identification to request is a passport.

Overseas people do use bank accounts in Hong Kong to do the following transactions, which without explanation should be regarded as suspicious :

- (i) 'U' Turn transactions - where money is say remitted from the USA to the account in Hong Kong and then remitted straight back to another person or US Company.
- (ii) Layering - a number of different transactions when one could have sufficed.
- (iii) Numerous transactions with countries known for drug or criminal activities.
- (iv) Transactions which are inconsistent with the clients background or profile.

As the operator of the account the lawyer should not wait for the banks to spot the suspicious transaction and disclose. The lawyer must monitor accounts he is responsible for and that includes his own client account (for large cash transactions) and disclose when he sees suspicious activities.

(b) *Operation Maltwine*

A character called Mr. 'A' was operating a legitimate money lending business called Co. X Ltd. This company had four offices around the territory and through newspaper adverts he attracted a steady stream of clients. These clients were required to complete an application form giving all their personal particulars. The application forms were then passed to the head office and only a very small percentage of applicants were ever successful in obtaining a loan.

Details of all the unsuccessful applicants were passed to the criminal side of the business and from a secret office within the head office cold calls were made to the unsuccessful applicants who were offered loans of \$2,000. The initial payment was only \$1,800, \$200 being deducted for a handling charge. Then \$400 interest had to be paid every 10 days until the principal of \$2,000 was paid in full. This works out to over 1,000% per annum.

This offer was made on a take it or leave it basis and many desperate people accepted. If it was agreed another gang member was contacted and told to pay the money direct into the debtors account and the application form and other details were then Faxed to a records office in Shenzhen, just across the border with China. Records in the Hong Kong office were then shredded.

The office in Shenzhen had all the records computerised. The debtors were told to repay money into various accounts which had been opened by debtors or drug addicts who had registered a number of different companies and opened a series of bank accounts for a small payment. 36 accounts were used in all. The office in Shenzhen monitored repayment into the different accounts. Non payers details were referred to another office in Shenzhen

which ran the debt collecting side of things.

From the debt collecting office a group of young triads were tasked daily to visit various addresses to either remind the debtors to repay or to splash paint all over their doors and leave threatening messages. It also transpired that the debt collecting office took orders from other syndicates to harass their debtors.

Meanwhile the money was withdrawn from the repayment accounts by bank cards or as there is a daily limit on withdrawals by using the Jockey Club. One can purchase betting vouchers for large amounts by using ones bank card and these were then cashed straight away. Some of the money was used to lend to new debtors and the rest, about HK\$2 million a month was remitted to Macau.

The money was later remitted back to another company, Co. Y, which pretended to be involved in trade, but in fact did none at all and from there it was used to run the operation or it was moved to Mr. X and his relatives who bought flats.

While some of the companies were in X's name, anything illegal was distanced from him and the only time he felt safe to actually get involved was in the Records Office in Shenzhen or with Co. Y.

Various police units had arrested a number of the young men causing criminal damage and the Organized Crime & Triad Bureau also identified the people operating the collection account and paying the debtors. This suggested a large syndicate was at work. Surveillance and investigation work led on to much of the rest of the operation, although everything was not really tied together until police went overt in April 2000. Anyway once it was realised that the gang were keeping records and directing things from China,

HK Police approached the Police Security Bureau who gave us very professional assistance, including surveillance. There were some problems at first in that loansharking is not an offence in the Mainland but these were overcome, thanks to a great spirit of co-operation.

In April 2000 joint raids in China and Hong Kong were carried out once Mr. X was seen at his records office in Shenzhen and everyone arrested. HK Police were allowed to be present in China, film the raid and seizing of exhibits which the PSB agreed to do in accordance with HK procedures, so that everything will be admissible in our Courts.

Mr. X's assets of about HK\$48 million have been restrained and enquiries were made with thousands of debtors and criminal damage victims. Mr. X and the five other Hong Kong citizens arrested in China were returned and charged. Mr. X and his main assistant are detained and the rest were given Court Bail. Of those arrested in Hong Kong some have been charged and some are on bail.

The money being laundered through Macau was an attempt to disguise its source and it was explained away as money coming out of China from trading deals through unofficial sources given China's tight currency control restrictions. Whilst the Macau police have been helpful and understanding their Judiciary has blocked our efforts to obtain warrants to see what was happening over there and how much money is still held there. HK Police are now trying a formal letter of request. However we have been able to link money going to Macau to money returning after one of those detained in China gave us permission to access his accounts in Macau.

Mr. X had been running this operation for about 8 years and keeping his records

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and involvement outside of Hong Kong where the group was operating, made him feel secure. In Hong Kong the only thing that ties him to the syndicate is the money and it is to hope we not only convict him, but we also confiscate his assets.

(c) *Tax Evasion*

An appeal case HKSAR and LI CHING (CA 436/97) is an important case for money laundering investigators. LI opened a bank account for a group involved in a deception which duly came off and \$2.8 million HK was deposited into the account and withdrawn by LI. On arrest LI claimed to know nothing about the deception and that he was given \$50,000 only and the rest of the cash he gave to Ah Keung. He claimed he thought Ah Keung was using the account to put some tax evasion money from China through. The Appeal Court held that his belief was that he dealt in the proceeds of tax evasion from China. Tax evasion was an offence in China, it was indictable in Hong Kong and therefore he was guilty of money laundering. His appeal was dismissed. This ruling emphasised that investigators did not have to prove the actual offence, merely that the defendant believed the proceeds was from an offence.

(d) *Bookmaking Cases*

The following have been noted as strong indicators that bank accounts are being used for bookmaking :

- (i) Increased use on Mondays and Thursdays i.e. the days after the races.
- (ii) The Accounts have few transactions in July and August, which is the close season.
- (iii) The deposits are either 'no book cash deposits' or 'transfer deposits'.
- (iv) The withdrawals are in cash. Sometimes they are then followed by deposits to a number of other accounts, but the account holder

requests the transactions to be shown as cash deposits rather than transfer deposits, thereby breaking the audit trail.

The banks are well aware of this thanks to Police feedbacks and have made regular disclosures over the years. Police have tried different approaches :

- (i) Operation Birchwood was mounted against 25 syndicates operating in China and Macau who were laundering their proceeds through Hong Kong banks. In June 1998, 28 people were arrested and four were charged when they admitted what they were doing, with sentences of between a fine and 10 months imprisonment imposed. The man who got 10 months, YU Leung-chong is still fighting police as we are trying to get his proceeds confiscated. We have restrained his accounts and property worth \$3.9 million HK and we are attempting to confiscate up to \$6.9 million as his wife also has \$3 million in assets, but has never worked in her life. The confiscation hearing is set for March 2001. Following this operation we have had few successes as the overseas bookmakers now know it is an offence, which some did not before the operation. Consequently admissions are not so easy to obtain now.
- (ii) Operation Guildersome was mounted against a number of local bookmaking syndicates, and saw 25 bookmakers and 4 money launderers arrested. Fourteen of the bookmakers were convicted and received between fines and suspended sentences. This operation highlighted to us the

difficulties in proving the proceeds of crime in bookmaking cases. Proceeds in the Ordinance are described as payments received, whereas people bet on credit with bookmakers. Consequently bets on the day are not proceeds, one has to show that money going through the bookmaker's accounts previously were bookmaking proceeds and this is not easy. It relies on admissions, punters telling you, or old betting records and banking records matching up. All unlikely. Police now try and identify locally operating bookmakers and through surveillance or call forwarding records identify the location of operation.

- (iii) Other operations - have been mounted and police have had success against football bookmakers and launderers. Also last racing season HK Police worked with the Macau Judicial Police (MJP) to get them to arrest a syndicate operating in Macau, and we are now trying to build a case against the bank account operators (launderers) in Hong Kong who will be arrested once the bookmakers are convicted in Macau. Other initiatives include trying to put a circumstantial money laundering case together. Investigators will pick an account which displays all the indicators and use the financial investigation units head to give expert evidence, Police will also show the person had no employment (we can get tax records through Production Orders), those who are identifiable who have dealt with the account will be record checked, most tend to have gambling and bookmaking convictions and lastly bank tellers

will give evidence that the account operator requests the transactions to be shown in cash rather than as a transfer. It will be hoped that the Judge will only be able to conclude given all the different circumstances that the money being dealt with in the account is the proceeds of an indictable offence.

(e) *A Drug Case*

Narcotics Bureau have had some very successful drug money laundering cases over the years and some large asset seizures, but one case to highlight was significant because it arose purely from disclosures.

A housing estate in Kowloon East had one bank and that bank noted that a number of accounts operated by young people aged from 14 to 22 were receiving regular deposits of between \$20 - 60,000HK every few days in \$20, \$50 and \$100 notes. Very soon after the deposits the depositors would withdraw the sum in 1,000 dollar notes. The bank was suspicious and made a disclosure.

Investigators mounted an operation using surveillance, Observation Posts and undercover officers to make controlled buys. The Narcotics Bureau Financial investigators also looked at the money. Over a one year period this street level trafficking operation had laundered HK\$13 million through their accounts. Fifteen syndicate members were eventually charged and convicted in the High Court and over HK\$2 million in assets was confiscated.

VIII. INTERNATIONAL CO-OPERATION

Given that the proceeds of crime can be moved around the world easily, it is impossible for any one jurisdiction to effectively fight the battle on their own. Co-operation among all law enforcement agencies therefore becomes vital. Such co-operation should be two-phased; the exchange of intelligence in money laundering matters and the rendering of assistance to another jurisdiction in obtaining evidence. The swift exchange of intelligence between enforcement agencies and FIU of different jurisdictions at the investigation phase is important if transnational money laundering is to be tackled effectively and efficiently. There are treaties governing mutual legal assistance in criminal matters designed for collecting evidence for use in a court of law. FATF Recommendation No. 32 states:

“Each country should make efforts to improve a spontaneous or “upon request” international information exchange relating to suspicious transactions, persons and corporations involved in those transactions between competent authorities. Strict safeguards should be established to ensure that this exchange of information is consistent with national and international provisions on privacy and data protection.”

Recommendation No. 37 goes on to state:

“There should be procedures for mutual assistance in criminal matters regarding the use of compulsory measures including the production of records by financial institutions and other persons, the search of persons and premises, seizure and obtaining of evidence for use in money

laundering investigations and prosecutions and in related actions in foreign jurisdictions.”

To assist other jurisdictions further in the fight against money laundering, Hong Kong has provisions for Overseas Confiscation Orders and Asset Sharing.

A. Overseas Confiscation Orders

The trans-national nature of organized crime is reflected in the fact that criminals will often keep their assets in different countries. It is essential, therefore that legislation provides for this by allowing for confiscation orders issued in overseas jurisdictions to be enforced domestically. In this regard, the FATF Recommendation No. 38 says:

“There should be authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate proceeds or other property of corresponding value to such proceeds, based on money laundering or the crimes underlying the laundering activity.”

B. Asset Sharing

Once an overseas confiscation order is enforced domestically, fairness dictates that the overseas jurisdiction be allowed to share the confiscated assets. Provision must therefore be made, both by law and by policy, for assets to be shared between jurisdictions. This may not always be practicable where only a small amount of property has been confiscated, as the administrative costs involved would outweigh the value of the assets to be shared. Government policy, therefore, should set a realistic threshold over and above which foreign governments may be allowed to apply for and receive a share of the assets commensurate with the work done by each side in that particular case.

IX. CONCLUSION

Tackling money laundering will never be easy. The ease with which money can be moved around the world, the ingenuity of money launderers in finding new ways to disguise their ill gotten gains, the prevalence of tax havens and shelf companies and the excessive secrecy of certain jurisdictions all combine to ensure that tracing the flow of dirty money and prosecuting the money launderer will remain one of the hardest tasks in criminal investigation. This task will be made somewhat easier, however, if various anti-money laundering components are welded together to form a cohesive anti-money laundering strategy in as many jurisdictions as possible. A workable and comprehensive law, close international cooperation, an effective FIU and strong regulation of the financial sector, combined with imaginative and thorough investigation, are vital if money laundering and its inherent dangers to society are to be effectively combated.