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Compiling evidence in cross-border transactions and investigations (2020)

17th June 2020

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Compiling evidence in cross-border transactions and investigations (2020)

The law as stated during this webinar is up to date as of **11 June 2020**



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Overview

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Mutual Legal Assistance (MLA) Overview

- A principle of public international law is that “states cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter.” (Brownlie)
- Mutual legal assistance (MLA) provides the framework for states to co-operate with each other in enforcing their respective laws, including criminal law. It requires:
 - States to agree that they will provide assistance – treaties or ad hoc agreements.
 - States to pass laws so their criminal justice authorities are empowered to provide assistance to criminal justice authorities overseas.
- EU’s technique of pooling sovereignty has allowed it to develop more streamlined systems for co-operation:
 - The concept of mutual recognition of judicial orders has led to European investigation orders, European arrest warrants and the recognition of restraint and confiscation orders.
 - EU has also adopted and developed Joint Investigation Teams.

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Mutual Legal Assistance – Outgoing Letters of Request (England and Wales)

- Can seek assistance in gathering evidence (including intrusive measures such as search and seizure) or in pursuing the proceeds of crime (including securing restraint/freezing orders and enforcing confiscation orders).
- Mutual legal assistance requests can be made by designated prosecuting authorities or judicial authorities (who make the requests at the request of non-designated prosecuting authorities or defendants).
- As a pre-condition to seeking mutual legal assistance in gathering evidence, it must appear to the designated prosecuting authority seeking assistance that an offence has been committed or there must be reasonable grounds to suspect the commission of an offence and it has opened a criminal investigation.
- The letter of request is submitted to the UK Central Authority (UKCA), who will review it, check whether on its face it complies with domestic law and then decide whether the United Kingdom should formally seek the assistance.
- If UKCA decides to seek assistance it will send it to the Central Authority of the requested state, who will review it against its treaty obligations and decide whether the state should provide the assistance sought. If so, it will refer the matter to its criminal justice authorities for execution.
- Crime (International Co-operation Act) 2003 permits direct transmission. But that only works if other states agree to operate mutual legal assistance in that way.
- Council of Europe Convention on Mutual Assistance

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Mutual Legal Assistance – Incoming Letters of Request (England and Wales)

- Letters of request submitted to UKCA, who decide whether the United Kingdom will offer the assistance sought and so refer the matter for execution to a criminal justice agency. Considerations include:
 - de minimis standards – under £1,000 loss or case over 10 years old;
 - dual criminality - search and seizure, production orders, restraint and confiscation;
 - investigation or prosecution is politically motivated;
 - substantial grounds for believing that the request is made for the purpose of investigating, prosecuting a person on account of their race, gender, sexual orientation, religion, nationality, ethnic origin or political opinions; and
 - execution would prejudice the *ordre public* of the UK (including risk of death penalty).
- On receipt of the referral, the agency will review the referral to ensure it falls within their powers/statutory remit and, if so, it will decide whether to accept the case for execution.
- In executing the case, it will rely on powers relating to mutual legal assistance.
- Once the evidence is obtained UKCA will decide whether or not it should be transmitted to the requesting state.

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Letters of Request – Key Points

- The normal rules of admissibility apply to evidence obtained from overseas by mutual legal assistance. However material obtained by a letter of request cannot be put in evidence for purpose other than that specified in the request without the consent of the requested state – the collateral use rule.
- At each stage of the process, a public authority exercises discretion and are subject to judicial review. Issues to consider:
 - Risk – section 6 Human Rights Act 1988 and FCO’s Overseas Security and Justice Assistance Guidance
 - Data protection – Letters of request contain personal data which must be processed lawfully – see Chapter 5, Part 3 Data Protection Act 2018
 - What stage in the process has the public authority reached and what specific powers is it exercising at that stage? Is that exercise of power lawful?
 - R (oao Unaenergy Group Holding Pte Limited) v Director of the Serious Fraud Office [2017] EWHC 600 (Admin)
 - Disclosure
 - Attorney General’s Guidelines on Disclosure 2013, paras 59 to 64
 - Judicial Protocol on the Disclosure of Unused Material, paras 51 to 53
 - R (River East Supplies Limited) v Crown Court at Nottingham [2017] EWHC 1942 (Admin).

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Mutual Legal Assistance – EU Mechanisms

- EU has promoted the mutual recognition of judicial orders.
- Evidence gathering - Criminal justice (European Investigation Order) Regulations 2017.
 - Issued by a designated prosecutor or by a court – where the assistance sought is coercive then the designated prosecutor should go to the court.
 - Limited grounds for refusal (essentially where it fails a necessary and proportionate test or the remedy sought unavailable in the requested jurisdiction).
 - Time limits for compliance (30 days for central authority; 90 days for executing authority).
 - Transmission without undue delay.
 - Product admissible in domestic proceedings.
 - Arrangements do not extend to Eire or Denmark.
- Joint Investigation Teams – Council Framework Decision on Joint Investigation Teams 2002.
 - Investigation team set up for a set period based on an agreement between two or more states and/or competent authorities, for a specific purpose.
 - Allows team members from different countries to share information without the need for a formal letter of request.
 - Can be considered where close and coordinated cooperation between countries is required effectively and efficiently to investigate crime.
 - Other legal bases for JITs apply: Article 49 United Nations Convention Against Corruption; Article 20, Second Additional Protocol, Council of Europe Convention 1959.

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Compelling the Production of Evidence

- R (oao KBR Inc.) v Director of the Serious Fraud Office [2018] EWHC 2368 (Admin).
- Supreme Court has given permission to KBR Inc to appeal.

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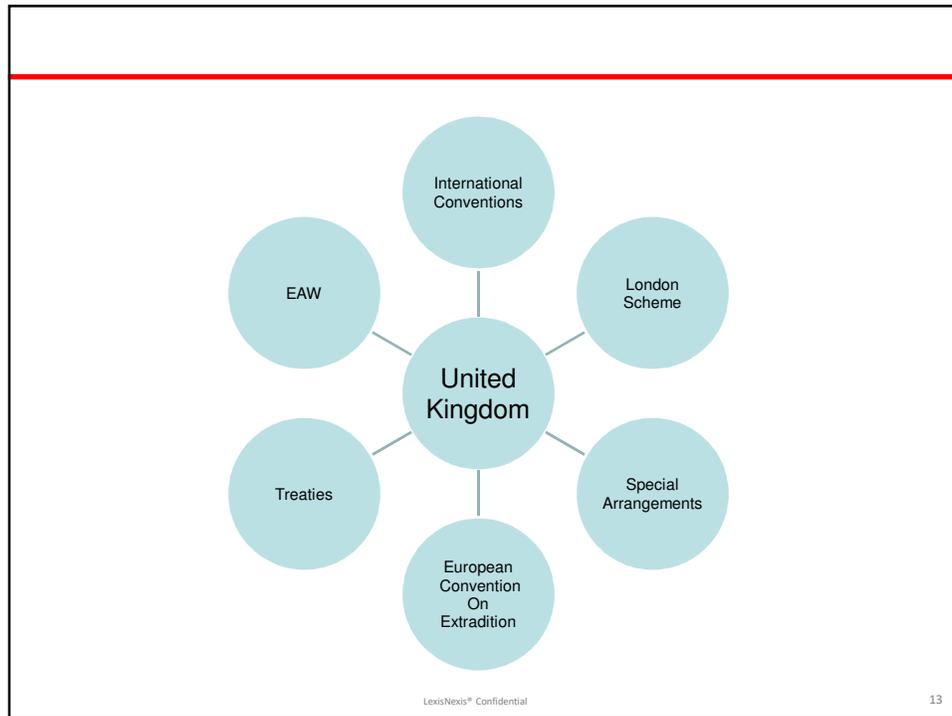
Extradition

- Extradition is the formal process for requesting the surrender of requested persons from one territory to another for the following purposes: to be prosecuted; to be sentenced for an offence for which the person has already been convicted; or to carry out of a sentence that has already been imposed.

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Content of Extradition Requests

- European Arrest Warrants should be drafted in accordance with the template annexed to Framework Decision June 13^t 2002/584 (as amended).
- The European Convention 1957 requires an original or certified copy of the warrant of arrest / certificate of conviction; a signed statement of facts; a signed statement of law; and evidence of identity.
- The Commonwealth 'London Scheme' requires an original or certified copy of the warrant of arrest / certificate of conviction; sworn evidence amounting to a prima facie case on all offences on which extradition is requested; sworn evidence of the law; and evidence of identity.
- Bilateral treaties vary.

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Bars to Extradition

- The statutory bars to extradition apply to all cases, even if there is no explicit clause in the relevant treaty. If the judge finds that any of the bars to extradition apply, the requested person must be discharged. The statutory bars to extradition include the following:
 - Double Jeopardy;
 - Absence of Prosecution Decision (EAW cases only);
 - Extraneous Considerations;
 - Passage of Time;
 - Age (EAWs only);
 - Hostage-taking Considerations (non-EAW cases only);
 - Death Penalty (non-EAW cases only);
 - Specialty;
 - Earlier Extradition from Territory / by the International Criminal Court;
 - Forum;
 - No case to answer;
 - Retrial rights;
 - Physical and mental condition;
 - Human Rights [including proportionality].

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Human Rights

- In all extradition cases the judge has to consider whether or not extradition would be compatible with the requested person's human rights. If the judge finds that extradition would not be so compatible, he cannot order that person's extradition and must discharge him. Common challenges include claims regarding family or private life in the UK, the possibility of receiving a fair trial and prison conditions in the requesting state.

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Avenues of Appeal

- To the High Court against the decisions of the District Judge and / or the Secretary of State;
- To the Supreme Court on a certified point of law of general public importance;
- If all statutory appeals fail, extradition proceeds. Some seek to apply to the European Court of Human Rights.

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Asylum

- If a person makes an asylum claim at any time whether before or after the issue of an EAW or the making of a request for his extradition, he or she must not be extradited during the relevant period until his asylum claim has been finally determined by the Secretary of State.
- The relevant period for these purposes starts when the Secretary of State issues the certificate that the claim has been lodged and finishes when extradition occurs.

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Removal

- Where surrender has been ordered by Westminster Magistrates' Court on the basis of an EAW and the order is not appealed or is upheld on appeal, the requested person must be surrendered within 10 days of the last proceeding unless a later date is agreed by the judge and the foreign authority.
- Where extradition has been ordered by the Secretary of State (non-EAW cases) and does not appeal or the order is upheld on appeal, he must be extradited within 28 days of the date of the last proceeding. There is no legal mechanism for extending the date for removal.

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Tensions between State process and companies wishing to cooperate with prosecuting authorities

- Options available to corporates:
 - Consider whether self-reporting is desirable and what that entails.
- Tensions between State process and companies' timetable and strategy
 - Factors to take into account:
 - Companies involved in a self-reporting process will wish to benefit from cooperation credit.
 - May decide to provide company documents to authorities directly.
 - Companies and their advisers should consider whether documents are privileged/whether there should be a waiver of privilege:
 - » Consider possible tensions between different legal systems and how to practically manage those tensions.
 - Application of local blocking statutes and the resulting limitations imposed on corporates and their advisers.

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Upcoming Corporate Crime webinars

- Private prosecutions (2020) – 30th September 2020



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