



China, India and Brazil – the scope for international cooperation in criminal matters with the world’s future economic superpowers

Elizabeth Robertson, Partner, Laura Atherton, Senior Associate and Zaib Malik, Associate with the Corporate Crime and Regulatory department of *K&L Gates*, take us through the twin concepts of mutual legal assistance and extradition and how the complex web of bilateral and multilateral treaties work in practice between western nations and China, India and Brazil.

China, India and Brazil are widely perceived to be three of the most important developing economies in the world. They are also signatories to a growing number of bilateral and multilateral investment treaties, tying them economically closer to western nation states. With these increasingly close commercial and financial relationships come cooperation in other international spheres, such as protecting the environment, for-

eign policy and the global enforcement of each country’s domestic criminal law.

In this article, we take a detailed look at the principles of mutual legal assistance and extradition and the arrangements between the United Kingdom and these three powerhouses of the 21st century.

Mutual Legal Assistance

Mutual Legal Assistance (MLA) refers to formal cooperation between sovereign

states in criminal investigations and proceedings and generally falls into two categories: requests for evidence; and requests for restraint and enforcement of confiscation orders. Requests can also involve mutual service of procedural documents (such as summonses,) mutual freezing orders and the provision of banking information and telephone intercepts.

The legal basis for MLA falls into three categories: 1) domestic legislation;



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Elizabeth Robertson

2) bilateral MLA treaties (MLATs); and 3) multilateral MLATs.

Bilateral MLATs provide a legal framework for MLA through which a requesting state’s law enforcement authorities can make a request for legal assistance of a requested state.

The United Kingdom has a bilateral MLAT in place with Brazil¹ and India², but there is no MLAT currently in force between the UK and China. However, on June 17th 2014, in a joint statement from the UK and Chinese governments, it was announced that both the UK and China intended to “*promote early ratification of the Agreement between China and the UK on Mutual Legal Assistance in Criminal Matters*” suggesting a bilateral MLAT between China and the UK may be coming soon.

In the absence of a bilateral MLAT, practitioners may look to applicable multilateral treaties such as the United Nations Convention against Corruption (UNCAC) and the United Nations Convention against Transnational Organized Crime (UNTOC). Chapter V of UNCAC sets out that “*State Parties shall afford one another the widest possible measure of mutual legal assistance in investigations, prosecutions and judicial proceedings.*”³ Both China and the UK have ratified UNCAC and UNTOC. Thus, even before a bilateral

MLAT between China and the UK is formally introduced, MLA requests may be grounded in the relevant provisions of UNCAC and UNTOC.⁴

This is what happened in January 2008, when UK law enforcement authorities carried out an investigation of a case of VAT fraud and money laundering involving a Chinese company. The UK authorities made a MLA request based on UNTOC to the Ministry of Justice of China, with the hope of sending officials to China for evidence collection. After the Chinese authorities were satisfied the requirements in UNTOC had been met, they agreed to assist the UK. On April 15, 2008, based upon substantial assistance by the Chinese central authorities, witness testimony and related evidential documentation were provided to the UK authorities.

The domestic legislation of the requesting and requested states also will be important relative to effective MLA requests. Domestic legislation often serves as a basis for implementing MLATs. It may also serve as the legal basis for complying with a MLA request in the absence of any MLAT. For instance, based on domestic laws, the UK can assist any recognised country or territory in the world in respect of most forms of legal assistance without there being a relevant bilateral or

international agreement in place and, except in indirect tax matters, does not require reciprocal assistance from a requesting state. However, where a bilateral or international agreement is in force, the UK will adhere to the specific conditions or procedures it imposes and expect reciprocal adherence.

Bilateral or multilateral MLAT frequently will contain provisions which state that any MLA request will be subject to the domestic laws of the requested state. For instance, Article 6 of the UK-India MLAT states that assistance may be refused if “*the action sought is contrary to the domestic laws of the requested party.*” Further, with respect to China, Article 43 of UNCAC states international cooperation on criminal matters shall be subject to State Parties’ domestic legal systems.

The Crime (International Co-operation) Act 2003, Proceeds of Crime Act 2002 and Part 32 of the Criminal Procedure Rules 2013 provide the UK domestic framework for mutual legal assistance to overseas jurisdictions and incoming requests and would apply to all such requests relating to China, India and Brazil.⁵

In all cases, it is an essential precondition that the requesting state is satisfied that 1) an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed, and 2) proceedings in respect of the offence have been instituted or that the offence is being investigated.

Refusal of assistance

The requested state must determine whether to facilitate the assistance or refuse the request. Between the UK, Brazil and India, the grounds for refusal for any formal request for assistance are set out in Article 4 of the UK-Brazil MLAT and Article 6 of the UK-India MLAT. The identified reasons for refusal include: if the legal principle of double jeopardy would be offended;⁶ if undertaking the request could compromise an investigation or proceedings in the requested state;⁷ and (as mentioned above) if undertaking a request would be contrary to the domestic law of the requested state.

If assistance is refused, there is usually little, if any, scope for negotiation; however, refusal is rare and would usually occur simply because the request cannot be executed because, for example, there is insufficient information to establish the whereabouts of the evidence.

Extradition

Extradition is for the most part governed under a complex web of bilateral treaties by which states agree to the rendition of fugitives from other jurisdictions so that they can stand trial in the country where a crime took place or, in exceptional cases, where there are other jurisdictional links such as the nationality of the offender or of the victim. Again, as with MLA, domestic law and bilateral and multilateral treaties must be considered with respect to extradition.

India agreed to an extradition treaty with the UK in 1993, but it was not until 1997 that Brazil and the UK signed an extradition treaty. The absence of any treaty prior to this date was one of the reasons that the UK was unable to have extradited the infamous train robber Ronald Biggs from his life on the Brazilian coast. The UK currently has no extradition treaty with China.

Again, domestic laws play a crucial role in the extradition process. For instance, under the Brazilian constitution, it is prohibited for Brazilian authorities to extradite a Brazilian citizen. In contrast, there is no such prohibition in UK law,

which means Brazilian authorities could have a UK citizen who is in the UK extradited to Brazil but the UK would not be able to have a Brazilian citizen who is in Brazil extradited to the UK. Similarly, in respect of China, Article 8 of the Extradition Law of the People's Republic of China (2000) states that a request for extradition shall be rejected if "*the person sought is a national of the People's Republic of China.*" However, there is nothing preventing the UK from having a non-Chinese citizen who is in China extradited to the UK. This was demonstrated in 2012 when the UK managed to secure the return of David Price, a UK national, who was charged in the UK with offences relating to pedophilia and who had subsequently fled to China while on bail. The Price case was the first-ever extradition of an individual from China to the UK.

Extradition from the UK is governed by the Extradition Act 2003 (the Act.). The Act is divided into Parts 1 and 2, which deal, respectively, with extradition to Category 1 and 2 territories and which detail the stages and steps required for each category of extradition.⁸ Both Brazil and India are classified as Category 2 countries under the Act, which is significant because, generally, Category 2 countries must show they have *prima facie* evidence that would justify the committal for trial of a prisoner for the crime of which he is accused had it been committed in England or Wales.

There are further provisions in the Act dealing with territories that are neither designated as Category 1 nor 2, but are parties with the UK to international conventions (section 193), or are territories with which the UK may wish to have ad hoc extradition arrangements (section 194.) Although China has no bilateral extradition treaty in place with the UK, both are signatories to UNTOC, which has provisions dealing with extradition, and so section 193 could potentially apply to extradition requests relating to certain offences that fall under UNTOC. However, in the absence of any bilateral or multilateral treaty, both China and the UK allow for *ad hoc* agreements regarding extradition. In the case of the UK, for any requesting state that falls under section 193 or 194, the procedure adopted would be the same as for a Category 2 country. Therefore, the procedure for processing an extradition request from China, on the one hand, or India or Brazil, on the other, would be the same, even though there is no bilateral treaty in place with the former.

Before extraditing an individual to China, India or Brazil, the UK will need to be satisfied that the alleged conduct amounts to a criminal offence in both the UK and the requesting state ("dual criminality")⁹ and that the individual is dealt with in the requesting state only for the offences for which they are being extradited ("speciality").¹⁰

Challenging extradition

Despite the structures and systems for extradition to China, India and Brazil, such extraditions may be barred by EU and UK law.

One of the 'bars' to extradition from the UK, set out in section 79(1) of the Act, which may be particularly relevant with regard to China, is where an extradition request is made for the purpose of punishing or prosecuting a person on the grounds of *inter alia* his religion, nationality or political opinions. This is because the government of China enacted a statute on October 30, 1999, with retrospective application to suppress "*heterodox religions*" across China. This would apply to

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the practice of Falun Gong, a Chinese spiritual discipline, which is legal in the UK, and any other spiritual groups deemed “dangerous to the state.” The retrospective nature of this law might also prove a bar to extradition in respect of offences committed before its enactment.

Another potentially relevant ground for challenging an extradition, would be that it would breach the rights afforded an individual under the European Convention on Human Rights (the ECHR.) For example, in the 1997 case of *Chahal v. United Kingdom*¹¹ the extradition of a Sikh separatist, Mr. Chahal, from the UK to India was refused by the ECHR on the grounds that Article 3 would be breached, as there was a real risk Mr. Chahal would be subjected to torture or inhuman or degrading treatment if sent back to India. Similarly, and in the same year, the Polish Supreme Court, in respect of a proposed extradition of two individuals back to China to face fraud charges, concluded that, if extradited, there was a real chance they would be subjected to treatment contrary to Article 3 of the ECHR.

In the recent case of *Patel v. India and Others*,¹² involving the proposed extradition of a terror suspect of Indian nationality, Mr. Patel, it was argued that, because of the inadequacies of the Indian legal system, he would not be afforded a fair trial if he were sent back to India to face terror charges, which would breach his right to a fair trial under Article 6 of the ECHR. However, the UK courts rejected this argument.

Convention rights might also be a relevant issue, since China imposes the death penalty for certain offences, including some financial crimes. Therefore, the right to life, enshrined in Article 2 of the ECHR may be used as a basis for challenging extradition. It is also prohibited under the Act for the Secretary of State to extradite a person if he or she could face the death penalty; however, in such circumstances, the Act states that extradition may be permitted if the Secretary of State is able to obtain adequate assurances from the requesting state that the death penalty will not be applied.¹³



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The road ahead

With the increasing economic prominence of countries such as China, India and Brazil, it is becoming important to examine the tools by which cooperation on criminal matters can be achieved. Mutual legal assistance and extradition are key weapons in the armory of law enforcement agencies, in the context of increasing internationalisation of criminal investigations. The legal framework underpinning these modes of cooperation is quite complex, encompassing domestic legislation and bilateral and multilateral treaties. Recent developments suggest the UK is strength-

ening its cooperation with these countries. Such matters will command growing attention from practitioners, as the directors and managers in their client businesses respond to the risk of mutual legal assistance and the threat of extradition.

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Footnotes:

1. The treaty came into force on April 13, 2011.
2. The treaty came into force on May 1, 1995.
3. See articles 44 to 50, which set out the scope of assistance.
4. Both Brazil and India have also ratified UNCAC.
5. For guidance on procedures for dealing with MLA requests, see *Requests for Mutual Legal Assistance in Criminal Matters: Guidelines for Authorities Outside of the United Kingdom—2014*, 11th Edition.
6. See Article 4(1)(b) of UK-Brazil MLAT; see Article 6(1)(e) of UK-India MLAT.
7. See Article 6(1)(c) of UK-India MLAT.
8. The Secretary of State designates by order the territories in Categories 1 and 2.
9. Section 137 and 138.
10. Section 95.
11. 23 Eur. H.R. Rep. 413 (1997).
12. [2013] All ER (D) 160 (Apr).
13. Section 94.