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# THE ROLE OF MUTUAL LEGAL ASSISTANCE TREATIES IN OBTAINING FOREIGN EVIDENCE

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We live in a world that appears smaller each day due to the ease of instantaneous electronic communication. Not surprisingly, the criminal's ability to cross international borders to commit crimes, store evidence, and employ codefendants in foreign countries is correspondingly on the rise—in fact, the media report daily on new cases involving such cross-border criminal offenses. Practitioners know that, in this ever-contracting world of the unlawful, prosecutors are pressed into employing increasingly sophisticated strategies to gather central evidence from foreign countries. Defense attorneys, for their part, dig deep in their efforts to defend their corporate and individual clients. As today's criminal cases are routinely characterized by such transnational dimensions, once-mysterious Mutual Legal Assistance Treaties (MLATs), the key government-to-government method of sharing and obtaining evidence, have truly taken center stage. But how MLATs actually function, what differentiates MLATs from letters rogatory, and the challenges posed by the inherently one-sided nature of the MLAT are just some of the questions and issues that practitioners—particularly those new to multinational criminal cases—can find puzzling. We are here to help.

Let us at the outset address a key area of confusion—namely, the precise scope and purpose of the MLAT. MLATs are limited to law enforcement officials involved in criminal investigations and proceedings (or, in some cases, in civil matters where the civil case is related to the criminal matter). Access to evidence though an MLAT is, therefore, restricted to prosecutors, governmental agencies that investigate criminal conduct, and governmental agencies responsible for matters ancillary to criminal conduct, including civil forfeiture.

It is interesting that the first three MLATs signed by the United States—those with Switzerland, Turkey, and the Netherlands—did, in fact, include provisions granting access to defense counsel. But that more all-inclusive approach is, indeed, history; today these self-executing treaties, for better or (as many in the defense bar believe) worse, do not create individual rights or provide mechanisms for private parties, such as criminal defendants, to request the production of evidence. Criminal defendants, for their part, are thus relegated to using letters rogatory to secure evidence located abroad—a far less efficient and reliable process.

MLATs, being treaties, provide for mutual cooperation through explicitly enumerated categories of law enforcement assistance unique to each treaty. The types of assistance usually provided for in an MLAT include the following:

Illustration by Sean Kane

- serving judicial or other documents;
- locating or identifying persons or things;
- taking testimony;
- examining objects and sites;
- requesting searches and seizures;
- obtaining documents or electronic evidence;
- identifying, tracing, and freezing or confiscating proceeds or instrumentalities of crime and/or other assets;
- transferring persons in custody for testimonial purposes or to face charges (extradition);
- freezing assets; and
- any other assistance permitted by the foreign law and specified in the applicable treaty.

## The Mutual Legal Assistance Treaty Process

Today a seasoned federal prosecutor can be expected to be very familiar with the MLAT process. Consider, for example, that the United States has bilateral MLATs in force with many of the Organization of American States' member states, as well as a multitude of other countries around the world. In February 2010, moreover, the United States and the European Union (through its 28 member countries) entered into a historic MLAT that includes standard areas of assistance such as identifying financial account information, finding and seizing evidence, and the taking of testimony. Beyond the typical "meat and potatoes" provisions, however, today's MLATS also include more sophisticated provisions addressing areas such as bank secrecy, the use of videoconferencing for taking testimony, the operation of joint investigations, and the provisions of assistance to administrative agencies such as the Securities and Exchange Commission and the Federal Trade Commission.

Reflecting the realization that MLATs are now a well-worn tool in the prosecutors' toolbox, Congress passed the Foreign Evidence Efficiency Act, 18 U.S.C. § 3512 (effective in 2009). The act was explicitly passed to help streamline the MLAT process, making it "easier for the United States to respond to requests by allowing them to be centralized and by putting the process for handling them within a clear statutory system." 155 Cong. Rec. S6809–10 (daily ed. June 18, 2009) (statement of Sen. Whitehouse). Section 3512, for example, permits a single prosecutor to pursue requests in multiple judicial districts, eliminating the need for judges in different districts to appoint commissioners and otherwise duplicate their efforts. Section 3512 also permits judges to oversee and approve subpoenas and other orders (but not search warrants) outside their district.

U.S. district courts, for their part, have considerable discretion concerning whether to authorize a foreign request. Put another way, while MLATs are legally binding commitments, each individual application a "requesting country" sends to a "requested country" is carefully reviewed prior to being enforced.

Moving from the general to the specific, Section 1782 authorizes—but does not require—courts to provide judicial assistance to foreign or international tribunals. That said, "When a request for assistance under the MLAT arrives before a district court . . . almost all the factors already would point to the conclusion that the district court should grant the request." *In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 571 (9th Cir. 2011). In some narrow circumstances, however, this "presumption" in favor of granting the requested assistance can be overcome; the key inquiry is on whether the request complies with U.S. law.

Like 28 U.S.C. § 1782, the newer Section 3512 is written permissively, providing that U.S. courts "may issue such orders as may be necessary to execute a request from a foreign authority for assistance," and "may also issue an order appointing a person to direct the taking of testimony or statements or of the production of documents or other things, or both." Federal judges, therefore, continue to serve as the gatekeepers for search warrants, wiretaps, and other methods of obtaining evidence, ensuring that the requested foreign evidence collection meets the same standards as those required in U.S. cases (such as, for example, finding probable cause; disapproving of general warrants; and protecting attorney-client, physician-patient, and similar recognized privileges).

## The Role of District Courts

While district courts are involved in overseeing incoming MLAT requests, they have no direct oversight over requests sent from the United States to a foreign country. Nevertheless, the court may become indirectly involved in the outgoing MLAT process, as when delays in processing affect case management or speedy trial issues. To the extent that an MLAT request issued by the U.S. Department of Justice threatens to interfere impermissibly with either of the foregoing, defense counsel need to keep in mind that courts can use their inherent power to try to push the government to either forgo obtaining certain evidence or limit its request to core, essential evidence to ensure that requests are processed expeditiously and are answered as quickly as possible.

While the majority of MLAT applications proceed uneventfully, there are legal issues to be on the lookout for. Extradition treaties typically require "dual criminality" (also known as "double criminality"), which means that the offense for which the foreign state seeks assistance must also constitute a crime in the requested state. Because MLAT requests are intended to improve law enforcement cooperation between countries, however, and the United States' law enforcement objectives often rely on speedy and generous help from treaty signatories, the United States

has committed to responding to requests under MLATs, regardless of whether a dual criminality exists, in part to set a high standard of responsiveness that will allow the United States to seek the same in return from foreign authorities.

As noted at the outset, the MLAT process is available to the government; private parties and defendants are precluded from requesting foreign assistance through MLATs. That, at least, is the formal rule.

In some cases, however, counsel for the defense may well argue that a vital piece of exculpatory evidence is located overseas, letters rogatory can take years to process (and even then, the outcome is typically far from certain), and the MLAT process is the only realistic way of obtaining it. And this argument, in the right case, may have some basic appeal.

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Today's federal prosecutors, after all, increasingly rely on extraterritoriality provisions in federal law, such as those incorporated into the Foreign Corrupt Practices Act, to bring cases in which virtually all of the physical evidence and potential witnesses are located overseas. A defendant's ability to have at least something approaching "equality of arms" in terms of collecting, testing, and presenting evidence, implicates issues of basic fairness; if only the government is able to prepare its case, and it refuses to provide the defendant with readily available assistance, then defense counsel may argue that this raises very real due process concerns. (The due process argument may have greater resonance if the defense has attempted to use letters rogatory to access evidence and its efforts proved futile.) If the Department of Justice refuses to use an MLAT to execute a Rule 15 court order authorizing a criminal defendant to take a deposition abroad, moreover, the defendant may also contend that the refusal violates the defendant's rights under the Compulsory Process Clause of the Sixth Amendment.

Defense counsel should, therefore, in appropriate cases, consider asking the prosecutors to help them access such key evidence through the MLAT process and, if the prosecution refuses, petition the court for assistance. Even though the case law, as a general matter, does not raise hopes for defense counsel's success in pressing such a due process argument, the public perception and other factors may persuade the government that resisting such a request is simply not worth the effort.

One of the most challenging—and directly related—issues facing courts when the government files a post-indictment MLAT request for assistance is the delay that is frequently occasioned and the interference with the court's case management orders. A defendant in custody amplifies this concern and raises legitimate questions concerning how much time the MLAT process might take and how critical this evidence is to the government's case.

Particularly in the area of high-tech crime, obtaining evidence through the use of formal MLATs between nations can be time consuming. The central difficulty is the required level of legal formality and resource-allocation challenges as they relate to staff time and funding. In more complex cases, another obstacle is the more limited capacity of some foreign law enforcement agencies to conduct sophisticated forensic searches of subject computers.

The court has "broad discretion in supervising the pretrial phase of litigation, and its decisions regarding the preclusive effect of a pretrial order . . . will not be disturbed unless they evidence a clear abuse of discretion." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992). Courts will certainly scrutinize case delays caused by the government's filing of successive MLAT requests.

Defense options are more limited when the U.S. government files what the statute terms an "application" (a motion) prior to the return of an indictment indicating that it intends to obtain evidence of an offense in a foreign country. In such cases, the district court before which the grand jury is impaneled is, pursuant to 18 U.S.C. § 3292, required to, as the statute puts it, "suspend" (toll) for up to three years the running of the statute of limitations. This is an ex parte hearing; section 3292 does not provide the party whose statute of limitations is being suspended with a right to notice or a hearing. The court must find by a preponderance of the evidence that the government made an official request for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country. The suspension of the statute of limitations begins on the date that the treaty request is made and ends when the foreign government takes its final actions.

We live in an era in which the United States has now entered into MLATs with more than 60 foreign nations, using these treaties to target crimes such as money laundering, drug trafficking, Internet fraud, and similar offenses that often have an inherent transnational component. Nevertheless, misconceptions about the scope and functions of this powerful pro-prosecution tool abound. We hope our short discussion has helped dispel some of these, while at the same time identifying areas where the law and real-world practical implementation related to MLATs are still evolving. ■