Malaysia

The Legal Framework for Extradition, MLA and Recovery of Proceeds of Corruption

Extradition, MLA and the recovery of proceeds in Malaysia are governed by the Extradition Act 1992 (Act 479) and the Mutual Assistance in Criminal Matters Act 2002 (Act 621) (MACMA). An extradition or MLA treaty which Malaysia has signed is incorporated into the domestic legal framework when the Minister of Internal Security (MIS) issues an order directing that the Extradition Act or the MACMA applies to the treaty in question. In the absence of a treaty, the MIS may direct that the MACMA or the Extradition Act applies to a foreign state with which Malaysia has no treaty, though MLA may be refused in the absence of an assurance of reciprocity by the requesting state. Malaysia has internal guidelines on when a request should be refused on other grounds. Letters rogatory requests are governed by Order 66 of the Rules of the High Court 1980.

Concerning multilateral instruments that may provide MLA in corruption cases, Malaysia (along with Singapore and Vietnam) has signed and ratified the Southeast Asian MLAT. Malaysia has signed the UNTOC and UNCAC but, as of April 2007, it had only ratified the former. Malaysia has only one bilateral MLA treaty in force (with Australia, which is a member of the ADB/OECD Initiative and a Party to the OECD Convention).

As for multilateral instruments that may provide extradition in corruption cases, Malaysia has signed but has not ratified the UNCAC. It has also signed and ratified the UNTOC, but it has declared that it does not take the Convention as a legal basis for extradition with other States Parties. Malaysia also has extradition relations based on its legislation under the London Scheme with six member countries of the Initiative (Bangladesh; Cook Islands; Fiji Islands; Samoa; Sri Lanka; and Vanuatu) and one Party to the OECD Convention (United Kingdom). Malaysia has five bilateral extradition treaties in force, four of which are with members of the Initiative (Australia; Hong Kong, China; Indonesia; Thailand) and two with Parties to the OECD Convention (Australia and United States). Extradition to and from Singapore is based on a scheme in the Extradition Act for the endorsement of arrest warrants.

The Extradition Act and the MACMA are both fairly recent legislation. Both broadly include detailed provisions on the grounds for denying cooperation, the procedure for making outgoing requests and executing incoming requests. The MACMA provides for a broad range of assistance, including search warrants, production orders, and enforcement of foreign restraining and confiscation orders. Taking evidence by video conference is not available.

Available statistics indicate that, from 2002 to 2006, Malaysia had 1 outgoing and 9 incoming extradition cases, and 7 outgoing and 48 incoming MLA cases. None of these cases involved corruption offenses. During the same period, Malaysia has received 11 MLA requests concerning proceeds of crime, 4 of which concern freezing or confiscation. It has also made 3 outgoing requests concerning proceeds of crime involving freezing or confiscation. Upon receiving a request from a country with which Malaysia has no treaty, it takes an average of 1 to 3 months for the MIS to issue the requisite special direction that allows the matter to proceed. It then takes a further 6 months to 2 years for the complete execution of the request. The delay in extradition cases is mainly due to court challenges to the request by the person sought, and because requests must be go through the MIS before they are sent to the Attorney General’s Chambers for review and approval (see below).

All incoming MLA requests may be made to the Attorney General of Malaysia through the diplomatic channel. Incoming requests for extradition must be transmitted through the diplomatic channel to the MIS. The parties to bilateral agreements may also indicate a specific channel. A requesting state must provide its request (or a translation) in English.
Legal Preconditions for Extradition and MLA (Including in Relation to Proceeds of Corruption)

Dual criminality is a mandatory requirement for incoming extradition and MLA requests to Malaysia. The definition of dual criminality is conduct-based. For extradition, the offense in the requesting state, if committed within the jurisdiction of Malaysia, must be punishable under the laws of Malaysia by imprisonment of not less than one year, or death. Extradition between Malaysia and Singapore does not require dual criminality. For incoming requests to take evidence, the request must relate to an act or omission that, if it had occurred in Malaysia, would have constituted an offense against the laws of Malaysia. For incoming requests for more intrusive measures (e.g., production orders, search and seizure), the foreign offense must be punishable by at least one year’s imprisonment or death. Malaysia does not have an offense of bribery of foreign public officials, but as of early 2007, it was in the process of creating such an offense in order to comply with the UNCAC. Illicit enrichment is an offense in Malaysia; incoming requests involving this offense will likely meet the requirement of dual criminality. Since Malaysia imposes liability against legal persons for corruption offenses, the requirement of dual criminality should not pose difficulties to incoming requests in which the target of an investigation is a legal person.

Certain evidentiary tests may have to be met before Malaysia provides extradition or MLA. For incoming extradition requests, the Extradition Act requires sworn evidence of a prima facie case against the person sought unless an applicable treaty provides otherwise. For outgoing MLA requests, the Attorney General must be satisfied that there are reasonable grounds for believing that relevant evidence would be found in the requested state. For incoming requests for production orders or search and seizure, there must be reasonable grounds to suspect that a person specified in the request has committed an offense, and that evidence of substantial value will likely be found. The MACMA does not prescribe an evidentiary threshold for incoming requests to take evidence from a witness. Malaysia has encountered some difficulties in meeting evidentiary tests in outgoing requests but some have been resolved successfully; in one extradition case, Malaysia had difficulty confirming the location of a fugitive and the requested state was unable to assist. In an outgoing MLA case involving money laundering, initial problems – insufficient evidence to show probable cause – were resolved by consultation, providing additional evidence and amending the request.

Necessity and the importance of the evidence sought are also relevant factors for incoming MLA requests. Malaysia will refuse MLA if the evidence requested is not of sufficient importance to the foreign investigation, or if the evidence could reasonably be obtained by other means.

Specialty and use limitation apply to extradition and MLA respectively. For incoming extradition requests, specialty must be provided for in a relevant treaty, a provision in the law of the requesting state, or through an undertaking by the government of the requesting state. For outgoing extradition requests, the Extradition Act provides specialty protection to persons surrendered to Malaysia. With incoming MLA requests, the appropriate authority of the requesting state must undertake that the evidence requested will only be used for the criminal matter in which the request was made. However, the Attorney General of Malaysia may agree to waive this requirement.

Essential interests may be a ground for denying MLA. Under the MACMA, Malaysia will refuse to grant an MLA request that would affect the sovereignty, security, public order or other essential interests of Malaysia. A court may also refuse to issue a production order or search warrant if it finds that it is not in the public interest to do so. Malaysia has never denied an extradition or MLA request for these reasons.

Malaysia may refuse to extradite its nationals, having regard to factors such as whether the legal prerequisites for surrender are satisfied, whether it is detrimental to the security of Malaysia, and public interest concerns. If extradition is refused for this reason, the Public Prosecutor will consider prosecuting the person sought if Malaysian courts have jurisdiction over the offense. Malaysia may also agree to extradite if the national will be returned by the requesting state to Malaysia to serve any sentences upon conviction. Malaysia has never refused extradition solely on the ground that the person sought is its national.

The presence of an on-going proceeding or investigation in Malaysia could affect whether Malaysia will provide MLA. Under the MACMA, Malaysia will refuse MLA if the provision of assistance could prejudice a criminal matter in Malaysia. In practice, Malaysia will postpone executing the request and reconsider the case after the domestic investigation has been completed.
Regarding other grounds for denying cooperation, Malaysia may refuse extradition and MLA if it has jurisdiction to prosecute the offense underlying a request. Malaysia will not provide extradition or MLA in respect of an offense of a political character. MLA will also be denied if the target of an investigation or proceedings has been convicted, acquitted, pardoned or punished in the requesting state for the same offense. As of early 2007, Malaysia had not denied extradition or MLA on any of these grounds.

The denial of MLA because of bank secrecy is not dealt with in the MACMA. However, both the Southeast Asian MLAT and the Australia-Malaysia treaty state that assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions.

Malaysia is not obliged to consult with a requesting state before denying a request for extradition or MLA. In practice, Malaysian authorities will consult and confer with the requesting state in order to facilitate the granting and execution of the request.

Procedures and Measures to Improve the Efficiency of Extradition and MLA

The International Affairs Division (IAD) of the Attorney General’s Chambers (AGC) is the main body involved in extradition and MLA, being involved in receiving, transmitting and monitoring requests. The MIS also plays a key role in extradition cases.

Incoming extradition and MLA requests are processed slightly differently in Malaysia. Incoming extradition requests received through the diplomatic channel are forwarded to the MIS. The MIS then reviews the request with the advice of the AGC to determine whether the request complies with the relevant legislation and treaty. If the requirements are met, the MIS forwards the request to the AGC for execution. In corruption cases, the Anti-Corruption Agency Malaysia (ACA) will cooperate with the AGC to execute the request. On the other hand, incoming MLA requests are provided directly to the AGC, which will review the request in consultation with other relevant agencies, e.g., the ACA in corruption cases. The MIS is involved only for requests that are not based on a treaty, in which case the MIS must issue a special direction that the MACMA applies to the case. Once the AGC decides to proceed with the case, the IAD will process the request with the cooperation of the Prosecution Division of the AGC and the relevant law enforcement agency (again the ACA in corruption cases). All incoming extradition and MLA requests are kept confidential.

Outgoing extradition and MLA requests are handled in a similar fashion to incoming requests. Outgoing extradition requests are drafted by a law enforcement agency (e.g., the ACA in corruption cases) and forwarded to the MIS, which will review the request with the assistance of the AGC. If the MIS decides that the request meets the requirements of a relevant treaty and that there is sufficient evidence to support the request, it will send the request to the foreign state through the diplomatic channel. On the other hand, outgoing MLA requests are drafted by the AGC with the cooperation of the prosecutors and investigators involved in the case before they are sent through the diplomatic channel. The MIS is not involved.

The IAD also plays a central role in monitoring all incoming and outgoing extradition and MLA requests. In doing so, the IAD communicates with the competent authorities of the requested state as well as the relevant Malaysian officials in the MIS, the Ministry of Foreign Affairs, and law enforcement agencies (e.g., the ACA). Malaysia also liaises with foreign authorities through diplomatic and informal channels on case-specific and general matters. To help foreign authorities prepare requests to Malaysia, the AGC has a Web site in English with a description of the extradition and MLA process, the relevant legislation and treaties, contact information, and a Model Request Form and Checklist.

To discharge these responsibilities, the IAD is staffed with legally qualified officers who are fluent in Malay and English. Qualified translators are available if necessary. Training on extradition and MLA is provided to officials in the IAD as well as law enforcement officers, prosecutors and judges through training programs organized by the Judicial and Legal Services Training Institute. Officials are bound by the Official Secrets Acts to maintain the confidentiality of requests.

Malaysia provides particular measures to deal with urgent requests. Requests for provisional arrest may be transmitted outside the diplomatic channel, such as via Interpol or other police channels. Urgent MLA requests must still be transmitted through the diplomatic channel. However, the AGC will begin to prepare executing a request based on an advance copy of the request while waiting for the formal request to arrive through the diplomatic channel.
Regarding the procedural aspects of the extradition process in Malaysia, a person sought must be brought before a magistrate upon his/her arrest. Upon being advised by the MIS that the person arrested is sought for extradition, the magistrate shall transfer the case to the Sessions Court. At this stage, the person sought may consent to being committed into custody to await the decision of the MIS on whether he/she should be surrendered. Alternatively, the Sessions Court will conduct a hearing before deciding whether to commit the person sought. During the hearing, the Court must receive evidence tendered by the person sought to show that he/she “did not do or omit to do the act alleged to have been done or omitted by him” (Extradition Act Section 19(1)(a)). If the Court orders committal, the matter reverts to the MIS to decide whether the person sought should be surrendered. The Extradition Act, however, does not impose any time limits on the MIS.

The Royal Malaysian Police (RMP) may provide additional assistance at the police level. The RMP and its counterparts in Indonesia, Singapore and Thailand meet annually to share information on transnational crime. The agency also cooperates closely with law enforcement agencies in Australia, Germany, New Zealand, the Netherlands, and the United States.

Recovery of Proceeds of Corruption in Criminal Proceedings

The MACMA contains a broad definition of “proceeds of crime” that may be the subject of an incoming request to restrain or forfeit. The definition includes direct proceeds (“payments or other rewards received in connection with a foreign serious offense”) and indirect proceeds (“property derived or realized, directly or indirectly, from [direct proceeds].”) Also covered is confiscation of property of a value equivalent to direct or indirect proceeds. A “foreign serious offense” is in turn defined as an offense consisting of conduct which, if it had occurred in Malaysia, amounts to a defined offense under the Anti-Money Laundering Act 2001 (AMLA), or an offense punishable by death or imprisonment of at least one year. Defined offenses under the AMLA include all of the major corruption offenses in the Anti-Corruption Act 1997.

The status of foreign proceedings may affect whether Malaysia can execute a request for restraint or forfeiture. Restraining orders are available if proceedings are on-going in the requesting state and a forfeiture order has been made or there are reasonable grounds to believe such an order will be made. Restraining orders are also available if proceedings will be instituted in the requesting state and forfeiture may be ordered in those proceedings. Requests for forfeiture may be executed only if a court in the requesting state has ordered forfeiture. There is no requirement that a person be finally convicted of an offense.

Foreign forfeiture orders that are not subject to appeal may be enforced in Malaysia through direct registration. In other words, foreign orders may be directly registered with a court in Malaysia, after which the order becomes enforceable in Malaysia like a domestic court order. There is thus no need to apply for a second court order in Malaysia. Foreign restraining orders cannot be enforced by direct registration.

The MACMA also deals with the sharing and repatriation of proceeds. The Malaysian government has absolute discretion to manage and dispose of forfeited property, including liquidation. After paying for expenses incurred in recovering and managing the property out of the forfeited property (or the proceeds of liquidation), the Minister has discretion to return the balance to the appropriate authority of the requesting state.

Conclusion

Malaysia has established a legal framework for extradition and MLA based primarily on its domestic legislation rather than on treaties. Malaysia has recently expanded its treaty relationships, however, by concluding and ratifying the Southeast Asian MLAT, and bilateral extradition and MLA treaties with Australia. The implementing legislation (the Extradition Act and the MACMA) contains helpful features for expediting cooperation, such as extradition by consent, extradition by endorsement of warrants to and from Singapore, and enforcement of a foreign forfeiture order by direct registration.

To implement this framework in practice, Malaysia has designated the IAD as the central authority for MLA. The AGC has sufficient qualified staff and budgetary resources. It maintains an informative Web site in English with contact information and relevant legislation. Training on international cooperation has been
provided to IAD staff as well as law enforcement officers, prosecutors and judges. The ACA is involved in executing incoming extradition and MLA requests in corruption cases, thereby taking advantage of the ACA’s expertise in these cases.

Recommendations for a Way Forward

The Legal Framework for Extradition and MLA

Further expansion of its network of treaties, especially in MLA, could strengthen Malaysia’s ability to seek and provide international cooperation in corruption cases. Malaysia could therefore consider ratifying the UNCAC and concluding more bilateral extradition and MLA treaties.

Legal Preconditions for Extradition and MLA

To enhance extradition, Malaysia may wish to revisit the evidentiary aspects of the process. At present, Malaysia continues to apply the *prima facie* case evidentiary test in extraditions. Civil law jurisdictions seeking extradition from other common law jurisdictions have had difficulties in complying with this test. Malaysia could therefore consider following the example of some common law countries (e.g., Australia and the United Kingdom for extradition to certain non-Commonwealth countries) and require less or even no evidence for extraditions. Malaysia could also consider removing the right of a person sought under Section 19(1)(a) of the Extradition Act to tender evidence in relation to the substance of the charges at the extradition hearing, bearing in mind that the hearing should not be converted into a trial of the crime.

Malaysia could further streamline the extradition process by examining the distribution of functions among institutions. Unlike MLA requests, outgoing extradition requests are checked by both the MIS and the AGC for treaty compliance and sufficiency of evidence. The MIS also checks incoming requests for compliance with the relevant treaty and legislation before sending the request to the AGC for execution. Malaysia may wish to consider assigning these functions to a single central authority (as in many other jurisdictions), which will likely speed up the extradition process.

To further enhance extradition, Malaysia could relax the requirement that the requesting state provide a specialty assurance in its law or an applicable treaty. Instead, Malaysia could consider accepting assurances by diplomatic, judicial or prosecutorial officials. Malaysia could also consider imposing additional time limits for certain steps in the extradition process, such as deadlines for the person sought to make submissions to the MIS, and for the MIS to order and to effect surrender. Malaysia may also wish to expand the scheme for consent extraditions by allowing the person sought to consent immediately after arrest and to consent to surrender (as opposed to just committal).

To improve its system of providing MLA further, Malaysia could consider reducing the applicable evidentiary thresholds. Presently, search warrants and production orders may be issued only if there are reasonable grounds to believe that evidence of substantial value will be found. There is no such requirement for outgoing requests for search and seizure by Malaysia or in international instruments, e.g., Article 18(1) of the Southeast Asian MLAT.

Malaysia could consider further enhancing MLA by addressing bank secrecy in the MACMO. Recent international instruments expressly prohibit the use of bank secrecy as a ground for denying MLA (e.g., Article 9(3) of the OECD Convention, Article 46(8) of the UNCAC, and Article 3(5) of the Southeast Asian MLAT). Considering its emerging role as a financial center, Malaysia could consider codifying a similar prohibition in the MACMA. Malaysia could also consider allowing the taking evidence by video conference and providing for the necessary technical equipment.

To provide greater cooperation in both extradition and MLA, Malaysia could consider revising its approach to prosecution in lieu of cooperation. If Malaysia refuses to extradite its nationals, it will prosecute the person sought only if it has jurisdiction over the offense. Malaysia may wish to ensure that its criminal law provides for jurisdiction to prosecute all such cases. As well, in light of international standards (such as Article 10(3) of the OECD Convention and Article 44(11) of the UNCAC) Malaysia could consider requiring a case to
be submitted to its competent authorities for prosecution whenever extradition is denied solely because of nationality. In addition, Malaysia may refuse extradition and MLA if it has jurisdiction to prosecute the offense underlying the request. It could consider ensuring that the jurisdiction to prosecute is exercised whenever it denies extradition or MLA on this basis. Finally, before denying cooperation on these grounds, Malaysia may wish to ensure that it consults the requesting state.

Relaxing the dual criminality requirement, which is presently mandatory for both extradition and MLA, could also improve cooperation. Malaysia could consider eliminating the dual criminality requirement for MLA or reducing it to a discretionary requirement. Alternatively, Malaysia could consider requiring dual criminality only for more coercive measures (extradition, search and seizure etc.) and not for less intrusive ones, such as requests for production orders and service of documents.

Malaysia denies extradition and MLA for political offenses, and the Extradition Act and the MACMA contain negative definitions of offenses that are not considered political. Malaysia could consider following the example of Article 44(4) of the UNCAC and add corruption offenses to this negative definition.

**Procedures and Measures to Improve the Efficiency of Extradition and MLA**

As for procedure and practice, Malaysia requires all incoming requests (except requests for provisional arrest) to be sent via the diplomatic channel. It has observed delays in using this medium of transmission. Malaysia could therefore consider allowing transmission of requests outside the diplomatic channel, particularly urgent MLA requests. Possible options include accepting requests electronically, via facsimile, or even orally with subsequent confirmation in writing.

**Recovery of Proceeds of Corruption in Criminal Proceedings**

As for MLA in relation to proceeds of corruption, Malaysia could consider allowing direct registration of foreign restraining orders (as opposed to only confiscation orders). Malaysia may also wish to clarify its policy on when and how it will repatriate proceeds of corruption.

**Information for Seeking Assistance**

**Central Authority**

For MLA under the Southeast Asian MLAT:

Attorney General of Malaysia  
c/o International Affairs Division  
Attorney General’s Chambers  
Level 6, Block C3, Federal Government Administrative Centre  
62512 Putrajaya, Malaysia  
Tel: +60 3 8885 5000  
Fax: +60 3 8888 3518 or +60 3 8888 6368  
www.agc.gov.my/agc/agc/int/int.htm

For MLA under the Australia-Malaysia treaty and requests in the absence of a treaty: The Attorney General of Malaysia through the diplomatic channel  

For Extradition: The Minister of Internal Security through the diplomatic channel

**Relevant Laws and Documentation**

Extradition Act and information on the extradition process: www.agc.gov.my/agc/agc/int/EU/index.htm  
The MACMA and information on the MLA process: www.agc.gov.my/agc/agc/int/EMAM/index.htm  
Model MLA Request Form and Checklist: www.agc.gov.my/agc/sec/form.htm  