CRIMINAL LAW IMPLICATIONS OF

INTERNATIONAL BUSINESS TRANSACTIONS

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Introduction

This chapter aims at examining the criminal law implications of international business transactions and practices. It will focus on money laundering regulations affecting international business as this is the gravest criminal problem which the international business law practitioner may encounter. Emphasis will be placed on international criminal treaties, US, Canadian, and European Union criminal norms. The first substantive part of this chapter delves into a thorough examination of money laundering. It analyzes the crime and its main phases. Then it analyzes United States and Canadian money laundering norms affecting international business transactions. In order to facilitate civil law trained lawyers' comprehension of the elements of the crime in common law jurisdictions, the chapter briefly examines the main elements of common law crimes. Then, it analyzes European Union regulations. Although most European Union countries follow the civil law tradition, the European conceptions of the money laundering crime present clear common law elements and features because they have been strongly influenced by US legislation.

This chapter will provide the international business lawyer with an invaluable insight to effectively serve international clients and help them avoid undesirable criminal consequences of international business transactions.

Money Laundering

Money laundering regulations are quite complex, usually drafted in very broad language, and with extensive extraterritorial jurisdictions. So, a thorough understanding of their content, extent, and possible implications become imperative for the international business lawyer as even the most adverse risk client may –unwillingly- be implicated in an international transaction tainted by money laundering.

Money laundering involves using the proceeds of a crime in innumerable transactions until law enforcement and regulatory agencies are unable to trace the origin of the money. The money laundering crime was created in the 1980's in order to repress drug trafficking and later corruption of foreign politicians. After September 11, 2001, it became an instrument to combat terrorism. It is now used in a very broad fashion and it represses almost any crime that involves money.

Criminal penalties prescribed for money laundering offenses are rather severe. They include imprisonment, in some cases, such as the US, up to 20 years, substantial fines, in the US up to US$ 500,000, and the confiscation of all property involved in a transaction –even if legitimate- and the proceeds of the criminal activity, which the money laundering operation intends to clean, including property, such as collaterals, personal property, and bank accounts.

Money laundering phases

There are three steps that money launders use in the money laundering process, generally known as placement, layering, and integration.

The placement phase involves placing the proceeds of a crime in a front operation, generally a business, whether legitimate or especially designed for money laundering purposes, that produces high revenues in cash. The launderers then report the proceeds of the crime as if they were earnings from this business. The second step is the layering stage where the launderers set up a shell corporation, usually in offshore jurisdictions. This shell corporation will start moving the money all over the world in different transactions. In the integration phase the money is moved from the offshore accounts into legitimate banks in the country of the launders. All law enforcement efforts take place at the integration phase, because governments can partner with banks to enforce money laundering norms.

Money Laundering norms in the United States

In 1970, the US Congress enacted the Bank Secrecy Act.[1] The alleged purpose of the act was to permit the identification of the source, volume, and movement of currency and other monetary instruments transported or transmitted into or out of the United States or deposited in financial institutions. For this purpose, it adopted a system that requires individuals, banks, and other financial institutions to file currency reports with the U.S. Department of the Treasury, to properly identify persons conducting transactions, and to maintain appropriate records of financial transactions. The Money Laundering Control Act of 1986 established criminal liability on a person or financial institution that knowingly assists in the laundering of money, or that structures transactions to avoid their report.

In April 1996, the US government created a reporting scheme known as Suspicious Activity Report (SAR), where all banks must file a SAR whenever they detect a known or suspected criminal violation of federal law or a suspicious transaction related to money laundering activity or a violation of the BSA.

After the September 11, 2001 incidents, the US government strengthened money laundering measures by criminalizing the financing of terrorism and by tightening the existing BSA identification and reporting system. The US Patriot Act prohibited the engagement of financial institutions with foreign shell banks and mandated the adoption of due diligence procedures[2].

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[1] US Bank Secrecy Act.
[2] The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act). Title III of the Patriot Act is the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001.

Structure of the money laundering criminal offense

The money laundering criminal offense[3] in the United States has been structured as several different offenses:[4] (i) domestic money laundering and participation in transactions involving criminal proceeds, (ii) international money laundering and transportation of criminally derived monetary instruments in foreign commerce, (iii) the use of government sting operations to expose criminal activity, and the engagement in transactions involving property exceeding US$ 10,000 derived from specified unlawful activities.

Since the focus of this chapter is international business transactions, we will examine the international money laundering offense in the United States. However, most of the issues and elements surrounding the international money laundering crime also apply to other types of money laundering offenses in the United States. The international money laundering crime is described as follows:

> "(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—
>
> > (A) with the intent to promote the carrying on of specified unlawful activity; or

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[3] 18 USC 1956.

[4] 18 U.S.C. § 1956 criminalizes almost any dealings a person might have with the proceeds of a wide range of "specified unlawful activities" on the concealing or disguising of the source, ownership, location, or nature of the proceeds of such activity. Sections 1956(a)(1) and (a)(2) are the core of the provision. Subsection (a)(1) discusses laundering violations of illegal proceeds within a domestic context. Subsection(a)(2) discusses laundering violation of proceeds from a specific illegal activity when such proceeds are transported between the U.S. and other foreign countries or vice-versa. Section 1956(a)(3) was added in 1988 to provide for "sting" operations by government agents. *18 U.S.C. § 1957* criminalizes any "known" monetary transaction or attempted monetary transaction in criminally derived property when the following three factors exist: 1) the amount of the transaction is *over* $ 10,000; 2) a "financial institution is involved at some point, and; 3) the property is derived from a "specified" unlawful activity. Section 1957 does *not* require that the property be used for any additional criminal purpose or that Government prove the defendant knew that the offenses from which the criminally derived property was from a specified unlawful activity.

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both[5]".

Elements of a crime in common law jurisdictions

The basic common elements of a crime in common law jurisdictions are *actus reus* and *mens rea*, together with the absence of justifications and defenses. *Actus reus* is defined as "the physical act specified in the crime."[6] The *actus reus* is comprised of "a voluntary act… that causes… social harm"; where causation is the nexus between the act and the social harm.[7] Typically, the *actus reus* requirement is met when an agent acts voluntarily. "Social harm" has been "defined as the 'negation, endangering, or destruction of [a socially valuable and legally protected interest, whether] individual, [societal] or state."[8] It may adopt the form of a wrongful result, wrongful conduct, or "attendant circumstances." The causal link requirement implies that for criminal liability to arise, the act must cause the social harm. An act can cause harm when the "but for" test is satisfied, i.e., when a particular result would not have occurred but for the act. Additionally, the *actus reus* requirement means that there is no criminal liability for an omission to act,

[5] 18 U.S.C. § 1956.
[6] Lynnette S. Cobun, *The Insanity Defense: Effects of Abolition Unsupported by a Moral Consensus*, 9 AM. J. L. AND MED. 471, 474 (1984).
[7] DRESSLER, *supra* note 251, at 81.
[8] *Id.* at 110.

save for the exceptional situations where “a ‘legal duty’ to act” exists. There is a duty to act when there is a special relationship; a contract which creates a duty to act, and when the defendant himself caused the danger; or, when the defendant undertook to render assistance to the victim. The *mens rea*, or guilty mind, implies that the actor’s mental state coincides with the mental state required by the law for a particular offense. In other words, this requirement is met when, at the time the agent committed the crime, she had the legally requisite mental state that the law requires for the existence of criminal liability. *Mens rea* comprises four distinct states of mind.[9] These states are: (i) *purposeful*, when a defendant desires his conduct to cause a particular result; (ii) *knowing*, when a defendant is aware that his conduct is practically certain to cause a particular result; (iii) *reckless*, when defendant *is* aware of a risk– which for the US Model Penal Code, must be “substantial and unjustifiable”– that his conduct might cause a particular result; and (iv) *negligent*, when defendant *should be* aware of a risk that his conduct might cause a particular result. The third component of the offense in common law jurisdictions is the absence of justification or excuse.[10] In other words, the presence of an excuse or justification may lead to the absence, or even inexistence, of a crime. Justifications and excuses permit the exclusion, or reduction, of criminal liability in conduct that would otherwise constitute an offense.[11] They generally include: (i) duress, (ii) necessity, (iii) self-defense, (iv) defense of others, (v) defense of property, (vi) parental disciplinary rights, (vii) law enforcement privileges, (viii) entrapment, (ix) mental defenses negating responsibility, and (x) a very limited defense of error of law.

Structure of the International Money Laundering Crime in the US

Section 1956(a)(2) specifies three separate offenses associated with the transportation, transmission, or transfer of criminally derived proceeds into or out of the United States. The three offenses are: (i) intent to promote the carrying on of specified unlawful

[9] MPC §2.02 (2)
[10] *See* 21 AM. JUR. 2D *Criminal Law* §§ 216, 217 (1998).
[11] *See* U. S. v. Parr, 516 F.2d 458 (5th Cir. 1975) (justification and excuse are affirmative defenses); Hightower v. State, 481 S.E.2d 867, 869-870 (Ga. Ct. App. 1997) (“[T]he defendant [must] admit the crime before he can raise such defense”); People v. Lemons, 562 N.W.2d 447, 453-454 (Mich. 1997) (defendant has burden to prove duress).

activity, (ii) the transportation of a monetary instrument that represents the proceeds of some form of unlawful activity designed to conceal or disguise that instrument, and (iii) the transportation of the monetary instrument that represents the proceeds of some form of unlawful activity designed to avoid a state or federal transaction reporting requirement.

A breakdown of the elements of the international money laundering crime in the United States are as follows. The actus reus is the transportation (transmittal, or transfer) of a dirty (i.e., proceeds of some form of unlawful activity) monetary instrument. The voluntary act is the transportation, transmittal or transfer of dirty money. The social harm has been expressed in terms of a wrongful conduct, which is precisely the transportation of those monetary instruments. Social harm takes the form of wrongful conduct when the offense is described in terms of injurious conduct, and no harmful result is required.[12] In this case, the social interest– to ensure clean financial transactions- is endangered by the transportation and transfer of money instruments derived from unlawful activities.

Congress did not define the concept of proceeds and thus courts have construed the term broadly. However, disagreement exists regarding when property becomes "proceeds"[13]. The courts held that the government does not have to trace proceeds involved in a scheme back to a particular offense, it only needs to present evidence that the defendant engaged in conduct typical of criminal activity and had no other legitimate source of funds[14].
The international money laundering offense has been structured as a specific intent crime, where apart from the mens rea required for the actus reus there is a further ultimate intent. The statute is silent as to the mens rea for the transportation. An analysis of the context leads to presume that it requires intention –and probably knowledge- to transport the funds. It also requires knowledge that the money derives from an unlawful activity and knowledge of the specific intent, which is either to conceal the nature or origin of the funds or to avoid the reporting requirements. However, the statute has adopted an objective standard to determine the existence of knowledge independent of actual knowledge of defendant. Thus, the defendant's knowledge may be established by proof

[12] Robinson, *supra* note 279, at 235.
[13] Christopher Boran, "Money Laundering" 40 Am. Crim. L. Rev. 847, at 857.
[14] United States v. Smith, 223 F.3d 554, 576 (7th Cir. 2000).

that a law enforcement officer represented its existence as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true, whether in fact they were true or not. So, there may be instances in which a business person does not actually know, for example, that the funds he is transferring to carry out a financial transaction derive from unlawful activities and a law enforcement agent imputes the existence of such knowledge based on some indicia. The only practical solution to avoid this risk is that the lawyers involved in an international transaction that involve the transfer of funds to, from or through the United States conduct a due diligence or request their clients to identify the origin of the funds.

Also, the definition of "financial transaction" is not limited to transactions with banking or financial institutions. Virtually any exchange of money between two parties constitutes a financial transaction subject to criminal prosecution. While the legislative history of the international money laundering offense indicates that Congress did not want every transfer or delivery of property to constitute a "financial transaction," courts interpret the term broadly, allowing a wide variety of transactions to qualify under the statute[15].

Money Laundering norms in Canada

According to the Criminal Code of Canada, "[e]very one commits [the] offence [of Money Laundering] who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds, knowing or believing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of (*a*) the commission in Canada of a designated offence; or (*b*) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence[16].

[15] Christopher Boran, "Money Laundering" 40 Am. Crim. L. Rev. 847, at 857.
[16] Canadian Criminal Code section 462.31.

Structure of the Money Laundering Crime in Canada

Unlike the US, Canadian criminal law contains only one money laundering offense, which is used to repress all types of money laundering crimes. In Canadian criminal law, the actus reus is described by a wide range of actions, including the use, transfer, delivery, and transportation of dirty property. Like in the US, social harm has been defined in terms of the conduct, which is the use or transfer or dirty property. In turn, dirty property has been defined as property or proceeds derived from a crime committed in Canada or abroad, provided that the crime committed outside Canada is also an offense in Canada.

The Canadian Criminal Code is silent as to the mens rea requirement for money laundering. Again, from the context of the offense, it may be presumed that intent -and possibly knowledge of the elements of the actus reus- is required.

Money Laundering in Europe

In Europe, both the Council of Europe and the European Union have passed norms defining and regulating transactions between countries to combat money laundering. The Council issued a series of directives on the prevention and use of the financial system for money laundering purposes. These directives, together with the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) attempt to unify domestic legislative measures towards a broad but workable international crime control mechanisms.

The First Council Directive urges all European member states to adopt a common definition of money laundering and contained a definition of the money laundering crime. The second European Union Money Laundering Directive, effective on 28 December 2001, extended the predicate offence to cover organized crime, fraud against the EU, corruption, and serious offences. The Third Directive 2005/60/EC of the European

Parliament and of the Council formally adopted on 20 September 2005, now covers terrorist financing as well as money laundering[17].

According to the Third Directive, money laundering is the intentional:

(a) "conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action;

(b) concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity;

(c) acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity;

(d) participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the foregoing points".

Money laundering is to be regarded as such even where the activities which generated the property to be laundered were carried out in the territory of another Member State or in that of a third country. It is important to point out that knowledge, intent or purpose required as an element of the activities mentioned may be inferred from objective factual circumstances.

The Directive applies to financial and other key services sectors, as well as lawyers, notaries, accountants, real estate agents, casinos, trust and company service providers, and all providers of goods when payments are made in cash in excess of €15,000. The

[17] Member states have two years, i.e., until 15 December 2007, to adopt and bring into force appropriate implementing measures.

Directive imposes all these persons with the obligation to cooperate in the fight against money laundering by taking various measures to establish customers' identities, report suspicions and set up preventive systems within their organizations. In this respect, they must identify and verify the identity of their customer and of its beneficial owner, and to monitor their business relationship with the customer. They also have to report suspicions of money laundering or terrorist financing to the public authorities and they have to take supporting measures, such as ensuring a proper training of the personnel and the establishment of appropriate internal preventive policies and procedures.

The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime also mandates the adoption of legislative measures to establish money laundering as a criminal offence under domestic law. The Convention defines money laundering with very similar language as in the Directive[18]:

Although most European Union countries follow the civil law tradition, the money laundering crime in the EU norms has clearly been influenced by common law, particularly US legislation.

Conclusions

The most severe international criminal problem which the international business lawyer may face while providing legal services is money laundering. Money laundering has been defined in very broad terms in the US, Canada, and Europe, as well as in all those jurisdictions strongly influenced by US efforts in combating money laundering.

Even the most risk-adverse client may inadvertently and unwillingly be implicated in a money laundering scheme. Criminal sanctions for money laundering are quite severe and include fines and imprisonment. The best way to avoid being implicated in a money

[18] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime Strasbourg, 8.XI.1990, article 6.

laundering criminal offense is to conduct a thorough due diligence of the client's funds. In this respect, the due diligence standards contained in the European Directive are a good model for international business lawyers to follow in any jurisdiction.