Unsettling

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Settlements in cases relating to foreign bribery are leading to only a miniscule amount of money ever being paid back to the countries where the wrongdoing was carried out. There is talk of legal action being brought in the UK to help resolve this.

Aziz Rahman wonders why no one has thought of this approach before, as UK law is so stacked in favour of the accuser when it comes to proceeds of crime.

A report from the World Bank has revealed a disturbing picture when it comes to the settlements that have been reached in foreign bribery cases.

The study by the Stolen Asset Recovery initiative, called "Left Out Of The Bargain", looked at the extent of settlements in foreign bribery cases between 1999 and 2012. And it took an especially close look at those cases where the settlements were agreed in different locations to where the bribery occurred.

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Its findings are disconcerting. One of its main points was that only a tiny amount of money in such cases ever made its way back to the countries where the

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bribery is believed to have taken place. Only around 3% of an estimated $6 billion in fines that were issued in this 13-year period was ever handed back to the developing countries whose officials were bribed to secure contracts. Unsurprisingly, the report concludes that more should be done to make sure settlements have an international dimension. It recommends that there should be more transparency in settlements, more proactive anti-corruption behaviour, increased sharing of information between the authorities in all countries and more legal routes for those people who feel the need to seek legal redress in such circumstances.

Dimitri Vlassis, of the UN Office on Drugs and Crime, said there has been "considerable progress" in the fight against foreign bribery.

But he admitted: "More can and should be done to ensure that these efforts contribute also to asset recovery, which is a critical objective of the UN Convention Against Corruption. The return of assets to affected countries should be systematically integrated into the settlement processes and outcomes."

On reading the World Bank's report, few could argue with Vlassis' claim. The report accuses western countries of hanging on to the billions of dollars of fines while fully aware their companies convinced many developing countries to pay well over the market rate for major projects such as roads, dams and bridges. Such deals often involved huge state contracts that involved tens or even hundreds of millions of dollars.

The report makes it clear that the trend this century has been for settlements to be used to end foreign bribery cases, thus preventing the need – and cost and embarrassment for the guilty parties – of a full trial. But the report explains: "In the majority of settlements, the countries whose officials were allegedly bribed have not been involved in the settlements and have not found any other means to obtain redress."

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Here in the UK, the report will have stirred interest as it names 19 British companies. For example, construction giant Mabey & Johnson was found to have paid bribes to Iraqi officials in relation to a major bridge construction project. The company was also identified as having made corrupt payments to officials in Ghana and Jamaica. In 2009, Mabey entered into a plea bargain with the Serious Fraud Office. It was ordered to pay £658,000 to Ghana, £139,000 to Jamaica and £618,000 to Iraq. Iraq and Jamaica have received payment but no transfer of funds has been made to Ghana.

Macmillan Publishers is also named for having reached an agreement to pay £11m to three African countries in which they were involved. And arguably the best-known settlement is the one that saw BAe repay £29.5M to the Tanzanian government after the aerospace company supplied the country with a radar system with military capabilities that far exceeded its needs.

The World Bank launched its report in Panama. It was there that its co-ordinator Jean Pesme said that he hoped the developing countries who had not seen money returned to them would join on-going prosecutions brought in London, Washington or Zurich. “If you are a developing country, you can be a party to a case,” he said. “In our view, the affected countries should be allowed to join the prosecution.”

There is a certain irony that the man behind the report looks to the UK for legal redress to the problems he has highlighted. Why? Well, because here in the UK we have an approach to the proceeds of crime that seems so heavily weighted against a defendant that, at first glance, an unbiased onlooker would find it amazing that anyone could still have the assets they gained from the sort of business crime the World Bank has so clearly highlighted.

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For a start, the main law on confiscation, the Proceeds of Crime Act, has been widely viewed as Draconian. But also there is unfairness about the whole way such cases are run. For example, prosecution applications for confiscation are generally handled by a police Financial Investigator – rather than a prosecution barrister or Crown Prosecution Service (CPS) lawyer – so it can be argued police impartiality does not exist from the start.

The FI will usually produce the 'prosecution statement', which tends to set out artificially high figures for both the 'benefit' and 'realisable assets' amounts. There are, however, approaches that can help a defence team fight back in the face of such unreasonable demands from the authorities and Rahman Ravelli's POCA team are recognised for their innovative strategies.

Those at the receiving end of POCA proceedings should know that it is highly likely that any case against you in the UK would be affected by the lack of judicial discretion that POCA permits.S6(5) of POCA provides that the Court "must" make an order for the 'recoverable amount'. POCA is supposed to be a way for the authorities to remove the profit from the crime. Its opponents would say it is far more punitive than that. And with the various organisations in such a prosecution having a financial stake in the outcome, is it any surprise that they are occasionally accused of being over zealous and unrealistic in their assessment of the precise proceeds someone has derived from a crime?

Whatever the quality of evidence against a defendant in any case similar to those in the aforementioned World Bank report,, the strength of the defence will essentially come down to two things: the audit trail the defendant can produce to show whether or not bribery and corruption took place overseas and any evidence that shows the defendant had taken steps to be legally compliant.

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At Rahman Ravelli, we defend many companies who are able to show a strong, documented audit trial to support their arguments that either nothing was being done wrongly in their name or, if it was, there was no way they could have known about it. We also work with companies at an earlier stage to ensure they are legally compliant, as by designing out the potential for wrongdoing the right legal advice can pre-empt and prevent any future problems.

As the World Bank report highlights, the scale of corruption is huge and wide-ranging and is not always resolved satisfactorily. The best possible course of action is to take the right legal advice at the earliest possible opportunity to avoid becoming a statistic in the next international corruption report.

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