

ARNOLD & PORTER  
| KAYE SCHOLER

Collecting the Debt:  
Forfeiture and Restitution  
in *United States v. Bengis*

Marcus Asner  
Vienna, Austria  
25 September, 2017

[apks.com](http://apks.com)

Arnold & Porter Kaye Scholer LLP  
All Rights Reserved.

# Roadmap

---

- **Overview and Impact of the Scheme**
- Prosecutions
- Restitution
- Collecting the Bill

Privileged & Confidential

# South Africa – Supply Side

- Hout Bay Fishing Industries
- Rock lobster
  - West Coast rock lobster
  - South Coast rock lobster
- Patagonian Toothfish
  - Chilean sea bass



Privileged & Confidential

# South Africa – Supply Side Impact

- Massive overharvesting (1987 to 2001)
  - Circa 2000 – over 90% of West Coast lobster illegal
- OLRAC report
  - Cost of remediation – What it would cost South Africa to restore fishery
    - \$46.7 million
  - Market value of the poached lobster = (quantity of overharvested fish) x (prevailing market price)
    - \$61.9 million

Privileged & Confidential

# United States – Demand Side Impact

- Ice Brand New York
  - Importation and distribution
- Ice Brand Maine
  - Processing factory/distribution
- Impact on U.S. market
  - Lower prices/undercutting U.S. competitors
  - Impact U.S. supply
  - Providing consumers with illegal fish



Privileged & Confidential

# Roadmap

---

- Overview and Impact of the Scheme
- **Prosecutions**
- Restitution
- Collecting the Bill

Privileged & Confidential

# South African Prosecution

- Hout Bay operations manager
- Rock lobster fishermen
- 14 fisheries inspectors
- Seizures (lobster, boats, factory)
- Hout Bay Fishing Industries
  - Corporate plea
  - Fines
- Total ~ \$7,000,000

Privileged & Confidential

# F/V Portia 1 Seized by South Africa



Privileged & Confidential



# United States Prosecution – as of May 2004

- Arnold Bengis and 4 others – August 2003 arrests
- Lacey Act, smuggling and conspiracy charges
- Sentences (May 2004)
  - Bengis – 46 months
  - Others – time served to 30 months
  - \$7.4 million in forfeiture
    - Fish seized in U.S.; Ice Brand Maine

Privileged & Confidential

# City tycoon jailed in USA

**MELANIE GOSLING**  
Environment Writer

FORMER Cape Town fishing magnate Arnold Bengis, the mastermind behind an international lobster and Patagonian toothfish poaching and smuggling syndicate, has been jailed by a New York federal court for three years and 10 months.

Bengis, former head of the defunct firm Hout Bay Fishing (Pty) Ltd, and his co-conspirator, Jeffrey Noll, who was sentenced to 30 months' jail, were ordered to forfeit a total of \$5.9 million.

Bengis's son, David, was jailed for one year and ordered to forfeit \$1.5 million.

According to court papers, Bengis, 68, had told his sidekicks it was unlikely he would ever be prosecuted for his illegal fish trafficking scheme because he had "f\*\*\* you money".

Bengis, who has both South African and US citizenship and owns houses in New York and

Patagonian toothfish, and then to import the fish illegally into the United States.

Bengis's sentencing is the culmination of a three-year joint investigation by the Scorpions, Marine and Coastal Management (MCM) and the US authorities into the criminal conduct of the organisation headed by Bengis.

Court papers say the US branch of Bengis's criminal organisation played a central role in his fish-trafficking scheme from 1987 to 2001.

The New York office, run by Arnold Bengis and Noll, "served as the brain centre" for the criminal organisation. The financial aspects of the scheme were run from there, where two sets of books were kept: one with the legal fish caught within the South African quota allocations, and a second book recording the fish that had been poached.

The "sheer greed involved" and the "remarkable disdain for



**NETTED:** Arnold Bengis was the mastermind in an international poaching and smuggling syndicate that damaged SA's resources.

without work permits, to work in their US fish factories where they were paid below the minimum wages.

Bengis also hired a private investigator to follow the US agents during their investigation in an effort to locate a container of stolen fish that the US authorities had seized.

A witness said that in 2000, more than 90% of West Coast rock lobster processed by Hout Bay Fishing was illegal.

Bengis and his co-conspirators had used various US banks to "funnel millions of dollars of criminal proceeds to themselves and their relatives", and to bank accounts in the Jersey Islands, Gibraltar and Switzerland.

About \$2.1 million was also forwarded to a law firm in London engaged by the Bengis organisation.

Arnold Bengis's monthly American Express account ranged from \$9 000 to \$40 000.

The poaching operation had

# Roadmap

---

- Overview and Impact of the Scheme
- Prosecutions
- **Restitution**
- Collecting the Bill

Privileged & Confidential

# Restitution

- What is “property” for the purposes of the U.S. restitution statutes
  - Mandatory Victims Restitution Act, 18 U.S.C. § 3663A
  - Victim and Witness Protection Act, 18 U.S.C. § 3663
- Who is a “victim” of a crime?
  - Direct or proximate harm as a result of defendants’ conduct

Privileged & Confidential

# Restitution Theories

- *Res Publicae*/Public Trust theory – Lobster resource owned by the state but on behalf of the public at large
  - *Res nullius* doctrine – altered by UNCLOS and post-Apartheid legislation and other developments
    - OLRAC – Cost of Remediation – \$46.7 million
- South Africa's Property Interest in Stolen Fish
  - Illegally poached fish cannot belong to the poacher
  - South Africa has a right to seize, forfeit and sell poached fish
  - Scheme denied South Africa of its rights to seize and sell poached fish for market value
    - OLRAC – Market Value – \$61.9 million

Privileged & Confidential

# Argued December 2008; Decided January 2011

07-4895-cr  
United States v. Bengis

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

August Term, 2008

(Argued: December 10, 2008

Decided: January 4, 2011)

Docket No. 07-4895-cr

---

UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

— v. —

ARNOLD MAURICE BENGIS, JEFFREY NOLL, and DAVID BENGIS

*Defendants-Appellees.*

---

Before:

FEINBERG, CABRANES, and HALL, *Circuit Judges.*

---

# Court of Appeals

- “[L]obsters possessed in violation of the regulatory scheme do not become property of the possessors, rather they are subject to seizure and sale by the government of South Africa. **Under this logic, the moment a fisherman pulls an illegally harvested lobster out of the sea, a property right to seize that lobster is vested in the government of South Africa. Evading seizure of overharvested lobsters thus deprives South Africa of an opportunity to sell those illegally captured lobsters at market price and retain the proceeds, representing an economic loss to South Africa each time an illegally harvested lobster goes unseized.** South Africa's interest in those illegally harvested lobsters, therefore, goes beyond a mere regulatory interest in administering the fishing activities in its waters.”

Privileged & Confidential





# CAPE TIMES

with Business Herald • 10th Anniversary • Sunday, 12 October 2014



## Net loss

We gave it all we've got, says legend after  
Safana fail to make World Cup Page 16

## Flour power

City chef Giorgio Nicos wins World Pasta  
Championship in Italy Page 3



US COURT RULES AGAINST HOUT BAY MAN

# Lobster thief told to repay R294m

By David Berman

US COURTS HAVE ORDERED THE HOUT BAY MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT. THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT. THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT.

THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT. THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT.

THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT. THE COURT ORDERED THE MAN TO REPAY THE R294 MILLION HE OBTAINED FROM THE SALE OF HIS FISHING BOATS AND EQUIPMENT.



## Zuma warns youth of freedom's enemies

President Jacob Zuma has warned young people that freedom is not free and that they must be vigilant against its enemies. He said that the struggle for freedom is ongoing and that they must stand firm against those who seek to undermine it.

**Get Cooking**  
CELEBRITY CHEF ADIES SOULES

## Elderly Hout Bay couple's mugging on mountain trail the 15th this year

A 75-year-old couple was mugged on a mountain trail in Hout Bay on Sunday, the 15th such incident in the area this year. The couple was walking on a popular trail when they were approached by several men who demanded their money.

## All Black Duggie dragged off for calling player a fag

All Black player Duggie was dragged off the field for calling a player a fag. The incident occurred during a match and caused a significant disruption.

**St Elmo's**  
FAMILY donut



# Roadmap

---

- Overview and Impact of the Scheme
- Prosecutions
- Restitution
- **Collecting the Bill**

Privileged & Confidential

# Chasing the Money

- Restraining Order – March 2013
  - SG Hambros, Jersey, UK
  - Trust sues SG Hambros in UK
- Deposit Order – October 2013 – Defendants and “all persons in active concert” with them
  - Ordered to deposit \$22,446,720 with Clerk of Court in New York
  - Enjoined from encumbering or transferring to any entity other than the Clerk of Court any property in which defendants hold an interest
- David Bengis settlement – January 2016 – \$1,250,00
- Arnold Bengis deposits appeal bond of \$1,854,387

Privileged & Confidential

# Resentencing

- Order to Show Cause – December 2016
  - Ordering Arnold Bengis to show why he should not be found in contempt, resentenced for default, held in criminal default, and/or be subject to other action to obtain compliance with restitution order
- South Africa intervenes as victim, July 2017
  - Requesting forfeiture and restitution
  - Oral in-court presentations by South Africa on impact of Bengis scheme
- Resentenced – July 19, 2017 – 18 U.S.C. § 3614
  - 57 months' imprisonment
  - Forfeiture and money judgment of \$37,200,838.36

Privileged & Confidential

# Resentencing

Now, what has gone on here, in my judgment, is a blatant attempt by Mr. Bengis to put his assets beyond the reach of the United States in order to avoid the enforcement of what he feared and came ultimately to know would be a very large restitution obligation imposed upon him.

It is necessary to make clear that the United States is not going to tolerate this behavior in this case or in any other case, and putting Mr. Bengis aside for just a moment, people who contemplate these kinds of so-called asset protection measures, as certain elements of the bar like to refer to them, or evasion, as others might refer to them, carry with them very large risks, one of them being more jail time.

Privileged & Confidential

# Resentencing

Now, whether the United States will pursue arrest and extradition, whether it will succeed, I have no idea. That's an executive branch function. It's up to them. Whether a jurisdiction in which Mr. Bengis may find himself would grant extradition in these circumstances is not up to me either. It's above my pay grade, to use the vernacular. But there is value even to Mr. Bengis understanding that one of these days, there may be a knock at the door and a pair of handcuffs in his future, and he ought to feel that.

Privileged & Confidential

# Stay Tuned

Marcus Asner

Arnold & Porter Kaye Scholer LLP

250 West 55<sup>th</sup> Street

New York, NY 10022

+1.212.836.7222

Marcus.Asner@apks.com

Privileged & Confidential