Enforcement of Foreign Restraining Orders

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Legislation in the United States now permits the federal courts to register and enforce orders issued by foreign courts for the purpose of preserving assets that are subject to forfeiture under foreign law.

by Stefan D. Cassella

INTRODUCTION

For as long as anyone can remember, the proceeds of crime have been flowing across international borders, unhindered by law enforcement or financial regulations, yet policy makers and law enforcement officials are still searching for ways to freeze criminally-derived assets where they are found so that they may be returned to the country from which they came and forfeited under that country’s laws. Happily, after a series of false starts, progress has finally been made in this area in the United States.

This article discusses the problems that the United States encountered when it first attempted to enact and apply legislation designed to facilitate the enforcement of foreign asset-preservation orders, the remedial legislation enacted to address those problems, and the recent success the U.S. government has had under that new legislation in restraining assets at the request of foreign courts so that they may be forfeited under foreign law.

THE PROBLEM

It is not uncommon for the criminals in one country to place their criminal proceeds in another country, either as a means of hiding the proceeds from law enforcement or from the victims in the country where the crime occurred, or simply because the second country has a more stable currency or presents better investment opportunities.

There are many examples: drug dealers in South America and corrupt public officials in Eastern Europe or Africa invest their criminal proceeds in the United States, while persons committing massive fraud schemes in the United States send their fraud proceeds to bank accounts in bank-secrecy jurisdictions on island nations or to the most prestigious banks in Western Europe. What is frustrating for law enforcement officials in all countries is the ability of the criminals to move their money with absolutely no regard for international borders, while law enforcement operates under centuries-old rules that treat the borders and the principles of national sovereignty as sacrosanct.
This is not a new problem, and efforts to address it have been made many times. In 2001, for example, I proposed, in a paper presented at this Symposium, legislation that would allow the courts in one country to preserve assets subject to forfeiture in another country in either of two ways. The proposal read as follows:

To preserve the availability of property subject to an action pending in a foreign country for the entry of a forfeiture or confiscation judgment, or subject to an investigation leading to the commencement of such action, the Government may apply for, and the court may issue, a restraining order regarding such property. In issuing the restraining order, the court –

(A) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding, or

(B) may register and enforce restraining order that has been issued by a court of competent jurisdiction in the foreign country.

Such order may be entered at any time before or after an application is made to enforce such foreign judgment, and shall remain in effect until such time as the judgment is enforced.2

Indeed, in the aftermath of the September 11, 2001, terrorist attack, something much like that proposal was enacted into law by the United States Congress as part of the U.S.A. Patriot Act.3

SECTION 2467(d)(3)

The statute was called Section 2467(d)(3), and it allowed the Attorney General of the United States to apply for, and the court to issue, a restraining order “To preserve the availability of property subject to a foreign forfeiture or confiscation judgment.”4 Moreover, the statute said that the court could issue the order by relying on information set forth in an affidavit describing the proceeding or investigation underway in the foreign country, or by registering and enforcing a restraining order already issued by a foreign court that was directed against assets in the United States.

Here, in pertinent part, is the text of Section 2467(d)(3) as it was originally enacted:
(3) Preservation of property.—

(A) In general.—To preserve the availability of property subject to a foreign forfeiture or confiscation judgment, the Government may apply for, and the court may issue, a restraining order . . . at any time before or after an application is filed [to enforce a foreign forfeiture order].

(B) Evidence.—The court, in issuing a restraining order under subparagraph (A)—

(i) may rely on information set forth in an affidavit describing the nature of the proceeding or investigation underway in the foreign country, and setting forth a reasonable basis to believe that the property to be restrained will be named in a judgment of forfeiture at the conclusion of such proceeding; or

(ii) may register and enforce a restraining order that has been issued by a court of competent jurisdiction in the foreign country and certified by the Attorney General pursuant to subsection (b)(2).

(C) Limit on grounds for objection.—No person may object to a restraining order under subparagraph (A) on any ground that is the subject of parallel litigation involving the same property that is pending in a foreign court.⁵

TIGER EYE INVESTMENTS

The first attempt by the United States to use the new statute did not go well. In a case called In Re Any and All Funds . . . in the Name of Tiger Eye Investments, Ltd.,⁶ the Government of Brazil was conducting a criminal investigation of certain Brazilian citizens who had perpetrated a fraud scheme in Brazil and had placed the fraud proceeds in accounts held by two foreign companies at banks and investment firms in the United States. Invoking the Mutual Legal Assistance Treaty (MLAT)⁷ between Brazil and the United States, Brazil asked the United States to freeze the assets of the two foreign companies pending the conclusion of its investigation, and it supported its request with an affidavit from a Brazilian official stating that there was an investigation underway and setting forth the facts of the case.

This seemed to be a perfect application of Section 2467(d)(3), so in response to the Brazilian request, the United States moved for an order
restraining the U.S. assets of the two companies. The trial judge, however, denied the motion, and the Government appealed.

The argument on appeal was whether the statute was meant to allow the restraint of assets while the foreign investigation was underway, or whether the restraining order could be made only once the investigation was complete and the foreign court had issued a judgment. The Government argued that the whole purpose of the legislation was to empower a court in the United States to restrain assets in the United States subject to forfeiture in a foreign country before that country is able to obtain a forfeiture judgment — just as the United States asks other countries to freeze the proceeds of crimes committed in the U.S. before it is able to obtain a final judgment of forfeiture. But the court was not persuaded.

The language of the statute, the court said, authorizes the entry of a restraining order “to preserve the availability of property subject to a foreign forfeiture or confiscation judgment.” In the court’s view, that meant that there had to be a final judgment; it did not mean that the court could restrain property in the hope that there would be a judgment some day. If Congress wanted to authorize the restraint of property in the United States prior to the entry of a foreign forfeiture judgment, the court said, it would have said so.

Indeed, the court’s reaction to the Government’s argument was almost visceral. Under the Government’s reading of the statute, the court said, a court could conceivably restrain the assets of U.S. citizens in the United States before there is any adjudication of guilt based solely on a foreign official’s allegation that the owner of the assets violated that country’s laws. The panel could not fathom how Congress could have intended such a thing: “It is difficult to believe Congress would enact so significant a measure without a clear indication of its purpose to do so,” the court said. “Congress does not typically hide elephants in mouseholes, and the Government’s assertion of authority in this case qualifies as such an elephant.”

So the appeal was denied and the United States was not able to freeze the assets that the Brazilian Government had asked it to preserve.

THE PROGENY OF TIGER EYE

As it turned out, the worst was yet to come. Other courts, reading the Tiger Eye opinion, decided to follow it. For example, in a case called In re Contents of Citibank Account No. Held by Rouz USA, Inc., decided four months after the Tiger Eye case, a Russian court issued five restraining orders for property in the
United States traceable to fraud committed in Russia. With the criminal case still pending, the Russian Government asked the United States to register and enforce the restraining orders to preserve the property, and the United States filed an application in the district court pursuant to Section 2467(d)(3) to do just that.

It is worth noting that this case involved the enforcement of an actual judicial order issued by a foreign court, not just the affidavit of a foreign official as was the case in Tiger Eye, but the claimant – reading the Tiger Eye case – argued that the U.S. court could not enforce the foreign restraining order until the foreign Government had obtained a final forfeiture judgment. The court agreed and refused to enforce the Russian restraining orders.13

THE 2010 AMENDMENT

At this point it was clear that what was needed was what we call a “legislative fix” — an amendment to the statute making it clear that the United States could assist a foreign Government to preserve assets found in the United States in the run-up to the foreign Government’s obtaining a final forfeiture judgment. And so, in the waning days of the legislative session at the end of 2010, Congress enacted the Preserving Foreign Criminal Assets for Forfeiture Act of 2010.14

This name does not roll easily off the tongue, but it is reasonably descriptive of what the legislation was intended to do, which was to allow a federal court in the United States to preserve foreign criminal assets for forfeiture under foreign law. Here is what the law now provides:

“To preserve the availability of property subject to civil or criminal forfeiture under foreign law, the Government may apply for, and the court may issue, a restraining order at any time before or after the initiation of forfeiture proceedings by a foreign nation.”15

Moreover, the statute provides, as it did before, that the court issuing the order may either rely on the affidavit of the foreign official describing the nature of the proceedings or investigation and the basis for belief that the property will be named in a forfeiture judgment, or register and enforce a restraining order issued by a foreign court.16

THE FIRST TEST
The first test of the revised law came in May 2011 in a case called In re Enforcement of Restraining Order. In that case, the United States asked a court in Washington, D.C. to register and enforce an order entered by a court in Hong Kong that restrained $23.7 million in various bank accounts in the United States. After finding that criminal proceedings were pending against the account holders in Hong Kong, and that they involved offenses that would give rise to forfeiture if they were committed in the United States, the court held that it had jurisdiction to register and enforce the Hong Kong order under Section 2467, and granted the Government’s application.

With that decision, the enforcement of the revised statute was off to a good start, but a more significant test would come in a hotly contested case called In re Restraint of All Assets . . . at UBS Financial Services, Inc.

**UBS FINANCIAL**

In *UBS Financial*, a court in Curacao issued an order authorizing the seizure of three accounts at a Miami bank that were implicated in a Curacao money laundering investigation. When the United States moved to enforce the Curacao order by having a court in Washington, D.C. restrain the three accounts, the corporations in whose names the accounts were held opposed it on a variety of grounds. They could not oppose it on the ground that the Curacao court had not yet issued a final order: that problem was solved by the 2010 amendment; but they raised other issues.

First, the three corporations objected that the Curacao court lacked the authority to issue a restraining order. But the court held that nothing in Section 2467(d)(3) authorizes or requires a district court “to pierce the veil of authority behind a request for legal assistance.” All that is required under the statute, the court said, is that the Attorney General of the United States certify the foreign request. In this case, the Attorney General did so, and the court declined to look behind that decision.

Second, the corporations argued that Section 2467(d)(3) contains a “dual forfeiture” requirement whereby property may be restrained pursuant to a foreign order only if the acts underlying the foreign order would give rise to a forfeiture action under federal law if those acts occurred in the U.S. But the court held that even if there were a “dual forfeiture” requirement insofar as the enforcement of a foreign restraining order were concerned – which the court did not decide – money laundering is an offense that would support civil or criminal forfeiture if it occurred in the United States.
Third, Section 2467(d)(3) requires a showing that the foreign order was obtained in a proceeding that was compatible with the requirements of due process. The corporations disparaged the procedures employed by the Curacao court as incompatible with due process as understood in the United States, but the court held that it “should not lightly sit in judgment of the legal system of a foreign sovereign,” and accordingly held that “the showing required is not strenuous.” Minor differences in procedure, the court said, such as whether an order may be issued *ex parte* and whether it is subject to direct appeal, are not sufficient to reject a request to enforce a foreign restraining order.

Fourth, the corporations argued that they were entitled to an evidentiary hearing before the order under Section 2467(d)(3) was entered. But the court disagreed. Under the applicable statute, a property owner is entitled to a pre-restraint hearing if *no action* is pending in *any court*. Because there was, in fact, an action pending in Curacao, the court said, that right did not apply. In so holding, the court prevented the corporations from relitigating factual issues that they had already litigated, or could litigate, in the foreign court that issued the original restraining order.

Finally, the corporations asked the court simply to exercise its discretion not to enforce the foreign order. The court and the Government acknowledged that the court had such discretion, but the court declined to exercise it in this case.

Accordingly, the court granted the Government’s motion under Section 2467(d)(3) and issued the restraining order.\(^\text{22}\)

**$12.1 MILLION RESTRAINED IN BRAZIL**

The most recent test of Section 2467(d)(3) came in 2012 in another case involving a criminal prosecution in Brazil.

In a case called *In re Seizure of Approximately $12,116,153.16*,\(^\text{23}\) the United States asked a court in Washington, D.C. to register and enforce a criminal restraining order issued by a Brazilian court against eleven U.S. bank accounts. The Brazilian order indicated that a criminal prosecution was pending against the account holders in Brazil, who were charged with money laundering and operating an illegal money exchange business, and that the restraining order was issued to preserve the assets for criminal forfeiture under Brazilian law.
The account holders who were the defendants in the Brazilian criminal case, intervened in the proceeding and objected on a variety of grounds.

First, the account holders, like the corporations in *UBS Financial*, argued that they had a statutory right to a pre-restraint hearing. But the court agreed with *UBS Financial* that there is no right to a hearing if a criminal or civil action is already pending in the foreign court that issued the restraining order.\(^{24}\)

Alternatively, the account holders argued that they also had a *constitutional* right to a pre-restraint hearing under the Due Process Clause, but the court rejected that argument as well. As the Supreme Court held in the *James Daniel Good* case,\(^ {25}\) there is no due process right to a pre-restraint hearing if there is a danger that the property could be easily moved or dissipated if not restrained. That rule applies, the court said, whether the restraint involves a forfeiture action under U.S. law or the enforcement of a restraining order issued under foreign law.\(^ {26}\)

Next, the account holders argued that even if they did not have a right to a pre-restraint hearing, they nevertheless had a right to a *post*-restraint hearing. Without deciding that the account holders actually had a right to such a hearing, the court said that it would grant them one. But it cautioned that under the terms of Section 2467(d)(3)(C), the account holders could not use the hearing to raise any challenge that could or should be raised in the Brazilian courts, such as a challenge to the underlying criminal prosecution or the Brazilian court’s authority to issue restraining orders in criminal cases.

The account holders also argued that the restraining order should not be enforced because the six statutory criteria set forth in Section 2467(d)(3) were not satisfied. In particular, they argued that Brazilian law was not consistent with U.S. concepts of due process, that there was no counterpart to Brazil’s forfeiture law in the United States (“the dual forfeitability” requirement), and that the Brazilian court did not have jurisdiction to issue the restraining order under Brazilian law. The court rejected all three arguments.\(^ {27}\)

Brazil’s forfeiture law appears to contain the same due process requirements as does the federal forfeiture law in the United States; the Brazilian forfeiture provision for the offenses with which the account holders were charged – money laundering and operating any illegal money exchange business – is similar to the forfeiture provisions in 18 U.S.C. § 982(a)(1) for violations of the federal money laundering statutes; and Brazilian officials represented in their MLAT request that the restraining order was issued by a court with jurisdiction to
do so. On the latter point, the court held that for purposes of enforcing the restraining order under Section 2467, the representation of the Brazilian officials was sufficient. If the account holders wished to challenge the underlying authority of the Brazilian court, the court said, they must do so in Brazil, not in the U.S. court where the Section 2467 motion was filed.28

Accordingly, the court rejected all of the account holders’ objections and granted the Government’s motion to register and enforce the Brazilian restraining order.29

CONCLUSION

After a few false starts, and a decade of litigation, it now appears that the United States has the legislation it needs to allow it not only to register and enforce a foreign forfeiture order, but also to register and enforce a foreign restraining order designed to preserve assets found in the United States until a foreign forfeiture order can be obtained. This is good news.

One of the great challenges presented by the globalization of crime in the early 21st Century is to find ways to give full faith and credit to requests by one Government to another to preserve assets so that they might be recovered for the benefit of the victims, wherever the assets or the victims might be, and so that we might begin to break down the barriers to effective cooperation created by the political boundaries – virtually invisible to criminals – that so frustrate our law enforcement colleagues and ourselves. The most recent cases show that we have made progress. Our task is now to build on that progress as we take this forward one step at a time.
The author has been a federal prosecutor in the United States Department of Justice for 28 years. He currently serves as an Assistant United States Attorney in the Office of the U.S. Attorney for the District of Maryland, and is the Chief of the Asset Forfeiture and Money Laundering Section in that office. This paper is a revised version of the author’s presentation at the 30th Cambridge International Symposium on Economic Crime, Jesus College, Cambridge University, on September 5, 2012. The views expressed are solely those of the author and do not necessarily represent the views or policies of the United States Department of Justice or any of its agencies.


4. Section 2467(d)(3) was enacted as an amendment to 28 U.S.C. § 2467, which was enacted the previous year as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA), to allow federal courts in the United States to enforce foreign forfeiture orders. For a discussion of CAFRA with citations to the legislative history of its various provisions, see Stefan D. Cassella, The Civil Asset Forfeiture Reform Act of 2000: Expanded Government Forfeiture Authority and Strict Deadlines, Journal of Legislation, 27.1 (2001), 97-151. Available at: http://works.bepress.com/stefan_cassella/14.


8. Tiger Eye Investments, 601 F. Supp. 2d at 262.

9. Tiger Eye Investments, 613 F.3d at 1127.
10. *Id.* In advancing this position, the opponents of the restraining order emphasized the difference between the language proposed at the 2001 Symposium and the language ultimately enacted by Congress on this point. In the proposal, the introductory language would have read, “To preserve the availability of property subject to an action pending in a foreign country for the entry of a forfeiture or confiscation judgment, or subject to an investigation leading to the commencement of such action, . . .” whereas the statute as enacted read, “To preserve the availability of property subject to a foreign forfeiture or confiscation judgment . . .”

11. 613 F.3d at 1130.


19. 860 F. Supp. 2d at 40.

20. 860 F. Supp. 2d at 41.

21. 860 F. Supp. 2d at 42.

22. 860 F. Supp. 2d at 43.


24. *Id.* at *8.


27. *Id.* at *11-12.

28. *Id.* at *14.

29. *Id.* at *15.