

Hurdling the Sovereign Wall: How Governments Can Recover the Proceeds of Crimes that Cross National Boundaries

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Introduction

The globalization of crime has made it possible for international money launderers, kleptocrats, and fraudsters to commit crimes in one jurisdiction while remaining safely in another and hiding their assets in a third. At the same time, law enforcement officials remain constrained by the rules of national sovereignty that inhibit their ability to recover assets located beyond the territorial jurisdiction of their courts.

Three recent cases, however, illustrate that governments have begun to find ways to hurdle the walls that have traditionally made the recovery of assets in other countries so difficult.

This article sketches the facts of those cases, the legal issues presented, and the ways in which the obstacles presented by the walls of sovereignty were overcome.

A little background

It is not hard for a person in one country to commit a crime that impacts victims in another. A corrupt contractor in Afghanistan can steal money from a US aid program; a computer wizard in New Zealand can use the internet to steal intellectual property from businesses in the United States. And it is not hard for a person in another country to commit a crime in violation of his own national law and launder the money somewhere else. A corrupt African dictator can steal billions of dollars from his own Treasury, launder it through financial institutions in the US and hide it in investment accounts in another jurisdiction.

Traditionally, governments have been hard-pressed to deal with these situations. Even if the principles of extraterritorial jurisdiction permit the criminal prosecution in one country of a crime committed in another, there can be no prosecution (and no conviction) if the defendant is a fugitive or successfully resists extradition.

At the same time, even if the courts in one country have jurisdiction over the person who committed the crime, the proceeds of that crime may be located in another country, beyond the power of the criminal court to compel their seizure and thus ensure their recovery.

In the past two decades, however, countries have begun to enact legislation designed to overcome these obstacles. While the progress has been slow and the resistance – political and judicial – has been great, there have been some notable successes.

For example, courts in the US now have the authority to order a criminal defendant over whom the court has *in personam* jurisdiction to repatriate the proceeds of his crime from another country on pain of being held in contempt of court or being subjected to an increase in the period of incarceration he must serve as a consequence of his offense if he is convicted.ⁱⁱ

In the reverse situation whether the defendant is convicted in a foreign court but the proceeds of his crime are in the United States, a US court can now register and enforce a *foreign* forfeiture order and direct the return of the property to the country where the crime was committed.ⁱⁱⁱ

Other countries have similar provisions and procedures. But these are only tiny steps that work at the margins of the problem. Most important, they do not apply and are of no use when there is no criminal conviction because the perpetrator cannot be brought to justice.

Forfeiting Money In A Foreign Bank's Correspondent Account

One solution to this problem would be to authorize the courts in one country to reach across the international border to seize, restrain, and confiscate funds in a foreign bank account. In that scenario, the wrongdoer might remain at large, but the proceeds of his crime could be recovered by courts in the jurisdiction where the crime occurred. National legislatures are unlikely to enact legislation ceding such authority to foreign courts any time soon; at the very least, most countries would insist that a foreign forfeiture order be presented to a local court where it could be registered and enforced. But a statute enacted in the United States provides a vehicle for accomplishing the same thing without the acquiescence of the foreign government.

Pursuant to 18 U.S.C. § 981(k), if a prosecutor in the United States establishes that the proceeds of a crime committed within the jurisdiction of the United States are located in a foreign bank account, the US court may issue an order forfeiting an equivalent sum of money from the correspondent bank account that the foreign bank maintains in the US. Thus, instead of filing a civil forfeiture action against the money in the foreign bank and trying to get the foreign government to enforce any judgment that is obtained, a prosecutor would file an action against the foreign bank's money that it has on deposit in its

correspondent account at a bank in the US, and force the foreign bank to make itself whole by debiting the account of its customer. To oppose the forfeiture action, the foreign customer would have to appear in the US court.

If the action is successful, the result would be to deprive the foreign account holder of the proceeds of the crime through a proceeding conducted entirely within the United States.

The most recent example of a Section 981(k) action involves the misappropriation of US funds in Afghanistan by Hikmatullah Shadman. In an action brought by the Special Inspector General for Afghanistan Reconstruction (SIGAR), the United States alleged that Shadman obtained more than \$77 million in fraudulent payments for transporting military supplies and deposited the money into two accounts at Afghanistan International Bank (“AIB”). The money was transferred multiple times and some of it ended up in other banks.

To recover the money under Section 981(k), the United States filed a civil forfeiture action against funds that AIB and the other banks had on deposit in correspondent accounts at banks in New York. For its part, AIB contested the action by filing a claim and moving to dismiss the complaint on the ground that Section 981(k) deprived it of due process. Because Afghan law would prohibit it from offsetting its loss by debiting its customer’s accounts if the Government prevailed in the forfeiture action, AIB said, it would be unfair to allow the US to move against the funds it maintained in its account at a US bank. But the court held that to allow a foreign bank to circumvent Section 981(k) any time foreign law barred the bank from offsetting its loss by debiting its customer’s account would reopen the loophole in forfeiture law that Section 981(k) was intended to close.

Accordingly, the court held that it was Shadman and not the bank that had to contest the forfeiture action.^{iv}

Eventually, Shadman and various associates did file claims contesting the forfeitures. By the time they did so, however, two of the Afghan banks had released all of his funds to him. Accordingly, the Government moved for summary judgment, asserting that because Shadman had already recovered his funds from those banks, he lacked standing to contest the forfeiture of the funds in their correspondent accounts. The court agreed with the Government and held that because he had already recovered his money, Shadman had suffered no injury and thus lacked standing to contest the forfeiture of the funds in the correspondent accounts.^v With no one left to oppose the forfeiture action, the money will be forfeited to the US.

MegaUpload

To be sure, Section 981(k) is a blunt instrument that the United States prefers to use only when it despairs of gaining the cooperation of the foreign country where the criminal proceeds are located. In cases in which the proceeds of the crime are located in country more amenable to cooperating with the US, the Government prefers to file an action against the criminal proceeds and then enlist the foreign courts in restraining and forfeiting those funds.

The most recent example of that is the MegaUpload case – a case that illustrates the obstacles to obtaining such a forfeiture order as well as some of the tools the Government can employ to overcome them.

The case involved one Kim Schmitz, a resident of New Zealand who changed his name to Kim Dotcom and set up a file-sharing website on the internet called MegaUpload. The function of MegaUpload was to allow users to transfer pirated intellectual property such as motion pictures, television programs, and music anywhere in the world in violation of the owners' property rights and national copyright laws.

In its heyday, MegaUpload was the largest file-sharing service for pirated property in the world, causing losses to copyright holders of more than \$500 million, and earning \$175 million in income for its perpetrators.

Dotcom lives in New Zealand and operated his business from there and other countries, but the computer servers that he used to transfer the software – and to transfer the proceeds of his crime -- were located in Virginia in the United States. Accordingly, because the crimes occurred at least in part in the United States, the United States had a basis for charging Dotcom with at least two criminal offenses: copyright infringement and money laundering. In due course he was indicted; but there were two problems: 1) he resisted extradition and it was clear he would not be coming to the US to stand trial anytime soon; and 2) the money that he earned from his illegal business (which the US would like to recover) was located not in the US but in bank accounts in New Zealand and Hong Kong.

Civil Forfeiture Action

So what to do? As in the Shadman case, one of the key tools that a prosecutor has to recover criminal proceeds when a criminal conviction is not possible – *e.g.*, when the bad guy is a fugitive fighting extradition -- is to file a civil forfeiture action against the money. So the US filed a civil forfeiture action in Virginia against the money in the New Zealand and Hong Kong banks -- \$60

million in Hong Kong, and \$15 million in New Zealand -- and asked those countries to restrain the money, which they did.

Mr. Dotcom and his associates did not take kindly to this action, however, and they opposed the US action in the Virginia court. Opposed it, that is, through counsel, without ever appearing in the US.

This presented two important legal questions that are central to most international asset recovery cases, and particularly those that involve international money laundering. First, does a court in one country (here, the USA) have jurisdiction to issue a civil or non-conviction-based forfeiture order against property in another country (such as New Zealand or Hong Kong). Second, can the defendant in a criminal case who is fighting extradition nevertheless use the resources of the country in which he refuses to appear to defend his property rights.

After extended litigation, an appellate court answered those two questions.^{vi}

Jurisdiction

The jurisdictional question had several parts. First, the court asked if there is a statute that allows a court to exercise jurisdiction over property located beyond the borders of the United States. The answer was yes: 28 U.S.C. § 1355(b)(2). Second, the court asked if such statutory authority is sufficient. Are there no limits, the court asked, to the legislature's ability to expand the jurisdiction of the courts?

There may be such limits, the court decided, but those limits are not exceeded where there have been at least "minimal contacts" between the property and the place in which the court asserting jurisdiction is sitting. Here MegaUpload used no fewer than 525 computer servers, all located in Virginia, at a cost of tens of millions of dollars to perpetrate the offense. That was more than enough, the court said, to satisfy the minimal contacts requirement and show that the defendants "purposefully availed themselves of the privilege of conducting activities in the state."

Whether it would be sufficient if they had used only one server was a question the court left for another day.

Next, the court asked if it was necessary to show that a court in the foreign country would enforce the forfeiture judgment if one were issued. The question was pertinent because courts do not typically render meaningless judgments that

do not provide any remedy: they do not like to engage in spiritual exercises. But the court held that it was not necessary to show that New Zealand or Hong Kong would be able to enforce the forfeiture judgments. To the contrary, it was sufficient to show that they had an interest in doing so, as their willingness to restrain the bank accounts indicated that they did.

So the court answered the jurisdictional question in the Government's favor: a US court has the power to issue a non-conviction-based forfeiture judgment against property overseas. Whether that judgment will be enforced will be up to the courts in the country where the property is located, but the US court has the power to issue the order nevertheless.

Fugitive disentitlement doctrine

That brings us to the second question: can a person who is indicted in a criminal case and is fighting extradition intervene in the civil forfeiture action to protect his property interests while remaining a fugitive. The court answered that question too.

First, the court asked if there is a statute that allows a court to dismiss a claim to property solely on the ground that the claimant is a fugitive. Again the answer was yes: 28 U.S.C. § 2466, which is commonly known as the fugitive disentitlement doctrine.

The court then asked, does that statute violate due process in that it deprives a person of his right to be heard before he is deprived of his property? The court held that it does not. The statute does not deprive the fugitive of the right to be heard, the court said, it just says that he forfeits that right if he decides to remain a fugitive. He will have every opportunity to be heard in the forfeiture case if he decides to surrender on the criminal charges.

The court then turned to what the Government has to prove for the statute to apply. Among other things, it must show that the defendant's reason for not appearing personally in the United States is to avoid prosecution. Mr. Dotcom and his associates claimed, however, that their absence from the US had nothing to do with the criminal charges. They had not previously traveled to the US, were comfortable living where they were living, and simply had no desire to travel.

The court acknowledged that the world is full of homebodies who prefer to remain close to hearth and home, but it held that that is not, by itself, a defense to the fugitive disentitlement doctrine. For the doctrine to apply, the Government does not have to show that avoiding the criminal charges is the *only reason* a person has not appeared in the United States; it only has to show that that is one

of the reasons he is unwilling to travel, and Dotcom's battle against extradition in the New Zealand courts was strong evidence that avoiding prosecution was one of his reasons for staying home.

Even so, Dotcom argued, he has a *right* under New Zealand law to oppose extradition. Is it not a violation of international law for one country to prevent a person from freely exercising his rights in the courts of another country?

It may indeed be a violation of international law to do that, the court said, but that was not what was happening here. The United States was not depriving Dotcom of his rights under New Zealand law; it was merely putting him to the choice of exercising those rights knowing that doing so meant that he would be putting himself at a disadvantage with respect to his ability to defend his property in a US court. Placing a fugitive in the position of having to make that choice, the court said, is not unfair and does not violate international law.

Accordingly, the appellate court held that the trial court had the power to make a forfeiture order against the property located overseas, and that Dotcom had no right to oppose it as long as he remained a fugitive. So the court entered a default judgment against the money in New Zealand and Hong Kong.

That, of course, raised another issue: does a foreign court have the ability to enforce a default judgment issued in a non-conviction-based or civil forfeiture case by a court in another country. The answer to that was given by the court in the case of Gen. Sani Abacha.

Abacha

Gen. Abacha was the late military ruler of Nigeria who looted \$4 billion from his country's treasury, laundered it through financial institutions in the United States, and placed it in bank accounts around the world in the names of nominee companies that his family controlled. \$287 million of that money was traced to bank accounts in Jersey in the Channel Islands.

Taking the view that the United States does not want its financial institutions used to launder money for kleptocrats in developing countries, and that the US has an obligation to attempt to recover that money and return it to the people of the country from which it was stolen, the U.S. Department of Justice filed a civil forfeiture action against the \$287 million in the Jersey bank in the district court in Washington, DC, relying on the same jurisdictional statute that was at issue in the MegaUpload case: 28 U.S.C. § § 1355(b)(2).

The money in the bank account was held in the name of one of the Abacha family's shell companies called Doraville, so the Government sent notice of the forfeiture action to Doraville with instructions on how to file a claim contesting the action in the US. Doraville received the notice but chose not to file a claim, so the court entered a default judgment.

The case in Jersey

The question then was what to do with the default judgment: The judgment was entered by a court in the US, but the money was still in Jersey. To give effect to the forfeiture order, the US had to ask the assistance of the Jersey court.

Acting on behalf of the United States, the Attorney General of Jersey asked the Royal Court to restrain the money in the Doraville accounts in anticipation of a request by the US to enforce the default judgment. The court made that order, but Doraville sought to have it vacated on the ground that the default judgment was not enforceable under Jersey law, and on two other grounds as well. The matter was litigated in the Royal Court and a judgment was issued in July 2016.^{vii}

Doraville's principal argument was that Jersey law permits the enforcement of a foreign forfeiture orders only if the foreign court has "found" that the property in question is "tainted property." Because the US judgment was a default judgment, Doraville said, it was not based on any "finding of fact" that the property was tainted. The court held, however, that Doraville's reading of Jersey law was too narrow.

Not to permit the enforcement of foreign forfeiture judgments because no findings of fact were made when the parties were in default, the court said, would "severely emasculate the scheme for the recognition and enforcement of such overseas orders." All one would have to do to avoid the confiscation of Jersey assets would be to ignore the overseas proceedings and let the foreign court enter judgment by default. That would lead to the counter-intuitive result that judgments entered in close cases that were vigorously contested could be enforced in Jersey, but judgments entered in cases where the evidence was overwhelming, such that no one contested the judgment, could not.

Moreover, the court held that Jersey, like other parties to the various multilateral mutual legal assistance agreements, has an obligation to give force and effect to foreign judgments where it is possible to do so. Giving Jersey law the narrow reading that Doraville was urging would be inconsistent with those obligations.

The court also noted that the default judgment should not be considered in isolation, but in the context of the facts alleged in the complaint that was filed to commence the action. Those facts were sufficient, the court said, if assumed to be true, to support a finding that the property in the Jersey accounts was the proceeds of crime; and is all that Jersey law requires.

Other Arguments

Doraville had two other arguments. One was a somewhat technical argument based on US money laundering law. It argued that because US law allows both the criminal proceeds *and any money commingled with it* to be forfeited as property involved in a money laundering case, there was no way to know whether the Doraville property was being forfeited as tainted property or not.

The court's response was that tainted property under Jersey law is not limited to the proceeds of the underlying crime but includes property used to commit a money laundering offense. Clean money that is commingled with criminal proceeds, the court reasoned, is property that is used to commit a money laundering offense. Thus, even if there was some clean money in the Doraville accounts, it was tainted by the money laundering offense and thus subject to the enforcement of the foreign order under Jersey law.

Finally, Doraville objected that the forfeiture of the assets in Jersey would violate the proportionality requirement of Article 1 of the First Protocol of the European Convention on Human Rights. The court disposed of this argument in a few words: If Doraville had evidence that the property in question included clean funds, such that the enforcement of the US judgment would violate the proportionality requirement, it had the opportunity to present that evidence in the civil forfeiture case in the US. Because it chose not to do so, it would not be heard to contest the judgment on that ground in the Jersey court.

Accordingly, the Jersey court overruled all of Claimant's objections to the entry of the restraining order to preserve the Jersey assets for the benefit of the United States.

Conclusion

So what do we learn from these three cases? From MegaUpload, we learn that it is possible for a court in one country to make a non-conviction-based forfeiture order against assets in another country, at least where the assets are derived from a crime that occurred in the country where the court making the order is located. Further, we learn that a fugitive must surrender to face criminal

charges if he wants to contest the forfeiture of his property in the court where the charges are pending.

From Abacha, we learn that it is possible for a court in the foreign country where the assets are located, to abide by its treaty obligations and enforce the foreign forfeiture order, even if it is obtained by default, so that the property may be returned to the country where the crime occurred and ultimately to the victims of the crime.

And from Shadman we learn that there is a tool for recovering property in a foreign country even if the foreign courts are not inclined to enforce the foreign order. If the criminal proceeds are in an account at a bank that has a correspondent account in the US, the US may leverage its jurisdictional authority over the correspondent account to reach across the international border and effectively recover the criminal proceeds that have been placed in the foreign country.

These cases – all decided in the past year – illustrate that indeed there has been some progress in the effort to hurdle the walls of sovereignty that have, for decades, allowed criminals to act with impunity as they move their illicit proceeds around the world. There is a long way to go, but progress is to be celebrated when it occurs.^{viii}

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ⁱⁱ 21 U.S.C. §§ 853(e)(4) and (p)(3) provide that a court in a criminal case may order the defendant to repatriate assets either prior to trial or following his conviction. Section 853(e)(4)(B) further provides that the failure to comply with an order to repatriate “shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence” under the sentencing guidelines. See *United States v. Adams*, 782 F. Supp. 2d 229, 236-38 (N.D. W. Va. 2011) (the sanctions under § 853(e)(4)(B) are not mutually exclusive but may be imposed in any combination; that defendant has been incarcerated as a sanction for civil contempt does not preclude the Government from indicting him for criminal contempt); *Susi v. United States*, 2015 WL

1602074 (W.D.N.C. Apr. 9, 2015) (defendant found in civil contempt and is subject to 2-level increase in his offense level under U.S.S.G. § 3C1.1 for obstruction of justice for refusing to comply with order to repatriate \$1 million from Swiss bank account).

ⁱⁱⁱ See 28 U.S.C. § 2467; *United States v. Federative Republic of Brazil*, 748 F.3d 86, 95-97 (2nd Cir. 2014) (the common law penal rule bars federal courts from enforcing foreign penal laws, including criminal and civil forfeiture judgments, but § 2467 creates an exception to that rule; because § 2467 requires certification by the AG that the foreign court complied with due process, and because enforcement is mandatory, the statute avoids inserting the judiciary into a matter of international relations best left to the executive branch); *In re Seizure of Approximately \$12,116,153.16 and Accrued Interest in U.S. Currency*, 903 F. Supp.2d 19, 30 (D.D.C. 2012) (listing the statutory criteria in § 2467 for enforcing a foreign restraining order); *Luan v. United States*, 722 F.3d 388, 391 (D.C. Cir. 2013) (same).

^{iv} *United States v. \$70,990,605*, 305 F.R.D. 20 (D.D.C. 2015) (explaining how § 981(k) allows the Government to recover funds deposited into a bank in Afghanistan by filing a civil forfeiture action against the Afghan bank's account at a bank in New York); *United States v. Sum of \$70,990,605*, 128 F. Supp.3d 350, 354-55 (D.D.C. 2015) (explaining the purpose and legislative history of § 981(k) and how it operates). See also *United States v. \$1,879,991.64 Previously Contained in Sberbank of Russia's Interbank or Correspondent Bank Account*, 2017 WL 396542 (D.N.J. Jan. 30, 2017) (as long as customer has funds in any account at the foreign bank, the bank lacks standing to contest the forfeiture of funds in like amount seized from its correspondent account); *United States v. \$1,879,991.64 Previously Contained in Sberbank of Russia's Interbank or Correspondent Bank Account*, 185 F. Supp.3d 493 (D.N.J. 2016) (§ 981(k) is a "tough pill for foreign financial institutions to swallow" but that was what Congress intended; if courts were to be concerned with the restrictions that foreign laws place on foreign banks, "the entire statutory scheme envisioned by Congress would be frustrated"; accordingly, foreign bank secrecy laws do not excuse a bank's failure to produce evidence that its customer's account has been depleted).

^v *United States v. \$70,990,605*, 2017 WL 573499 (D.D.C. Feb. 13, 2017) (§ 981(k) gives the account holder statutory standing to contest the forfeiture of the funds in the correspondent account, but if the foreign bank has already released funds in the foreign account to the account holder so that he is suffering no injury, he lacks Article III standing).

^{vi} *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016).

^{vii} *Doraville Properties Corporation v. Her Majesty's Attorney General [2016] JRC128, Royal Court, Bailiwick of Jersey, (July 2016)*. The full text is available at <http://assetforfeiturelaw.us/?p=901>.

^{viii} For further reading on these issues see the following articles by the author: "Enforcement of foreign restraining orders", *J. of Money Laundering Control*, Vol. 16 No.: 4, pp. 290–97 (2013); "Recovering the Proceeds of Crime from the Correspondent

Account of a Foreign Bank,” 9 J. of Money Laundering Control 401 (2006) (combining papers presented at the 22nd and the 23rd Cambridge International Symposium on Economic Crime, Cambridge University, September 2004 and September 2005); “Bulk Cash Smuggling and the Globalization of Crime,” Berkeley Journal of International Law, Vol.22, No. 1 (2004); “The Recovery of Criminal Proceeds Generated in One Nation and Found in Another,” 9 J. of Financial Crime 268 (2002) (paper presented at the 19th Cambridge International Symposium on Economic Crime, Cambridge University, September 2001). All articles are available at www.assetforfeiturelaw.us.