

ASSET RECOVERY: ENFORCEMENT OF NCB FORFEITURE ORDERS IN A FOREIGN JURISDICTION

StAR Initiative Workshop

Buenos Aires, Argentina – March 20, 2018

Stefan D. Cassella
Asset Forfeiture Law, LLC
www.AssetForfeitureLaw.us
Cassella@AssetForfeitureLaw.us¹

I. INTRODUCTION

On the first day of our meeting, I explained the reasons why NCB forfeiture is a valuable law enforcement tool

- And I gave many examples of cases involving the international movement of stolen property where NCB forfeiture was the only way to recover the money

The examples involved cases where:

- The crime occurred elsewhere, but the property was found in your country
- The crime occurred in your country, but the property was elsewhere
- The crime occurred in one foreign country and was found in another foreign country, but it passed through your country in violation of your country's laws

I used those cases as examples of what you could use NCB forfeiture to do

- What I skipped over, and promised to return to today, were the legal issues that arise when you try to use NCB forfeiture in those situations

¹ Stefan D. Cassella is a former Assistant U.S. Attorney who specialized in asset recovery and money laundering prosecutions. His firm, Asset Forfeiture Law, LLC, provides training and legal assistance to state, local, federal, and foreign law enforcement agencies in connection with domestic and international money laundering and asset forfeiture matters.

For example, suppose the crime occurred in your country but the property is elsewhere

- Does your court have the authority under your law to issue an order against property located in another country?
- Can the foreign property owner come into your court to oppose the order?
- What connection to the property must he have to do so?
- Would it matter if he was a fugitive refusing to answer criminal charges in your country?
- Will the foreign court enforce your court's NCB forfeiture order?

That last question forces us to look at the problem from the perspective of the country where the property is located

- That is, the country receiving the request to enforce the foreign order
- Can that country preserve the property while the matter is pending in your court or will it only enforce a final order?
- Will the court in that country enforce your order without relitigating the case, or will it give the property owner a second opportunity to contest the order on the merits?
- What assurance must the country where the property is located have that the judgment you want to enforce was obtained in a proceeding that was open and fair?

There are more questions that arise in this context than we can hope to answer in the time we have this morning

- Indeed, answering these questions has troubled the courts for most of the first 18 years of the 21st Century
- And we are only now beginning to see how some of them have been answered in at least a few countries

- Answering these questions – to figure out how to overcome the hurdles presented by the political borders between countries, the inconsistent legal systems, and concepts of sovereignty – while the criminals act as if the borders did not exist – remains one of the most important in international law enforcement
- And will remain so for a long time
- All we can do is make as much progress as we can, case-by-case, and by working together and learning from each other, advance toward the day when we are able to keep pace with the criminals as they move their money around the world.

While I cannot cover all the issues or answer all the questions, I will spend this morning using some of the cases from my first presentation, and some others, to show how some of these issues have been handled

- Again, I will use US cases as my examples, but that is not because I am here to teach US law or to suggest that Argentina do things as they are done in US courts
- I use these cases only as examples of the issues that will arise in *any case* when criminal proceeds move across international borders
- And one country must find a way to recover property located in another

II. AUTHORITY OF THE COURT WHERE THE CRIME OCCURRED TO ENTER A FORFEITURE ORDER

I am going to begin with the case where the crime occurred in your country, but the property is somewhere else

MegaUpload

Remember the MegaUpload case

Kim Dotcom lives in New Zealand and used his business there to steal property over the internet from copyright holders in other countries,

- Although Dotcom was in New Zealand, 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
- so, the United States had a basis for charging Dotcom with at least two criminal offenses: copyright infringement and money laundering
- because the crimes occurred at least in part in the United States

So, he was indicted; but there were two problems:

- he resisted extradition and it was clear he would not be coming to the US to stand trial anytime soon
- and 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, the US filed a civil forfeiture action in the federal court 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

But Mr. Dotcom and his associates did not take kindly to this action, and they opposed the US action in the Virginia court

- Opposed it, that is, through counsel, without ever appearing in the US

The Issues

The case presented two important legal questions that are central to most international asset recovery cases, and particularly those that involve international money laundering

1. 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)?

2. 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?

Jurisdiction

The jurisdictional question had several parts:

1. Is there a statute that allows a court to exercise jurisdiction over property located beyond the borders of the United States?
 - Yes, there is: 28 U.S.C. § 1355(b)(2)
2. Is statutory authority enough? Are there no limits to the legislature's ability to expand the jurisdiction of the courts?
 - There may be limits, 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
3. Is it necessary to show that the foreign court will enforce the forfeiture judgment if one is issued?
 - 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 said that it was not necessary to show that New Zealand or Hong Kong would be able to enforce the judgments
- 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

- The US court has the power to issue a non-conviction-based forfeiture judgment against property overseas
- Whether that judgment will be enforced is up to the courts in the country where the property is located

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, is there a statute that allows a court to dismiss a claim to property solely on the ground that the claimant is a fugitive?

- yes, there is: 28 U.S.C. § 2466
- it's call the fugitive disentitlement doctrine

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?

- No, the statute does not deprive the fugitive of the right to be heard
- 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

What does the Government have to prove for the statute to apply?

- it must show that the defendant knew about the criminal charges and that his reason for not appearing personally in the United States is to avoid prosecution
- Mr. Dotcom and his associates claimed that their absence from the US had nothing to do with the criminal charges
- They had not been to the US, were comfortable living where they were, and simply had no desire to travel
- The court acknowledged that the world is full of homebodies who just like to stay home, but that is not a defense

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

But 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

Conclusion

So, the bottom line is that the trial court had the power to make a forfeiture order against the property located overseas,

- 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
 - *United States v. Batato*, 833 F.3d 413 (4th Cir. 2016) (evading prosecution need not be the sole reason claimant is declining to come to the U.S.; that he, as a foreign national, would prefer to “stay home” is not dispositive)

Old Mutual of Bermuda, Camelot, and \$506,069.09

You will also remember the case of the two corrupt Mexican officials who sent millions of dollars first to bank accounts in Texas and then used it to buy investments in Bermuda

- The same issue arose there, and the court reached the same result
- The fugitive defendant had no right to oppose the forfeiture action as long as he refused to come to the United States to answer the criminal charges
- Examining the fugitive’s travel records, which showed frequent travel to the U.S. prior to his indictment, the court concluded that his decision to remain in Mexico was motivated by a desire to avoid facing the criminal charges
 - *United States v. All Funds on Deposit at Old Mutual of Bermuda, Ltd.*, 2014 WL 4101212 (S.D. Tex. June 5, 2014) (Report and Recommendation), adopted by the district court 2014 WL 4101215 (S.D. Tex. Aug. 18, 2014) (claimant’s frequent travel to the U.S. prior to his indictment was sufficient to show, for purposes of the fugitive disentitlement doctrine, that his decision to remain in Mexico was motivated by a desire to avoid facing the criminal charges);

The courts also said the same thing in the case of the woman who sold the worthless medicine to the terminally-ill cancer patients in Oklahoma and fled to Mexico

- *United States v. Real Property Known As 7208 East 65th Pl.*, 185 F. Supp.3d 1288 (N.D. Okla. 2016) (person who refuses to reenter the US unless guaranteed that she will not be taken into custody is a fugitive for purposes of § 2466; one cannot refuse to submit to an arrest warrant as a way to negotiate the terms of surrender);

— And in the case of the Ohio doctor who over-prescribed opioid drugs and fled to Pakistan

- *United States v. \$506,069.09 Seized from First Merit Bank*, 2014 WL 7185585, *7 (N.D. Ohio Dec. 16, 2014) (denying defendant fugitive's motion on fugitive disentitlement doctrine grounds, but denying wife's claims on the merits);

Standing

All of these cases involved the person who had committed the crime and who was the owner of the property that the Government was trying to recover

- Suppose someone else claims the property
- Does the court have to consider that claim?

Abacha

You will remember the case of Gen. Abacha who stole \$4 billion in Nigeria and laundered it through the United States

The money went to many different places; two of them were Jersey and the UK

- The Jersey money was sent to an account held by a company called Doraville Properties
- And the UK money was sent to accounts held by companies owned by something called the Blue Family Trusts
- When the Government commenced the forfeiture action, it sent notice to both entities
- Doraville did not file any claim, and the NCB forfeiture judgment was entered by default
- I will come back to that in a minute

With respect to the UK money, the companies that owned the money did not file claims, but 8 beneficiaries of the trusts that owned the companies did

- This is a common occurrence when large sums of money are taken out of one country and laundered overseas
- The money is generally not simply deposited in an account in the bad guy's name
- Rather, it is common for it be held in the name of a shell corporation whose ownership is unknown
- Or held in the name of a trust
- Or even more complicated, held in the name of a company that is owned by a trust

Now, this is going to get complicated for a minute, but I do this just to illustrate the issues that will likely arise in these cases

Here, the people opposing the forfeiture were the beneficiaries of a discretionary trust that owned the companies that owned the \$35.2 million in the UK bank accounts

- Why do criminals set up such complicated structures to control their assets?
- They do it to distance themselves from the property so that it is difficult to find, and so that the connection between the property and their crime is concealed
- That is a great idea from the criminal's point of view, until the Government figures out the connection and seizes the property
- At that point, when the Government commences an NCB forfeiture action against the property, the criminal needs establish that the property belongs to him so that he can intervene
- When he tries to do so, everything he did to conceal his connection to the property comes back to haunt him

In the Abacha case, the Government moved to dismiss the claims filed by the eight beneficiaries on two grounds

- First, because the trust was a discretionary trust, the beneficiaries had only a contingent, future interest, not a present interest in the trust's assets
- Second, even if the beneficiaries had a present interest in the trust's assets, the trust did not own the \$35 million
- The companies owned the money; the trust was only a shareholder of the companies
- Because shareholders do not own the corporation's assets, the beneficiaries of the Blue Family Trusts did not own the \$35 million that was subject to forfeiture
- So, they had no right to make a claim
 - *United States v. All Assets in Account Number 80020796*, ___ F. Supp. 3d ___, 2018 WL 1158002 (D.D.C. Mar. 5, 2018) (even the sole shareholder of a corporation does not have standing to contest the forfeiture of the corporation's assets; like an heir or a person with a spousal interest contingent on the dissolution of the marriage, the beneficiary of a discretionary trust lacks a present interest in the defendant property and thus lacks standing);

Notice the date on that case

- One of the advantages to you of my waiting until the last minute to prepare what I wanted to say to you is that I get to include the latest cases

III. FOREIGN COURT'S ENFORCEMENT OF NCB JUDGMENT

Now, the question I've been avoiding all morning, is perhaps the most important:

- After we go through all of this to get a judgment against property located in another country, will the other country enforce the judgment?
- We've seen, for example, that the US court could issue a forfeiture order against property in New Zealand and Hong Kong, and against property in an account in Bermuda

- But will New Zealand, or Hong Kong or Bermuda enforce those orders?
- Those cases are still pending, but let's look at what happened in the Abacha case

Abacha

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 forfeiture
- Doraville received the notice but chose not to file a claim
- So, the court entered a default judgment.

The case in Jersey

Now, what to do with the default judgment:

- The judgment has been entered by a court in the US, but the money is still in Jersey
- So, the US asked Jersey's assistance

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 2016

- The case is *Doraville Properties Corporation v. Her Majesty's Attorney General* [2016] JRC128, Royal Court, Bailiwick of Jersey, (July 2016)

- The court conducted a three-day hearing, and I had the opportunity to serve as the Attorney General’s expert witness on US forfeiture law

Default Judgment

In any event, Doraville’s principal argument was that Jersey law permits the enforcement of 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 that Claimant’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 an 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

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
- and that clean money that is commingled with criminal proceeds is property that is used to commit a money laundering offense
- so 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.

So, what do we learn from all of this?

- If a crime is committed in one country and the property is found in another...
 1. The country where the crime occurred can make an NCB forfeiture order against the proceeds of that crime, wherever located
 2. In at least some countries, the courts can enforce another country's NCB forfeiture order

US Enforcement of Foreign Order

It would be fair of you to ask, suppose the situation were reversed

- Suppose Jersey, or Argentina, or any other country asked the US to enforce a foreign forfeiture judgment
- Or to enforce an order restraining or freezing property while the case was pending
- Could the US enforce that order?
- And if so, what would the other country have to show before the US court could do so?

The answer is that yes, the United States can now register and enforce foreign restraining orders and foreign forfeiture judgments

- And it can do so whether the foreign judgment was a criminal judgment or an NCB judgment
- But the road to this point was not an easy one
- And some of the obstacles we encountered might be instructive, not only if you are thinking of enforcing foreign orders in Argentina
- But also if you may be asking the US or another country to enforce an order from Argentina

Tiger Eye

In 2001, we proposed, and the U.S. Congress enacted, a statute that allowed the Attorney General to preserve assets in the United States that were derived from a foreign crime when we were requested to do so by the foreign Government

- it said the court could issue the order in either of two ways
- 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
- Unfortunately, when we tried to use this statute, it didn't work

In a case called *Tiger Eye Investments*, 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 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 they supported their request with an affidavit from a Brazilian official stating that there was an investigation underway and setting forth the facts of the case

Now, this seemed like a perfect application of the new statute

- so, in response to the Brazilian request, our Government moved for an order restraining the U.S. assets of the two companies
- the trial judge, however, denied the motion and we appealed

The argument on appeal was whether the statute was meant to allow to restraint of assets while the foreign investigation is underway

- or whether the restraining order could be made only once the investigation was complete and the foreign court had issued a judgment

We said, of course, 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 can obtain a forfeiture judgment

- just as the United States asks other countries to freeze the proceeds of crimes committed here before we can 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*”
- that means there must be a final judgment
- it doesn’t mean that we can restrain property in the hope that there will 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.

So, the appeal was denied, and we were not able to freeze the assets that the Brazilian Government had asked us to preserve.

The Progeny of *Tiger Eye*

As it turned out, the worst was yet to come.

- We thought maybe the problem in *Tiger Eye* was that we were asking the court to freeze the property based on the sworn statement of a foreign official instead of on a court order

In the next case, 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
- we filed an application in the district court pursuant to Section 2467(d)(3) to do just that
- 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 restraining orders

- *In re Contents of Citibank Account No. Held by Rouz USA, Inc.*, 759 F. Supp.2d 281 (S.D.N.Y. 2010)

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 we 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

Now, it isn’t easy these days to get the Congress of the United States to agree on anything, but in this case they did

- Congress enacted something called the Preserving Foreign Criminal Assets for Forfeiture Act of 2010
- this name doesn’t roll easily off the tongue, but it is reasonably descriptive of what the legislation is intended to do
- which is to allow a U.S. court to preserve foreign criminal assets for forfeiture

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 proceeds by a foreign nation.”

- 28 U.S.C. § 2467(d)(3)(A)(i)

— moreover, it says, 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

- 28 U.S.C. § 2467(d)(3)(B)

The first test

The first test of this new law came in May 2011 in a case called *In re Enforcement of Restraining Order*

- *In re Enforcement of Restraining Order*, 2011 WL 3920280 (D.D.C. May 5, 2011);

In that case, the Attorney General filed an application asking the court to register and enforce a restraining order entered in a criminal case by a court in Hong Kong

— the Hong Kong order restrained \$23.7 million in various bank accounts in the United States

— the court issued the order, finding that the new statute meant what it said

So far, so good

— but a more significant test would come in a hotly contested case decided a year later called *In re Restraint of All Assets . . . at UBS Financial Services, Inc.*,

- *In re Restraint of All Assets Contained or Formerly Contained in Certain Investment Accounts at UBS Financial Services, Inc.*, 860 F. Supp.2d 32 (D.D.C. 2012)

In that case, a court in Curacao issued an order authorizing the seizure of three bank accounts at a Miami bank that were implicated in a Curacao money laundering investigation

- the Attorney General moved to enforce the Curacao court's order by having a court restrain the three accounts
- the corporations in whose names the accounts were held opposed the Government's motion on a variety of grounds

They couldn't 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 had other issues

First, the three corporations objected that the Curacao court lacked the authority to issue its order

- but the court held that nothing in the statute authorizes or requires a court in the United States "to pierce the veil of authority behind a request for legal assistance"
- all that is required under the statute 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 three corporations argued that Section 2467(d)(3) contains a "dual forfeiture" requirement whereby property may be retrained 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 money laundering is an offense that would support civil or criminal forfeiture if it occurred in the U.S.
- so, the dual forfeiture requirement was satisfied

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

- in other words, a U.S. court is not bound to enforce a foreign order issued by a crazed dictator or a kangaroo court
- that, by the way, is an Americanism that refers to “a mock court in which the principles of law and justice are disregarded or perverted”

In *UBS Financial*, the companies 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 that minor differences in procedure, 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, Claimants argued that they were entitled to a hearing before the restraining order could be entered

- but the court disagreed
- under the statute, a hearing is required if *no action* is pending in *any court*
- but here, there was, in fact, an action pending in the Curacao court, and the corporations had already had their opportunity to contest the restraining order there
- thus, in denying the hearing, 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, Claimants asked the district 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.

- *In re Restraint of All Assets ... at UBS Financial Services, Inc.*, 860 F. Supp. 2d 32, 42 (D.D.C. 2012) (holding that a U.S. court “should not lightly sit in judgment of the legal system of a foreign sovereign,” and accordingly held that minor differences in procedure, 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);
- *Luan v. United States*, 722 F.3d 388, 393 (D.C. Cir. 2013) (the reference in § 2467(d)(3)(A) to the due process protections that apply to the issuance of restraining orders under § 983(j) means that a foreign restraining order may be enforced if issued in a manner consistent with the procedural protections afforded property owners in civil forfeiture cases in the United States);
- *In re Seizure of Approximately \$12,116,153.16 and Accrued Interest in U.S. Currency*, 903 F. Supp.2d 19, 33-34 (D.D.C. 2012) (finding that Brazil’s criminal forfeiture procedures comport with due process; that claimant has burden of proving lack of due process does not itself offend due process);

Kesten Development

Finally, I want to tell you about one other case that is the most recent in this sequence.

- The case involves a money exchange business called Kesten Development that was incorporated in the BVI and was based in Brazil, but had bank accounts in the United States

Law enforcement agents found \$6.8 million in drug proceeds from Brazil in a Kesten bank account in New Jersey called the Venus account

- The Government tried to forfeit the money in a US court under US law, but the forfeiture was reversed on appeal
- This was an NCB case, and remember that in NCB cases, the Government must trace the money back to the offense
- I was involved in this case, and as I recall, the account was volatile: while we could prove that the drug money came into the account, we could not prove that the money in the account when we seized it was the same money

— So, forfeiture under US law was not possible

Meanwhile, Brazil indicted the owner of Kesten, Antonio Pires de Almeida, for the fraudulent management of a financial institution

— When the indictment was returned, Brazil asked the US to freeze the money from the Venus account, and the US did so

— Then, when Pires was convicted, the Sao Paulo court entered a criminal forfeiture order.

The US then moved to register and enforce the foreign forfeiture order under the applicable statute, 28 U.S.C. § 2467

— Pires argued that enforcement was not possible because under international law, one country will not enforce the penal laws of another

— But the court did not agree

— The US statute, the court said, creates an express exception to that rule

- *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);

— So, to get the US to enforce a foreign forfeiture judgment, all the foreign country has to do is to satisfy the requirements in the statute

What are those requirements? There are six:

1. The US and the foreign country are parties to a bilateral or multilateral MLA agreement;
2. Dual forfeitability
3. The US Attorney General certifies that enforcement would be in the interests of justice

4. The forfeiture order was issued consistent with due process
5. The foreign court had jurisdiction
6. There is no reason to believe that the foreign order was obtained by fraud
 - *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);

The Kesten case seemed to satisfy all those criteria

- That decision was rendered in 2014 but the 2014 decision was not the end of the case
- A third party came forward to oppose the enforcement of the order claiming it was the true owner of the property
- But the US court would not hear it
- A third party with a competing claim to the funds subject to the foreign forfeiture order, the court said, may not use the US court to relitigate an issue that was or should have been raised in the foreign court
 - *In re \$6,871,042.36 and Accrued Interest*, 217 F. Supp.3d 84 (D.D.C. 2016) (allowing a third party with a competing claim to the funds subject to a foreign forfeiture order to intervene in the § 2467 proceeding to oppose the restraining order, but denying the motion to vacate the order on various grounds including the bar in § 2467(d)(3)(C) against using the US court to relitigate an issue that was or should have been raised in the foreign court);

IV. CONCLUSION

So, where does all of this leave us?

As I said at the beginning, 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 country to preserve and recover assets found in another

- so that they might be recovered for the benefit of the victims, wherever the assets or the victims might be
- So that criminals may be punished and not allowed to profit from their crimes
- and so that we may 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.

These cases illustrate that there are many hurdles to overcome, but that we have made progress

- our task is now to build on that progress as we take this forward one step at a time.
- I hope that the work we are doing together here this week will bring us one step closer to that goal.