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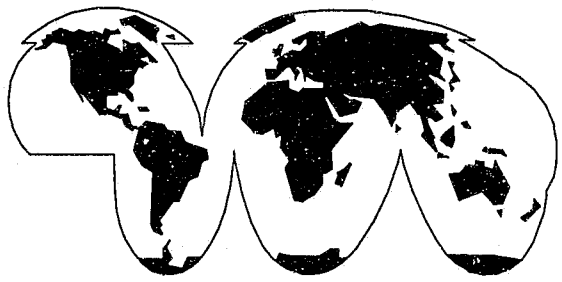
International Forfeiture News



Forfeiture Actions Involving Foreign-Based Property and Persons

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On October 28, 1992, 28 U.S.C. § 1355(b)(2) became law, thereby expanding the reach of United States civil forfeiture laws to assets located abroad. Specifically, section 1355(b)(2) vests United States district courts with jurisdiction in civil forfeiture actions against assets that are within a foreign territory.

While expanding jurisdiction to cover foreign-based assets, section 1355(b)(2) does not dispense with domestic jurisdictional requirements, such as seizure or restraint of the property or the subsequent execution of the warrant of arrest *in rem*.[1] This article addresses those issues, as well as the service of potential claimants who are known or believed to be abroad, and the importance of transmitting only *final* United States forfeiture orders to foreign countries for enforcement.

I. Notification Requirement Before Filing an Action Under Section 1355(b)(2)

There is little value to filing a complaint based on section 1355(b)(2) against property in another country when that country (hereinafter the host country) may not, or will not, restrain, seize, and ultimately liquidate the property upon forfeiture. If the host country is unable or unwilling to cooperate with the United States, the U.S. forfeiture order may well turn out to be a "useless judgment," calling into question whether our court ever had jurisdiction at the time the complaint was filed.[2]

Therefore, the first step in obtaining the civil forfeiture of assets located abroad is to determine whether the host country will take specific measures on our behalf. To that end, the Office of International Affairs (OIA) should be notified at least ten days before any civil forfeiture action based on section 1355(b)(2) is filed. *See* USAM 9-13.526.

Within that ten day period, OIA, working with the Asset Forfeiture Office (AFO), will determine whether the host country will seize or restrain the property in question, help us execute the warrant of arrest *in rem*, and ultimately give effect to the U.S. forfeiture order by either sending the property to the United States for disposal or by registering and enforcing the U.S. forfeiture order under its own laws.

II. Making Requests for Foreign Forfeiture Assistance

The United States has entered into a number of treaties and executive agreements providing for legal assistance, including cooperation in civil and criminal forfeiture matters.[3] Whenever the United States and the host country have entered into such a relationship, the process for obtaining forfeiture assistance is made easier.

First of all, under a treaty or agreement, the United States central authority (i.e. OIA) may make the forfeiture assistance request directly to its foreign counterpart without having to go through judicial and diplomatic channels. Moreover, the existence of a bilateral treaty or agreement usually signals that the pertinent authorities of the host country have some understanding of United States forfeiture requirements, and may, therefore, be better prepared to meet our legal and procedural needs.

In the absence of a treaty, the United States may request that the host country, pursuant to a letter rogatory, extend forfeiture assistance as a matter of international comity. A letter rogatory request – although signed by a federal judge from the pertinent district and sent through diplomatic channels – is also coordinated with, and made through, OIA.

III. Seizure of the Property and Execution of Process

In order to perfect *in rem* jurisdiction over forfeitable property, a district court must have actual or *constructive* control over the forfeitable property.[4] When the property is located abroad, the United States depends on the host country to seize or restrain the property in connection with our civil forfeiture action. In most cases, the foreign seizure or restraint is precipitated by a treaty or letter rogatory request from the United States and may have occurred prior to the filing of the civil forfeiture complaint and as part of a related criminal investigation.

Rule C(3), Supplemental Rules for Admiralty and Maritime Claims, also requires that "[i]n actions by the United States for forfeitures for federal statutory violations, the clerk, upon filing of [the] complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property...."[5] In cases where the property is within the United States, the warrant directs the seizing official (normally a Deputy U.S. Marshal) to take control of the property on behalf of the court, and instructs potential claimants to file their claims and answers to the forfeiture complaint within a defined period of time.

In cases where the property is located abroad, however, the court should not be asked to instruct the marshal, or any other United States officer, to execute process against the foreign based property.[6] In such cases, assuming the host country agrees to cooperate, the warrant should instruct the Attorney General, or her duly authorized representative, to request that the authorities of the host country take such action on behalf of the United States as is necessary to arrest and post the property until further order of the court.

Because Supplemental Rule C(3) allows for service of the warrant by, *inter alia*, "a person authorized to enforce it," the warrant may be served by a foreign official. In practical terms, the host country authorities would simply serve the warrant of arrest *in rem* upon the foreign custodian of the property and provide us with proof of execution. Since such assets are usually funds on deposit in a bank account, the foreign authorities would serve the warrant on the appropriate bank officials, thereby bringing the forfeitable property within the "constructive" control of the United States court hearing the civil forfeiture action against the same property.

IV. Personal Notice (or Service of Process)

Although the Supplemental Rules do not so provide, personal notice of a pending civil forfeiture action should be served upon all persons, including lienholders, whose identities and addresses are known or reasonably ascertainable and whose rights and interest in the property will be affected by the lawsuit.[7] This requirement also applies in cases where the potential claimants are known or believed to be abroad.

Federal Rule of Civil Procedure 4(i) sets forth provisions for effecting service in a foreign country, including service by any form of mail.[8] When documents are mailed abroad, however, it may not always be possible to obtain a signed receipt or, conversely, proof that delivery was rejected by the addressee. Accordingly, alternatives to regular mail service that provide for a receipt, such as international Federal Express service, should be considered. It may even be possible to obtain an affidavit from a contract carrier, such as Federal Express, describing the company's unsuccessful efforts to deliver an envelope or package.

In cases in which the United States and the country where the person to be served is located have entered into a mutual legal assistance treaty or executive agreement providing for forfeiture assistance, it may be preferable to request the host country to effect personal service for us, rather than sending the documents by mail.[9] Thus, in such cases, the United States may formally request the local authorities to serve process on the named individuals and to execute an affidavit detailing proof of service.[10]

V. Publication of Notice

In addition to personal notice, the Supplemental Rules require notice by publication. Rule C(4) provides that after execution of process, the plaintiff:

> shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest [of the property] to be given in a newspaper of general circulation in the district designated by the court. Such notice shall specify the time within which the answer is required to be filed as provided by [Rule C(6)].

Most local rules require publication in a *local* newspaper for three successive weeks.

When the *res* is located outside the United States, it is best to publish where the action is filed *and* where the property is located. Dual publication is particularly important in cases involving non-liquid assets. In non-cash cases, potential claimants, such as lienholders and other secured creditors, are more likely to be found where the property is located than where the forfeiture action happens to take place. Also, proof of foreign publication may later be useful in convincing a United States district court to enter a default judgment on the basis that the United States took all reasonable steps to provide notice to all potential claimants.

The logistics of publishing abroad will depend on how much the host country will help. For example, in drug-related forfeiture matters, Hong Kong authorities will arrange to have our notice published there in both English and Mandarin Chinese. In other countries, the authorities may recommend that we publish in a particular local newspaper, but will not arrange for publication. In such cases, the United States authorities would have to contact the foreign newspaper directly or ask a United States representative in the host country (e.g., the DEA attaché or FBI Legat) to arrange for publication. If no suitable newspaper exists in the host country, publication in a newspaper with international circulation, such as the *International Herald Tribune*, should be considered.

VI. Foreign Enforcement of United States Forfeiture Orders

In growing numbers, foreign countries have enacted laws providing for the registration and enforcement of *final* foreign forfeiture/confiscation orders.[11] Moreover, some countries extend the coverage of their law to include both criminal and civil orders rendered by United States courts.[12] In such instances, the United States may transmit a certified copy of the forfeiture order, asking the host country to enforce it under its domestic laws.[13]

In criminal cases, defendants often forfeit their interests in foreign-based property as part of a plea agreement. However, a plea, or even a preliminary forfeiture order resulting from a plea or trial, is not enough to forfeit property. A plea agreement and/or a preliminary forfeiture order, while sufficient to serve as the basis for a foreign country to initiate its own domestic forfeiture action, should not be transferred to another country for registration and enforcement. The United States

must first comply with the procedures set forth in 18 U.S.C. § 982(b)(1)(A), 18 U.S.C. § 1963(l), and 21 U.S.C. § 853(n) for the protection of innocent third party interests before transmitting a criminal forfeiture order to another country for enforcement.

Moreover, no civil or criminal forfeiture order that is still subject to appeal, or for which an appeal is pending, should be transmitted abroad for enforcement. We should avoid ever having to ask a foreign country to revoke its own forfeiture decree because the underlying United States forfeiture order was subsequently reversed or amended.

The resolution to many of the issues addressed in this article depends on the interplay between United States and foreign law. AFO and OIA are available to provide assistance and guidance to Assistant United States Attorneys and agents who are dealing with such international forfeiture issues. Please contact either Linda M. Samuel or Juan C. Marrero in AFO at (202) 514-1263, or OIA's attorneys at (202) 514-0000.

Endnotes

[1] In pertinent part, section 1355(b)(2) provides that "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, *or* has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought." (Emphasis added.) Although the disjunctive is used, in light of traditional *in rem* jurisdictional requirements, the statute makes sense only when the "or" is read as an "and." There is no legislative history to shed light on this point, and it cannot reasonably be explained away by assuming that Congress had in mind seizures by foreign governments on the high seas.

[2] *See Republic National Bank of Miami v. United States*, 113 S. Ct. 554, 559 (1992).

[3] As of December 1, 1993, the United States had entered into mutual legal assistance with 16 jurisdictions (Anguilla, Argentina, Bahamas, British Virgin Islands, Canada, Cayman Islands, Italy, Mexico, Morocco, Montserrat, the Netherlands, Spain, Switzerland, Thailand, Turkey, and the Turks and Caicos Islands). These treaties all contain provisions for making forfeiture-related requests to the treaty partner. In addition, the United States has entered into executive agreements with the United Kingdom and Hong Kong that provide for forfeiture cooperation in drug-related cases. Finally, the United States and over 80 other countries have ratified the United Nations (Vienna) Convention of 1988, which contains an article (V) addressing issues of forfeiture and international forfeiture cooperation.

[4] Last year, the Supreme Court stated in *dicta* that, for *in rem* jurisdiction to vest, the district court "must have actual or constructive control of the *res* when an *in rem* forfeiture action is initiated." *Republic National Bank of Miami v. United States*, 113 S. Ct. 554, 559 (1992).

[5] One commentator, however, has questioned the need for service of process under Rule C(3) where the property has already been seized by a law enforcement agency:

> Where the property has already been seized by an executive branch agency, the marshal's action in arresting the property, thereby taking it into the 'custody of the court,' is a formality of questionable value. Common sense dictates that the requirement of *two* seizures – one by the executive branch agency and another by the court acting through the marshal – to perfect the court's jurisdiction is one seizure too many.

D.B. Smith, *Prosecution and Defense of Forfeiture Cases* Vol. 1, § 9.01[4] (1991). Whatever the merits of domestic service of process, there is a strong argument justifying service of process

under Rule C(3) where the *res* is located abroad. Service of the complaint and warrant of arrest upon foreign-based property serves to put a "U.S." stamp on what had been up to that point a foreign seizure (albeit one that may have been precipitated by a United States treaty or letter rogatory request).

[6] No United States agency, including the United States Marshals Service, may execute process upon property located outside the United States without the approval of the host country. Few foreign countries sanction such foreign law enforcement activities. For information about the position of a given country on this issue, prosecutors and agents should contact OIA.

[7] Every reasonable effort should be made to determine the identities of all persons who may have an interest in the property subject to forfeiture. This may include a search of lien records (if the foreign laws require the recording of liens), license records, business registrations, and the like.

[8] Rule 4(i) also permits service in the manner prescribed by the law of the foreign country. Some countries (*e.g.*, Colombia and Panama) require that the United States retain local counsel for purposes of carrying out personal service of process. In some cases, this method may be preferable to service by mail (particularly where there is no return receipt service available) because private counsel could execute an affidavit, if necessary, attesting to the unsuccessful delivery attempts.

[9] Recent U.S. mutual legal assistance treaties and executive forfeiture agreements, as well as the Vienna Convention (for drug cases), all contain provisions providing for the service of documents on behalf of the signatories to those agreements.

[10] If the foreign country involved is not one with which we have an international assistance agreement, and for whatever reason service by mail is not feasible or acceptable, the United States could make a letter rogatory request for personal service. However, as a general rule, the letters rogatory route is a time consuming process, and there is no obligation for the country to provide assistance.

[11] Presently, the United States is not among them. However, by relying on foreign evidence and foreign forfeiture orders, we may civilly forfeit foreign drug proceeds located in the United States, 18 U.S.C. § 981(a)(1)(B), and the proceeds of fraud by or against a foreign bank, kidnapping, robbery, and extortion, which are laundered in violation of United States law. *See* 18 U.S.C. § 981(a)(1)(A) and 18 U.S.C. § 1956(c)(7).

[12] To date, the following jurisdictions have signaled their legal ability and willingness to attempt to enforce United States foreign forfeiture orders: the Cayman Islands, Hong Kong, Luxembourg, and the United Kingdom. The Bahamas, the Netherlands, and Singapore have laws providing for the enforcement of foreign forfeiture orders, but require further legislative or administrative action before those laws apply to United States forfeiture orders.

[13] The fact that we obtain a forfeiture order against foreign-based property does not mean such property will automatically be transferred to the United States once the order is given effect by the foreign country. For instance, a forfeiture order sent to the United Kingdom for enforcement becomes a British confiscation judgment with the assets to be disposed of in accordance with British law. The Department will then request the foreign government to share the assets with us in recognition of our overall contribution to the case. ✹