

A New Test For Enforcing Foreign Restraining Orders

Law360, New York (August 01, 2013, 1:20 PM ET) -- The U.S. Court of Appeals for the District of Columbia Circuit recently became the first appellate court to consider the scope and operation of a statute authorizing federal courts to restrain assets in the United States based on foreign governments' requests.[1] The court of appeals found that the law (28 U.S.C. § 2467(d)(3)) expanded the district courts' authority to restrain assets based on preliminary or provisional foreign orders. But the court also explained that the law required district courts first to examine the due process protections available to litigants in foreign proceedings. The court's emphasis on due process carves out a significant role for the federal courts in assessing foreign restraining order requests.

Background

Law enforcement confronts a globalized economy in which funds flow freely across national borders. This creates challenges for law enforcement when investigators suspect that a crime has been committed in one country, and the proceeds of that suspected crime have been transferred to another. In that situation, the country where the crime occurred sometimes seeks to restrain the assets with the assistance of the country in which they are located. Whether the assets can be so restrained and, if so, under what circumstances, turns on the facts of any given case, of course, but also on the law of both countries.

In the United States, the Department of Justice plays a central role in reviewing foreign nations' requests for asset restraints. Such requests are governed by mutual legal assistance treaties as well as federal statutes. The first review of foreign requests rests with the attorney general. When the attorney general concludes that it would be in the interests of justice to assist the foreign government, then the DOJ, working closely with their foreign counterparts, may file an application in federal court to restrain the assets in question.

Once an application is filed, it is up to the courts to assess its merits in light of the statutory framework. That framework has evolved significantly over the years; the trend has been to grant the DOJ ever-increasing authority to obtain restraining orders based on foreign requests. In 2010, however, this trend was interrupted, when the D.C. Circuit held that Congress had only authorized courts to restrain assets in the United States that were subject to a final foreign forfeiture order — not provisional orders entered during the course of an investigation or during preliminary proceedings. Dissatisfied with this result, the DOJ took the issue to Congress, which responded by amending the statutory framework to expand, again, the circumstances in which federal courts could enter restraining orders based on foreign requests.

The Gang Luan Case

In late 2010, Hong Kong authorities obtained a warrant to arrest Gang Luan on allegations that he and his businesses had smuggled goods into China, bribed foreign officials, and laundered the resulting proceeds. By then, however, Luan had relocated to the United States. Law enforcement responded by seeking an order from a Hong Kong magistrate that provisionally restrained the assets derived from the alleged offenses, including roughly \$23.7 million that Luan alleged caused to have been transferred to the United States. Hong Kong authorities then requested the DOJ's assistance in enforcing this order in the United States.

The DOJ agreed to assist. Relying on the newly amended statute, the DOJ, acting ex parte, asked a federal court in Washington, D.C., to restrain bank accounts in Texas containing the \$23.7 million. Finding that the statutory prerequisites were satisfied, the district court granted the request. Luan sought to dissolve the restraining order. After the district court denied that request, he appealed to the D.C. Circuit.

The D.C. Circuit's Decision

The court of appeals confronted a statutory framework that was dense and somewhat obtuse. The central issue in Luan's appeal involved the interplay between 28 U.S.C. § 2467(d)(3) and 18 U.S.C. § 983(j). That issue arose because Section 2467(d)(3), which authorizes federal courts to enter restraining orders based on foreign requests, directs them to do so "in a manner consistent with ... the procedural due process protections for a restraining order under section 983(j) of title 18."

Section 983(j), in turn, governs civil forfeiture actions. It authorizes courts to restrain assets that are or will be named in civil forfeiture complaints. It provides for three levels of judicial scrutiny based on the timing of the government's request (e.g. pre- or post-complaint). Importantly, for precomplaint requests (akin to requests for preliminary restraining orders), Section 983(j) provides that the order should issue only if the government demonstrates a likelihood of success on the merits.

To assess the interplay between these two provisions, the court first considered whether Section 2467(d)(3)'s reference to Section 983(j) limited the statute's application to cases involving foreign civil forfeiture actions. But it rejected this argument based on the statutory text and the legislative history. In particular, the court found that Congress must have intended the statute to apply more broadly because it directed courts to treat Section 983(j)'s reference to civil forfeiture complaints as references to the "applicable foreign criminal or forfeiture proceedings."^[2]

But the court also noted that the statute's reference to the "applicable" foreign proceeding was unclear. It thus considered various different approaches to resolving the meaning of this phrase. The court began by rejecting the DOJ's position, which would have treated whatever foreign proceeding had occurred (e.g., a formal criminal investigation) as the equivalent of a civil forfeiture complaint. (An approach that would have significantly limited the ability of litigants to contest the restraining order on the merits in a federal court.) The court next rejected Luan's approach, which would have required the foreign government to file a civil forfeiture complaint or, perhaps, to initiate formal adversary proceedings, such as through the returns of an indictment.

Having rejected the litigants' positions, the court went on to devise its own approach. Recognizing that Section 983(j) provides for restraining orders of various lengths depending upon the amount of process accorded to the aggrieved parties, the court suggested that courts look to the nature of the foreign proceedings — and the amount of process they accorded the litigants — to determine what sort of restraining order (if any) might be available. The court then found that because Hong Kong offered due process protections that were analogous to those offered in civil forfeiture proceedings, the district court's indefinite restraining order was proper.

The D.C. Circuit's approach would thus allow the DOJ to obtain a restraining order of indefinite duration when the foreign proceedings provided a level of due process that was comparable that which would be provided to a party claiming ownership of assets that were named in a domestic forfeiture complaint. But it would presumably deny the DOJ the ability to obtain such an order when the foreign proceedings provided lesser due process protections. The effect of the decision, then, is to deny indefinite restraining orders based on foreign requests unless the foreign proceedings are in accordance with American notions of due process.

Future Implications

Under the D.C. Circuit's approach, district courts will be required to compare the sorts of process due to litigants in foreign proceedings to that which is available in domestic civil forfeiture proceedings. Whether the foreign country offers comparable due process protections to U.S. forfeiture proceedings will, in many instances, be the central issue in any challenge to a restraining order. That is because litigants like Luan who seek to challenge a restraining order requested by a country with comparable due process protections will likely be required to do so in the foreign country. In contrast, when a foreign government's due process protections are not comparable to those in U.S. forfeiture proceedings, then litigants will have an opportunity to attack the restraining order on the merits, as per Section 983(j)(1)(A).

This aspect of the D.C. Circuit's ruling makes sense because to do otherwise would be to allow restraining orders to assist foreign investigations based on less than the federal courts would require in domestic investigations. But the D.C. Circuit's ruling also poses a dilemma for the DOJ, which has sought to prevent litigation on the merits in these sorts of disputes. Such litigation would seemingly always involve complicated facts, absentee witnesses, and questions of foreign law. Given the resources involved in litigating such issues, it remains to be seen whether the DOJ will seek restraining orders based on foreign requests when the requesting nation's procedures provide limited due process protections.

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[1] *Gang Luan v. United States*, No. 12-5142 (D.C. Cir. July 9, 2012).

[2] 28 U.S.C. § 2467(d)(3)(A)(ii)(II)(aa).