ANALYSIS

Provisions of the USA PATRIOT Act Relating to Asset Forfeiture in Transnational Cases

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INTRODUCTION

The USA PATRIOT Act was the first major piece of legislation enacted in the USA in the wake of the events of 11th September, 2001. Among other things, the Act imposed new requirements on financial institutions regarding anti-money laundering enforcement, created new money laundering offences, and gave the government new powers concerning the confiscation of assets involved in terrorism, money laundering, and other transnational crimes.

In this regard, the PATRIOT Act built upon another set of provisions dealing with the same issues that were enacted a year earlier as part of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). This discussion highlights the parts of both the PATRIOT Act and CAFRA that bear directly on transnational cases and the recovery of assets from criminals and terrorists. To make sense of this, however, it is first necessary to have a brief understanding of the vocabulary of asset forfeiture law in the USA.

Asset forfeiture in the USA

Federal law in the USA authorizes both civil and criminal forfeiture of property connected to the commission of a crime. Both methods of forfeiture are employed to recover property involved in crimes that cross international borders, and each has its advantages and disadvantages for law enforcement.

Civil forfeiture is an in rem action that is brought against the property itself. It does not require a criminal prosecution or even that the defendant be in custody. All that is required is that the government prove, by a preponderance of the evidence, that a crime was committed and that the subject property was derived from, used to commit, or otherwise involved in that crime. The focus, in other words, is on the property, not the offender; but property owners, other than the wrongdoer himself, have a right to contest the forfeiture by asserting an innocent owner defence.

So, if an airplane used in a drug smuggling scheme is seized, a civil forfeiture action can be brought against it, even if the drug dealer is a fugitive. If someone other than the drug dealer has an ownership interest in the airplane, he can contest the forfeiture as an innocent owner, but if he was aware of the wrongful use of his property, it can be forfeited even though he was not involved in the commission of the crime.

Civil forfeiture is a powerful and indispensable tool of law enforcement. As will be seen, there is often no other means of recovering property when the crime occurred in another jurisdiction, or when the defendant cannot be found. But civil forfeiture has a major limitation: as an in rem action, it is limited to the property directly involved in the underlying criminal offence. There is no possibility of obtaining a value-based money judgment in a civil forfeiture case, or of substituting assets of equal value for property that cannot be recovered.

Criminal forfeiture is in personam: it is part of the sentence imposed on the defendant in the criminal case. It is more limited than civil forfeiture because it requires custody of the defendant in order to obtain a criminal conviction, and only property that belongs to the defendant can be forfeited. Third party property — even if it was used to commit the crime — cannot be forfeited in a criminal case. But criminal forfeitures have the advantage of permitting value-based judgments and the forfeiture of ‘substitute assets’ if the proceeds or the property used to commit the offence cannot be found.

So in a criminal case against a drug dealer who used his own airplane to commit a crime, the airplane could be forfeited as part of his sentence. If the airplane is missing, a money judgment could be found for its value, or something of equal value forfeited. But if the airplane belonged to someone else, there is no forfeiture, because only the defendant’s property can be forfeited in a criminal case. To
obtain a forfeiture judgment in that case, it would be necessary to use civil forfeiture.

This regime has worked well. In the USA, there are more than 15,000 seizures and forfeits of over $400m a year in civil and criminal cases combined. But there are problems applying both the civil and criminal forfeiture laws in cases where the crime, the defendant, or the property crosses an international border. CAFRA and the PATRIOT Act have legislatively addressed many of these problems.

INTERNATIONAL APPLICATIONS OF THE TWO ACTS

The criminal proceeds are in the USA, but the defendant is a fugitive

First, suppose the crime occurred in the USA, and the criminal proceeds are found there, but the offender has absconded. Obviously, if the government has been unable to apprehend the defendant, there can be no prosecution, and hence no criminal forfeiture. Civil forfeiture, in other words, is essential in dealing with property left behind by fugitives. But what is there to stop a fugitive from attempting to contest the civil forfeiture action through counsel, while maintaining his fugitive status abroad? Should a person who refuses to appear to answer criminal charges nevertheless be able to use the resources of the courts to contest the forfeiture of his property in a related case?

In CAFRA, Congress enacted what is called the ‘fugitive disentitlement doctrine’.² It says, in essence, that a person who is charged in a criminal case can oppose the civil forfeiture of his property only if he surrenders to face the criminal charges. Thus, for example, if a corporate criminal flees to the UK, leaving behind his stock portfolio, he can be forced to choose between returning to the USA to face the criminal charges or face the civil forfeiture of any property involved in the offence by default.

The money is in the USA, but the crime was committed abroad

Next, suppose that the proceeds of the crime are found in the USA, but the offence was a violation of foreign law and was committed abroad. Obviously, there can be no criminal forfeiture because if the crime was committed abroad, no US court would have jurisdiction over a criminal prosecution. But what about civil forfeiture?

Until recently, with few exceptions, federal law in the USA did not permit the forfeiture of the proceeds of foreign crimes. Except in drug cases and in a few other instances, the civil forfeiture statutes could be used to confiscate only the proceeds of domestic crimes.

The PATRIOT Act fixed that to a large extent. The civil forfeiture statutes still do not extend to all foreign crimes, but a civil action can now be brought to forfeit the proceeds of public corruption offences, crimes of violence, bank fraud and other serious offences that are committed abroad in violation of foreign law, if the property is found in the USA.³

The problem, of course, is that civil forfeitures are limited to the actual property traceable to the offence. Criminal forfeitures can include value-based money judgments but civil forfeitures cannot. But suppose the country where the crime was committed has prosecuted the defendant and obtained a criminal forfeiture judgment. For a long time, the USA had no statutory authority to register and enforce foreign forfeiture judgments. But CAFRA addressed that problem.

Under 28 USC §2467, there is now a procedure that allows the Attorney General to go to a federal court to register and enforce a foreign judgment — either criminal or civil — against assets in the USA. That may include assets directly traceable to the offence as well as other assets of the defendant that are forfeitable pursuant to a value-based judgment. Moreover, the PATRIOT Act added a provision allowing the registration and enforcement of a pre-forfeiture restraining order issued by a foreign court to preserve the property while the action in the foreign court is pending.⁴

The criminal is in the USA, but the property is abroad

Next, consider what remedies the government should have if the crime was committed in the USA and the offender is found there, but the property has been sent abroad. In short, how does the government give effect to a forfeiture order in a criminal case when the property is outside of the USA?

One solution, enacted by the PATRIOT Act, is to allow the court to order the defendant (over whom it does have jurisdiction) to repatriate his property to the USA.⁵ This can be done either as part of a pre-trial restraining order, or as part of the final judgment. Failure to comply with such a 'repatriation
order’ is punishable by contempt and/or by a higher sentence in the criminal case.

The crime occurred in the USA, but both the criminal and the property are abroad
What would happen if the crime occurred in the USA but both the criminal and his property are in another country? Again there can be no criminal forfeiture without apprehending the criminal. To address this, a statute enacted in the early 1990s gave the federal courts in the US jurisdiction permission to enter civil forfeiture judgments against property in foreign countries, as long as the crime giving rise to the forfeiture occurred in the USA. But there has always been some question as to whether that statute meant what it said.

A new case from the Court of Appeals in Washington, DC, says yes, a federal court does have jurisdiction to issue a forfeiture order against property in another country. The question, the court said, is not whether the US court can issue such an order, but whether the courts in another country will enforce it. For that, the USA still needs the cooperation of foreign governments. It is hoped that the problems encountered in obtaining such cooperation in the case of civil forfeiture judgments will improve as other countries begin to enact civil forfeiture laws.

Another approach, embodied in a new statute, is more controversial. It is the result of what is sometimes called ‘thinking outside the box’. Most of the time, in discussion about proceeds of crime located in another country, that discussion concerns funds deposited in a bank account. But funds in a bank account are electronic funds. The question may sound metaphysical, but where are electronic funds?

Electronic funds are simply ledger entries noting that the bank owes a debt to its depositor. Historically, the funds exist in the place where that ledger entry is kept. But if the foreign bank where the account is held also has an account at a US bank — a correspondent account — that it would draw on to pay the depositor if he wanted to withdraw his funds, or if he wanted to send his funds to a third party, then are the electronic funds really abroad? Why is it not fair to say that the depositor’s funds are actually in the USA in the correspondent account?

When money is transferred from one country to another, it does not actually move across the international border. There are just a series of offsetting debits and credits representing the shift of the debt from the bank in one country to the bank in another. For example, if a criminal has money in a foreign bank that he wants to send to a confederate in the USA, he directs the bank to debit his account; the bank in turn directs its correspondent bank in the USA to debit its correspondent account and to pay the beneficiary. Why could civil forfeiture not be done by running that process in reverse? If the offender has money in a bank in another country, and that bank has a correspondent account in the USA, why not seize and forfeit the money from the correspondent account and let the foreign bank recover its money by debiting the account of the offender on its books and records?

The PATRIOT Act does just this. The new statute allows the USA to bring a civil forfeiture action against funds in a foreign bank — funds derived from a crime that occurred in the USA — by seizing the funds from the correspondent account of the foreign bank. The offender, not the bank, could oppose the forfeiture action, but if the government meets its burden, and the depositor has no innocent owner defence, the court will enter a forfeiture judgment against the US funds.

The notion is that the foreign bank will then make itself whole by debiting its customer’s account, just as it would do if the customer had initiated the transaction by directing the bank to send his funds to a third party. The banks, of course, are worried that such offsets will not be sustained in foreign courts when the customer was an unwilling participant in the transaction. In that case, the bank will end up the loser. That is what makes this so controversial. But so far, the new statute has been applied in two cases with no problems.

The USA needs the assistance of a foreign government to restrain property and obtain bank records
Finally, suppose the USA is pursuing a civil or criminal forfeiture action against property involved in a domestic crime, but it needs the assistance of a foreign government either to restrain the property or to obtain financial records. This raises many issues, of which three are mentioned below.

Bank records
In many cases, there are Mutual Legal Assistance Treaties that provide a mechanism for obtaining foreign business records. In other cases, however,
the records are in the possession of banks in rogue states that do not choose to provide legal assistance. But those same banks often have correspondent accounts in the USA.

A new statute, also enacted by the PATRIOT Act, says in essence, ‘if you want to bank in the United States, you will be required to comply with subpoenas for bank records, even if the records are located abroad.’ Under the statute,9 in other words, the USA can serve a subpoena on any foreign bank that has a correspondent account in the USA and ask it to produce records of transactions that occurred abroad. If the bank declines, the sanction is that the US bank is required to close the correspondent account.

This authority has not yet been used, and the intention is to use it only when all other avenues fail, but there are several cases pending.

Attorneys’ fees

Often a foreign government is asked to restrain property so that it can be preserved while a civil or criminal case is pending. Many governments are able to assist in this regard, but the courts then let defence counsel draw on the restrained funds to cover their attorneys’ fees. The result is that by the time the forfeiture order is obtained, the money has been dissipated, and the victims for whom the property is to be recovered are left with nothing.

The rule in the USA is that a defendant cannot use forfeitable property to pay for defence counsel.10 The notion is that money stolen in a fraud case or earned in a drug deal belongs to the government and the victims, not to the defendant; so he cannot use it to pay his attorney.

If funds that the defendant says he needs to hire counsel in a criminal case are restrained, he is required to make a showing that he has no other funds available to pay for counsel. But even if he makes that showing, the funds remain under restraint if the government satisfies the court that it has probable cause to believe that the funds will be forfeited in the event of a conviction.11 Only if the defendant has no other funds available, and only if the property is not the proceeds of a criminal offence, can the money be released to pay for attorneys’ fees.

It is understood that other countries do not have the same rule, but some requirement that the defendant demonstrates the absence of other funds before any restrained funds could be released would do much to protect the interests of innocent victims on whose behalf the forfeiture action is being prosecuted.

Challenges on the merits

A constantly recurring issue, in cases where property is restrained in another country at request, is whether the foreign court should hear challenges to the restraint on the merits. The fervent wish, of course, is that the foreign court will simply register and enforce the restraining order and refer any challenges to the forfeiture on the merits to the forum court. But the reality is that citizens in the foreign country usually demand that their own courts hear their complaints regarding the validity of the restraint of their property.

It is difficult for a court to turn a deaf ear to its own citizens, but unless it does so, persons challenging forfeiture proceedings will have two opportunities to litigate the same issues: once in the country were the property is restrained, and once in the forum state where the forfeiture action is pending. United States law now prohibits that practice.

As mentioned, the PATRIOT Act contains a provision that permits a federal court to register and enforce pre-trial restraining orders issued by foreign courts. The provision goes on to say that if anyone wants to challenge the restraining order on the merits, they must do so in the foreign court where the forfeiture action is pending. The US court, in other words, is acting only as the agent of the foreign court, and will not give the defendant two bites at the apple in challenging the forfeiture action on the merits by litigating matters that are pending in the forum court. This applies even if the person whose property is being restrained is a US citizen.12

TERRORIST ASSETS

Prior to the PATRIOT Act, there was no authority to forfeit assets in terrorist cases. But in the aftermath of the terrorist attacks, Congress enacted 18 USC §981(a)(1)(G), which authorises the civil forfeiture of all assets, foreign or domestic, of any person, entity or organisation that is engaged in planning or perpetrating acts of terrorism against the USA or its citizens and residents.

The new statute is emphatically not limited to the property derived from or used to commit the terrorism offence; it says ‘all assets’ and means ‘all assets’. If the government can establish that a person or organisation is engaged in terrorist activity, a court can
order the forfeiture of all of its property — right down to their socks and underwear. Moreover, this sanction can be imposed in either a civil or criminal forfeiture case: that is, whether the terrorist is convicted or only his money is found.

Here is where the new tools already discussed come into play. If terrorist assets are found in a US bank account, a civil forfeiture action can be brought against them. If the assets are in a foreign bank that has a correspondent account in the USA, the forfeiture action can be brought against the correspondent account. And if the person who attempts to contest the forfeiture is a fugitive in a criminal case, the court can be asked to strike the claim and order the forfeiture of the property by default under the fugitive disentitlement doctrine.

The only limitation on forfeiture under s. 981(a)(1)(G) is the Excessive Fines Clause of the 8th Amendment. If the terrorist shows that the forfeiture of his property would be grossly disproportional to the gravity of his offence, the forfeiture would have to be mitigated. It remains to be seen whether the forfeiture of any amount of property would be considered 'grossly disproportional' to the gravity of an act of terrorism.

Note that forfeitures under s. 981(a)(1)(G) are distinct from the action the President can take under his war powers authority to freeze the assets of foreign adversaries. That authority is in the International Emergency Economic Powers Act (IEEPA). IEEPA actions are not forfeiture actions: they freeze assets pending the cessation of hostilities, but do not confiscate them. IEEPA actions are handled by the Treasury, not the Department of Justice.

CONCLUSION

The USA PATRIOT Act and its predecessor, CAFFRA, gave law enforcement in the USA new powers to seize and confiscate assets involved in transnational crime. The immediate focus of law enforcement is on terrorism, but the new powers will be used to combat all manner of criminal activity that has begun to pervade the global economy. Such steps are only a beginning, but they bring us slightly closer to the day when law enforcement can match the ability of organised criminals to move themselves and their property with an agility that is unfettered by national borders.

REFERENCES

(1) See United States v All Funds in Account Nos. 747.034/278 (Banco Espanol de Credito) 295 F 3d 23 (DC Cir. 2002) ('Civil forfeiture actions are brought against property, not people. The owner of the property may intervene to protect his interest').
(2) 28 USC §2466.
(3) 18 USC §§981(a)(1)(B) and §1956(c)(7)(B).
(4) 28 USC §2467(d)(3).
(5) 21 USC §§853(c)(4) and (g)(3).
(6) 28 USC §1335(b).
(7) See United States v All Funds, ref. 1 above (South American drug dealer places proceeds from US drug crimes in bank in Spain).
(8) 18 USC §981(k).
(9) 31 USC §5318(k).
(11) See United States v Jones, 160 F 3d 641 (10th Cir. 1998) (defendant has initial burden of showing that he has no funds other than the restrained assets to hire private counsel or to pay for living expenses, but if he makes this showing he is entitled to a hearing); United States v Farmer, 274 F 3d 800 (4th Cir. 2001) (defendant entitled to pretrial hearing if property is seized for civil forfeiture if he demonstrates that he has no other assets available; following Jones); United States v Jamieson, 189 F Supp. 2d 703 (ND Ohio 2002) (same, following Jones; to satisfy 6th Amendment requirement, defendant must show he has no access to funds from friends or family; government has right to rebut showing of lack of funds if hearing is granted).
(12) 28 USC §2467(d)(3).
(13) See United States v Bajakajian, 524 US 321 (1998) (forfeiture of property is unconstitutional if the forfeiture would be 'grossly disproportional to the gravity of the offence').

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