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Expansion Of DOJ's International Reach On The Horizon

Law360, New York (January 08, 2014, 6:09 PM ET) -- Arguably one of the most significant developments in federal criminal law over the past decade has been the increasingly international reach of the U.S. Department of Justice's investigative and prosecutorial efforts. More and more, the Department of Justice has been investigating and prosecuting conduct that occurs less and less inside the United States.

Often, these cases involve a situation where the core criminal conduct occurs outside the United States together with either a tenuous jurisdictional nexus to the United States (such as an incidental wire transfer or mailing) or a claimed harm to a victim in the United States. Examples beyond the obvious Foreign Corrupt Practices Act context include recent investigations and prosecutions involving allegations of the manipulation of the London Interbank Offered Rate, the failure of financial institutions to have effective anti-money laundering programs, violations of trade-based sanctions restrictions, and trade secret theft.

A basic question can arise from some of these investigations and prosecutions: Can the Department of Justice properly serve a summons in a criminal case on a purely foreign corporation, that is, one that does not have any operations or offices in the United States?

Obviously, this question will not arise in the prosecution of a global money-center bank or corporation with a global reach, where the entity in question has extensive operations, including offices, in the United States. And a failure to appear by a purely foreign corporation is not a palatable option for most companies, for example, where a significant sanction can be visited upon the company, such as asset forfeiture, if it fails to appear. But the frequency with which this question arises should not be underestimated.

For example, in the ongoing prosecution of alleged copyright infringer Kim Dotcom and his company Megaupload Ltd. for the allegedly massive online piracy of numerous types of copyrighted work, Megaupload moved to dismiss the indictment based on a failure of the government to properly serve Megaupload with a summons. The basis for Megaupload's motion was the failure of the government to comply with the specific requirements for serving a summons on a corporation. Although the motion to dismiss was denied in October 2012, it was only because the judge there found that, someday, the government might be able to properly serve Megaupload with the summons, not that the government had actually satisfied the applicable Federal Rule of Criminal Procedure.[1]

Similarly, in three recent trade secret theft prosecutions, corporate defendants moved to dismiss the indictment and/or quash service of a summons on the basis of a claimed failure to properly serve a corporate defendant. In these cases, the foreign corporate defendants argued either that the seemingly simple requirements of the applicable rule were not followed or that the government improperly served a subsidiary that was not the "alter ego" of the foreign corporate defendant. The government has had a mixed record of success in opposing these motions to dismiss, having had service of the summons to a corporate defendant quashed in two of these recent cases.[2]

Why Is It Difficult for the Government to Serve Purely Foreign Corporations With a Summons?

The present version of Rule 4 of the Federal Rules of Criminal Procedure requires that, to effect service on a corporation, the government must: (1) deliver the summons "to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process"; and also (2) mail the summons to the company's "last known address within the district or its principal place of business elsewhere in the United States."[3] The other relevant limitation on service of a summons is the general requirement that "a summons [may be] served" "within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest."[4]

Each of these requirements can present difficulties to the government in effectuating service on a pure foreign corporation. For example, in Dotcom, the foreign corporate defendant, Megaupload, lacked a "last known address within" the Eastern District of Virginia, where the case is pending, or a "principal place of business elsewhere in the United States" at which Megaupload could have received a summons, rendering the mailing requirement practically impossible to satisfy.[5]

And even in cases where courts have found the mailing requirement to be neither a component of effective service nor a prerequisite to the exercise of jurisdiction, despite the apparently clear language of Rule 4,[6] they have found wanting substantial efforts by the government to satisfy the delivery requirement.[7]

Finally, under the current version of Rule 4, there is no apparent mechanism for the government to resort to other means of service that are either internationally recognized or court-authorized as reasonably calculated to give notice. For example, in Dotcom, the court noted that the possibility of service under a mutual legal assistance treaty between the United States and Hong Kong, the jurisdiction under whose laws Megaupload was formed, "provides no relief to the government here" because "the service requirements in Rule 4 appear to govern exclusively."[8]

In that way, Fed. R. Crim. P. 4 stands in stark contrast to Rule 4 of the Federal Rules of Civil Procedure, which specifically allows for service on parties outside the United States by means of service "reasonably calculated to give notice," whether such means are created by a treaty or not. Civil Rule 4 also permits service by other [court-ordered] means not prohibited by international agreement."[9]

However the litigated cases have come out, it is obvious that there is a significant gap in the Federal Rules of Criminal Procedure with respect to foreign corporate defendants. And courts have struggled to fill the gap given the plain language of the Federal Rules of Criminal Procedure. As the court in the Dotcom case noted, the gap might effectively immunize a broad class of potential defendants:

It is doubtful that Congress would stamp with approval a procedural rule permitting a foreign corporate defendant to intentionally violate the laws of this country, yet evade the jurisdiction of United States' courts by purposefully failing to establish an address here.[10]

What Changes May Be Upcoming?

Recognizing that foreign corporate defendants may not have been contemplated at the time that the operative provisions of Rule 4 were drafted, the Department of Justice has recommended,[11] and a criminal rules advisory subcommittee has adopted and proposed,[12] several amendments to Rule 4. The amendments would make effective service of a summons on foreign organizations substantially easier for the government.

The proposed changes are scheduled to be considered by the larger Criminal Rules Advisory Committee in April 2014 and, if adopted, would still be subject to the remainder of the rulemaking process, which involves a number of other entities, including the U.S. Supreme Court and Congress.

Authorizing Service Outside the United States

At the outset, the subcommittee has proposed that the geographic limitations contained in present Rule 4(c)(2) be eliminated to specifically permit service of a summons on a foreign organization "at a place not within a judicial district of the United States."[13]

Three Specified Means of Service on a Foreign Corporate Defendant

Next, the subcommittee proposes three specified means by which a summons may be served on a foreign corporate defendant in a criminal case.

The first specific means of service is to permit delivery of a summons pursuant to the law of the foreign jurisdiction by which the subcommittee presumably means the law under which the corporate defendant was formed or is governed. The means of service would be by delivery of the summons to "an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process."[14]

The second means of service would be by stipulation between the government and the corporate defendant.[15]

The third means would be service undertaken by a foreign authority "in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement," the availability of which has been doubted by at least one court under the present Rule 4.[16]

Catch-All Provision

As a catch-all, the proposals would permit service on a foreign corporate defendant by any other means that gives notice — by which the subcommittee appears to mean actual notice — "that is not prohibited by an applicable international agreement."[17] Unlike the civil analogue, this means of service would not need to be court authorized; nor would it need to be the means of service of last resort.

Elimination of Mailing Requirement for Service on a Foreign Corporate Defendant

Unlike the current rule, which, on its face, requires a mailing to a corporate defendant's "last known address within the district or its principal place of business elsewhere in the United States," a mailing under the proposed rule would be required only for service on an organizational defendant in the United States and, even then, only when service is made on an agent authorized by statute to accept service and the applicable statute so requires.[18]

Sanctions for Failure to Appear

Finally, in perhaps the most significant departure from present practice, the proposed amendments to Rule 4 would provide a district court with a mechanism to sanction organizations that "fail to appear in response to a summons." Specifically, a court would be permitted, in response to a failure to appear, to "take any action authorized by law."[19]

The proposed amendment declines to enumerate what specific actions might be taken, but the subcommittee notes several possibilities, all suggested by the Department of Justice, including: (1) a contempt order; (2) injunctive relief; (3) the appointment of counsel to appear on behalf of the organization; (4) the imposition of penalties in a parallel civil action; (5) the application of the fugitive disentitlement doctrine in any civil forfeiture proceedings; and (6) the imposition of trade sanctions by the executive branch.[20]

The advisory committee notes to the proposed rules clarify that an arrest warrant would not be available for cases involving corporate defendants that do not appear, such that a corporate officer would not have to fear arrest for the failure of his or her corporation to appear, unless he or she had been separately charged.[21] As to most of these forms of sanction, the Department of Justice contends that they are legally available, but at least as to some means, appears to concede that there is some uncertainty about their legality.[22]

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[1] United States v. Dotcom, No. 12 Cr. 3, 2012 U.S. Dist. LEXIS 148114, *3-4, 11 (E.D. Va. Oct. 5, 2012).

[2] United States v. Kolon Indus., Inc., 926 F. Supp. 2d 794 (E.D. Va. 2013) (holding that fact that foreign corporate defendant had no U.S. address or place of business did not preclude service of the summons, but that government failed to properly serve defendant when it served subsidiary because subsidiary was not alter ego of parent corporation); United States v. Pangang Group Co., Ltd., 879 F. Supp. 2d 1052 (N.D. Cal. 2012) (granting defense motion to quash service of summons where government failed to establish that domestic company acted as foreign corporate defendant's general agent). There is continuing litigation relating to service of process in Kolon Indus. and Pangang Group Co. There is a motion regarding whether a foreign corporate defendant was properly served pending in United States v. Sinovel Wind Group Co., Ltd., No. 13 Cr. 84 (W.D. Wisc.).

[3] Fed. R. Crim. P. 4(c)(3)(C).

[4] Fed. R. Crim. P. 4(c)(2).

[5] Dotcom, 2012 U.S. Dist. LEXIS 148114, *3.

[6] Kolon Indus., Inc., 926 F. Supp. 2d at 802.

[7] Id. at 802-21 (evaluating whether delivery to Secretary of State, on wholly-owned subsidiary, and pursuant to mutual legal assistance treaty were sufficient means of service of summons).

[8] Dotcom, 2012 U.S. Dist. LEXIS 148114, *4 n.5.

[9] Fed. R. Civ. P. 4(f)(1-3).

[10] Dotcom, 2012 U.S. Dist. LEXIS 148114, *3-4; see also Kolon Indus., Inc., 926 F. Supp. 2d at 802 ("The Court declines Kolon's invitation to follow a course that produces an absurd result and that would impute to Congress the intent to produce a nonsensical consequence.").

[11] Letter from Lanny A. Breuer, Assistant Attorney General, U.S. Department of Justice, Criminal Division, to the Honorable Reena Raggi, Chair, Advisory Committee on the Criminal Rules, dated Oct. 25, 2012 (available at <>).

[12] Memorandum from Professors Sara Sun Beale and Nancy King, Reporters, to Members, Criminal Rules Advisory Committee, dated Sept. 24, 2013 ("9/24/13 Memo.") (available at <>). These materials include the revised Rule 4 and proposed Advisory Committee notes to the revised rule.

[13] Id. at 4-5.

[14] Id.

[15] Id.

[16] Id. at 5-6; see Dotcom, 2012 U.S. Dist. LEXIS 148114, *4 n.5.

[17] Id. at 6-8.

[18] Id. at 3-4.

[19] Id. at 2-3.

[20] Id.; see also Memorandum from Jonathan J. Wroblewski and Kathleen A. Felton, to Judge David M. Lawson, dated Aug. 23, 2013, at 3-6 ("8/23/13 Memo.") (available at <>).

[21] 9/24/13 Memo. at 2.

[22] 8/23/13 Memo. at 4-5 (noting that there is "some authority for the proposition[s] that" "a court may appoint counsel for a corporation that fails to appear after being properly served, and may proceed with a criminal trial" and that "a court may sanction a party that fails to comply with orders in a criminal action through penalties in a parallel civil action").