Increased Extradition For Business Crime

Today, many significant white-collar cases have cross-border implications. Often the presence of defendants for trial in cases pursued by U.S. authorities can only be obtained with the assistance of foreign authorities. To ensure such cooperation, in recent years the federal government has entered into or updated extradition and law enforcement treaties with a number of other nations to better facilitate the extradition process. The result has been a significant increase in the return and prosecution of persons located on foreign soil. According to the Department of Justice figures quoted in The Wall Street Journal, 579 individuals were extradited to the United States in 2008—double the number reported in 2000.

This uptick is partly due to increasing international law enforcement attributable to the growing number of multinational financial institutions and the borderless trade and communication caused by technological innovations. White-collar practitioners have seen a growth in international investigations involving antitrust, the Foreign Corrupt Practices Act, tax evasion, and securities law violations, among other things. Extradition is necessarily an important issue in such cases. For instance, the United States currently is seeking the extradition of Leroy King, the former banking supervisor of the government of Antigua, for his role in a multibillion-dollar Ponzi scheme run by jailed Texas financier R. Allen Stanford.

In another case, Raoul Weil a Swiss citizen and the former chairman and chief executive of global wealth management for the Swiss bank UBS was declared a fugitive by the United States after refusing to come to the United States to face charges that he conspired to evade taxes. To date, the United States has not been successful in its attempts to extradite Mr. Weil.

In the case of hotel executive Stanley Tollman and his nephew Gavin Tollman, the United States was unsuccessful in extraditing the defendants from Britain and Canada, respectively, on criminal tax charges in connection with their ownership and management of Days Inn hotels throughout the United States. With respect to the attempted extradition of Gavin Tollman, the Canadian courts were critical of the U.S. government, finding an abuse of process harmful not only to Mr. Tollman, but also to the integrity of the Canadian judicial system.

Once extradited, the U.S. government has had success in prosecuting individuals for white-collar criminal activity. In July 2010, Ian Norris, a citizen of the United Kingdom and former CEO of Morgan Crucible Co., became the first foreign defendant extradited to, and convicted in, the United States for charges arising from a criminal antitrust investigation.

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In March 2011, Jeffrey Tesler, a British lawyer and dual citizen of the United Kingdom and Israel, pled guilty in the United States to charges that he helped a Halliburton subsidiary bribe Nigerian officials to win more than $6 billion in contracts in violation of the Foreign Corrupt Practices Act, after losing a long extradition battle in which his lawyers argued he should not be extradited to the United States because the crimes alleged did not have a substantial link to the United States.

Extradition therefore is no longer relegated to drug cases, but has become relevant in white-collar cases. Accordingly, practitioners should have a working knowledge of extradition law and procedure. This article addresses the fundamentals of extradition proceedings to and from the United States.
decision whether to extradite, often in the context of a judicial hearing, based on these documents and any evidence submitted in opposition by the fugitive. A foreign government’s decision ultimately to extradite an individual in response to a request from the United States is not subject to review by U.S. courts.13

Extradition From the United States. The relevant treaty, case law, and statutes set forth in 18 U.S.C. §§3181-3195 govern an extradition proceeding in the United States. U.S. law provides that a person may be extradited from the United States only pursuant to a treaty, unless he has committed a crime of violence against nationals of the United States in foreign countries, in which case a person may be extradited under the principle of reciprocity or comity.14 U.S. citizenship is not a defense to extradition from the United States.15 In extradition proceedings initiated in the United States, the foreign government seeking the return of a fugitive is represented by the U.S. Attorney’s Office in the U.S. district in which the proceeding is filed.16

Although the individual sought by the foreign government may be accused of criminal activity, the extradition process itself is not a criminal proceeding.17 However, on the basis of a complaint filed by the U.S. government on behalf of a requesting country, a warrant may be issued for the arrest of an individual accused or suspected of having committed a crime in the requesting country.

Once the individual is arrested in the United States, an arraignment is held and, after procedural matters are addressed, a date will be set for the extradition hearing.18 Defendants may overcome the presumption against bail by demonstrating by clear and convincing evidence 1) that they are neither a flight risk nor a danger to the community, and 2) the existence of “special circumstances,” such as a high probability of success on the merits or unusually prolonged or delayed extradition proceedings.19

Proof Required at the Extradition Hearing. Before a defendant will be extradited from the United States, our government, acting on behalf of the requesting nation, must establish that: 1) the offense is an extraditable offense listed under the applicable treaty; 2) the individual in custody is the person being sought by the requesting nation and that he has actually been charged with an extraditable offense in that country; 3) the acts alleged constitute criminal conduct under the laws of both the United States and the requesting nation in satisfaction of the requirement of “dual criminality;” and 4) there is probable cause to believe the individual is guilty of the crimes charged.19

As analyzed by U.S. courts, “dual criminality” exists where the “essential character” of the laws is the same or, as stated by the U.S. Court of Appeals for the Second Circuit, “where the laws of both the requesting and the requested party appear to be directed to the same basic evil.”20 In assessing dual criminality, a court may examine analogous federal statutes, similar laws of the state where the fugitive is found, and the laws of the various states within the United States.21

In establishing probable cause to warrant extradition from the United States, the government must present “evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief in the accused’s guilt.” Thus, a judge is not required to find sufficient evidence to justify a conviction during an extradition hearing.

The Rule of Specialty

The rule of specialty, a principle of international law that an extradited defendant may only be tried by the requesting state for the specific offenses for which extradition is granted, is an issue that frequently arises in extradition cases. Practitioners should be aware that there are many intricacies to the rule which are not addressed in detail in this column. Generally, a country seeking extradition must “adhere to any limitations placed on prosecution by the surrendering country.”22 With respect to individuals extradited to the United States, federal courts, including district courts in the Second Circuit, are split on whether a defendant, in addition to the countries that are parties to the treaty, has standing to raise the rule of specialty to challenge a subsequent conviction.23

When objections are raised under the rule of specialty in cases where an extradition is effected pursuant to treaty, courts look to the treaty’s provisions to determine the nature and scope of any intended limits on the terms of extradition.24 A court also may look to other evidence of limits imposed by the surrendering country that may be set forth in an extradition order or diplomatic correspondence between the countries.25

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Conclusion

In this era of global transactions with instantaneous international impact, the pursuit of defendants outside the United States is more common. Although these cooperative efforts among law enforcement agencies bring a new host of questions, such as which nation has priority where concurrent jurisdiction exists,26 little doubt exists that the number of white-collar cases in which extradition is sought—both from and to the United States—will continue to grow.

2. Nathan Koppel and Deborah Ball, “Fugitives Run Out of Place to Hide,” The New York Times (Oct. 20, 2008). In the white-collar area, there has been a marked increase in the number of foreign based antitrust defendants in Department of Justice antitrust cases. In the period between 1998 and 2005, the number of such defendants rose from one percent to almost fifty percent. Daseul Kim, “Perfectly Properly Triable in the United States: In Extradition a Real and Significant Threat to Foreign Antitrust Offenders?” 28 Nw. J. Int’l L. & Bus. 583 (Spring 2008).