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The End of US v. Hoskins: And the End of an Era?

Author:
Frederick T. Davis
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On November 16, 2022, a perfunctory entry appeared in the docket of the United States Court of Appeals for the Second Circuit in the case of *United States v. Hoskins*, Dkt. No. 20-842: Without comment, the Court noted the "issuance of the mandate" in the case. The issuance of a "mandate" signifies that no pending matters remain in the appellate court, it is the Court's laconic way of saying that an appeal is over and done with. In this instance, the issuance was caused by the non-occurrence of an event: November 11 had been the last day on which the Department of Justice (DoJ) could have sought *en banc* review of a decision it lost [1] on August 12, 2022 in its appeal of a partial post-trial acquittal of a long-running money laundering and foreign corruption case; without comment, the DoJ declined to do so.

This not only marked the end of the decade-long prosecution of Lawrence Hoskins, but more broadly of a complex series of investigations in the United States and elsewhere related to foreign bribery committed by French industrial giant Alstom SA. The saga included two separate DoJ appeals of adverse trial court decisions, fundamental changes to the law applicable to the territorial reach of US criminal statutes, the publication of a book that, at one point, topped the Best Seller list in the People's Republic of China, and important changes in the criminal procedures of France and other countries.

Alstom, with corporate roots almost a century old, has been one of France's most successful industrial companies, a national icon with leading global market shares in rail transport and energy generation markets. In 2009, it learned that the DoJ was examining its activities in Indonesia and other countries for possible illegal payments, and, in 2014, it entered into an agreement with the DoJ whereby the parent company and several subsidiaries pleaded guilty and paid a US$772 million penalty. The DoJ had already charged five Alstom officers with participation in Alstom's bribery and money laundering schemes, including Lawrence Hoskins, Alstom's former Vice President for Asia. Another former Alstom office (Frédéric Pierucci, a former Alstom Vice President) pleaded guilty after spending more than a year in pre-trial detention

The DoJ's press release reporting the Alstom guilty plea [2] was notable for one thing it did not say: While it mentioned no fewer than eight countries whose officials had provided "significant cooperation," no mention was made of any efforts in France to investigate Alstom, notwithstanding the fact that the company was incorporated there, several of the accused were citizens and/or residents, and many of the facts alleged in the indictments took place on French soil.

The case against Hoskins proceeded in the United States District Court for Connecticut, before the able Judge Janet B. Arterton [3]. It soon became apparent that Hoskins's defense relied less on contesting the allegation that he participated in bribes and more on whether the Foreign Corrupt Practices Act (FCPA) and the Money Laundering Control Act applied to him. His FCPA argument had two principal parts. First, he emphasized that, by its terms, the FCPA applies only to citizens and individuals who commit an act on US territory, neither of which applied to him. He also argued that he did not fall within a separate category of individuals covered by the FCPA, namely "agents of a domestic concern." The two issues followed distinct procedural paths, culminating in separate DoJ appeals to the Second Circuit.

The DoJ's ability to prosecute a non-citizen who (like Hoskins) never set foot in the U.S. depended in part on its ability to charge him either as an "aider and abettor" under 18 USC § 2 or under a conspiracy theory pursuant to *Pinkerton v. United States*, 382 U.S 640 (1946): that is, even if he could not directly be charged, he could vicariously be found guilty for having aided others to whom the statute squarely applied. The principle that a defendant can be convicted on one of these theories, even if immune from direct prosecution, is well understood in US law, but Hoskins managed to persuade Judge Arterton that it should not apply to him, arguing that in adopting the FCPA, Congress had not intended to subject non-citizens to prosecution unless they committed acts here. Judge Arterton agreed, and ruled that she would not allow the jury to convict Hoskins on the vicarious liability theory posited by the DoJ. Rather than face a risk of acquittal (and undoubtedly to avoid negative precedent) the DoJ took the unusual step of appealing her ruling prior to trial. In 2018, the Second Circuit affirmed her ruling (*Hoskins 1*), in a thorough decision by Judge Rosemary S. Pooler, with a thoughtful concurrence by Judge Gerald Lynch. 902 F.3d 69. The two opinions relied significantly on *Morrison v. Nat'l Australian Bank*, 561 U.S. 247, a non-criminal case from 2010, where the Supreme Court had reinforced a strong presumption against extraterritoriality, holding that in order to proceed against non-citizens for acts committed abroad, the proponent (the DoJ in a criminal case) needed to demonstrate that, in adopting the relevant legislation (the FCPA), Congress specifically intended that the law apply to the conduct at issue.

The case then proceeded to a jury trial. The DoJ still maintained that Hoskins had violated the FCPA, now relegated to the claim that he had acted as an "agent" of Alstom's US subsidiary (thus, a "domestic concern" within the meaning of the FCPA), even though he had no formal role in it and never came to the US. In her jury instructions, Judge Arterton told the jurors that they should follow the common law definition of the word "agent," which included an element that the principal (the US subsidiary) exercised some element of "control" over the agent (Hoskins). The jury convicted on most of the FCPA and money laundering counts, but on February 26, 2020 Judge Arterton ruled under F. R. Crim. P. 29 [4] that the DoJ had adduced "insufficient evidence" on the "agency" issue because the proof did not support an inference of "control;" she thus acquitted Hoskins of foreign bribery, but declined to overturn the money laundering charges (on which Hoskins had argued, among other things, that he should benefit from a statute of limitations).

Again, the DoJ appealed, this time arguing that the jury verdict should be reinstated since the jurors could have concluded from the totality of the evidence that Alstom's US subsidiary had exercised "control" over Hoskins. (Hoskins cross-appealed from his money laundering conviction). On August 12, 2022 the Court of Appeals affirmed [1] Judge Arterton's acquittal of the FCPA charges (as well as Hoskins's conviction for money laundering). It basically agreed with her analysis that the proffered evidence simply did not show a "control" relationship between the US company and the foreign Hoskins. On behalf of the International Academy of Financial Crime Litigators [5], I filed an amicus brief in the case, arguing that *Morrison* and the FCPA's legislative history mandated a more restrictive interpretation of the word "agent" than its rather broad common law meaning; the Court noted that it did not need to reach this "thorough" analysis since it affirmed on the basis reached by Judge Arterton.

What are we to make of this saga? Two points come to mind.

First, it is noteworthy that the Hoskins legal battles focused less on the criminal significance of what he did, and more of the power of the DoJ to prosecute him under the FCPA – that is, the territorial reach of the criminal statute. The Second Circuit's 2018 holding in *Hoskins 1* that *Morrison* precluded extending the FCPA to a broad class of non-citizens is probably the most significant post-*Morrison* curtailment of the DoJ's territorial power – precedent that the DoJ intensely dislikes, as shown by a separate DoJ appeal, now pending in the United States Court of Appeals for the Fifth Circuit in *United States v. Rafoi*, Dkt. No. 21-20658, where it argues that *Hoskins 1* was "incorrectly decided;" as I have noted in these pages [6], the DoJ clearly hopes to obtain a "circuit split" as an entrée to Supreme Court review. The *Hoskins 2* interpretation of an "agent of a domestic concern" also limits the DoJ's ability to prosecute foreign nationals.

Second, France and several other countries have reacted to the prosecutions of Alstom and Hoskins with far-reaching changes to their criminal procedures. Such changes were not immediately apparent. Much of the reaction in France and other countries to DoJ efforts to prosecute non-US companies like Alstom, and non-American citizens like

Hoskins, was very negative, and included claims that the DoJ was motivated to protect US companies against their overseas competitors. Frédéric Pierucci, the fellow Alstom officer who pleaded guilty after spending more than a year in jail, published a book known in French as *Le Piège Américain*, available in the US as *The American Trap* [7], which largely consists of wild accusations of prosecutorial misconduct and territorial aggressiveness by the DoJ. The book created a stir in mainstream publications in Europe, such as The Economist [8]; its translation into Chinese was for a while the Number One best seller in China, where of course its message was welcome. In France, some legislators advocated what would amount to an economic cold war against the United States by prosecuting US companies. Meanwhile, the largely unstated position of the DoJ and others in the US enforcement community was that France and other countries in Europe had simply not shouldered the responsibilities to prosecute overseas bribery they undertook by signing the OECD *Convention on Combatting Bribery of Foreign Public Officials* [9] in 2000, as shown by their lamentable track record: As of 2017 in France, not a single company had been convicted of overseas bribery.

In an article I wrote in 2017 [10] I urged that such French (and other non-US) failures were not attributable to ill will or malfeasance but to the fact that many Continental criminal enforcement regimes simply lacked the procedures that would allow their prosecutors to move quickly and effectively in the rapidly evolving world of transnational crime, creating a void that the DoJ was well equipped to fill; as I pointed out, the DoJ benefitted from prosecutorial powers that its counterparts "could only dream of." Unmatched DoJ advantages included:

- An experienced, dedicated group of prosecutors at the DoJ
- Flexible and broad territorial limits
- High financial and other sanctions applicable to corporations
- Broad laws relating to corporate criminal responsibility, essentially a regime of automatic criminal responsibility of a corporation for any criminal act committed by an officer or employee, even if committed in violation of company policy and rules
- A range of negotiated outcomes, including corporate Deferred Prosecution Agreements whereby a corporation can avoid a criminal conviction (with possible automatic disbarment form markets) through cooperation
- The virtual absence of any judicial review of prosecutorial decisions or negotiated outcomes, giving prosecutors great flexibility and agility.

In essence, the US posture consisted of a "carrots and sticks" environment that matched severe "sticks" in the form of easily pursued, consequential corporate convictions with tasty "carrots" in the form of negotiated outcomes free from pesky judicial oversight, resulting in widespread corporate cooperation.

Remarkably, to my mind, rather than pursuing an economic war with the US, France and several other countries adopted legislative, administrative, and judicial enhancements that, over a few years, has radically changed their prosecutorial landscapes. These included:

- Revision of corporate penalties, now based on a percentage of turnover, permitting very important criminal sanctions.
- The creation of a National Financial Prosecutor's Office in France, headed by astute (and internationally savvy) prosecutors who have created a strong team that has now shown its clout by going to trial – and winning [11] – a major case against a non-French corporation.
- At the level of its Supreme Court, changes in the laws of corporate criminal responsibility [12] that makes it easier to prosecute corporations
- Adjustments to the territorial limits set out in the French Penal Code to permit more flexible cross-border prosecutions.
- And perhaps most unusually, the legislative adoption of a form of the corporate Deferred Prosecution Agreement often used by the DoJ, a procedural device that has now been successfully used by more than a dozen corporations in France and the United Kingdom. As I noted in a recent article [13], the French and English versions are two of several around the world that have developed corporate negotiated outcomes similar to the DoJ original – unmistakably in response to competitive pressure from it.

These changes are impressive: they took place rather quickly, and are already showing results. The 2020 outcome in *Airbus* is a strong example: in a situation quite similar to Alstom a few years earlier – that is, a European industrial icon accused of making illicit bribes in to get commercial advantages over US competitors – Airbus negotiated an outcome with the French National Prosecutor's Office [14] that was joined by the UK Serious Fraud Office [15] and the US DoJ [16], after an internationally coordinated investigation where the French National Financial Prosecutor appropriately claimed [17] that his office had been the "pivot" – and where most of the penalties were payable in France.

Had these procedural innovations been adopted a decade earlier, it is unlikely that the DoJ would have needed to exercise its territorial muscle to go after Alstom, Pierucci, and Hoskins. The political will to make these changes and other changes in Europe should be recognized and applauded: crime is rapidly globalizing; prosecutors imperatively must coordinate their responses to deal with it rather than risk friction by unilaterally extending their territorial reach.

Frederick Davis is a member of the New York and Paris Bars, and is the principal of Fred Davis Law Office LLC, https://freddavisnylaw.com/ [18] . He is a Lecturer in Law at Columbia Law School and Yale Law School, where he teaches courses in comparative and transnational criminal procedures. Cambridge University Press published his book *American Criminal Justice: An Introduction.*

Links
[1] https://law.justia.com/cases/federal/appellate-courts/ca2/20-842/20-842-2022-08-12.html
[2] https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery
[3] https://www.ctd.uscourts.gov/content/janet-bond-arterton
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