

UBS Libor trader attacks “unprecedented” US prosecution

Tom Webb, 3 October 2014

Former UBS trader Roger Darin, a Swiss national and resident who faces US Libor manipulation charges, says the legal theory behind his DoJ indictment is an “unprecedented attempt” at expanding the extraterritorial reach of US criminal law.

In court documents filed on 2 October, Darin argued that the government has failed to show a strong enough connection between his alleged conduct and the US. He said he has never resided in the US, and worked for UBS in Singapore, Tokyo and Zurich, where he traded yen derivatives.

The indictment against Darin was unsealed by Southern District of New York Magistrate Judge Frank Maas in 2012. Darin was charged with conspiring to commit wire fraud with fellow UBS trader Tom Hayes, who also faces US and UK charges.

Darin allegedly agreed to make inaccurate yen Libor submissions on behalf of UBS that benefited Hayes’ trading positions.

“Before this court is an unprecedented attempt to expand the extraterritorial reach of the United States criminal law,” Darin argued. “The [US] government has charged Roger Darin, a foreign national, with conspiring to manipulate a foreign financial benchmark, for a foreign currency, while working for a foreign bank, in a foreign country.”

Darin said the only connection between his alleged manipulation and the US was that the Libor benchmark was published by third parties in the US, “along with virtually every other country in the world”.

He argued that this connection is too weak to impose criminal liability, and that the US constitution would block such prosecutorial over-reach.

However, in the indictment, the DoJ said the alleged conspiracy harmed financial services institutions located in the US.

In doing so, Richard Holwell at Holwell Shuster & Goldberg in New York, a former Southern District of New York judge, said the DoJ “isn’t breaking new ground”.

“The government’s argument is a classic one,” he said. “If you stand in Canada and fire a gun across the border, and knew that would have a direct effect on the US, then it’s fair to prosecute. The government probably has the stronger side of the argument in this case.”

Darin said his prosecution would also clash with principles of international comity, which forces courts to avoid unreasonably interfering with other nations’ sovereignty,

Comity can be ignored in extremely serious cases, such as treason or offences by military forces. This would be unlikely to apply in Darin’s case, he said. If it did, Japan or Singapore could also assert jurisdiction. Switzerland could have jurisdiction because of Darin’s nationality and Swiss residence.

“Here, in contrast, the United States asserts the right to reach into Swiss territory, to prosecute a Swiss national living in Switzerland, for conduct that took place in other non-US countries”, Darin said. “The risk of undue interference with these other countries’ right to independently regulate their own citizens and conduct taking place within their own territory is plain.”

Darin also said wire fraud conspiracy applies only to actions that take place in the US. US wire fraud legislation contains no mention of extraterritorial application, and US law must only apply outside the US when legislation clearly indicates that this is intended, Darin argued.

Shari Brandt at Richards Kibbe & Orbe in New York said the case could set an important precedent if the court agrees with Darin’s arguments.

“It could jeopardise other Libor prosecutions, and affect the investigation and prosecution of alleged wire fraud conspiracies based on foreign conduct in other matters,” she said.

Plaintiffs in private Libor-related lawsuits have also had to deal with a potential weak connection between alleged conduct and the US, Brandt said.

“The civil lawsuits contain similar types of allegations to the prosecutions,” she said. “Judge Daniels in the Southern District of New York has been asking plaintiffs to explain how the allegations actually affected the US or took place here. It’s become an important point both in criminal prosecutions and in civil lawsuits.”

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