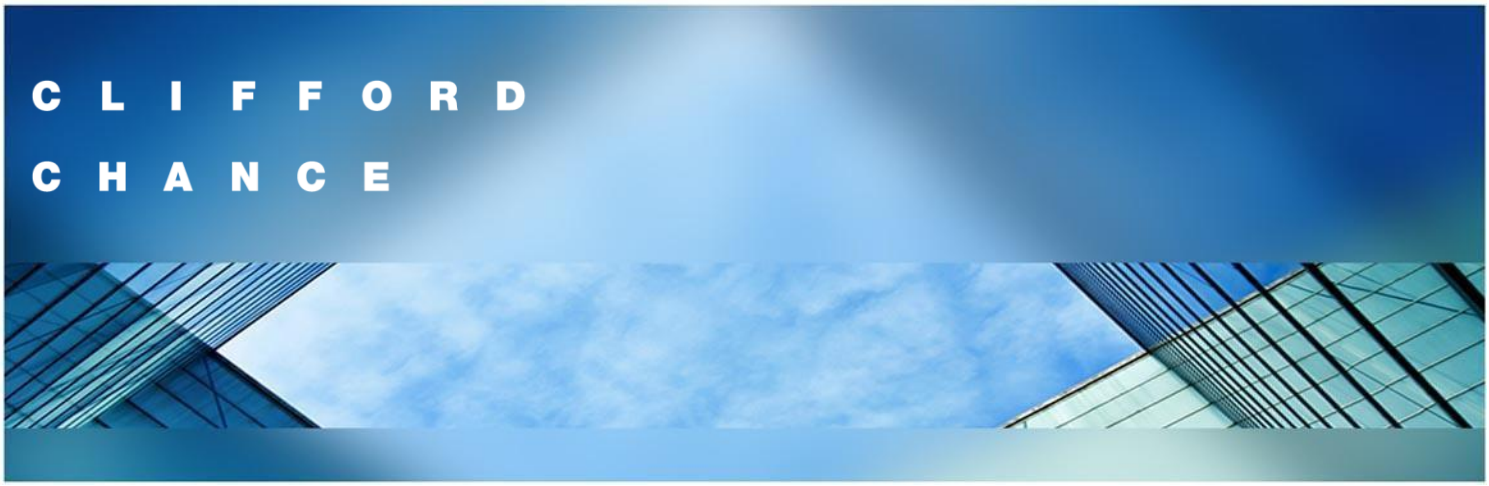

SECOND CIRCUIT AFFIRMS BANK FRAUD CONVICTIONS IN SANCTIONS EVASION CASE

On July 20, 2020, the United States Court of Appeals for the Second Circuit issued its opinion in *United States v. Atilla*, which upheld the conviction of Mehmet Hakan Atilla,[1] for, among other things, conspiring to violate US sanctions and to commit bank fraud. The *Atilla* opinion is the first appellate court decision to affirm a bank fraud conviction in the context of a scheme to evade US sanctions. The case arose out of the US Department of Justice's ("DOJ") investigation and prosecution of a multibillion-dollar scheme to evade US economic sanctions and launder Iranian oil proceeds through Halkbank, a Turkish state-owned bank. DOJ charged that Atilla—a former Deputy General Manager at Halkbank—and his co-conspirators helped to steer billions of US dollars to Iran by disguising Iranian oil proceeds as permissible payments and humanitarian assistance.

BACKGROUND

In January 2018, Atilla was tried and convicted by a jury in the Southern District of New York on charges of conspiracy to violate the International Emergency Economic Powers Act ("IEEPA") and to defraud the United States, bank fraud, conspiracy to commit bank fraud, and conspiracy to commit money laundering.

Atilla's appeal of his conviction proceeded under unusual circumstances. By the time the Second Circuit heard oral argument on his appeal in December 2019, Atilla had already completed his sentence of 32-months imprisonment and been deported to Turkey, where he was welcomed by the Turkish government and, in October 2019, appointed to become CEO of the Istanbul Stock Exchange.[2] Atilla nevertheless pressed ahead with his appeal. Notably, DOJ has indicted and

[1] No. 18-1589, 2020 WL 4045356 (2d Cir. July 20, 2020).
[2] *See https://www.bloomberg.com/news/articles/2019-10-22/turkey-picks-ex-banker-convicted-in-the-u-s-as-new-bourse-ceo.*

charged his former employer Halkbank with near-identical counts, including bank fraud and conspiracy to commit bank fraud.

This case was first unsealed in March 2016 when Atilla's co-defendant Reza Zarrab was arrested on identical charges. Zarrab initially contested the charges vigorously, including arguing that DOJ could not apply a bank fraud theory since there was no alleged scheme to deprive any victim bank of money or property or otherwise expose it to loss.[3] At oral argument before the district court, Zarrab's counsel contended that the US correspondent banks actually benefited from the alleged scheme: "They process the wire transfer [and] have gotten some compensation for that. If the scheme works, the bank is better off. Every other bank fraud case I have ever seen, if the scheme works, the bank is worse off."[4]

The district court rejected this argument, holding that when a defendant intentionally withholds or falsifies material information, "'the defendant will have already exposed the [bank] to 'immediate harm by denying [the bank] the right to control [its] assets by . . . depriving [the bank] of the information necessary to make discretionary economic decisions.'"[5] The district court also credited DOJ's argument that the sanctions evasion scheme exposed the US banks to the risk of "massive fines and forfeiture," noting, "[b]y way of example," that DOJ had made HSBC Bank "forfeit $1.256 billion [and] enter into a deferred prosecution agreement because it had violated the IEEPA."[6]

After the district court rejected these arguments, Zarrab pleaded guilty on the eve of trial and testified as a principal government witness against Atilla. The evidence adduced at trial included testimony by Zarrab that Atilla, aided by Halkbank and others, had helped concoct schemes to evade US sanctions by deploying a web of front companies, falsified bank documents, and sham transactions in gold, food, and medicine, to conceal from US banks the true beneficiaries of payments for Iran.[7] With respect to the bank fraud charge, DOJ argued, and the district court agreed, that the evidence showed that the co-conspirators transferred Iranian oil proceeds by deceiving US correspondent banks into processing dollar denominated payments by using falsified documents to make it appear as if these transactions involved payments for gold or food, and that Atilla knew from meetings with US officials that banks could be exposed to sanctions or criminal prosecutions for violating IEEPA.[8]

Atilla did not challenge, at either the district court or on appeal, the sufficiency of the government's proof that the alleged scheme exposed the victim banks to potential loss or deprived them of money or property within the meaning of the bank fraud statute. Instead, as discussed below, Atilla's appeal focused on the

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3 *See United States v. Zarrab*, No. 15 Cr 867 (RMB), 2016 WL 6820737, at *11, 13 (S.D.N.Y. Oct. 17, 2016) ("Zarrab contends that Count III must be dismissed because 'there is no allegation that [he] conspired to make a material misrepresentation to a U.S. bank, harm a U.S. bank, or obtain money or property from a U.S. bank.' (Mot. to Dismiss at 25.) Zarrab argues that 'the government is attempting to convert allegations that Zarrab participated in a scheme to structure transactions for the purpose of evading sanctions, by wiring funds to or from non-restricted entities, into a separate conspiracy to mislead financial institutions that happened to have a role in effecting those transactions.' … The defense also argues that the Indictment fails to allege that Zarrab conspired to expose the bank to loss.").

4 *Id.* at *14.

5 *Id.*

6 *Id.*

7 *See United States v. Atilla*, No. 15 Cr 867 (RMB), 2018 WL 791348, at *5-8 (S.D.N.Y. Feb. 7, 2018).

8 *See id.* at *6-7, 9-10, 11.

IEEPA conviction, including the sufficiency of the evidence with respect to that charge and the requisite US nexus, as well as other evidentiary issues.

ISSUES RAISED ON APPEAL

The Second Circuit's opinion affirmed all of Atilla's convictions and rejected each of the four challenges that he raised on appeal: (1) that the district court erred in instructing the jury on IEEPA; (2) that there was insufficient evidence to support all charges of conviction, including conspiracies to violate IEEPA and to commit bank fraud, because there was no evidence Atilla knew the schemes would involve US banks; (3) that his conviction of conspiring to defraud the United States required a finding that he had deprived the government of a property interest, such as tax revenue; and (4) that the district court abused its discretion by excluding a phone call recording that Atilla sought to introduce at trial.[9]

The Second Circuit's disposition of the first challenge bears noting here. Atilla argued that the district court had incorrectly instructed the jury that it could convict him of conspiring to violate IEEPA merely for agreeing to evade or avoid secondary sanctions that had not yet been imposed on Halkbank.[10] The Second Circuit agreed with Atilla that this jury instruction was erroneous, holding that Atilla could not be convicted "merely for conspiring to avoid the imposition of future sanctions."[11]

But the Second Circuit decided that this error was harmless, because the jury would have necessarily convicted Atilla under an alternate, "properly instructed theory of liability": "namely, that Atilla conspired to violate the IEEPA by exporting services (including the execution of U.S.-dollar transfers) from the United States to Iran in violation of the [Iranian Transactions and Sanctions Regulations ("ITSR")]."[12]

Moreover, the Second Circuit noted that "[t]o find Atilla guilty of bank fraud and bank fraud conspiracy, the jury was required to find that he obtained or agreed to obtain, through deceit, funds in the custody of one of several named federally insured banks located in the United States."[13] Because this was the same predicate conduct that would support a conviction on the IEEPA charge, the Second Circuit reasoned that "the jury necessarily would have found Atilla guilty of [conspiracy to violate the IEEPA] based on the properly instructed ITSR theory."[14]

In affirming Atilla's bank fraud convictions, the Second Circuit effectively endorsed DOJ's approach of charging bank fraud in connection with a scheme to violate IEEPA, even where there was no evidence that Atilla or his co-conspirators sought to steal funds from a US bank, or otherwise intended to cause a US bank to incur an actual monetary loss.

IMPLICATIONS

This prosecution and its companion cases are indicative of the growing trend in which DOJ relies on bank fraud or bank fraud conspiracy charges in connection

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9 2020 WL 4045356 at *2.

10 *Id.* Atilla also argued that his conviction for money laundering conspiracy was likewise defective, because that count "effectively incorporated the erroneous IEEPA charge." *Id.* at *2 (quoting Appellant Br.).

11 *Id.* at *5.

12 *Id.*

13 *Id.*

14 *Id.*

with alleged schemes to violate US sanctions.[15] This trend is significant because bank fraud charges carry a longer statute of limitations (10 years) than IEEPA charges (5 years).[16] In addition, it can be easier for DOJ to establish the necessary intent for a bank fraud prosecution, which does not require proof of the specific intent to willfully violate any particular sanctions regime.

The Second Circuit's acceptance of the expansion of bank fraud to encompass sanctions evasion is also notable because Congress did not enact the bank fraud statute as a catch-all statute to cover a wide range of criminal conduct. Instead, the legislative history of the bank fraud statute demonstrates that Congress intended it to fill "various gaps in existing statutes," rather than to punish conduct already regulated by a narrower statute.[17] DOJ policy is consistent with this view.[18] Despite this stated policy, DOJ's charging decisions here indicate that it is willing to pursue bank fraud charges in parallel to IEEPA violations in cases involving financial institutions, even when the conduct at issue is substantially the same. Thus, when the conduct at issue is already addressed by the IEEPA statute, prosecuting that conduct as bank fraud could contravene Congress's intent and DOJ's stated policy, unless there are some aggravating factors establishing the "intent to victimize a bank by fraud."[19]

In this case, however, the contours of bank fraud liability in the sanctions evasion context were not squarely before the Second Circuit. Atilla did not challenge on appeal DOJ's ability to pursue bank fraud charges in parallel with IEEPA charges based on the same predicate conduct, nor did he raise the arguments that Zarrab had made before the district court challenging the loss theory underpinning the bank fraud charges. Thus, there remain open questions as to what kind of deceptive conduct suffices to support a bank fraud charge when the conduct at issue is otherwise regulated by narrower statutes, like IEEPA or the Bank Secrecy Act.

For example, it is unclear whether a bank fraud charge could apply if a defendant allegedly deceives a bank into processing a transaction that it would have otherwise rejected for internal policy reasons, but the transaction does not itself constitute a criminal violation and does not otherwise expose the "victim" bank to financial loss. The *Atilla* opinion does not offer clear limiting principles to guide future prosecutions.

Nevertheless, financial institutions, corporates, and executives should expect that DOJ will continue to pursue bank fraud prosecutions in connection with investigations of sanctions-related conduct.[20] For example, in May 2020, DOJ

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15 Since initiating this case in 2016, DOJ has charged bank fraud in connection with sanctions violations in at least two other reported cases – *United States v. Nejad*, 18-cr-224 (AJN), ECF No. 2 (S.D.N.Y. Mar. 19, 2018) and *United States v. Huawei Technologies Co. Ltd*., 18-cr-457 (AMD), ECF No. 19 (E.D.N.Y. Jan. 24, 2019). We are aware of only one reported case before 2016: in *United States v. Amirnazmi*, the defendant was charged and convicted of violating IEEPA, bank fraud, and making false statements, but the convictions for bank fraud were not at issue on appeal. *See* 645 F.3d 564 (3d Cir. 2011).

16 *See* 18 U.S.C. § 3293(1) (bank fraud); 18 U.S.C. § 3282(a) (applicable to non-capital offenses such as IEEPA or money laundering).

17 *See* Comprehensive Crime Control Act of 1983, S. Rep. No. 98-225. 98th Cong, 1st Sess. 378 (1983).

18 *See* U.S. Dep't of Justice, Criminal Resource Manual § 826 ("Prosecutions under Section 1344 [the bank fraud statute] may be analogized to the traditional use of the mail fraud statute to prosecute fraudulent conduct not otherwise the subject of specific criminal statutes.").

19 *Cf. United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2012) ("[T]he bank fraud statute is not an open-ended, catch-all statute encompassing every fraud involving a transaction with a financial institution. Rather, it is a specific intent crime requiring proof of an intent to victimize a bank by fraud.").

20 To date, Halkbank appears to be the only financial institution that DOJ has charged with bank fraud in connection with sanctions violations under IEEPA.

unsealed an indictment against 28 North Korean and five Chinese bankers charging them with violations of IEEPA and bank fraud, among other things, and accusing them of using more than 250 front companies to disguise $2.5 billion in illicit payments on behalf of North Korea's state-owned Foreign Trade Bank.[21] In addition, DOJ could in the future seek to expand the application of a bank fraud theory to other kinds of crime involving financial institutions, such as conduct that is traditionally prosecuted as money laundering or as violations of the Bank Secrecy Act.

Since bank fraud charges carry a longer statute of limitations and do not require the same proof of willfulness as IEEPA or Bank Secrecy Act offenses, this practice heralds a significant expansion of potential criminal liability.

21 *See United States v. Man et al.*, 20-cr-32 (RC), ECF No. 1 (D.D.C. Feb. 5, 2020).

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