Clients&FriendsMemo

US Second Circuit Finds Testimony Compelled by UK Regulators to be Inadmissible in Criminal Proceedings

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Creating a potential new impediment for collaboration between UK and US investigators, the Court of Appeals for the Second Circuit in New York recently held that evidence derived from compelled testimony cannot be used in a criminal case in the United States, even if the testimony was lawfully obtained in the foreign jurisdiction. In overturning the convictions of two former Rabobank traders charged with manipulation of the London Interbank Offered Rate, the Second Circuit in *United States v. Allen*[1] adopted a broad view of the Fifth Amendment right against involuntary self-incrimination as it applies to statements made to foreign regulators and law enforcement. The decision will make it more likely that compelled statements made to investigators in the UK and elsewhere will be inadmissible against criminal defendants in the US.

Background

The case arose out of parallel investigations conducted by the UK's Financial Conduct Authority ("FCA") and the US Department of Justice ("DoJ") into alleged manipulation of the London Interbank Offered Rate ("LIBOR") by employees of Rabobank.

In 2013, two former Rabobank traders and UK citizens, Anthony Allen and Anthony Conti, were interviewed by the FCA pursuant to its statutory authority to compel interviews (when such power is exercised the individual under investigation may be subject to a fine and/or imprisonment for non-compliance).[2] Each provided statements regarding their roles in setting LIBOR while at Rabobank, and the FCA showed their testimony transcripts to a third trader, Paul Robson. The FCA ultimately stayed its investigation and any enforcement action of Rabobank employees, including Robson, while the DoJ pursued criminal charges against them.

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[1] *United States v. Allen et al.*, No. 16-898 (2nd Cir. July 19, 2017).

[2] Pursuant to section 171 of the Financial Services and Markets Act 2000 ("FSMA") an investigator of the FCA (as defined in section 167 of FSMA), has the power to compel a person under investigation, or any person connected with the person under investigation, to attend an interview before the investigator or otherwise produce information required for the investigation. If a person so compelled fails to comply with such a request, the investigator may seek that the request be certified to the court, after which the court may sanction that person as if in contempt of court for non-compliance (provided there was no reasonable excuse for non-compliance). The penalty for contempt of court may include a term of imprisonment, a fine, or both. *See* section 177 of FSMA.

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The following year, Robson was indicted in the US on wire fraud charges. He subsequently pled guilty and entered into a cooperation agreement with the DoJ, providing evidence and testimony against other Rabobank employees. Several months later, Allen and Conti were indicted on multiple counts of wire fraud and conspiracy to commit wire fraud and bank fraud based on evidence Robson had provided to US authorities.

At trial, Allen and Conti sought to supress Robson's testimony under the US Supreme Court's ruling in *Kastigar v. United States*,[3] which found that if a witness is compelled to testify, he must be granted immunity from use of the compelled testimony in subsequent criminal proceedings (so-called "direct use" immunity) *and* immunity from use of evidence derived from the testimony (so-called "derivative use" immunity). The DoJ contended that, in constructing the case against the defendants, the prosecution took steps to avoid the direct use of their compelled testimony, including conducting interviews independent of those conducted by the FCA. The district court sided with the prosecution, finding that Robson's review of Allen and Conti's testimony to the FCA did not taint the evidence that he later provided because the DoJ had demonstrated an independent source for such evidence — namely, Robson's personal experience and observations.[4] Allen and Conti were each convicted and sentenced, respectively, to two years' and one year and a day's imprisonment.

On appeal, Allen and Conti argued that their Fifth Amendment rights were violated when the DoJ used "tainted evidence" from Robson which was, in essence, derived from their own compelled testimony to the FCA. The DoJ's position was that the Fifth Amendment did not apply to testimony compelled by a foreign government, which was the equivalent of statements made to a private sector employer under the threat of termination. Alternately, the DoJ argued that the evidence provided by Robson was untainted by the compelled testimony of Allen and Conti. The Second Circuit rejected the DoJ's positions and unanimously reversed the convictions, holding that in order to be admissible, incriminating statements obtained by foreign officials must have been made voluntarily and cannot have been compelled, even if obtained in full compliance with the laws of the foreign government.

Protections Against Self-Incrimination in the UK and US

The protection against self-incrimination in the US is generally broader than that pertaining in the UK. The Fifth Amendment to the US Constitution states, "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." Courts in the US do not require every procedural step to be adhered to in order to ensure the admissibility of statements — for example, foreign police officers are not required to provide *Miranda* warnings to inform

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[3] 406 U.S. 441 (1972).

[4] Under *Kastigar*, where a witness who has invoked the Fifth Amendment is nonetheless compelled to testify, a "*Kastigar* hearing" is conducted at which the prosecution must demonstrate its case is not based on tainted compelled testimony.

defendants overseas of their constitutional right to remain silent.[5] However, the Second Circuit's decision in *Allen* reinforces the decision already reached by several other circuits throughout the US that a statement must be "voluntary" and cannot be compelled if it is to be admissible in a criminal trial. This requirement applies regardless of whether the statement was compelled in accordance with the laws of the foreign country. In the words of Judge José Cabranes, who wrote the unanimous opinion in *Allen*, "the right not to testify against oneself at trial is absolute."

In the UK, the common law and statutory protection of the "privilege against self-incrimination" protects a person from being compelled to produce documents or provide information which may incriminate the individual in criminal proceedings or expose him to a penalty for commission of a crime (akin to "direct use" immunity in the US).[6] However, this protection is not absolute; it is common for regulators to exercise their statutory investigatory powers to conduct interviews which may lead to a person being compelled to disclose incriminating information. Compelled statements obtained by the FCA may not be directly used as evidence against the accused in certain types of criminal proceedings, but this does not mean that the individual is shielded from providing the requested information, or from declining to answer questions.[7] Rather the FCA is restricted in dealing with the information in certain ways.

In addition, information "derived" from such compelled statements may be admissible in criminal proceedings in limited circumstances including where the accused asks a question in relation to, or adduces evidence in relation to, the compelled evidence. The FCA may also provide a copy of the transcript of a compelled interview to a co-defendant in a criminal prosecution (which is not unusual and indeed occurred when Robson was provided with the transcripts of Conti and Allen's interviews), and use such a transcript to cross-examine the co-defendant. Failure to comply with an FCA statutory request for an interview or to cooperate and answer questions may be dealt with as if the individual were in contempt of court, and the penalty may include a term of imprisonment, a fine, or both.[8] Answering questions in such an interview with deliberately false or misleading information is also a criminal offence.[9]

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[5] *See*, *e.g.*, *United States v. Martindale*, 790 F.2d 1129, 1131-32 (4th Cir. 1986) (holding that defendant's statement to British officers at Scotland Yard was admissible despite the officers' failure to provide *Miranda* warnings).

[6] *See* section 14(1) of the Civil Evidence Act 1968, which applies to incrimination and penalties for domestic criminal offences only. However, an English court may exercise discretion and apply the protection where there is a risk of incrimination under foreign criminal law. *See Arab Monetary Fund v Hashim* [1989] 1 WLR 565 as referred to in *Compagnie Noga v Australia and New Zealand Banking Group Ltd* [2007] EWHC 85 (Comm).

[7] *See* section 174 of FSMA.

[8] *See* section 177 of FSMA.

[9] *See* section 177(4) of FSMA, which provides that a person who knowingly or recklessly provides false or misleading material information to a regulator pursuant to a FSMA statutory request to provide information, will be guilty of an offence, and liable on summary conviction to a term of imprisonment not exceeding six months or a fine not exceeding the statutory maximum, or if convicted on indictment he or she will be liable to a term of imprisonment not exceeding two years, or a fine, or both.

The UK's Serious Fraud Office also has the power to compel individuals to answer questions pursuant to section 2 of the Criminal Justice Act 1987. However, answers provided during such interviews are generally not admissible against the interviewee in most types of criminal proceedings.[10]

Conclusion

The Second Circuit's decision in *Allen* introduces several new obstacles that must be considered when US and overseas investigators and prosecutors seek to collaborate. US federal prosecutors will need to carefully coordinate investigative approaches with overseas regulators, and be wary of any compelled testimony obtained by foreign governments. If foreign testimony is compelled, US prosecutors will need to meet the heavy burden under *Kastigar* to demonstrate that evidence it seeks to use in a criminal proceeding was clearly derived from independent sources. Time will tell how significant a burden the *Allen* decision places on the trend in recent years for US, UK, and other international investigators to work together, particularly on cross-border white collar prosecutions.

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[10] *See* section 2(8) of Criminal Justice Act 1987.