July 17, 2018

Section 1782 Discovery

Second Circuit Reverses a Section 1782 Order Directing a Law Firm to Produce a Foreign Client's Documents

SUMMARY

On July 10, 2018, in *Kiobel* v. *Cravath, Swaine & Moore LLP*, No. 17-424-cv (2d Cir.), the United States Court of Appeals for the Second Circuit reversed a district court order granting a petition under 28 U.S.C. § 1782 ("Section 1782") directing Cravath, Swaine & Moore LLP ("Cravath") to produce documents for use in the plaintiff's planned proceeding in The Netherlands against one of that firm's clients, Royal Dutch Shell ("Shell"). Although the reversal limits the circumstances in which Section 1782 may be used to obtain discovery in the United States in aid of a foreign proceeding, the Second Circuit's decision highlights the potential that delivery of materials to counsel in the United States in connection with a request for legal advice could subject the underlying documents to disclosure in litigation either in the United States or abroad.

BACKGROUND

Section 1782 permits "any interested person" to petition a federal district court for discovery (including testimony or documents) from persons located in that district for use in a foreign proceeding. In *Kiobel*, a potential plaintiff in Dutch litigation filed a Section 1782 petition against Cravath, counsel for Shell, to obtain documents in Cravath's possession that Shell had provided to Cravath in connection with an earlier action in New York involving the same plaintiff.[1] In the earlier action, the documents had been produced to the plaintiff pursuant to a stipulated confidentiality order restricting use of the documents produced during discovery in that case "solely for purposes" of that prior litigation. In *Kiobel*, the plaintiff argued that she required the materials to satisfy the high pleading standards for her contemplated separate litigation in The Netherlands. The plaintiff did not seek the documents (and apparently could not have obtained all of them) from Shell outside the United States, but instead subpoenaed them from Cravath. The district court ordered Cravath to produce the documents, directing Cravath and the plaintiff

to enter into a new confidentiality stipulation limiting use of the documents to the contemplated Dutch proceeding. Cravath appealed the district court's order to the Second Circuit.[2]

The Second Circuit first rejected Cravath's argument that the district court lacked jurisdiction to order production of documents held by an agent in the United States when the principal was not within the jurisdiction of the court. The court found no room for such an exception in the statutory language, which provides for discovery when the person from whom discovery is sought "resides or is found" in the district.[3]

Nonetheless, the Second Circuit held that the existence of jurisdiction to compel discovery under Section 1782 does not end the analysis because the determination of whether to grant such discovery is a matter of discretion, reviewable on appeal under an abuse of discretion standard. In applying that standard, the court relied on the factors set forth by the Supreme Court in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The court concluded that two of those factors counseled against ordering production: first, that "the real party from whom documents are sought (here, Shell) is involved in foreign proceedings," making the need for Section 1782 assistance less apparent; and second, that plaintiffs were attempting to circumvent more restrictive discovery practices in The Netherlands.[4]

The Second Circuit went on to observe that the *Intel* factors "are not to be applied mechanically" and that the district court should consider as well "other pertinent issues arising from the facts of the particular dispute."[5] In particular, the court concluded that allowing discovery in the circumstances here would (i) discourage open communication with counsel, (ii) undermine confidence in confidentiality orders, and (iii) upset the balance between a client's right to the return of its documents and a lawyer's right to retain a copy of the client file for his or her protection. The court stated that "[i]f foreign clients have reason to fear disclosing all pertinent documents to U.S. counsel, the likely results are bad legal advice to the client, and harm to our system of litigation."[6]

IMPLICATIONS

The Second Circuit's decision is noteworthy in three ways. *First*, the decision appears to recognize a kind of privilege to deliver documents to counsel in connection with a request for legal advice without increasing exposure to Section 1782 discovery. The court had suggested such a doctrine in *dicta* in two prior opinions, but had not previously relied on it to deny a Section 1782 petition.[7] *Second*, the Second Circuit's opinion reinforces the benefits and need for reliability of the types of confidentiality orders routinely sought and granted in federal court litigation. *Third*, the court's opinion emphasizes that the four *Intel* factors are not exclusive, and that other policies should be considered—and, indeed, may be paramount—in considering Section 1782 petitions.

While the Second Circuit's order could therefore be seen as reducing the circumstances in which discovery may be compelled under Section 1782, the decision reconfirms that Section 1782 remains a

powerful means by which persons outside the United States can use the broad discovery devices available under U.S. law to obtain access to documents and information to which they may not be entitled under the law of the forum. In particular, although the *Kiobel* court wrote relatively expansively about the risk that legal advice could be curtailed if the requested discovery were permitted, the court provided no safe harbor. The court emphasized, for example, that it regarded the case to be "possibly unique": "The decision to alter the confidentiality order without Shell's participation, and without considering the costs of disclosure to Shell, makes this case exceptional, and mandates reversal."[8] It is unclear whether the court would bar Section 1782 discovery of documents placed in the hands of counsel if there were no need to modify a protective order.

Kiobel thus highlights the risks of providing documents to counsel in the United States to obtain legal advice or representation in connection with litigation or investigations. This consideration is particularly relevant because the attorney-client privilege and work product doctrines generally do not protect from discovery most ordinary-course business documents delivered to counsel to obtain legal advice.[9] Parties in jurisdictions in which discovery is limited should consider whether delivering documents for review by counsel in the United States—as opposed, for example, to having them reviewed outside the United States—increases the potential exposure to document discovery in the United States.

* * *

ENDNOTES

1 In 2013, the U.S. Supreme Court had dismissed the earlier action for lack of subject matter jurisdiction. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

2 As pro bono counsel to the New York City Bar Association, Sullivan & Cromwell filed an amicus brief urging reversal. The Second Circuit cited the amicus brief in its decision.

3 28 U.S.C. § 1782(a).

4 *Kiobel* v. *Cravath, Swaine & Moore LLP*, 2018 WL 3352757, at *5 (2d Cir. July 10, 2018). The Supreme Court in *Intel* enumerated the following two other factors to be considered in exercising discretion under Section 1782: (1) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; and (2) "whether the request is 'unduly intrusive or burdensome.'" *Id*. at *4-5 (quoting *Intel Corp.*, 542 U.S. at 264-65).

5 *Id*. at *5.

6 *Id*. at *7.

7 *Application of Sarrio, S.A.*, 119 F.3d 143 (2d Cir. 1997) (remanding to district court after concluding that subsequent waiver of privilege removed basis for order); *Ratliff* v. *Davis Polk & Wardwell*, 354 F.3d 165 (2d Cir. 2003) (holding that law firm was subject to a Section 1782 petition after voluntarily turning documents over to SEC).

8 *Kiobel*, 2018 WL 3352757, at *6, 7.

9 *See*, *e.g.*, *Fed. Hous. Fin. Agency* v. *HSBC N. Am. Holdings Inc.*, 2014 WL 1327952, at *3 (S.D.N.Y. Apr. 3, 2014) ("To the extent that the request for advice attaches business records created in the ordinary course of business, those business records do not become privileged because copies are also sent to counsel in connection with a request for advice.").

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York		
Theodore Edelman	+1-212-558-3436	edelmant@sullcrom.com
Joseph E. Neuhaus	+1-212-558-4240	neuhausj@sullcrom.com
Matthew A. Schwartz	+1-212-558-4197	schwartzmatthew@sullcrom.com
Thomas W. Walsh	+1-212-558-7334	walsht@sullcrom.com
London		
Theodore Edelman	+44-20-7959-8450	edelmant@sullcrom.com