ALERT MEMORANDUM

Second Circuit Holds that U.S. Law Firm Need Not Produce Foreign Client's Documents Pursuant to 28 U.S.C. § 1782

July 17, 2018

On July 10, 2018, the Second Circuit in *Kiobel v. Cravath, Swaine & Moore LLP*,[1] held that a district court abused its discretion under 28 U.S.C. § 1782 by ordering a U.S.-based law firm to produce, to a litigant in foreign proceedings, documents that were held by the firm on behalf of a foreign client. The decision reinforces existing Second Circuit precedent counseling a cautious approach to requests to compel U.S. counsel to produce documents under Section 1782 that are undiscoverable abroad, as so doing tends to jeopardize the policy favoring open communications between foreign clients and their U.S. attorneys. The decision is also noteworthy in that it turns on the existence of a protective order covering the documents at issue, and thus underscores the continued importance of obtaining confidentiality agreements in the context of both civil litigation and enforcement proceedings both in the U.S. and abroad. Finally, the decision informs a growing body of law dealing with subpoenas directed at counsel seeking documents unavailable from their clients, which has relevance outside of the Section 1782 context, including where U.S. counsel collect and review foreign documents for production in civil litigation or government investigations.

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[1] *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, No. 17-424-CV, --- F.3d ----, 2018 WL 3352757 (2d Cir. July 10, 2018).

Background

In 2002, Esther Kiobel filed a class action lawsuit against Royal Dutch Petroleum and related entities ("Shell") for alleged violations of the Alien Tort Statute. That case, *Kiobel v. Royal Dutch Petroleum Co.*, was subsequently consolidated for pretrial purposes with three other actions bringing similar allegations against Shell (the "*Wiwa* actions").[2] In all of these proceedings, Shell was represented by the U.S.-based law firm Cravath, Swaine & Moore LLP ("Cravath").[3]

Discovery in the consolidated actions proceeded subject to a stipulated protective order, which limited the use of documents marked "confidential" solely to the actions. Shell produced a large volume of documents through Cravath, most of which were marked confidential.[4] Ultimately, the *Wiwa* actions were settled, and *Kiobel* was dismissed for lack of subject-matter jurisdiction on appeal.[5]

Years later, Ms. Kiobel prepared to bring suit against Shell in the Netherlands, raising similar allegations to those in her earlier U.S. lawsuit. To facilitate the Dutch lawsuit, in October 2016, Ms. Kiobel filed a Section 1782 petition in the Southern District of New York, seeking to obtain from Cravath the documents, deposition transcripts, and other discovery materials in its possession from the *Kiobel* and *Wiwa* actions.[6]

Section 1782 is a federal statute through which litigants may obtain discovery in the United States for use in foreign proceedings. The statute has three elements: (i) the person from whom discovery is sought must "reside" or be "found" in the district where the court is located; (ii) the discovery must be "for use in a proceeding in a foreign or international tribunal"; and (iii) the request for discovery must be "made by a foreign or international tribunal or upon the application of any interested person."[7] If the statutory requirements are satisfied, the decision to order discovery is left to the discretion of the court, which is guided by four non-exclusive factors articulated by the Supreme Court in *Intel Corporation v. Advanced Micro Devices, Inc.*[8]

On January 24, 2017, the District Court granted Ms. Kiobel's Section 1782 petition against Cravath, ruling that she had satisfied all three statutory elements, and that all four discretionary *Intel* factors weighed in favor of granting the petition.[9]

The Second Circuit's Decision

Cravath advanced two primary arguments on appeal. First, it argued that the District Court did not have jurisdiction over Cravath under the first statutory element of Section 1782 because Cravath only held the subpoenaed documents as counsel for Shell, which itself did not reside and was otherwise not found within the Southern District of New York. The Second Circuit summarily rejected this argument, holding that the statutory text of Section 1782 contains "no express mandate to consider a principal-agent relationship, or whether documents being held by the subpoenaed party belong to a foreign party."[10]

Cravath also argued that the District Court abused its discretion when it granted the Section 1782 application. Although the Second Circuit briefly touched upon the first and third *Intel* factors,[11] its

[2] *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386; *Wiwa v. Brian Anderson*, No. 01 Civ. 1909; and *Wiwa v. Shell Petroleum Development Corp. of Nigeria*, No. 04 Civ. 2665.
[3] *In re Kiobel*, No. 16 CIV. 7992 (AKH), 2017 WL 354183, at *1 (S.D.N.Y. Jan. 24, 2017).
[4] *Kiobel*, 2018 WL 3352757, at *1.
[5] *In re Kiobel*, 2017 WL 354183, at *1.
[6] *Id*. at *2.
[7] 28 U.S.C. § 1782(a).
[8] 542 U.S. 241, 264-65 (2004). The four *Intel* factors are: (i) whether the person from whom discovery is sought is a party to the foreign proceeding; (ii) the nature of the foreign tribunal, including whether the foreign tribunal is receptive to U.S. federal-court judicial assistance; (iii) whether the Section 1782 request is an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the U.S.; and (iv) whether the requested discovery is unduly intrusive or burdensome.
[9] *In re Kiobel*, 2017 WL 354183, at *7.
[10] *Kiobel*, 2018 WL 3352757, at *4.
[11] The court held that the first and third *Intel* factors counseled against granting the petition. As to the first factor, the court held that Shell, the real party from whom the documents were sought, was a party to the Dutch proceedings. With respect

analysis here turned primarily on two earlier Section 1782 decisions, *Sarrio* and *Ratliff*, which assessed whether U.S. counsel can be compelled to produce documents held on behalf of a foreign client.

In *Sarrio*, a foreign litigant sought documents under Section 1782 held by Chase Bank in New York on behalf of the litigant's adversary in a foreign proceeding.[12] In assessing whether the documents were protected from disclosure, the *Sarrio* court relied on the Supreme Court's decision in *Fisher v. United States*.[13] There, the Supreme Court reasoned that client documents cannot be subpoenaed from a lawyer if they are privileged from disclosure from the client. Otherwise, in the Court's view, clients would be prevented from obtaining "fully informed legal advice."[14] In *Sarrio*, the Second Circuit suggested, but ultimately did not decide, that a similar concern may prevent disclosure when a Section 1782 petition is targeted at the U.S. counsel of a foreign party, as the policy favoring open attorney-client communications "would be jeopardized if documents unreachable in a foreign country became discoverable because the person holding the documents sent them to a lawyer in the United States for advice . . . ."[15]

In *Ratliff*, a U.S. plaintiff sought documents pursuant to Section 1782 from the U.S. law firm Davis Polk & Wardwell ("Davis Polk"), which were held on behalf of a Dutch accounting firm, Ernst & Young.[16] The Second Circuit again raised the specter that a *Sarrio*-type privilege could protect the documents held by Davis Polk, but did not decide the issue because Davis Polk had voluntarily produced the documents in the course of an SEC investigation. The court held that this disclosure vitiated any *Sarrio*-type privilege that could have applied to the documents.[17]

In ruling on Ms. Kiobel's Section 1782 application, the Second Circuit emphasized that these earlier decisions "suggested" that a "district court should not exercise its discretion to grant a Section 1782 petition for documents held by a U.S. law firm in its role as counsel for a foreign client if the documents are undiscoverable from the client abroad, because this would disturb attorney-client communications and relations." Although potentially broad in scope, the Second Circuit's decision ultimately turned on what it called "extraordinary" and "possibly unique" factual circumstances. Of particular importance to the court, the documents sought by Ms. Kiobel were subject to a protective order with Shell, which in combination with "the more restrictive Dutch discovery processes," rendered the "documents at issue undiscoverable from Shell in the Netherlands."[18]

In the court's view, compelling discovery from Cravath under these circumstances would be "perilous."[19] First, it would in effect circumvent the protective order entered between Shell and Ms. Kiobel without a showing of "extraordinary circumstance or compelling need." This made the "case exceptional, and mandate[d] reversal." The court further expressed concern that circumventing the protective order could "inhibit foreign companies from producing documents to U.S. law firms, even under a confidentiality order, lest Section 1782 become a workaround to gain discovery." The interference this portended with attorney-client communications thus raised the same policy considerations that the court said in *Sarrio* and

to the second factor, the court found that statements by Ms. Kiobel's counsel suggested that the petition was an attempt to circumvent the more restrictive discovery practices in the Netherlands. *Kiobel*, 2018 WL 3352757, at *5.

[12] *Application of Sarrio, S.A.*, 119 F.3d 143, 144 (2d Cir. 1997).

[13] 425 U.S. 391 (1976).

[14] *Id*. at 403.

[15] *Sarrio*, 119 F.3d at 146.

[16] *Ratliff v. Davis Polk & Wardwell*, 354 F.3d 165, 167 (2d Cir. 2003).

[17] *Id*. at 170.

[18] *Kiobel*, 2018 WL 3352757, at *6. The protective order also distinguished the case from *Ratliff*, where the voluntary production to the SEC meant the documents at issue there had "already seen the bright light of public disclosure." *Id*. (citing *Ratliff*, 354 F.3d at 170).

[19] *Kiobel*, 2018 WL 3352757, at *6.

Ratliff could immunize the disclosure of documents held by U.S. counsel.[20]

In light of "the respect owed to confidentiality orders, and the concerns raised for lawyer-client relations in *Sarrio*," the Second Circuit concluded that the District Court abused its discretion in granting Ms. Kiobel's Section 1782 application.

Implications

Although the Second Circuit was careful to avoid casting *Sarrio* as providing a categorical rule or privilege, its decision nonetheless reflects the court's continued concern over impeding the ability of foreign companies to obtain legal advice in the United States due to threat of discovery of their U.S. counsel. While this concern does not obviate the need for caution whenever documents are transferred to counsel in the United States – Second Circuit law continues to support the position that such documents may be subpoenaed in appropriate circumstances – it does suggest that the court is rightly circumspect of litigants' attempts to circumvent obtaining documents from the real party in interest by instead taking advantage of that party's having sought legal advice in the United States. The decision also reiterates the practical importance of protective orders and confidentiality agreements in the context of both civil litigation and enforcement proceedings, as they may serve to avoid compelled production in subsequent or ancillary proceedings.

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[20] *Id*. at *7 (internal quotation marks omitted).