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US Courts Continue Reluctance Toward Foreign Discovery

By **Alexander Lawrence** (September 25, 2019, 2:12 PM EDT)

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While underutilized in the past, the use of U.S. Code Title 28, Section 1782, to obtain discovery in the United States for use in foreign proceedings is on the rise. U.S.-based law firms pose a tempting target for litigants seeking documents to use in foreign litigation.

The reasons are obvious. Discovery outside of the United States is much more limited, and the law firm clients may not be subject to Section 1782 discovery in the United States. U.S.-based law firms provide a possible end-run around these limits.

While the U.S.-based law firms may not control their clients' documents, they often have possession and custody of vast repositories of client documents, as well as documents obtained from their adversaries in litigation.

The list of firms that have been targets of Section 1782 discovery reads like a big law who's who.[1] While a few of these applications have been successful, the trend has been one of substantial headwinds against those seeking to use Section 1782 against U.S.-based law firms. A recent decision from Judge George Daniels of the U.S. District Court for the Southern District of New York in In re Hulley Enterprises[2] provides another example of this trend.

Discovery Under Section 1782

Under Section 1782, a federal district court may grant an applicant the authority to issue subpoenas under Rule 45 of the Federal Rules of Civil Procedure to obtain documents or testimony. An applicant needs to show three things:

1. It is an "interested person" in a foreign proceeding;

2. The proceeding is before a foreign "tribunal," which could include actual or contemplated judicial or other governmental proceedings;[3] and

3. The person from whom evidence is sought resides or is found in the district of the court before which the application has been filed.

If the threshold statutory factors are established, the district court typically considers certain factors laid

out by the U.S. Supreme Court in Intel Corp. v. Advanced Micro Devices Inc.,[4] to decide whether to exercise its discretion to grant the application. These discretionary factors include:

1. Whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach and, thus, accessible absent Section 1782 aid;

2. 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 the United States federal court judicial assistance;

3. Whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and

4. Whether the subpoena contains unduly intrusive or burdensome requests.

While in most cases involving U.S.-based law firms, the courts have found the statutory factors to be met, they have most often exercised their discretion to deny applications for discovery from the firms.

The Hulley Decision

The application arises out of a long-standing dispute between investors in Yukos Oil Co. and the Russian government arising out of the takeover of Yukos by Russian state-owned oil and gas companies Rosneft and Gazprom.

In furtherance of foreign litigation in the Netherlands, the investors sought documents from White & Case LLP. The investors sought two types of documents: (1) those that were generated at the time of White & Case's representation of Yukos in the 1998-2004 time period and that have remained in White & Case's continual custody since that time because of that representation; and (2) those documents that came into White & Case's possession because of their later representation of the Russian Federation in certain arbitration and other proceedings involving Yukos. Most, if not all of the documents, are maintained in White & Case's foreign offices.

While recognizing that the statutory factors were met, Chief Magistrate Gabriel Gorenstein rejected the application upon consideration of the discretionary Intel factors, including the potential Russian privilege questions and the investors' delay in pursuing the application.[5]

In connection with the burden factor, Magistrate Gorenstein recognized an important policy consideration. "If American courts entertain applications to obtain client documents and attorney depositions from American law firms with foreign offices, it will discourage foreign clients from engaging the foreign office of an American law firm for fear that American courts would order production of documents and depositions of attorneys that not might not be ordered by the country where the client is located. This would have a chilling effect on the ability of American law firms with foreign offices to provide representation to foreign clients."[6]

Magistrate Gorenstein relied on the Second Circuit's decision in Kiobel v. Cravath, Swaine & Moore LLP.[7] In Kiobel, the Second Circuit had, likewise, recognized 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."[8] Judge Daniels overruled the Yukos investors' objections to Magistrate Gorenstein's decision in all respects.

In particular, Judge Daniels recognized the important public policy considerations expressed by the Second Circuit in Kiobel. Judge Daniels recognized the serious impact of a contrary decision on lawyer-client relations and that "attorneys located in the United States should not have to fear that Section 1782 will be used to require them to produce materials belonging to their foreign client."

Considerations for U.S.-Based Law Firms

The circumstances under which foreign litigants seek documents under Section 1782 from U.S.-based law firms are varied. In some instances, the request relates to the actual conduct of the U.S.-based law firm. In some instances, however, the request is directed to the U.S.-based law firm simply as a way to get to documents that would otherwise be unavailable from the firm's client because of limits on discovery in a foreign forum. Courts will likely continue to take a jaundiced view towards using Section 1782 to obtain client documents from U.S.-based law firms.

In some cases, the vast majority of the documents will be privileged. In some cases, the documents will be subject to protective orders entered in the United States litigation. Even in the absence of these circumstances, courts recognize the chilling effect of granting Section 1782 applications directed to U.S.-based law firms.

While the trend is toward rejecting such applications, U.S.-based law firms can also take steps to minimize the risks of Section 1782 discovery. Such steps include ensuring that the opposing party and third-party documents are promptly destroyed pursuant to the terms of protective orders upon the conclusion of a case.

Likewise, because some courts have held that Section 1782 cannot be used to obtain documents outside of the United States,[9] firms can avoid transferring client documents to their United States offices unless necessary for the representation.

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[1] See, e.g., In re The Islamic Republic of Pakistan, No. 18-103 (RMC), 2019 U.S. Dist. LEXIS 61780 (D.D.C. April10, 2019) (Arnold & Porter Kaye Scholer LLP); In re Biomet Orthopaedics Switz. GmbH, 742 Fed. Appx. 690 (3d Cir. 2018) (Greenberg Traurig LLP); Kiobel v. Cravath, Swaine & Moore LLP, 895 F.3d 238 (2d Cir. 2018), cert denied 139 S. Ct. 852 (2019); In re Shareefah Khaled Alghanim, 17-mc-406 (PKC), 2018 U.S. Dist. LEXIS 83453 (S.D.N.Y. May 9, 2019) (Akin Gump Strauss Hauer & Feld LLP); In re Grynberg, 223 F. Supp. 3d 197 (S.D.N.Y. 2017) (Cooley LLC); In re Hulley Enters., 286 F. Supp. 3d 1 (D.D.C. 2017) (Baker Botts LLP); In re Financialright GmbH, 17-mc-105 (DAB), 2017 U.S. Dist. LEXIS 107778 (S.D.N.Y. June 23, 2017) (Jones Day); In re Republic of Kazakhstan, 110 F. Supp. 3d 512 (S.D.N.Y. 2015) (Clyde & Co. LLP); In re Okean B.V., 60 F. Supp. 3d 419 (S.D.N.Y. 2014) (Chadbourne & Parke LLP); In re Mare Shipping Inc., 13 Misc. 238, 2013 U.S. Dist. LEXIS152337 (S.D.N.Y. Oct. 23, 2013) (Squire Sanders (US) LLP); In re Cathode Ray Tube (CRT) Antitrust Litig., 07-5944 SC, 2013 U.S. Dist. LEXIS 8255 (N.D. Cal. Jan. 17, 2013) (Saveri & Saveri Inc.); In re Bank of Cyprus Pub. Co. Ltd., No. 10 Misc. 23, 2011 U.S. Dist. LEXIS 6082 (S.D.N.Y. Jan. 21, 2011) (Greenberg Traurig); In re Braga, 272 F.R.D. 621 (S.D. Fla.

2011); In re Microsoft Corp., 428 F. Supp. 2d 188 (S.D.N.Y. 2006) (Cleary Gottlieb Steen & Hamilton LLP); Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79 (2d Cir. 2004) (Cravath, Swaine & Moore LLP); Ratliff v. Davis Polk & Wardwell, 354 F.3d 165 (2d Cir. 2003).

[2] In re Hulley Enterprises, 18-mc-00435-GBD-GWG (September 5, 2019).

[3] Post-Intel, whether Section 1782 applies to private arbitral proceedings is an open question. See, e.g., In re Iraq Telecom, 18-MC-458 (LGS) (OTW), 2019 U.S. Dist. LEXIS 136321, at *9 n. 5 (S.D.N.Y. Aug. 13, 2019) (discussing the differing views of district courts in the Second Circuit as to whether in Intel, the United States Supreme Court held that Section 1782 applies to private international arbitration, thereby implicitly overruling a prior Second Circuit decision that Section 1782 does not apply to private international arbitration). Post-Intel, only one court of appeals has answered the question. See In re Application to Obtain Discovery, No. 19-5315, 2019 U.S. App. LEXIS 28348 (6th Cir. Sept. 19, 2019) (holding Section 1782 applies to private international arbitration); see also Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1270 (11th Cir. 2014) (declining to decide the question). Two pre-Intel court of appeals decisions held that Section 1782 does not apply to private international arbitration. See Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999); National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999).

[4] Intel Corp. v. Advanced Micro Devices Inc., 542 U.S. 241 (2004).

[5] In re Hulley Enters., 358F. Supp. 3d 331 (S.D.N.Y. 2019).

[6] In re Hulley Enters., 358 F. Supp. 3d at 353.

[7] Kiobel v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 243 (2d Cir. 2018).

[8] 895 F.3d at 247.

[9] The extraterritorial effect of Section 1782 is currently before the Second Circuit in two appeals. In re Accent Delight Int'l Ltd., No.18-1755 (2d. Cir. argued June 20, 2019); In re Ruiz, No. 18-3226 (2d. Cir. argued Mar. 25, 2019). And the Eleventh Circuit has held that there are no extraterritorial restrictions. Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194 (11th Cir. 2016). Nevertheless, many courts will consider the burden of extraterritorial discovery in their discretionary analysis.