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Recent Developments Section 1782 Litigation and the Attorney-Client Privilege

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28 U.S.C. §1782 allows an "interested party" to obtain an order from a U.S. court compelling discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. §1782(a). Perhaps recognizing that U.S.-style discovery, including depositions and full-scale document production, is comparatively broader than discovery in many foreign jurisdictions, litigants have attempted to use Section 1782 creatively by seeking discovery from foreign entities' U.S.-based advisors and agents, including law firms or other sources of potentially privileged information.

Below we discuss recent Section 1782 litigation developments concerning the application of attorney-client and other privileges in this context.

Section 1782 precludes disclosure of materials protected by "any legally applicable privilege."

Section 1782 itself explicitly provides that "a person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." 28 U.S.C §1782(a).

What is a "legally applicable privilege?"

The Second Circuit has long held that a "legally applicable privilege" can mean a privilege recognized by U.S. or foreign law. *See In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997).

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Four years ago, the Second Circuit instructed courts to apply a "touch base" test to determine which privilege is "legally applicable." *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 99, (2d Cir. 2020). Under that test, a court determines and then applies the privilege law "of the country that has the 'predominant' or 'the most direct and compelling interest' in whether ... communications should remain confidential, unless that foreign law is contrary to the public policy of this forum." *Id.* The country with the predominant interest is either "the place where the allegedly privileged relationship was entered into," or "the place in which that relationship was centered at the time the communication was sent." *Id.*

Since then, several courts in the Second Circuit have applied the touch-base test. One illustrative example occurred earlier this year in *In re BM Brazil 1 Fundo de Investimento em Participacoes Multistrategia*, 347 F.R.D 1 (S.D.N.Y. 2024). There, Magistrate Judge Gary Stein assessed whether English privilege law or American privilege law applied in a Section 1782 application filed by a party "("Party-1") to a breach of contract action in the English courts seeking discovery from its adversary's ("Party-2's") U.S.-based financial advisor.

Applying the touch-base test, the court held that England had "the most direct and compelling interest in whether communications should remain confidential." *Id.* at 10 (internal citations and quotations omitted). The court so held, in part, because the materials sought to be withheld as privileged were communications with Party-2's London-based counsel, no American lawyers were involved with the documents at issue, and the contracts at issue in the foreign dispute contained English choice-of-law clauses. *Id.*

Judge Stein also noted that, unlike other cases in which U.S. law applied under the touch-base test, the documents were not created in connection with litigation in the United States. *Id.* Finally, Judge Stein found it significant that the privilege was not being asserted on behalf of Party02's U.S. based in financial advisor itself, even though it was holding the documents at issue; rather the privilege being asserted over communications between Party-2, which is based in South Africa, and its English legal counsel.

The court then applied English privilege law. Notably, in holding the majority of the documents were privileged, the court highlighted an important distinction between English and U.S. privilege law. While U.S. privilege law provides that disclosure of attorney-client communications to a third-party generally waives the privilege, English law provides that the privilege can be maintained as long as the party sharing the information with a third-party intended to share it confidentially. *Id.* at 11. This distinction proved significant, because it meant that Party-2 did not necessarily waive the privilege by sharing attorney-client communications with its financial advisor. *See id.*

If a foreign privilege applies, what level of proof must be submitted to assert it?

Despite, as evidenced by the above, the willingness of some U.S. courts to apply foreign privileges in U.S. proceedings, Section 1782 litigants should recognize an attorney's assertion or legal argument that a foreign privilege applies is likely not going to be enough. Indeed, courts in the Second Circuit and elsewhere have indicated that they will not apply a foreign privilege to preclude discovery absent "authoritative proof" that the privilege would apply in the foreign tribunal. *See In re Arida, LLC*, No. 19-MC-522 (PKC), 2021 WL 2226852, at *2 (S.D.N.Y. June 2, 2021) (collecting cases).

As noted by a court earlier this year in the District of New Jersey, "examples of such authoritative proof would include a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures." *In re RH2 Participaes Societrias LTDA*, No. CV 23-4025(GC)(JTQ), 2024 WL 3598379, at *5 (D.N.J. July 31, 2024) (quotation omitted).

That court rejected counsel's assertion that the discovery sought "contravenes Brazilian law" and denied a motion to quash a Section 1782 application for discovery in aid of a proceeding in Brazil. In contrast, in *In re BM Brazil 1 Fundo de Investimento em Participacoes Multistrategia*, discussed above, the party resisting discovery under English law provided, *inter alia*, declarations from an English barrister with expertise in privilege law, an English lawyer involved in representing the party in the transaction underlying the English litigation, and an English lawyer representing the party in the English litigation.

Can a law firm be required to produce client documents in response to a Section 1782 request?

At times, Section 1782 applicants have sought discovery from directly from a foreign party's U.S. law firm. In *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895 F.3d 238, 241 (2d Cir. 2018), for example, a party to a lawsuit in the Netherlands sought discovery from her adversary's U.S. legal counsel. The Second Circuit held that the district court abused its discretion in allowing the application. In doing so, the Second Circuit cited a number of factors.

These included that: (i) in Section 1782 applications generally, seeking discovery from a party to the foreign litigation weighs against approving the application, as do attempts to circumvent foreign proof-gathering restrictions; (ii) relatedly, although the discovery was sought from a U.S. law firm, as a practical matter those materials belonged to its client, which was a party of the foreign litigation; and (iii) strong policy concerns underlying the attorney-client privilege counsel against any ruling that would require U.S. law firms to house documents abroad simply to avoid U.S. style discovery.

Thus, when assessing Section 1782 requests to law firms, courts have looked at the extent to which the party is seeking discovery from the law firm itself (as opposed to client materials housed by the law firm) and the extent to which the law firm shared those documents or materials with third parties. Earlier this year, for example, in *In re SBK Art LLC*, Magistrate Judge Tarnofsky in the Southern District recommended granting narrowed Section 1782 subpoenas to a law firm, in a dispute involving control over a Netherlands-based entity. The petitioner argued that the other shareholders of the Dutch entity began a "smear campaign" against him, which included having the law firm issue an opinion letter that the petitioner was subject to asset freeze restrictions and had violated sanctions.

After extensive argument and analysis, the magistrate judge recommended granting a narrowed application, limited to documents "uniquely possessed by [the law firm] or that have been shared with third parties other than [the law firm's client]." *In re SBK Art LLC*, No. CV 24-MC-0147 (PAE) (RFT), 2024 WL 4264893, at *20 (S.D.N.Y. July 30, 2024) The court found it significant that the petitioner's adversary had shared the law firm's opinion with Dutch courts, potentially effecting a wavier if U.S. law applied or at least making the opinion and related materials "something more like the discoverable work of a lawyer acting as a lobbyist or business advisor." *Id.* at *21.

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Section 1782 is a powerful tool to obtain broad discovery in connection with foreign proceedings where it is not otherwise available. Privilege issues like the ones discussed above can arise and often involve complicated fact issues and choice of law issues. The recent case law though provides some guidance and data points for both Section 1782 applicants and those opposing such applications.

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