

INTERNATIONAL LITIGATION

Expert Analysis

Should I Stay or Should I Go? Reviewing Documents Here or Abroad

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U.S. lawyers advising their non-U.S. clients concerning potential legal exposure to the Department of Justice often must make a judgment concerning where to review their overseas client's documents. Speed, cost and efficiency considerations ordinarily argue in favor of the client sending the documents to the U.S. for counsel to review in their office. But the prudent lawyer must first consider whether bringing the documents to the U.S. from overseas, where they may (practically speaking) be undiscoverable, exposes them to discovery via grand jury subpoena. Because the Justice Department's grand jury subpoena power overseas is limited to U.S. nationals or residents (Fed. R. Crim. P. 17(e)(2); 28 U.S.C. §1783), and other means by

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which the Justice Department may obtain international discovery, such as letters rogatory and mutual legal assistance treaties, are cumbersome and uncertain, it is not unheard of for the Justice Department to seek an overseas client's otherwise unavailable documents by issuing a grand jury subpoena to the client's counsel. *See In re Grand Jury Subpoenas*, 627 F.3d 1143 (9th Cir. 2010) (reversing district court order quashing grand jury subpoenas to counsel for their overseas client's documents).

Lawyers facing this dilemma have long sought arguments that would

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allow them to bring documents to the United States for review without exposing their client to the risk that the documents may wind up in the government's hands. One such line of argument—inspired by the Supreme Court in *Fisher v. United States*, 425 U.S. 391 (1976)—is that documents that are undiscoverable

in the hands of the client do not become discoverable in the hands of counsel. At first blush, this argument runs counter to the general rule that documents that are unprotected from discovery obtain no special protection because they are housed in a law firm. Nevertheless, an earlier Second Circuit opinion, *In re Sarrio*, 119 F.3d 143 (2d Cir. 1997), relying on *Fisher*, recognized that compelling the production of an overseas client's documents from counsel when the documents would be undiscoverable from the client abroad would interfere with the attorney-client relationship. The Second Circuit's recent holding in *Kiobel v. Cravath, Swaine & Moore*, No. 17-424, 2018 WL 3352757 (2d Cir. July 10, 2018), adds considerable support for this argument.

The 'Kiobel' Decision

Kiobel arose out of litigation commenced in 2002, when Esther Kiobel filed a putative class action against Royal Dutch Shell alleging that Shell was complicit in the Nigerian military's execution of her husband, who opposed Shell's activities in Nigeria. Years after the Supreme Court affirmed the dismissal of Kiobel's claims for lack of subject-matter jurisdiction, Kiobel pursued litigation against Shell in the Netherlands. To support her claims in the Dutch court, Kiobel sought to use discovery materials from her U.S. litigation, but was impeded from doing so by a stipulated protective order that restricted use of the discovery

material to the U.S. case. Accordingly, in 2016, Kiobel filed a petition to subpoena Shell's counsel, Cravath, for the discovery materials under 28 U.S.C. §1782, which provides a mechanism for an "interested person" to use U.S. discovery procedures to obtain documents located in the U.S. in aid of foreign litigation. Applying the four factors that *Intel Corp v. Advanced Micro Devices*, 542 U.S. 241 (2004), held should be considered in addressing Section 1782 petitions, the district court granted the petition.

On appeal, the Second Circuit, in a unanimous opinion written by Judge Dennis Jacobs, and joined by Judge José A. Cabranes and Judge Richard C. Wesley, reversed. In addition to briefly addressing the *Intel* factors, the court reasoned that "an order compelling American counsel to deliver documents that would not be discoverable abroad, and that are in counsel's hands solely because they were sent to the United States for the purpose of American litigation, would jeopardize the policy of promoting open communications between lawyers and their clients."

The court noted that *Sarrio* had explained that "while *Fisher* was expressed in terms of ... common law or constitutional privilege, its reasoning also applied to protect a foreign party's documents that are not amenable to a subpoena in the hands of the foreign party, even if the court can subpoena the documents from the foreign party's U.S. counsel under Section 1782."

This is because the principle articulated in *Fisher* "arose from the policy of promoting open communications between lawyers and their clients. That policy would be jeopardized if documents unreachable in the a foreign country became discoverable because the person holding the documents sent them to a lawyer in the United States for advice"

Kiobel thus concluded that the district court abused its discretion in ordering Cravath to produce the discovery materials.

Kiobel also considered the implications of the protective order requiring the parties to the original Shell litigation to maintain the confidentiality of the discovery materials produced by Shell and restrict their use to the original U.S. litigation. The court expressed concern that allowing the Shell documents to be produced would "undermine confidence in protective orders," which "serve the vital function ... of secur[ing] the just, speedy, and inexpensive determination of civil disputes ... by encouraging full disclosure of all evidence that might conceivably be relevant." The court further noted that an order requiring Cravath to produce the documents would, in substance, alter the protective order, something it "should not countenance" without Shell's participation and "absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need." In addition, the court reasoned, it

would be “perilous” to override the confidentiality order because “doing so would 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.” *Kiobel* thus concluded that the district court’s “decision to alter the confidentiality order without Shell’s participation, and without considering the costs of exposure to Shell, makes this case exceptional, and mandates reversal.”

Implications of 'Kiobel'

Kiobel offers significant comfort to overseas clients and their U.S. counsel who are concerned that bringing the client’s documents to the U.S. to mitigate the costs, burdens and delay inherent in reviewing the documents overseas could expose the documents to discovery. Unfortunately, when it comes to Justice Department subpoenas to counsel seeking a non-U.S. client’s overseas documents, the comfort afforded by *Kiobel* is incomplete. To be sure, *Kiobel* recognized that it would harm our system of litigation if “foreign clients have reason to fear disclosing all pertinent documents to U.S. counsel.” But the decision considered a Section 1782 petition to use discovery materials to pursue civil claims outside the U.S.; it did not consider a grand jury subpoena seeking an overseas client’s documents that the government contends it needs for a criminal investigation. *Kiobel* did

not indicate whether its reasoning would extend to a grand jury subpoena. On the one hand, courts may give similar—or even greater—weight to the importance of open and frank discussions with counsel in the context of potential criminal exposure. On the other hand, it may be that a court would view the U.S. government’s need for documents in a criminal case to be stronger than an overseas litigant’s need for documents to pursue civil litigation

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Kiobel’s holding, moreover, rests not only on the attorney-client considerations discussed in *Fisher* and *Sarrío*, but also on the confidentiality and use restrictions in the protective order in the underlying U.S. litigation. While many Justice Department investigations proceed contemporaneously with related civil cases in which overseas documents are brought to the U.S. and produced pursuant to civil protective orders, a non-U.S. client’s need to engage U.S. counsel to review its overseas documents often arises before the commencement of a grand jury investigation or the entry of a protective order in related civil litigation. It remains to be seen whether the reasoning of

Kiobel will apply to a grand jury subpoena to counsel seeking a client’s otherwise unavailable documents that are not subject to the standard provisions of a protective order.

Conclusion

So what does this mean for lawyers who need to review an overseas client’s documents to advise on its potential exposure to U.S. prosecution? *Kiobel* grappled with the practical implications of the issue before it. It observed that a decision compelling U.S. counsel to review their non-U.S. client’s documents overseas could lead counsel “to store documents and servers abroad,” “result in excessive costs to law firms and clients,” and lead non-U.S. clients to “be less willing to engage with U.S. law firms.” *Kiobel* goes a long way to addressing these concerns, and provides significant support for the argument that the Justice Department cannot obtain an overseas client’s otherwise undiscoverable documents from U.S. counsel. Nevertheless, until its holding is applied to a grand jury subpoena to counsel seeking a non-U.S. client’s overseas documents, the safest course continues to be review of the non-U.S. client’s documents overseas.