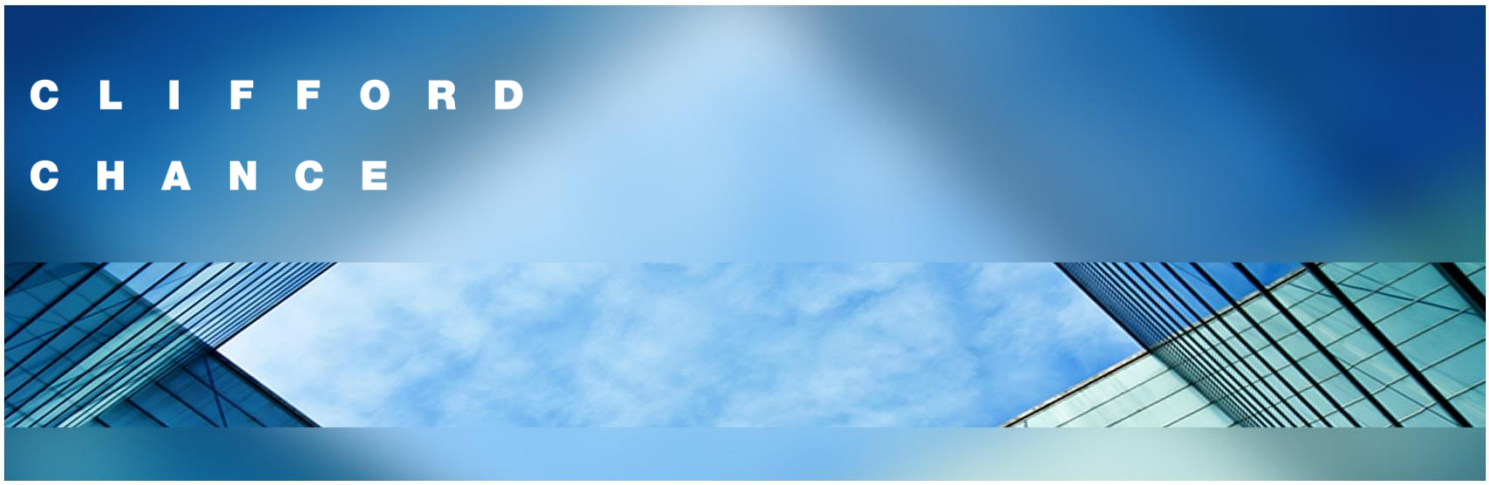

SECOND CIRCUIT LEAVES DOOR OPEN FOR CLIENT DOCUMENTS TO BE SUBPOENAED FROM LAW FIRMS

On July 10, 2018, the Second Circuit ruled that a U.S.-based law firm was not required to turn over documents it had obtained from an overseas client to defend that client in U.S. litigation that was ultimately dismissed for lack of subject matter jurisdiction. The decision reversed the district court, which had granted a petition for the documents by a plaintiff preparing to sue the client in the Netherlands. The Second Circuit agreed with the district court that it had jurisdiction over client documents in a law firm's possession. But the district court's order failed to recognize, the Second Circuit held, that requiring disclosure would impede clients' ability to engage in open communication with their attorneys and undermine confidence in protective orders. While U.S.-based counsel can take some comfort in the protection the ruling affords to documents placed in their hands by foreign clients, such documents should be kept confidential and, to the extent possible, only be produced under confidentiality orders, lest the protection be lost.

Background and District Court Decision

In 2002, Esther Kiobel and several other individuals sued Royal Dutch Shell ("**Shell**") in the Southern District of New York, alleging that a Shell affiliate was involved in human rights abuses in Nigeria. The case generated a large amount of discovery, including both documents and depositions.[1] Shell was represented in the US litigation by Cravath, Swaine & Moore, LLP ("**Cravath**"). Kiobel and Cravath (on behalf of Shell) signed a stipulated confidentiality order, which required the parties to mark sensitive materials "confidential," and to use materials

[1] In re Kiobel, No. 16 Civ. 7992 (S.D.N.Y. Jan. 24, 2017), at 1.

bearing that designation only for purposes of the US litigation.[2] Kiobel's claims were ultimately dismissed for lack of subject matter jurisdiction.[3]

After her US claims were dismissed, Kiobel prepared to sue Shell in the Netherlands. Because the Netherlands (according to Kiobel) requires a higher evidentiary standard at the outset of a legal proceeding, Kiobel sought to obtain the discovery from her US case before filing suit in the Netherlands.[4] In October 2016, Kiobel filed a petition in the Southern District of New York for a subpoena requiring Cravath to turn over all depositions transcripts and all documents and communications that had previously been produced by Cravath in the US litigation.[5] Kiobel filed her petition under 28 U.S.C. § 1782, which states, in relevant part: "The district court of the district in which a person resides or is found may order him . . . to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

In opposing Kiobel's motion, Cravath argued that the documents were owned by Shell, and that therefore Shell was the actual "person" from whom the documents were being sought.[6] Because Shell is not a resident of New York, Cravath argued, the Southern District of New York did not have jurisdiction under Section 1782, which only grants jurisdiction over persons who "reside[] or [are] found" within the district.[7] The district court rejected this argument, finding that the documents were in fact being sought from Cravath, a resident of New York, irrespective of the fact that Shell was the owner of the documents.[8] As the district court put it: "The question is whether Cravath is in possession of the documents, not whom the documents 'belong' to."[9]

Having concluded that it had jurisdiction to order Cravath to produce the documents, the district court then considered whether to grant the petition under the four-factor test in *Intel Corp. v. Advanced Micro Devices, Inc.*[10] Finding that each of these factors weighed in favor of granting the petition, the district court ordered Cravath to provide the documents to Kiobel.[11]

---

2 *Kiobel v. Cravath, Swain & Moore, LLP.*, No. 17–424-cv, 4 (2d Cir. 2018).
3 *Kiobel*, slip. op. at 1.
4 *Id.*, slip. op. at 2.
5 *Id.*
6 Reply Brief for Respondent-Appellant at 4, In re Kiobel, No. 16 Civ. 7992.
7 *Id.* at 10–11.
8 *Kiobel*, slip. op. at 2–3.
9 *Id.*
10 542 U.S. 241, 264 –65 (2004). The *Intel* factors are:
1. Whether the person from whom discovery is sought is a participant in the foreign proceeding, in which case the need for § 1782(a) aid generally is not as apparent;
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 U.S. federal-court judicial assistance;
3. Whether the § 1782(a) 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 request is unduly intrusive or burdensome.

11 *Kiobel*, slip. op. at 4–7.

The Second Circuit Decision

Cravath appealed and the Second Circuit reversed, concluding that the district court had abused its discretion in granting Kiobel's petition.[12] In so finding, however, the Second Circuit agreed with the district court that Section 1782 grants a plaintiff the ability—under the right set of facts—to subpoena client documents from a law firm.[13]

Addressing the exercise of discretion under the *Intel* factors, the Second Circuit disagreed with the district court's analysis of two of the four factors. In particular, the fact that Shell was "the real party from whom documents were sought" weighed against granting the application, as did Kiobel's obvious intent to circumvent foreign proof-gathering restrictions by seeking documents that concededly could not be obtained from other parties before trial.[14] The Court then homed in on what it considered to be the determinative issue: the confidentiality order that Shell and Kiobel had signed, limiting use of discovery to US court proceedings.[15] In the Court's view, ordering Cravath to turn over the documents would impede "the policy of promoting open communications between lawyers and their clients" and undermine confidence in protective orders designed to further that policy.[16] In explaining this policy, the Court distinguished two prior decisions of the Second Circuit.

- In the first, a plaintiff in a Spanish lawsuit had sought documents that the Spanish defendant had provided to its bank, Chase, and which Chase had sent to the U.S. for review by in-house counsel. The district court denied plaintiff's petition, but the Second Circuit reversed and granted the petition when Chase withdrew its claims of attorney-client privilege over the documents.[17]
- In the second, U.S. plaintiffs sought the Dutch court's assistance in obtaining certain documents from the Amsterdam office of Ernst & Young ("**E&Y**"). In connection with that Dutch motion, the U.S. plaintiffs also sought a subpoena for the documents from the law firm Davis, Polk & Wardwell ("**DPW**") in New York, to whom E&Y had given the documents in connection with an SEC investigation. The district court denied plaintiffs' petition, but the Second Circuit again reversed, holding that because E&Y had authorized DPW to provide the documents to a third party (the SEC), DPW could not shield the documents from disclosure to plaintiffs.[18]

While both of those prior decisions involved documents in the hands of US attorneys, the former did not involve documents provided by a foreign defendant to a US counsel. Rather, it involved documents that a foreign defendant had provided to a bank, which were in turn provided to the bank's US in-house counsel.[19] And the latter case did not involve documents that had remained non-

12 *Kiobel v. Cravath, Swain & Moore, LLP.*, No. 17–424-cv.
13 *Id.* at 9.
14 *Id.* at 10–11
15 *Id.* at 13.
16 *Id.* at 3 (quoting Application of Sarrio, S.A., 119 F.3d 143, 146 (2d Cir. 1997)).
17 *Sarrio*, 119 F.3d at 145–48.
18 Ratliff v. Davis Polk & Wardwell, 354 F.3d 165, 167–71 (2d Cir. 2003).
19 *Sarrio*, 119 F.3d at 144–45.

public, since they had been provided to the SEC without a confidentiality order. Unlike in those cases, the confidentiality of Shell's documents had been maintained by the confidentiality order. Requiring disclosure would render such a confidentiality order meaningless, making foreign clients reluctant to share documents with U.S. counsel and ultimately undermining the U.S. legal system.[20]

Because of the risk of inhibiting open communications between attorneys and their clients, and because the district court had neither analyzed the impact of overturning the confidentiality order nor sought Shell's input on modifying the order, the Second Circuit reversed.[21]

* * *

The Second Circuit's decision serves as a reminder that documents provided to US counsel are at risk of being subpoenaed for use in a foreign action—particularly if counsel has provided the documents to third parties. The risk is especially acute for foreign parties to US actions, given the greater likelihood that they will be sued abroad and given that the laws in their home jurisdictions may have more limited discovery provisions than are available in the United States. To minimize this risk, parties should insist on confidentiality orders, whenever possible, to govern the production of their foreign documents in US actions.

20 *Kiobel v. Cravath, Swain & Moore, LLP.*, No. 17–424-cv, 14.

21 *Id.* at 13–15. On July 25, 2018, Kiobel filed a petition asking the Second Circuit for a rehearing. Petition for Rehearing and / or Rehearing En Banc, Kiobel v. Cravath, Swaine & Moore, LLP, No. 17-424-cv (2d Cir. July 25, 2018).

CLIFFORD
CHANCE

CONTACTS

Celeste Koeleveld
Partner

T +1 212 878 3051
E celeste.koeleveld
@cliffordchance.com

Jeff Butler
Partner

T +1 212 878 8205
E jeff.butler
@cliffordchance.com

Anthony Candido
Partner

T +1 212 878 3140
E anthony.candido
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

Christopher Morvillo
Partner

T +1 212 878 3437
E christopher.morvillo
@cliffordchance.com

Robert Rice
Partner

T +1 212 878 8529
E robert.rice
@cliffordchance.com

Daniel Silver
Partner

T +1 212 878 4919
E daniel.silver
@cliffordchance.com

Benjamin Peacock
Associate

T +1 212 878 8051
E benjamin.peacock
@cliffordchance.com