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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Comity and Discovery Requests In Cross-Border Litigation

By **Edward M. Spiro**

And **Judith L. Mogul**

International comity—the broad discretionary doctrine under which courts in one territory seek to avoid intruding into matters touching on the laws and interests of other sovereign states—arises in a variety of contexts. We discuss below three recent decisions from the U.S. District Court for the Southern District of New York that explore this doctrine in connection with requests for discovery in aid of foreign litigation, and in assessing the impact of a foreign insolvency proceeding on litigation in this district.

28 U.S.C. §1782 Applications

The provision 28 U.S.C. §1782 permits a federal district court to order discovery from a person or entity residing or found within its district for use in a proceeding before a foreign tribunal. Inasmuch as §1782, by its very nature, injects U.S. courts into the legal proceedings of other countries, the extensive body of case law surrounding its interpretation and application relies on principles of comity to define the line between assisting foreign proceedings and interfering with them.

Southern District Judges Naomi Reice Buchwald and P. Kevin Castel each issued decisions this fall illustrating the central role of comity in this aspect of international litigation. Both noted the two-tiered approach to assessing a §1782 application set forth by the Supreme Court in *Intel v. Advanced Micro Devices*.[1] Under that approach, the court first determines whether the mandatory statutory factors for a §1782 application are satisfied and then, whether certain additional factors warrant exercise of the court's discretion to order the requested discovery.

The statutory factors are that (1) the person from whom discovery is sought resides or is found in the district; (2) the discovery is for use in a foreign proceeding; and (3) the application is made by the foreign tribunal or an interested party.

If the statutory factors are met, *Intel* instructs the court to weigh certain additional discretionary factors, including (1) if the respondent is a party to the foreign proceeding (which cuts against granting the application); (2) the receptivity of the foreign tribunal to receiving the fruits of U.S. judicial assistance; (3) whether the §1782 application conceals an attempt to circumvent foreign proof-gathering limits or other policies; and (4) if the application is unduly burdensome or intrusive—in which case the requests can be appropriately trimmed.[2]

Threshold Issues

Castel and Buchwald each found that the statutory factors were readily met in their cases, but each confronted a threshold issue not addressed in the statute or by *Intel*. In *In re Mare Shipping*,[3] before getting to the statutory factors, Castel first considered whether the court had subject matter jurisdiction to hear an application seeking documents and testimony from U.S. lawyers for the Kingdom of Spain or whether the Foreign Sovereign Immunities Act (FSIA)[4] provided them immunity from the court's jurisdiction. He concluded that although FSIA immunity extends to "agencies and instrumentalities" of a foreign state, lawyers and law firms do not fall within the statutory definition of "agency or instrumentality" and thus could not assert Spain's immunity.[5]

Buchwald's decision was issued in *In re Application of Kreke Immobilien KG*.[6] In that case, Kreke, a German limited partnership involved in litigation in Germany against Oppenheim, a German private bank, sought document discovery from Deutsche Bank for use in the German litigation. Deutsche Bank had acquired Oppenheim following the events at issue in the litigation. Kreke sought 16 categories of documents that Kreke asserted were in Deutsche Bank's possession as a result of due diligence Deutsche Bank conducted in connection with the acquisition, or that Deutsche Bank now controlled by virtue of its parent-subsidiary relationship with Oppenheim.

Kreke candidly acknowledged that it could not obtain these documents through "German-style discovery," which restricts discovery to documents the requesting party already knows about in great detail. Indeed, it predicated its application on the assertion that §1782 was the only "conceivable" way to gain access to the requested documents that "generally pertain[ed]" to Oppenheim's alleged wrongdoing.

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Buchwald found that Kreke's application satisfied the statutory requirements inasmuch as Deutsche Bank operates in the Southern District of New York and the information was sought for a German proceeding by a party to that proceeding.

She held, however, that an additional threshold issue—and one on which the courts in the Southern District are split—required denial of the application even before consideration of the discretionary factors. Specifically, she held that because the physical documents sought were all located in Germany, they could not be obtained through §1782.

Buchwald observed that although the statute itself does not contain an express ban on extraterritorial discovery, the U.S. Court of Appeals for the Second Circuit has suggested in dicta that "there is reason to think that Congress intended to reach only evidence located within the United States."[7] Noting that at least one court has held that the location of documents outside the jurisdiction should be at best a discretionary consideration,[8] Buchwald found more compelling those decisions holding that §1782 does not authorize discovery of documents held abroad.[9] On this basis, she denied the application, concluding that where the conduct at issue took place in

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason & Anello, and coauthors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson West 2013).*

Germany, the physical evidence is in Germany, and the electronic documents are as accessible there as from Deutsche Bank's offices in New York, the "connection to the United States is slight at best and the likelihood of interfering with foreign discovery policy is substantial."[10]

Although she found the location of the documents dispositive, "for the sake of completeness" Buchwald went on to consider the *Intel* discretionary factors. First, she found that because Oppenheim was a wholly-owned subsidiary of Deutsche Bank, discovery was "fundamentally being sought from a participant in the German proceedings." That factor, coupled with the fact that the documents sought were located in Germany, cut against allowing discovery.

Castel also found that the first factor weighed against ordering discovery in *In re Mare Shipping*. Interestingly, although he found that the respondent U.S. law firm and lawyers were not agents of Spain for purposes of sovereign immunity, for purposes of the first discretionary factor the application effectively sought discovery from Spain, which was a party to the foreign proceeding. He concluded that the §1782 applicants could apply to the foreign tribunal for the requested discovery, and that accordingly the first discretionary factor did not weigh in favor of discovery.

Castel evaluated the factors regarding receptivity of the foreign forum and concern for circumvention of foreign proof gathering restrictions together, finding that they both weighed against discovery. He held that the fact that the applicants in *Mare Shipping* did not first seek the materials at issue from the Spanish court counseled against granting the request, noting that a requesting party's failure to first seek the documents from the foreign tribunal is a factor weighing against granting an application under §1782.[11]

Buchwald also stressed the applicant's failure to seek the documents from the Spanish tribunal in *Kreke*. She specifically noted that §1782 contains no "quasi-exhaustion requirement," but nevertheless found that Kreke's certainty that the court would not grant such a request weighed against granting the application—observing that "exhaustion is one thing, but evasion is quite another." Buchwald reasoned that "[i]t would create a perverse system of incentives—one counter to the efficiency and comity goals of §1782—to encourage foreign litigants to scurry to U.S. courts to preempt discovery decisions from tribunals with clear jurisdictional authority."[12]

Finally, Buchwald found that Kreke had already agreed to submit itself to German procedural rules through the forum selection clause in its contract with Oppenheim—a factor that furthered the appearance that it was seeking to circumvent German discovery rules and weighed against the §1782 request.

Foreign Bankruptcy-Type Stay

Whereas the forum selection clause was consistent with comity concerns in *Kreke*, Southern District Judge Ronnie Abrams found that U.S. forum selection and choice of law clauses needed to give way to principles of comity in her recent decision in *Oui Financing v. Dellar*.[13]

The plaintiff in *Oui Financing* had loaned money to a French company, personally guaranteed by its president under a contract expressly waiving any defense to enforcement of the contract in New York. Shortly before payment was due under the loan, the French company commenced a "safeguard procedure" in the French courts, akin in certain respects to a reorganization under U.S. bankruptcy law. At the commencement of a safeguard procedure, the French court issues a judgment opening a "period of observation" during which a reorganization plan is developed for later adoption by the court. This initial judgment also prohibits the debtor from paying any claims arising prior to the judgment and stays legal proceedings against the debtor and its guarantors. The defendants in *Oui Financing* sought dismissal of the Southern District action as barred by the stay.

Whereas the forum selection clause was consistent with comity concerns in 'Kreke,' Judge Ronnie Abrams found that U.S. forum selection and choice of law clauses needed to give way to principles of comity in 'Oui Financing v. Dellar.'

Abrams found that principles of international comity required dismissal of the case before her. She noted that under Second Circuit authority, courts should decline to hear creditor claims that are the subject of foreign bankruptcy proceedings, so long as the foreign proceedings are procedurally fair and do not violate public policy.[14] After describing the safeguard procedure in considerable detail, Abrams concluded that it afforded creditors adequate procedural protection. She discounted plaintiff's various objections to aspects of the specific proceedings, noting that the focus of the comity analysis is not on "specific frustrations" but on "whether the foreign proceeding in general, provides a fair forum in which to litigate."[15]

Abrams also held that the French safeguard procedure was consistent with public policy, observing that the aims of that proceeding to permit distressed debtors to reorganize so as to avoid insolvency and repay their creditors were the same as the U.S. Bankruptcy Code objectives, notwithstanding the fact that creditors play a less active role in France than they do in the United wStates.

Abrams rejected plaintiff's argument that it should be permitted to proceed against the non-debtor guarantor because dismissal on comity grounds would permit the guarantor to "avoid and rewrite" his personal obligations to plaintiffs, particularly where New York and U.S. law favor enforceability of non-debtor guarantees. She found that "the issue here is properly framed not as whether [the guarantor] seeks an impermissible 'end run' around his contractual obligations, but rather…whether Plaintiff's attempt to sue [the guarantor] here constitutes" an end run around the parallel foreign bankruptcy.[16]

Citing cases in which courts have held that private agreements as to choice of forum or law "must be subordinated to the 'overarching concerns' the comity doctrine addresses," she concluded that permitting the plaintiff to obtain a judgment against the guarantor risked interference with the safeguard plan. She did so while recognizing New York's "strong interest in protecting the justifiable expectations of the parties who choose New York law as the governing law" to a transaction, finding that "the particular need to extend comity to foreign bankruptcy proceedings outweighed the…strong interest in ensuring the enforceability of valid debts under the principles of contract law and in maintaining New York's status as one of the foremost commercial centers in the world."[17]

Conclusion

As these cases demonstrate, understanding the complexities of the comity doctrine and the varied contexts in which it comes into play is important, not just for parties already involved in cross-border litigation, but for those engaging in international business transactions where litigation may be only a distant prospect.

1. 542 U.S. 241 (2004).
2. Id. at 264-5.
3. 2013 WL 5761104 (S.D.N.Y. Oct. 23, 2013).
4. 28 U.S.C. §1604.
5. FSIA defines an agent or instrumentality as (1) a separate legal entity (2) "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof"; and (3) which is neither a U.S. citizen nor created under the laws of any third country. 28 U.S.C. §1603(b). In denying sovereign immunity to Spain's U.S. lawyers, Castel distinguished *Catskill Development v. Park Place Entm't*, 206 F.R.D. 78 (S.D.N.Y. 2002) (McMahon, J.) which quashed subpoenas served on counsel to Native American Tribes on the grounds of sovereign immunity, because the scope of immunity granted by FSIA is narrower than that accorded Native Americans under the common law. 2013 WL 5761104, at * 2-3.
6. 2013 WL 5966916 (S.D.N.Y. Nov. 8, 2013).
7. Id. at *5 (quoting *In re Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997)).
8. Id. (citing *In re Gemeinschaftpraxis*, 2006 WL 3844464 (S.D.N.Y. 2006) (Jones, J)).
9. Id. (citing *In re Godfrey*, 526 F.Supp.2d 417 (S.D.N.Y. 2007) (Rakoff, J.); *In re Microsoft*, 428 F.Supp.2d 188 (S.D.N.Y. 2006) (McMahon, J.)).
10. Id. at *5-6 (quoting *In re Godfrey*, 526 F.Supp.2d 423 (internal alterations and citations omitted)).
11. 2013 WL 5761104, at *6 (citing *Aventis Pharma v. Wyeth*, 2009 WL 3754191 (S.D.N.Y 2009) (Batts, J.)).
12. 2013 WL 5966916, at *8-9 & n.4.
13. 2013 WL 5568732 (S.D.N.Y. Oct. 9, 2013).
14. Id. at *6 (citing *JPMorgan Chase Bank v. Altos Hornos de Mexico, S.A.*, 412 F.3d 418 (2d Cir. 2005)).
15. Id. at *9-10 (internal citations omitted).
16. Id. at *12-13 (citing *JPMorgan Chase*).
17. Id. at *15 (internal quotations and citations omitted).