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Applying English Law to a Privilege Dispute Under Section 1782

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Under 28 U.S.C. Section 1782, a party to a foreign proceeding is entitled to petition a U.S. district court to seek the production of documents or testimony from a U.S. person for use in the foreign proceeding. The statute specifically provides, however, 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."

Over the last decade, there has been a substantial increase in the use of Section 1782. Pursuant to Section 1782, once a U.S. court authorizes a foreign litigant to obtain discovery from a U.S. person, the foreign litigant serves a subpoena on the U.S. person. At that point, U.S. civil discovery rules govern, and litigation often ensues regarding the discovery sought.

Not surprisingly, privilege disputes constitute a frequent topic of litigation in connection with Section 1782 proceedings. When a privilege dispute arises, the first question a U.S. court must address is which nation's privilege laws govern: the U.S. or the nation

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with the underlying foreign proceeding. In *Mangouras v. Boggs*, 980 F.3d 88, 98 (2d Cir. 2020), the Second Circuit held that, when a party to a Section 1782 proceeding invokes a foreign nation's privilege law, and "competing national laws provide different results, courts should first conduct a choice-of-law analysis to determine which body of privilege law applies." Following *Mangouras*, district courts in this circuit have applied the "touch base" test, which is a traditional choice-of-law contacts analysis, to determine the law that applies to claims of privilege in a Section 1782 proceeding. Under that test, a court must determine which country has the most compelling interest in whether the materials at issue remain confidential, and then apply that country's law unless the law would be contrary to U.S. public policy.

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In *In re BM Brazil I Fundo de Investimento em Participações Multistratégia,* 347 F.R.D. 1 (S.D.N.Y. 2024), Southern District Magistrate Judge Gary Stein applied the "touch base" test to determine whether English or U.S. law applied to a privilege dispute. Stein also addressed the preliminary issue of whether a U.S. or an English court should decide the parties' privilege dispute. After concluding that the parties' privilege dispute appropriately was decided by a U.S. court and that English law applied, Stein concluded that most of the withheld documents were privileged under English law and thus declined to order their production.

'In re Application of BM Brazil'

In this Section 1782 proceeding, the petitioner Appian Capital Advisory LLP (Appian) sought discovery in aid of breach of contract litigation being pursued by Appian in England against Sibanye-Stillwater Limited and Sibanye BM Brazil (Pty) Ltd. (Sibanye). Appian sought to serve a subpoena for documents on Moelis & Company LLC (Moelis), a U.S.-based investment bank, and two of its employees. Moelis had served as Sibanye's financial advisor for two share purchase agreements, pursuant to which Sibanye had agreed to buy Appian's interest in certain Brazilian mines. Sibanye terminated the agreements based on its claim that a "material adverse effect" had occurred.

Following motions to quash the Section 1782 subpoena, Stein issued a report and recommendation (to which no party objected) that resolved the motions by allowing discovery to proceed against Moelis with certain modifications to the subpoena. Thereafter, in producing documents, Moelis withheld 33 responsive documents based on claims of privilege under English law.

In briefing the privilege claims, the parties' dispute centered on (i) whether a U.S. court or English court should resolve the privilege dispute and (ii) whether, under English law, the documents were protected by the "legal advice privilege" and/or "litigation privilege." The legal advice privilege and litigation privilege are the English law equivalents to the U.S. attorney-client privilege and attorney work-product protection, respectively.

The Parties' Privilege Dispute Should Be Resolved by a US Court

Stein first rejected Sibanye's argument that the English court handling the underlying foreign litigation should resolve the parties' privilege disputes. Stein reasoned that because "the parties agree[d] upon the relevant principles of English privilege law, the premise for Sibanye's argument—that [a U.S. court] should not enmesh itself in resolving disputed issues of foreign law—is lacking." *BM Brazil*, 347 F.R.D. at 9. During oral argument, Stein also distinguished the cases on which Sibanye relied, noting that they either did not involve a privilege dispute or, unlike this case, involved complex or otherwise difficult-to-apply foreign law. Dkt. No. 72 (4/25/24 Tr.) at 3:8-4:20. Here, by contrast, Judge Stein observed that the English law at issue is not particularly complex. Id. From a practical perspective, Stein also noted that it would be inefficient for the parties to present their privilege dispute to a U.K. court when the issue was already before a U.S. court. Id.

Further, Stein rejected Sibanye's argument that the English forum selection clause in the share purchase agreements underlying the parties' foreign litigation precluded Appian from moving to compel Moelis to comply with the Section 1782 subpoena. *BM Brazil*, 347 F.R.D. at 9. In previously challenging Appian's petition seeking leave to serve the Section 1782 subpoena on Moelis, Sibanye had made a similar argument, which Stein had rejected. Stein concluded that the forum selection clauses were not dispositive, but a factor to consider based on the facts of the case. Here, the clause, although broad, applied to Appian and Sibanye, and not Moelis, a non-signatory to the share purchase agreements. Dkt. No. 47 at 27-33. Applying that same reasoning here, Stein concluded that the English

forum selection clause did not preclude Appian's motion to compel. *BM Brazil*, 347 F.R.D. at 9.

English Law Applies to the Privilege Dispute

Next, Stein applied the "touch base test" to determine whether English or U.S. law applied to the parties' privilege dispute. Stein concluded that England was the country with "'the most direct and compelling interest in whether … communications should remain confidential.'" Id. at 10 (quoting *Astra Aktiebolag v. Andrx Pharms.*, 208 F.R.D. 92, 98 (S.D.N.Y. 2002)). To support his conclusion, Stein cited the following facts (among others): All of Sibanye's assertions of privilege arose from its relationship with its English lawyers; those lawyers provided Sibanye with advice under English law; the share purchase agreements defined the parties' rights and obligations and contained English choice-of-law clauses; the documents underlying the parties' privilege dispute were sent from England; and the documents were sought for use in an English case. Id.

Stein observed that unlike other cases where American law was found applicable under the "touch base" test, "here no U.S.-based attorneys were involved with the [relevant] documents … nor were the parties preparing for litigation in the United States." Id. Under the circumstances, Stein found that "the United States [did not] hav[e] the 'predominant,' or even a significant, interest in th[e parties'] privilege dispute." Id.

English Privilege Law Differs From U.S. Law

In applying English privilege law to resolve the parties' dispute, Stein observed that the relevant English privilege law differed in material respects from U.S. law.

The English legal advice privilege, the corollary to the U.S. attorney-client privilege, applies to confidential communications between lawyers and their clients whose dominant purpose is to give or receive legal advice. Id. at 11. Therefore, a "dominant purpose" test applies to evaluate whether the primary communication is to seek or disseminate legal advice. Id.

Unlike under U.S. law, however, Stein observed that under English law privileged communications can be shared with third parties without disturbing the privilege so long as the party sharing the privileged communications "intended to share [them] confidentially" and shared them under circumstances that would indicate to the recipient that they should be kept confidential. See id. at 12.

The English litigation privilege, the corollary to the U.S. attorney work-product doctrine, attaches where litigation has commenced or is in "reasonable contemplation" and "the communication in dispute was prepared for the dominant purpose of litigation." Id. Again, under English law, "disclosure to any third party in the normal course will not defeat this privilege." Id.

Applying the English legal advice and litigation privileges, Stein determined that 24 of the 33 documents properly were withheld as privileged. Many of those 24 documents had been shared with third parties, and so under U.S. privilege law, the privilege would have been broken and Appian would have been entitled to receive them. Under the applicable English law, however, the privilege was maintained.

Conclusion

Given the relative ease with which parties to a foreign proceeding can obtain discovery from a U.S. person using Section 1782, no reason exists to believe that the upward trend in Section 1782 petitions will cease. Accordingly, U.S. courts likely will continue to be faced with discovery disputes where they will need to evaluate whether to apply foreign privilege law and where the application of the foreign law may lead to a different outcome than under U.S. law.