# Resolving The Conflict In 2nd Circ. Foreign Discovery Rulings

By **Elan Dobbs and Adrienne Koch** (April 9, 2026)

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Two recent U.S. Court of Appeals for the Second Circuit decisions highlight the ongoing uncertainty around the limits of Title 28 of the U.S. Code, Section 1782, the federal statute that permits discovery in the U.S. for purposes of a foreign proceeding.

Subject to much attention from the courts and those who do business in the United States, the statute permits a party to a foreign proceeding to take seemingly broad, U.S.-style discovery from any target that can be found within the U.S., as long as the discovery is for use in a proceeding before a foreign or international tribunal.[1]

Although a district court has broad discretion to deny discovery even if the statutory criteria are met if, among other things, it finds the request unduly burdensome or concludes that it represents an attempt to circumvent public policy, Section 1782 is expressly designed to promote discovery rather than to restrict it.[2] As a result, it is a substantial strategic tool for those pursuing litigation in jurisdictions less amenable to the types of discovery to which American litigants are accustomed. But it is not without limits.

The Second Circuit's decisions in Banoka SARL v. Elliott Management Corp.[3] and In re: SBK Art LLC[4] provide a prime example of how confusing and unpredictable interpreting those limits can be.

The opinions appear to be in conflict: Although in both instances the court found the statutory criteria met, Banoka affirmed a blanket denial of a Section 1782 petition based in part on the overbreadth and burdensomeness of the discovery sought; in contrast, SBK Art affirmed an order that granted one — agreeing that objections to overbreadth and burden were more appropriately raised in subsequent proceedings. Ostensibly, the very same objections that carried the day in Banoka were brushed aside in SBK Art: What gives?

When you look under the hood, both decisions illustrate the fact-intensive nature of the Section 1782 analysis and the extraordinary deference afforded to district courts in this area of the law. The details — including facts discussed by the district courts, but not the Second Circuit — help reconcile the seemingly disparate outcomes.

**Banoka**

In Banoka, prospective sellers of a hotel in France brought a Section 1782 proceeding seeking discovery from the purchaser's investors and investment advisers for a contemplated proceeding against the purchaser in England. But they had entered an exclusivity agreement with the purchaser in which they agreed that "the courts of England and Wales [would] have exclusive jurisdiction in relation to any dispute arising out of or in relation" to the agreement.[5]

Their initial Section 1782 application, made in Texas, seeking discovery from the purchaser itself was denied based largely on that provision.[6]

Undeterred, the sellers turned to New York — this time seeking Section 1782 discovery from the purchaser's investors and advisers. They met the same result: Although the U.S. District Court for the Southern District of New York found the statutory criteria met, it denied the discovery in the exercise of its discretion based on the forum selection clause, the fact that many of the documents sought were located abroad, and the burdensome nature of the requests themselves.[7]

In July 2025, the Second Circuit affirmed, finding "no abuse of discretion" in the outright denial of discovery under these circumstances.[8]

**SBK Art**

Less than seven months later, however, the Second Circuit's Feb. 20 decision in SBK Art permitted Section 1782 discovery against a U.S. law firm and appeared to wave away the concerns about burden that, at least in part, justified outright denial of the application in Banoka.

In SBK Art, the applicant commenced a Section 1782 proceeding seeking documents and depositions from Akin Gump, a law firm that had advised a company, Fortenova, in which SBK had held an interest, for use in proceedings challenging various actions that had resulted in a divestiture of that interest.

The Southern District of New York granted the petition in May 2025 but severely curtailed the breadth of the request: In addition to limiting it in time and scope, Akin would only be required to produce "non-privileged materials that are uniquely possessed by Akin or that have been shared with third parties other than Fortenova."[9] The Second Circuit affirmed.

The court distinguished its 2018 decision in Kiobel by Samkalden v. Cravath, Swaine & Moore LLP[10] — where it had reversed an order granting Section 1782 discovery from a party's counsel for use in proceedings against the party — reasoning that in Kiobel the petition sought to circumvent a confidentiality order that had been entered in a prior litigation, a factor not present in SBK Art.[11]

It went on to hold that "Akin's concerns are properly addressed under ordinary discovery rules" rather than at the Section 1782 stage. Its reasoning bears repeating at length:

> Akin's argument ultimately is not about the risk of disclosing privileged materials; indeed, neither SBK's proposed subpoena nor the District Court's order requires disclosure of such documents. ... According to Akin, because this risk of disclosure implicates Kiobel's policy concerns, the District Court should have denied SBK's petition outright. We disagree. As explained, Kiobel's policy concerns alone do not require denial, and the District Court did not abuse its discretion in granting the petition, in spite of the potential burdens that may be imposed on Akin in responding.[12]

The court further noted that its ruling merely "opened the gate" to discovery, and that Akin could still make whatever arguments and motions it felt necessary respecting undue burden and privilege under Rule 26 of the Federal Rules of Civil Procedure — emphasizing the district court's power to fashion a protective order.[13]

But what of Banoka? Doesn't it instruct that burden — including Akin's argument that, just as in Banoka, many of the documents were located abroad — be given weight in considering

whether to grant the Section 1782 application in the first place? The court said no, explaining:

> [W]hile Banoka found it was not an abuse of discretion to consider the foreign location of documents, it did not impose a rule requiring consideration of that factor. That the Banoka district court did not abuse its discretion in denying that petition does not mean the District Court here abused its discretion in granting this petition. Banoka merely underscores the well-settled principle that a district court has broad discretion under Section 1782.[14]

**Takeaways**

It is tempting at first blush to read these decisions as inconsistent. One ruling determined that the discovery sought was overbroad and would impose an undue burden, and on that basis denied the application outright. The other held that overbreadth and burden can be addressed under Rule 26 during the discovery process itself and should not preclude discovery entirely. And the Second Circuit expressly said that both approaches are correct. So where is the guidance — both for the district courts and for parties and their counsel?

The answer lies largely in the scope of the district court's discretion under Section 1782. It can conduct a thorough burden and overbreadth analysis at the Section 1782 stage, as in Banoka. Alternatively, it can narrow the requests and defer remaining disputes to the Rule 26 process, as in SBK Art. Both approaches are within the realm of what is permissible, as long as the district court adequately considers all relevant factors in exercising its discretion.

As a result, the key for any party seeking to navigate these shoals will almost certainly be in the facts of the individual case. The parties resisting discovery in Banoka prevailed largely because of the forum selection clause, but also partly because the application appeared to be a second attempted bite at the apple following an unsuccessful application in Texas.

The party seeking discovery in SBK Art prevailed (albeit on a substantially more limited scale than it had hoped) largely because the pared-down discovery the district court granted included mechanisms designed to address Akin's concerns about privilege and burden, but also partly because Akin was acting both as counsel and as a registered lobbyist for its client — and its activities might not have been privileged.[15]

In other words, the details provided at the district court level, including some that were not necessarily a focus in the Second Circuit, mattered in the discretionary determination of whether to grant a Section 1782 application that met the statutory criteria.

There is one further point to bear in mind: Unless there is an issue over whether those statutory criteria — which require that the material be sought from a party that is "found" in the district, be "for use" in a proceeding before a foreign or international tribunal, and be sought either by the tribunal itself or by an "interested person" — have been met, a district court's discretionary ruling with respect to a Section 1782 application is reviewed only to ensure that the court's discretion was not abused.

Under that standard of review, the circuit court will leave the ruling in place unless the outcome "cannot be located within the range of permissible decisions," as the Second Circuit put it in its 2023 decision in Buon v. Spindler.[16] That is, and should be, rare.

Given these insights, the best approach — either for a party seeking Section1782 discovery

or for a party resisting it — is to persuade the district court that the facts of the particular case warrant an exercise of discretion in its favor. A party's chances on appeal from any discretionary determination by a district court are generally pretty slim, and Banoka and SBK Art demonstrate that this area of the law is no exception.

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[1] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246 (2004).

[2] Kiobel by Samkalden v. Cravath, Swaine & Moore LLP, 895 F.3d 238, 244 (2d Cir. 2018) (identifying the "'twin aims' of Section 1782" as (i) "providing efficient means of assistance to participants in international litigation in our federal courts" and (ii) "encouraging foreign countries by example to provide similar means of assistance to our courts").

[3] 148 F.4th 54 (2d Cir. 2025).

[4] 168 F.4th 68 (2d Cir. 2026).

[5] Banoka, 148 F.4th at 60.

[6] Id. at 60-61.

[7] Id. at 61-62.

[8] Id. at 59.

[9] SBK Art, 168 F.4th at 75.

[10] 895 F.3d 238 (2d Cir. 2018).

[11] SBK Art, 168 F.4th at 80-85

[12] Id. at 84.

[13] Id.

[14] Id. at 85-86.

[15] In re SBK ART LLC, 2025 WL 1537474, at *12 (S.D.N.Y. May 30, 2025), aff'd, 168 F.4th 68 (2d Cir. 2026).

[16] Buon v. Spindler, 65 F.4th 64, 74 (2d Cir. 2023) ("A district court abuses its discretion when (1) its decision rests on an error of law ... or a clearly erroneous factual finding, or (2)its decision ... cannot be located within the range of permissible decisions.") (internal quotation omitted).