GIBSON DUNN

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SFO SUCCESSFULLY DEFENDS CHALLENGE OVER THE TERRITORIAL SCOPE OF COMPULSORY DOCUMENT REQUESTS

To Our Clients and Friends:

Last week the High Court in London handed down its decision following a challenge by KBR, Inc. against the issuing of compulsory document requests that required the production of documents held by the company outside of the UK.

KBR, Inc. is a U.S. engineering and construction company and ultimate parent company of the KBR Group. It does not have a physical presence in the UK, but has a subsidiary, KBR Ltd, that does. KBR Ltd is under investigation by the SFO for suspected bribery.

At the heart of the proceedings was a notice issued to KBR, Inc. by the Serious Fraud Office ("**SFO**") under section 2(3) of the Criminal Justice Act 1987 ("**CJA**") (the "**July Section 2 Notice**") compelling the production of documents held outside the UK. The SFO issued the July Section 2 Notice to a representative of KBR, Inc. who had attended a meeting with the SFO in the UK to discuss its investigation into KBR Ltd.

The Challenge

KBR, Inc. challenged the July Section 2 Notice on three grounds:

1. **Jurisdiction**: the July Section 2 Notice was *ultra vires* the CJA, as it requested material held outside of the UK from a company incorporated outside of the UK.

2. **Discretion**: the Director of the SFO made an error of law in issuing the July Section 2 Notice instead of using its power to seek Mutual Legal Assistance ("**MLA**") from the US authorities under the UK's 1994 bilateral MLA Treaty with the US.

3. **Service**: the July Section 2 Notice was not properly served on KBR, Inc. under the CJA.

Jurisdiction

The Court held that in relation to UK companies with documents outside of the UK, that section 2(3) of the CJA must have "*an element of extraterritorial application*" otherwise "*a UK company could resist an otherwise lawful s.2(3) notice on the ground that the documents in question were held on a server out of the jurisdiction*". The extraterritorial reach would minimize the risk of the SFO's investigations being frustrated by companies moving their documents out of the jurisdiction.

As regards documents held by foreign companies outside of the UK, the court held that section 2(3) will extend to some foreign companies in respect of documents held abroad, when there is a "*sufficient connection*" between the foreign company and the jurisdiction (the UK). This test is fact specific in order to allow for "*practical justice in the individual case*".

In KBR, Inc.'s case, the Court found that certain following factors were not sufficient on their own to satisfy the "*sufficient connection*" test, including:

- the fact that KBR, Inc. was the parent company of KBR Ltd, as it would ensnare parent companies of multinational groups without justification.

- the fact that KBR, Inc. cooperated to a degree with the SFO's request for documents and remained willing to do so voluntarily, on terms that it would apply SFO search terms across data held in the US. Cooperation is to be encouraged but it should not give rise to a risk of being held to imply acceptance of jurisdiction.

- the fact that a KBR, Inc. representative agreed to, and did, attend a meeting with the SFO. This is for similar reasons as those set out above.

However, the Court went on to find that there was a sufficient connection between KBR, Inc. and the UK in this case, based on the fact that some suspected corrupt payments made by KBR to Unaoil required the express approval of KBR, Inc. and were processed by KBR, Inc.'s treasury function, and for a period approval was also required from KBR, Inc.'s compliance function before payment could be released. The Court also observed that a corporate officer of KBR, Inc. was based in the Group's UK office.

Discretion

KBR, Inc. argued that even if the CJA did confer jurisdiction on the SFO to compel the production of materials abroad, the Director of the SFO should not have exercised his power under section 2(3) of the CJA, which is discretionary, and should have first considered using the MLA route. KBR, Inc.'s position was that in failing to do this amounted to an error of law.

This argument was rejected. The High Court held that the MLA option was an additional power available to the SFO:

> "*The availability of MLA gives the Director additional options; it does not curtail his discretion to use the separate power of issuing s.2(3) notices… It follows that KBR [Inc] has failed to demonstrate any error of law on the part of the Director in the exercise of his discretion to issue the July Notice.*"

The High Court noted additionally in the SFO's favour that there are "*good practical reasons*" for the Director to use a section 2 notice instead of MLA. Such reasons included delays, the risk that a request is ignored, and the burden on the requested state of having to deal with a request when it would be simpler to obtain the materially directly. KBR, Inc. had neither shown nor suggested that compliance

with the July Section 2 Notice would have raised any complexities or issues of local U.S. law, or conflict with duties owed by KBR, Inc. to third parties.

Service

KBR, Inc. argued that simply giving the July Notice to KBR, Inc.'s representative during an SFO meeting was not enough to "serve" KBR, Inc. with the July Section 2 Notice, and that the fact that KBR, Inc. 's representative was in the UK did not signify that KBR, Inc. was present in the UK.

The court rejected this challenge, noting in particular that section 2(3) required no additional formality beyond the giving of the notice. The Court held that KBR, Inc. was "*plainly present*" in the jurisdiction when the SFO gave the July Section 2 Notice to its representative. The SFO made the meeting in question conditional on the attendance of "the clients" (i.e., KBR, Inc.). As such, it was clear that KRB Inc's representatives were in the jurisdiction in their capacity as representatives and not "*coincidentally or on some personal frolic*".

The High Court, however, noted that the SFO's plan to give the July Notice to KBR, Inc.'s representative during the course of the meeting had "*unappealing features*". However, those features did not invalidate the July Notice; rather they serve as a warning to others who may attend similar meetings with the SFO in the future.

Implications

The decision has helped to clarify the scope of the SFO's section 2 notice power, which to-date has not been considered comprehensively by the courts. The SFO will no doubt be satisfied with the result.

Foreign companies that hold documents outside of the UK will not be immune from the SFO's section 2 power, provided that the SFO can illustrate a "*sufficient connection*" between the company in question and the UK. A parent / subsidiary relationship alone will not suffice, but where there are links between a UK subsidiary and its foreign parent, for example if they share accounting or compliance functions, this will likely suffice. In this case, another connection was the presence of a KBR, Inc. employee in KBR Ltd's office. This seems a rather tenuous connection. Whether that factor alone would have been enough is difficult to assess. The High Court, however, obviously thought it was sufficiently material to identify and take into account. This decision is likely to embolden the SFO in serving section 2 notices on foreign companies involved in their investigations.

The Crime (Overseas Production Orders) Bill, which is currently before Parliament, may soon render the decision less relevant, at least as far as documents are stored electronically and in states where reciprocal arrangements are made for recognition of production orders. The Bill has received little press attention to date but it may have significant implications. If enacted, the SFO (amongst other authorities) will be able to make an application to the Crown Court for an order requiring an overseas person to produce electronic data in connection with an investigation, where there is an international cooperation agreement in place with the jurisdiction in question. We note that the U.S. has passed the CLOUD Act (Clarifying Lawful Use of Overseas Data Act), which the UK Government has stated was passed "*in anticipation and preparation*" for a bilateral UK-US data access agreement. If the Bill becomes law and

agreements are put in place, it may become much easier for the SFO to obtain electronic data from overseas to aid its investigations.

This client alert was prepared by Patrick Doris, Sacha Harber-Kelly, Steve Melrose and Rose Naing.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. If you would like to discuss this alert in greater detail, please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any of the following members of the firm's disputes practice:

Philip Rocher (+44 (0)20 7071 4202, procher@gibsondunn.com)
Patrick Doris (+44 (0)20 7071 4276, pdoris@gibsondunn.com)
Sacha Harber-Kelly (+44 20 7071 4205, sharber-kelly@gibsondunn.com)
Charles Falconer (+44 (0)20 7071 4270, cfalconer@gibsondunn.com)
Allan Neil (+44 (0)20 7071 4296, aneil@gibsondunn.com)
Steve Melrose (+44 (0)20 7071 4219, smelrose@gibsondunn.com)
Sunita Patel (+44 (0)20 7071 4289, spatel2@gibsondunn.com)