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Sixth Circuit Opens Door To U.S.-Style Discovery In Aid Of Private International Arbitration Under 28 U.S.C. § 1782

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Commentary

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[Editor's Note: Lisa Houssiere is a principal and Cecilia Ibarra-van Oostenrijk is senior counsel at McKool Smith in the Houston office. Any commentary or opinions do not reflect the opinions of McKool Smith or LexisNexis®, Mealey Publications™. Copyright © 2020 by Lisa Houssiere and Cecilia Ibarra-van Oostenrijk. Responses are welcome.]

By virtue of a landmark decision from the United States Court of Appeals for the Sixth Circuit, foreign parties that find themselves embroiled in cross-border disputes can add another weapon to their arsenal. Once an esoteric statute that parties used to request evidence in support of either regulatory, state-sponsored, or treaty arbitration, 28 U.S.C. § 1782 may now be used by foreign litigants to obtain U.S.-style discovery for use in private international arbitration.

United States courts have long tussled with whether to apply § 1782 in the context of international arbitration between two commercial parties. Under § 1782(a), a federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon application by "any interested party."[1] Whether § 1782 can be used to obtain evidence for use in private international arbitrations has been subject to debate because courts disagree on whether the term "foreign or international tribunal" in the statute includes private, contracted-for commercial arbitrations.

On September 19, 2019, the Sixth Circuit further fueled the debate, ruling that U.S.-style discovery is available to parties for use in private international arbitrations under § 1782(a).[2] The Sixth Circuit's groundbreaking decision is particularly notable because it departs from decisions by the Second and Fifth Circuits that previously held that § 1782 applications could not be brought in support of private international arbitrations.[3] In *Abdul Latif Jameel Transportation Company v. FedEx Corp.*, FedEx International entered into an agreement for delivery services in Saudi Arabia with Abdul Latif Jameel Transportation Company ("ALJ"), a Saudi corporation.[4] FedEx International and ALJ entered into a separate agreement for support services.[5] Pursuant to these agreements, ALJ initiated arbitration against FedEx International under the rules and laws of Saudi Arabia, and FedEx International initiated arbitration against ALJ in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA").[6]

In aid of these arbitrations, ALJ filed a § 1782(a) petition to compel discovery from FedEx Corporation, FedEx International's parent company, in the United States District Court for the Western District of Tennessee.[7] ALJ sought to subpoena documents and deposition testimony from a corporate representative of FedEx Corporation even though FedEx Corporation was not a party to either of ALJ's contracts with FedEx International.[8] The district court denied ALJ's application, determining that neither the Saudi arbitration panel nor the DIFC-LCIA arbitration panel constituted a "foreign or international tribunal" within the meaning of § 1782(a).[9]

The Sixth Circuit reversed the district court decision and engaged in a lengthy discussion regarding the use of

the word "tribunal" in dictionaries, legal writing, and statutory sources.[10] The court considered the plain meaning of the term, and to a lesser degree, the legislative history of the statute, concluding that the term "tribunal" in § 1782(a) encompasses private, contracted-for commercial arbitrations.[11]

The issue of whether parties can routinely obtain discovery under § 1782(a) for use in private international arbitration is far from settled, and the United States Supreme Court is likely to weigh in soon given the circuit split. In the meantime, the Sixth Circuit decision will be a valuable tool for foreign litigants seeking discovery from companies within the jurisdiction of U.S. courts for use in private international arbitration.

While the decision has far-reaching consequences, there are geographic limitations to who can take advantage of it. Specifically, the decision is only binding on courts within the Sixth Circuit, which includes federal courts in Kentucky, Michigan, Ohio, and Tennessee. An application under § 1782(a) may be brought by "any interested person" in the "district in which a person [from which the discovery is sought] resides or is found," meaning that discovery for use in private international arbitration can only be sought from persons residing or located within the jurisdiction of the Sixth Circuit.[12] An attempt to obtain discovery via § 1782(a) from persons residing or solely located within the jurisdiction of the Second Circuit (New York, Connecticut, and Vermont) or the Fifth Circuit (Texas, Louisiana, and Mississippi) would most likely not be successful under the current law in those jurisdictions.

Even if parties satisfy the geographic requirement to file a § 1782(a) application, discovery is not automatic. There are significant hurdles to overcome prior to a district court compelling discovery for use in private international arbitrations. While the Sixth Circuit's decision is binding for district courts in that circuit, those same district courts are not required to grant discovery in aid of a foreign proceeding under § 1782(a) – the district courts retain substantial discretion to determine the scope of discovery they may permit.[13] District courts within the Sixth Circuit must still consider four discretionary factors identified by the United States Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* when evaluating a § 1782(a) application.[14] The *Intel* factors are: (1) whether the person from whom the discovery is sought is a participant in the foreign proceeding; (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 assistance; (3) whether the request is an attempt to circumvent foreign proof gathering limitations or other policies of a foreign country or the U.S.; and (4) whether the discovery sought is unduly intrusive or burdensome.[15] Even though district courts within the Sixth Circuit must now consider that a private international arbitration meets the definition of a "tribunal" for the purposes of § 1782(a), a district court may still refuse to compel discovery based on its own discretionary authority.

More than ever, parties who may become involved in cross-border disputes must plan ahead and have a clear global strategy for how they will seek or attempt to limit others from seeking evidence for use in international arbitration proceedings. Cross-border disputes continue to be challenging to navigate because they often involve multinational companies, multiple contracts, and parallel litigation. In the modern business world, the reality is that information relevant to cross-border disputes is often located in numerous jurisdictions around the world. The ability to seek evidence from a party that has ties to the U.S. – even if that evidence is actually located outside the U.S. – can have game-changing effects in a private international arbitration. Another factor to consider if the evidence is located outside the U.S. is whether there are data privacy laws that may preclude access to the information.

The impact of the Sixth Circuit decision is noteworthy in the sense that it empowers parties in private international arbitrations to seek ancillary discovery through U.S. federal courts, has the potential to delay foreign proceedings, is likely to add significant costs for all parties, and forces parties to become entangled in U.S. court proceedings on discovery issues. Companies with ties to the U.S. and that desire to limit risk and increase certainty regarding the application of § 1782 to private international arbitrations should consider addressing this issue in their arbitration clauses. There are a variety of measures parties may consider to limit or avoid the potential application of § 1782 to their private international arbitration proceedings. Parties may choose to exclude § 1782 discovery altogether or limit its application to their disputes. The consequences of ignoring the Sixth Circuit's ruling could result in significant delays and costs, making it all the more important

that parties proactively consider their exposure in their commercial agreements.

Endnotes

1. 28 U.S.C. § 1782(a).
2. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.,* 939 F.3d 710 (6th Cir. 2019).
3. *See Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999) (holding that § 1782 only applies to "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies" and that Congress did not intend for § 1782 to apply to an arbitral body established by private parties); *see Rep. of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) (holding that the term "foreign and international tribunals in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations").
4. *Abdul Latif Jameel Transp. Co.,* 939 F.3d at 714.
5. *Id.*
6. *Id.* at 715.
7. *Id.* at 715-16.
8. *Id.* at 716.
9. *Id.*
10. *Id.* at 717-28.
11. *Id.* at 717-30.
12. 28 U.S.C. § 1782(a).
13. Abdul Latif Jameel Transp. Co., 939 F.3d at 732.
14. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004) (permitting a foreign litigant to obtain discovery in the U.S. provided certain discretionary factors are met).
15. *Id.* ■

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