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Client Alert

SEPTEMBER 23, 2019

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Sixth Circuit Allows Discovery In Support of DIFC Arbitration

The United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") has ruled that federal courts in the United States may order parties to produce documents and testimony in support of private commercial arbitrations overseas pursuant to 28 U.S.C. § 1782. It is the first federal court of appeal to do so, and its decision stands in conflict with prior decisions. This ruling establishes a circuit split that will eventually require resolution by the nation's highest court.

BACKGROUND

The case involved an arbitration administered under the DIFC-LCIA Arbitration Rules between Saudi Arabian company, Abdul Latif Jameel Transport Co. Ltd. (ALJ) and U.S. company, FedEx, in respect of an agreement whereby ALJ was to serve as FedEx's delivery services partner in the Kingdom. ALJ alleged that FedEx International decided to nix the agreement without cause, while FedEx alleged unsatisfactory performance from ALJ. Through its 1782 petition, ALJ sought documents and testimony from FedEx, headquartered in the United States, regarding its role in the underlying negotiations and its subsidiary's decision to terminate the agreement with ALJ. The Tennessee district court denied the petition on grounds that the DIFC did not qualify as "a foreign or international tribunal" within the meaning of the statute, and thus disclosure from FedEx was not permitted.

THE DECISION

In reviewing the district court's determination that Section 1782 did not permit discovery in aid of commercial arbitrations, the Court of Appeals first noted that two other federal Courts of Appeal - in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* and *Republic of Kazakhstan v. Biedermann Int'l* - had previously ruled on this issue, holding that Section 1782 did not permit discovery in aid of private commercial arbitrations. Fifteen years later, however, the United States Supreme Court issued its decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, which generally broadened the scope of the statute's application.

With these precedents as a backdrop, the Sixth Circuit proceeded to a *de novo* determination of whether Section 1782 may be used in aid of private commercial arbitrations, beginning with a textual analysis of the meaning of "tribunal." Examining the meaning of the word as used in dictionaries, legal writings, and other parts of the statute, the Court found no reason to exclude tribunals convened in private commercial arbitrations. The Court further noted that nothing in the Supreme Court's decision in *Intel* would preclude inclusion of commercial arbitral tribunals within the universe of "foreign tribunals" that Section 1782 was intended to aid. Finally, the Court noted its disagreement with the *NBC* and *Kazakhstan* decisions.

Having determined that DIFC-LCIA arbitration was a proceeding in aid of which Section 1782 discovery could be employed, the case was remanded back to the Tennessee district court to determine whether the other discretionary requirements for 1782 relief, stipulated in *Intel* were satisfied, including whether the person from whom discovery is sought is a participant in the foreign proceeding, the nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign tribunal to judicial assistance from the United States courts. Although the Sixth Circuit's decision binds only courts within its purview, the decision creates the first circuit split on the issue of the use of Section 1782 in the context of international commercial arbitration, and an opportunity for the Supreme Court to weigh in and provide clarity on this issue for all federal courts.

PRACTICAL CONSIDERATIONS

Section 1782 has always been a powerful tool in the pursuit of evidence located in the United States for use in foreign proceedings. It has been well understood for some time that 1782 can be used in support of proceedings before foreign courts. The present decision reflects an ongoing trend favoring the liberal granting of discovery for use before foreign tribunals and makes clear -- at least within the Sixth Circuit -- that the same reasoning also applies when the underlying proceeding is a private commercial arbitration located on foreign soil, such as the DIFC. Whether litigating or arbitrating in the world's financial centers, for and against multinational parties, well-informed counsel should be aware of the tactical advantages of Section 1782 discovery, particularly in the arbitral context, where Section 1782 is still infrequently used. Moreover, Section 1782 may be utilized even if the links between the dispute and the United States are not obvious. For example, because U.S. dollar transactions all clear through U.S. banks, discovery into money movements can be obtained even where the parties themselves are not operating in the United States. It pays therefore to know that Section 1782 may be used as a sword in a variety of situations, but also to be aware that it might too be used adversely.