ALERT MEMORANDUM

Broadening the Scope of 28 U.S.C. § 1782: Trends in Using U.S. Discovery In Foreign Proceedings

October 18, 2019

Recent decisions of the Sixth and Second Circuits have the potential to significantly broaden the application of 28 U.S.C. § 1782 in order to compel production of documentary evidence for use in arbitration proceedings seated outside the U.S.

Specifically, on September 19, 2019 the Sixth Circuit determined that the term "foreign or international tribunals" as used in § 1782 encompasses private foreign or international arbitrations, as well as state-sponsored proceedings.[1] This is in direct contrast to recent decisions of the Second and Fifth Circuits, which had restricted discovery pursuant to § 1782 to national courts and other state-sponsored bodies.[2]

Separately, on October 8, 2019, the Second Circuit ruled that § 1782 applies extraterritorially to encompass documents wherever they are located, provided they are within the "possession or control" of the respondent party. [3]

These two recent decisions may substantially broaden the scope of discovery available under § 1782 in cases involving foreign or international arbitrations and/or documents located outside of the U.S. Such a broadening could be especially relevant for entities like financial institutions and consulting firms that often maintain substantial repositories of documents and information for their clients. Considering the potential significance of the two decisions, they also set the stage for possible review of the statute by the U.S. Supreme Court for the first time since 2004.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Ari MacKinnon
+1 212 225 2243
amackinnon@cgsh.com

Howard S. Zelbo
+1 212 225 2452
hzelbo@cgsh.com

One Liberty Plaza
New York., NY 1006-1470
T: +1 212 225 2000
F: +1 212 225 3999

*New York associate Ye Eun Charlotte Chun contributed to the preparation of this Alert Memorandum.

[1] *Abdul Latif Jameel Transportation Co. v. FedEx Corp*. (6th Cir. 2019).

[2] *See National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.4d 184, 190 (2d Cir. 1999); *see Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999).

[3] *In re del Valle Ruiz*, No. 18-3474 (2d. 2019).

Statutory Overview of § 1782

Pursuant to 28 U.S.C. § 1782, a U.S. federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon application by "any interested person." U.S. courts interpreting the statute have generally required proof of three statutory prerequisites in order to grant discovery requests:

> 1) the party invoking Section 1782 is an "interested person" with reasonable interest in judicial assistance of the U.S. courts or is a "foreign or international tribunal";
>
> 2) the evidence sought is to be used in a "proceeding in a foreign or international tribunal"; and
>
> 3) the person or entity targeted for production of evidence "resides" or "is found" in the U.S. court's district.

In the event that these three prerequisites are all met, a district court may have the discretion, but not the obligation, to permit discovery to proceed depending upon its assessment of several discretionary factors set out in the Supreme Court's decision in *Intel*[4].

Circuit Courts Split on § 1782

In the past month, the U.S. Court of Appeal for each of the Sixth and Second Circuits has issued potentially path-breaking decisions relating to the interpretation of the second and third statutory prerequisites mentioned above. Specifically, the Sixth Circuit in *ALJ Transportation v. FedEx*[5] addressed the question of whether private foreign or international arbitrations constitute "proceeding[s] in a foreign or international tribunal," thereby creating a split among the circuits. The Second Circuit in *In re del Valle Ruiz*[6] addressed what it means under Section 1782 for a party to "reside[]" or be "found" in the federal court's district as well as whether discovery may be sought of documents maintained outside that district, including outside of the U.S.

A. Private Commercial Arbitrations Included in Definition of "Tribunals"

In *ALJ Transportation v. FedEx,*[7] the Sixth Circuit addressed the question of whether private foreign or international arbitrations constitute "proceeding[s] in a foreign or international tribunal" for which Section 1782 discovery is available. In 1999, both the Second and Fifth Circuits had answered that question in the negative, opining instead that Section 1782 discovery is available only for use in "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[8] In direct contrast to those prior holdings, in its recent decision in *ALJ* the Sixth Circuit has now expressly held that Section 1782 "permits discovery for use in the private commercial arbitration at issue."[9]

The Sixth Circuit's decision in *ALJ v. FedEx* turns largely on a plain-language interpretation of the phrase "proceeding in a foreign or international tribunal." According to the Sixth Circuit, the principal question was not whether a private foreign or international arbitration was "foreign or international" in the relevant sense – it obviously was – but rather whether such a foreign or international arbitral body constituted a "tribunal."[10] To answer that question, the Sixth Circuit consulted various dictionary definitions and common usage, as well as the language of the surrounding provisions of Section 1782, to hold that a private arbitral body is indeed a tribunal.[11]

Having concluded that the plain language of Section 1782 unambiguously applied to private foreign or

[4] *See Intel* (2004). The most commonly cited discretionary factors (known as the *Intel* factors) include: (1) whether the person or entity targeted for the production of evidence is a participant in the foreign proceeding; (2) the nature of the foreign arbitral tribunal, the character of the foreign proceedings, and the "receptivity" of the foreign tribunal to U.S. judicial assistance; (3) whether the request is an attempt to circumvent a foreign country's or the United States' policies or discovery limitations; and (4) whether the request is unduly burdensome or intrusive.

[5] *See ALJ* (6th Cir. 2019).
[6] *See In re del Valle Ruiz* (2d. 2019).
[7] *See ALJ* (6th Cir. 2019).
[8] *See NBC,* 165 F.3d at 190; *see Biedermann,* 168 F.3d at 882.
[9] *See ALJ* (6th Cir. 2019).
[10] *Id.* at 10.
[11] *Id.*at 10, 14.

international arbitrations, the Sixth Circuit went on to hold that there was no need to review the statute's legislative history and other policy arguments put before it. Considering that the Second and Fifth Circuits in 1999 had found these factors to be persuasive, the Sixth Circuit stressed that the legislative history was largely silent and, thus, unpersuasive, and that the policy arguments did not obviously undermine its conclusion based on the plain-language.[12]

The Sixth Circuit's decision has created a circuit split, which revolves largely around the extent to which the statutory language in Section 1782 is unambiguous. Whereas the Sixth Circuit held the statute to be unambiguous, the Second and Fifth Circuits had previously disagreed, ruling instead that recourse must be had to Section 1782's legislative history and related policy considerations in order to interpret the term "proceeding in a foreign or international tribunal." In this regard, the Second and Fifth Circuits were persuaded that Congress did not intend the term to encompass private foreign or international arbitrations absent mention of such private arbitrations in the legislative history[13] – something they concluded one would expect to see if Congress intended to change the legal landscape to allow discovery for use in private arbitrations. Moreover, the Second and Fifth Circuits were particularly persuaded by two broad policy arguments[14]:

> 1) permitting Section 1782 discovery for use in private foreign or international arbitrations would produce the absurd result that broader discovery would be available in private foreign or international arbitrations than in private domestic arbitrations under Section 9 of the U.S. Federal Arbitration Act;
>
> 2) permitting Section 1782 discovery for use in private foreign or international arbitrations would enable parties to circumvent the typically narrower scope of discovery available in such proceedings.[15]

To the extent that the U.S. Supreme Court elects to address this circuit split, an important battleground will be whether the language of Section 1782 is in fact unambiguous, as the Sixth Circuit has now most recently held.

B. Expanded Scope of Jurisdiction and Extraterritoriality

As discussed, up until now the Second Circuit has taken a narrower view of the applicability of Section 1782 to private arbitrations than the most recent Sixth Circuit decision. At the same time, the Second Circuit's decision in *In re del Valle Ruiz* takes a broad view of the discovery available (subject to the federal district court's sound discretion) in the case of foreign or international judicial proceedings. Specifically, the Second Circuit addressed the questions of what it means for a party to "reside[]" or be "found" in the court's district for purposes of Section 1782, and assuming that the party resides or is found in the district, whether discovery may be had of documents outside the district, including outside the U.S.

In addressing the first question, the Second Circuit relied on well-established jurisprudence regarding personal jurisdiction to conclude that under the "reside" / "found-in" requirement the district court essentially must determine whether the party from whom discovery was sought was subject to the specific personal jurisdiction of the court.[16] The court held, "where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery."[17] In so doing, the Second Circuit rejected the argument that discovery could be had only if the party had more extensive contacts sufficient to bring it within the district court's general jurisdiction.[18]

[12] *Id.* at 19, 26.
[13] *See NBC*, 165 F.3d at 190; *see Biedermann*, 168 F.3d at 882.
[14] *Id.*
[15] *Contra ALJ* (6th Cir. 2019) at 24, 26.
[16] *See In re del Valle Ruiz* at 16, 19.
[17] *Id.* at 19.
[18] *Cf. In re Qualcomm Inc.*, 162 F. Supp. 3d 1029 (implying that Section 1782 requires analysis of general jurisdiction, rather than specific jurisdiction).

With respect to the second question, the Second Circuit – applying general principles governing the discovery available to parties to U.S. federal court litigations – determined that discovery may be had of any documents, wherever located (including outside the U.S.), provided that the documents are within the "possession, custody, or control" of the party.[19] Citing to the Eleventh Circuit decision in *Sergeeva v. Tripleton*[20], the Second Circuit held that "the location of responsive documents and electronically stored information – to the extent a physical location can be discerned in this digital age – does not establish a *per se* bar to discovery under Section 1782."[21]

Looking Forward

The Sixth Circuit's decision in *ALJ* has created a split among the Circuit courts on the question of whether private foreign or international arbitrations are included in the definition for "tribunals" for purposes of Section 1782. It remains to be seen how Circuits other than the Sixth, Second and Fifth Circuits will answer this question. At the same time, it seems reasonably likely that the Supreme Court will be called upon to intervene and resolve the divide over whether the plain language of Section 1782 covers private foreign or international arbitrations, or whether recourse must be had to the legislative history and policy considerations. In the meantime, Section 1782 discovery requests in aid of arbitrations seated abroad are more likely to be viewed favorably by the district courts within the Sixth Circuit, rather than the Second or Fifth Circuits.

The Second Circuit's decision in *In re Valle*, for its part, could give rise to significant consequences, especially for financial institutions, accounting firms, and consulting firms that hold client or customer information. It will behoove financial institutions, accounting firms, and consulting firms (among others) to take a further look at their data storage and access policies and practices based on the latest case law, separate and apart from the growing legion of considerations relating to evolving data privacy and banking secrecy regulations. Otherwise, the sole successful defense to a Section 1782 discovery request may be to appeal to the exercise of discretion by the district court not to grant discovery in accordance with the above-referenced *Intel* factors.

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[19] *Id.* at 25.

[20] *See Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016).

[21] *Sergeeva*, 834 F.3d at 1200.