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Legal Update

In a divergence from other US Federal Circuits, the US Sixth Circuit Court of Appeals rules that 28 U.S.C. § 1782 may permit US discovery for use in non-US private arbitrations

Title 28, US Code, Section 1782 authorizes an interested person to petition a US federal district court where any person "resides or is found" for an order directing such person to provide documents or testimony for use "in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). In *In re Application to Obtain Discovery for Use in Foreign Proceedings*, No. 19-5315, 2019 WL 4509287 (6th Cir. Sept. 19, 2019), the US Court of Appeals for the Sixth Circuit was called upon to decide if Section 1782 permits US-style discovery for use in a non-US private arbitration. In doing so, the Sixth Circuit became the first federal appellate court to depart from the interpretation of Section 1782 adopted by the Second and Fifth Circuits.[1] In contrast to its sister Circuits, a unanimous three-judge panel of the Sixth Circuit held that the word "tribunal" in the relevant clause of Section 1782 includes private arbitrations. This decision could make it easier for parties engaged in non-US arbitrations to obtain discovery from US entities, particularly those that fall within the Sixth Circuit's jurisdictional reach.[2]

1 The Supreme Court is the highest court in the US federal court system. Thirteen appellate courts, "Courts of Appeals," sit below the Supreme Court, and there are 94 federal judicial districts organized into 12 regional Circuits, each of which has a Court of Appeals. All courts are bound by the decisions of the Supreme Court. However, if the Supreme Court has not decided an issue, the federal district courts in each Circuit are bound by the judgments of the applicable Court of Appeals for that Circuit. The Courts of Appeals are free, however, to diverge from one another.

2 The states within the Sixth Circuit's jurisdiction are Kentucky, Michigan, Ohio and Tennessee.

A. Background

The underlying dispute arose under two contracts between Abdul Latif Jameel Transportation Company ("ALJ"), a Saudi Arabian company, and FedEx International ("FedEx Int'l"), a subsidiary of FedEx Corporation ("FedEx"). FedEx Int'l commenced the arbitration at issue under the rules of the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA"). In May 2018, ALJ filed an application in a federal district court in Tennessee, seeking discovery from FedEx under Section 1782, in aid of the DIFC-LCIA arbitration. The district court denied ALJ's application, holding that the phrase "foreign or international tribunal" in Section 1782 did not cover that arbitration. ALJ filed an expedited appeal in the Sixth Circuit and, for the reasons discussed below, the appellate court reversed the district court ruling.

B. What is a Section 1782 application?

Under Section 1782, a party can apply to a federal district court for an order directing a person or entity that "resides or is found" in that district to produce evidence for use in proceedings outside of the US. Such an application, which can be made against first or third parties, may be used to obtain evidence that might not necessarily be available via the disclosure process in the underlying non-US arbitration or court proceedings. The relevant portion of Section 1782 reads:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.… The order may be made … upon the application of any interested person.

28 U.S.C. § 1782(a). In the decision at issue, the key question was whether a privately contracted-for commercial arbitration (in that instance, the DIFC-LCIA arbitration) fell within the definition of a "foreign or international tribunal."

C. The Sixth Circuit's decision

1. APPLYING PRINCIPLES OF STATUTORY CONSTRUCTION

The Sixth Circuit applied basic statutory construction principles to determine whether the word "tribunal" in the phrase "foreign or international tribunal" in Section 1782 includes private arbitration. In particular, it noted that "[i]n determining the meaning of a statutory provision," courts should "look first to its language, giving the words used their ordinary meaning." *In re Application*, 2019 WL 4509287, at *4 (quoting *Artis v. Dist. of Columbia*, 138 S. Ct. 594, 603 (2018)).

The court first considered dictionary definitions of "tribunal" to establish an ordinary meaning. While some dictionaries had definitions "broad enough to include private arbitration," others contained "narrower definitions that seem to exclude such proceedings." *Id.* at *6 (citing, *e.g.*, *compare* Webster's Third New Int'l Dictionary (1966) (defining "tribunal" as "a person or body of persons having authority to hear and decide disputes so as to bind the disputants"), *with* Ballentine's Law Dictionary (3d ed. 1969) (defining "tribunal" as "[t]he seat or bench for the judge or judges of a court")).

Because these definitions were not determinative, the court then considered the use of "tribunal" by lawyers and judges. It noted that a respected treatise used the word "tribunal" to describe private arbitration as early as 1853. Furthermore, a myriad of US state and federal courts, including the Supreme Court, used "tribunal" throughout the 19th and 20th centuries to refer to private arbitration. For example, a New Jersey state court described arbitration as "a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary process of law." *Id.* at * 6 (quoting *E. Eng'g Co. v. Ocean City*, 167 A. 522, 523 (N.J. 1933)). Also, in describing an issue it was called on to decide, the Supreme Court said that the operative question was "whether a judicial rather than an arbitration tribunal shall hear and determine [an] accounting controversy." *Id.* at *7 (quoting *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 185 (1955)).

The Sixth Circuit was persuaded by the expansive dictionary definitions and longstanding usage of "tribunal" that the word's ordinary meaning encompassed private arbitrations. However it still needed to be satisfied that this interpretation was not at odds with the text, context, and structure of Section 1782.

To that end, the court considered two uses of "tribunal" in the Title 28 (i.e., the portion of the US Code that governs the federal judicial system). First, a sentence in Section 1782 provides that a discovery order issued under that section may follow the "practice and procedure of the foreign country or the international tribunal" for collecting evidence. *Id.* at *8 (quoting 28 U.S.C. § 1782(a)). Second, Section 1781 addresses the transmittal of "a letter rogatory issued, or request made, by a foreign or international tribunal" to a "tribunal, officer, or agency" in the US. *Id.* (quoting 28 U.S.C. § 1781)). The Sixth Circuit concluded that neither use of "tribunal" demanded a reading of Section 1782 that would exclude private arbitration. It explained that the relevant language of Section 1782 is permissive and does not limit a "foreign or international tribunal" to "a governmental entity of a country that has prescribed" policies and procedures for discovery. As for Section 1781, the court said "this section does not indicate that the word 'tribunal' in the statute refers only to judicial or other public entities" given that a "private arbitral panel can make a request for evidence." *Id.*

The court held that it "need look no further to hold" that the international arbitration at issue was a "foreign or international tribunal." *Id.*

2. THE SIXTH CIRCUIT'S ADDITIONAL DISCUSSION

Even though it had already decided the question before it, the Sixth Circuit discussed the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The court also explained why it rejected the reasoning of the Second and Fifth Circuits, as well as the policy considerations which FedEx had raised.

In *Intel*, the Supreme Court held that the word "tribunal" in Section 1782 included non-judicial administrative proceedings. The Sixth Court noted that, in reaching its conclusion, the Supreme Court focused on, among other things, the 1964 amendments to Section 1782 by which Congress replaced the ostensibly narrower phrase "judicial proceeding in a foreign country" with the phrase "foreign or international tribunal." The Sixth Circuit reasoned that the *Intel* court's broad interpretation of "tribunal" demonstrated that the word's ordinary meaning is not limited to foreign judicial proceedings or even state-sponsored arbitration. *In re Application*, 2019 WL 4509287, at *9-*10.

The Sixth Circuit also distinguished the Second and Fifth Circuit decisions at hand, respectively, *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999) ("NBC"), and *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999). Both courts had determined that, while the word "tribunal" does not expressly exclude private arbitrations, its scope is nevertheless ambiguous; the courts thus turned to extra-textual sources to resolve the ambiguity. After considering the legislative history of Section 1782 and policy considerations, the Second and Fifth Circuits had held that "tribunal" includes only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." *In re Application*, 2019 WL 4509287, at *11 (quoting *NBC*, 165 F.3d at 190).

The Sixth Circuit disagreed. Initially, the court said that it was improper under principles of statutory interpretation for the Second and Fifth Circuits to consider Section 1782's legislative history once they had determined that "the definition of 'tribunal' *is* broad enough to include private arbitrations." *Id.* Besides, the court found that the legislative history in fact supported its construction of "tribunal." It said that "[t]he facts on which the legislative history is most clear are that the substitution of 'tribunal' for 'judicial proceeding' broadened the scope of the statute" and, furthermore, there is no language in the legislative history that indicates "the expansion *stopped short* of private arbitration." *Id.* at *12. The Sixth Circuit refused to adopt the view primarily espoused by the Second Circuit that the legislative history's silence regarding private arbitration when discussing the expansion of Section 1782 served as confirmation that Congress did not intend for Section 1782 to cover such arbitrations. *Id.*

As mentioned above, FedEx raised two policy concerns, which it argued support a narrow interpretation of "tribunal." First, it argued that interpreting Section 1782 to include private arbitration would "permit foreign parties in arbitration overseas broader discovery" than US parties are entitled to in arbitration under Federal Arbitration Act. However the Sixth Circuit pointed out that *Intel* had rejected a similar proportionality argument, with the statement that: "We also reject Intel's suggestion that a § 1782(a) applicant must show that United States law would allow discovery to domestic litigation analogous to the foreign proceeding." *In re Application*, 2019 WL 4509287, at *13 (quoting *Intel*, 542 U.S. 241, 261-63) (emphasis removed). Second, FedEx argued that permitting US-style discovery to foreign parties in arbitration would undermine the efficiencies which arbitration is intended to create. *Id.* at *14. The court, however, highlighted that Section 1782 is merely permissive, and courts have "wide discretion in determining whether and how to" order discovery. *Id.*

3. THE *INTEL* FACTORS

The Sixth Circuit remanded the case for the district court to decide whether ALJ is entitled to the discovery requested in its Section 1782 application. In doing so, the Sixth Circuit noted that the *Intel* court identified the following four factors to assist district courts in reaching a decision: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature and character of the foreign tribunal or proceeding and how receptive the foreign government, court or agency is to US federal court assistance; (3) whether the Section 1782 application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or

the US; and (4) whether the request is unduly intrusive or burdensome. *In re Application*, 2019 WL 4509287, at *15 (quoting *Intel*, 542 U.S. at 264–65). The Sixth Circuit confirmed that it remains the case that a district court hearing an application "may" or may not grant the request (and if the request was granted, it would also be for the court to determine its actual scope by reference to the four *Intel* factors listed above).

D. What is next?

Section 1782 provides an often critical means for parties in non-US proceedings to obtain US-style discovery from an opposing party or third party located in the US that would not otherwise be subject to discovery. But this opportunity for discovery has always been against a background of an ongoing debate as to whether Section 1782 can properly be extended to private arbitrations.

The Sixth Circuit's decision, which marks a clear divergence of approach between the Sixth Circuit on the one hand, and the Second and Fifth Circuits on the other, does little to resolve this overall lack of clarity. What it does, however, is provide—in the first appellate consideration of this question since the Supreme Court's decision in *Intel*—reasoning that courts can rely upon to apply Section 1782 to private arbitrations. This ruling may increase the number of applications brought under Section 1782 in aid of international arbitrations, although outside the Sixth Circuit, the prospects of success will remain far from certain. Therefore, if an applicant can establish that the target person or entity "resides" or "is found" within the Sixth Circuit's jurisdiction, then this would now appear to be the preferred forum for the bringing of a Section 1782 application.

As mentioned briefly above, a person must bring an application under Section 1782 in the federal district court located where an individual or entity "resides" or "is found." It is unclear if this statutory prerequisite is coextensive with whether a court has personal jurisdiction over an individual or entity. However, many courts have held that, at a minimum, compelling a person or entity to provide discovery under Section 1782 must comport with "constitutional due process." *E.g.*, *In re Aso*, No. 19-MC-190, 2019 WL 3244151, *3 (S.D.N.Y. July 19, 2019) (collecting cases). Under this standard, an entity would generally be subject to a Section 1782 application in its place of incorporation and where its principal place of business lies, and, in an "exceptional case," it could become subject to the jurisdiction of a state with which its "contacts … are 'so continuous and systematic' as to render [it] essentially at home." *Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (internal quotation marks omitted)).

Any party in an international arbitration that is deciding whether and where to file an application under Section 1782 should consult attorneys who can advise on the application's likelihood of success and strategies for filing the application in a jurisdiction that would provide the best chance of success.

To have such a discussion, or if you have any questions about the issues raised in this legal update, please get in touch with your usual Mayer Brown contact or:

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