LITIGATION

CAN YOU TAKE DISCOVERY IN THE U.S. FOR FOREIGN ARBITRATIONS? MAYBE, SAYS THE SIXTH CIRCUIT COURT OF APPEALS

by Sharae' Williams

Introduction

The U.S. Court of Appeals for the Sixth Circuit ruled on September 19, 2019 that U.S. District Courts may order individuals and entities within the United States to produce discovery requested for use in private arbitrations abroad. The decision arises out of a Saudi Arabian corporation's request for the production of documents and deposition testimony from a U.S.-based company under federal statute 28 U.S.C. §1782, which permits U.S. District Courts to order discovery "for use in a foreign or international tribunal." The Sixth Circuit tasked itself with determining whether a private arbitral panel abroad constituted a "foreign or international tribunal" as used in 28 U.S.C. §1782. The Court found that it did, but whether the discovery would actually be allowed under a four-factor test was remanded to the district court. This decision marks the first time the Sixth Circuit Court of Appeals has ruled on this issue and establishes a circuit split that may result in Supreme Court review. In the meantime, parties involved in foreign arbitral proceedings at least now have a potential pathway to obtaining U.S. discovery.

Summary of Decision

In *Abdul Latif Jameel Transportation Company Limited v. FedEx Corporation*, Saudi corporation *Abdul* Latif Jameel Transportation Company Limited ("ALJ") issued a subpoena requesting documents and deposition testimony of corporate representatives for U.S.-based FedEx Corporation ("FedEx") in its §1782(a) discovery application.[1] The parties were involved in a commercial arbitration proceeding in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA"), arising out of a supply-chain contract dispute.[2] The U.S. District Court for the Western District of Tennessee denied ALJ's application, "holding that the phrase 'foreign or international tribunal' in §1782 did not encompass […] the […] arbitrations."[3] ALJ appealed the District Court ruling, arguing that the phrase "foreign or international tribunal" does include such proceedings and that its discovery request should be granted.[4] FedEx argued that the commercial arbitration at issue did not constitute a "foreign or international tribunal," relying on Supreme Court precedent in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), and other precedent.[5] The Sixth Circuit Court of Appeals, however, agreed with ALJ, ruling that the arbitration did constitute a tribunal under §1782.[6]

In the decision written by Circuit Judge Bush, the Court conducted an extensive analysis to determine whether the DIFC-LCIA Arbitration Panel constituted a "foreign or international tribunal" under §1782. The analysis included a look at the ordinary dictionary meaning of the word "tribunal" by referencing dictionaries used when §1782 was enacted, a look into the use of the word "tribunal" in legal writing, and a look at other uses of the word "tribunal" throughout §1782.[7] The Court found that the "text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract."[8]

The Court also analyzed FedEx's arguments that the DIFC-LCIA arbitration panel did not constitute a "foreign or international tribunal." Although it recognized that some arbitrations fall within §1782's use of the word "tribunal," FedEx argued that only state sponsored arbitration "permanently maintained by a national or international government" fall within the statute.[9] FedEx relied on the Supreme Court's decision in *Intel*, which described four discretionary factors a court should consider when deciding whether to grant a §1782(a) request.[10] The Court, however, rejected this argument, finding that the portion of the *Intel* decision relied on by FedEx did not define the word tribunal as argued.[11] The *Intel* court ultimately found that a non-judicial Commission constituted a tribunal under §1782.[12] As such, the Court in Adbul stated that *Intel* supports its conclusion that a private arbitration constitutes a "tribunal" under §1782.[13] The Court also rejected a number of FedEx's policy consideration arguments.

Circuit Split

The Sixth Circuit decision in *Abdul Latif Jameel Transportation Company Limited v. FedEx Corporation* is directly at odds with the Fifth Circuit and Second Circuit precedent that the term "tribunal" in §1782 includes only "governmental or intergovernmental arbitral tribunals," and not private arbitrations.[14] The Court in *Abdul* explained that it was unpersuaded by the Fifth and Second Circuit Courts' analysis and reasoning, criticizing the reliance on legislative history early in the statute interpretation process by both.[15] The Court reasoned that even if the legislative history of §1782 was helpful, it would not contradict its textual-based conclusion.[16]

So What Does It Mean?

Although the Court in *Abdul* ruled that a private arbitral panel abroad constitutes a "foreign or international tribunal" under §1782, the Court failed to analyze the *Intel* factors to determine whether ALJ was entitled to the discovery it requested. The *Intel* court recognized four factors a court should consider in ruling on a §1782(a) request:

> First, when the person from whom discovery is sought is a participant in the foreign proceeding […], the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. […] Second, […] a court presented with a § 1782(a) request may take into account 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 judicial assistance. [… Third,] a

district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. [Fourth,] unduly intrusive or burdensome requests may be rejected or trimmed.[17]

The First Circuit Court of Appeal recently examined the application of these factors in *In re Schlich*, recognizing the Supreme Court failed to establish the "appropriate burden of proof, if any, for any of the discretionary factors, or the legal standard required to meet that burden."[18] Specifically, the Court in *In re Schlich* recognized that there are differing views amongst the federal circuits regarding the second *Intel* factor. However, the Court in *In re Schlich* believed that the *Intel* court "did not intend to place a burden on either party [… Rather], we do not see the factors as creating a 'burden' for either party to meet, but rather as considerations to guide the district court's decision."[19]

Similar Sixth Circuit precedent examining the application of these factors is sparse. Therefore, while the Sixth Circuit has recognized the existence of a door, whether one can open it depends on satisfying the four *Intel* factors. As such, case law will need to develop in the Sixth Circuit to determine how the *Intel* factors should be applied.

[1] *In re Application to Obtain Discovery for Use in Foreign Proceedings,* No. 19-5315, 2019 WL 4509287, at *1 (6th Cir. Sept. 19, 2019).
[2] *Id.* at *1-2.
[3] *Id.* at *1.
[4] *Id.*
[5] *Id.* at *2.
[6] *Id.* at *14.
[7] *Id.* at *6-8.
[8] *Id.* at *8.
[9] *Id.* at *10.
[10] *Id.*
[11] *Id*.
[12] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004).
[13] *In re Application to Obtain Discovery for Use in Foreign Proceedings*, No. 19-5315, 2019 WL 4509287, at *9-10 (6th Cir. Sept. 19, 2019).
[14] *Id.* at *10-11.
[15] *Id.* at *11.
[16] *Id*.
[17] *Intel Corp.*, 542 U.S. at 264-65.
[18] *In re Schlich*, 893 F.3d 40, 49 (1st Cir. 2018).
[19] *Id.* at 50.

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