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U.S. Appeals Court Issues Important Decision on Discovery in Aid of Foreign Arbitrations

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On September 19, 2019, the U.S. Court of Appeals for the Sixth Circuit issued an important ruling on discovery in aid of foreign arbitrations. Deciding an issue that has divided U.S. courts, the Sixth Circuit held that a federal statute, 28 U.S.C. §1782, permits parties to seek discovery in the United States in support of foreign private arbitrations, not just court proceedings.

Section 1782 authorizes U.S. courts to order persons or entities who reside or are otherwise found within their jurisdiction to produce documents or give testimony for use in a "proceeding in a foreign or international tribunal." The statute is a powerful tool that can provide foreign litigants the benefit of liberal U.S. discovery rules to obtain evidence for use in proceedings abroad. U.S. courts have been divided over whether a private arbitration constitutes a "proceeding in a foreign or international tribunal" to which the statute applies.

In *Abdul Latif Jameel Transportation Co. v. FedEx Corp.*, No. 19-5315, 2019 WL 4509287 (6th Cir. Sept. 19, 2019), the Sixth Circuit held that the statute does apply to private arbitrations. The case involved a contract dispute between FedEx International and its delivery service partner in Saudi Arabia. The contract provided for disputes to be arbitrated in Dubai under the rules of the DIFC-LCIA Arbitration Centre.

Seeking discovery for use in that arbitration, the Saudi company filed a Section 1782 application in the U.S. District Court for the Western District of Tennessee. It sought to compel testimony and document production from FedEx Corp. The district court denied the application, ruling that Section 1782 does not apply to foreign private arbitrations.

The U.S. Court of Appeals for the Sixth Circuit reversed, reasoning that the plain meaning and common legal usage of the term "tribunal" encompassed arbitral tribunals no less than foreign courts. The court cited a 2004 U.S. Supreme Court case that applied the statute to proceedings before the European Commission's Directorate-General for Competition. The Sixth Circuit acknowledged that two other U.S. courts of appeals had reached the opposite conclusion. But it disagreed, concluding that they had placed too much weight on legislative history rather than statutory text.

The Sixth Circuit rejected the argument that allowing Section 1782 discovery would undermine one of the principal goals of arbitration by rendering the proceedings more costly and time-consuming. It noted that district courts have discretion to limit the scope of discovery in light of the nature of the foreign proceeding. Nonetheless, the opinion leaves open the possibility that courts may permit broad U.S.-style discovery even for foreign arbitral proceedings with more restrictive rules.

Any party to an international arbitration should consider adding U.S. discovery pursuant to Section 1782 to its arsenal in cases where evidence may be found in the hands of parties subject to U.S. jurisdiction.

Read the Sixth Circuit's decision **here**.