U.S. Circuit Court Finds Section 1782 Allows for Obtention of Evidence Located Outside the U.S. Detained by Companies not Incorporated in the U.S.

On 7 October 2019, the United States Court of Appeals for the Second Circuit (the ***Second Circuit***) rendered a decision in the case of *Re: Application of Antonio del Valle Ruiz* in which it ruled on whether 28 U.S.C. Section 1782 (***Section 1782***) allows for the obtention of evidence located outside the United States.

As we discussed before, Section 1782 is a U.S. Federal Statute that allows a litigant before a "*foreign or international tribunal*" outside the United States to apply to the U.S. district courts to obtain discovery against a person or entity residing or found in the district where the application is sought. As many jurisdictions, in particular civil law jurisdictions, have more limited procedures for the disclosure of evidence between parties, the possibility of using Section

1782 to obtain evidence is thus potentially very useful.

The case related to a dispute over the 2017 take-over, by the Spanish bank *Santander*, of *Banco Popular Espanol*, another Spanish bank. A group of Mexican and American investors contested the take-over and brought a case against *Santander* in the United States. During the dispute, the investors sought to obtain documents held by *Santander*. However, since *Santander* itself was not incorporated in the United States (and thus was not "*residing or found*" in the relevant district), the investors sought to obtain discovery, through a Section 1782 order issued against *Santander*'s New York affiliate: *Santander Investment Securities Inc*.

The issue raised in the case at hand is thus important as the interpretation of the Second Circuit can serve as a way to access documents held outside the United States by a non-US company based on the affiliation of that company with the US-based party. This can be achieved if it can be proved that the relationship was sufficiently close enough so as to allow the US-based party a requisite degree of control over the relevant documents.

In its decision, the Second Circuit held that there was "*no per se bar*" under Section 1782 against using that statute to reach documents located outside the United States. This ruling matches the decision reached by the Court of Appeals for the Eleventh Circuit (the ***Eleventh Circuit***) in 2016 in the case *Sergeeva v. Tripleton International Ltd* concerning the extraterritorial reach of Section 1782. The *Sergeeva* case concerned Russian divorce proceedings, where the Eleventh Circuit granted a Section 1782 order in favour of the wife compelling the production of documents held in the Bahamas by an affiliate of a US-based company on the basis of circumstantial evidence that the two companies regularly shared documents and information.

In the decision of 7 October, the Second Circuit followed the

reasoning of the Eleventh Circuit and affirmed the extraterritorial application of Section 1782. Nonetheless, the Second Circuit did leave room for each individual court to exercise its discretion to grant such an application noting "*that a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery*".

Consequently, based on the Second Circuit's reasoning, Section 1782 petitioners can obtain discovery from companies that are not headquartered or incorporated in the relevant districts where the discovery order is sought, so long as they can demonstrate that the documents that they seek to obtain arise from conduct in the district, and, additionally, the Second Circuit concludes that the scope of Section 1782 may extend to evidence located outside the United States.

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In addition to the decision handed down in *del Valle Ruiz* by the Second Circuit, the Court of Appeals for the Sixth Circuit (the ***Sixth Circuit***) also handed down another recent noteworthy decision, recognising the right of district courts to order discovery under Section 1782 in private commercial arbitral proceedings. As we discussed before, a similar question also arose in the *Kleimar* case in 2016 and U.S. courts appear to be divided on that issue.

The case at hand (*Abdul Latif Jameel Transportation Co. v. FedEx Co.*) arose from a service provider contract pursuant to which a Saudi Arabian transportation company agreed to be the delivery-services partner of *FedEx International* (***FedEx***) in Saudi Arabia. Pursuant to the agreements between the parties, the Saudi Arabian entity – *Abdul Latif Jameel Transportation Co.* (***ALJTC***) – initiated ad hoc arbitration in Saudi Arabia under Saudi Arabian law (although these proceedings were later

dismissed) while FedEx, for its part, commenced an arbitration seated in Dubai under DIFC-LCIA rules.

It is in this context that ALJTC filed a discovery application, under Section 1782 against FedEx, to the United States District Court for the Western District of Tennessee, the jurisdiction in which FedEx is headquartered. ALJTC sought to compel the production of documents and subpoena testimonies from FedEx. However, the district court, in March 2019, denied the application holding that the arbitration proceedings between ALJTC and FedEx did not fall within the notion of "*a foreign or international tribunal*" under Section 1782. The decision of the district court was appealed and, thus, the Sixth Circuit had to also consider the issue.

It is generally accepted that the notion of what constitutes "*a foreign or international tribunal*" extends to various quasi-judicial administrative and regulatory proceedings and even to investor-state arbitrations, however, as we discussed before, the U.S. district courts have been particularly divided on whether private commercial arbitrations can also fall within the scope. Although FedEx argued that only foreign arbitral proceedings sponsored by a state, or otherwise deriving its authority from the state, could fall within the scope of Section 1782, the Sixth Circuit ruled in favour of ALJTC.

The Sixth Circuit relied on the decision of the U.S. Supreme Court in *Intel* (a leading case on the matter where the U.S. Supreme Court found – among other things – that the European Commission constituted a "*foreign tribunal*" under Section 1782) and extended Section 1782 discovery to non-judicial proceedings, including international commercial arbitration. It found that the U.S. Supreme Court decision in *Intel* contained "*no limiting principle suggesting that the ordinary meaning of 'tribunal' does not apply here*" (with the ordinary meaning of "*tribunal*", according the Sixth Circuit, including "*privately contracted-for arbitral bodies with the power to*

bind the contracting parties“) and further reasoned that the legislature had intended to expand the scope of Section 1782 with its revision of the statute in 1964. The Sixth Circuit noted that the legislature changed the wording of the stature from “*any judicial proceeding pending in any court in a foreign country*” to “*a proceeding in a foreign or international tribunal*” and concluded that the intent must have been to expand the scope of Section 1782 to include international commercial tribunals.

As Ted Folkman says “*this case has to be on the ‘cert. watch’ list*“. So, stay tuned…
