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Discovery in International Legal Developments Year in Review: 1997

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statutes,[111] but it found that in *Robinson*, the one U.S.-based communication that took place met its higher standard.

V. Discovery

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U.S. law provides litigants with a variety of means to obtain evidence from foreign jurisdictions. The Federal Rules of Civil Procedure (the Federal Rules) and rules of state courts may be used if a U.S. court has jurisdiction over the person who is in control of the evidence in question.[112] Section 1783 of title 28 of the United States Code provides a means for serving a subpoena on U.S. nationals or residents abroad. Litigants may also obtain foreign discovery through letters rogatory as permitted by 28 U.S.C. § 1781 and treaties such as the Hague Convention on Taking Evidence (the Hague Convention).[113] U.S. law also provides litigants, who are before foreign or international tribunals, access to evidence in the United States through letters rogatory, the Hague Convention, and the extraordinarily generous procedure prescribed by 28 U.S.C. § 1782. Varying discovery procedures sounding in international conventions or domestic statutes coexist in the American court system; federal courts are given discretion in crafting the solution which best fits the case at bar.[114]

A. DISCOVERY IN AID OF FOREIGN PROCEEDINGS UNDER 28 U.S.C. § 1782.

There were a number of noteworthy developments in 1997 involving section 1782 in the Second Circuit, the jurisdiction with perhaps the most developed—and the most generous—caselaw on the statute.

1. *Section 1782 May Not Reach Evidence Abroad*

Although the discussion was dicta, the Second Circuit indicated that section 1782 could not be used to reach evidence located outside of the United States but still under the control of persons or entities resident in the United States. In *In re Application of Sarrio, S.A.*,[115] the court noted first that "[o]n its face, § 1782 does not limit its discovery power to documents located in the United States." Based on the legislative history[116] and a declaration by Professor Hans Smit, who had assisted in drafting the final version of the statute,[117] however, the Second Circuit concluded that "despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States."[118]

111. *Id.* at 906 (citing Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

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112. *See, e.g.*, FED. R. CIV. P. 28(b).

113. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

114. *See generally* Societe Nationale Industielle Aerospatiale v. United States District Court for the Southern District of Texas, 482 U.S. 522 (1987).

115. 119 F.3d 143, 147 (2d Cir. 1997).

116. *Id.* (quoting S. REP. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 (emphasizing that purpose of statute is "in obtaining oral and documentary evidence *in the United States*.")) (emphasis added by court).

117. *Id.* (stating that if the statute were interpreted to have such an extraterritorial reach, United States courts would become the "clearing houses" for discovery the world over).

118. *Id.*

2. *The Second Circuit Reinforces Its Position that Evidence Sought Under Section 1782 Need Not Be Discoverable in the Foreign Court*

Unlike most other circuits, the Second Circuit has held that there is no requirement that evidence requested pursuant to section 1782 be discoverable under the rules of the foreign or international tribunal.[119] In particular two decisions in the past year—one from the District of Connecticut and one from the Second Circuit itself—illustrate the strict constraints that the Second Circuit places on a district court's discretion in assessing discovery requests for proceedings before foreign tribunals.

In *In re Application of Metallgesellschaft AG*, the Second Circuit reiterated its rejection of any requirement that evidence sought in the United States pursuant to § 1782(a) be discoverable under the laws of the foreign country that is the locus of the underlying proceeding; "[s]imilarly, we have held that a district court may not refuse a request for discovery pursuant to § 1782 because a foreign tribunal has not yet had the opportunity to consider the request."[120] The court reversed the district court's denial of the section 1782 petition, which had been based on a concern that granting U.S.-style discovery would skew the foreign litigation. The denial was an abuse of discretion because the proper response to such a concern was to craft a "closely tailored discovery order rather than . . . simply denying relief outright."[121]

Following the Second Circuit's dictate that discoverability in the foreign jurisdiction is not a valid factor, the district court in *In re Application of CBG Corporation Geneva*,[122] observed that "[t]he American litigation should not become, as here, a battle-by-affidavit of international legal experts."[123] Noting that under the Second Circuit's standard only authoritative proof that a foreign tribunal would reject the requested evidence could be considered, the district court granted the petition.[124] However, what precisely constituted authoritative proof, short of the tribunal itself ruling that it would not accept the evidence in question, was left unclear by the court's ruling.[125]

Although the view that discoverability may not be considered on a section 1782 application is most closely linked to the Second Circuit's line of cases, certain other courts have applied a similar rule. See, for instance, *In re Geert Duizenstraal*, a case from the Northern District of Texas in which the district court found that, based on the statutory text, Fifth Circuit precedent, and Second Circuit precedent, there was no discoverability requirement in section 1782.[126]

3. *Section 1782 May Not Be Invoked in Favor of Private Arbitrations*

In *In the Matter of Application of Medway Power Limited*, a New York district court held that an "arbitration is not a tribunal for the purposes of § 1782."[127] A critical difference for the

119. *See* Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).

120. 121 F.3d 77, 79 (S.D.N.Y. 1997) (citation omitted).

121. *Id.* at 80 (quoting *Euromepa*, 51 F.3d at 1101).

122. 1997 WL 348053 (D.Conn. 1997).

123. *Id.* at *3.

124. *Id.* at *4.

125. *See id.* at *5. (stating that whether or not a deposition is allowed under British law should not be decided based on affidavits, but left to the British judicial officer); *compare* In re Application of Noboa, No. M18-302, 1995 U.S. Dist. LEXIS 14402 (S.D.N.Y. Oct 4, 1995) (delaying deposition in order to prevent potentially duplicative discovery, because, unlike the facts in *CBG*, time was not of the essence); *see also International Legal Development Year In Review*, 31 INT'L LAW. 335 (1996).

126. 1997 WL 195443 at *2 (N.D. Tex. Apr. 16, 1997); *see also* In re Letters Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310 (5th Cir. 1995).

127. 985 F. Supp. 402, 403 (S.D.N.Y 1997), *appeal dismissed*, No. 97-9540 (2d Cir. Dec. 24, 1997).

court was that "arbitrators are not officials of foreign sovereign governments, but private persons tested with their decision-making authority most commonly as a result of private parties' entering into contractual arrangements for their private resolution of disputes."[128] In 1964, section 1782 was amended such that "judicial proceeding" was replaced by "proceeding in a foreign or international tribunal."[129] This change was not meant to sweep in arbitrations, but rather "was intended to make the statute available to foreign governmental agencies exercising a judicial or quasi-judicial function as well as to 'conventional' courts."[130]

In reaching this decision, the district court distinguished *In re Application of Technostroyexport*,[131] finding that its statement that an arbitrator or arbitration panel is a tribunal under section 1782 was dicta and without support. Moreover, the parties in *Technostroyexport* were bound by an arbitration agreement, while the person from whom discovery was sought in *Medway* was a third party that was not contractually obligated to recognize the arbitrator's authority.

The district court concluded by stating that the proper procedure would be for the arbitrator to begin proceedings for an order of compulsion before a real tribunal, in this case an English court.[132] The English court could then compel a non-party to provide evidence.

B. International Discovery in Proceedings before U.S. Courts.

1. *The Relationship of the Federal Rules of Civil Procedure to the Hague Convention*

Decisions in 1997 have provided further proof that, given a choice between the Federal Rules of Civil Procedure and the Hague Convention in cases involving international litigants, U.S. federal courts are strongly inclined to resort to the Federal Rules, finding that the Hague Convention does not trump the Federal Rules, and that the latter are often preferable for reasons of efficiency.

In *In re Aircrash Disaster Near Roselawn Indiana*, the defendants, foreign aircraft manufacturers, argued that they were not subject to discovery under the Federal Rules of Civil Procedure, as discovery in such a case must proceed exclusively under the Hague Convention.[133] Moreover, the defendants argued that, in deference to French sovereign interests, the French civil code should control the discovery of documents found in France.[134]

Noting that the discovery rules set forth in the Federal Rules of Civil Procedure and the Hague Convention are both the law of the United States and that there was nothing in the record "showing that the Hague Convention discovery would prove any more effective than" the Federal Rules, the district court stated that "[i]t is easily apparent from applicable case law, that there is absolutely no valid reason or justification for abandoning the Federal Rules of Civil Procedure in favor of the Hague Convention method of discovery."[135] Not only had the foreign defendants not shown that French law was in jeopardy, they also ignored the sovereign interests of the United States in protecting its own citizens and the fact that "[m]anufac-

128. *Id.* (quoting Lawrence W. Newman & Rafael Castilla, *Production of Evidence Through U.S. Courts for Use in International Arbitration*, 9 J. Int'l Arb. 61, 69 (June 1992)).

129. *Id.* at 404.

130. *Id*

131. 853 F. Supp. 695 (S.D.N.Y. 1994).

132. *Medway Power Limited*, 985 F. Supp. at 405. As this article was being submitted for publication, another judge of the same court reached the same conclusion as that in *Medway*. In re National Broadcasting Co., No. M-77 (RWS) (S.D.N.Y. Jan. 16, 1998).

133. 172 F.R.D. 295, 298 (N.D. Ill. 1997).

134. *Id.* at 307

135. *Id.* at 308.

turers producing products abroad for use in the United States are subject to the laws of the United States."[136] Moreover, use of Hague Convention procedures could cause delay and frustrate U.S. policy of facilitating just, speedy, and inexpensive litigation.[137]

Similarly, in *Fishel v. BASF Group*, an Iowa district court rejected German defendants' arguments that the Hague Convention should take primacy over the Federal Rules.[138] Quoting *Aerospatiale*, the district court agreed that Hague Convention procedures can be "unduly time consuming and expensive."[139]

In *In re First American Corporation*, a New York district court used a four-prong analysis to determine the reasonableness of a foreign discovery request.[140] The factors considered were: (1) the competing interests of the nations whose laws are in conflict; (2) the hardship of compliance on the party or witness from whom discovery is sought; (3) the importance of the information and documents requested; and, (4) the good faith of the party requesting discovery.[141]

2. *The Relationship of the Federal Rules of Civil Procedure to Foreign Discovery Rules.*

Other 1997 decisions also assessed the role of international comity in determining the scope of discovery in federal court proceedings. In *Odone v. Cropda International PLC*, the court had to decide whether or not to limit discovery by applying a foreign privilege statute.[142] The plaintiff had requested discovery of documents exchanged between the defendant and its British patent agent. The defendant declined to produce the materials, arguing that the communications were privileged under British copyright law, and that, in the interest of comity and because the communications did not "touch base" in the United States, the British privilege should be honored.[143]

The district court in *Odone* stated that where a federal district court has jurisdiction over a foreign company or individual, it is not required to defer to international comity and that the court can and should mandate compliance with the discovery rules of the Federal Rules of Civil Procedure.[144] Where federal courts have deferred to foreign statutes governing the privilege of patent agents, the common denominator has been that the communications related solely to activities outside the United States. That was not the case here. Moreover,

> [i]t would be against U.S. public policy to limit discovery—thus preclude or hinder claims by United States citizens of patent infringement, by awarding comity to the restrictive discovery laws of Great Britain while at the same time extending the full panoply of our open discovery privileges to foreign defendants that have availed themselves to the protections of U.S. patent and trademark law pursuant to the Patent Cooperation Treaty.[145]

The issue of fairness in discovery procedures was also considered in *Minnesota Mining & Manufacturing Company v. Nippon Carbide Industries Co.*, in which the district court ordered the inspection of defendant's plant in Japan, even though such an inspection might not comport

136. *Id.* at 309
137. *Id.* at 310-11.
138. 175 F.D.R. 525 (S.D. Iowa 1997).
139. *Id.* at 529.
140. 1997 U.S. Dist. LEXIS 20137 (S.D.N.Y. Dec. 19, 1997).
141. *Id.* at *30.
142. 950 F. Supp. 10 (D.D.C. 1997).
143. *Id.* at 12
144. *Id.*
145. *Id.* at 14

with Japanese law.[146] The court explained: "[a]lthough we are keenly sensitive to the promotion of international comity, we cannot ignore the fact that NCI is properly within the jurisdiction of this Court, and therefore, is 'subject to the same legal constraints, including the burdens associated with American judicial procedures, as their American competitors.' "[147]

VI. Personal Jurisdiction

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U.S. courts continued in 1997 to refine the legal principles governing when they may properly adjudicate cases involving foreign parties and events. Notable developments in the law of personal jurisdiction focused on national contacts based jurisdiction under Federal Rule of Civil Procedure 4(k)(2) and assertions of personal jurisdiction over a foreign defendant based on its activity on the Internet.

A. DEVELOPMENTS IN JURISDICTION BASED ON RULE 4(K)(2)

Federal Rule of Civil Procedure 4(k)(2), adopted in 1993, authorizes the exercise of personal jurisdiction by federal courts based on contacts with the nation as a whole, rather than contacts limited to the state of the forum.[148] The outer bounds of rule 4(k)(2)'s expansion of jurisdiction, however, have proved as yet unfixed.

1. *National Contacts Based Personal Jurisdiction in Admiralty Cases*

While courts and commentators have sometimes assumed that the provisions of rule 4(k)(2) support personal jurisdiction in the federal courts only in cases where subject matter jurisdiction is premised on the federal question statute,[149] some courts have found the rule to encompass all cases raising questions of law fundamentally federal in nature. Several courts in the past year have considered the availability of rule 4(k)(2) as a basis of personal jurisdiction in admiralty cases.

In *World Tanker Carriers Corp. v. MV Ya Mawlaya*,[150] the lower court had held that rule 4(k)(2) applied only in cases where federal jurisdiction was based on a federal question; the rule could not support personal jurisdiction in a suit under general maritime law. The Fifth Circuit reversed, finding the proper analysis under rule 4(k)(2) to be whether federal substantive law provided the rule of decision, not whether federal jurisdiction was based on the federal question statute.[151] Although the federal question statute did not necessarily provide federal

146. 171 F.R.D. 246 (D. Minn. 1997).

147. *Id.* at 249 (quoting Societe Nationale Industielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. at 540 n.25).

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148. FED. R. CIV. P. 4(k)(2) provides:

> Territorial Limits of Effective Service . . .
>
> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

149. 28 U.S.C. § 1331; *see, e.g.*, Eskofot A/S v. E.I. Du Pont de Nemours & Co., 872 F. Supp. 81, 87 (S.D.N.Y. 1995) ("Rule 4(k)(2) only provides federal courts with personal jurisdiction over a foreign defendant in federal question cases . . .") (dictum).

150. 99 F.3d 717 (5th Cir. 1996).

151. *Id.* at 720-22.