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1782 Discovery Applications Now Permitted in a ‘Reasonably Contemplated’ Foreign Judicial Proceeding

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The **U.S. Court of Appeals for the Eleventh Circuit** recently affirmed a decision by the Southern District of Florida that substantially expanded a litigant’s ability to obtain discovery in aid of a foreign proceeding. The court’s decision affirmed the grant of a party’s application pursuant to Section 1782 of Title 28 of the United States Code to obtain discovery in aid of a proceeding that was not ongoing, but rather “within reasonable contemplation.” Clients should be aware of the broadened scope of § 1782, as requests that were once outside of the statute’s scope are now permissible.

Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 2014 U.S. App. LEXIS 531; 2014 WL 104132 (11th Cir. 2014) arose out of a foreign shipping contract billing dispute between Consortio Ecuatoriano de Telecomunicaciones S.A. (CONECEL) and Jet Air Service Equador S.A. (JASE). CONECEL filed an application in the Southern District of Florida pursuant to Section 1782 of Title

28 of the United States Code (USC) to obtain discovery for use in a foreign proceeding in Ecuador. The application sought discovery from JASE’s U.S. counterpart, JAS Forwarding (USA), Inc. (JAS USA). The district court granted the application and permitted CONECEL to issue a subpoena.

CONECEL’s claims included allegations that JASE improperly overbilled CONECEL by millions of dollars. Specifically, CONECEL alleged that an internal investigation revealed that two of its employees colluded with JASE by processing invoices that were artificially inflated. CONECEL believed JASE’s inclusion of an “extra-contractual multiplication factor” into the billing equation inflated the prices charged to CONECEL. JASE counterclaimed, alleging that CONECEL failed to pay several invoices.

CONECEL sought to file a claim for collusion in the civil-mercantile court in Quito, Ecuador. Furthermore, if CONECEL succeeded in the civil proceeding, it could then bring a private criminal action against its former employees. As a civil law country, Ecuador requires litigants to attach to the complaint all evidence necessary to support their claims. Therefore, CONECEL sought § 1782 discovery before commencing suit in Ecuador. The district court granted the application, and JASE appealed on the grounds that: 1) § 1782 could not be used to obtain discovery for a proceeding that was not *pending* and 2) CONECEL’s subpoena request was unduly intrusive and burdensome, as it sought confidential materials, *i.e.*, JASE’s pricing formula.

The U.S. Court of Appeals for the Eleventh Circuit held that § 1782 properly permitted litigants to obtain discovery in aid of a proceeding that had not yet been initiated but was “within reasonable contemplation.” It believed that the legislative history of § 1782 supported a finding that the statute should be applied broadly and “strengthen the power of district courts to respond to requests for international assistance. Furthermore, the court stated that the propriety of a § 1782 request did not require an ongoing proceeding, but rather it reasoned that Congress’ amendment of the language of the statute from “in any judicial proceeding pending in any court in a foreign country” to “in a proceeding in a foreign or international tribunal” supported the proposition that a § 1782 request could be made to obtain discovery in aid of a proceeding that was only “within reasonable contemplation.” Finding CONECEL’s sworn declaration that it was considering the institution of a civil, and possibly thereafter a criminal, action in Ecuador as sufficient evidence that a proceeding was “within reasonable



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contemplation,” the Eleventh Circuit held that the district court did not abuse its discretion in granting the application. Finally, the court rejected the opportunity to answer the question of whether a § 1782 discovery request could be made to obtain discovery for aid in foreign arbitration.

The Eleventh Circuit also held that the district court did not abuse its discretion in granting CONECEL’s application, which requested confidential and proprietary information. While the court typically analyzes four factors in considering a § 1782 request, it only examined the factor addressed by JASE, “whether the request was otherwise unduly intrusive or burdensome.” Acknowledging that the request sought confidential and proprietary information, the court held that it was neither overbroad nor improper because it was narrowly tailored to discover pricing information from JASE and JAS USA that was only pertinent to CONECEL. Indeed, all requests in the application that bore on pricing information used “language limiting the request to information relating directly to CONECEL.”

The Eleventh Circuit has now considerably expanded the scope of § 1782 discovery by permitting an applicant to subpoena evidence from an American citizen or company, even though the applicant is not presently involved in a proceeding in a foreign court or tribunal. The Eleventh Circuit holds that the proceeding must only be “within reasonable contemplation;” this definition is sure to require further interpretation.

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