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RECENT DECISIONS POINT TOWARD A RESTRICTION ON U.S. DISCOVERY IN AID OF FOREIGN ARBITRATION PROCEEDINGS

Two federal magistrate judges recently held that litigants in private arbitration proceedings cannot use 28 U.S.C. § 1782 to obtain U.S. discovery.[1] Both courts declined to allow Grupo Unidos por el Canal, S.A. ("GUPC"), the claimant in an International Chamber of Commerce ("ICC") arbitration involving breach of contract and other claims relating to the expansion of the Panama Canal, to take discovery of U.S. companies in aid of its claims. In recent years, it has been unclear whether § 1782 discovery is available to parties in private arbitration proceedings because district courts have issued conflicting decisions. Practitioners have generally felt, however, that the trend in the law was toward favoring the use of § 1782 in aid of foreign arbitrations. The two most recent decisions rejecting § 1782 petitions filed in aid of arbitration simply add to the uncertainty. Still, they are likely to be instructive to other courts and are undoubtedly a negative development for parties to foreign arbitrations hoping to obtain U.S. discovery. GUPC has challenged the decision of the Colorado magistrate judge, which now goes to a federal district court judge for review.

Section 1782 is a powerful discovery tool that allows litigants in foreign proceedings to take discovery in the United States. A petition for § 1782 discovery must meet several requirements, including that the evidence sought must be "for use in a proceeding in a foreign or international tribunal." Some, but not all, federal district courts have concluded that a foreign private arbitration meets this requirement. The impact of the two latest decisions holding that arbitration litigants can't obtain discovery under § 1782 may be mitigated somewhat by the fact that there is a clear question as to whether GUPC's arbitration is truly foreign. Although it is proceeding under ICC rules and involves foreign parties and arbitrators, the seat of the arbitration is in fact Miami, Florida. Magistrate Judge Tafoya, in the District of Colorado, noted the issue, but declined to decide it.

The Colorado decision also addresses another important and unresolved question -- whether § 1782 may be used to obtain documents that may be in the custody or control of a U.S. resident, but that are located outside of the United States. The decision concludes that documents located abroad are outside the ambit of § 1782, which is focused on assisting foreign litigants with obtaining evidence inside the United States. In reaching this conclusion, Magistrate Judge Tafoya did note the complexity of the question given the cyber availability of documents from any location. Still, she concluded that documents physically located in Panama could not be obtained through § 1782 discovery.

Obtaining § 1782 discovery in aid of foreign arbitrations may still be possible. However, any applicant will need to be prepared to deal with the reasoning in these recent, unfavorable cases. The complexity and uncertainty flowing from these decisions highlight the need for a § 1782 petitioner to have attorneys who are both experienced in international litigation and are up to speed on all recent developments in the United States. We at Lewis Baach have that expertise.

For further information please contact:

Katherine Toomey at katherine.toomey@lewisbaach.com
Manuel Varela at manuel.varela@lewisbaach.com
Chiara Spector-Naranjo at chiara.spector@lewisbaach.com

[1] See *In re Application of Grupo Unidos Por El Canal*, S.A., 2015 WL 1815251 (N.D. Cal. Apr. 21, 2015) and *In re Application of Grupo Unidos Por El Canal, S.A.*, 2015 WL 1810135 (D. Colo. Apr. 17, 2015).