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DISCOVERY IN THE US FOR FOREIGN DISPUTES

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In a decision handed down this past Tuesday, the United States Court of Appeals for the Second Circuit held that a litigant in a foreign lawsuit can seek discovery for that lawsuit in the United States without having to show that the discovery the litigant is seeking would be admissible in the foreign action. *Brandi-Dohrn v. IKB Deutsche Industriebank AG,* No. 11-4851 (2d Cir. Mar. 6, 2012). With this ruling, the Second Circuit joins the other circuits that had previously addressed the issue. This case also highlights that discovery in the US can be a powerful tool that may be used in disputes in other countries.

Under 28 USC § 1782, a person with an interest in a legal proceeding in a foreign country can ask an American court for permission to take discovery in the United States "for use in" the foreign proceeding. In *Brandi-Dohrn,* the plaintiff had commenced a securities fraud case in Germany, which the German trial court dismissed. The plaintiff appealed, then applied to the federal district court in New York under § 1782 for permission to take discovery in the United States in support of the appeal (German appellate courts apparently accept new evidence in certain circumstances).

To qualify for § 1782 discovery, the applicant has to meet three statutory prerequisites:

- the person from whom the applicant wants discovery is found in the district where the application is made;
- the discovery is for a proceeding in a foreign tribunal;
- the applicant is an interested person (or the applicant is the foreign tribunal).

If the application complies with those three requirements, the district court has discretion to grant the application. The district court's discretion is supposed to be guided by the four factors that the Supreme Court listed in *Intel Corp. v. Advanced Micro Devices, Inc.*[1] But the discretionary factors never come into play if the statutory preconditions aren't met.

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[1] 542 U.S. 241 (2004). *Intel* listed the four factors as follows:
First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . .
Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . .
Third, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.
Fourth, unduly intrusive or burdensome requests may be rejected or trimmed.
Id. at 264-65.

In the lower court, the defendant in the German case, IKB, made an appearance to argue against permitting the discovery that Brandi-Dohrn was seeking in the US. One of the arguments IKB made was that the evidence would not be admissible in the German appellate court, which meant that the discovery could not be "for use in" a foreign proceeding. In other words, IKB was arguing that the statutory requirements could not be met. Both sides submitted proof of German law to the district judge to try to show that the German appellate court either would or would not consider the evidence to be sought under § 1782.

The district court ultimately denied the request for discovery because the judge was doubtful that the German appellate court would accept the evidence being sought. In the district judge's view, if it was doubtful the German appellate court would accept the evidence, that meant the evidence could not be "for use in" the foreign litigation. So the statutory requirements could not be met and the discovery had to be denied.

The Second Circuit reversed. The Second Circuit stressed that evidence could be "for use in" a foreign proceeding even if it would not be admitted into evidence. The court relied on the Supreme Court's opinion in *Intel*, which held that American courts can permit discovery in the US under § 1782 for use in a foreign case even if the foreign court where the suit is pending would not permit that discovery. The Supreme Court's main rationale was that the statute does not say that the discovery sought would have to be available under the forum state's discovery rules. Without a clear statutory restriction, the Supreme Court saw no reason to impose one. Another reason, which was developed in the lower courts before *Intel*, is prudential: it is not a good idea for American courts to try to figure out the procedural nuances of foreign legal systems, and any attempt to do so would inevitably degenerate into a duel of expert affidavits.

Both these rationales came into play in *Brandi-Dohrn*. Just as § 1782 says nothing about limiting discovery to matters that would be discoverable in the foreign court, it likewise says nothing about limiting discovery to matters that would be admissible in the foreign court. It is possible for matters to be "used" in a foreign proceeding without actually being offered into evidence, much less admitted into evidence. Indeed, most discovery in normal domestic litigation in the US is "used" in the case without being offered or admitted.

The Second Circuit also noted that it was highly inadvisable for American trial courts to figure out a foreign court's rules for admitting evidence. Note that the proceedings in the trial court in *Brandi-Dohrn* demonstrate the pitfalls quite starkly: both sides submitted affidavits from experts in German evidence law, and the experts (predictably) came to opposite conclusions. A foreign admissibility requirement could inject this sort of dispute into almost every § 1782 application, which would undermine the utility of this statutory tool.

This case underscores once again the breadth of § 1782, and its powerful potential as a tool. Overseas litigants in substantial cases should always consider, as part of their strategic planning, whether to make use of § 1782. It might not be suitable for most cases, but for those cases where it can be invoked, it can be a powerful tool.

If you have any questions about *Brandi-Dohrn* or § 1782 generally, or would like a copy of the *Brandi-Dohrn* case, feel free to contact me by email at sriback@wilkauslander.com or by telephone at (212) 981-2326.