

LALIVE

U.S. Discovery made available for commercial arbitrations outside of the United States - Risks and Opportunities

Until recently, U.S. courts have largely rejected discovery requests made in support of commercial arbitrations seated outside of the United States. These requests would have enabled parties to these arbitrations to compel the production of documents and testimony from counterparties and third parties located within the United States. However, the U.S. Court of Appeals for the Sixth Circuit has just issued a decision that may change this in the future. In a case related to pending DIFC-LCIA arbitration between a Saudi Arabian company and an affiliate of Delaware-based FedEx, the Sixth Circuit reversed the lower court and found that discovery under 28 U.S.C. 1782(a) was available for commercial arbitrations. Unless this decision is appealed, the Saudi Arabian claimant will be able to compel the production of documents and testimony from the parent (FeDEX).

Risks and opportunities: While there is now a split between various Circuits of the U.S. Court of Appeals, this decision opens the path for compelling the production documents of documents through U.S.-style discovery and depositions, even from a parent company. It applies to pending and future arbitrations. While U.S. courts are deferential to arbitral tribunals in regards to evidence-gathering in arbitrations, and would heed any restrictions on document production agreed by the parties, many of these safeguards can be circumvented by initiating discovery requests prior to the constitution of the arbitral tribunal.

The United States Court of Appeals for the Sixth Circuit has recently held that discovery under 28 U.S.C. 1782(a) is available in aid of private international arbitrations. On 19 September 2019, in *Abdul Latif Jameel Transportation Company Limited v. FedEx Corporation*, the Sixth Circuit ruled that Section 1782(a), which allows discovery “for use in a proceeding in a foreign or international tribunal” upon application by “any interested person”, could encompass an international commercial arbitration seated in a foreign country. The decision opens a path for litigants in commercial arbitrations to use broad discovery requests against counterparties and third parties with operations in the United States.

In its decision, the Sixth Circuit reversed a district court decision from earlier this year, which had rejected a request for discovery by the Saudi Arabian logistics company Abdul Latif Jameel Transportation Company Limited against the Delaware-registered courier delivery company FedEx Corporation (“**FedEx**”). The request had been sought in aid of a pending DIFC-LCIA arbitration against FedEx’s affiliate FedEx International. This dispute arose out of two separate agreements for the provision of transportation-related services in and around Saudi Arabia. The first contract provided for arbitration in Dubai under DIFC-LCIA rules, while the second provided for arbitration in Saudi Arabia under local laws and rules.

In 2018, following the souring of the parties’ relationship, the appellant commenced one arbitration in Dubai and another in Saudi Arabia. Shortly thereafter, the appellant also sought to compel production of documents and the testimony of a FedEx Corporation representative by lodging a Section 1782(a) request in the U.S. District Court for the Western District of Tennessee. The district court denied the application, ruling that a commercial

