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SECTION 1782 SUBPOENAS: WHAT HAPPENED TO DUE PROCESS?

U.S. Company receives a discovery subpoena — a court order commanding the company to provide testimony at a deposition or to disclose documents, or both. If U.S. Company wants to challenge the subpoena as a whole (it imposes an undue burden), it needs to file a motion to quash before the deadline for performance.

U.S. Company takes a closer look at the subpoena. The caption reads, "In re application of Foreign Company for an Order to Conduct Discovery for use in Foreign Proceedings under 28 U.S.C. § 1782." U.S. Company has never heard of Foreign Company. U.S. Company does not know about the foreign proceedings for which Foreign Company supposedly needs discovery. Finally, U.S. Company does not know why Foreign Company was allowed to obtain a court order affecting U.S. Company without any notice or opportunity to be heard.

28 U.S.C. § 1782 is a law that allows "any interested person" to request a U.S. court to order testimony or document production from a U.S. company for "use" in "a proceeding in a foreign or international tribunal." For nearly 60 years, courts have been analyzing this language and shaping the contours of Section 1782. More recently, courts have grappled with whether to authorize Section 1782 subpoenas for discovery for non-U.S. (foreign) arbitrations, enforcement/confirmation actions of foreign arbitration awards, and execution of such awards once confirmed into foreign court judgments.

Section 1782 does not provide procedures that a foreign applicant must follow to obtain a court order to issue a subpoena. Specifically, it does not provide what notice the targeted U.S. entity or individual must receive of the application seeking such an order. Consequently, courts have not adequately addressed the recipient's due process rights before a foreign company is entitled to have a court authorize Section 1782 discovery against the recipient.

Usual rules of court procedure and due process rights require both sides to be present at any argument before a judge. However, international litigants are routinely submitting Section 1782 applications *ex parte*, i.e., without notifying the U.S. entity or person who the resulting subpoena targets. Because the U.S. court is not presiding over the international proceeding, it is not intimately familiar with its posture and nuances. Consequently, the court may not have all of the information needed to determine whether a subpoena is warranted.

Ex parte applications should be the exception. They connote a sense of urgency that necessitates disregarding these safeguards. Even then, however, any resulting order is usually temporary. A federal court in California aptly explained why:[1]

> [E]x parte proceedings pose a threat to the adversary system. By allowing both sides to have their say, the adversary system promotes accuracy, fairness, and consistency—the hallmarks of our system of justice. That is not to say that [a]dversary proceedings will . . . magically eliminate all error, unfairness, or inconsistency. But, when one side proceeds ex parte, the risk of such dangers inevitably is compounded.

Ex parte Section 1782 applications should be exceptional and require some exigent circumstance. The latter is likely rare given that these applications relate to discovery. Indeed, an adversarial response allows the court, unfamiliar with the underlying dispute, to assess whether the applicant has met its burden under Section 1782. Even then, the court can determine whether to issue an order allowing such discovery in light of the discretionary factors that the Supreme Court created in *Intel v. Advanced Micro Devices, Inc.*[2]

Yet courts today are granting *ex parte* Section 1782 applications without any showing of an exigent circumstance. Instead, applicants claim *ex parte* applications are "routine" or "common practice." The origin of this proposition — a 1976 Ninth Circuit opinion called *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan* — is dubious.[3] There, the district court received a letter rogatory from a foreign court, seeking the district court's assistance to obtain evidence for use in a foreign proceeding. Without explanation, the Ninth Circuit commented that courts had "customarily" acted upon letters rogatory *ex parte* and that a motion to quash a resulting subpoena sufficed to protect the recipient's due process rights. Since then, many courts have cursorily stated that *ex parte* Section 1782 applications are the norm.

In re Letters Rogatory from Tokyo Dist. errantly created a presumption that *ex parte* Section 1782 applications are proper. Based on only a preliminary showing of the statutory prerequisites, foreign companies are submitting *ex parte* Section 1782 applications and requesting courts to issue subpoenas. After obtaining an order, these companies are using subpoenas to obtain discovery in connection with proceedings that may well be wholly unknown to the recipient. Because of *In re Letters Rogatory from Tokyo Dist.*, the recipient has to use a motion to quash to argue that the application was improper. This should not be the subpoenaed company's burden.

Although most courts routinely accept *ex parte* applications, at least two have recognized the problem that *ex parte* applications create. A district court in North Carolina in *In re Merck & Co., Inc.* noted that barring an exigent circumstance, not hearing all relevant views risks defective discovery,

[1] *In re Intermagnetics Am., Inc.*, 101 B.R. 191, 192 (C.D. Cal. 1989).

[2] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-66 (2004).

[3] 539 F.2d 1216, 1219 (9th Cir. 1976).

unfairness, and perhaps, irreparable damage to the other parties to the underlying litigation.[4] This rationale equally applies to third parties, who are often the targets of these discovery subpoenas.

A district court in Nebraska shared this concern in *In re Anglin*.[5] That court found that proceeding *ex parte* prevents developing a proper record to allow it to determine if and to what extent to authorize such discovery. Instead, the court fashioned a process to manage a Section 1782 application that respected the due process rights of all relevant parties. *First*, the applicant had to provide notice of the Section 1782 application to the adverse party in the foreign proceeding. The applicant also had to notify the proposed targets of the requested discovery under the application. *Second*, the applicant had to notify the foreign court of its application and of the U.S. court's ruling, which included an invitation for the foreign court to provide its comments on the proposed discovery. *Third*, the applicant had to file a brief and any evidence supporting its application. In summary, the court provided all involved an opportunity to respond to the application *before* the court issued any order.

Courts should carefully examine *ex parte* Section 1782 applications. If the applicant does not articulate some exigent circumstance that discovery will be lost without an immediate order, courts should adopt a process similar to the one described above before issuing an order. This includes mandating that the applicant notify all relevant actors, especially a third party that would be the target of the resulting subpoena. In addition to protecting the target's due process rights, this would promote efficiency by allowing the court to determine the legal propriety of the Section 1782 application at the outset and providing the target an opportunity to advise that it does not have the requested discovery, obviating the issuance of a subpoena altogether.

The next time your company receives a subpoena, check it closely. If it was authorized under Section 1782, there may be more grounds to challenge the subpoena and assert your due process rights than previously contemplated.

If you have any questions about the information contained in this Client Alert, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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[4] 197 F.R.D. 267, 271 (M.D.N.C. 2000).

[5] 7:09-CV-5011, 2009 WL 4739481, at *1 (D. Neb. Dec. 4, 2009).