ILLINOIS STATE BAR ASSOCIATION

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The Globe

The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

David Aubrey's "Message from the Chair" discusses the International Criminal Court and its role on international human rights.

In this issue of *The Globe*, we are appreciative of authors not involved in the International & Immigration Law Section, but who are interested in topics concerning immigration or international law.

Howard Stovall provided, "Some Highlights of the Jordanian Labor Law." Since the August 2001 issue of *The Globe*, Howard has provided 16 different articles concentrating in commercial matters throughout the Arab Middle East.

"A Man Without a Country (Almost)" by William T. Kaplan first appeared in *Federal Taxation*. "USCIS Revised Fee Waiver Requirements Impact on

Continued on next page

Message From the Chair: The International Criminal Court Bears Watching

BY DAVID W. AUBREY, ESQ.

First, I would like to begin this message with a sincere thank you to all who have worked to build our section this year. Members of the Section Council have worked tirelessly to advance sound legislation in Springfield, create some of the best CLE programs in the ISBA, contribute articles to this publication, and reach out to law students. I am honored to work with all of you and thankful for your friendship. I also would like to give a special thanks to Lewis Matuszewich for his dedication to editing this publication for so many years. We owe him a debt of gratitude.

Recently, three developments came from the International Criminal Court (hereinafter, "ICC"), which will deserve the attention of lawyers advocating for human rights. First, Sudan has agreed to surrender Omar al-Bashir to the ICC to face charges arising from his brutal genocide in Darfur. Second, the ICC has decided to hear briefs on whether it has jurisdiction over the Palestinian areas of the West Bank and the Gaza Strip even though Palestine is not

Editor's Comments

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Pathways to Legal Immigration" by Bhavani Raveendran was first published in the December 2019 issue of *Human Rights*.

Hyun Yung (Julia) Lee provided "Discovery in the United States in Support of International Arbitrations," which first appeared in *Alternative Dispute Resolution*. This issue of *The Globe* includes the first part of her paper, with the remainder to be included in the next issue.

As always, thank you to all of our authors and contributors. ■

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Message From the Chair: The International Criminal Court Bears Watching

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an independent state. Third, the ICC has appointed a prosecutor to investigate crimes arising from the U.S.-Taliban conflict in Afghanistan. All three of these developments at the ICC by the current prosecutor, Ms. Fatou Bensouda, will define the ICC's future for the next decade.

For background, the ICC is an intergovernmental, international, tribunal formed by treaty in 2002. It has jurisdiction to prosecute individuals for international crimes of genocide, crimes against humanity, war crimes, and the crime of aggression. The official seat of the court is in The Hague, Netherlands, however, the tribunals themselves may operate anywhere in the court's jurisdiction.

The U.N. Security Council referred the case arising from the atrocities in Darfur to the ICC back in 2005. At that time, Omar al-Bashir opposed the ICC and vowed to never allow a Sudanese citizen to be prosecuted before the ICC. Nevertheless, the ICC prosecutor issued warrants for Omar al-Bashir himself for genocide, crimes of war, and crimes against humanity.

An investigation into war crimes committed in Gaza and the West Bank began in 2015. Ms. Bensouda asked for a determination whether the ICC has jurisdiction to investigate crimes in these territories. Palestinian leaders have welcomed this investigation arguing the court has jurisdiction, while the current Israeli Prime Minister, Benjamin Netanyahu, denies the court has jurisdiction over the territories. Israel has not ratified the treaty to the court, but Palestinian leaders have done so.

Last, on March 5, 2020, the court ruled that its prosecutor could begin an inquiry about crimes committed in Afghanistan by either the United States of America, the Afghani government, or the Taliban. This is the first time American forces have been potential targets of prosecution by the ICC. Although the United States is not a party to the treaty establishing the ICC, Americans may face prosecution for their conduct abroad when they are in countries which are part of the ICC's jurisdiction. ■

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The Globe

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Some Highlights of the Jordanian Labor Law

BY HOWARD L. STOVALL

The Jordanian Labor Law (Law No. 8 of 1996 as amended) contains the most important rules applicable to employment relationships in Jordan. In general, that law applies equally to Jordanian national employees as well as expatriate employees.

The following summary highlights some of the more significant aspects of the Jordanian Labor Law (including amendments to that Law enacted in 2019).

Permits for Foreign Nationals

A local company is not permitted to engage any nonJordanian employee except with the approval of the Ministry of Labor and after obtaining a work permit. This assumes that the work requires experience and capability which are not available through Jordanian employees, or that the available number of local employees does not meet the overall demand. The work permit is valid for one year and should be renewed annually.

Even if an expatriate employee is performing shortterm work, s/he is required to obtain a work and residency permits. (Such a requirement does not apply to experts who enter Jordan to provide their expertise to a company, on the condition that their residence in Jordan does not exceed three months.)

The Ministry will charge the employer a fee for the issuance and renewal of the work permit for every nonJordanian employee. In addition, the following documents should be submitted to the local authorities:

- the registration certificate of the employer;
- the employment contract;
- the vocational license of the company;
- a copy of the employee's passport;
- health certificate for the employee from the Ministry of Health; and
- a certificate from the Social Security Corporation, stating that the employee is registered with it.

Upon obtaining the work permit, the employee should obtain a residency permit (to be renewed every year). According to the Residency and Foreign Affairs Law, any foreigner who legally enters Jordan and does not obtain the necessary residency permit or exceeds the duration of his/her residency permit without renewal within one month from the date of its expiry, shall be subject to a fine. According to that same law, any employer who hires a foreigner without having a valid residency permit will be subject to fine.

Hours of Work/Leave

According to the Jordanian Labor Law, working hours are calculated on a daily or weekly basis, rather than on a yearly basis. Ordinary working hours are eight hours per day or fortyeight hours per week. (Time allocated for meals and rest is not included in this number.)

Unless the employment contract provides for more generous vacation, every employee (regardless of nationality) is entitled to fourteen working days annual paid leave. Such leave is increased to twenty-one working days after the employee remains in the service of the employer for more than five consecutive years.

In general, vacation time is mandatory under Jordanian law. Any waiver by the employee of any of his/her rights is considered null and void. However, the employer may fix, during the first month of the year, the date of each employee's annual leave according to work requirements, provided that due consideration is given to the employee's interests.

If annual leave is not used in one undivided period of time, any partial annual leave should not be taken in less than two day increments.

Every employee (again regardless of nationality) is entitled to fourteen days sick leave with full pay per year, based on a medical report issued by a doctor approved by the employer. Such sick leave may be extended for another fourteen days with full pay if the employee is hospitalized, based on a medical report (for employers who employ less than twenty employees) or a report by a medical committee (for employers who employ more than twenty employees). This requirement is reflected in an amendment to the Labor Law enacted last year.

There are a number of other statutorily required periods of leave. Every employee shall have the right to:

- four months leave without pay if s/he joins an officially recognized university, institute or college.
- fourteen days paid leave per year if s/he joins a labor cultural course approved by the Ministry of Labor or the General Federation of Jordanian Trade Unions, upon the nomination of the employer in coordination with the concerned labor union.
- fourteen days paid leave for the performance of pilgrimage; the employee should serve five consecutive years with the employer in order to enjoy such right, and this leave is to be granted only once during the employee's period of service.
- each member of a working couple may obtain a leave once without pay for a period not exceeding two years to accompany a spouse who is transferred to another job located outside the governorate where s/he works within Jordan or for a job abroad.
- a female employee is entitled to maternity leave totaling ten weeks with full pay, prior to and after

delivery, provided that the period subsequent to delivery may not be less than six weeks; an employer is prohibited from putting the mother back to work before this period expires.

- after expiry of maternity leave, an employer must permit a nursing mother for a year from the date of birth to take a period or periods not exceeding one hour in total per day with pay for nursing her newborn.
- a woman who works at an establishment which engages ten employees or more shall have the right to leave without pay for a maximum period of one year in order to devote her full time caring after her children. (This right is forfeited if the woman works for pay in any other establishment during this period of leave.)
- a male employee is entitled to a three day paid paternity leave. (This benefit is based on an amendment to the Labor Law last year.)

A Jordanian national or expatriate worker is permitted to work during holidays, provided that s/he receives an additional minimum wage during that day of not less than 150% of usual wages.

An employer is not required to pay unused sick leave when an employee leaves employment. However, if the employee departs before using accrued vacation days, s/he is entitled to payment in lieu of the unused vacation days for the past two years before leaving employment.

Overtime and Shift Work

The Jordanian Labor Law contains a number of rules governing overtime. The employer is permitted to put an employee to work (with his/her consent) in excess of the daily or weekly working hours, provided that the employee receives a wage for every hour of overtime at a minimum rate of 125% of the regular wage.

- The employer may require the employee to work more than the daily or weekly working hours in any of the following cases, provided again that the employee receives overtime pay:
- Carrying out the establishment's annual inventory, preparing the balance sheet and closing accounts, getting ready to sell at discounted prices, provided that the number of days on which this provision is applied does not exceed thirty days per year and that the actual working hours do not exceed ten hours a day.

To avoid the occurrence of loss to goods or any other item which is exposed to damage, to avoid the risks of technical work or to receive certain materials, delivery or transporting of same, provided that the number of days on which this provision is applied do not exceed thirty days per year. (This increase to thirty days is based on an amendment to the Labor Law last year.)

If the employee works on his/her weekly rest day, religious feast holidays, or other official holidays, s/he should receive a wage on that day of not less than 150% of the regular wage.

The Jordanian labor law does not regulate night work except for women and minor employees. Female employees (including those who are pregnant) may not be employed at night, from ten p.m. until six a.m., except with the approval of the employee and only in some specific industries. In no case can employers employ minors who have not reached the age of sixteen. No minor is permitted to work from eight p.m. through six a.m., and no minor under the age of eighteen is permitted to work more than six hours per day (provided that a minimum of one hour rest is granted after four hours of successive work). In addition, no minor is permitted to work during religious feasts, official holidays and weekly holidays, and no minor under the age of eighteen is permitted in jobs that are deemed hazardous, exhausting or prejudicial to health. (Such jobs are specified through decisions issued by the Minister of Labor.)

An employee cannot waive overtime hours or maximum weekly working hours. According to the Jordanian Labor Law, any agreement under which any employee waives any rights under the Jordanian Labor Law shall be considered null and void.

Bonuses and End-of-Service Benefits

Under the Jordanian Labor Law, if the labor contract or the employer's internal regulations provide for additional pay or bonuses (such as a 13th month salary), the employee should not be deprived of such a right. (Every employer who engages ten employees or more should establish internal regulations for organizing the work in its establishment, outlining working hours, daily and weekly rest periods, work violations, penalties and measures taken in respect thereof, including discharge from work, the method for its implementation, and any other details required by the nature of work. The establishment's internal regulations are subject to approval by the Minister of Labor. Failing to establish such internal regulation will subject the employer to penalties.)

There are also end-of-service benefit payments that should be paid to an employee who is not enrolled under the Social Security system. Such an employee is entitled (when the employment contract ends for any reason) to an end-of-service benefit at a rate of one month salary for every year of employment. Fractions of a year shall be paid proportionately. The end-of-service benefit is calculated on the basis of the employee's last salary, including any regular compensation, such as housing allowance, car allowance, bonuses, as well as salary payments.

Most Jordanian or expatriate employees between the ages of 16 and 55 (for female employees) or 60 (for male employees) should be registered with the Social Security Corporation. Each employee under the Social Security system is insured against work injuries, diseases, disability, old age, and the like. Pension payments become payable provided that the employee fulfils certain requirements set out in the Social Security Law.

(Under the Social Security Law, the maximum salary for calculating an employee's participation in the Social Security system is Jordanian Dinars 3000 (or, in the case of employees who joined the Social Security system before 15 October 2009, JD 5000). A few recent Jordanian court decisions, including by the Court of Cassation, have required employers to pay employees, even though participants in the Social Security system, an additional endofservice benefit for any salary exceeding the above thresholds. The courts adopted an end-of-service benefit calculation as the

difference between the employee's actual salary and the maximum salary registered with the Social Security system, i.e., entitling the employee to end-of-service benefit for the amount that his/her actual salary exceeds the ceiling set for participation in the Social Security system.)

Termination of Employment

An employee may terminate an indefinite term contract upon one month written notice and with no compensation owed to the employer. In the case of a definite term contract terminated by the employee without cause before the end of the contract period, the employer may claim whatever damages arise from the employee's termination, but not to exceed the equivalent of one-half of the wages owed to the employee for the remaining period of the labor contract.

On the other hand, an employer's termination of the labor contract should always be for cause. If the employer terminates a definite term labor agreement before the end of its period without cause, the employer should pay the wages of the employee until the end of the contract period, in addition to any other entitlements (such as payment in lieu of vacation time).

As for an employer's termination of an indefinite term contract without cause, the employee will be entitled to compensation for unfair dismissal, equal to one-half month salary for every year of employment (not less than two months' salary), in addition to one month pay in lieu of notice, and any other entitlements owed.

Termination for cause under the Jordanian Labor Law includes:

- If the employee assumes a false identity or submits false certificates or documents with the purpose of acquiring a benefit or causing prejudice to others.
- If the employee fails to fulfill the obligations contained in the employment contract.
- If the employee commits a fault causing serious material damage to the employer, provided that the employer notifies the appropriate authorities of the incident within five days from the date of learning of the occurrence.
- If the employee violates the internal regulations of the employer (including safety regulations), despite being warned in writing twice.
- If the employee is absent without good cause for more than twenty intermittent days during the year, or for more than ten consecutive days, provided that dismissal is preceded by a written warning sent by registered mail to the employee's address and published, at least once, in a local newspaper.
- If the employee discloses work secrets.
- If the employee is convicted, by a court decision which has become final, of a criminal offense or a misdemeanor involving dishonorable or immoral conduct.
- If the employee is found drunk or under the influence of any drugs, or if s/he has committed, at the workplace, an act violating public morals.
- If the employee strikes or insults the employer, the manager in charge, a superior, a fellow employee or any other person in the course or on account of work.

* * * *

The Jordanian Labor Law contains detailed provisions governing various minimum rights owed to an employee. Accordingly, any agreement under which any employee waives any of his/her rights under the Labor Law shall be considered null and void. However, this does not prevent the employee from being granted any more favorable right(s) by any other applicable law, labor contract, agreement or decision.

This memorandum is intended to summarize some general legal principles of labor law in Jordan, but not to provide legal advice on any specific question of law.■

A Man Without a Country (Almost)

BY WILLIAM T. KAPLAN

It is a beautiful August Friday. The temperature is 81 degrees, no humidity, and just a slight breeze.

Stone Darnell, the managing partner of Darnell and Munch, a law firm in Stoneville, is contemplating spending an enjoyable afternoon with his family.

Stone allowed the staff to take the afternoon off; only Stone's administrative assistant, Mrs. Jackson, remains on duty.

Stone's daydreams are shattered by Mrs. Jackson's voice: "Stone, Mr. J.D. Ardy is on the phone." Mr. Ardy is not Stone's best client, but he is one of Stone's top ten clients.

Stone: "Good afternoon J.D., how are things with you?"

J.D.: "Well, Stone, we haven't talked in a while, and I want to tell you business is fantastic. Cash flow is impressive, but I have expenses. The college tuitions, the additions to the house, and very expensive vacations have set me back to the extent that I haven't paid my income taxes for two years, and I owe over $200,000. To be precise I have a statement from the IRS stating that I owe $208,413.84 and the amount is growing daily with the interest the IRS is charging."

J.D.: "And something else. A notice of a federal tax lien has been filed and a levy to collect the debt has been issued."

Stone: "J.D., what you have told me is not good news, but we should be able to work out a payment plan with the IRS."

J.D.: "There is something else I need to tell you. There is a conference in Russia that I must attend."

Stone: "So why can't you attend the conference?"

J.D.: "Oh, I can attend the conference. It's just getting back into the United States that is the problem, and I prefer not to be stuck in Russia, especially in the winter."

Stone: "What do you mean?"

J.D.: "Well, Stone, what I didn't tell you is that I received a letter from the State Department stating that the State Department received a notice from the IRS certifying that I have a 'seriously delinquent tax debt', and that my current passport will be revoked. Can they do this? I don't want to be stuck in Russia and I don't want to be a man without a country!"

Stone does not know the answer to the questions but tells J.D. that he needs time to research the issues and that he will call back later that afternoon. Stone sighs, knowing that this research will take the remainder of the afternoon.

Stone commences his research by reviewing the "Fixing America's Surface Transportation Act" ("FAST") under which the IRS is statutorily required to notify the United States State Department of a taxpayer owing a seriously delinquent tax debt, which amount is $52,000.00 or more for the year 2019 (this amount includes interest and penalties), as the threshold is adjusted annually for inflation. If a taxpayer has a valid passport, the State Department may revoke the passport or limit a taxpayer's ability to travel outside the United States.

Stone learned that since 2015 the IRS has been required to notify the State Department that a taxpayer has been certified as having a seriously delinquent tax debt. The IRS is also required to notify (using Notice Form CP 508C) the taxpayer, in writing, of the certified debt submitted to the State Department for action. It is also interesting to note that if the taxpayer has entered into a Power of Attorney, the agent under the Power of Attorney *will not* receive a copy of Notice Form CP 508C. The Notice Form will be sent via regular United States Mail to the last known address of the taxpayer.

Although the IRS had the obligation to notify the State Department of a taxpayer's seriously delinquent tax debt since 2015, it has only been since February 2018 that the IRS did begin notifying the State Department of a certified seriously delinquent tax debt of a taxpayer.

However, before the IRS asks the State Department to revoke a passport, the IRS will forward a letter (Letter 6152) to the taxpayer requesting the taxpayer to contact the IRS within thirty (30) calendar days from the date of the Letter 6152 to resolve the taxpayer's account. The purpose of such a letter is to allow the taxpayer an additional opportunity to resolve the taxpayer's debt with the IRS, and thus preventing the IRS from requesting revocation of the taxpayer's passport.

Once the notice from the IRS is received, the State Department will generally deny a pending passport application for initial issuance or renewal, or revoke or limit a previously issued U.S. Passport.

Stone's research uncovered that taxpayers have several methods to avoid the IRS from sending the certification to the State Department.

The most obvious method is to pay the tax debt in full as soon as possible.

Short of that obvious remedy, other remedies include:

- Enter into an approved installment agreement with the IRS to pay the debt;
- Enter into an accepted offer in compromise to pay the debt;
- Enter into a settlement agreement with the Department of Justice to pay the debt;
- Have the collection process suspended because a taxpayer has made an innocent spouse election, or requested innocent spouse relief.

If the IRS did certify a taxpayer's debt to the State Department, and the taxpayer believes the certification is erroneous or the IRS failed to reverse the certification when it was required to do so, the taxpayer can file suit in either the U.S. Tax Court or the U.S. District Court. Note that if the taxpayer is successful in a court action, the court has no

authority to release a lien or a levy, and the taxpayer cannot be awarded money damages. If the taxpayer is successful, the court can order the IRS to notify the State Department that the certification was erroneous.

Stone discovered that the IRS does have a heart. If a taxpayer is serving in a combat zone or participating in a contingency operation, the certification process will be postponed.

Also, a passport will not be at risk if any of the following are applicable to the taxpayer:

The taxpayer has filed for bankruptcy;

- The IRS has determined that the account is not collectible due to a hardship;
- The taxpayer is located within a federally declared disaster area;
- The taxpayer has a request pending with the IRS for an installment agreement;
- The taxpayer has a pending offer in compromise with the IRS; or
- The IRS accepted an adjustment to the taxpayer's account that would satisfy the debt in full.

Stone now sits back, pushing aside the printed research material, and sighs. He now knowns how to advise his client, J.D. Ardy.

As promised, Stone called J.D. "J.D., I have completed my research about your IRS problem. While there are ways to pay your tax debt over a period of time, these payment methods are extremely time consuming and require submission of considerable personal financial information. Our recommendation is that you discuss securing a loan from your personal banker in the amount of the debt owed. As time is of the essence, this suggested course of action is the quickest way to resolve the problem, and guarantees that you will not be a man without a country. The interest paid on the bank loan is equivalent to the interest you would pay to the IRS, so nothing is to be gained by negotiating with the IRS. Of course, the bank fees would just be a cost of doing business. In addition, you would probably not qualify for the other IRS payment programs as your income is too large and any negotiations with the IRS would be time consuming."

J.D.: "Thanks for the prompt response and send me your bill as quickly as possible."

Couldn't have a better client than that thinks Stone. ■

William T. Kaplan, JD, MBA, practices transactional law in Joliet, Illinois, and is a member of the Federal Taxation Section Council.

USCIS Revised Fee Waiver Requirements Impact on Pathways to Legal Immigration

BY BHAVANI RAVEENDRAN

In October, USCIS announced that it would be removing the means-tested benefit criteria in determining whether an applicant was exempt from filing fees.[1] In practical terms, USCIS revised Form I-912, used to request fee waivers, to no longer allow applicants to demonstrate their need or financial hardship by their eligibility for a public benefit offered by another federal, state or local agency.[2] Information from a public benefit with similar eligibility and amount consideration, such as Medicaid or SNAP, is no longer considered an "appropriate criteria" by USCIS. In the statement provided on October 25, 2019 on the USCIS website (available at https://www.uscis.gov/news/news-releases/uscis-updates-fee-waiver-requirements), the agency stated that it "has determined that receiving a means-based benefit is not an appropriate criteria in reviewing fee-waiver requests because income levels used to decide local assistance eligibility vary greatly from state to state."[3] Citing its reliance on fees to function and its need to ensure the quality and consistency of fee waiver approvals, USCIS Director Ken Cuccinelli stated that the change was necessary for USCIS to conduct its mission "fairly."[4]

By implementing this change, USCIS has restricted the simplest method for documenting qualification for a fee waiver. USCIS emphasized in their statement that fee waivers can still be requested if documented annual household income is below 150 percent of the Federal Poverty Guidelines or the applicants can "demonstrate financial hardship."[5] A family of four is within 150 percent of the Poverty Guidelines at $37,650.00 annual income. According to the guidelines as applied in 2018, a family of four making $50,200 and using public benefits could have been eligible according to one immigration law service.[6] Clearly, family who make even thousands more a year could be in a position to not afford immigration fees.

Without the ability to use mean-based benefits applicants must re-document their low-income, flooding USCIS with extensive documentation that may require applicants to choose between hiring legal counsel to complete a fee petition or pay the fee for an application. Both options are unobtainable for many applicants. Citizenship applications in 2019 cost $725.00[6] and marriage-based green cards could cost as much as $1,960.00.[8]

In DHS's 2018 Annual Report on Citizenship and Immigrations, the Ombudsman cited USCIS programs that did

not allow applicants to submit fee waivers and commented that it was "limiting the system's viability for applicants in need."[9] Further, the Ombudsman cited that in 2017, almost 40 percent of N-400 applicants for citizenship and more than 20 percent of Form I-90 applicants for green cards filed for a fee waiver request.[10] That is a substantial portion of the applicants which may have to choose to forgo applying for legal status and the benefits of citizen due to their financial restraints. The impact of these rules changes is yet to be seen but many believe this is just the latest in a number of moves making it more difficult for low-income applicants to apply for US citizenship or legal status.[11] ■

1. https://www.uscis.gov/news/news-releases/uscis-updates-fee-waiver-requirements.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. https://www.boundless.com/blog/public-benefits-immigration-fee-waivers/.
7. https://www.boundless.com/immigration-resources/how-much-does-it-cost-to-apply-for-us-citizenship/.
8. https://www.boundless.com/blog/public-benefits-immigration-fee-waivers/.
9. https://www.dhs.gov/sites/default/files/publications/DHS%20%20Annual%20Report%202018.pdf.
10. *Id.*
11. https://www.boundless.com/blog/public-benefits-immigration-fee-waivers/; http://immigrationimpact.com/2019/10/30/uscis-changes-fee-waivers-policy/#.Xe7u8-hKj-g

Discovery in the United States in Support of International Arbitrations Part 1

BY HYUN YUNG (JULIA) LEE

While the advent and development of the American court litigation judicial system allowed access to justice for all and was undoubtably one of the greatest achievements to build a more peaceful and inclusive society in the American history, the light of court litigation carries its own shadows. The statutory and procedural rules of court litigation provide a uniform standard and expectations at the cost of allowing little to no flexibility for the parties to establish desirable rules more appropriate for the specifics of the case to facilitate a constructive agreement. As the process is slow, long, costly, and public, litigation processes also invite greater tension between and stress within the parties.

The formal institutionalization of arbitration in the late 19th century provided an avenue for disputants to bypass these pitfalls, and the American Arbitration Association was established to promulgate rules on the methods for arbitration and to provide guidance to both arbitrations and parties alike.[1] However, the rules and laws governing arbitration remain gray and ambiguous in international disputes between different countries. One of the most recent questions relates to the discovery process of international arbitration.

The Congress enacted 28 U.S.C. § 1782 in 1948 to allow litigants to utilize the U.S. discovery procedure in aid of litigation in foreign courts.[2] Specifically, § 1782(a) authorizes parties to seek discovery of documents and other items in U.S. federal courts for use in proceedings based outside of the U.S.[3] The purpose of the statute was to make U.S. judicial discovery processes available as a means to obtain evidence for use in foreign and international dispute resolution proceedings.[4] Reciprocity by another country was not mandatory to utilize this mechanism.[5] Instead, Congress only had philanthropic intentions and sought to lead by example.

In 1964, the Congress revised § 1782(a). Among other things, the beneficiaries of the discovery opportunity were altered from (a) "any judicial proceeding pending in any court in a foreign country" to (b) any "proceeding in a foreign or international tribunal," thereby expanding the availability of such U.S. judicial assistance. [6]

Since, there has been disagreements amongst influential circuit courts about whether the statute applies to private international arbitrations seated outside of the U.S. Recently, the court in Abdul Latif Jameel Transportation Company v. FedEx provided a decision that unfortunately raised more questions than it had answered.

The History

Prior Landscape of § 1782

The issue of § 1782 first surfaced in 1999 in two cases brought forth to the second and the fifth circuit court of appeals.[7] Both circuits determined that the scope of the word "tribunal" is ambiguous.[8] After scrutinizing the legislative history for statutory interpretation, the circuits held that there was no evidence of congressional intent to extend § 1782 to qualify private international commercial arbitration.[9] Therefore, the courts concluded that the term "tribunal" only encompassed "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[10]

The First and the Last of Supreme Court Comments

The second and fifth circuit decisions,

however, were cast into some question by the Supreme Court's subsequent interpretation of § 1782 in 2004. In Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court made rulings that did not address the specific § 1782 issue but nevertheless drew a vague scope of the term "tribunal."

Advanced Micro Devices (AMD) filed a complaint with the European Commission against Intel for unfair competition.[11] AMD alleged that Intel was monopolizing the computer microprocessor market and was too large in size.[12] In accordance with the European Commission's legal procedure, the commission's directorate general reviewed the complaint and performed fact-finding to determine if the commission should in fact pursue the complaint. During this stage, AMD requested that the directorate review documents from a separate American court case that contained Intel's trade secrets.[13] The request was declined.[14] Finding no avenue under the European law to gain access to these documents, AMD instead utilized the § 1782(a) mechanism and filed suit in the United States against Intel to compel the discovery of these documents.[15] By doing so, Intel sought to include the documents to the complaint before the European Commission.

The question was whether § 1782 of Title 28 of the U.S. Code authorizes a federal district court to compel the release of material for use in a foreign tribunal when the foreign tribunal itself is unwilling to demand production of the material. Before addressing the crux of the issue, in effort to reach a ruling, the courts inevitably had to determine whether the directorate's investigation of the Commission of the European Communities constitutes a tribunal. The district court found that the directorate's investigation was only a fact-finding body and therefore could not be considered a foreign tribunal of any kind and ruled in favor of Intel.[16] In appeal, the ninth circuit reversed.[17]

In a 7-1 decision, the Supreme Court reversed the ninth circuit.[18] While the Supreme Court's ruling was more concerned with identifying the factors to consider when determining whether to permit discovery in support of a foreign tribunal, in the process of doing so, the Supreme Court qualified the Commission of the European Communities as a "foreign or international tribunal." To justify the qualification, the Supreme Court reasoned that the European Commission acted "as a first-instance decisionmaker."[19] Further, in reference to the amendment made to section (a) in 1964, the court acknowledged the expansion of the statute's application from "any judicial proceeding" to "a proceeding in a foreign or international tribunal."[20] The Court noted in dicta that "the Congress understood that change to 'provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceeding abroad.'"[21] The Court also looked to a Columbia Law Review article written by Hans Smit, the co-author of the statute, from which the court adopted a definition of "tribunal" to include "investigating magistrates, administrative and arbitral tribunals, and quasi- judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[22] ■

This is part one of Discovery in the United States by Hyun Yung (Julia) Lee. The article will continue in the next issue of The Globe.

1. Michael McManus and Brianna Silverstein, *Brief History of Alternative Dispute Resolution in the United States*, CADMUS JOURNAL Nov. 1, 2011, https://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states.
2. Gilbert A. Samberg and Todd Rosenbaum, *Calling SCOTUS: Sixth Ciruit Re-Establishes Circuit Split Re U.S. Discovery In Aid of Foreign Commercial Arbitration (28 U.S.C. § 1782)*, Nat. L. Rev. (Oct. 4, 2019), https://www.natlawreview.com/article/calling-scotus-sixth-circuit-re-establishes-circuit-split-re-us-discovery-aid.
3. *Id.*
4. *Id.*
5. *Id.*
6. See 28 U.S.C. § 1782.
7. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 2009); *Nat'l Broad. Co. v. Bear Stearns & Co*., 165 F.3d 184 (2d Cir. 1999).
8. *Biedermann*, 168 F.3d at 881; NBC, 165 F.3d at 188.
9. *Biedermann*, 168 F.3d at 881.
10. *NBC*, 165 F.3d at 190; see *Biedermann*, 168 F.3d at 882.
11. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 241 (2004).
12. *Id.* at 241 n.6.
13. *Id.* at 241.
14. *Id.*
15. *Id.*
16. David Y. Loh and Christopher Raleigh, *Sixth Circuit Finds Discovery Under 28 USC § 1782 Is Available in Foreign Arbitrations*, COZEN O'CONNOR (Sept. 24, 2019), https://www.cozen.com/news-resources/publications/2019/sixth-circuit-finds-discovery-under-28-usc-1782-is-available-in-foreign-arbitrations.
17. *Intel*, 542 U.S. at 241.
18. Loh and Raleigh, supra note 16.
19. *Intel*, 542 U.S. at 243.
20. *Id.*
21. *Intel*, 542 U.S. at 257-58.
22. *Id.* (emphasis added).