

The Intersection of Corruption in International Arbitration and Discovery Pursuant to 28 USC § 1782

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Corruption in the context of international arbitration is at the forefront of current discussion and analysis. At the same time, innovative efforts to obtain evidence in the U.S. through 28 USC § 1782 to support or counter a wide variety of international (*i.e.* non-U.S.) cases continue to evolve (including its recent extraterritorial application discussed more fully here). A recent case from the D.C. District Court highlights the interplay of access to evidence for foreign proceedings in connection with claims of corruption against the backdrop of an ongoing ICSID arbitration and a pending foreign state criminal investigation.

In re Application of The Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer, LLP, analyzes The Islamic Republic of Pakistan's (Pakistan) request to obtain evidence located in the U.S. from Arnold & Porter Kaye Scholer, LLP (Arnold & Porter) in connection with a pending ICSID arbitration and a proceeding before Pakistan's National Accountability Bureau (NAB). The request related to dealings between Pakistan and Arnold & Porter's client, a Turkish company called Karkey Karedeniz Elektrik Uretim A.S. (Karkey).

Karkey obtained a large contract from Pakistan in 2008 to provide Powerships pursuant to Rental Power Projects contracts to aid Pakistan during its 2006-2007 energy crisis. Following complaints of prima facie corruption in procuring those agreements, the Supreme Court of Pakistan held them void *ab initio* and ordered the NAB to investigate possible corruption. Pakistan froze Karkey's bank accounts and vessels pending the NAB inquiry. In 2012, the NAB essentially cleared Karkey of liability under Pakistan's anti-corruption laws.

The Supreme Court of Pakistan disagreed. It unilaterally abrogated the NAB's determination and required \$120 million USD from Karkey to release its vessels while directing the NAB to pursue criminal charges against individuals involved in the underlying projects. When the NAB objected, the Court held it in contempt. The NAB then instituted proceedings into possible corruption during which several of Karkey's vessels were detained.

As stated, the dispute resulted in two ongoing proceedings: the NAB investigation and the 2013 ICSID arbitration initiated by Karkey alleging that the Supreme Court of Pakistan's ruling (that the contract was void *ab initio*) was arbitrary. In response, Pakistan argued that the tribunal lacked jurisdiction to hear the claim due to Karkey's fraudulent and corrupt procurement of the underlying contract.

Documents were exchanged in the course of the arbitration proceeding. While Karkey produced documentation, it advised Pakistan that some electronic documentation prior to April 2010 was contained on inaccessible backup tapes that were unduly burdensome to search. In an effort to obtain evidence to support its claims, Pakistan brought three separate motions before the ICSID tribunal to obtain the backup tapes - each of which was denied. The tribunal entered an award in favor of Karkey in August 2017 after which Pakistan filed a request for annulment.

In August 2018, Pakistan filed an *ex parte* Section 1782 application in the United States District Court for the District of Columbia, seeking the backup tapes from Karkey's counsel, Arnold & Porter. In September 2018, that application was denied and service of the application on Arnold & Porter required. Pakistan sought information regarding negotiations of the underlying agreements and documents reflecting payments or items of value by Karkey to various Pakistan agents or employees. In addition, Pakistan propounded interrogatories seeking the manner in which the tapes were preserved and stored as well as identification of Arnold & Porter's client document retention policies. Importantly, Arnold & Porter attested

under oath that it was not in possession of the backup tapes.

The Court then analyzed Pakistan's application pursuant to both the ICSID proceeding and the criminal investigation. First, the Court easily determined that it had authority to grant the relief and found that the *prima facie* factors necessary for Section 1782 were satisfied with respect to both proceedings. Namely, (a) the request was made by an "interested person" or a foreign or international tribunal (b) sought evidence (c) for use before a "foreign or international tribunal" (d) from a person residing or found in the district where the application was made.

Next, the Court analyzed the discretionary factors implicated by Section 1782: (a) whether discovery is sought by a participant in the foreign proceeding; (b) review of the nature of the foreign tribunal, the status of the proceedings and receptivity of the foreign court, government or agency to judicial assistance from a U.S. federal court; (c) whether the applicant is seeking to circumvent foreign proof-gathering restrictions or policies; and (d) whether the discovery requested is unduly burdensome.

As to the ICSID arbitration, the Court determined that the discretionary factors were somewhat split. The factors weighing against granting relief included that the matter was within the jurisdictional reach of the ICSID tribunal and would circumvent its proof-gathering policies (because Karkey was a party and the tribunal had repeatedly denied Pakistan's request for the tapes). Most significantly, the fact that Arnold & Porter was not in possession of the backup tapes strongly militated against Pakistan's application. By contrast, the tribunal's announced receptivity to additional evidence with respect to ongoing proceedings weighed in favor of granting the relief.

As to the pending NAB investigation, the Court similarly determined that Karkey was within the jurisdictional reach of Pakistan to the extent its assets were located there, including three of its ships. This factor weighed against granting the application as the information could be compelled in that proceeding. However, the parties failed to present evidence with respect to the NAB's proof-gathering practices. The lack of evidence weighed in favor of granting the application.

The Court then determined that the foreign court would likely be receptive to the evidence. The contention that the foreign proceeding was incompatible with U.S. standards of fairness was balanced against the strong U.S. policy favoring

international comity. While caution was warranted due to the conflicting postures of the case taken by the NAB and the Pakistan Supreme Court, the fact that the relief requested was limited to a request for civil discovery further tipped this factor in favor of granting relief.

After weighing the various factors, the Court ultimately denied the subpoena for documents and request for the backup tapes (that, nonetheless, were not in Arnold & Porter's possession). However, the Court granted Pakistan's request for interrogatories regarding issues related to inquiry of the storage methods, access and possession of the tapes (recognizing that privilege issues would likely be implicated due to the fact that the application was directed to a law firm). By including the interrogatories in its application, Pakistan broadened the scope of relief requested and access to evidence.

This case illustrates the flexibility of discovery pursuant to 28 USC § 1782 to obtain evidence for a variety of claims (here, to locate potential evidence regarding corruption) as well as the importance of framing the application in a manner to maximize the potential for relief (by seeking not only the tapes or documents but information by way of interrogatory as well).