

# U.S. Decisions: December 2006 Round-Up: Part II

Again with thanks to the International Civil Litigation Blog for many of the citations below, Part II of the December 2006 round-up will discuss a few significant case developments in the fields of International Discovery and Foreign Sovereign Immunity. More expanded discussion of these cases, and a few others pertaining to these topics, can be found at that site and other sites linked below.

## INTERNATIONAL DISCOVERY

***Linde v. Arab Bank, PLC, 2006 WL 3422227 (E.D.N.Y. Nov. 25, 2006).***

In this case, a number of Israeli and American individuals and estates pressed actions against Arab Bank for aiding and abetting murder, conspiracy to commit murder, provision of material support to terrorists, committing and financing terrorism and other related claims. Arab Bank claimed that bank secrecy laws in Jordan, Lebanon, and the Palestinian Monetary Authority (recognized by the United States) prevent the disclosure of certain records. At issue here is whether foreign bank secrecy laws can shield Arab Bank's records from discovery. Violations of these laws involve criminal penalties of fines and incarceration, and plaintiffs apparently conceded that some of the information they sought in discovery would require violating the secrecy laws.

Nonetheless, the Court concluded that the U.S. interests in combating terrorism trumped a foreign state's interest in bank secrecy, holding that:

*"there is no question that important interests of the United States would be undermined by noncompliance with the discovery orders issued by the court. As the court has already recognized, those interests are articulated in statutes on which some of the claims in this litigation rest: "Congress has expressly made criminal the providing of financial and other services to terrorist organizations and expressly created a civil tort remedy for American victims of international terrorism." Linde v. Arab Bank, PLC, 384 F.Supp.2d 571, 584 (E.D.N.Y.2005). The discovery sought here is transactional and other evidence of precisely those financial and other services at which the statutes here are aimed. Without that*

*discovery, the interests expressed in those statutes will be difficult if not impossible to vindicate in this action.”*

According to the court, although maintaining bank secrecy is an important interest of the foreign jurisdictions where the discovery sought here resides, that interest must yield to the interests of combating terrorism and compensating its victims. As members of the Middle East and North Africa Financial Action Task Force, both Jordan and Lebanon have expressly adopted a policy not to rely on bank secrecy laws as a basis for protecting information relating to money laundering and terrorist financing. Although the Palestinian Monetary Authority has apparently not expressly adopted any policies recognizing the subordination of bank secrecy to the interest of fighting terrorism, it is not a state, and its interests therefore need not be accorded the same level of deference accorded to “states” in considering comity. In any event, as the Palestinian Monetary Authority operates in an area governed at least in part by other authorities that have themselves engaged in terrorist activity, it would be absurd for this court to exalt the bank secrecy interests of those under the jurisdiction of the Palestinian Monetary Authority over the anti-terrorism interests of the United States and other recognized states in the region. The court ultimately concluded that Arab Bank should, with this opinion in hand, seek permission from appropriate governments to disclose information. The court deferred further action pending the outcome of this process. News source and blog discussions of this case can be found [here](#) and [here](#).

***SEC v. Sandifur, 2006 U.S. Dist. LEXIS 89428 (W.D. Wash. 2006)***

This case involves an action against Defendants for securities fraud. A witness who is a United States citizen working in Luxembourg has declined Defendant’s request to voluntarily appear in the United States for a deposition. The Walsh Act however, provides a U.S. Court with subpoena power over a national or resident of the United States who is in a foreign country if “it is not possible to obtain [a witness’s] testimony in admissible form without his personal appearance.” 28 U.S.C. § 1783(a). The issue presented here is whether the party seeking that subpoena power should be required to resort to the procedures outlined in the Hague Evidence Convention as a “possible” means of obtaining the testimony without a Walsh Act subpoena. The court noted that:

*“Under the Walsh Act, subpoenas may be issued when it is “impractical” to obtain the information. . . . Impracticality occurs, for example, where resort to alternative methods is unlikely to produce the relevant evidence in time to meet impending discovery deadlines. The court held that “[u]se of the Hague Convention procedures in this case would be impractical. . . . [T]he discovery deadline of February 17, 2007 is only a few months away. Though the Parties disagree on precisely how long the Hague Convention procedures generally take to process letters of request, . . . it can take up to a year, and that at the end of the process the government of Luxembourg may exercise its right Under Article 23 of the Hague Convention not to grant such a request. [T]he issue here is not that the Hague Convention procedures are merely inconvenient because they would require more resources or expertise to implement, but rather that they are impractical in the context the looming discovery deadline and overall trial schedule. [T]he Walsh Act does not require a harsh rule of 20/20 hindsight to see whether it ever would have been possible to obtain the information via other means but rather whether, looking forward, it “is not possible to obtain [the] testimony in admissible form without [the witness’s] personal appearance.” 28 U.S.C. § 1783(a) (emphasis added). While a party’s unreasonable delay may factor into the “interests of justice” analysis, the Act thus does not require denial of a subpoena where the alternative means would once have been theoretically feasible.”*

Accordingly, the court held that “Defendants demonstrated that it is not possible to obtain [the requested] testimony in admissible form without his personal appearance and have thus satisfied both requirements to obtain a Walsh Act subpoena.” The subpoena was accordingly granted.

Finally, the court discussed where the deposition should occur. The court considered London, but decided that this alternative would infringe upon the sovereignty of the UK. Forcing the foreign party to fly to New York seemed an excessive burden to the party and the court. Therefore, the court held that the deposition should proceed in Luxembourg. As for the infringement on Luxembourg’s sovereignty: Any potential infringement on Luxembourg’s sovereignty is outweighed by the imposition that the alternatives would impose on the nonparty witness. The Supreme Court has held that “American courts are not required to adhere blindly to the directives” of countries who oppose unauthorized, American-style discovery even when they have gone so far as to

enact “blocking statutes.” *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 544 n. 29 (1987); see also *Valois of America Inc. v. Ridson Corp.*, 183 F.R.D. 344; *Rich v. KIS California, Inc.*, 121 F.R.D 254, 258 (M.D.N.C. 1998). While this Court recognizes that the “interest of foreign nations in the sanctity and respect of their laws is both important and deserving of significant respect,” see *In re Vitamins Antitrust Litig.*, 120 F. Supp. 2d 45, 54 (D.D.C. 2000), in this case any potential sovereignty concerns are outweighed by the countervailing considerations regarding the significant burden that would otherwise be imposed on a nonparty witness. This decision, particularly that the Hague Evidence Convention is an “impractical” process, seems to further weaken the strength of that Convention in U.S. Courts.

***In re Application of Roz Trading Ltd., 2006 WL 3741078 (N.D. Ga. Dec. 19, 2006)***

Roz Trading, the Coca-Cola Export Company (“CCEC”), and the government of Uzbekistan entered a contract for a joint venture. Roz Trading alleges that Uzbekistan and CCEC seized its interest in the venture and accordingly brought its claim before the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna (the “Centre”) in accordance with the contractual arbitration clause. Roz Trading sought the assistance of the court to obtain discovery from the Coca-Cola Company to be used in the arbitration.

Roz Trading relied upon 28 U.S.C. §1782(a) in requesting judicial assistance for document discovery. The court addressed whether section 1782(a) includes arbitrations before the Centre, a private arbitral forum. The Coca-Cola Company argued that the Centre is not a “tribunal” for purposes of §1782(a) because it is a private institution whose proceedings are voluntary and arbitral. Taking guidance from *Intel v. AMD*, 542 U.S. 241 (2004), wherein the Supreme Court determined that the Directorate-General of Competition for the Commission of the European Communities was a “tribunal,” the court here held that private arbitral panels are also “tribunals” for 1782(a) purposes. In *Intel*, the Supreme Court drew special attention to the 1964 amendment to 1782(a) which “deleted the words ‘in any judicial proceeding pending in any court in a foreign country,’ and replaced them with the phrase ‘in a proceeding in a foreign or international tribunal,’” and characterized §1728(a) tribunals as “first-instance decisionmaker[s], capable of

rendering a decision on the merits, and as part of the process that could ultimately lead to final resolution of the dispute.” Here, the Centre performs just such a function. Accordingly, “[t]he Court held that the Centre is a ‘foreign or international tribunal’ within the meaning of § 1782(a).” In so holding, the court expressly disagreed with both the Second and the Fifth Circuits which, prior to *Intel v. AMD*, held that only governmental bodies qualify as tribunals under 1782(a). See *Nat’l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d. Cir.1999) and *Republic of Kazakhstan v. Beidermann*, 168 F.3d 880 (5th Cir.1999).

As a question of first impression in the Eleventh Circuit, the court issued an opinion fully supportive of international arbitration and robust judicial assistance for such forums. This opinion also fulfills the prediction of some commentators that *Intel v. AMD* would cause some courts to revisit whether private arbitration constitutes a tribunal under §1782.

## **FOREIGN SOVEREIGN IMMUNITY**

### ***Powerex Corp. v. Reliant Energy Services, No. 05-85 (U.S. 2006)***

In a possible watershed case regarding the Foreign Sovereign Immunity Act, the Supreme Court has now twice re-listed the cert. petition in *Powerex Corp. v. Reliant Energy Services*, 05-85, thereby pushing back its grant or denial of Certiorari until after its holiday break. The Questions Presented by the Petition are:

- 1. Whether an entity that is wholly and beneficially owned by a foreign state’s instrumentality, and whose sole purpose is to perform international treaty and trade agreement obligations for the benefit of the foreign state’s citizens, may nonetheless be denied status as an “organ of a foreign state” under the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. § 1603(b)(2), based on an analysis of sovereignty that ignores the circumstances surrounding the entity’s creation, conduct, and operations on behalf of its government.*
- 2. Whether an entity is an “organ of a foreign state” under the FSIA when its shares are completely owned by a governmental corporation that, by statute, performs all of its acts as the agent of the foreign sovereign.*

The cases grew out of the energy crisis in California in 2000 and 2001. Powerex contends that it is an arm of the province of British Columbia in Canada, but the Ninth Circuit Court rejected that argument. The full Petition is available courtesy of SCOTUS Blog here. The SG has recommended that the Court grant on the first question. The decision of the Ninth circuit opinion is available here.

***Agudas Chasidei Chabad of U.S. v. Russian Federation, 2006 WL 3476236 (D.D.C. Dec. 4, 2006)***

This is a fascinating case blending history and international law. It involves the proper possession of the historic collection of books and materials of the Agudas Chasidei Chabad (“Chabad”), an organization of Jewish religious communities located worldwide with origins in the Russian Empire. The organization’s complaint against the Russian Federation and several Russian state agencies alleges that the defendants illegally took and retained a library and archive of Jewish religious books and manuscripts after World War II, which Chabad claims to rightfully own. On a motion to dismiss, the court heard: (1) Whether the Foreign Sovereign Immunities Act precludes jurisdiction over the case in US federal court; (2) Whether the act of state doctrine, which instructs US courts to presume the validity of actions taken by foreign governments within their territories, should preclude the court from ruling on the plaintiffs’ claims; (3) Whether forum non conveniens should compel dismissal of the plaintiffs’ action.

The Foreign Sovereign Immunities Act embodies the longstanding tradition of foreign sovereign immunity, but the Act includes a series of exceptions, one of which, the expropriation exception, the court found applicable to this case. For the exception to apply, the court needed to find that (1) property rights are at issue; (2) the property was taken in violation of international law; and (3) the property is owned or operated “by an agency or instrumentality of the foreign state and that agency or instrumentality’ engages in commercial activity in the United States.” The court granted the motion to dismiss regarding the library of works. Discussing the second prong, it concluded that the alleged taking of the property took place in the early 1920s, when the Fifth and Sixth Rebbes of the Chabad were citizens of the Soviet Union. In order for a taking to violate international law, the court reasoned, it must involve a state taking the property of citizens of a foreign state, and that condition was not satisfied in this case. Regarding the archives, however, the court found that the complaint alleged a

violation of international law. Specifically, the archival materials were seized by the Nazis during WWII and, at the end of the war, they were appropriated by the Soviet Red Army in Poland in 1945. By the time the property taking occurred, the sixth Rebbe had become a Latvian citizen and the Chabad had been formally constituted as a New York Corporation, satisfying the requirement that the taking be conducted by a state actor against citizens of a foreign state. The court also found the first and third prongs easily met with regard to the archives.

The court then found the Act of State doctrine inapplicable to this case because the taking in question did not occur within Soviet territory. While “[t]he act of state doctrine directs courts in the United States to presume the validity of ‘acts of foreign sovereigns taken within their own jurisdictions,’” neither the initial seizure of the library by the Nazis nor the subsequent appropriation of the library by the Soviet Union took place in Soviet territory. Consequently, the court held the act of state doctrine to be inapplicable to this case.

Finally, the court rejected the invitation to dismiss on *forum non conveniens* grounds, finding that the defendants had failed to satisfy their burden to demonstrate the existence of a viable alternative forum. Additionally, the court found that the costs of hearing the case in the United States, including the expenses of document translation and the difficulty of accessing evidence currently located within the Russian Federation, did not justify moving the case to an alternative forum. Finally, the court noted strong public interest factors in resolving the dispute in the plaintiff’s chosen forum, including the DC Circuit’s location in the nation’s diplomatic and political epicenter, the longstanding interest that the United States government has taken in the dispute, and the lack of regard that the Russian government has shown in allowing the archives to fall into disrepair. These factors, taken together, led the court to find that the defendants had failed to overcome the strong presumption in favor of the plaintiffs’ chosen forum.

Some news discussions of this case can be found [here](#). *Opinio juris* has this commentary.