2015 WL 3439220

American Maritime Cases

United States District Court for
the Southern District of New York

JIANGSU STEAMSHIP CO., LTD.
v.
SUCCESS SUPERIOR LIMITED

No. 14 Civ. 9997 January 6, 2015

ARBITRATION -- 17. Proceedings for Security -- PRACTICE -- 1581. Scope, Privilege -- STATUTES -- Federal -- Assistance to Foreign and International Tribunals, 28 U.S. Code s 1782.
A 28 U.S.C. s 1782 request for discovery of a party against which London arbitration is being considered must be for use in a foreign proceeding which is adjudicative in nature. (Reviewing cases) Here, shipowner's requests to several banks for documents regarding the charterer's assets is not for adjudicative use; it would not help prove its breach of contract claim in the London arbitration, but would only be used to collect an eventual award.

ARBITRATION -- 17. Proceedings for Security -- PRACTICE -- 1581. Scope, Privilege -- STATUTES -- Federal -- Assistance to Foreign and International Tribunals, 28 U.S. Code s 1782.
A court has discretion to deny a request for s 1782 discovery even where the statutory requirements are met if it "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or of the United States." Here, movant appears to be using "liberal American discovery rules" to conduct a fishing expedition for assets without an argument or evidence that defendant has assets related to any bank covered by the discovery request. A s 1782 discovery request is not meant to support a fishing expedition to determine whether available assets justify commencing an arbitration.

PRACTICE -- 113. Rules of District Courts -- 1581. Scope, Privilege.
Nothing in s 1782 states that an application for discovery is to be made ex parte and the court has inherent authority to require notice to other parties. The S.D.N.Y. Local Rule 6.1 requires "a clear and specific showing why a procedure other than by notice of motion is necessary." Here, movant's concern that charterer's knowledge of shipowner's discovery requests will cause it to secret assets is not a sufficient showing. The request to seal the order denying shipowner's *ex parte* application for s 1782 discovery is denied.

Related proceedings reported at 2015 AMC 875. ***885**

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Opinion

Colleen McMahon, D.J.:

Petitioner Jiangsu Steamship Co., Ltd. ("Jiangsu") has filed this*ex parte* petition to conduct discovery pursuant to 28 U.S.C. s 1782. For the reasons stated below, the petition is denied.

BACKGROUND

Jiangsu is the owner of the vessel M/V *Jian Hua.*

On or about April 4, 2014, Jiangsu entered into a charter party with Success Superior Limited ("SSL") and Mingli International Group S. de R.L. de C.V. ("Mingli"). Per the charter party, the *Jian Hua* was to carry 70,000 metric tons of iron ore for SSL from Manzanillo, Mexico, to a port in north China. Mingli guaranteed SSL's performance. Jiangsu alleges that Mingli is an alter ego or agent of SSL (or vice versa) because the two entities share a common principal.

The petition asserts that Jiangsu performed its obligations under the charter party. According to Jiangsu, when the *Jian Hua* arrived in Manzanillo to load the iron ore, the vessel was detained and the cargo impounded, through no fault of Jiangsu's. Despite the detainer of the vessel and the seizure of the cargo, Jiangsu contends that SSL owes it for the sum due under the charter party.

The charter party provides for arbitration of disputes in London under English law. Jiangsu states that it has pursued or soon intends to pursue arbitration of its breach of contract

claim. I take that to mean that no proceedings have yet been instituted in London.

Jiangsu has filed a petition in this Court seeking to take discovery from various New York banks/financial institutions. Jiangsu argues that the discovery it seeks -- which includes both SSL's and Mingli's account statements, records, and recent wire transfers and payment orders -- will help it locate those entities' assets.

It is clear from Jiangsu's moving papers that Jiangsu does not need this information in order to prosecute the London arbitration; Jiangsu does not pretend that information about SSL's assets will help prove its breach of contract claim. Instead, Jiangsu represents ***886** that it may be able to use the information it obtains to bring unspecified "foreign attachment proceedings" (in unspecified foreign countries) in order to secure or satisfy any award it might receive from the arbitrators:

be Jiangsu "submits this Memorandum .. in support of its application for an order, pursuant to 28 U.S.C. s 1782, authorizing discovery .. for use in certain contemplated foreign proceedings in which *Petitioner will be seeking to obtain security by way of foreign maritime attachment actions* to aid in the recognition and enforcement of a foreign arbitration award ..." Jiangsu Mem. at 1.

be "Determination of the locus of such assets *will allow [Jiangsu] to obtain security through certain contemplated maritime attachment actions*.. which assets will then be used for enforcement of the eventual London arbitration award." Jiangsu Mem. at2.

be "Obtaining such information *will allow [Jiangsu] to determine where to initiate foreign attachment proceedings and seek ultimate enforcement* of the arbitral award..." Jiangsu Mem. at 3.

be "*[D]iscovery is sought for use in foreign attachment proceedings* in support of an eventual London arbitration award to be issued in favor of [Jiangsu]." (Jiangsu Mem. at 4). (emphasis added)

DISCUSSION

I. Petitions for Discovery Under s 1782

Pursuant to 28 U.S.C. s 1782(a), district courts may authorize certain persons to take discovery in aid of foreign proceedings:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be ***887** made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

"In ruling on an application made pursuant to s 1782, a district court must first consider the statutory requirements...."*Brandi-Dohrn v. IKB Deutsche IndustriebankAG*, 673 F.3d 76, 80 (2 Cir. 2012). There are three statutory requirements imposed by s 1782: (1) that "the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) [that] the discovery is for use in a foreign proceeding before a foreign tribunal, and (3) [that] the application is made by a foreign or international tribunal or any interested person." *Id; see also Application of Gianoli Aldunate*, 3 F.3d 54, 58-59 (2 Cir. 1993); *La Suisse, Societe d'Assurances Sur La Vie v. Kraus*, No. 06 CIV. 4404, 2014 WL 6765684, at *2 (S.D.N.Y. Dec. 1, 2014).

Even if the statutory requirements of s 1782 are satisfied, the district court has discretion whether to grant an application for discovery.*Brandi-Dohrn*, 673 F.3d at 80. The district court should exercise its discretion to further the twin aims of s 1782: (l) efficiently assisting participants in international litigation in our courts; and (2) encouraging foreign countries to provide similar assistance to our courts.*Schmitz v. Bernstein Liebhard & Lifshitz, LLP.*, 376 F.3d 79, 84 (2 Cir. 2004); *see also Brandi-Dohrn*, 673 F.3d at 80.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the United States Supreme Court outlined the factors that should guide district courts in exercising their discretion under s 1782: "First, when the person from whom discovery is sought is a participant in the foreign proceeding ..., the need for s 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." *Id* at 264. "Second, .. a court presented with a s 1782(a) request may take into account the nature of the

foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court ***888** judicial assistance." *Id.* Third, "a district court could consider whether the s 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Id.* at 264-65. Finally, "unduly intrusive or burdensome requests may be rejected or trimmed." *Id.* at 265.

II. Jiangsu's Request for Discovery is Denied

A. Jiangsu's Request Does Not Satisfy The Second Statutory Requirement That It Be "For Use in a Proceeding in a Foreign or International Tribunal"

Jiangsu's petition appears to satisfy the first and third statutory requirements. Jiangsu requests the production of documents from various banks all of which appear to conduct business in this District. Jiangsu is also an "interested person." In *Intel*, the Supreme Court held that "interested persons" include anyone, such as litigants and foreign officials, who has a reasonable interest in obtaining the information requested. 542 U.S. at 256. As a prospective participant in an arbitration, Jiangsu does have a reasonable interest in obtaining information about SSL's assets to enforce any judgment it obtains.

That leaves the second statutory requirement: discovery must be "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. s 1782(a). The Second Circuit, applying this requirement in *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24 (2 Cir. 1998), held that satisfaction of this factor turns on: (l) whether there actually is a foreign proceeding; and (2) whether the foreign proceeding is adjudicative in nature. *Id.* at 27; *see also In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017, 1021 (2 Cir. 1967) (Friendly, Ct.J.).

The facts of *Euromepa* are these. Esmerian, an American diamond and jewelry dealer, sued Euromepa and Allied, both European insurance companies, in a French commercial court. Esmerian claimed that both insurers were liable for the loss of $20 million of Esmerian's jewelry. The French court agreed and Esmerian was awarded a $10 million judgment. That judgment was affirmed on appeal, after which ***889** Euromepa filed a bankruptcy petition in France. The French Supreme Court then affirmed the appeals court's judgment.

Throughout the French litigation process, Esmerian and Allied had sought to take discovery in the Southern District of New York under s 1782. Initially, they claimed that the discovery would aid them in their litigation against Esmerian by establishing ownership of the jewelry. By the time the issue reached the Second Circuit, that litigation had ended. So Esmerian and Allied changed their theory, and claimed on appeal that the discovery they requested would be used in the French bankruptcy proceeding, as well as on any motion to reopen the French Supreme Court appeal.

The Second Circuit rejected both arguments for two reasons. First, it concluded that s 1782 discovery was not available in aid of the motion to reopen because that motion was "neither very likely to occur nor very soon to occur," *Euromepa*, 154 F.3d at 29. Second, the Court of Appeals concluded that discovery was unavailable because "the French Bankruptcy Proceeding in this instance is not an adjudicative proceeding." *Id.* at 28. As regards this second ground for opinion, the Court explained:

> The merits of the dispute between Esmerian and Euromepa have already been adjudicated and will not be considered in the French Bankruptcy Proceeding. As a matter of French law, the judgment of the French Supreme Court acts as res judicata with respect to the merits of the dispute in the French Bankruptcy Proceeding. Thus, in the French Bankruptcy Proceeding, nothing is being adjudicated; the already extant judgment is merely being enforced (to the extent permitted by the assets of the bankruptcy estate). *Id.*

The quoted language is directly applicable here. Jiangsu does not seek this discovery in order to help decide the "merits of the dispute" between it and SSL; it wants the information about SSL's and Mingli's assets so it can easily obtain advance security for such a judgment (assuming that there is a foreign jurisdiction that, like the United States of America, has a pre-judgment attachment procedure) or enforce whatever judgment it might obtain in the as-yet-to-be-brought London arbitration. However, neither pre-judgment attach ***890** ment nor post-judgment enforcement proceedings are "adjudicative" in nature; indeed, the latter is the explicit holding of *Euromepa*, and if an enforcement proceeding is not adjudicative in nature, I fail to see (and Jiangsu does not suggest) how a pre-judgment security proceeding could possibly so qualify. Therefore, as long as *Euromepa* remains good law, the request for this particular form of discovery should be denied.

The question for this court is whether this aspect of *Euromepa* is still good law. I conclude that it is.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court overturned *Euromepa* insofar as it held that s 1782 discovery was not available because a motion to reopen the French judgment was neither "pending" nor "imminent." Rejecting that standard, the Supreme Court ruled that s 1782 discovery could be had as long as an identifiable foreign proceeding was "reasonabl[y] contemplat[ed]."*Id.* at 258-59.

I question whether, even under the Supreme Court's expansive reading of the scope of s 1782, Jiangsu has managed to identify any "reasonably contemplated" foreign proceeding in which the fruits of s 1782 discovery could be used. Two possibilities are easily eliminated. I have already noted that the London arbitration is not such a proceeding, because information about the whereabouts of SSL's and Mingli's assets has no bearing on whether either or both of them breached the charter party by failing to pay Jiangsu. And while every United States District Court sitting in admiralty is familiar with the use of pre-judgment attachments to secure maritime awards, s 1782 cannot be invoked in order to obtain information for use in such a proceeding in the United States, because the statute by its terms is limited to discovery that will assist *a foreign tribunal. See In re Hanwha Azdel, Inc.*, 979 F. Supp.2d 178, 180 (D. Mass. 2013).

So Jiangsu asserts that the proceeding it "reasonably contemplates" bringing either is some sort of "foreign maritime attachment proceeding" or a post-judgment proceeding in a foreign country to enforce the arbitration award it hopes to get.

As regards the former, Jiangsu does not identify a single country that countenances such a procedure. This court has no idea whether ***891** any country in which SSL or Mingli actually has assets would permit those assets to be attached prior to judgment, in a proceeding akin to our maritime attachment proceedings. Jiangsu does not even offer evidence that the courts of England -- the site of the proposed arbitration, and the very country from whence our admiralty law derives -- would allow it to attach any assets of SSL or Mingli that might be located in the United Kingdom, if the discovery sought in this country revealed their existence! It is difficult to fathom how a "foreign attachment proceeding" can be "*reasonably* contemplated" when Jiangsu, having no idea where its target's assets are located, cannot possibly have any idea whether the sort of procedure that is purportedly "contemplated" is even available.

As regards the latter, the request for discovery in aid of the enforcement of an arbitration award seems unreasonably premature (to put it mildly). Indeed, insofar as enforcement is concerned, Jiangsu's effort to identify a "reasonably" contemplated procedure differs not a whit from a scenario in which I "reasonably contemplate" buying a new car because I might win the lottery if I decide to buy a ticket on my way to work tomorrow morning. I might indeed contemplate buying a car with my winnings, should I actually obtain them, but my contemplation is not "reasonable" until I have some money with which to purchase the car. So here, while I am "certain Jiangsu believes that it should win the day at arbitration, no adjudicator has suggested that its case is strong (for all I know, it might be quite weak), so it is unreasonable for Petitioner to contemplate enforcing a judgment that it does not have and might never obtain.

A United States court must be particularly cautious to insure that s 1782 is not being invoked as a subterfuge, to mask some extra-statutory purpose, such as initiating pre-judgment attachment proceedings in the United States, rather than a foreign tribunal -- a very real possibility in this case, since most of the entities sought to be subpoenaed are U.S.-based, such that assets "held by your institution" or contracts or loan agreements "your institution has with [SSL/Mingli]" would almost certainly be U.S.-based assets that could not be reached in a "foreign attachment proceeding." Where, as here, it appears likely that most, if not all, of the information that ***892** would be obtained by the s 1782 subpoenas to U.S. institutions could only be used in a proceeding in the United States -- and no showing whatever is made that information about U.S. domestic accounts and contracts with U.S. banks could be attached in a foreign country -- a petitioner can hardly be found to have satisfied its burden of demonstrating that the second statutory requirement has been satisfied.

It is even possible that Jiangsu is trolling for assets in U.S. institutions in order to decide whether it is worth Jiangsu's while to commence a London arbitration in the first place. My colleague, Judge Buchwald, confronted just such a situation, when she denied a request for s 1782 discovery in *In re Certain Funds, Accounts, &/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC ("Fortress")*, No. 14 Civ. 1801, 2014 WL 3404955 (S.D.N.Y. July 9, 2014), on the ground that the petitioners had failed to show that they wanted the discovery "for use" in a "foreign" proceeding.

In *Fortress*, investors in two fraudulent Saudi Arabia-based business conglomerates sought s 1782 discovery from two accounting firms that had performed auditing services for the conglomerates. *Id.* at *1-2. The plaintiffs asserted that they wanted to use the discovery in contemplated but not-yet-filed lawsuits in Saudi Arabia, England, and possibly other foreign countries, against both the accounting firms and the business conglomerates.*Id.* at *2. While recognizing that Congress sought to provide "broad discovery," Judge Buchwald noted that Congress also wanted to "guard[ ] against the potential that parties may use s 1782 to investigate whether litigation is possible in the first place, putting the cart before the horse." *Id.* at *6. She concluded that a "fishing expedition[ ] before actually launching litigation" was "not an appropriate [situation] for a court to compel discovery," *id.*, and did not satisfy the statutory requirement that discovery pursuant to s 1782 be "for use" in a "foreign" proceeding. *Id.* at *6-7.

I perceive no difference between *Fortress* and this case. Although Jiangsu talks vaguely about bringing "foreign" attachment or enforcement proceedings, the conclusion that what it really wants is to decide whether to commence arbitration at all is inescapable -- ***893** since it cannot at present establish whether any attachment or enforcement proceeding relating to assets that would be revealed by its subpoenas *could* be brought in any foreign jurisdiction, let alone identify where such a proceeding*might* be brought.

In short, Jiangsu has not satisfied its burden to demonstrate that any specific foreign proceeding in which the results of s 1782 discovery might be used is "reasonably contemplated" at this juncture. The only thing that the contemplated s 1782 discovery would assuredly be "in aid" of is Jiangsu's decision-making, and the statute is not designed to provide potential litigants with information that will help them decide whether and where to commence proceedings.

Furthermore, *Intel* did not disturb the Second Circuit's ruling that any proceeding for which s 1782 discovery is sought must be "adjudicative" in nature, or its conclusion that an enforcement proceeding is not "adjudicative." While the Supreme Court held that discovery under s 1782 is available for use in "administrative and quasi-judicial proceedings" as well as strictly "judicial" proceedings. *Intel*, 542 U.S. at 258, that merely acknowledges the reality that proceedings in tribunals other than law courts can be adjudicative in nature. Arbitrations, for example, are "adjudicative" in nature.

The Supreme Court did not, however, hold that s 1782 discovery was available for use in non-adjudicative proceedings; indeed, in *Intel* the court described its opinion as "reject[ing] the view[ ] .. that s 1782 comes into play only when adjudicative proceedings are "pending' or "imminent.'.", *Id.* at 259; *see also id.* at 258 ("Section 1782(a) does not limit the provision of judicial assistance to "pending" adjudicative proceedings.") These quotations suggest that, in the Supreme Court's view, the Second Circuit got the part about the "adjudicative" nature of the proceedings right, and erred only when it concluded that such proceedings should be "pending."

At least one district court in this circuit has applied on *Euromepa*'s "adjudicative" proceeding requirement since *Intel* was decided.*See In re Application of Hill*, No. M19-117, 2005 WL 1330769 (S.D.N.Y. June 3, 2005). As far as I am aware, neither the Second Circuit nor any district court in the Second Circuit has called this aspect of *Euromepa* into question. ***894**

There is nothing remotely adjudicative about a pre-judgment attachment proceeding. It is a means of obtaining security for a judgment that has not yet been obtained and that may never be obtained. And a post-judgment enforcement proceeding, if that is the sort of proceeding contemplated by Jiangsu, is exactly the sort of proceeding for which *Euromepa* held that s 1782 discovery is unavailable.

That this aspect of the Second Circuit's holding remains good law (at least in this circuit) is beyond dispute. When the Supreme Court overturns one holding by a circuit court, but does not disturb other holdings in the circuit court's opinion, the other holdings remain good law. *See, e.g.*, *Citizens Against Casino Gambling in Erie Cnty. v. Stevens*, 945 F. Supp.2d 391, 403 (W.D.N.Y. 2013); *Pearson v. Easy Living, Inc.*, 534 F. Supp. 884, 894 & n.8 (S.D. Ohio 1981). The Supreme Court has overruled*Euromepa*'s "imminence/ pending" requirement. But as long as the "adjudicative" aspect of *Euromepa* remains good law, I am bound by it and must apply it to deny the Petition.

B. Alternatively, the Petition is Denied in an Exercise of the Court's Discretion

Courts deciding petitions for discovery under s 1782 have the discretion, but not the obligation, to grant petitions that satisfy the statute's requirements. The exercise of that discretion is guided by four*Intel* factors mentioned above: (1) whether

the person from whom discovery is sought is a participant in a foreign proceeding; (2) whether the foreign tribunal is receptive to providing assistance to American courts; (3) whether the petitioner is attempting to circumvent proof-gathering restrictions in foreign or American courts; and (4) whether the requested discovery is overly broad. *Intel*, 542 U.S. at 264-65.

I conclude that the petition should be denied in an exercise of this court's discretion.

The first factor does not favor granting discovery because, to the extent that Jiangsu -- pursuant to the laws of some as-yet unidentified foreign country -- is allowed to bring an attachment or enforcement proceeding directly against the banks from which it here seeks dis ***895** covery, the first factor would not favor granting the petition. *See Intel*, 542 U.S. at 264 ("[W]hen the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for s 1782(a) aid generally is not as apparent....").

Without knowing where the proceedings that Jiangsu contemplates will be brought, it is impossible to ascertain whether the second factor is satisfied, since this Court can only guess whether a foreign country's tribunals would look favorably on providing comparable discovery to litigants in American courts. Experience suggests strongly that most foreign courts (all, perhaps, except those in common law countries) are often not receptive to sweeping third party discovery requests, so I certainly cannot simply assume that reciprocity would be on offer.

The third factor is "whether the s 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States," *Intel*, 542 U.S. at 265. Here, Jiangsu's inability to identify any particular foreign jurisdiction whose tribunals it would invoke in either an attachment or an enforcement proceeding works against it. Jiangsu might say that it wants to commence pre-judgment attachment proceedings in foreign tribunals, but this court has found nothing to prohibit petitioner from making "incidental" use of information obtained through s 1782 discovery to commence a pre-award attachment or an *in rem* proceeding in United States district courts under the Supplemental Rules for Admiralty or Maritime Claims. Indeed, I would be shocked were Jiangsu not to commence such a proceeding in the event that it learned that SSL and/or Mingli had assets located in the United States -- even though the information would have come to it only pursuant to discovery that, by the literal terms of the law authorizing it, is limited to aiding a proceeding *in a foreign tribunal*. Additionally, nothing in the record before this court suggests that any foreign country would allow Jiangsu to poke around SSL's bank accounts without the latter's knowledge before it decided whether to commence an arbitration in the first place. That sort of "general use," untethered to any "specific" proceedings, is not the type of use Congress contemplated with s 1782. *Lazaridis v. Int'l Ctr. for* ***896** *Missing & Exploited Children, Inc.*, 760 F. Supp.2d 109, 115-16 & n.5 (D.D.C. 2011) *aff'd sub nom. In re Application/or an Order Pursuant to* 28 U.S.C. s 1782, 473 Fed.Appx. 2 (D.C. Cir. 2012); *see also In re Application/or an Order Permitting Metallgesellschaji AG to take Discovery*, 121 F.3d 77, 79 (2 Cir. 1997) (noting that courts may reject "fishing expedition [s]" or vexatious discovery requests under s 1782).

I thus conclude, in an exercise of my discretion, that none of the first three factors mentioned by the Supreme Court in *Intel* favors issuing the order herein sought at this time. Should Jiangsu become aware of U.S.-based assets during the course of any London arbitration, the procedures available to it under the Admiralty Rules may be invoked; and should petitioner be able to identify jurisdictions in which similar pre-judgment attachments can be had, I would be receptive to considering this matter further. And of course, if and when there is an award to enforce, this court will be only too happy to entertain an application for discovery about SSL's assets -- without regard to whether that discovery will be used in a domestic or an identified foreign tribunal. But sufficient unto the day -- which today is not.

III. Public Filing of This Opinion

Jiangsu moved *ex parte* for the requested relief. Discovery requests under s 1782 are "customarily received and appropriate action taken with respect thereto ex parte," *In re Letters Rogatory from Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1219 (9 Cir. 1976), because "witnesses can .. raise [ ] objections and .. exercise[ ] their due process rights by motions to quash the subpoenas." *Id.; see In re Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991). I have, therefore, properly considered the matter without notice to SSL, Mingli or the targeted banks and financial institutions. [1] ***897**

Jiangsu has ten days to explain why this court should not release the entire decision, including the names of the parties, onto the public record. It may file its brief under seal.

CONCLUSION

For the foregoing reasons, Jiangsu's petition is denied. The Clerk of the Court is directed to remove Docket #1 from the Court's list of pending motions.

All Citations

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Footnotes

1 Other district courts have ordered*ex parte* applicants for discovery under s 1782 to serve their petitions on opposing parties in the foreign proceedings in which they intend to use any discovery obtained. *See, e.g., Beluga Shipping GmbH & Co. KS Beluga Fantastic v. Suzlon Energy Ltd.*, No. C 10-80034 JW PVT, 2010 WL 3749279 (N.D. Cal. Sept. 23, 2010); *In re Anglin*, No. fnbreak7:09CV5011, 2009 WL 4739481, at *2-2 (D. Neb. Dec. 4, 2009); *In re Merck & Co., Inc.*, 197 F.R.D. 267, 271 (M.D.N.C. 2000). As the district court said in *Merck & Co,:* "Nothing in s 1782 states that the application is to be made *ex parte*, much less that the Court must entertain the application *ex parte.* Moreover, such a reading would seem to be contrary to the purpose of the statute, which is to help promote evenhanded justice and a sense of fair treatment." 197 F.R.D. at 270. Rather, the Court has "inherent authority to require that other parties to the foreign litigation be notified of the application and be allowed to present their views to the Court," which authority "is also supported by the provisions of s 1782 which provide the Court with authority to approve the practice and procedure of the discovery..." *Id.* However, in the cited cases, a foreign proceeding with identifiable parties was actually pending. Here, the parties that Jiangsu wants to subpoena will not be parties to the only foreign proceeding yet identified: the arbitration (as yet uncommenced) between Jiangsu, SSL and Mingli. It is not even clear whether the United States entities that would be subpoenaed here in New York would be parties to the foreign attachment or enforcement proceedings that Jiangsu purportedly "contemplates."