The Sixth Circuit's Sensible Decisions
on Foreign Claimants' Asset Recoveries

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With ever-greater involvement of U.S. regulators and prosecutors in monitoring overseas conduct of U.S. based companies and their foreign subsidiaries and associated uncovering of fraudulent activity, recent Sixth Circuit decisions indicate non-U.S. claimants may have greater opportunities for the recovery of ill-gotten gains through the use of the U.S. court system. Two recent Sixth Circuit decisions are notable: one indicates an unwillingness to adhere to prior *forum non conveniens* doctrine, and in a very recent ruling, that court ruled that in the case of international arbitrations, the provisions of 28 U.S.C. § 1782 may be relied upon in order to use U.S. discovery procedures to assist in non-U.S. based arbitrations.

In *Associação Brasileira de Medicina de Grupo v. Stryker Corporation*, 891 F.3d 615 (6th Cir. 2018) ("*Abramge v. Stryker*"), a unanimous three-judge panel rejected a district court's rubber stamp acceptance of a multi-national's claim of *forum non conveniens*. More recently, a different three-judge panel of the same court found the provisions of 28 U.S.C. § 1782(a), allowing discovery "for use in a proceeding in a foreign or international tribunal" applicable to an international arbitration pending in a foreign country. *Abdul Latif Jameel Transportation Company Ltd. v. Fed Ex Corp.* (No. 19-3515, September 19, 2019) ("*ALJT v. Fed Ex*").

I. Forum Non Conveniens – Can Foreign Plaintiffs Maintain Claims in U.S. Courts?

Starting in 2014, reports appearing in the investigative media in Brazil indicated that the subsidiaries of major North American medical device manufacturers had engaged in a number of fraudulent sales practices in Brazil. These practices included bribing physicians to utilize the type of replacement or implant manufactured by a particular North American company; and

horizontal price fixing and bid rigging schemes designed to elevate the prices paid by Brazil's private health insurance segment, an industry that exists to supplement Brazil's system of universal medical care. It should be noted that, when Brazilian health insurers first investigated, the majority of the alleged wrongdoing appeared to have occurred in Brazil. In 2016 Brazil's association of private health insurers, Associação Brasileira de Medicina de Grupo ("Abramge") filed complaints in federal and state courts around the United States seeking damages from eight different device manufacturers: Abbott Labs; Boston Scientific; Orthofix Medical Inc., St. Jude Medical; and Stryker Corporation were representative of the defendants sued by Abramge.

In each of the lawsuits, the defense of *forum non conveniens* was raised. Two principal arguments were advanced in the various U.S. courts, whether federal or state: first, that the choice of forum of a foreign-based defendant is to be given little deference; and second, that Brazil furnished an adequate alternative forum. In the case against Stryker Corporation, where the issue of *forum non conveniens* was most thoroughly litigated before the federal district court for the Western District of Michigan, the defendant relied heavily on established Supreme Court and other appellate authority holding that a foreign plaintiff had heavy presumptions against its ability to use U.S. courts, as well as the presumption that foreign courts provided an adequate remedy. The district court granted defendant's motion, after a summary motion to dismiss based on counsel's assertion that Brazilian courts have been recognized as "adequate" in other cases, and that in any event, defendant's counsel had stipulated to jurisdiction in Brazil.

Stryker Decision

In a unanimous 2018 opinion, the Court of Appeals for the Sixth Circuit reversed the district court's decision that *forum non conveniens* dictated dismissal. In *Abramge v. Stryker*, the

Sixth Circuit indicated that domestic defendants seeking *forum non conveniens* rulings must meet exacting standards, holding that the fact of a plaintiff's foreign residence "does not automatically mean that his choice of forum is owed little deference."

The court also found that any findings of the "adequacy" of the foreign forum must be fully supported and that an attorney's consent to a client being sued in a foreign jurisdiction is essentially meaningless in all but the most open and shut cases. In light of the Sixth Circuit opinion in *Abramge v. Stryker*, it is clear that non U.S. plaintiffs seeking a U.S. forum applying U.S. law to the resolution of their claims will not be stripped of their rights to litigate in the U.S. by summary presentations.

The *Stryker* opinion is best understood with an appreciation of the situation in Brazil, where there have been widespread allegations of improper behavior by local firms owned by U.S. parents. Recent years have seen an uptick in investigations and administrative findings by the SEC and other regulators, as violations of various U.S. statutes have been found.

The medical device industry furnishes many examples of such cases. In 2016, Orthofix was found to have improperly recognized revenue in both its Brazilian and Mexican subsidiaries, and in 2018 it was accused of antitrust violations in that country. In 2014, St. Jude Medical was cited by Brazilian authorities for price fixing and bid-rigging activities in Brazil. Stryker Corporation has been cited as being on "an ignominious list of recidivists" under the FCPA, with admission of illegal conduct in multiple countries and fines totaling $12.9 million for activities stretching from 2003 until 2009. In 2018, the Company paid a $7.8 million fine to the SEC for bribery schemes in India, Kuwait and China.

Ability to claim for overseas activity in U.S. Courts

At the outset, it should be observed that, in a federal court claim, any non-U.S. claimant believing it was defrauded must establish that, regardless of where it should be properly venued, can successfully survive a motion to dismiss. Not every improper practice in a non-U.S. jurisdiction will furnish the facts necessary to support a cause of action recognized by U.S. courts. For example, it is well-recognized that not all settlements under the FCPA lead to valid claims under U.S. securities law. In the case of *Employees Retirement System of the City of Providence, et al. v. Embraer S.A., et al.*, No. 16-CV-06277 (S.D.N.Y. 2018), Judge Berman dismissed the case with prejudice, finding that Embraer did not have a duty to disclose uncharged, unadjudicated wrongdoing, when the company had disclosed the pendency of the investigation in its filings with the SEC. However, the famous "car wash" scandal in Brazil supported a recent $2.95 billion class action settlement that was approved by Judge Rakoff, *In re Petrobas Securities Lit*, No. 14-CV-9662 (S.D.N.Y. 2018). The substance of each case will have to be closely examined, with fact patterns often driving the determination of whether a claim can survive a motion under Rule 12(b)(6).

The Stryker Court's Three-Step Analysis

In determining whether dismissal under *forum non conveniens* is appropriate, the Sixth Circuit laid out a three-step test in *Abramge v. Stryker*: 1) a court determination of the degree of deference owed the plaintiff's forum choice; then 2) the defendant bearing the burden of "establishing an adequate alternative forum"; and 3) the further burden of showing the U.S. forum is "unnecessarily burdensome."

1. Deference to Plaintiff's Choice

Concerning factor 1 above, the Sixth Circuit observed in *Abramge v. Stryker*:

> That a plaintiff's ties to the United States are weak—or even nonexistent—does not automatically mean that her choice of forum is owed little to no deference. A foreign plaintiff may decide to file suit in the United States because of "a legitimate reason such as convenience or the ability to obtain jurisdiction over the defendants rather than tactical advantage." *Hefferan,* 828 F.3d at 494 (citing *Iragorri*, 274 F.3d at 72–73). A foreign plaintiff might logically believe that a U.S. forum is the most "convenient" location in which to file her case if she doubts that any other court would be able to exercise jurisdiction over the defendant. In such a case, the deference owed to her choice of forum would increase.

691 F.3d at 619.

Following the above analytical outline, the Sixth Circuit determined that the district court's finding that plaintiff's choice of forum was owed "little deference" was not an abuse of discretion.

2. "Available and Adequate"

Concerning factor 2, establishing that an alternative forum exists, prior to *Abramge v. Stryker*, it was undisputed that in order for a court to refuse to exercise its jurisdiction under the doctrine of *forum non conveniens* there needed to be an available and adequate foreign forum. *See Duha v. Agrium, Inc.*, 448 F.3d 867, 873 (6th Cir. 2006) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947)). It was also undisputed that the movant seeking a *forum non conveniens* dismissal bears the heavy burden of "establishing an adequate alternative forum." *Hefferan v. Ethicon Endo–Surgery Inc.*, 828 F.3d 488, 492 (6th Cir. 2016); *Deb*, 832 F.3d at 806. Further, it was undisputed that a court must determine that an adequate, alternative, available forum exists before it may consider any of the other *forum non conveniens* factors. *See Piper*

Aircraft Co. v. Reyno, 454 U.S. 235, 254, n. 22 (1981); *see also Hefferan*, 828 F.3d at 492; *Watson v. Merrell Dow Pharm., Inc.*, 769 F.2d 354, 357 (6th Cir. 1985); *Dowling v. Richardson-Merrell, Inc.*, 727 F.2d 608, 612 (6th Cir. 1984).

However, some courts overlooked the above-cited standards for establishing adequacy and availability, and so watered down the concept of adequacy that they ruled that amenability to process in the alleged convenient forum demonstrated both availability and adequacy. *See Piper Aircraft*, 454 U.S., at 254 n. 23 and *Gulf Oil*, 330 U.S. at 506-07. The Sixth Circuit in *Stryker* reinforced the need for a higher standard:

> However, a foreign forum is not truly "available"—and a defendant is not meaningfully "amenable to process" there—if the foreign court cannot exercise jurisdiction over both parties. *See Watson*, 769 F.2d at 357. Similarly, the foreign forum is not adequate if the remedy it offers "is so clearly inadequate or unsatisfactory that it is no remedy at all," as, for example, if the other forum "does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 254 & n.22. An alternative forum, however, is not inadequate merely because its substantive law is different or less favorable to the plaintiff than that of the U.S. forum. *Id.* at 247.

Abramge v. Stryker, 891 F.3d at 620.

In the Stryker case, defendant attempted to show availability by "consenting" to jurisdiction in Brazil, via the device of its attorney as stating part of a brief submitted in support of its *forum non conveniens* motion that it would submit to the jurisdiction of courts in Brazil. While the Sixth circuit conceded "In particularly clear cases, pleadings and preliminary submissions alone may suffice," it emphasized that "the nature of the showing required to carry the burden depends on the nature of the case at hand." *Id.*

Stryker argued that it carried its burden in the district court by showing that Brazil is an available and adequate alternative forum. Stryker based its argument on a single line in its reply

brief in support of its motion to dismiss: "Additionally, Stryker consents to jurisdiction in Brazil, so Brazil is an available forum." As the Sixth Circuit held, this lone statement does not suffice to carry Stryker's burden for two reasons.

The first reason detailed by the Sixth Circuit bears repeating:

> First, an attorney's statement in a brief is not evidence. *See Duha*, 448 F.3d at 879. Consents to jurisdiction or representations that a party is amenable to process in a foreign country are normally made in an affidavit or other declaration by the party so consenting. *See, e.g.*, *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847, 867 (7th Cir. 2015) (declaration of an Austrian bank's chief legal officer consenting to jurisdiction in Hungary); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 250 (4th Cir. 2011) (affidavits that the defendant would not contest service of process in China). . . Whether an attorney's statement is binding on a client, on the other hand, is—at least in U.S. courts—a matter of agency doctrine, binding only if the statement is made within the scope of the attorney's authority and without contradiction by the client. *See United States v. Johnson*, 752 F.2d 206, 210–11 (6th Cir. 1985).

Id. at 621.

The second reason stated in *Abramge v. Stryker* has even more applicability than the first:

> Second, Stryker provided no evidence that its consent to jurisdiction in Brazil would be legally meaningful even if it were presented in a proper evidentiary form. By way of analogy, a party's consent to a federal court's jurisdiction over her state-law claim worth $50,000 would not be legally meaningful; regardless of her consent, the federal court would be unable to hear the case for lack of subject-matter jurisdiction. *See* 28 U.S.C. § 1332. On the record before us, we do not know if Abramge can prove (or if Stryker admits) that Stryker has any connection to Brazil nor do we know if Abramge can prove . . . that Stryker has any connection to Brazil, nor do we know if Brazilian courts permit litigation over this subject matter.

Id.

3. Balancing Test

Because defendant failed to identify an available and adequate forum, the Sixth Circuit ruled that it need not address the final step in *forum non conveniens* analysis, the balance of public and private interests. *Id*. at 622.

II. Use of 28 U.S.C. § 1782 in Foreign-Situs Arbitrations – ALJT v. Fed Ex

Under 28 U.S.C. § 1782(a), a federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon application by "any interested person." On September 19, 2019, in *Abdul Latif Jameel Transportation Company Ltd. v. FedEx Corp.*, the U.S. Court of Appeals for the Sixth Circuit ruled that a commercial arbitration panel presiding in a foreign country constituted a "foreign or international tribunal" as that phrase is used under § 1782(a) and that therefore discovery was available under the statute. In so doing, the Sixth Circuit reversed the district court's denial of the appellant's § 1782(a) application and remanded for a determination as to which specific discovery demands should be granted.

This dispute arose from a contractual relationship between Abdul Latif Jameel Transportation Company Limited (ALJ) and FedEx International (FEI), a wholly owned subsidiary of its parent FedEx Corp., to provide transportation-related services in and around Saudi Arabia. ALJ entered into two separate transportation agreements with FEI, each with its own arbitration clause. In 2018, ALJ commenced two arbitrations in the Middle East. After commencing both arbitrations, ALJ commenced suit pursuant to § 1782(a) in the U.S. District Court for the Western District of Tennessee to compel production of documents and the testimony of a corporate representative from FedEx Corp. In April 2019, the district court denied ALJ's application, holding

that a private arbitration was not included within the term "foreign and international tribunal" and therefore ALJ could not avail itself of discovery under § 1782(a).

The Sixth Circuit's decision is significant because its ruling was contrary to decisions from the Second Circuit and the Fifth Circuit. Both the Second and Fifth Circuits concluded that the word "tribunal" included only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." Both circuit courts reached this outcome by ruling that the phrase "foreign and international tribunal" was ambiguous, they then analyzed the legislative history of the statute to conclude that the meaning of "tribunal" did not include private arbitration.

In contrast to the Second and Fifth Circuits, the Sixth Circuit adopted a textual analysis, citing in several instances to the late Justice Scalia's guide to textual interpretation, Reading Law; the Interpretation of Legal Texts. In support of its Opinion, the Sixth Circuit also relied upon the Supreme Court's 2004 decision in *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241. It specifically rejected its sister circuits' reliance on legislative history. Also, in *Intel*, the Supreme Court addressed the scope of section 1782's use of "tribunal" in a different factual context. Relying on that case, the Sixth Circuit concluded that "Intel determines that 1782(a) provides for discovery assistance in non-judicial proceedings." *ALJT v. Fed Ex* at 16.

The First Circuit and Second Circuit cases relied upon by FEI predated *Intel: Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.* 165 F.3d 184 (2d Cir. 1999). It should be noted that *Intel* was decided in a majority opinion written by Justice Ginsburg, with a Scalia concurrence and a dissent by Justice Breyer. Justice O'Connor took no part in the decision of the case.

Conclusion

The Sixth Circuit's analysis of *forum non conveniens* law and the necessary requirements to deprive a foreign plaintiff of its choice of forum in *Stryker* is refreshing in its rigor and open-mindedness about allowing the use of U.S. Tribunals to right wrongs committed against overseas parties, in instances when many of the facts, as well as witnesses underlying the claim, may reside in the overseas locale. Whether other courts will follow is open to question. However, this writer will venture to say that the more recent Sixth Circuit decision in *ALJ v. FEI* is likely to win acceptance before the currently-constituted United States Supreme Court, where a working majority of justices favor the Scalia approach to Textualism and that approach's corresponding disdain for the kind of statutory history analysis used in prior leading § 1782 cases in the Second and Fifth Circuits.