The United States Law Week

INSIGHT: International Arbitration and Discovery—An Emerging Risk

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Recent cases and a circuit split on discovery and arbitration create a growing risk to companies that use contractual clauses requiring arbitration in a forum outside the U.S., but that have operations, employees, or affiliates here, Sullivan & Cromwell attorneys say. They offer steps companies can take to mitigate U.S. discovery risks.

In recent years, parties in international arbitrations have increasingly sought assistance from U.S. federal courts using a federal statute—28 U.S.C. §1782—to obtain U.S.-style discovery.

For 20 years until last fall, the only two federal appellate courts to have considered the application of that statute to private arbitrations ruled that Section 1782 did not provide an avenue for such discovery. However, in the last seven months, the Fourth Circuit and the Sixth Circuit reached the opposition conclusion, allowing district courts to order discovery in aid of a foreign commercial arbitration.

This split of authority creates significant uncertainty for companies that have a presence in the U.S. and use arbitration for their commercial disputes. Even where those companies incorporate clauses in their commercial contracts that call for arbitration seated outside the U.S., they may nonetheless find themselves subjected to broad and intrusive U.S.-style discovery ordered by a U.S. federal court.

Until the U.S. Supreme Court (or Congress) resolves this split, there are several steps companies may wish to consider to mitigate the risk.

Does Section 1782 Apply to Arbitration?

Section 1782 authorizes a court to order discovery "for use in a proceeding in a foreign or international tribunal." Until 2019, the two federal circuit courts of appeal to confront the question of Section 1782's application to private arbitration had answered it in the negative.

In 1999, the Second Circuit in *NBC* v. *Bear Stearns & Co.* rejected an attempt by a claimant in a private commercial arbitration to obtain discovery under Section 1782, holding that a "foreign or international tribunal" meant a "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies," and not private arbitral tribunals.

In doing so, the court recognized that Section 1782 allows U.S. courts to authorize potentially broad discovery under the Federal Rules of Civil Procedure, which would "be at odds with" key benefits of private arbitration-namely "its asserted efficiency and cost-effectiveness." The Fifth Circuit adopted a similar approach. For twenty years, no circuit court staked out a contrary position.

Then, last September, that changed. The Sixth Circuit held in *Abdul Latif Jameel Transp. Co.* v. *FedEx Corp.* that an arbitration panel seated in Dubai and constituted under the rules of the DIFC-LCIA qualified as a "foreign or international tribunal" under Section 1782, and authorized the claimant to obtain document discovery and deposition testimony from the respondent's U.S. affiliate.

In doing so, the Sixth Circuit relied primarily on what it viewed as the common usage of the word "tribunal," noting that the term "tribunal" had been used to refer to private and public bodies.

In addition, the Sixth Circuit relied on the Supreme Court's 2004 decision in *Intel* v. *Advanced Micro Devices*, a seminal decision interpreting Section 1782. Although Intel did not address arbitration proceedings directly, the Court held that judicial assistance under Section 1782(a) was permitted for "non-judicial proceedings," and "'administrative and quasi-judicial proceedings abroad.'"

Widening this circuit split, on March 30, the Fourth Circuit ruled in *Servotronics Inc.* v. *Boeing Co.* that a U.K. arbitral panel at issue qualified as a foreign tribunal within the meaning of Section 1782. There, the parties

had agreed to dispute resolution by an ad-hoc arbitration in England and under the rules of the Chartered Institute of Arbitrators and the U.K. Arbitration Act of 1996.

The court held that the arbitral panel was an "entit[y] acting with the authority of the state" because "UK arbitrations are sanctioned, regulated, and overseen by the government and its courts," making the panel "a product of 'government-conferred authority.'" In doing so, the court rejected Boeing's argument that application of Section 1782 discovery would improperly import the broad federal discovery rules to private arbitrations, and noted that the district court still has discretion to limit or deny discovery requests as needed.

Other attempts to obtain discovery under Section 1782 continue to percolate in district courts across the county, with varying results that reflect the growing divergence in authority on whether and when the statute applies to arbitration.

Implications and Practical Tips

These recent cases create a growing risk to companies that use contractual clauses requiring arbitration in a forum outside the U.S. but that also have operations, employees, or affiliates in the U.S.

While federal courts still have discretion to limit or deny Section 1782 discovery, companies now face a greater likelihood that counterparties may seek broad and costly discovery in the U.S. While the Supreme Court, or Congress, could resolve the split among courts on the application of Section 1782 to arbitration, that may not happen any time soon.

In the interim, companies may wish to consider several steps to mitigate U.S. discovery risks, including :

- For those in arbitral proceedings where the risk of U.S. discovery is significant due to the presence of a party, witnesses or other evidence in the U.S., parties may consider proactively raising limitations on discovery with the appointed arbitrators early in proceedings to set ground rules. In the absence of any provision in the arbitration agreement or governing rules, a ruling from the arbitral tribunal limiting discovery may be crucial in limiting the likelihood of federal court intervention. Federal courts have been less receptive to Section 1782 applications where the foreign tribunal is not receptive to the discovery sought. Courts will also tend to defer to the foreign tribunal when a person from whom discovery is sought is a party to the foreign proceeding, and thus subject to discovery under the tribunal's own jurisdiction.
- Companies may consider whether updates to arbitration clauses are warranted, including by expressly addressing limits on discovery. Courts in the U.S. recognize arbitration clauses as enforceable contracts, and including an express limitation on discovery could be a useful tool in resisting broad discovery sought by a counterparty under Section 1782. In addition, when considering Section 1782 applications, district courts often disfavor discovery requests that act to "circumvent foreign proof-gathering restrictions."

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