Overview

First Tuesday Update is our monthly take on current issues in commercial disputes, international arbitration, and judgment enforcement.

In September, the Sixth Circuit held that a federal district court may order discovery for use in a foreign private arbitration. *Abdul Latif Jameel Transportation Co. v. FedEx Corp.* (6th Cir. 2019). 28 U.S.C. § 1782(a) authorizes discovery “for use in a proceeding in a foreign or international tribunal” upon application by “any interested person.” The Sixth Circuit held that private international arbitration is a “foreign tribunal” for purposes of that statute. The Sixth Circuit's decision creates a circuit split between it and the Second and Fifth Circuits—a split that the United States Supreme Court may be interested in resolving, given its opinion in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004). At a minimum, this decision is likely to further the nearly constant debate regarding whether US-style discovery is encroaching on the principles of international arbitration.

The underlying issue in the case arose between Abdul Latif Jameel Transportation Company Limited (ALJ), a Saudi corporation, and FedEx International Incorporation (FedEx International) related to an agreement for delivery services in Saudi Arabia. Disputes under the agreement were to be arbitrated in Dubai pursuant to the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA). ALJ initiated arbitration before the DIFC-LCIA and then filed a § 1782(a) petition to compel discovery from US-based FedEx Corp. in the United States District Court for the Western District of Tennessee, the district in which FedEx Corp. is based. ALJ sought to subpoena documents and deposition testimony of a corporate representative. FedEx Corp. is neither a party to the service agreement nor to the international arbitration.

The district court denied the discovery application, holding that the phrase "foreign or international tribunal" in § 1782(a) did not encompass private international arbitrations. ALJ appealed the lower court's decision. The Sixth Circuit held that “[u]pon careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history of § 1782(a), . . . this provision permits discovery for use in the private commercial arbitration at issue.”

The court considered the use of the word “tribunal” in dictionaries, legal writing, and statutory sources. First, the court considered dictionary definitions of the word “tribunal” and determined that “[t]here is dictionary support for ascribing a meaning that includes private arbitral panels.” Op. at 10. Second, the court considered the use of the word “tribunal” in legal writing, and found “support in American courts’ historical and continuing usage of the word to describe private arbitration.” Op. at 11. Third, the court considered other uses of the word “tribunal” in the statute, and found that usage of the term in the statute "does not compel a narrower understanding of that word's meaning.” Op. at 14.
The Sixth Circuit is the third US Court of Appeals to weigh in on this question. However, the Sixth Circuit's opinion departs from decisions by the Second and Fifth Circuits. See Republic of Kazakhstan v. Biedermann Int'l 168 F.3d 880, 883 (5th Cir. 1999) (Biedermann); National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999) (NBC). In those decisions, the court determined that the scope of the word "tribunal" is ambiguous. See Biedermann, 168 F.3d at 881; NBC, 165 F.3d at 188. After considering the legislative history of § 1782(a), the Second and Fifth Circuits concluded that "tribunal" includes only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." NBC, 165 F.3d at 190; see Biedermann, 168 F.3d at 882. However, the Sixth Circuit rejected such reliance on legislative history. The court noted that "some scholars and judges have questioned the reliability of legislative history as an indicator of statutory meaning." Op. at 20. Indeed, even "[a]ssuming that legislative history is a helpful aid in some cases," the court maintained that the legislative history does not contradict the court's conclusion here. Op. at 21.

In 2004, the United States Supreme Court considered a similar issue—whether a proceeding before the Directorate General for Competition in the European Commission is a foreign tribunal. See Intel Corp. v. Advanced Micro Devices, Inc., 542 US 241 (2004). The Supreme Court held that the European Commission is a foreign tribunal "to the extent it acts as a first-instance decisionmaker." Id. at 243.

Here, the Sixth Circuit considered the policy implications of expanding US-style discovery to private international arbitral tribunals. While the Sixth Circuit noted that FedEx "may be correct in its assessment of some of the interests at stake in extending discovery," it noted that this was "a task for Congress, not the courts." Op. at 22-23. This case will surely kindle the debate regarding whether US-style discovery is encroaching on the principles of international arbitration. Moreover, it highlights the split on whether § 1782 provides for discovery in private international arbitration, which makes the geographic location of the sought-after information important. Until the Supreme Court weighs in to resolve the split, § 1782 may be seen as a useful means of third-party discovery in international private arbitration for discovery located within the Sixth Circuit and other courts that may follow its decision.

Steptoe litigators have extensive experience both obtaining and opposing discovery pursuant to 28 U.S.C. § 1782 to support foreign proceedings. Michael Miller, Evan Glassman, and Charles Michael have repeatedly obtained or defeated § 1782 discovery for proceedings abroad, including most recently successfully quashing an application for § 1782 discovery in the Southern District of Florida. See In re Olga Kurbatova, Case No. 18-mc-81554, (S.D. Fla. 2019).