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WHAT'S INSIDE

Discovery in the United States in Aid of International Arbitration

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Parties involved in foreign litigation have long had at their disposal a useful tool for obtaining discovery in the United States. 18 U.S.C. § 1782(a) authorizes a United States district court to order a person "resid[ing] or found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal ...."[1]

Prior to 2004, the prevailing view was that § 1782(a) could not be used to obtain discovery in aid of private international arbitration. The United States Circuit Courts for the Second Circuit and the Fifth Circuit had both held that § 1782(a) does not authorize United States district courts to compel discovery in aid of private international arbitration.[2] In reaching that result both courts held that an arbitration panel was not a "tribunal" within the meaning of § 1782(a).[3]

Then in 2004, the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*[4] The Court held that the European Union's primary antitrust enforcement body, the Directorate-General of Competition for the Commission of the European Communities, was a "tribunal" within the meaning of §1782(a).[5] In reaching this result the Court noted that in 1964, Congress had broadened the statute from merely covering "any judicial proceeding pending in any court in a foreign country" to more expansively covering a "proceeding in a foreign or international tribunal."[6] The Court quoted a Senate Committee report stating that Congress used the word "tribunal" in order to "ensure that 'assistance is not confined to proceedings before conventional courts.'"[7] The Court in dicta cited to a scholarly article that stated that the word "tribunal" included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts."[8]

In concluding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute, the Court emphasized that this body "acts as a first-instance decision maker" in a "proceeding that leads to a dispositive ruling" that is reviewable by European courts.[9]

The *Intel* Court did not specifically address whether a private international arbitration panel is a "tribunal" within the meaning of the statute. The decision has led some courts to answer this question in the affirmative, and others in the negative.

Courts Holding That Private International Arbitration Tribunals Are Not Covered Under § 1782(a). In *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa,*[10] the United States Circuit Court for the Fifth Circuit held that *Intel* provided no authority for the notion that a private international arbitration panel is a "tribunal" within the meaning of § 1782(a)."[11] The court held that *Intel* was limited to finding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute.[12] The court thus refused to allow discovery in aid of an arbitration conducted before a Swiss arbitral panel under the United Nations Commission on International Trade Law ("UNCITRAL").[13]

In *In re Arbitration between Norfolk Southern Corp., Norfolk Southern Railway Co., & General Security Insurance Co. & Ace Bermuda Ltd.,* the United States District Court for the Northern District of Illinois likewise held that *Intel* was silent on the issue whether purely private arbitrations are covered under the statute.[14] The court distinguished

purely private arbitrations established by contract from arbitrations under the UNCITRAL, a body established by its member states, holding that the former are not covered under the statute.[15]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an arbitration conducted under the International Chamber of Commerce ("ICC").[16] The court held that, unlike the Director-General of Competition for the Commission of the European Communities at issue in *Intel*, the ICC arbitral panel does not act as a first-instance decision-maker whose decision is subject to judicial review.[17]

Courts Holding That Private International Arbitration Tribunals Are Covered Under § 1782(a). Other courts have reached the opposite conclusion. For example, in *In re Roz Trading Ltd,* the United States District Court for the Northern District of Georgia held that a panel of the Vienna International Arbitral Centre ("VIAC") was a tribunal under §1782(a),[18] emphasizing that it is widely accepted that the word "tribunal" includes arbitration panels.[19]

In *In re Hallmark Capital Corp,* the United States District Court for the District of Minnesota held that a private commercial arbitration panel in Israel was a "tribunal" under §1782(a),[20] emphasizing that the word "tribunal" commonly includes arbitration panels.[21] In *In re Babcock Borsig AG and Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.,* respectively, the United States District Courts for the Districts of Massachusetts and Delaware held that the ICC was a "tribunal" under the statute.[22]

New Trend? – A Functional Analysis. In the last couple of years a number of courts have applied what they call a "functional analysis test" to the decision whether an arbitral body is a tribunal under the statute. The functional analysis test inquires whether the arbitral body functions as a first-instance decision-maker whose decision is subject to judicial review.[23]

In *In re Winning (HK) Shipping Co.,* the United States District Court for the Southern District of Florida emphasized that the unidentified English arbitral body at issue in the case was a first-instance decision-maker whose decision would be subject to judicial review.[24] The arbitration award could be appealed to the English Courts and the parties did not waive their right to judicial review.[25] Accordingly, the body was a foreign "tribunal" under § 1782(a).[26]

In O*JSK Ukrnafta v. Carpatsky Petroleum Corp.,* the United States District Court for the District of Connecticut held that a party could obtain § 1782(a) discovery in aid of an arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC").[27] In reaching this result the court emphasized that the AISCC would act as a "first-instance decision maker" whose award was subject to review by the Swedish courts.[28]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an ICC arbitration because the panel's decision was not subject to judicial review.[29]

Conclusion. As of this writing there is no published opinion by the United States Circuit Court for the Sixth Circuit on whether an international arbitration panel is a tribunal within the meaning of § 1782(a). Nor is there any such opinion by the United States District Courts for the Eastern and Western Districts of Michigan. Hence lawyers seeking or opposing discovery in aid of private international arbitration from persons in Michigan will need to rely on the cases decided above in arguing their respective positions.

ENDNOTES

1. 28 U.S.C. § 1782(a).
2. *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kaz. v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999).
3. *Nat'l Broad. Co. v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999); Republic of *Kaz. v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999).
4. *Intel Corp.,* 542 U.S. 241 (2004).
5. *Id.* at 257-58.
6. *Id.* at 248-49.
7. *Id.* at 249 (quoting S. REP. NO. 1580, at 7 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).
8. *Id.* at 258 (quoting Hans Smit, *International Litigation Under the United States Code,* 65 COLUM. L REV. 1015, 1026-27 (1965)).
9. *Id.* at 255, 258-59.
10. *El Paso Corp.,* 341 Fed. Appx. 31 (5th Cir. 2009).
11. *Id.* at 34.
12. *Id.*
13. *Id.*
14. *Norfolk,* 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).
15. *Id.* at 886.
16. *Operadora,* No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).
17. *Id.* at *9-11.
18. *Roz Trading,* 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006).
19. *Id.*
20. *Hallmark,* 534 F. Supp. 2d 951, 957 (D. Minn. 2007).
21. *Id.* at 954-55.
22. *In re Babcock Borsig AG,* 583 F. Supp. 2d 233, 240 (D. Mass. 2008); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.,* No. 08-135-GMS, 2008 WL 4809035, at *2 (D. Del. Oct. 14, 2008).
23. *In re Winning (HK) Shipping Co.,* No. 09-22659-MC, 2010 WL 1796579, at *10 (S.D. Fla. 2010).
24. *Id.* at *8.
25. *Id.* at *9.
26. *Id.* at *10.
27. *OSJK,* No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009).
28. *Id.* (quoting *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241, 258 (2004)).
29. *Operadora,* No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9-12 (M.D. Fla. Aug. 4, 2009).

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