US: Four significant developments in arbitration case law

Americas Arbitration Roundup

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In this article, we discuss four significant arbitration-related case law developments in the US in the last year, which concern (1) the increased availability of US-style discovery in international arbitration under 28 U.S.C. § 1782; (2) whether non-signatories to an arbitration agreement can compel arbitration on the basis of equitable estoppel; (3) the availability of class-wide arbitration when the arbitration agreement is ambiguous; and (4) the ongoing use of the US District Court for the District of Columbia as a default venue for enforcement of ICSID awards.

Case law developments under 28 U.S.C. § 1782

Section 1782 is a US federal statute that permits any party or other interested person involved in proceedings taking place before a foreign or international tribunal, or the tribunal itself, to make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits.[1] Section 1782 actions have proved to be a powerful and increasingly popular tool for litigants involved in foreign proceedings, including more recently non-US arbitration proceedings. There have been two recent developments of note involving this statute.

Extraterritorial discovery is permitted under Section 1782
In *In re Del Valle Ruiz,*[2] the US Court of Appeals for the Second Circuit, departed from earlier jurisprudence[3] and held that petitioners could, at least in theory, utilize a Section 1782 action to obtain documents held outside the US, so long as the entity from which the documents were sought had sufficient links to the forum state so as to satisfy the requirements of constitutional due process. The Second Circuit’s reasoning was largely the result of a textual reading of the statute and a determination that the language did not create a per se bar on extraterritorial application. In particular, the court reasoned that Congress intended the scope of discovery under Section 1782 to be similar to scope of discovery available in an ordinary domestic lawsuit, where discovery, conducted in accordance with the Federal Rules of Civil Procedure, permits extraterritorial discovery so long as the evidence sought is within the subpoenaed party’s “possession, custody, or control.”

The Second Circuit did caution, however, that an order compelling production of documents was not a foregone conclusion and that courts were still obligated to consider a number of factors in determining whether to actually exercise their discretion,[4] including whether the location of the documents would render compliance overly burdensome.

Nevertheless, in at least admitting the possibility, the Second Circuit seemingly removed what had to date been one of the most significant constraints to the breadth of Section 1782.

**Section 1782 can be used in aid of private international arbitration in some circuits**

Historically, the Second and Fifth Circuits have limited the application of Section 1782 to “state-sponsored” arbitration, on the basis that a “foreign or international tribunal” does not include a privately constituted international arbitration tribunal. A number of recent federal appellate cases have reinvigorated the debate, increasing the probability that the Supreme Court will shortly weigh in to resolve the issue. On the one hand, the Fourth and Sixth Circuits have recently held that discovery may be ordered in aid of private foreign and international arbitral proceedings. By contrast, the Seventh Circuit recently sided with the Second and Fifth Circuits in holding that Section 1782 does not apply to private arbitral tribunals, while the Second Circuit had an opportunity to revisit the issue in light of *Intel* and confirm its previous position. The Third and Ninth Circuits[5] will shortly address the issue.

In *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, the Sixth Circuit held that the private DIFC-LCIA arbitration panel qualified as a “foreign or international tribunal.” In reaching its conclusion, the Tribunal emphasized that the “text, context, and structure” of the statute “provide no reason to doubt that the word ‘tribunal’ includes private commercial arbitral panels.”

Just six months later, in *Servotronics, Inc. v. The Boeing Company,* the Fourth Circuit joined the Sixth Circuit’s interpretation of the statute, though it differed slightly in the analysis used to reach its conclusion. The court emphasized that while the drafters had initially considered limiting the availability of this assistance to judicial proceedings, ultimately Congress selected broader language, which, in the Circuit Court’s view, signalled an intent to offer assistance not just in connection with foreign court proceedings, but also in administrative, quasi-judicial, and arbitral proceedings. The Fourth Circuit further declined to view arbitration as simply a “private agreement” between parties as argued by Boeing. Rather, given the various ways in which US and UK law sanction, regulate, and oversee arbitration, the Fourth Circuit reasoned arbitration is a product of “government-conferred authority.”

The Fourth Circuit also addressed concerns that its decision would otherwise eradicate the very benefits of arbitration for which contract parties negotiate. The court clarified that Section 1782 is not designed to authorize full-blown US style discovery. Rather, the Fourth Circuit reasoned that Section 1782 permits a US district court to serve as a substitute for the foreign tribunal by taking testimony and statements for use in the foreign proceeding (but not, as would be normal in US-style discovery, to permit the parties to collect evidence that might or might not be admissible). In any event, the court stated that any undue burdens that might result should and could be managed by the district court with the discretion conferred to it under Section 1782.

By contrast, in its recent decision of *In re: Application and Petition of Hanwei Guo,* the Second Circuit hued closely to its prior precedents to decline a request for discovery assistance in connection with a commercial arbitration. The court’s analysis rested on its view that its prior decision in *NBC v. Bear Stearns* remained binding based on the “longstanding principal” that “a three judge panel is bound by a prior panel’s decision until it is overruled by either this Court sitting en banc or by the Supreme Court.”

Further, in *Servotronics Inc. v. Rolls-Royce PLC,* a parallel case to that considered by the Fourth Circuit, the Seventh
Circuit sided with the Second Circuit (and older Fifth Circuit precedent) in holding that Section 1782 does not authorize district courts to compel discovery for use in private foreign arbitrations. In so doing, the court also engaged in a textual interpretation of the statute, but found that (1) the ordinary meaning of the term “tribunal” does not unambiguously resolve whether private arbitral panels should be included, and (2) the context of the statutory scheme in which the revisions to Section 1782 took place, which included revisions to statutes addressing service-of-process assistance and letters rogatory - both matters of comity between governments - suggests that the phrase “foreign or international tribunal” refers to state-sponsored tribunals only. Finally, because the Federal Arbitration Act (FAA) only permits the arbitration panel, and not the parties, to obtain discovery assistance in domestic arbitrations, the court found a separate policy rationale for denying such requests under Section 1782 on the basis that doing so avoids a conflict between the FAA and Section 1782, if the latter were to apply to private foreign arbitrations.

The ability of non-signatories to compel arbitration

On June 1, 2020, the US Supreme Court issued its opinion in GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA LLC (No. 18-1048), holding that a non-signatory to an arbitration agreement may compel arbitration under the New York Convention based on the domestically available doctrine of equitable estoppel.[11] This opinion resolved a circuit split on the question: the First and Fourth Circuits had held that non-signatories may compel a signatory to arbitrate via the doctrine of equitable estoppel, while the Ninth and Eleventh Circuits had declined to apply the doctrine under the New York Convention.[12]

GE Energy involved a contract to construct steel mills in Alabama, with an arbitration clause providing for arbitration in Germany under the ICC Rules. Fives subcontracted with GE Energy to supply motors to the mills, which later failed. After GE Energy removed the case to federal court, the district court granted GE Energy’s motion to compel arbitration against Outokumpu under the Outokumpu-Fives contract, even though GE Energy had never signed the agreement. On appeal, the Eleventh Circuit reversed the decision to compel arbitration, finding that GE Energy could not require Outokumpu to arbitrate when GE Energy had not signed the underlying contract.[13] The Eleventh Circuit reasoned that equitable estoppel was not available under the New York Convention because the Convention required the arbitration agreement to be “signed by the parties before the Court or their privities.” [14]

The Supreme Court, in an opinion authored by Justice Clarence Thomas, reversed the lower courts’ decision. The Court reasoned that Chapter 1 of the FAA does “not alter background principles of state contract law regarding the scope of agreements including the question of who is bound by them.”[15] In interpreting the Convention, the Court first looked to the text. In its view, nothing in the text of the Convention directly addresses whether non-signatories may enforce arbitration agreements under domestically available doctrines such as equitable estoppel. Similarly, the court reasoned that neither the text of the Convention nor the drafting history reflects an intent to preclude the application of domestic laws that are more generous and which would enhance the enforceability of arbitration agreements.

In a concurring opinion, Justice Sonia Sotomayor noted her agreement with the principle that the Convention does not categorically prohibit the application of domestic doctrines in enforcement, yet she cautioned that the application of domestic doctrines must be rooted in the principle of consent to arbitrate. Lower courts applying domestic non-signatory doctrines to enforce arbitration agreements must “strictly adhere” to “the foundational FAA principle that arbitration is a matter of consent.” In Justice Sotomayor’s view, the “basic precept” that arbitration is a matter of consent, not coercion, constrains any domestic doctrines that might apply to proceedings under the Convention.

Class arbitrations

In April 2019, in Lamps Plus, Inc. v Varela,[16] the US Supreme Court considered whether a court can order class-wide arbitration when an arbitration agreement is ambiguous on the topic.

The dispute arose out of an employment contract. The agreement contained certain provisions that might be interpreted to contemplate individual arbitration, while others appeared to contemplate a possible “class” or collective arbitration.

The US Supreme Court held, by a 5-4 vote, that an arbitration agreement that is ambiguous as to the availability of class arbitration does not provide sufficient consent in order to submit a dispute to class arbitration under the FAA. In so doing, the court recognized that class arbitration is fundamentally different from the individualized arbitration protected by the FAA. Accordingly, the US Supreme Court reversed the Ninth Circuit’s decision and in so doing, rejected the application by the Ninth Circuit of California’s contract-interpretation doctrine that construes ambiguities against the drafter, on the basis
that such doctrine was effectively preempted by the federal FAA.

**Enforceability of intra-EU awards at US District Court for the District of Columbia**

Several actions have been filed in the US District Court for the District of Columbia (DDC) to enforce ICSID awards rendered against Spain, and new enforcement actions are likely to be filed as other ICSID arbitrations relating to regulatory changes in the Spanish renewable energy regime conclude. Since the ruling in *Achmea* [17] by the Court of Justice of the European Union, however, the enforcement of many intra-EU awards has been practically impossible in Europe. A ruling on these pending cases against Spain will likely be the first cases to determine whether the DDC will enforce an arbitral award resulting from intra-EU awards.

The DDC has been the default choice for actions against foreign states. Pending enforcement cases in the DDC against Spain include *Eiser Infrastructure Ltd. v. Kingdom of Spain*, [18] in which the DDC recently lifted its stay, and denied Spain's motions to dismiss and strike, in light of the annulment committee’s decision to annul the award; *Infrastructure Servs. Luxembourg S.à.r.l. v. Kingdom of Spain*, [19] which was stayed pending Spain's annulment application; *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain*, [20] in which the DDC recently rejected Masdar’s motion to lift DDC’s stay, after the *ad hoc* committee denied Spain’s request for a continuation of stay of enforcement; *9Ren Holding S.à.r.l. v. Kingdom of Spain*, [21] awaiting outcome of annulment proceeding with ICSID initiated by Spain; *NextEra Energy Global Holdings B.V. v. Kingdom of Spain*, [22] stayed in connection with Spain’s annulment application; *RREEF Infrastructure v. Kingdom of Spain*, [23] in which Spain filed motions to dismiss and stay the proceeding in light of its annulment application; and *Watkins Holdings S.à.r.l. and others v. Kingdom of Spain*. [24]

The DDC’s first judgment and decision upon the enforceability of ICSID awards resulting from intra-EU disputes may have a major effect on parties’ choice of the DDC as a default venue for enforcement against foreign sovereigns. This first ruling could further impact the strategies of EU member states and those seeking enforcement against them and impact the US enforcement regime as it relates to intra-EU awards.

Read this article in Spanish.

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[3] See *In re Sarrio*, 119 F.3d 143, 147 (2d Cir. 1997); *Purolite Corp. v. Hitachi America, Ltd.*, 2017 WL 1906905 (S.D.N.Y May 9, 2017); *In re Application of Gorsoan Ltd. and Gazprombank CJSC*, 2014 WL 7232262, slip op. at 10 (S.D.N.Y. Dec. 10 2014); *In re Fuhr*, 2014 WL 11460502 (S.D.N.Y. Aug. 6, 2014); *In re Godfrey*, 526 F.Supp.2d 417, 423–24 (S.D.N.Y.2007) (“The bulk of authority in this Circuit, with which this Court agrees, holds that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States.”). Notably, however, the Eleventh Circuit had held in, *Sergeeva v. Tripleton Intl. Ltd.*, that Section 1782 reaches documents located in foreign countries.
[4] In the *Intel Corp. v. Advanced Micro Devices, Inc.*, the Supreme Court held that aside from satisfying itself that the statutory requirements are satisfied, the court must undertake a secondary four-step analysis to determine whether it should exercise its discretion. The four discretionary factors the district courts *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) consider are:

- Whether the person from whom discovery is sought is not a participant in the foreign proceeding and is therefore outside the foreign tribunal’s jurisdictional reach.
- The nature of the foreign tribunal and its receptivity to judicial assistance by U.S. federal courts.
- Whether the request conceals an attempt to circumvent foreign evidence-gathering rules.
- Whether the request is unduly intrusive or burdensome.


[14]  *Id.*


[17]  Case C-284/16, Slowakische Republik v. Achmea BV, 2018 E.C.R. 158. The CJEU ruled that the arbitration clause in Article 8 of the 1991 Netherlands-Slovakia BIT had an adverse effect on the autonomy of EU law and was incompatible with key principles of EU law.


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