3rd Circ. Could Select Middle Path On Foreign Discovery Law

By **Adrienne Koch** (November 20, 2020, 2:58 PM EST)

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The federal statute Title 28 of the U.S. Code, Section 1782 is a useful tool for participants in foreign legal proceedings. Under it, any interested person may apply to a U.S. district court for an order directing someone who resides or is found in the district to produce discovery "for use in a proceeding in a foreign or international tribunal."[1]

But the federal circuit courts have split on the question of whether a private arbitration is a proceeding in a foreign or international tribunal within the meaning of the statute.

The U.S. Courts of Appeals for the Second, Fifth and Seventh Circuits hold that it is not, reasoning that excluding a private tribunal that does not act under governmental auspices is consistent with the use of the word "tribunal" elsewhere in Section 1782.[2]

The U.S. Courts of Appeals for the Fourth and Sixth Circuits hold that it is, pointing to dictionary and other uses of the word "tribunal" — and contend that their reading is equally consistent with the statute.[3]

Each side urges that other tools of statutory construction support its interpretation.[4] All agree, however, that Intel Corp. v. Advanced Micro Devices Inc.[5] — the U.S. Supreme Court's only pronouncement on the scope and application of Section 1782 — does not squarely address this issue.

It will ultimately be for the Supreme Court to resolve this circuit split. But in the meantime, there is one kind of private arbitration that may involve sufficient judicial oversight to make it subject to Section 1782 even under the reasoning applied by the courts that have found the discovery statute generally inapplicable to such proceedings: arbitration under the United Kingdom's Arbitration Act.

The U.S. Court of Appeals for the Third Circuit will soon have an opportunity to weigh in on this issue in In re: Ex Parte Application of Axion Holding Cyprus Ltd.

The Axion Case

In **Axion**, the U.S. District Court for the District of Delaware denied an application for discovery under Section 1782 for use in connection with an arbitration under the U.K. Arbitration Act.

As the district court noted, the Third Circuit "has yet to resolve the difficult question of whether Section 1782 applies to private foreign or international arbitration proceedings."[6] The district court resolved that question by simply stating that it agreed with "the reasoning and conclusions" of cases holding that, as a general rule, it does not.[7]

The court then turned to Axion's argument that, despite this general rule, the level of judicial involvement in arbitrations under the U.K. Arbitration Act requires the conclusion that the tribunal in such an arbitration "act[s] with authority of the state."[8] Rejecting this

argument, the court found the U.K. Arbitration Act analogous to the U.S. Federal Arbitration Act.[9]

The court reasoned:

Despite the judicial oversight guaranteed by the [Federal Arbitration Act], private arbitrators resolving potential federal cases are clearly not state actors. ... It follows that, contrary to [Axion's] argument, similar judicial process abroad does not allow a foreign private arbitral body to "act with authority of the state."[10]

Based on this analysis, the district court denied Axion's application. Axion timely appealed to the Third Circuit, where briefing has not yet commenced.[11]

The U.K. Arbitration Act

Is the U.K. Arbitration Act analogous to the Federal Arbitration Act? Maybe not.

The U.K. Arbitration Act is a comprehensive statute, containing 110 sections that address a broad range of matters. In contrast, the Federal Arbitration Act contains only 16 sections — and the Federal Arbitration Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the Inter-American Convention on International Commercial Arbitration, contain only 31 sections combined.

But for purposes of Section 1782, the key characteristic of the U.K. Arbitration Act may be the scope of judicial involvement it authorizes.

It provides for courts to be involved in the appointment of arbitrators,[12] make orders concerning the attendance of witnesses and the taking and preservation of evidence,[13] hear applications during the course of an arbitration to determine a preliminary point of law,[14] and entertain appeals not only based on jurisdictional or other irregularities, but also on a point of law.[15]

The Federal Arbitration Act provides nowhere near the same level of judicial oversight and, most significantly, does not give courts the power to overturn an award based on a point of law — let alone the ability to weigh in on a preliminary point of law during the course of an arbitration.[16]

As a result, arbitration under the U.K. Arbitration Act is arguably much less private than a U.S. arbitration. Based on these differences, the U.S. Court of Appeals for the Fourth Circuit observed that even under the "more restrictive definition of 'foreign or international tribunal' adopted by [the Second and Fifth Circuits] ... we would conclude that the UK arbitral panel charged with resolving [this] dispute ... meets that definition."[17]

Can Axion Walk the Middle?

If the Third Circuit adopts the broader definition of tribunal urged by the Fourth and Sixth Circuits and reverses the district court on that basis, the distinctions between the Federal Arbitration Act and the U.K. Arbitration Act will not matter: The arbitral tribunal will meet the statutory definition regardless of the extent to which it is subject to court supervision.

But a contrary decision to follow the narrower path of the Second, Fifth and Seventh Circuits will not similarly end the statutory inquiry. The court could, as suggested by the Fourth Circuit, nevertheless find that an arbitration under the U.K. Arbitration Act has sufficient

judicial involvement to make it a "proceeding before a foreign or international tribunal" within the meaning of Section 1782.

This may be a strange outcome. The U.K. Arbitration Act applies whenever "the seat of arbitration is England and Wales or Northern Ireland."[18] A finding that its application brings the arbitration within the statutory definition of a "proceeding before a foreign or international tribunal" would therefore mean that all arbitrations seated in any of those places meet that statutory definition.

This could mean that most private arbitrations are not subject to Section 1782, except if they are seated in one of those places. Such a rule may be difficult to reconcile as a matter of policy. That difficulty may, in turn, lead the Third Circuit to stay on one side or the other of the circuit divide rather than, in essence, creating a special category based on the court supervision mandated by the U.K. Arbitration Act.

Bridging the Gap

It remains to be seen how the Third Circuit will rule. It also seems likely that the Supreme Court will soon be called upon to weigh in — either in Axion or in one of the many other cases percolating in the federal courts. But in the meantime, the divergent lines of authority regarding Section 1782's mandatory requirements may not actually be as far apart as they seem.

Those two lines obviously differ on a fundamental question: One says that discovery can never be obtained under Section 1782 for use in a private arbitration, while the other says that it can be. But under Intel, meeting the statutory requirements of Section 1782 is only part of the applicant's burden: Even if the application meets all of the statutory criteria, the court has discretion to grant it or not.[19]

Thus, for example, when the Fourth and Sixth Circuits decided as a matter of law that discovery under Section 1782 is statutorily available in connection with a foreign private arbitration, they remanded each of the cases before them for a discretionary determination of whether such discovery should be awarded in those particular cases.[20] The Third Circuit will likely do the same if it reverses in Axion.

The significance of this is that it may mean that the actual results on either side of the circuit split are not so different. Among the factors courts consider in exercising their discretion under Section 1782 are "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of [the tribunal] to U.S. federal-court judicial assistance."[21]

As a practical matter, this could substantially limit the availability of Section 1782 discovery for use in private arbitrations — where the parties have agreed to a process that, among other things, generally limits discovery. Moreover, a party who believes that such discovery is inconsistent with those limits or is otherwise unfair — such as where only the other side's evidence is likely to be discoverable through proceedings in the U.S. — may be able to obtain a ruling from the tribunal to that effect. Such a ruling could constitute a clear indication that the tribunal is not receptive to the discovery.

The circuit split remains and will continue regardless of what the Third Circuit does in Axion. But even in courts on the side that allows Section 1782 discovery in aid of arbitration, litigators handling applications for such discovery need to keep a close eye on the

discretionary factors. In many cases, application of those factors may produce the same results as a rule precluding Section 1782 discovery altogether.

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[1] 28 U.S.C. § 1782(a).

[2] See Servtronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 694 (7th Cir. 2020) ("Rolls-Royce"); In re Guo, 965 F.3d 96, 105-06 (2d Cir. 2020); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881-82 (5th Cir. 1999).

[3] See In re Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 719-23 (6th Cir. 2019); accord Servtronics, Inc. v. Boeing Co., 954 F.3d 209, 212-13 (4th Cir. 2020) ("Boeing").

[4] Compare, e.g., Rolls-Royce, 975 F.3d at 695-96 (reasoning that to allow Section 1782 discovery for use in a foreign arbitration would give parties to such arbitrations greater discovery rights than those afforded to parties to domestic arbitrations) and Biedermann, 168 F.3d at 883 (same) with Boeing, 954 F.3d at 213 (reasoning that Section 1782 represented a change from prior law — under which judicial assistance was available only for a "judicial proceeding pending in any court in a foreign country" — and evidences a Congressional intent to expand the availability of U.S. discovery to parties to proceedings in other kinds of tribunals, including private arbitrations).

[5] 542 U.S. 241 (2004).

[6] In re Ex Parte Application of Axion Holding Cyprus Ltd., 2020 WL 5593934, *1 (D. Del. Sep. 18, 2020) (citations and internal quotations omitted).

[7] Id.

[8] Id. (internal quotations omitted).

[9] Id. at *2.

[10] Id. (citations omitted).

[11] Although Axion's application was made ex parte and denied before any respondent appeared, OEP Capital Advisors, L.P. and OEP Capital Advisors GP, LLC (from which the discovery was sought) will defend the district court's ruling as Respondents-Appellees. See Case No. 20-3132, Docs. 13-15.

[12] U.K. Arbitration Act, §§ 16, 18.

[13] Id., §§ 43, 44.

[14] Id., § 45.

[15] Id., §§ 66-71.

[16] See Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 584, 588 (2008) (judicial review of arbitral awards limited to the grounds specified in sections 10 and 11 of the FAA – which pointedly do not include ordinary legal error); accord Stolt-Nielsen, S.A. v. AnimalFeeds International Corp., 559 U.S. 662, 672 n.3 (2010) (declining to decide whether "manifest disregard" of the law survives as an "independent ground" on which an arbitral award can be vacated).

[17] Boeing, 954 F.3d at 214. In Rolls-Royce, supra – which involved the same arbitration but reached the opposite result – the Seventh Circuit noted in passing that the view expressed by the Sixth Circuit in Boeing that arbitration under the U.K. Arbitration Act "is the product of government-conferred authority" "strikes us as mistaken." 975 F.3d at 693 and n.2. But because no party in Rolls-Royce had actually taken that position, the Seventh Circuit made no holding on the issue. Id.

[18] U.K. Arbitration Act, § 2(1).

[19] See Intel, 542 U.S. at 264-65.

[20] See Boeing, 954 F.3d at 216; In re Application to Obtain Discovery, 939 F.3d at 731-32.

[21] See Intel, 542 U.S. at 264.