U.S. Judicial Discovery Assistance for Private Foreign Arbitrations: The Fifth Circuit Says "No"

The Fifth Circuit U. S. Court of Appeals last week reaffirmed its position that 28 U. S. C. 1782, which provides for federal assistance in obtaining discovery for use in foreign and international tribunals, does not apply to private commercial arbitration tribunals. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 2009 U. S. App. LEXIS 17596 (5th Cir. Aug. 6, 2009). The Fifth Circuit had adopted that position ten years ago in Republic of Kazakhstan v. Biedermann Int'l, 168 F. 3d 880 (5th Cir. 1999). In that case, the court examined the legislative history of the 1964 amendments to section 1782 — which substituted "foreign or international tribunals" for "foreign courts" — and concluded that the expansion was intended to cover international government-sanctioned tribunals but not private international commercial arbitral tribunals.

The Fifth Circuit in El Paso rejects the notion that its position is in conflict with the interpretation of Section 1782 given by the Supreme Court of the United States in Intel Corp. v. Advanced Micro Devices, Inc., 542 U. S. 241 (2004). The El Paso panel notes that the status of private arbitral tribunals under Section 1782 was not a question presented to or addressed by the Intel Court. The panel also parts ways with those judges and commentators who have believed the Intel Court, in dicta, had accepted the view that private arbitral tribumals were within the coverage of Section 1782.

The Fifth Circuit's decision in El Paso appears to be the first occasion since Intel that a federal appellate court addressed the issue of whether a private arbitral tribunal is within the coverage of Section 1782. At present there is no conflict in the circuits; only the Fifth and Second Circuits have addressed the issue, and their positions are the same.

Decisions of federal district courts have been sharply divided. Only two days before the El Paso decision, a federal district judge in Florida held that an arbitral tribunal constituted under the auspices of the ICC Court of International Arbitration is not within the coverage of Section 1782. (In re: Application of Operadora DB Mexico, S. A. de C. V. , 2009 U. S. Dist. LEXIS 68091 (M. D. Fla. Aug. 4, 2009). (Indeed the Florida district court's decision is a particularly thorough and elegant exposition of the position that Section 1782 does not apply to private tribunals, and it may well become the model for future decisions).

A great deal has been written about whether more U.S.-style discovery in international arbitration is a good idea when it is imposed by federal judges who may ignore the wishes of the arbitrators and the discoverability of the information under the law governing the arbitration. Only one of the points in that debate will be noted here: that if Section 1782 applied to private arbitral tribunals sitting outside the United States, the rights of international arbitration litigants to obtain discovery from non-parties would be greater in an a foreign arbitration than in an international arbitration taking place in the United States. In the latter case, non-parties may only be subpoenaed to testify at a hearing and to bring documents with them to the hearing. Among the salutary effects of excluding private arbitral panels from Section 1782 is to avoid an odd inconsistency in the U. S. approach to non-party witness participation in international arbitrations.