Kluwer Arbitration Blog

When is an Arbitral Panel an International Tribunal?

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, May 9th, 2012

When is an arbitral panel an international tribunal for purposes of Section 1782? Section 1782, of course, is the U.S. statute that authorizes federal courts to order discovery in aid of proceedings before foreign courts and international tribunals. As discussed in a forthcoming article in the Virginia Journal of International Law entitled, *Ancillary Discovery to Prove Denial of Justice*, what constitutes an international tribunal is not a simple question. It is also a critically important question, because the power to invoke federal court discovery in aid of foreign or international proceedings is one of the most effective evidentiary tools that any international lawyer can wield.

Ever since the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.* that question has vexed lower federal courts. Although the Supreme Court did not address international arbitration directly, its reasoning appeared to support a broad interpretation that would encompass arbitral tribunals, which likewise act as "first-instance decision-makers" that render "dispositive rulings" subject to limited national court review. Moreover, in describing the scope of Section 1782, the Court found that Congress amended the statute in 1964 to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad" and quoted scholarly commentary that defined the term 'tribunal' to include "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."

In the wake of *Intel*, federal courts have struggled to apply the Court's liberal Section 1782 standards to the context of international arbitration. Lower courts are divided on the question of whether a contract-based private international arbitral panel satisfies the statutory definition of "international tribunal."

A majority have concluded that arbitral tribunals established by private contract are "foreign or international tribunals." As the federal district court in *In re Babcock Borsig AG*, 583 F.Supp.2d 233 put it, addressing a Section 1782 petition involving an ICC arbitration, "[t]here is no textual basis upon which to draw a distinction between public and private arbitral tribunals, and the Supreme Court in *Intel* repeatedly refused to place 'categorical limitations' on the availability of § 1782(a)." Under this analysis, the functional approach adopted by the Supreme Court in *Intel* suggests that contract-based arbitral tribunals are first-instance decision-makers that issue decisions both responsive to the complaint and reviewable in court. As the court in *Roz Trading*, 469 F.Supp.2d 1221 put it, "it is the function of the body that makes it a 'tribunal,' not its formal identity as a 'governmental' or 'private' institution."

Other federal district courts have concluded that private arbitral tribunals are not "international tribunals" within the meaning of Section 1782. These courts focus on arbitration as an alternative to litigation, foreclosing a key element of *Intel*'s analysis: judicial review. "[T]he very narrow circumstances in which [arbitral] decisions may be subject to review does not allow for judicial review of the merits of the parties' dispute," opined the federal district court in *Norfolk Southern Corp.*, 626 F.Supp.2d 882. "Accordingly, the 'arbitral tribunal' at issue here does not fall within the definition the Supreme Court embraced in its *Intel* dictum." Moreover, according to some courts, the fact that the source of judicial authority is derived from private agreement likewise militates against classifying it as a foreign or international proceeding under § 1782. Finally, pragmatic concerns have loomed large in the analysis. As one court put it, "[i]nterpreting § 1782 to apply to voluntary, private international arbitrations would be a body blow to such arbitration, since it would create a tremendous disincentive to engage in such arbitration wherever, as here, such a reading would create substantially asymmetrical discovery obligations."

Whatever doubts there may be about the application of Section 1782 to contract-based international arbitration, federal courts uniformly agree that an arbitral tribunal established pursuant to a bilateral investment treaty constitutes an "international tribunal" within the meaning of the statute. Since *Intel*, over twenty federal courts have considered motions to compel Section 1782 discovery in aid of proceedings before treaty-based investment arbitration tribunals. Not a single federal court has held that such arbitral tribunals fall short of the statutory definition of an "international tribunal."

Rather than take a functional approach that analyzes whether the investment tribunal is a first-instance decision-maker rendering decisions subject to judicial review, these courts either assume that such arbitral panels are "international tribunals," or focus on the fact that the arbitral tribunal has its origins in a bilateral investment treaty. Although the absence of judicial review in the investment context is even more pronounced than in private commercial arbitration, this factor has not featured in any of the decisions applying Section 1782 to investment arbitration. In short, federal courts take a functional approach in defining an "international tribunal" in the commercial arbitration context, and a formalist approach in the investment arbitration context.

This entry was posted on Wednesday, May 9th, 2012 at 6:06 pm and is filed under Arbitration Proceedings, Commercial Arbitration, Investment Arbitration, Section 1782 Discovery
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.