Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

6th Circ. Increases Uncertainty Over Foreign Discovery Law

By **Caroline Simson**

Law360 (September 27, 2019, 8:00 PM EDT) -- The Sixth Circuit's decision that federal courts can order parties to turn over evidence for private commercial arbitration abroad has created a rift among the nation's appeals courts, increasing uncertainty and making it more likely the issue will end up before the U.S. Supreme Court.

The Sixth Circuit ruled Sept. 19 that under Section 1782 of the U.S. Code, a Saudi company could obtain discovery from FedEx Corp. as it pursues arbitration in Dubai over a soured delivery services agreement.

Once an obscure statute, Section 1782 has become a powerful and popular tool for litigants pursuing evidence for use in proceedings before "a foreign or international tribunal" at the request of "any interested person." The definition of "tribunal" has previously been interpreted by the Fifth and Second Circuits not to include private commercial arbitrations abroad, and, for years, the question was largely unanswered in other circuits.

But far from providing clarity on the question of whether Section 1782 can be used for discovery in private arbitration abroad, the Sixth Circuit's decision in the FedEx case has actually resulted in more confusion.

"We have a true circuit split, with the Fifth and Second Circuits on one side, and now the Sixth Circuit on the other," Morrison & Foerster LLP partner J. Alexander Lawrence said. "I would ... not be surprised if the Supreme Court took this issue up."

Supreme Court Sparks Uncertainty

While the Second and Fifth Circuits each ruled in 1999 that Section 1782 does not apply to private international arbitration, the U.S. Supreme Court issued a ruling in 2004's Intel v. AMD that many district courts — including some in the Second Circuit — have since relied on to conclude the opposite.

Although the justices didn't directly address the issue in their decision, the opinion, authored by Justice Ruth Bader Ginsburg, noted that Congress intended during revisions in the early 1960s for the term

"tribunal" to include "arbitral tribunals." But the issue was not a central component of the case, which related to an antitrust complaint filed against Intel with the European Commission. So it has caused confusion as to how the court might rule if confronted with the question head-on.

While it's unclear whether the Second and Fifth Circuits might rule differently on the issue post-Intel, there have already been instances in which district courts in the Second Circuit have departed from the circuit's precedent in recent years.

In fact, New York district courts have concluded since Intel that the statute can be used in arbitrations before the London Maritime Arbitration Association and the London Court of International Arbitration.

"Thus, some of the confusion in the courts is directly attributable to the Supreme Court's own decision," Lawrence said.

The Eleventh Circuit, meanwhile, appears inclined to go the way of the Sixth Circuit: Although the appeals court ruled in 2012 in Consorcio Ecuatoriano de Telecomunicaciones SA that a private arbitration tribunal could qualify under Section 1782, the judges later withdrew that opinion and declined to decide the question in a new opinion.

Still, whether and in what circumstances the Supreme Court might weigh in to resolve the issue remains unclear — particularly since the justices only take on about one out of every 100 petitions they receive.

It's worth noting that the Supreme Court hasn't taken on a case relating to Section 1782 since Intel. Moreover, other than the FedEx case before the Sixth Circuit, there doesn't appear to be any such case that could make its way to the high court anytime soon.

"Obviously, a circuit split is a strong factor in favor of Supreme Court review, and I think that there's now a fair volume of 1782 applications in the U.S., so this is probably something that the Supreme Court will want to look into at some point." Wilk Auslander LLP partner Stuart M. Riback said. "Whether [the FedEx case] is the right case to do it, I don't know."

A New Arbitration Tool

In the meantime, the Sixth Circuit's opinion in the FedEx case has changed the game for litigants seeking discovery from companies within the jurisdiction of U.S. courts for use in private commercial arbitrations abroad.

Section 1782 can be a powerful tool in international arbitration, since many foreign legal traditions don't allow the expansive discovery allowed in the U.S. As a result, those who do have access to it can have an advantage over their opponent.

Now, companies with any kind of U.S. presence will have to decide whether they'll want to deal with

U.S. subpoenas if they're involved in arbitration against a foreign party, according to BakerHostetler partner Paul Levine.

“A U.S. entity or the foreign subsidiary of a U.S. parent should consider whether it wants to risk U.S. discovery before signing an arbitration clause with a foreign company," he said, noting that parties can opt to limit such discovery in their contract. "With an arbitration clause, you can contract around anything."

The case is Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp., case number 19-5315, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Breda Lund and Alanna Weissman.