



North America

United States

DISCOVERY AVAILABLE FOR ICC INTERNATIONAL ARBITRATION

Application of Babcock Borsig AG, Re; Comision Ejecutiva Hidroelectrica del Rio Lempa v Nejapa Power Co; Comision Ejecutiva Hidroelectrica del Rio Lempa v El Paso Corp

Arbitral tribunals; Discovery; Foreign proceedings; International commercial arbitration; United States

Discovery; Disclosure; Third-Party Documents; 28 USC 1782; Meaning of "Tribunal"; Evidence; Orders in Support of Foreign Arbitration

An ICC tribunal is considered a "tribunal for purposes of 28 USC 1782's procedure for allowing discovery in aid of foreign proceedings"

2008 WL 4748208 Massachusetts Federal District Court, October 30, 2008; 2008 WL 4809035 Delaware Federal District Court, October 14, 2008; 2008 WL 5070119 Southern District of Texas Federal District Court, November 20, 2008

Summary

28 USC 1782 Discovery Available For ICC International Arbitration Proceedings

The federal court for the District of Massachusetts acknowledged that an ICC international arbitration tribunal is a "tribunal" for the purposes of 28 USC 1782's procedures for allowing discovery in aid of foreign proceedings, but declined to exercise its jurisdiction to make such an order. In a separate case, the federal court for the Southern District of Texas concluded that a foreign private commercial tribunal was not a "tribunal" within the meaning of the statute.

Background

28 USC 1782 is a statutory provision authorising federal courts to grant discovery assistance to persons involved in disputes before a foreign or international "tribunal" outside the United States. In 1999, the influential Second Circuit Court of Appeals held in *National Broadcasting Co Inc v Bear Stearns, & Co Inc* 165 F.3d 184 2d Cir. 1999 that the term "tribunal" as it is used in s.1782 was intended to include only governmental bodies (including courts, other state tribunals, and investigative authorities acting under the direct authority of a state), and that s.1782 discovery was not, therefore, available to parties to private commercial arbitration proceedings. The Fifth Circuit Court of Appeals adopted the same analysis in *Republic of Kazakhstan v Beidermann* 168 F.3d 184 5th Cir. 1999.

In 2004, the US Supreme Court ruled that the Directorate-General for Competition of the EU Commission qualified as a s.1782 tribunal: *Intel Corp v Advanced Micro Devices Inc* (2004) 542 US 241. The court reached this conclusion based on: (1) the plain meaning of the term "tribunal"; (2) the lack of any indication that Congress intended to limit the term "tribunal" in any way; and (3) a functional analysis of the Directorate-General as the initial decision maker, subject to court review and appeal. The court's approach suggested that the rulings by the Second and Fifth Circuits that private arbitral tribunals did not qualify as s.1782 tribunals might be open to significant doubt. An article in *International Arbitration Law Review* in 2005 by one of the authors suggested that the *Intel* judgment required the federal courts to reconsider the issue of s.1782 discovery in aid of international commercial arbitration (Wessel, "A Tribunal by Any

Other Name: US Discovery in Aid of Non-US Arbitration" (2005) Int. A.L.R. 139).

In 2006, a district court in New Jersey held that s.1782 discovery was available in aid of investment arbitration: *Matter of the Application of Oxus Gold Plc*, Re Misc. No.06-82, 2006 WL 2927615; 2006 U.S. Dist. LEXIS 74118. Two months later, the district court in Georgia held, relying on the view of s.1782 taken by the Supreme Court in *Intel*, that s.1782 is also available in aid of private international commercial arbitration: *Application of ROZ Trading Ltd*, Re 469 F. Supp. 2d 1221 N.D. Ga.

Babcock Borsig

A federal district court in Massachusetts has now adopted the same approach, holding that the ICC is a "tribunal" within the meaning of s.1782: *Application of Babcock Borsig AG*, Re 2008 WL 4748208. Babcock Borsig sold certain business operations to Babcock Power Inc, and certain other business operations to Hitachi. Babcock Borsig settled a dispute in relation to the sale of assets to Babcock Power, and the settlement agreement between them included a very broad release. In connection with ICC arbitration proceedings that Babcock Borsig contemplated taking against Hitachi, it sought discovery from Babcock Power of documents relating to the dispute with Hitachi. Babcock Power refused, and contested Babcock Borsig's application under s.1782 on the grounds that the discovery proceedings were precluded by the broad release that was included in the settlement agreement, and further that an international arbitration tribunal did not qualify as a "tribunal" as that term was used in s.1782.

The court ruled in favour of Babcock Borsig on both issues. Even though the release encompassed "rights and demands of any nature whatsoever", the court refused to adopt a broad interpretation of the "rights and demands" that had been released, instead reading this broad language in the context in which the release was given. The court therefore ruled that the release did not extend to an action for discovery under s.1782.

In relation to the s.1782 application itself, the court followed the modern trend towards an inclusive reading of the provision, and relied extensively on the reasoning in *ROZ Trading* to find that the statutory language of section 1782 authorizes assistance in connection with ICC arbitration. However, the court exercised its discretion to deny the discovery request, wanting to see proof that the ICC tribunal would be receptive to admitting the documents sought into evidence.

Najapa Power

A similar conclusion had been reached shortly before *Babcock*, by the federal district court in Delaware, which held that a private commercial arbitration tribunal sitting in Geneva under UNCITRAL rules qualifies as a tribunal under s.1782: *Comision Ejecutiva Hidroelectrica del Rio Lempa v Nejapa Power Co LLC* CA No.08-135-GMS. Notably, in this case the person from whom discovery was sought is a party to the foreign arbitration. This decision is being appealed to the Third Circuit Court of Appeals following the district court's denial of a motion for reconsideration.

El Paso Corporation

Less than a month after the *Babcock* judgment, the federal district court for the Southern District of Texas (which sits within the Fifth Circuit Court of Appeals) reached a somewhat contradictory conclusion. The court had earlier granted authorisation for the issuance of subpoenas under s.1782, but it reversed this decision on an application for reconsideration. The court found that the Supreme Court in *Intel* was silent on the question of whether a private arbitration tribunal constituted a tribunal as that term is used in s.1782. Since this was the case, the court was bound to follow the judgment of the Fifth Circuit Court of Appeals in *Republic of Kazakhstan v Biedermann*

International 168 F.3d 880, 993 5th Cir. 1999 expressly excluding private arbitral tribunals from the scope of s.1782. Notably, the *El Paso* court also noted that it was unlikely that the Swiss arbitral tribunal would have been receptive to considering the documents if the s.1782 application were granted.

Comment

Federal district courts in different circuits across the United States continue to be faced with s.1782 applications, and it appears that these cases may herald a split between the circuits that may eventually bring this important issue squarely before the United States Supreme Court. The trend seems to favour an inclusive interpretation of s.1782, but some jurisdictions, perhaps because they feel bound by pre-*Intel* precedent, have bucked this trend.

From a practical point of view, a party seeking s.1782 discovery may have a number of options of courts in which an application might be brought against a particular company. It is important to appreciate the different approaches taken by courts in the various geographic circuits of the US federal court system so that the correct assessment can be made as to the most advantageous court to make such an application. From the point of view of the custodian of documents that may be the subject of a s.1782 application, the location of those documents and the identity of the entity holding them may be critical to successfully defending against a s.1782 application.

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Europe

Germany

ARBITRATION CLAUSES IN STANDARD FORM CONTRACTS IN GERMANY

Validity of arbitration agreements and the application to the courts for replacement arbitrators

 *Arbitral tribunals; Arbitration agreements; Arbitrators; Commercial arbitration; Construction contracts; Germany; Standard forms of contract; Validity*

Validity of Arbitration Agreement; Agreement to be in Writing; Standard Form Contracts; Constitution of Arbitral Tribunal; Arbitral Procedure

Facts

The respondent had sold a plot of land to the claimant and built a one-family house on these premises. The underlying notarially certified contract contained the following clause:

"Arbitration Agreement

(1) All disputes between the parties arising out of the construction contract ['Bau-trägervertrag'] in accordance with Chapter I shall, when legally admissible, be decided by an arbitral tribunal without recourse to the ordinary courts of law. Its decisions shall be final and binding.

(2) The arbitral tribunal shall consist of one arbitrator. The arbitrator shall be Mr. R, chief judge at the Local Court of X. If this arbitrator is not able to accept the arbitrator's position for factual or legal reasons, the arbitrator shall be appointed by the President of the Higher Regional Court Hamm on a request of one of the parties. The arbitrator shall in any case be qualified to work as a judge. Following the commencement of the arbitral proceedings each party shall be entitled to communicate its objections concerning the identity of the arbitrator to the other party and to the arbitrator within 14 days after it first learnt about the commencement of the arbitral proceedings. Otherwise any objections as to the identity of the arbitrator should be excluded once the arbitral proceedings have started.