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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

2nd Circ. Arbitration Discovery Ruling Ripe For High Court

By **Caroline Simson**

Law360 (July 10, 2020, 10:34 PM EDT) -- The Second Circuit's recent decision firmly rejecting the proposition that U.S. law allows federal courts to order discovery for private commercial arbitration abroad has cemented a circuit split that could boost the chances of the U.S. Supreme Court finally resolving the fiercely contested issue.

The circuit court concluded on July 8 that Section 1782 of the U.S. code, which allows federal courts to order entities in their district to turn over evidence to be used in proceedings before "a foreign or international tribunal" at the request of "any interested person," does not apply to private international commercial arbitration.

The decision entrenches the Second Circuit as diametrically opposed to the Fourth and Sixth circuits, which have ruled in recent months that Section 1782 is applicable in private commercial arbitration. The Fifth Circuit is also on the other side of those two circuits, having taken the Second Circuit's approach in several cases.

"It's quite a momentous decision," said Greenberg Traurig LLP shareholder Nicole Y. Silver. "This has been a hotly contested issue — whether or not private commercial arbitration qualifies — and [the opinion] is now putting it squarely before everyone in the country."

A petition before the Supreme Court on this point is expected to be filed in the coming months by Rolls-Royce, which has said that it intends to challenge a Fourth Circuit decision concluding that three Boeing employees may have to provide testimony in a U.K. arbitration relating to an engine fire.

If the Supreme Court were to side with the Fourth and Sixth circuits and conclude that Section 1782 can be used with regard to private commercial arbitration, the impact in that sphere could be significant — both in the number of such cases being filed, and the time and expense associated with litigating them.

"This could cause a race to the courthouse for 1782 applications in international arbitration cases," said Lisa Houssiere, a principal in McKool Smith PC's Houston office.

The reason why Section 1782 could prove important in private commercial arbitration is that U.S. courts generally allow for more broad discovery than international arbitration tribunals.

U.S. courts allow access to documents that are considered "relevant" to a proceeding, while the widely

accepted standard in international arbitration — enumerated by the International Bar Association — places more emphasis on whether the documents are "material" to the dispute.

"Under the IBA Rules on the Taking of Evidence in International Arbitration, parties requesting documents must state not only why they're relevant to the case, but also why they're material to its outcome," said Reed Smith LLP partner James P. "JP" Duffy IV. "The materiality requirement significantly narrows what's obtainable, because a lot of things can be relevant without being material to the outcome."

Moreover, the statute arguably also allows parties to seek discovery in "reasonably contemplated" proceedings, meaning that it could be available for parties who haven't even filed their arbitration yet. That could make it easier for parties to a potential arbitration to evaluate which parties will need to be involved in the dispute, and which theories the case should be brought under, according to Houssiere.

"If [parties] can get pre-dispute discovery ... that would be a game changer," she said.

Still, whether the Supreme Court signing off on the broader usage of Section 1782 will be good or bad for arbitration depends on which side of the petition you're on. Could allowing U.S.-style discovery in private commercial arbitration result in some asymmetry between the parties, because one would have access to discovery that another party may not?

Experts say that while this issue has caused some concern, the potential problems posed there are not necessarily insurmountable. The district court has numerous discretionary factors to consider when deciding whether to grant the petition, and any alleged asymmetry could be brought up then. Even if the petition is still granted, an aggrieved party still has options.

"The arbitral tribunal could take whatever steps are in its power to address allegations of an inequality of arms between the parties," said Three Crowns' Luke Sobota, a founding partner of the firm.

Moreover, if the Supreme Court does side with the Fourth and Sixth circuits on this issue, it's likely that parties may begin addressing it even before a dispute arises.

"I think you'll see parties start to address the issue specifically in their arbitration clauses," said Greenberg Traurig shareholder Thomas G. Allen, noting the arbitration is based on consent. "The things that parties agree to in their arbitration agreement have long been honored by courts."

Before the Second Circuit's most recent decision, there was much debate as to whether its stance on the issue, articulated in 1999 in a case called NBC v. Bear Stearns & Co., had been trumped by a 2004 decision issued by the U.S. Supreme Court — the high court's only word on the statute so far.

The case before the justices, Intel v. AMD, related to an antitrust complaint AMD had filed against Intel with the European Commission. AMD had asked a California federal court to order Intel to turn over potentially relevant documents, but the court declined. That decision was reversed by the Ninth Circuit, whose opinion was then upheld by the high court, which said the statute conferred broad discretion on district courts to permit foreign litigants to obtain discovery in the U.S.

But the court didn't specifically address arbitration, except to note that Congress had intended during revisions in the early 1960s for the term "tribunal" to include "arbitral tribunals."

The Second Circuit concluded in its July 8 decision that that wasn't enough to cast doubt on the reasoning it had adopted in the NBC case, since the question of whether foreign private arbitral bodies qualify as tribunals under Section 1782 hadn't been before the court.

If the justices are to accept certiorari over the Rolls-Royce case — or over any other case that raises this issue — that question is one that could be finally addressed. But whether they do decide to take up the issue remains an open-ended question.

Allen noted that over the last few years, the Supreme Court has been quite active in the arbitration space. Most recently, the justices concluded that nonsignatories to an international arbitration agreement may compel arbitration of disputes arising under that agreement.

They also granted certiorari last month for the second time over a case involving dental equipment distributors, agreeing to take on the question of whether a carveout in an arbitration agreement negates a provision allowing arbitrators to rule on their own jurisdiction.

Still, Allen said that it's difficult to predict whether the justices would want to take on the Section 1782 issue.

"I think it's equally likely as it is unlikely," he said.

--Editing by Emily Kokoll and Jill Coffey.