Elite Exports

Learning the enforcement of international commercial transactions

By Lisa Pick and Fredrick Acomb

▲ Lisa Pick, principal, practice leader of entertainment, sports and multimedia and Fredrick Acomb, principal and chair of international dispute resolution section at Miller Canfield explain the importance of navigating the international market.

Michigan businesses are increasingly looking outside the United States to drive their growth and success. Recent figures reveal metro Detroit as the fourth largest region in the nation in terms of exports, and it isn't just large companies contributing to this growth. More than 11,000 Michigan businesses are now exporting.

Although these companies may have experience resolving domestic business disputes, many are unaware that domestic courts may be ineffective in resolving international disputes. A Michigan company may successfully obtain a court judgment in the U.S. against its foreign supplier or customer and if the foreign party has assets in the U.S., there may well be full recovery. But what if it has insufficient assets in the U.S.?

A U.S. court judgment typically has no direct force outside the country; therefore, the Michigan company will likely have to bring additional proceedings in another nation to enforce the judgment. Because there are no treaties compelling a foreign court to enforce the judgment of a U.S. court, there is little to no chance of success.

Although some foreign courts will consider recognizing and enforcing a U.S. court judgment, the U.S. judicial system is viewed with deep suspicion and disfavor by the courts of many countries, even those of many friendly western nations. Some foreign courts will decline to enforce U.S. judgments if they deem the trial or judgment violates public policy or is otherwise lacking by the standards of their own judicial systems. The courts in other countries – China and Russia being two notable examples – rarely if ever enforce U.S. judgments.

According to the U.S. Department of Commerce, in 2011 Detroit was the largest metropolitan exporter to Canada and Mexico. Canadian and Mexican courts generally will consider recognition of U.S. court judgments that have been adjudicated in a manner consistent with legal principles of the recognizing jurisdiction. However, a defendant may allege that the adjudication was inconsistent with applicable legal principles or otherwise in contravention of the foreign country's public policy.

Companies are increasingly turning to international arbitration as a popular alternative to commercial litigation involving parties from different countries. Pursuant to an international treaty known as the New York Convention of 1958, to which more than 140 nations, including the U.S. and even China and Russia are parties, arbitration awards in commercial disputes are enforceable as a matter of right.

Other reasons parties may choose international arbitration include the following:

- Arbitration can be held in a neutral location, with an arbitrator from a neutral nation, applying the laws of a neutral country. This minimizes any "home court" advantage that may exist in litigation in the foreign party's home jurisdiction.

- Arbitration can reduce the likelihood of dueling litigation in the nations of both parties and the associated expense, risk and anxiety.

- Arbitrators with the appropriate expertise can be appointed. In a court proceeding, the parties typically are not permitted to appoint the judge. The appointment of an experienced arbitrator can also expedite resolution when the dispute is highly technical.

- Arbitral proceedings and awards are generally non-public and can be made confidential.

In order for arbitration to apply, parties need to enter into an arbitration agreement. An agreement can be included as part of the general transaction but it is important to carefully word the specific arbitration provisions. Off the shelf or standard arbitration agreements often lead to disappointing results and what works in domestic litigation often fails in an international context.

Unfortunately, it's common for negotiators and drafters of transaction documents to address the dispute resolution clause as an afterthought. This frequently has unintended consequences that can negate anticipated transactional success and severely impair the bottom line.

Fortunately, these consequences can be avoided with the careful and often minimal attention of an experienced international dispute resolution expert who becomes involved early in the negotiation process. Parties do not enter into transactions with the intention of getting into disputes, but the inevitability of controversy in many transactions cannot be ignored. Preparation for international dispute resolution will minimize certain risks, provide added certainty and offer needed guidance for future negotiations in what can be very unfamiliar territory. ■ Fredrick Acomb and Lisa Pick are principals of Miller Canfield.

Discovery in the United States in Aid of International Arbitration

by: Frederick A. Acomb & Mary Kate Griffith

Parties involved in foreign litigation have long had at their disposal a useful tool for obtaining discovery in the United States. 18 U.S.C. § 1782(a) authorizes a United States district court to order a person "resid[ing] or found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal ...."[1]

Prior to 2004, the prevailing view was that § 1782(a) could not be used to obtain discovery in aid of private international arbitration. The United States Circuit Courts for the Second Circuit and the Fifth Circuit had both held that § 1782(a) does not authorize United States district courts to compel discovery in aid of private international arbitration.[2] In reaching that result both courts held that an arbitration panel was not a "tribunal" within the meaning of § 1782(a).[3]

Then in 2004, the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*[4] The Court held that the European Union's primary antitrust enforcement body, the Directorate-General of Competition for the Commission of the European Communities, was a "tribunal" within the meaning of §1782(a).[5] In reaching this result the Court noted that in 1964, Congress had broadened the statute from merely covering "any judicial proceeding pending in any court in a foreign country" to more expansively covering a "proceeding in a foreign or international tribunal."[6] The Court quoted a Senate Committee report stating that Congress used the word "tribunal" in order to "ensure that 'assistance is not confined to proceedings before conventional courts.'"[7] The Court in dicta cited to a scholarly article that stated that the word "tribunal" included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional . . . courts."[8]

In concluding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute, the Court emphasized that this body "acts as a first-instance decision maker" in a "proceeding that leads to a dispositive ruling" that is reviewable by European courts.[9]

The *Intel* Court did not specifically address whether a private international arbitration panel is a "tribunal" within the meaning of the statute. The decision has led some courts to answer this question in the affirmative, and others in the negative.

Courts Holding That Private International Arbitration Tribunals Are Not Covered Under § 1782(a). In *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa,*[10] the United States Circuit Court for the Fifth Circuit held that *Intel* provided no authority for the notion that a private international arbitration panel is a "tribunal" within the meaning of § 1782(a)."[11] The court held that *Intel* was limited to finding that the Directorate-General of Competition for the Commission of the European Communities was a "tribunal" within the meaning of the statute.[12] The court thus refused to allow discovery in aid of an arbitration conducted before a Swiss arbitral panel under the United Nations Commission on International Trade Law ("UNCITRAL").[13]

In *In re Arbitration between Norfolk Southern Corp., Norfolk Southern Railway Co., & General Security Insurance Co. & Ace Bermuda Ltd.,* the United States District Court for the Northern District of Illinois likewise held that *Intel* was silent on the issue whether purely private arbitrations are covered under the statute.[14] The court distinguished

purely private arbitrations established by contract from arbitrations under the UNCITRAL, a body established by its member states, holding that the former are not covered under the statute.[15]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an arbitration conducted under the International Chamber of Commerce ("ICC").[16] The court held that, unlike the Director-General of Competition for the Commission of the European Communities at issue in *Intel,* the ICC arbitral panel does not act as a first-instance decision-maker whose decision is subject to judicial review.[17]

Courts Holding That Private International Arbitration Tribunals Are Covered Under § 1782(a). Other courts have reached the opposite conclusion. For example, in *In re Roz Trading Ltd,* the United States District Court for the Northern District of Georgia held that a panel of the Vienna International Arbitral Centre ("VIAC") was a tribunal under §1782(a),[18] emphasizing that it is widely accepted that the word "tribunal" includes arbitration panels.[19]

In *In re Hallmark Capital Corp,* the United States District Court for the District of Minnesota held that a private commercial arbitration panel in Israel was a "tribunal" under §1782(a),[20] emphasizing that the word "tribunal" commonly includes arbitration panels.[21] In *In re Babcock Borsig AG and Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.,* respectively, the United States District Courts for the Districts of Massachusetts and Delaware held that the ICC was a "tribunal" under the statute.[22]

New Trend? – A Functional Analysis. In the last couple of years a number of courts have applied what they call a "functional analysis test" to the decision whether an arbitral body is a tribunal under the statute. The functional analysis test inquires whether the arbitral body functions as a first-instance decision-maker whose decision is subject to judicial review.[23]

In *In re Winning (HK) Shipping Co.,* the United States District Court for the Southern District of Florida emphasized that the unidentified English arbitral body at issue in the case was a first-instance decision-maker whose decision would be subject to judicial review.[24] The arbitration award could be appealed to the English Courts and the parties did not waive their right to judicial review.[25] Accordingly, the body was a foreign "tribunal" under § 1782(a).[26]

In O*JSK Ukrnafta v. Carpatsky Petroleum Corp.,* the United States District Court for the District of Connecticut held that a party could obtain § 1782(a) discovery in aid of an arbitration under the Arbitration Institute of the Stockholm Chamber of Commerce ("AISCC").[27] In reaching this result the court emphasized that the AISCC would act as a "first-instance decision maker" whose award was subject to review by the Swedish courts.[28]

In *In re Operadora DB Mexico, S.A. de C.V.,* the United States District Court for the Middle District of Florida held that a party could not obtain discovery in aid of an ICC arbitration because the panel's decision was not subject to judicial review.[29]

Conclusion. As of this writing there is no published opinion by the United States Circuit Court for the Sixth Circuit on whether an international arbitration panel is a tribunal within the meaning of § 1782(a). Nor is there any such opinion by the United States District Courts for the Eastern and Western Districts of Michigan. Hence lawyers seeking or opposing discovery in aid of private international arbitration from persons in Michigan will need to rely on the cases decided above in arguing their respective positions.

ENDNOTES

1. 28 U.S.C. § 1782(a).
2. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kaz. v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).
3. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); Republic of *Kaz. v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).
4. *Intel Corp.*, 542 U.S. 241 (2004).
5. *Id.* at 257-58.
6. *Id.* at 248-49.
7. *Id.* at 249 (quoting S. REP. NO. 1580, at 7 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788).
8. *Id.* at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L REV. 1015, 1026-27 (1965)).
9. *Id.* at 255, 258-59.
10. *El Paso Corp.*, 341 Fed. Appx. 31 (5th Cir. 2009).
11. *Id.* at 34.
12. *Id.*
13. *Id.*
14. *Norfolk*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009).
15. *Id.* at 886.
16. *Operadora*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).
17. *Id.* at *9-11.
18. *Roz Trading*, 469 F. Supp. 2d 1221, 1225-26 (N.D. Ga. 2006).
19. *Id.*
20. *Hallmark*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007).
21. *Id.* at 954-55.
22. *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co.*, No. 08-135-GMS, 2008 WL 4809035, at *2 (D. Del. Oct. 14, 2008).
23. *In re Winning (HK) Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *10 (S.D. Fla. 2010).
24. *Id.* at *8.
25. *Id.* at *9.
26. *Id.* at *10.
27. *OSJK*, No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009).
28. *Id.* (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004)).
29. *Operadora*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *9-12 (M.D. Fla. Aug. 4, 2009).

Frederick A. Acomb is a senior principal at Miller, Canfield, Paddock and Stone, P.L.C. and Chair of the firm's International Dispute Resolution Section. He is a member of the International Bar Association and the International Section of the American Bar Association. He received his J.D. from the University of California, Hastings College of Law and his B.M. from Northwestern University.

Mary Kate Griffith is an associate at Miller, Canfield, Paddock and Stone, P.L.C. She practices business and commercial litigation. She received her J.D. from Washington University School of Law and her B.A. from the University of Notre Dame.