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U.S. Discovery in Aid of International Arbitration: Recent Developments

Lucy Reed (Freshfields Bruckhaus Deringer LLP) · Tuesday, February 3rd, 2009 · Freshfields Bruckhaus Deringer

Parties involved in foreign litigation have a powerful U.S. discovery tool at their disposal in 28 U.S.C. § 1782(a). Section 1782(a) provides that a federal district court "may 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…" Accordingly, if documents or witnesses relevant to a foreign litigation are found in the U.S., a party to the proceeding may petition a U.S. federal district court for discovery.

Of potentially more interest to readers of this blog, however, is whether Section 1782(a) discovery is available in aid of foreign arbitral proceedings.

Prior to the Supreme Court's decision in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (Intel), hopes were dim. The Second and Fifth Circuits held in 1999 that Section 1782(a) discovery was not available to parties to foreign arbitral proceedings. See National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann International, 168 F.3d 880 (5th Cir. 1999).

While the Supreme Court in Intel did not directly address the question of whether Section 1782(a) is available to parties to international arbitrations, it did cite an influential article by Professor Hans Smit that stated that the term "tribunal," in the statutory phrase "foreign or international tribunal," "includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies . . ." Intel, 542 U.S. at 258 (emphasis added).

In the wake of Intel, a number of U.S. district courts have held that discovery under Section 1782(a) is available to parties to foreign arbitral proceedings. See, e.g., In re Roz Trading, 469 F. Supp. 2d 1221 (N.D. Ga. 2006); In re Application of Oxus Gold Plc for Assistance Before a Foreign Tribunal, No. MISC. 06-82, 2007 WL 1037387 (D.N.J. April 2, 2007); In re Application of Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007).

However, two very recent decisions have come to opposite conclusions on Section

1782(a) discovery in the context of international arbitration.

In In re Application of Babcock Borsig AG, No. 08-MC-10128, 2008 WL 4748208 (D. Mass. Oct. 30, 2008), the district court concluded that "the reasoning and dicta [in Intel] strongly indicate that [arbitral tribunals] also fall within the [Section 1782] statute." Therefore, the district court held that Section 1782(a) discovery was available to parties to a foreign ICC proceeding.

Conversely, less than one month later in Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. El Paso Corp., MISC Action No. H-08-335, 2008 WL 5070119 (S.D. Tex. Nov. 20, 2008), the district court stated that Intel "shed no light on the issue" of whether Section 1782(a) discovery was available to parties to foreign arbitrations. Therefore, the district court followed the Fifth Circuit's pre-Intel opinion directly on point (as it was bound to do), and held that U.S. discovery was not available in aid of a pending arbitration in Switzerland. Interestingly, the movant also made an application to the District Court of Delaware for Section 1782(a) discovery in respect of the same arbitration, but addressed to a different party. The Delaware court held that discovery was available in aid of the arbitration. See Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. Nejapa Power Co., LLC, No. 08-135, 2008 WL 4809035, at *1 (D. Del. Oct. 14 2008).

While the majority of district courts to consider the issue have concluded that Section 1782(a) is available to parties to foreign arbitrations, it is too early to state with any degree of certainty how the Section 1782(a) jurisprudence will develop in the future. No Circuit Court conflict, or subsequent Supreme Court case, is yet on the horizon. While we wait for a definite answer in the US courts, there is nothing stopping us from participating in one of the hottest current debates: is §1782 discovery a good or bad thing for international arbitration?

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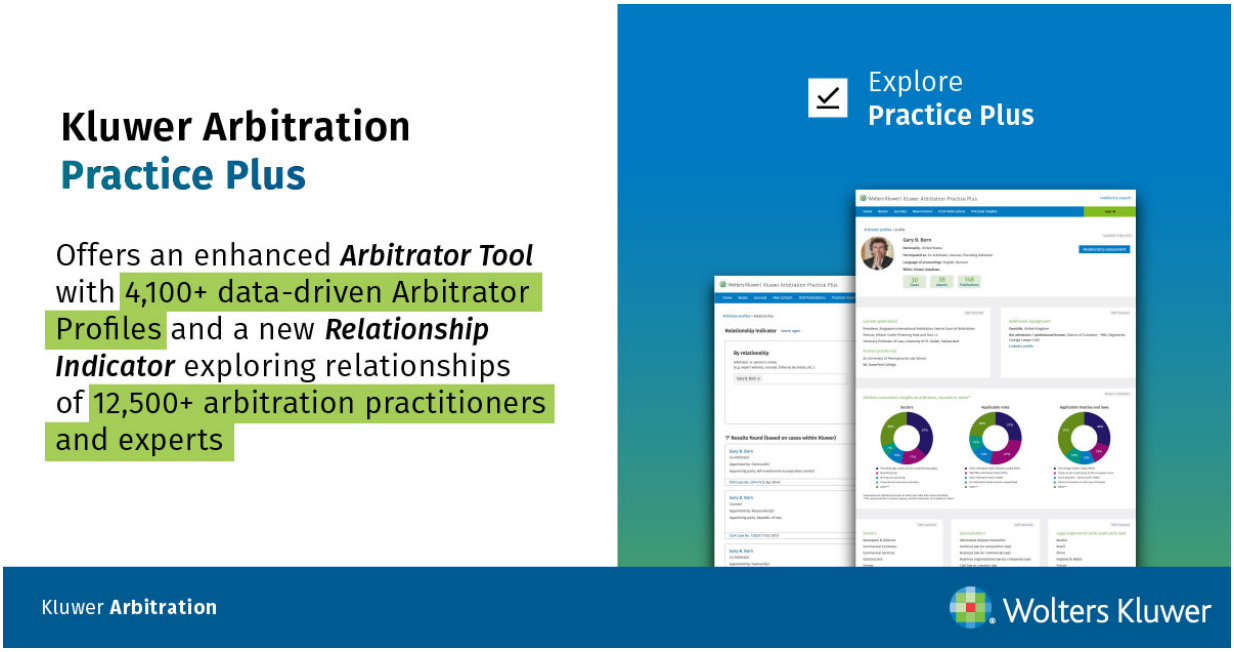

This entry was posted on Tuesday, February 3rd, 2009 at 12:15 am and is filed under Arbitration Proceedings, Domestic Courts, International Courts, National Arbitration Laws, Section 1782 Discovery
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