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More Uncertainty about § 1782's Extension to International Arbitral Proceedings

Gary B. Born (Wilmer Cutler Pickering Hale and Dorr LLP) · Friday, June 11th, 2010 · WilmerHale

In the past year, there have been several posts (here , here, and here) on the applicability of 28 U.S.C. § 1782 to international arbitration and on the issuance of conflicting judicial opinions on this topic. As reported by Roger Alford in a recent post , a federal district court in the Southern District of New York held four weeks ago in the Chevron case that an international arbitral tribunal operating under the UNCITRAL Rules constitutes a "foreign tribunal" for purposes of § 1782 largely because the arbitration arose out of a bilateral investment treaty rather than out of a purely private agreement (see: In re Application of Chevron, 2010 WL 1801526, at *6 (S.D.N.Y. May 6, 2010). While the court in Chevron said little else about the applicability of § 1782, an opinion issued by a federal magistrate judge in the Southern District of Florida one week before, in In re Winning (HK) Shipping Co. Ltd., offered a detailed approach to determining whether a private international arbitral tribunal is a foreign tribunal that qualifies for judicial assistance under § 1782. Specifically, the court in Winning discussed a functional test for determining whether an international arbitral tribunal qualifies as a foreign tribunal under § 1782. The Winning opinion is yet another addition to the growing body of conflicting case law on whether, and if so when, judicial assistance under § 1782 is available to parties in international arbitral proceedings – a body of conflicting case law that ultimately will need to be clarified by the federal appellate courts and possibly by the U.S. Supreme Court.

The Winning court's functional test, which focuses on the judicial reviewability of arbitration awards, is reminiscent of a functional test provided ten months ago by the U.S. District Court for the Middle District of Florida in Operadora. According to the Operadora court, federal district courts evaluating whether an entity is a "foreign tribunal" under § 1782 should analyze, among other things, whether the tribunal: (1) has the ability to gather evidence; (2) is obligated to apply the law to the facts in an impartial manner; (3) has the authority to issue a binding decision; (4) will issue opinions that are judicially reviewable; and (5) is state-sponsored or purely private. According to the Operadora court (and the magistrate judge in Winning), the issue of whether a decision is judicially reviewable is of decisive importance because of the Supreme Court's heavy focus on judicial review in Intel v. AMD, which is the only Supreme Court case to touch upon the meaning of the term "foreign tribunal" under § 1782.

According to the Winning court, the arbitration at issue – which had not yet been commenced but was merely being contemplated by the party that made the § 1782 request – would be sited in London. The Charter Party Agreement between the potential claimant and respondent did not specify any institutional rules to be used in connection with the arbitration. According to the court,

in the absence of any such rules specified in the Charter Party Agreement, either the London Maritime Arbitrators Association ("LMAA") Rules or the English Arbitration Act (1996) (the "Act") would apply to the arbitration. Relying on the LMAA website's "FAQs" about appealing an arbitral award, the court stated that regardless of whether the arbitration was governed by the LMAA Rules or not, the Act provided for both substantive (§69) and procedural (§68(2)) judicial review of any resulting arbitral award. Based on this reasoning, the Winning court concluded that "to the extent the arbitration forum at issue is subject to the Arbitration Act 1996 (of England) or . . . the rules of the London Maritime Arbitrators Association, Winning is proceeding before a 'foreign tribunal.'" (see: Application of Winning (HK) Shipping Co. Ltd., 2010 WL 1796579, at *10 (S.D. Fla. Apr. 30, 2010).

In its opinion, the Winning court also favourably discussed the Second Circuit's decision in NBC and the Fifth Circuit's decision in Biedermann – both pre-Intel cases holding that private arbitral tribunals are not "foreign tribunals" under § 1782 – stating that there is no reason to believe that either the ICC arbitration in NBC or the Stockholm Chamber of Commerce arbitration in Biederman would have resulted in judicially reviewable awards. According to the Winning court, in post-Intel cases that have not extended § 1782 to private arbitral tribunals, courts also have examined whether the tribunals in question would issue judicially reviewable awards.

Under the functional test applied by the Winning and Operadora courts, only private arbitrations sited in jurisdictions where awards can be judicially reviewed qualify as "foreign tribunals" under § 1782. It is not clear, however, when exactly an arbitral award can be said to be judicially reviewable for the purpose of this functional test. Moreover, this test could prove to be challenging in practice, insofar as it would require federal district courts confronted with § 1782 requests to examine in detail the institutional rules that may be applicable in a particular case, the laws of the seat of the arbitration, and the parties' arbitration agreement.

At present, it is unclear if the functional test set forth in Winning and Operadora will be adopted by any circuit courts in the United States. Indeed, the current variance in opinions on the applicability of § 1782 to international arbitration suggests that it is unlikely that a uniform approach will emerge any time in the near future. To the contrary, the addition of this functional test to the conflicting body of § 1782 case law that currently exists only strengthens the case for why the federal appellate courts – and, if a circuit split emerges, the U.S. Supreme Court – should address sooner rather than later whether, and if so when, § 1782 extends to cover proceedings before international arbitral tribunals.

Justin Lugar and Gary Born

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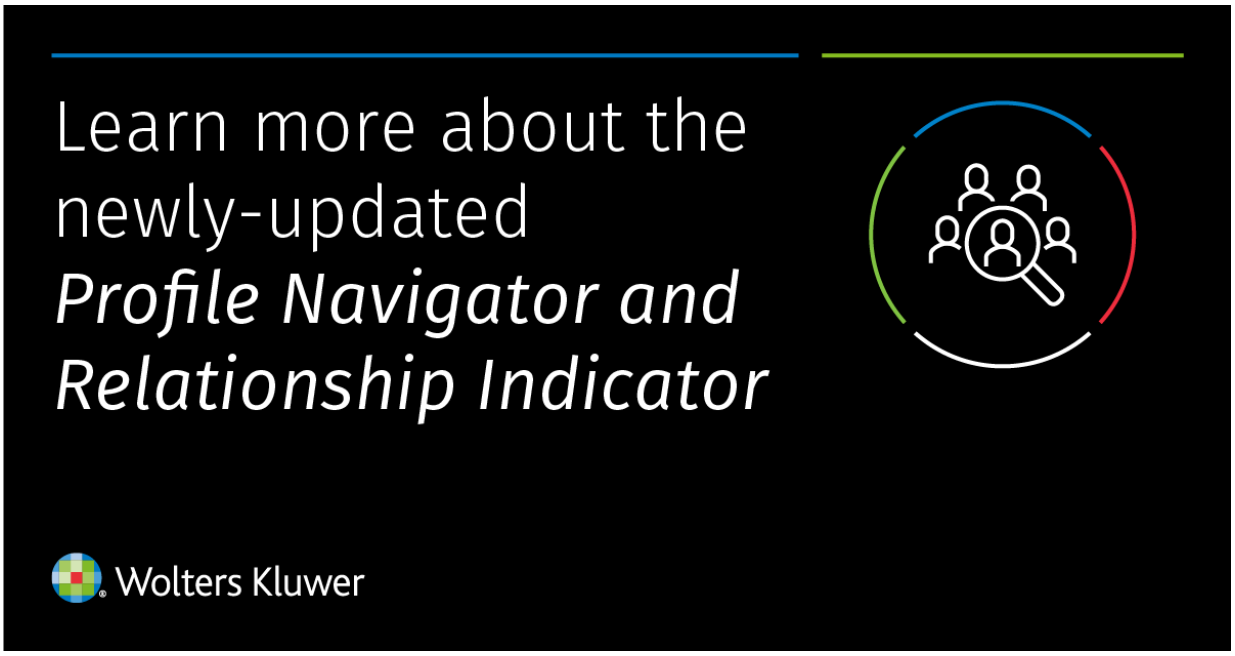

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