Section 1782 and International Arbitration: Is New York Still a Swing State?

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Section 1782 has become the weapon of choice for international litigants seeking discovery in aid of foreign proceedings. Section 1782 allows an "interested person" to apply for discovery over a person or entity "found" in the U.S. "for use" in a proceeding "in a foreign or international tribunal." Significant uncertainty exists, however, in whether Section 1782 discovery can be sought for use in a private arbitration abroad. While the Second Circuit has not weighed on this issue post-*Intel*,[fn]A Supreme Court decision that many district courts have used to allow Section 1782 discovery for use in foreign arbitrations.[/fn] a recent decision from the District Court for the Southern District of New York ("SDNY") provides some much needed insight on how New York federal courts interpret the statute.

In *In Re Ex Parte Application of Kleimar N.V.*, No. 16-MC-355, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016), Petitioner Kleimar N.V. ("Kleimar") filed an ex parte application in the SDNY to seek discovery in connection with a series of arbitrations in London before the London Maritime Arbitration Association ("LMAA"), in which Kleimar alleges that defendant Dalian Dongzhan Group Co. Ltd. breached its obligations under a contract of affreightment. The District Court granted that application and allowed Kleimar to seek discovery of Vale S.A. ("Vale") and some other third parties. The Court noted that the application was presented *ex parte* and stated that "should any Respondent wish to challenge the subpoena, it should file a timely motion to quash." Dkt. 4, at 2.

Importantly, the Court also noted that "while the law is not entirely settled as to whether a foreign arbitral proceeding qualifies as a matter before 'a foreign tribunal' within the meaning of Section 1782 […] such an issue is more properly resolved through a timely motion to quash." Dkt. 4, at 2-3.

Kleimar subsequently served Vale (the Brazilian mining giant) with the subpoena and Vale moved to vacate the discovery order and quash the subpoena. Vale argued, inter alia, that Kleimar failed to satisfy the requirements of Section 1782 because (1) Vale does not reside nor is found in the district, and (2) the London arbitrations are not a "foreign tribunal" under Section 1782. Kleimar opposed Vale's motions by arguing, inter alia, that (1) Vale does reside in New York, through its New York-registered indirect subsidiary Vale Americas, Inc. ("Vale Americas"); and (2) the London arbitrations are foreign tribunals under Section 1782.

With respect to the target's location, the Court found that Vale has "significant contacts" with New York such that it resides or is found in the state for purposes of the Section 1782. These contacts include: trading American Depositary Receipts (also known as "ADRs") on the New York Stock Exchange; listing Vale Americas as agent for service; Vale Americas defending an ongoing action in the SDNY; and Vale Americas conducting systematic business in the U.S. and New York.

Next, the Court turned to the scope of "foreign tribunal" under Section 1782. In finding that the LMAA is a "foreign tribunal" within the purview of the statute, the Court noted the tension between the Second Circuit's decision in *National Broadcasting Co., Inc. v. Bear Stearns & Co.*, Inc., 165 F.3d 184, 191 (2d Cir.1999) ("NBC") (holding that an ICC commercial arbitration in Mexico was not within the scope of Section 1782), and dictum from the Supreme Court's decision in *Intel*:

> While the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in *Intel*, suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782. Compare Nat'l Broad Co. v. Bear Sterns & Co., 165 F.3d 184, 190 (2d Cir. 1999) with Intel, 542 U.S. at 258.

The Court further noted that other courts, following *Intel*, have found that a private, commercial tribunal is a "foreign tribunal." But it also recognized that the Second Circuit has not weighed on the issue since *Intel*. This led the Court to look elsewhere for guidance. The Court was particularly persuaded by the reasoning of "several district courts" which found that the LMAA is a "foreign tribunal" within Section 1782. For example, an opinion from the District Court for the Southern District of Florida found that the LMAA qualified as a "foreign tribunal" because it "acts as a first-instance decision maker whose decisions are subject to judicial review." *Ex rel Application of Winning (HK) Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at *7 (S.D. Fla. Apr. 30, 2010) ("Intel suggests that courts should examine the nature of the arbitral body at issue to determine whether it functions as a "foreign tribunal" for purposes of section 1782."). Specifically, the court in *Winning* focused on whether the decision of the LMAA arbitrators would be judicially reviewable. Noting that the Arbitration Act 1996 (of England) provides for judicial review of arbitral awards (including on points of law), the Court concluded that the LMAA was a "foreign tribunal" for purposes of Section 1782.

Does the *Kleimar* decision suggest a need to show that, for purposes of Section 1782, the foreign arbitration is subject to judicial review akin to that available under the English Arbitration Act of 1996? *Kleimar* is unlikely to stand for such an extreme proposition, particularly since the availability of judicial review of arbitral awards on a point of law is absent in many other jurisdictions.

In the final analysis, the *Kleimar* decision does not resolve the question of whether international private arbitrations fall within Section 1782. It does, however, suggest that the *NBC* decision is no longer controlling post-*Intel*. In doing so, it leaves the door open for a more liberal interpretation of the statute. While most SDNY decisions granting Section 1782 applications for use in foreign arbitrations do so in the context of "London maritime arbitration proceedings,"[fn]See e.g. *Challenger Trading S.A. v. Valeska Shipping Lines Limited*, No. 16-CV-04197, Dkt. 9, 4 (S.D.N.Y., Jun. 17, 2016) (Granting Section 1782 application "in aid of a contemplated London maritime arbitration proceeding, based on a breach of a time charter agreement."); *In re ex parte Application of Grand Bulk Shipping Limited*, No. 13-MC-00008, Dkt. 4 (S.D.N.Y., Mar. 12, 2014).[/fn] it appears that the SDNY is not confining its pro-arbitration interpretation to maritime arbitrations seated in London. See e.g. *AVIC International HK Trading Limited et al v. Reunited LLC et al*, 1:13-mc-00288, Dkt. 27 (Nov. 22, 2013)(Granting Section 1782 application for discovery for use in a private arbitral proceeding pending before the Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center)).[fn]See also *In Re ex parte petition of Ramburs Inc.*, No. 13-MC-00074, Dkt. 5 (S.D.N.Y., Mar. 1, 2013) (denying Section 1782 application for use in GAFTA arbitration in London because Petitioner failed to "provide a basis to believe that" the information sought would be "for use" – i.e. relevant – in the foreign proceedings).[/fn]

Until the Second Circuit weighs on the issue, it is likely that federal courts in New York will continue to

tread carefully in interpreting the scope of Section 1782, mindful of the shadow of *NBC* and the weight of *Intel*.

Lucas Bento is also the President of the Brazilian American Lawyers Association. He is the author of The Globalization of Discovery under 28 U.S.C. § 1782: Law and Practice (Kluwer Law International, forthcoming). The views expressed in this post are the author's personal views, and do not reflect the opinions of Quinn Emanuel or of the Brazilian American Lawyers Association.