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Section 1782 Discovery For Use In Private Arbitrations: The New York Saga Continues

Lucas Bento (Quinn Emanuel Urquhart & Sullivan, LLP) · Friday, March 8th, 2019

United States Code Section 1782 has become the weapon of choice for international litigants seeking discovery in aid of foreign proceedings. Section 1782 allows an "interested person" (such as a foreign litigant) 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. In a prior Kluwer Arbitration Blog post, I reviewed a decision of the U.S. District Court of the Southern District of New York ("SDNY") that granted an application for Section 1782 discovery for use in a foreign arbitration governed by the London Maritime Arbitration Association ("LMAA").

While the Second Circuit has not weighed on this issue post-*Intel (the leading Supreme Court case on Section 1782)*, a recent decision from the SDNY provides some additional insight on how New York federal courts interpret the statute, particularly in light of Second Circuit precedent ("*NBC*") holding that Section 1782 does not apply to proceedings before private arbitral panels—until now one of only two circuit court decisions addressing the issue. That precedent was called into question by a passage in *Intel* that parenthetically quoted a law review article authored by Professor Hans Smit—one of the principal advisers to Congress on the drafting of Section 1782—that included arbitration proceedings in an illustrative list of "tribunals."[1)]

In *Children's Investment Fund*, the SDNY declined to follow *NBC* by holding that an arbitration governed by the London Court of International Arbitration ("LCIA") rules fall within the purview of Section 1782. The applicants were investors in a group of Mauritius private equity funds that were formed to invest in real estate in India. Disputes eventually arose relating to the management of the funds, and the applicants initiated a series of actions in Mauritius, India, and an LCIA arbitration in the United Kingdom. The applicants subsequently filed a Section 1782 application seeking discovery over certain individuals and entities in the United States for use in those foreign proceedings, including the LCIA arbitration.

In considering the threshold issue of whether an LCIA tribunal qualifies as a "foreign or international tribunal" under Section 1782, the SDNY noted that "the question of whether a private, foreign arbitration panel satisfies the 'for use' requirement of § 1782 is unsettled in th[e] [Second] Circuit." While the Court explicitly acknowledged *NBC*, it went on to note that "five years after *NBC*…. the Supreme Court cited an article by Professor Hans Smit including the text, 'the term 'tribunal' includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative

courts."

In noting that the Second Circuit has not considered whether a private arbitration tribunal satisfies the "for use" requirement since *Intel*, the SDNY sided with the U.S. District Court of the Northern District of Georgia, which held that *NBC* no longer applies since *Intel*. The Court consequently found that

"a private arbitration tribunal is a 'proceeding in a foreign or international tribunal' for the purposes of § 1782; therefore, the LCIA satisfies this statutory requirement."

The decision is significant for foreign litigants who wish to use Section 1782 to obtain evidence from persons that "reside" or are "found" in New York for use in a foreign private arbitration. It departs from the "shadow" of *NBC* and falls more heavily within the gravitational pull of the "weight of *Intel*" and the district court decisions citing *Intel* for the proposition that Section 1782 authorizes discovery for use in private arbitral proceedings. While other SDNY decisions have also recently gone the other way, perhaps the time is ripe for the Second Circuit to finally weigh in on the issue.

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References

?1 *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004); citing Smit, International Litigation under the United States Code, 65 Colum. L.Rev. 1015, 1026–1027, and nn. 71, 73 (1965)

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