Kluwer Arbitration Blog

Section 1782 Discovery: Recent Decisions Highlight Splits in the Second Circuit

Julia Sherman (Three Crowns LLP) · Wednesday, July 10th, 2019 · Three Crowns LLP

The use of 28 U.S.C. Section 1782 to obtain through U.S. courts evidence in support of foreign proceedings is at its zenith. But a number of questions regarding the scope of the statute are still open. As recent decisions from the United States Federal Court for the Southern District of New York (***SDNY***) demonstrate, considerable uncertainty remains regarding (a) the post-*Intel* meaning of "foreign or international tribunals" under Section 1782, (b) the extraterritorial reach of the statute, and (c) the impact of applicant delay on a district court's exercise of its discretionary power to grant discovery. The time may be ripe for the Second Circuit Court of Appeals (***Second Circuit***) to weigh in on the post-*Intel* scope of Section 1782 discovery.

For Use in a Foreign or International Tribunal

First, recent SDNY decisions indicate that the question of whether private arbitrations constitute a "foreign or international tribunal" for purposes of Section 1782 discovery appears no closer to being resolved in the Second Circuit. The ambiguity is twofold. In the first place, there is the pressing question of whether the Second Circuit's pre-*Intel* decision on this issue in *NBC v. Bear Stearns*, which held that Section 1782 discovery cannot be provided for use in private arbitrations, is still controlling in light of the Supreme Court's reference to "arbitral tribunals" in *Intel*. But even in a world where *NBC* is good law, uncertainty exists regarding which arbitral institutions should properly be considered "private" arbitral bodies in 2019.

As discussed in a prior post on the subject published on the Kluwer Arbitration Blog, in Children's Investment Fund Foundation, Judge Broderick of the SDNY held in January 2019 that a tribunal formed under the rules of the London Court of International Arbitration (***LCIA***) is a "foreign or international tribunal" for Section 1782 purposes. In so holding, Judge Broderick declined to follow NBC's finding that a commercial arbitration administered by a tribunal acting under the rules of the International Chamber of Commerce (***ICC***) does not fall within the scope of Section 1782, and looked instead to the dictum in *Intel* from Professor Hans Smit that "the term 'tribunal' includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts".

Judge Broderick's opinion is consistent with Judge Marrero's 2016 decision in *Kleimar*, the SDNY's only previous post-*Intel* decision on the private arbitration question. In *Kleimar*, Judge

Marrero notably held that the London Maritime Arbitration Association is a "foreign tribunal" for Section 1782 purposes, implicitly determining that NBC was not controlling post-*Intel*.

However, any notion that the case law in the SDNY was settling following *Kleimar* and *Children's Investment Fund Foundation* was dispelled with Judge Furman's decision in February 2019 in *Hanwei Guo*, which held that an arbitration before the China International Economic and Trade Arbitration Commission (***CIETAC***) *does not* satisfy the "for use" requirement of Section 1782. There, Judge Furman summarily rejected the notion that the dictum in *Intel* overturned *NBC*. Expressly dismissing the approaches taken by his colleagues, he stated that *NBC* was still good law, and thus was binding upon the district court until overturned by the Second Circuit or Supreme Court.

Applying *NBC* to the application at hand, Judge Furman assessed the degree to which CIETAC could be said to be "an arbitral body established by private parties." Reviewing CIETAC's history, he acknowledged that it presented a closer question than the ICC proceedings did in *NBC*, as CIETAC "was originally established by an entity of the Chinese government". However, in his view, today's CIETAC was "closer to a private arbitral body" than a governmental or intergovernmental tribunal. Accordingly, under *NBC*, the CIETAC proceedings were outside the scope of Section 1782.

Hanwei Guo indicates that the scope of the "for use" requirement in the Second Circuit post-*Intel* is still far from clear. Further, it highlights two key questions for the Second Circuit: first, whether *NBC* is still good law; and second, if it is good law, which proceedings should be considered "private" arbitrations. If CIETAC was a close question for the court, one wonders how a commercial arbitration administered by the Permanent Court of Arbitration, established by states during the Hague Peace Conferences, might be viewed under *NBC*.

While the Second Circuit has yet to weigh in on these issues (and noting also that uncertainty exists within and across other Circuits on this question), the stark split in the SDNY illustrated by these cases suggests that the issue may shortly be before it. Both the unsuccessful respondents in *Children's Investment Fund Foundation* and the unsuccessful petitioner in *Hanwei Guo* have since filed notices of appeal. Accordingly, the Second Circuit may soon provide answers to at least some of these questions.

Extraterritorial Application of Section 1782

Another split exists within the Second Circuit, and indeed even within the SDNY, regarding whether Section 1782 can be applied extraterritorially to obtain discovery of documents located outside of the United States. At least four decisions in the SDNY have held that the statute has no extraterritorial application, while two SDNY decisions and a decision of the District of Connecticut have held in favor of extraterritoriality. In the February 2019 opinion in *Hulley*, an SDNY magistrate judge added further color to the debate, finding in favor of extraterritoriality while noting this uncertainty.

In the *Hulley* application, former Yukos shareholders sought documents from White & Case LLP in relation to Dutch court proceedings arising from the *Yukos* Arbitration. White & Case, for its part, contended that the bulk of the documents sought—if they exist at all—are likely overseas, and likely privileged.

Considering the extraterritoriality question at the outset, the SDNY magistrate judge acknowledged the split within the Circuit. The opinion also observed that dicta from the Second Circuit's pre-*Intel* decision in *Sarrio* suggested that its view was that Section 1782 could not reach documents abroad, while the Second Circuit's 2018 decision in *Kiobel* assumed (without holding) the same.

In the *Hulley* magistrate judge's view, however, the more persuasive reasoning was that expressed by the Eleventh Circuit in its 2016 decision in *Sergeeva v. Tripleton*. There, the Eleventh Circuit noted that the Federal Rules of Civil Procedure authorize extraterritorial document production where those documents are within the custody or control of the party before the U.S. court, and that applying this rule in the Section 1782 setting would be consistent with the Supreme Court's 2016 decision in *Nabisco* on the extraterritorial reach of RICO. Accordingly, the magistrate judge held in *Hulley* that Section 1782 can compel production of documents located outside of the United States in accordance with the Federal Rules of Civil Procedure.

The opinion in *Hulley* is consistent with (among others) the June 2018 SDNY opinion in *Accent Delight*, which similarly relied on the Eleventh Circuit's reasoning. At the same time, as noted above, several other decisions in the SDNY have also come out the other way. The unsuccessful petitioners in *Hulley* are currently seeking to overturn the magistrate judge's opinion, and thus attention will need to be paid to the district court judge's forthcoming decision on the application.

Nevertheless, the *Hulley* opinion reveals how this area of the Section 1782 jurisprudence is also far from settled and suggests that the extraterritorial reach of discovery under the statute may be another question ripe for the Second Circuit's docket.

Delay in Pursuing Section 1782 Discovery

In addition to the issue of extraterritoriality, the February 2019 *Hulley* opinion is notable for its discussion of applicant delay in pursuing Section 1782 discovery.

In considering the discretionary *Intel* factors, the *Hulley* court concluded that the first three factors (participant in the foreign proceeding; nature and receptivity of the foreign tribunal; and circumvention of foreign proof-gathering restrictions) generally weighed in favor of the production of certain unprivileged documents by White & Case. Yet the magistrate judge ultimately denied the application due to applicant's delay of almost six years in seeking the documents—a consideration that the judge felt did not fit neatly into any of the *Intel* factors—combined with a finding under the fourth *Intel* factor that the request was unduly intrusive/burdensome.

The consideration of the applicant's delay in seeking Section 1782 discovery is not entirely novel. The Second Circuit has indicated that an "inexcusably untimely" request would not be consistent with the statute's "twin aims" of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts", and district courts in other circuits have raised questions regarding the timeliness of requests in their general consideration of the discretionary *Intel* factors.

However, the *Hulley* opinion advances this area of Section 1782 jurisprudence by explicitly identifying delay as a distinct element from the four *Intel* factors for courts to consider when exercising their discretionary power under the statute. Whether other courts will build on this discussion and establish delay as a separate discretionary factor to be assessed when reviewing

applications for Section 1782 discovery remains to be seen.

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