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# Applying 28 USC § 1782 In The 2nd Circ.

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Law360, New York (January 23, 2017, 11:40 AM EST) -- A federal court in New York recently opened the door there for U.S.-style discovery of evidence in aid of foreign or international commercial arbitrations, in accordance with a unique American statute — 28 United States Code § 1782.

When 28 U.S.C. § 1782 was enacted in 1948 (and amended slightly in 1949), it was intended to set an example for international judicial cooperation in a world where international trade was recovering from the effects of World War II and the United States was the dominant exporter in many areas. With this statute, the United States made available its federal courts for discovery in aid of foreign judicial proceedings. And unlike virtually all provisions elsewhere for cross-border judicial cooperation, there was no reciprocity requirement in this statute. The U.S. courts were made available for document and deposition discovery in the U.S., insofar as provided in the statute, notwithstanding that a requesting party might be a citizen or domiciliary of a country, or might be litigating in a country, that did not offer the same to U.S. citizens or domiciliaries. The U.S. hoped to inspire other countries to be as generous and cooperative. (That quest appears to be, at best, a work in progress.)

In 1964, Section 1782 was amended to provide that that U.S. judicial assistance would be made available *in connection with* "a proceeding in a foreign or international tribunal," rather than in connection with "any judicial proceeding pending in any court in a foreign country," as the statute originally read. Subsection "a" of the statute now provides in pertinent part that

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal … . The order may be made … upon the application of any interested person … . To the extent the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with Federal Rules of Civil Procedure."

Since 1964, one of the nagging questions concerning the scope of 28 U.S.C. § 1782 has been whether it applies to tribunals other than national courts; for example, does it apply also to arbitral panels that are constituted in foreign or international commercial arbitrations?

According to Professor Hans Smit of Columbia Law School, one of the draftsmen of the 1964

amendment, that was the intent. That is, the definition of "foreign tribunals" was intended to include foreign private arbitration panels. H. Smit, International Litigation Under the United States Code, 65 Colum. L. Rev. 1026-1027 (1965). (The revisions that Congress enacted in 1964 had been "prepared by the Columbia Law School Project on International Procedure, of which [Prof. Smit] was the Director, and the U.S. Commission and Advisory Committee on International Rules of Judicial Procedure, to which [Prof. Smit] functioned as the Reporter." H. Smit, American Assistance to Litigation to Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com., at 1, 5 (1998).)

More recently, the United States Supreme Court referred to Professor Smit's law review statement and the 1964 legislative amendment in dictum in Intel Corp. v. Advanced Micro Devices, 542 U.S. 241 (2004). In Justice Ruth Bader Ginsburg's majority opinion, she cited Prof. Smit's assertion that the term "tribunal" includes "arbitral tribunal." Intel, 542 U.S. at 258.

> "Congress understood [the 1964 amendment] to 'provid[e]' the possibility of U.S. judicial assistance *in connection with* [administrative and quasi-judicial proceedings abroad]." S. Rep. No. 1580, at 7-8; see Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015 at 1026-1027, nn. 71, 73 ("[t]he term 'tribunal' … includes … arbitral *tribunals*, …")."

The dictum by the Supreme Court might reasonably have been expected to guide subsequent decisions by the lower courts generally, but instead there is great inconsistency in the federal district courts (the Circuit Courts of Appeal have not addressed the question squarely since Intel) on the question of whether judicial assistance under 28 U.S.C. § 1782 may (or must) be provided, where the statute's criteria are satisfied, to parties in a foreign or international commercial arbitration.
In the Second Circuit (covering New York, Connecticut and Vermont), the leading authority has been the pre-Intel decision in National Broadcasting Corp. v. Bear Stearns & Co., 165 F.3d 184, 191 (2d. Cir. 1999), which held against it based on reasoning that seemed more reflective of the pre-1964 statutory language.

More recently, however, in February 2008, the Committee on International Commercial Disputes of the influential Bar Association of the City of New York, chaired by Prof. Smit's son, issued a report that concluded that "the better position — based on the plain meaning of the statute, the Supreme Court's decision in Intel, the legislative history and policy considerations — is that Section 1782 discovery should be available in private, international arbitration seated outside the United States." 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Arbitration — Applicability and Best Practices, The Committee on International Commercial Disputes (Feb. 29, 2008), at 44.

And now decisive change is apparently afoot in the Second Circuit courts, as reflected in the recent door-opening decision by District Court Judge Victor Marrero in In re Ex Parte Application of Kleimar NV (S.D.N.Y. Nov. 16, 2016). There, the court held that the London Maritime Arbitration Association ("LMAA") — a private arbitration administrator akin to ICC, LCIA, AAA, ICDR, etc. in that respect — is "a foreign tribunal" within 28 U.S.C. § 1782.

Kleimar and defendant Dalian Dongzhan Group Co. Ltd. were engaged in several arbitrations before the LMAA. In October 2016, Kleimar applied ex parte to the U.S. District Court for the Southern District of New York (including Manhattan) for discovery vis-à-vis third-party Vale, which application was granted by Judge Richard Sullivan. Vale then moved (a) to vacate the ex parte discovery order and (b) to quash a subpoena duces tecum that Kleimar served on Vale. Judge Marrero denied both motions. He first pointed out that Vale did not have standing to challenge the

ex parte discovery order. He then denied Vale's motion to quash, observing that the Second Circuit Court of Appeal had not addressed the focal issue post-Intel, but that several other courts had found (post-Intel) that a private commercial arbitral tribunal is a "foreign tribunal" for these purposes.

The opening of the door to American-style discovery in New York (and Connecticut) in aid of foreign commercial arbitrations presents extraordinary opportunities there for interested parties, including litigants in arbitrations outside the United States. In addition to the applicability of the statute in question even in the absence of reciprocity, a few other features of this mechanism are worth noting here. (We will explore the mechanics of seeking discovery in the U.S. *on the basis of* 28 U.S.C. § 1782 in some detail in another posting.) First, there is no requirement that the evidence sought in the U.S. be "discoverable" in the non-U.S. tribunal. Second, a foreign interested party, including a litigant, does not have to exhaust all available remedies in the place of the arbitration before seeking discovery under Section 1782. And third, ex parte applications for such discovery in the U.S. are routine, and federal district courts seem untroubled by proceeding without prior notice to adverse parties or other interested persons.

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