World Arbitration & Mediation Report

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HIGHLIGHTS

The **White & Case Arbitration Practice Group** provides an account of recent changes in **Chinese arbitration law.** The Supreme People's Court, in its **2006 Interpretation**, has clarified certain aspects of PRC arbitration law. The 2006 Interpretation applies to arbitration generally and does not distinguish, for the most part, between domestic arbitrations and foreign-related and foreign arbitrations. Generally, the interpretation requires the parties to clearly state their intent to arbitrate and the scope of their reference. They must also designate an administering Arbitral institution. (Story begins on page 392.)

Jane Wessel and **Peter J. Eyre** of Crowell & Moring (London and Washington, D.C.) describe the significance of the recent ruling in *Oxus Gold PLC*. There, a federal district court in New Jersey held that an investment arbitral tribunal could have recourse to **28 U.S.C. § 11782** as a **"tribunal" to judicial assistance** in aid of **discovery**. The ruling appears to conflict with prior cases, although the court accommodate the difference with precedent by distinguishing between private commercial arbitration and investment arbitration. The authors conclude: "[T]here is no reason to believe that the United States legislature intended to limit the availability of section 1782 discovery to certain types of arbitration. This is especially so where investment arbitration of the type involved in *Oxus Gold*…did not yet exist at the time of the enactment of section 1782…There is no principled reason why the **term 'tribunal'** should be… inapplicable to private commercial arbitration." (The *Commentary* piece begins on page 397.)

Lawrence W. Newman and **David Zaslowsky** of the **Baker & McKenzie** law firm write about the effect of **manifest disregard of the law** on **international arbitration.** They conclude that recent case law indicates that that ground for judicial supervision might lead to the merits review of international arbitral awards by U.S. courts. (The *Commentary* piece begins on page 397.)

The **National Arbitration Forum (NAF)** Case Summaries cover the most recent developments in U.S. arbitration law, including the use of *Kaplan*, *kompetenz-kompetenz*, class action waivers, federal preemption, mutuality of the obligation to arbitrate, internet arbitration agreements, nonsignatories and arbitration, manifest disregard of the law, and venue. (The **NAF** *Case Summaries* begin at 384.)

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Patten filed a motion in the district court to vacate the determination in the arbitration award that the claims under the 1998 agreement were time-barred. The district court denied the motion to vacate. Patten appealed and the Fourth Circuit reversed. The court explained that "[u]nder our precedent, a manifest disregard of the law is established only where the 'arbitrator[ ] understand[s] and correctly state[s] the law, but proceed[s] to disregard the same" and that "[a]n arbitration award fails to draw its essence from the agreement only when the result is not 'rationally inferable from the contract.'"

The Fourth Circuit held that the arbitrator "acted in manifest disregard of the law and failed to draw his award from the essence of the agreement" by disregarding the "plain and unambiguous language of the governing arbitration agreement." The court found that it was unreasonable for the arbitrator to have failed to follow the terms of that agreement, including the parties' choice to omit a limitations term.

One could argue that this decision was simply the court's substituting its view of the law for that of the arbitrator. Indeed, this was essentially the view of the dissenting opinion, which found that that Patten had not met the standard of showing that "the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision."

In sum, it is a detriment to the U.S. legal system if there is a perception outside the United States that U.S. courts scrutinize the merits of international arbitration awards (other than for violation of public policy). Is the perception justified? For years, the "manifest disregard" standard was not applied to international arbitration awards. Now, however, it is being applied to at least some. And, if the Fourth Circuit's decision is an indication of where the standard is moving, perhaps we are on the road to moving reality closer to the perception.

Endnotes

+ This article originally appeared in the *New York Law Journal* on July 31, 2006 and in Volume 5, Issue 6 of the Baker & McKenzie *International Litigation and Arbitration Newsletter*.

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1. 346 U.S. 427 (1953).
2. *Id.* at 346.
3. Kurke v. Oscar Gruss & Son, Inc., 2006 U.S. App. LEXIS 17980 (7th Cir. 2006); MX, Inc. v. Zotec Solutions, Inc., 163 Fed. Appx. 466 (8th Cir. 2006) (not reported); Wallace v. Buttar, 378 F.3d 182 (2nd Cir. 2004).
4. 87 F.3d 844 (6th Cir. 1996).
5. International Standard Electric Corp v. Bridas Sociedad Anonima Petorlera, Industrial Y Commercial, 746 F.Supp. 172, 181 (S.D.N.Y 1990).
6. *Yusuf Ahmed Alghanim & Sons v. Toys R Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).
7. *Jacada (Europe), Ltd. v. Int'l Marketing Strategies, Inc.*, 401 F.3d 701(6th Cir. 2005).
8. *Lander Co. v. MMP Invs.*, 107 F.3d 476, 478 (7th Cir. 1997).
9. *Toys R Us, supra; Jacada, supra; Deiulemar Compagnia Di Navigazione, S.p.A. v. Transocean Coal Co.*, 2005 AMC 388 (S.D.N.Y. 2004); *Stone & Webster, Inc. v. Triplefine Int'l Corp.*, 118 Fed. Appx. 546 (2d Cir. 2004); *Shanghai Foodstuffs Imp. & Exp. Corp. v. Int'l Chem*, 2004 U.S. Dist. LEXIS 1423 (S.D.N.Y. 2004); *Broome & Wellington v. Levcor Int'l, Inc.*, 2003 U.S. Dist. LEXIS 7585 (S.D.N.Y. 2003); *Spector v. Torenberg*, 852 F. Supp. 201 (S.D.N.Y. 1994).
10. *Id.* at 913.
11. 441 F.3d 905 (11th Cir. 2006).
12. 441 F.3d 230 (4th Cir. 2006). ❑

Commentary

U.S. Discovery in Aid of Non-U.S. Arbitration Proceedings: In re Matter of the Application of Oxus Gold PLC

by **Jane Wessel* & Peter J. Eyre+**

In *In re Matter of the Application of Oxus Gold PLC*, Misc. No. 06-82, 2006 WL 2927615, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006) (slip copy), a federal district court in New Jersey held that an arbitration tribunal convened pursuant to the dispute resolution provisions of a bilateral investment treaty under UNCITRAL Rules is a "tribunal" as that term is used in 28 U.S.C. § 1782, and that broad US discovery is therefore available in aid of such proceedings.

Facts

Oxus Gold, an international mining group based in the U.K., created a joint venture (known as TGMC) with two other entities to develop the Jerooy gold deposit in the Kyrgyz Republic. After initially granting a license to TGMC to develop the gold deposit, the Kyrgyz Republic subsequently terminated that authorization. SIG Overseas Ltd. then contacted the Kyrgyz Republic on behalf of another entity expressing interest in obtaining a license to develop the mine—and following negotiations—SIG's client entered into a joint venture with a Kyrgyz state-owned joint stock company to develop the Jerooy mine.

TGMC filed several court proceedings in Kyrgyzstan stemming from termination of the license and the Republic's decision to enter into a relationship with a new joint venture partner. Additionally, Oxus Gold alleged that the Kyrgyz Republic had violated its bilateral investment treaty with the United Kingdom, and Oxus Gold therefore initiated

investment arbitration proceedings against the Kyrgyz Republic under the UNCITRAL arbitration rules.

Pursuant to 28 U.S.C. § 1782, Oxus Gold filed an application in a New Jersey federal district court to obtain discovery from SIG and its managing director, both of whom Oxus Gold asserted had information relevant to the international arbitration and the court proceedings.

Decision

Section 1782 of Title 28 of the United States Code is intended as a vehicle for obtaining federal court assistance in gathering evidence from domestic entities and persons for use in foreign and international tribunals. Section 1782(a) provides:

> 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 pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . .

There are two basic inquiries associated with a section 1782 application. The first is whether the prerequisites for invoking the district court's assistance have been met. If those prerequisites are satisfied, the court will then consider the extent to which it is appropriate to exercise its discretion to provide discovery assistance.

To fulfill the threshold requirements of section 1782, an applicant must show that the person from whom discovery is sought "resides" (or is found) in the district in which the application is made; that the application is made by an "interested person;" and that the discovery sought is for use in a proceeding in a "foreign or international tribunal."

In finding that the threshold requirements of section 1782 were met in this case, the court held that: (1) SIG and its managing director both resided in the district (New Jersey); (2) the discovery sought by Oxus Gold was for use in the arbitration proceedings bought against the Republic pursuant to UNCITRAL rules; and (3) Oxus Gold was clearly an interested party given that it owned a majority of TGMC—the company that was central to the foreign proceedings.

Deciding that the UNCITRAL arbitration was a "tribunal" within the meaning of section 1782, the federal court relied extensively on *Intel Corp. v. Advanced Micro Devices, Inc*.[1]

In that case, the United States Supreme Court adopted a broad and permissive interpretation of section 1782, and explained that Congress used the word "tribunal" to ensure that assistance is not limited to situations involving foreign or international proceedings before conventional courts, but rather that aid should be extended to other types of proceedings as well. In *Intel* itself, the Court found that the European Commission was a tribunal under section 1782.

The court also referred to *National Broadcasting Co. v. Bear Stearns & Co*., 165 F.3d 184 (2d Cir. 1999), in which the Second Circuit held that Congress intended section 1782 to cover state sponsored adjudicatory bodies, including arbitral tribunals convened under the auspices of a state.[2] However, according to *National Broadcasting*, purely private international arbitration tribunals are not included within the meaning of "tribunal" as that term is used in Section 1782.

The New Jersey district court finessed the issue by drawing a distinction between private commercial arbitration and arbitration pursuant to an investment treaty. The court noted that the international arbitration at issue in *Oxus Gold* was "not the result of contract or agreement between private parties as in *National Broadcasting*," but rather the proceedings had been authorized by the sovereign states of the United Kingdom and the Kyrgyz Republic for the purpose of adjudicating disputes under the bilateral investment treaty. After finding that the threshold requirements of section 1782 had been met (thus overcoming the jurisdictional hurdle), the court required the parties to narrow the scope of the subpoena and exercised its discretion to order SIG and its managing director to comply with the discovery request.

Comment

In light of the Supreme Court's reasoning in *Intel* and the legislative history of section 1782, the court's ruling in *Oxus Gold* that an international arbitration tribunal is a "tribunal" as that term is used in section 1782 should come as no surprise. The term "tribunal" has been used to refer to all those appointed as arbitrators of legal disputes for well over two hundred years, including those appointed in arbitrations.[3] But at present, no U.S. court has permitted section 1782 discovery in aid of proceedings in a private commercial arbitration.

This situation must now be seriously in doubt.[4] As one of the authors of this article suggested recently,[5] there is no reason to believe that the United States legislature intended to limit the availability of section 1782 discovery to certain types of arbitration. This is especially so where investment arbitration of the type involved in *Oxus Gold*—which was held to be within the ambit of section 1782—did not yet exist at the time of the enactment of section 1782 in its present form and so cannot have been within the contemplation of the legislature. International commercial arbitration, on the other hand, was well known at that time.

There is no principled reason why the term "tribunal" should be interpreted in a restrictive manner, making it inapplicable to private commercial arbitration. Such arbitration proceedings are "authorized by sovereign states"—just as was the case with the investment arbitration at issue in *Oxus Gold*—by way of modern arbitration laws. An interpretation of "tribunal" that encompassed all arbitration tribunals would be consistent with universal definitions of that term, and with the permissive approach employed by the Supreme Court in *Intel*. Further rulings on this issue are expected within the coming months.

Endnotes

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+ Peter Eyre is an associate in the Washington, D.C. office of Cromwell & Moring LLP in the International and Government Litigation and Arbitration Group. He can be reached at peyre@crowell.com.

1. A ruling by the Second Circuit Court of Appeals is not binding upon a district court in New Jersey, which lies within the Third Circuit Court of Appeals, but does have considerable 42 U.S. 241 (2004) persuasive value.

2. 42 U.S. 241 (2004).

3. *See, e.g.,* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 17 (London, Strahan, Cadell, and Prince 1787) (10th ed.).

4. The Fifth Circuit followed that holding in *Republic of Kazakhstan v. Biedermann*, 168 F.3d 880 (5th Cir. 1999). Other Circuit Courts of Appeal have yet to address the issue.

5. Jane Wessel, *A Tribunal by any Other Name: US Discovery in Aid of Non-US Arbitration*, 2005 INT'L ARB. L. REV. 139 (2005). ❑

DOCUMENTARY RESOURCES

Documentary Resources

ICANN Domain Name Decision

Mark Paigen v. Research and Design
Claim Number: FA0609000791739

Parties

Complainant is Mark Paigen ("Complainant"), represented by Gary J. Nelson, of Christie, Parker & Hale LLP, PO Box 7068, Pasadena, CA 91109-7068, USA. Respondent is Research and Design ("Respondent"), represented by Daniel R. Greening, of Research and Design, 416 Bee St. Apt. B, Sauslito, CA 94965-2315.

Registrar and Disputed Name

The domain name at issue is **<chaco.com>** (hereinafter the "Domain Name"), registered with **Go Daddy Software, Inc**.

Procedural History

The Complainant submitted a Complaint to the National Arbitration Forum ("NAF") electronically on September 7, 2006; the National Arbitration Forum received a hard copy of the Complaint on September 8, 2006.

On September 8, 2006, Go Daddy Software, Inc. confirmed by e-mail to the National Arbitration Forum that the **<chaco.com>** domain name is registered with Go Daddy Software, Inc. and that the Respondent is the current registrant of the name. Go Daddy Software, Inc. has verified that Respondent is bound by the Go Daddy Software, Inc. registration agreement and has thereby agreed to resolve domain-name disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On September 11, 2006, a Notification of Complaint and Commencement of Administrative Proceeding (the "Commencement Notification"), setting a deadline of October 2, 2006 by which the Respondent could file a Response to the Complaint, was transmitted to Respondent via e-mail, post and fax, to all entities and persons listed on Respondent's registration as technical, administrative and billing contacts, and to postmaster@chaco.com by e-mail.

A timely Response was received and determined to be complete on October 2, 2006.

The NAF received an Additional Submission from Complainant on October 4, 2006 and determined it to be timely and complete pursuant to Supplemental Rule 7. The NAF also received an Additional Submission from Respondent on October 9, 2006 and determined it to be timely and complete in accordance with Supplemental Rule 7.

On October 10, 2006, pursuant to Complainant's request to have the dispute decided by a single-member Panel, the National Arbitration Forum appointed Christopher Gibson as Panelist.

Relief Sought

The Complainant requests that the Domain Name be transferred from the Respondent to Complainant.

Parties' Contentions

A. Complainant

Complainant contends that: (i) Complainant has trademark rights in the word CHACO; (ii) the Domain Name is confusingly similar to the CHACO mark; (iii) Respondent has no right or legitimate interest in the Domain Name; and (iv) Respondent has registered and is using the Domain Name in bad faith. Complainant's arguments are reviewed below.

Rights in CHACO

Complainant is a company specializing in the manufacture and distribution of sandals, and is the owner of a United States trademark registration for CHACO. The Complainant has been using the CHACO trademark in association with sandals since as early as September 1994. The Complainant operates a website at <chacousa.com>.