

RECENT INTERNATIONAL DEVELOPMENTS

PRIVATE, INTERNATIONAL ARBITRATION PANEL QUALIFIES AS § 1782 TRIBUNAL, U.S. COURT HELD

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

On December 19, 2006, the United States District Court for the Northern District of Georgia handed down a judgment that expands the reach of 28 U.S.C. § 1782, a U.S. statute that permits persons who are (or are likely to be) involved in non-U.S. dispute resolution proceedings to seek discovery in the U.S. in aid of those proceedings.

The court held that a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic Chamber in Vienna qualifies as a “tribunal” for purposes of section 1782. In *In re Application of Roz Trading Ltd.*, Case No. 1:06-cv-02305-WSD (N.D. Ga. Dec 19, 2006), the court held that it had authority under section 1782 to enter an order requiring the respondent to disclose relevant documents.

The parties’ dispute arose from an alleged breach of contract between Roz Trading and its joint venture partners, which were doing business in Uzbekistan. After initiating the international arbitration, Roz petitioned the United States District Court for the Northern District of Georgia to order the respondent (The Coca-Cola Company) to produce documents for use in the arbitration proceedings. Respondent argued that the court should follow the Second Circuit’s reasoning in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999), which held that section 1782 applies only to governmental-sponsored bodies, including courts.

Acknowledging that the issue was one of first impression in the Circuit, the court in the Northern District of Georgia relied upon a recent U.S. Supreme Court case, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 214 (2004). In that case, the Court ruled that the Directorate General for

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Competition of the EU Commission qualified as a “tribunal” for purposes of section 1782. The Court reached this conclusion based on (1) the plain meaning of the term “tribunal”; (2) the lack of any indication that Congress intended to limit the term “tribunal” in any way; and (3) a functional analysis of the Directorate.

The District Court in Atlanta then distinguished the influential Second Circuit Court of Appeals holding in *Bear Stearns*, which held that the term “tribunal” as it is used in section 1782 was intended to include only governmental bodies (including courts, other state tribunals, and investigative authorities) acting under the direct authority of a state. Thus, the Second Circuit found that section 1782 discovery was not available to parties to private commercial arbitration proceedings. *Intel*, on the other hand, emphasized the broad scope of the definition of a “tribunal” for purposes of section 1782, including within its ambit foreign or international proceedings or investigations “of a criminal, civil, administrative, or other nature”. Therefore, the Northern District of Georgia reasoned that the Supreme Court’s decision in *Intel* superseded *Bear Stearns*, and the court held that it had the authority under section 1782 to enter an order requiring the respondent to disclose relevant documents. In light of the unusual facts of the case and the respondent’s unique access to the documents at issue, the court exercised its discretion under section 1782 to order the production of documents.

Similarly, in October 2006, the U.S. District Court in New Jersey followed the *Intel* reasoning and held that an arbitration convened under UNCITRAL Rules pursuant to the dispute resolution provisions in a BIT was a “tribunal” under section 1782 in *In re Matter of the Application of Oxus Gold PLC*, Misc. No. 06-82, 2006 WL 2927615 (D.N.J. Oct. 10, 2006). Accordingly, the New Jersey court ordered the respondent to produce documents.

Crowell & Moring LLP represented the successful applicant in *Roz Trading*. The respondent in *Roz Trading*, represented by King & Spalding LLP, has not yet indicated whether it intends to appeal the decision.

CANADA RATIFIES ICSID

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Canada has signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

“By signing the Convention, which has been adopted in 143 other countries, the Government is providing an additional tool to protect Canadian investments overseas,” said The Honourable Peter MacKay,