New York District Court Finds Section 1782 Applicable to Arbitral Tribunals… but What Kind of Arbitral Tribunals?

Happy New Year!

After having spent the last weeks of 2016 reporting on the Belgian aspects of the enforcement proceedings of the *Yukos* awards, I wanted to share some thoughts with you on a recent development that took place on the other side of the Atlantic.

On 16 November 2016, the District Court for the Southern District of New York (the ***S.D.N.Y***), handed down its decision in *In Re Ex Parte Application of Kleimar N.V*. This decision adds up to the relatively large number of federal district court cases which have – following the U.S. Supreme Court's judgment in *Intel v. AMD* – showed a willingness to consider arbitral tribunals to be included within the meaning of 28 U.S.C. Section 1782 (***Section 1782***).

Section 1782 is a U.S. Federal Statute that allows a litigant before a "*foreign or international tribunal*" outside the United States to apply to the U.S. district courts to obtain

discovery against a person or entity residing or found in the district where the application is sought. The questions of whether this federal statute also applies in arbitration proceedings and whether arbitral tribunals fall within the category of "*international tribunal*" within the meaning of Section 1782 remain, however, uncertain.

In the case at hand, *Kleimar N.V.* (***Kleimar***) was a party to a series of arbitration cases before the London Maritime Arbitration Association (***LMAA***) against *Dalian Dongzhan Group Co. Ltd*. In October 2016, Kleimar filed an *ex parte* application to seek discovery over a third party, *Vale S.A.* (***Vale***), in connection with the arbitration cases conducted in London. Kleimar's application was granted and it was allowed to seek discovery of Vale. In response, Vale filed a motion to vacate the discovery order on the grounds (i) that it did not reside in the Southern District of New York; and (ii) that an arbitration tribunal was not a "*foreign tribunal*" under Section 1782.

With respect to the first ground, the S.D.N.Y had no difficulty to find that Vale had significant contacts with New York such that Vale could be considered as residing or being found in New York for the purpose of Section 1782.

As to the second issue, the S.D.N.Y relied on a dictum from the *Intel v. AMD* case (a leading case on the matter where the U.S. Supreme Court found – among other things – that the European Commission constituted a "*foreign tribunal*" under Section 1782) to find that the LMAA arbitration tribunal seated in London also qualified as a "*foreign tribunal*".

The question immediately arises as to how should one read this ruling in light of *National Broadcasting Co. v. Bear Sterns & Co.* (***NBC***) where the Second Circuit (*i.e*. S.D.N.Y's appeal jurisdiction) explicitly found that an ICC arbitration was not a proceeding before a "*foreign or international tribunal*".

Different views and reasoning can be adopted to solve this question.

One radical view is to consider that the U.S. Supreme Court's approach in *Intel v. AMD* (2004), implicitly overruled NBC (1999). On this basis, any kind of arbitral tribunal would be considered a "*foreign or international tribunal*" under Section 1782 and parties to arbitral proceedings would be entitled to apply to U.S. Courts for discovery. As pointed out by the S.D.N.Y, some courts have in the past, already relied on this interpretation.

A second approach is to consider that the U.S. Supreme Court's position in *Intel* was just dictum and therefore NBC is still strong law and prohibits the application of Section 1782 to all kinds of arbitral tribunals. Under this approach, the S.D.N.Y decision at hand contravenes the Second Circuit's ruling.

A third and more consensual approach might reconcile both the S.D.N.Y decision at hand with the position adopted by the Second Circuit by arguing that NBC only applies to ICC arbitration while the decision of the S.D.N.Y at hand only applies to LMAA arbitration.

A narrow reading of the S.D.N.Y decision at hand might allow one to argue that the S.D.N.Y has already paved the way for some justifications under this third consensual approach. Indeed, in its decision, the S.D.N.Y highlighted that it had been "*persuaded by the reasoning of* [several district courts] *that have concluded that the LMAA is a "foreign tribunal" within the domain of Section 1782*". Such interpretation would therefore limit the S.D.N.Y's ruling to LMAA arbitration only.

In my capacity as a foreign lawyer, I have no qualification to argue whether *Intel v. AMD* has overruled NBC or whether this last case still governs the issue. One thing is sure though, I am not a supporter of the consensual approach. In my view, it

makes absolutely no sense to distinguish between *ad hoc* arbitration and arbitration under the auspice of an arbitral organisation, or worse, to sub-distinguish arbitration depending on which institutions govern the arbitral proceedings. Either we assume – in light of *Intel*'s ruling – that NBC is overruled and therefore Section 1782 applies to all kinds of arbitral proceedings or we fully reject this position and find that Section 1782 does not apply to arbitral tribunals at all.

Hopefully, the Second Circuit might have the opportunity to clarify this issue in the future.
