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Expanding Federal Court Participation In Arbitral Discovery

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Commentary

Roz Trading: Expanding Federal Court Participation In Arbitral Discovery

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[Editor's Note: Ms. Sperling and Mr. Suskin are associates in the New York office of Latham & Watkins LLP and members of the firm's International Dispute Resolution Practice. The views expressed in this commentary do not necessarily reflect that of Latham & Watkins LLP or its clients. Replies to this commentary are gratefully received. Copyright 2007 by the authors.]

The recent Northern District of Georgia decision in *In re Roz Trading, Ltd.*, No. 06-cv-02305, 2006 U.S. Dist. LEXIS 91461 (N.D. Ga. Dec. 19, 2006) expands the grounds for federal court involvement in the discovery phase of international arbitrations. Holding that a private foreign arbitral panel is a "tribunal" under 28 U.S.C. § 1782 ("Section 1782"),¹ *Roz Trading* departs from prior Second and Fifth Circuit decisions which excluded private foreign arbitral panels from the reach of Section 1782. Instead, *Roz Trading* follows the Supreme Court's analysis of Section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which broadened the scope of the term "tribunal" consistent with amendments to the statute. If upheld by the Eleventh Circuit, *Roz Trading* will signify a shift in law and in practice: the availability of federal court intervention in discovery disputes may benefit parties to international arbitrations, but greater judicial involvement may also result in increased pre-trial cost and delay.

Roz Trading, Ltd. ("Roz") applied to the Northern District of Georgia for an order pursuant to Section 1782, compelling the Coca-Cola Company ("Coca-Cola") to produce documents for use in arbitration proceedings before the International Arbitral Centre

of the Austrian Federal Economic Chamber in Vienna (the "Centre"), a private arbitral institution. The arbitration involved a joint venture agreement between Roz, the Coca-Cola Export Company (a subsidiary of Coca-Cola) and the government of Uzbekistan.

The key legal issue in *Roz Trading* was whether a private arbitral panel, such as the Centre, constituted a "tribunal" for the purposes of Section 1782. *Roz Trading*, 2006 U.S. Dist. LEXIS 91461, at *5. Coca-Cola argued that the court should follow the precedent established by *Nat'l Broadcasting Co. Inc. v. Bear Stearns & Co. Inc.*, 165 F.3d 184 (2d. Cir. 1999) and *Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880 (5th Cir. 1999), which limited the term "tribunal" to "governmental or intergovernmental arbitral tribunal[s] and conventional courts and other state-sponsored adjudicatory bodies." *Nat'l Broadcasting*, 165 F.3d at 190; accord *Biedermann*, 168 F.3d at 881-82. In arriving at this conclusion, both courts found that "tribunal" under Section 1782 was an ambiguous term and the legislative history did not indicate that Congress intended the section to apply to private foreign arbitral panels. *Nat'l Broadcasting*, 165 F.3d at 188-91; *Biedermann*, 168 F.3d at 881-83.

Departing from the reasoning set forth in *Nat'l Broadcasting* and *Biedermann*, *Roz Trading* based its holding on the Supreme Court's analysis of Section 1782 in the intervening *Intel* case. Although *Intel* did not directly address whether private arbitral panels fell under Section 1782, it did analyze the meaning of "tribunal" in connection with a discovery demand in foreign proceedings before the Directorate-General

of Competition for the Commission of the European Communities (the "Commission"). The Supreme Court found that the Commission qualified as a tribunal under Section 1782(a) because it was a "first-instance decisionmaker" that would issue a ruling "both responsive to the complaint and reviewable in court." *Intel*, 542 U.S. at 247, 255. Applying the Supreme Court's reasoning, *Roz Trading* held that the "Centre's arbitral panels are similarly 'first-instance decisionmaker[s]' that issue decisions 'both responsive to the complaint and reviewable in court,'" and therefore "[t]he Centre, when examined under the same functional lens with which the Supreme Court in *Intel* examined the [Commission], must necessarily be considered a 'tribunal' under § 1782(a)." *Roz Trading*, 2006 U.S. Dist. LEXIS 91461, at *9.

The statutory construction of Section 1782 articulated by *Roz Trading* follows that set forth in *Intel*.² *Intel* highlighted the significance of Congress's 1964 amendments to Section 1782, in particular the replacement of the term "in any judicial proceeding pending in any court in a foreign country" with "in a proceeding in a foreign or international tribunal." *Intel*, 542 U.S. at 248-49. Borrowing heavily from *Intel*, the statutory analysis in *Roz Trading* offers sound construction of Section 1782: not only is the word "tribunal" plain on its face under common legal parlance, the legislative history of the provision makes clear that Congress wished to broaden its scope under the 1964 amendment. *Roz Trading*, 2006 U.S. Dist. LEXIS 91461, at *9-14.

Interestingly, both the *Nat'l Broadcasting* and *Biedermann* opinions seem motivated as much by the precise construction of the term "tribunal" under Section 1782 as the practical ramifications that expanding that term might cause. For example, *Nat'l Broadcasting* cautioned that, *inter alia*, extension of Section 1782 discovery to private international arbitration would eliminate the discovery limitations codified in § 7 of the Federal Arbitration Act that were intended to make arbitration efficient and cost-effective. *Nat'l Broadcasting*, 165 F.3d at 191. *Biedermann* opined in dicta that "arbitration's principal advantages may be destroyed if the parties succumb to fighting over

burdensome discovery requests far from the place of arbitration." *Biedermann*, 168 F.3d at 883. *Biedermann* raised the additional point that one of the greatest benefits of international arbitration is the parties' ability to contract for substantive and procedural discovery rules in advance and "[r]esort to § 1782 in the teeth of such agreements suggests a party's attempt to manipulate the United States court processes for tactical advantage." *Id.*

It remains to be seen whether any of these concerns will be borne out in practice. *Roz Trading* may introduce potentially significant changes in discovery practice in international arbitration proceedings conducted abroad. While the use of U.S. federal courts as an additional means to obtain discovery creates a valuable new resource for parties in private arbitral proceedings, resort to the federal courts may also increase the scope for secondary litigation in national courts. Now the Eleventh Circuit must decide whether Section 1782, with its likely implications for the practice of international arbitration, applies to private arbitral proceedings abroad.

Endnotes

1. Section 1782(a) provides that "[t]he 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, including criminal investigations conducted before formal accusation."
2. Although not cited in the *Roz Trading* decision, the holding is consistent with the recent District of New Jersey case, *In re Oxus Gold PLC*, Misc. 06-92, 2006 U.S. Dist. LEXIS 74118 (D.N.J. Oct. 10, 2006), in which the district court granted discovery under Section 1782 in an investor-state dispute under UNCITRAL rules. ■

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