Labor Conciliation Proceeding is Not a Tribunal for the Purposes of 28 U.S.C. §1782

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The U.S. District Court for the Eastern District of Virginia recently ruled that Section 1782 disclosure is unavailable to assist parties to foreign conciliation proceedings. In *In re Nat'l Syndicate*, 2014 U.S. Dist. LEXIS 4796, the court denied the application of a Cameroonian labor union pursuant to 28 U.S.C. § 1782 to obtain documents from the U.S. parent of a local electric utility. The documents were sought for use in conciliation of a decade-long dispute related to bonuses and ownership of the local utility.

Cameroonian law requires parties to engage in mandatory conciliation before an inspector appointed by the Labor Ministry. The conciliator attempts to bring parties to settlement and then issues a report confirming whether they have reached an agreement. If no agreement is reached, the parties may proceed with arbitration before a panel established by a Cameroonian court.

Relying on the U.S. Supreme Court's decision in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004) and *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 995 (11th Cir. 2012), the court ruled that in order for Section 1782 to apply, foreign tribunal must be a first-instance decision-maker. The court found that the Cameroonian conciliator did not satisfy that requirement because he does not issue a decision on the merits that is subject to judicial review. Rather, the conciliator is supposed to encourage an amicable settlement, similar to a mediator, who is committed to being and remaining neutral and non-judgmental. I*n re Nat'l Syndicate* appears to be a case of first impression holding that conciliation is not a tribunal for purposes of Section 1782.

Previously, the U.S. District Court for the Southern District of New York in *Smoothline Ltd. v. North Am. Foreign Trading Corp.*, 2000 U.S. Dist. LEXIS 10225 (S.D.N.Y. 2000) granted Section 1782 discovery application in aid of mediation proceedings. In *Smoothline*, mediation was a prerequisite to the initiation of a lawsuit in a Liechtenstein court. The court avoided tackling the issue of whether mediation is a tribunal for purposes of Section 1782 directly. Instead, the court ruled that mediation signifies that the adjudicative proceedings are "imminent" and therefore could serve as the basis for Section 1782 discovery. Although after *Intel*, Section 1782 does not require that the foreign proceeding be pending or imminent, the approach taken by *Smoothline* should apply under a more liberal "reasonably contemplated" standard established by the Supreme Court.

Notably, just four days before the I*n re Nat'l Syndicate* decision was issued, the 11th Circuit Court of Appeals, after an unusual one-and-a-half-year hiatus vacated *sua sponte* its previous holding in *In re Consorcio Ecuatoriano*. In the original 2012 decision, the court ruled that international arbitration falls within the purview of Section 1782. In the reissued January 2014 decision, however, the court chose to avoid deciding this issue, holding instead that discovery could proceed in aid of certain Ecuadorian ancillary court proceedings which the court found to be reasonably contemplated.

The issue of whether an international arbitration panel is a "tribunal" within the meaning of Section 1782 has long been a subject of controversy and disagreement among the circuits. The reissued *In re Consorcio Ecuatoriano* decision arguably opens the possibility to avoid posing that question before the court focusing instead on foreign court proceedings which could be reasonably contemplated, for example, injunctions or other collateral litigations.

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