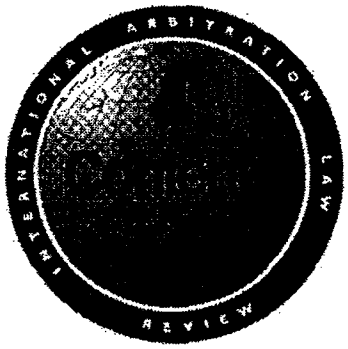


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## NORTH AMERICA



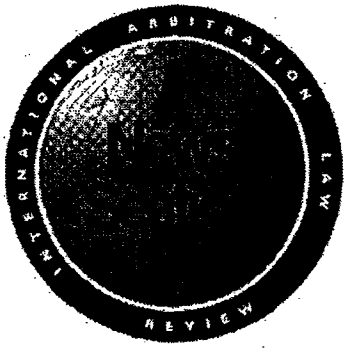
## EUROPE



## ASIA



## AUSTRALASIA




# NORTH AMERICA

## IN RE MATTER OF THE APPLICATION OF OXUS GOLD PLC; IN RE APPLICATION OF ROZ TRADING LTD

### *US Discovery in aid of non-US arbitration proceedings*

*Arbitral tribunals; International commercial arbitration; Jurisdiction; United States*

*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).*

*In re Application of Roz Trading Ltd., Case No.1:06-cv-02305-WSD 2006 WL 3741078 (N.D.Ga. Dec. 19, 2006).*

**Summary**
Two federal district court judgments have held that arbitration tribunals qualify as "tribunals" as that term is used in 28 U.S.C. s.1782 and that broad US discovery is therefore available in aid of such proceedings. In the first, the 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 s.1782 tribunal. The second case concerned institutional arbitration proceedings in a purely private dispute.

**The issue**
28 U.S.C. s.1782 is a US statutory provision that permits persons who are (or are likely to be) involved in non-US dispute resolution proceedings to seek discovery in the United States in aid of those proceedings. In 1999, the influential Second Circuit Court of Appeals held in *National Broadcasting Co Inc v Bear Stearns & Co, Inc*[1] that the term "tribunal" as it is used in s.1782 was intended to include only governmental bodies (including courts, other state tribunals, and investigative authorities) acting under the direct authority of a state, and that s.1782 discovery was not, therefore, available to parties to private commercial arbitration proceedings. The Fifth Circuit Court of Appeals adopted the same analysis in *Republic of Kazakhstan v Beidermann Int'l.*[2]

In 2004, the US Supreme Court ruled that the Directorate General for Competition of the EU Commission qualified as a s.1782 tribunal.[3] 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 General as the initial decision-maker, subject to court review and appeal. The court's approach suggested that the rulings by the Second and Fifth Circuits and the view that arbitration tribunals did not qualify as s.1782 tribunals might be open to significant doubt.[4] These two recent judgments analyse this issue in detail in light of *Intel*.

**Oxus Gold**
*Facts*
Oxus Gold, an international mining group based in the United Kingdom, 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 licence to TGMC to develop the gold deposit, the Kyrgyz Republic subsequently terminated that authorisation. SIG Overseas Ltd then contacted the Kyrgyz Republic on behalf of another entity expressing interest in obtaining a licence 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.

[1] 165 F.3d 184 (2d Cir. 1999).

[2] 168 F.3d 880 (5th Cir. 1999).

[3] *Intel Corp v Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

[4] One of the authors has written a number of articles on s.1782, including most recently an article in this publication taking the position that the approach taken by the Supreme Court in *Intel* required a fresh look at the status of private arbitration tribunals under s.1782. Jane Wessel, "A Tribunal by Any Other Name: US Discovery in Aid of Non-US Arbitration" [2005] Int.A.L.R. 139.

TGMC filed several court proceedings in Kyrgyzstan stemming from termination of the licence 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. s.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 that

> "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 s.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 for it to exercise its discretion to provide discovery assistance.

To fulfil the threshold requirements of s.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 s.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.

In deciding that the UNCITRAL arbitration was a "tribunal" within the meaning of s.1782, the federal court relied extensively on *Intel*. In that case, the US Supreme Court adopted a broad and permissive interpretation of s.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 s.1782.

The court also referred to *National Broadcasting*, in which the Second Circuit held that Congress intended s.1782 to cover state-sponsored adjudicatory bodies, including arbitral tribunals convened under the auspices of a state.[5] However, according to *National Broadcasting*, purely private international arbitration tribunals are not included within the meaning of "tribunal" as that term is used in s.1782.

The New Jersey district court finessed the issue by drawing a distinction between private commercial arbitration and arbitration pursuant to an

[5] 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 persuasive value.

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 authorised 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 s.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.

**Roz Trading**

*Facts*

Roz Trading was involved in a joint venture with the Coca-Cola Export Company (CCEC), a subsidiary of the Coca-Cola Company, and the Government of Uzbekistan. In private commercial arbitration proceedings before a tribunal of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna, Roz Trading alleged that CCEC breached the contract with Roz Trading, and that the Government of Uzbekistan had violently seized its interest in the joint venture. Roz Trading's employees fled Uzbekistan in fear of their lives and in the circumstances they were unable to take any corporate documents with them.

*Decision*

On December 19, 2006, the US district court in Atlanta held that a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic Chamber in Vienna also qualifies as a s.1782 tribunal. The court ruled that the Second Circuit's reasoning in *National Broadcasting* has been undermined by the Supreme Court's *Intel* ruling, which emphasised the broad scope of the definition of a s.1782 tribunal, including within its ambit foreign or international proceedings or investigations "of a criminal, civil, administrative, or other nature". The Atlanta court therefore held that it has the authority under s.1782 to make an order requiring the respondent to disclose relevant documents.

**Comment**

In light of the Supreme Court's reasoning in *Intel* and the legislative history of s.1782, the ruling in *Oxus Gold* and *Roz Trading* that an international arbitration tribunal is a "tribunal" as that term is used in s.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 200 years, including those appointed in arbitrations.[6] Prior to *Intel* and these two decisions, the Second Circuit's judgment in *National Broadcasting* had operated as an effective road block to the use of s.1782 in support of arbitration proceedings.[7]

That situation may now have changed, although this will not finally be settled until the Supreme Court has ruled upon the issue. Discovery under s.1782 is consistent with s.3(8) of the IBA Rules on the Taking of Evidence in International Arbitration. However, where the evidence that is sought under s.1782 is to be found within the jurisdiction of either the Second or Fifth Circuit Courts of Appeal, it may be difficult to make a successful application until those courts reverse their 1999 judgments.

[6] See, e.g. William Blackstone, *Commentaries on the Laws of England* (10th edn, Strahan, Cadell and Prince, London, 1787), p.17.

[7] Both *Oxus Gold* and *Roz Trading* are now under appeal.

[8] The authors' firm, led by Stuart Newberger in Washington D.C., acted for the successful applicant in *Roz Trading*.

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