Client Alert

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Continuing a Circuit Split, Second Circuit Reaffirms Section 1782 Discovery Not Available in Private Commercial Arbitration

What Happened: The United States Court of Appeals for the Second Circuit held that an investor could not seek 28 USC § 1782 ("Section 1782") discovery in the United States from four investment banks for use in the investor's private commercial arbitration in China.

Bottom Line: While Section 1782 can be used to provide assistance to the "broad panoply of unilateral, multilateral, international, and novel administrative bodies," it does not "sweep so broadly as to include private commercial arbitration." In so holding, the Second Circuit continues to align with the Fifth Circuit's reading of the statute, but conflicts with that of the Fourth, Sixth, and Eleventh Circuits, which have held that the meaning of the word "tribunal" within Section 1782 encompasses private commercial arbitration.

The Full Story

Section 1782 allows participants in foreign legal proceedings to come to the United States and take American-style discovery from people and information sources located in the United States. The grant of discovery under the statute is discretionary. 28 USC § 1782(a) ("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…"). One of the factors a district court must consider in deciding whether to grant Section 1782 discovery assistance is whether the evidence sought will be "for use in a proceeding in a *foreign or international tribunal*." *Id.* (emphasis added). The debate over what "tribunal" means has been the subject of much litigation.

In *In Re: Application and Petition of Hanwei Guo,* 19-781 (2d Cir. 2020), the Second Circuit reaffirmed its prior conclusion that "tribunal" under Section 1782 does not extend to foreign private arbitral bodies. Petitioner Hanwei Guo appealed a decision from the United States District Court for the Southern District of New York that denied his request to obtain Section 1782 discovery from four non-party investment banks in furtherance of his arbitration against several music streaming companies before the China International Economic and Trade Arbitration Commission ("CIETAC"). In affirming the District Court's denial, the Second Circuit rejected Guo's argument that the appeals court's earlier decision in *National Broadcasting Co. v. Bear Stearns* & Co., 165 F.3d 184 (2d Cir. 1999), was no longer applicable in light of the Supreme Court's Section 1782 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).[1] The Second Circuit concluded that "nothing in *Intel* alters" its earlier ruling that "(1) the statutory text, namely the phrase 'foreign or international tribunal,' was ambiguous as to the inclusion of private arbitrations; (2) the legislative and statutory history of the insertion of the phrase 'foreign or international

[1] *Intel* arose from an antitrust action initiated by the Directorate-General for Competition before the European Commission. The petitioner asked a California federal court to order *Intel* to produce documents under Section 1782, which petition the district court denied. The Ninth Circuit then reversed the district court's decision, which reversal was later upheld by the Supreme Court. The Supreme Court concluded that Section 1782 conferred broad discretion on district courts to permit foreign litigants to obtain discovery in the United States.

tribunal' into § 1782(a) demonstrated that the statute did not apply to private arbitration; and (3) a contrary reading would impair the efficient and expeditious conduct of arbitrations."

In finding that "foreign or international tribunal" does not include private commercial arbitration, the Second Circuit's decision remains consistent with the Fifth Circuit's reading of the statute. In *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (a pre-*Intel* case), the Fifth Circuit likewise concluded that Congress drafted Section 1782 to facilitate "discovery for international government-sanctioned tribunals," but that "[t]here is no contemporaneous evidence that Congress contemplated extending [it] to the then-novel arena of international commercial arbitration."

The Second and Fifth Circuit's reading conflicts, however, with the Fourth, Sixth, and Eleventh Circuits, which have held that the meaning of the word "tribunal" under Section 1782 *does* encompass private arbitration. For example, earlier this year, in *Servotronics, Inc. v. Boeing Co*., 954 F.3d 209 (4th Cir. 2020), the Fourth Circuit found that US-based Boeing employees could be ordered to provide testimony in a private arbitration in the United Kingdom arising out of an incident involving a fire in a Boeing 787 Dreamliner's engines manufactured by Rolls Royce. Servotronics filed a Section 1782 application in the United States District Court for the District of South Carolina to obtain evidence for use in its arbitration. In considering whether parties to private arbitrations in the United Kingdom could obtain testimony, the Fourth Circuit noted that Section 1782 "reflects a long-term—over 150-year—policy of Congress to facilitate cooperation with foreign countries by 'provid[ing] federal-court assistance in gathering evidence for use in foreign tribunals.'" *Id*. at *3 (quoting *Intel*, 542 U.S. at 247). Similarly, in *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp*., 939 F.3d 710 (6th Cir. 2019), a dispute arising out of a Saudi company's claims against FedEx Corp. related to a soured delivery services agreement, the Sixth Circuit examined the dictionary definition of "tribunal," as well as the term's legal usage, and held that Section 1782 permits discovery for use in a private international commercial arbitration. In its reasoning, the court noted, "American lawyers and judges have long understood, and still use, the word 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties." The same reasoning was followed eight years ago by the Eleventh Circuit in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc*., 685 F.3d 987 (11th Cir. 2012). There, the Eleventh Circuit found, as a matter of first impression, that an arbitral panel was a "tribunal" under Section 1782, though that decision was later vacated in *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc*., 747 F.3d 1262 (11th Cir. 2014).

At this time, it remains to be seen whether Mr. Guo will appeal the matter further. Rolls Royce, however, announced its intent to petition the Fourth Circuit's *Servotronics* decision for certiorari review with the Supreme Court. Unless the Supreme Court takes up the issue, or Congress amends the statute to define "tribunal," however, it appears the answer to the question of whether a party to a private commercial arbitration abroad can obtain Section 1782 discovery will be contingent on where that petition is filed.

Hunton Andrews Kurth will continue to monitor any developments in these cases, as well as the law surrounding Section 1782 in general. In the meantime, please feel free to contact the attorneys listed below for further information.

Contacts

Gustavo J. Membiela
gmembiela@HuntonAK.com

Elbert Lin
elin@HuntonAK.com

John Jay Range
jrange@HuntonAK.com

Armando Cordoves, Jr.
acordoves@HuntonAK.com