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The Expansion of Discovery in Aid of International Arbitrations Under Section 1782: Recent Decisions Deepen Circuit Split

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In recent months, the US Courts of Appeal for the Second, Fourth and Sixth Circuits have issued a number of important and, at times, conflicting decisions related to the scope of discovery in aid of international arbitration under 28 US Code Section 1782. First, on October 7, 2019, the Second Circuit ruled that there is no bar to the extraterritorial application of Section 1782, meaning a party may obtain discovery of documents located outside of the US. Second, on March 30, 2020, the Fourth Circuit relied on a September 19, 2019, decision of the Sixth Circuit to hold that Section 1782 extends to private commercial arbitrations. Finally, on July 8, 2020, the Second Circuit held that Section 1782 did not apply to private commercial arbitration, cementing an existing split between the circuit courts. Together, these cases have the potential to fundamentally reshape the ways in which discovery is conducted in international arbitration.

What is Section 1782?

Section 1782 permits US district courts to grant discovery in aid of proceedings before "a foreign or international tribunal" at the request of "any interested person," provided that the person from whom discovery is sought "resides" or is "found" within the district of the district court where the application is filed. However, Section 1782 does not define "foreign or international tribunal" or address whether the discovery of documents is limited to evidence located in the US.

The ambiguities of Section 1782 have led to conflicting decisions by the federal courts. Before the 2004 US Supreme Court decision of *Intel v. Advanced Micro Devices,*[1] the few circuit courts that had opined on the issue ruled that Section 1782 did not apply to private arbitration proceedings.[2] Both the Second and Fifth Circuits held in 1999 that Section 1782 did not authorize resort to federal courts to assist with discovery in private international commercial arbitrations and that the term "tribunal" included only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies," such as "foreign administrative tribunal or quasi-judicial agenc[ies]."[3]

In *Intel*,the US Supreme Court held that the Directorate-General for Competition of the EU Commission qualified as a "tribunal" for the purposes of Section 1782 when acting as a first-instance decision maker that renders rulings in antitrust enforcement proceedings subject to judicial review.[4] Although *Intel* did not involve an arbitration, the Supreme Court's reasoning, and its broader interpretation of the term "foreign or international tribunal" set the stage for the current debate, which focuses on two questions: (i) whether Section 1782 can be used to obtain discovery for documents held outside of the US, and (ii) whether Section 1782 applies to private international arbitrations. The recent decisions of the Second, Fourth and Sixth Circuits directly address these two unresolved issues and have the potential to reshape the interpretation of Section 1782.

The Second Circuit confirms extraterritorial discovery for Section 1782 requests

On October 7, 2019, the Second Circuit in *In re Application of Antonio Del Valle Ruiz*[5] affirmed the district court's decision to grant discovery under Section 1782 of documents from a foreign bank's New York-based affiliate. The discovery request arose from the forced sale of Banco Popular to Banco Santander. The petitioners initiated various foreign proceedings challenging the legality of the transaction. In support of these foreign proceedings, the petitioners filed Section 1782 applications seeking discovery from Banco Santander and its New York-based affiliate, Santander Investment Securities, including documents located overseas. The district

court granted the application in part with respect to Santander's New York affiliate, which the court found was within the district, and rejected Santander's argument that Section 1782 does not allow for extraterritorial discovery.[6]

In deciding "whether Section 1782 may be used to reach documents located outside of the United States," the Second Circuit reviewed the Eleventh Circuit's reasoning in *Sergeeva v. Tripleton Int'l Ltd*, a 2016 decision and the first decision by a circuit court examining the availability of extraterritorial discovery under Section 1782.[7] Ultimately, the Second Circuit joined the Eleventh Circuit in holding that Section 1782 does not bar a district court from granting discovery of documents located abroad.

The Second Circuit reasoned that a presumption against extraterritorial application would not apply to Section 1782, which was "strictly jurisdictional," and that the incorporation of the Federal Rules of Civil Procedure, which allow for extraterritorial discovery, into Section 1782 confirmed that no bar existed to the discovery of documents located overseas.[8] Instead, the Second Circuit held that the central inquiry is whether the requested documents "are within the subpoenaed party's possession, custody or control," regardless of their physical location.[9]

The Fourth and Sixth Circuits hold that Section 1782 applies to private arbitral tribunals

On March 30, 2020, the Fourth Circuit held in *Servotronics, Inc. v. Boeing Co.* that a private international commercial arbitral tribunal seated in the UK constitutes a "foreign tribunal" within the meaning of Section 1782.[10] The Fourth Circuit reversed the US District Court for the District of South Carolina's decision, which had relied on the pre-*Intel* decisions of the Second and Fifth Circuits to find that Section 1782 was strictly limited to entities exercising government-conferred authority.[11] Instead, the Fourth Circuit relied on the September 19, 2019, decision of the Sixth Circuit in *In re Abdul Latif Jameel*, which found Section 1782 could be used to seek discovery for use in a private arbitration proceeding seated abroad.[12]

The Fourth Circuit noted that there was no limiting principle in either Section 1782 or *Intel* to suggest that the ordinary meaning of "tribunal" did not apply to private arbitral tribunals. To conclude otherwise, the court reasoned, would represent "too narrow an understanding of arbitration" and would defeat Congress' intent to "increase international cooperation by providing US assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*."[13] Interestingly, the Fourth Circuit emphasized the more limited function and scope of the district court's "assistance to foreign tribunals" under Section 1782, as opposed to wider discovery under the Federal Rules of Civil Procedure. In the Fourth Circuit's view, far from being a process administered by the parties "to obtain all evidence relevant to a claim or defense," each Section 1782 request is administered in the discretion of the district court and is strictly limited to "take statements and receive testimony and documents or other materials intended 'for use' in the proceeding before the [foreign] tribunal."[14]

These decisions created a circuit court split over whether private arbitral tribunals fall within the meaning of "foreign or international tribunal[s]" under Section 1782. In its 2009 decision, *El Paso Corp.*, the Fifth Circuit had reaffirmed its pre-*Intel* position that private arbitral tribunals were not covered,[15] while until very recently the Second Circuit had not had the opportunity to revisit this issue post-*Intel*.

The Second Circuit confirms anew that Section 1782 does not apply to private arbitral tribunals

On July 8, 2020, the circuit split deepened when the Second Circuit expressly confirmed in *In re Application of Hanwei Guo* that its prior decision in *NBC* remains good law post-*Intel*.[16] The Second Circuit affirmed the earlier ruling of the US District Court for the Southern District of New York, which denied Chinese business professional Hanwei Guo's request under Section 1782 for documents in possession of four investment banks for use in China International Economic and Trade Arbitration Commission arbitration seated in China. The arbitration dispute stems from early investments made by Guo in three Chinese music streaming companies.

In disagreeing with the recent decisions of the Fourth and Sixth Circuits, the Second Circuit reasoned that the question of whether a private international tribunal qualifies as a "tribunal" under Section 1782 was not before the Supreme Court in *Intel*. Similarly, the court explained, even if Section 1782's legislative history suggests that Congress intended to expand the applicability of the statute to a "broad panoply of unilateral, multilateral, international, and novel administrative bodies," it does not "sweep so broadly as to include private commercial arbitrations."[17] Finally, the Second Circuit also rejected the argument that a CIETAC arbitration could be considered a "governmental or intergovernmental arbitral tribunal," holding that it was more akin to a private arbitral body than to other state-sponsored adjudicatory bodies.[18]

In re Application of Hanwei Guo has cemented the divide between the Second and Fifth Circuits, on one hand, and the Fourth and Sixth, on the other, as to whether Section 1782 can be used to obtain discovery in aid of foreign commercial arbitration proceedings. Petitions for certiorari are already pending before the Supreme Court, and the issue appears to be ripe for decision.

Looking forward, the Third Circuit may rule on this issue shortly

Another case to follow is *EWE Gasspeicher Gmbh,* currently pending before the Third Circuit. On March 17, 2020, the US District Court for the District of Delaware vacated an ex parteorder granting a German gas storage operator's discovery request under Section 1782, holding that a private arbitration proceeding before a German arbitral institution did not constitute a "tribunal."[19] Acknowledging the circuit court split and that "there are reasonable arguments on both sides," the district court noted that the Third Circuit had yet to address the question. It went on to hold that a private commercial arbitration "is not a 'tribunal' within the meaning of Section 1782" since it is neither a foreign court nor a quasi-judicial agency, as was the case in *Intel*.[20]

The prospect of worldwide discovery in aid of international arbitration

Until recently, Section 1782 had been largely ignored, but the number of recent cases suggests this may be changing. Parties in foreign proceedings are increasingly submitting discovery requests under Section 1782 and have been successful in obtaining evidence for use in these proceedings. Now, following the decisions of the Fourth and Sixth circuits on the availability of discovery in private commercial arbitrations and the Second and Eleventh circuits on the scope of this discovery, the number of Section 1782 actions is poised to increase.

Recent cases such as the ChevronLago Agrio litigation saga demonstrate what a potent tool Section 1782 can be. In that case, Chevron was able to succeed on a denial of justice claim and to obtain an interim arbitral award ordering Ecuador to suspend the enforcement of an $18 billion judgment against Chevron due, in large part, to the evidence obtained with dozens of Section 1782 applications. This evidence was mostly obtained from third parties to the arbitral proceedings and would have been impossible to procure by means of traditional discovery procedures in international arbitration.

Running throughout these cases is the question of whether Congress intended to grant parties in international arbitrations seated outside the US wider powers to seek discovery than parties in arbitrations seated in the US enjoy. According to the Fourth Circuit, this outcome "is the result of Congress' purposeful decision to authorize US district courts to provide assistance to foreign tribunals as a matter of public policy."[21]

Ultimately, until the Supreme Court takes up the question, the issue of whether parties can obtain discovery in aid of private commercial arbitrations is far from settled. Until then, parties to international arbitration agreements should consider the risks and opportunities that Section 1782 creates. For parties who desire to reduce the risk, the answer lies in careful arbitration clause drafting to limit discovery and addressing the issue at the start of proceedings, when ground rules for the conduct of the arbitration can be established.

Notes

1. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004).
2. At the same time, both pre and post-*Intel*, federal courts have uniformly considered Section 1782 requests

in aid of treaty-based investor-state tribunals because these arbitration proceedings are established by bilateral or multilateral treaties with states: see, for instance, *In re Application of Chevron Corporation*, 709 F.Supp.2d 283, at 291 (SDNY 2010) and *In re Matter of Application of Oxus Gold PLC*, 2006 WL 2927615 (DNJ 2006).

3. *National Broadcasting Co., Inc. ("NBC")., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, at 189-190 (2nd Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, at 883 (5th Cir. 1999).
4. *Intel Corp.*, at 246-247, 255.
5. *In re del Valle Ruiz*, 939 F.3d 520 (2nd Cir. 2019).
6. *Id.*, at 533.
7. *Id.*, at 524, 533; *Sergeeva v. Tripleton Int'l Ltd.,* 834 F.3d 1194 (11th Cir. 2016).
8. *In re del Valle Ruiz.,* at 532.
9. *Id.*, at 533.
10. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).
11. *Biedermann*, at 883; *NBC*, at 191.
12. *In re Application to Obtain Discovery for Use in Foreign Proceedings, Abdul Latif Jameel Transportation, Ltd. v. FedEx Corporation*, 939 F.3d 710 (6th Cir. 2019).
13. *Servotronics*, at 213.
14. *Id.*, at 215.
15. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed.Appx. 31 (5th Cir. 2009).
16. *In re Application of Hanwei Guo*, 19-781 (2nd Cir. 2020).
17. *Id.*, at 24-25.
18. *Id.*, at 23.
19. *In re EWE Gasspeicher GmbH*, 2020 WL 1272612 (D. Del. 2020).
20. *Id.*, at 2.
21. *Servotronics*, at 215.

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