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Second Circuit Rules in *Hanwei Guo* that Section 1782 Does Not Apply to Private Commercial Arbitrations

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In July 2020, the United States Court of Appeals for the Second Circuit held that 28 U.S.C. § 1782 does not apply to private commercial arbitrations seated outside of the US, barring US discovery in aid of foreign private arbitrations pursuant to Section 1782 in New York and other states within the Second Circuit. This decision solidifies a split between the US Court of Appeals for the Second and Fifth Circuits, which both prohibit Section 1782 discovery in aid of foreign private arbitrations, and the Fourth and Sixth Circuits, which both permit Section 1782 discovery in aid of foreign private arbitrations. Now it is up to the US Supreme Court to resolve whether or not Section 1782 applies to foreign seated private arbitrations.

Introduction

28 U.S.C. § 1782 is a US federal statute pursuant to which parties to a proceeding before a 'foreign or international tribunal' can apply to a federal court to seek discovery from persons found in that US court's district. The meaning of the phrase 'foreign or international tribunal' in Section 1782 has been debated for decades; specifically, whether it encompasses foreign private arbitral tribunals.

In July 2020, more than 20 years after first having addressed that issue, the US Court of Appeals for the Second Circuit in *Hanwei Guo* reaffirmed that private arbitrations do not fall within the scope of Section 1782, thereby solidifying a split on this issue among the federal courts of appeal. Ultimately, the US Supreme Court will have to resolve the meaning of Section 1782 with respect to foreign-seated private arbitrations.

Courts' prior interpretation of Section 1782

Prior to *Hanwei Guo*, the Second and Fifth Circuits had held that private arbitrations do not fall within Section 1782.

In *National Broadcasting Co. v. Bear Stearns & Co.*[1] ('*NBC*'), the Second Circuit[2] concluded that an arbitral tribunal constituted pursuant to the ICC arbitration rules did not constitute a 'foreign or international tribunal' under Section 1782. A party to the ICC arbitration sought discovery from non-party financial institutions in New York. The Second Circuit found that the term 'foreign or international tribunal' in Section 1782 was ambiguous and did 'not necessarily include or exclude the arbitral panel at issue here.'[3] The court considered the legislative history of the statute and concluded that 'based upon an analysis of the text and legislative history of § 1782, ... Congress did not intend for that statute to apply to an arbitral body established by private parties'[4] and to interpret Section 1782 otherwise would undermine the objective of private arbitrations to provide efficient, cost-effective dispute resolution.

Later that same year, in *Republic of Kazakhstan v. Biedermann International*[5] ('*Biedermann*'), the Fifth Circuit[6] applied similar reasoning, holding that Section 1782 does not apply to an international arbitration conducted under the arbitration rules of the Stockholm Chamber of Commerce

* The author wishes to thank Veronica Dunlop, her former student on the Brooklyn Law School Vis Moot team, for her contributions to this article.

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

2 The Second Circuit is the federal appellate court with jurisdiction over federal courts in New York, Connecticut and Vermont.

3 *NBC*, 165 F.3d at 188.

4 *NBC*, 165 F.3d at 190.

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

6 The Fifth Circuit is the federal appellate court with jurisdiction over federal courts in Texas, Louisiana and Mississippi.

The Second and Fifth Circuits concluded that the term 'tribunal' in Section 1782 encompasses only governmental or intergovernmental arbitral tribunals, conventional courts and other state-sponsored adjudicatory bodies.[7]

Subsequently, the US Supreme Court had occasion to interpret 'foreign or international tribunal' in *Intel Corp. v. Advanced Micro Devices, Inc.*[8] ('*Intel*'). In that case, the US Supreme Court concluded that Section 1782 applied to a proceeding before the Directorate General for Competition (DGC), the competition division of the European Commission. The Supreme Court reasoned that the DGC was acting functionally as a first instance decisionmaker and its decision would lead to a dispositive ruling, Section 1782 was designed to aid foreign courts and quasi-judicial agencies, and the legislative history of Section 1782 evidenced an intent to permit discovery for foreign administrative and quasi-judicial proceedings. The Supreme Court did not consider whether private arbitrations fall within the scope of Section 1782.

After *Intel*, the Sixth Circuit[9] held that Section 1782 applies to private arbitrations. In *In re Application to Obtain Discovery for Use in Foreign Proceedings*,[10] the Sixth Circuit rejected the Second Circuit's pre-*Intel* analysis and found that Section 1782 applies to private commercial arbitrations in a case involving an arbitration in Dubai under the arbitration rules of the DIFC-LCIA. The Sixth Circuit reasoned based on the language of Section 1782 that 'the statute's terms do not require that … a "foreign tribunal" be a governmental entity of a country that has prescribed such procedures'.[11]

Similarly, *the Fourth Circuit*[12] held that Section 1782 covers private international arbitrations. *Servotronics, Inc. v. Boeing Co.*[13] (finding with respect to an arbitration pursuant to the arbitration rules of the Chartered Institute of Arbitrators that Section 1782 extends to private arbitrations in the UK conducted under the English Arbitration Act, reasoning that arbitrations conducted under English Arbitration Act are the 'product of government-conferred authority' thus falling within the scope of Section 1782).

Yet also after *Intel*, the Fifth Circuit[14] followed its earlier holding in *Biedermann*[15] and reaffirmed that Section 1782 does not encompass private international arbitrations. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica de Rio Lempa*[16] (declining to apply Section 1782 to a private arbitration in Switzerland and following its pre-*Intel* precedent that a 'tribunal' within the meaning of Section 1782 did not include private international arbitrations).

In *Hanwei Guo*, the Second Circuit reaffirmed its earlier holding in *NBC* that private arbitrations do not fall within Section 1782

In *Hanwei Guo*, the Second Circuit reaffirmed its prior holding in *NBC*[17] that private arbitrations do not fall within Section 1782. *In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782.*[18] A party to a CIETAC arbitration sought discovery pursuant to Section 1782 from investment banks in New York. The federal district court denied the request, finding that it was bound by the Second Circuit's prior holding in *NBC* that private arbitrations fall outside the scope of an 'international or foreign tribunal'.

On appeal, the Second Circuit was asked to reconsider its holding in *NBC* in light of the Supreme Court's decision in *Intel*. Specifically, the Second Circuit was asked to address: (1) whether private arbitrations fall within Section 1782, and (2) if not, whether CIETAC arbitrations are state-sponsored adjudicatory bodies (such as the DGC in *Intel*) and therefore subject to Section 1782. In affirming the district court's decision, the Second Circuit found that: (1) the *Intel* decision did not alter its holding in *NBC* that Section 1782 does not encompass private international commercial arbitrations, and (2) a CIETAC arbitration is a private arbitration as opposed to a state-sponsored adjudicatory body.

7 *NBC*, F.3d at 190; *Biedermann*, 168 F.3d at 882.

8 542 U.S. 241 (2004).

9 The Sixth Circuit is the federal appellate court with jurisdiction over federal courts in Kentucky, Michigan, Ohio, and Tennessee.

10 939 F.3d 710 (6th Cir. 2019).

11 *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 723.

12 The Fourth Circuit is the federal appellate court with jurisdiction over federal courts in Maryland, North Carolina, Souh Carolina, Virgina and West Virginia.

13 954 F.3d 209, 210 (4th Cir. 2020).

14 The Fifth Circuit is the federal appellate court with jurisdiction over federal courts in Texas, Louisiana and Mississippi.

15 168 F.3d 880 (5th Cir. 1999).

16 341 Fed. Appx. 31 (5th Cir. 2009).

17 165 F.3d 184 (2d Cir. 1999).

18 965 F.3d 96 (2d Cir. 2020).

In concluding that Section 1782 does not apply to a private arbitration, the Second Circuit found that *Intel* did not cast 'sufficient doubt' on its prior reasoning or holding in *NBC*. With respect to the definition of 'international or foreign tribunal' discussed in *Intel*, the Second Circuit noted that the Supreme Court did not consider the question of whether a foreign private arbitral body qualifies as a tribunal under Section 1782 and stated '*Intel's* indirect reference to "arbitral tribunal" can thus be read consistently with *NBC* as referring solely to state-sponsored arbitral bodies.'[19]

In concluding that a CIETAC arbitration was a private arbitration, the Second Circuit noted that while CIETAC originally was established by the Chinese government, CIETAC had evolved to provide private dispute resolution that functions independently of the Chinese government, its proceedings are confidential, and CIETAC arbitrators are not required to have any affiliation with the government. The Second Circuit noted that the jurisdiction of a CIETAC arbitral tribunal derives exclusively from the agreement of the parties and the parties select their arbitrators. It further stated that '[b]ecause the provisions of Chinese law relied on by Guo merely control the enforceability of arbitrations in China in almost the same manner and to the same extent as the [Federal Arbitration Act] in the United States, they do not convert CIETAC arbitrations into state-sponsored endeavors.'[20] Accordingly, the Second Circuit found that a CIETAC arbitration is a private arbitration and does not fall within Section 1782.

Hanwei Guo crystallises the US Circuit Court split on whether Section 1782 applies to foreign private arbitrations

The *Hanwei Guo* Second Circuit decision of July 2020 crystallises the Circuit Court split that emerged after *Intel*. The Second and Fifth Circuits have held that private arbitrations do not fall within Section 1782.[21] The Fourth and Sixth Circuits have held the opposite. District courts in other circuits around the US have come to various conclusions with inconsistent interpretations of *Intel*. In *Hanwei Guo*, the Second Circuit considered various arguments that have been articulated after *Intel*, particularly those found persuasive by the Fourth and Sixth Circuits, but declined to depart from its prior reasoning in *NBC*. The issue is now ripe for resolution by the US Supreme Court.

In the meantime, parties to private arbitrations outside of the US may take advantage of the US Circuit Court split and seek evidence in federal district courts within the Fourth and Sixth Circuits that permit Section 1782 discovery in aid of private arbitrations and also in federal courts within other circuits that have not spoken definitively on the issue.

19 *Hanwei Guo*, 965 F.3d at 105.

20 *Hanwei Guo*, 965 F.3d at 108.

21 It should be noted that just as this article on *Hanwei Guo* went to print, the Seventh Circuit issued a decision in late September 2020 aligned with the Second and Fifth Circuits, holding that Section 1782 'does not authorize the district court to compel discovery for use in a private foreign arbitration'. *Servotronics, Inc. v. Rolls-Royce PLC*, — F.3d—, Case No 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).