U.S. Discovery in Aid of Foreign Arbitration – An Evolving Issue and Split of Authority

The United States has a statute which provides a very helpful and powerful tool for parties seeking testimony or documents from individuals or entities located in the United States in aid of a foreign dispute. Specifically, 28 U.S.C. § 1782 provides that a U.S. district court may, on the request of an applicant, provide assistance in connection with a proceeding before "a foreign or international tribunal" by ordering a person in its district "to give his testimony or statement or to produce a document or other thing for use in [the] proceeding." *Id*.

I. *Intel* and the Reach of § 1782

There has long been a lingering question among U.S. Courts and lawyers as to whether a private foreign arbitration proceeding qualified as a "*tribunal*." However, that specific inquiry has never been squarely before the United States Supreme Court to interpret the statute (which has been in its current form since approximately 1964). In a 2004 decision, and the only Supreme Court case to address §1782, the Supreme Court stated that the tribunal definition in the statute was "unbounded by categorical rules" and quoted from a 1965 law review article by Professor Hans Smit which stated that the legislative history of the statute intended to include "arbitral tribunals." *Intel Corp. v. Adv. Micro Devices, Inc*., 542 U.S. 241 (2004).[1] The statute 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*., 542 U.S. at 247. Since *Intel*, federal courts have debated whether the reference expanded the statute's application or was merely *dicta*.

[1] "[T]he term 'tribunal' … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts". *Id*. Professor Smit had participated in drafting the 1964 amendment. *See* https://www.law.columbia.edu/news/archive/hans-smit-58-towering-figure-international-arbitration-dies-84.

A. Two Circuits in Favor of Applicability to Private Arbitrations

Since that decision, there have been four (4) U.S. Circuit Court of Appeals opinions which have used the tools of statutory construction and legislative history of § 1782 to attempt to clarify whether District Courts have the authority to order discovery in aid of a foreign private arbitration. The Court decisions have split two/two.[2] Both the Sixth Circuit Court of Appeals and the Fourth Circuit Court of Appeals have ruled that the original legislative intent of the statute stands for the proposition that private arbitrations are to be included in the phrase "foreign tribunal." *See, e.g.*, *In Servotronics, Inc. v. Boeing Co*. 954 F.3d 209 (4th Cir. 2020) (citing *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (6th Cir. 2019)). An interpretation which those Courts found was supported by the Supreme Court's ruling in *Intel Corp.*, but which was not actually relied upon by either Court.

The Sixth Circuit focused its attention on giving the word "Tribunal" its ordinary and plain meaning as part of traditional statutory construction analysis. The Court ruled that:

> "[O]ur analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999) (citations and internal quotation marks omitted). Here, the text, context, and structure of § 1782(a) provide no reason to doubt that the word "tribunal" includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties. Therefore, we need look no further to hold that the DIFC-LCIA Arbitration panel is a "foreign or international tribunal" and reverse the district court's judgment.

[2] The Eleventh Circuit Court of Appeals had ruled in favor of application of §1782 in aid of a foreign private arbitration before *sua sponte* vacating and narrowing the reach of the decision by finding that contemplative civil or criminal cases in Ecuador would satisfy the statutory requirements without answering the question related to private foreign arbitration. *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc*., 685 F.3d 987 (11th Cir. 2012), *vacated and replaced Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. Jan 10, 2014)

939 F.3d 710, 723. The Court further held that, where (as here), the textual analysis of the statute could resolve the issue, other Circuits have erred by jumping ahead to 'legislative history' to attempt to resolve an issue which is not there. *Id*., at 727-28, rejecting the Second Circuit and Fifth Circuit decisions and analysis. *See* Point B, *infra*.

The Fourth Circuit ruled that tribunal clearly encompassed private arbitrations and that the historic basis for the statute supported the exercise by the district court to permit discovery in aid of such arbitrations. The Fourth Circuit highlighted that even though the arbitration proceeding before the Chartered Institute of Arbitrators was private, under the UK Arbitration Act of 1996, the arbitration was subject to governmental regulation and oversight, and therefore qualified as a "foreign tribunal" for purposes of § 1782. The Court reasoned that in serving the role given under § 1782(a), a district court functions effectively as a surrogate for a foreign tribunal by taking testimony and statements for use in the foreign proceeding. *Servotronics, Inc.*, 954 F.3d, 215. "When viewed in this light, the district court functions no differently than does the foreign arbitral panel or, indeed, an American arbitral panel." *Id*. (citations omitted).

B. Second and Fifth Circuits Reject the Expansive Application of §1782

The Fifth Circuit Court of Appeals and Second Circuit Court of Appeals have both held that *Intel* does not extend the right of discovery under § 1782 to private arbitrations. *See, El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009) (affirming *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999)). The Second Circuit recently issued a decision re-affirming its prior precedent that § 1782(a) does not extend to foreign private arbitration and criticizing the results of the Fourth and Sixth Circuits. *In re: Application and Petition of Hanwei Guo,* 965 F.3d 96, 2020 U.S. App.

LEXIS 21219 (2d Cir. July 8, 2020) (citing with approval *NBC, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999)).

In *Hanwei Guo*, the petitioner was seeking discovery from four (4) investment banks in aid of an arbitration pending before the China International Economic and Trade Arbitration Commission ("CIETAC"). The Second Circuit held that not only did the Supreme Court's decision in *Intel* not overturn (or even address) the question of whether the statute extended to private arbitration, but the *dicta* in the Supreme Court case is not actually at odds with the Second Circuit's holding that the § 1782 does not include private arbitrations. In support of this argument, the Second Circuit held:

> "Professor Smit's reference to "arbitral tribunals" does not necessarily encompass private tribunals, particularly in light of his view, expressed in a 1962 article cited in *NBC*, that "an international tribunal owes both its existence and its powers to an international agreement." Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 Colum. L. Rev. 1264, 1267 (1962); *see also NBC*, 165 F.3d at 189. *Intel*'s indirect reference to "arbitral tribunals" can thus be read consistently with *NBC* as referring solely to state-sponsored arbitral bodies."

Id., at *15-16. The Second Circuit ruled that neither Professor Smit's article nor the reference to same in *Intel* cast any doubt upon the analysis in *NBC* that the legislative intent of Congress in drafting § 1782(a) did not intend to include private commercial arbitration.

The Court further held that CIETAC was a private commercial arbitration and not a state sponsored tribunal. The Second Circuit ruled that the inquiry does not turn on the origins of the administrative entity, or even a single fact or factor, but requires the Court to assess whether the body in question "possesses the functional attributes most commonly associated with private arbitration." *Id*., at *19. Ruling that CIETAC operates much like any other private commercial arbitration with minimal involvement by the Chinese government, therefore § 1782 discovery was not available. Unlike the Fourth Circuit Court of Appeals decision in *Servotronics*, the Second

Circuit ruled that mere governmental oversight and regulation of the arbitral body was insufficient to find that the arbitration was a state-sponsored arbitral body. *Id.*

C. Seventh Circuit Ruling Aligns with the Second and Fifth Circuits

On September 22, 2020, the United States Court of Appeals for the Seventh Circuit joined with the Second and Fifth Circuit holding that §1782 does not authorize a district court to compel discovery private foreign arbitrations. *Servotronics, Inc. v. Rolls-Royce PLC*, No. 19-1847, 2020 U.S. App. LEXIS 30333, at *2 (7th Cir. 2020). The case involved the same parties from the Fourth Circuit case. Servotronics filed an *ex parte* application in the United States District Court for the Northern District of Illinois requesting that the court issue a subpoena to compel discovery from Boeing in aid of the pending London arbitration proceeding. *Id*. Rolls-Royce intervened in the civil action and moved to quash the subpoena and argued (once again) that §1782 does not permit discovery in private arbitrations. *Id*. Boeing also intervened and joined in the motion. *Id*. The district court granted the motion to quash and Servotronics appealed the decision of the district court. *Id*.

The Seventh Circuit agreed with the holding from the Second and Fifth Circuits, but interestingly utilized and relied upon the Sixth Circuit's "plain and ordinary meaning of the word" analysis to end up with a different result. The Seventh Circuit started by stating since the statute does not define "tribunal," the traditional definition and dictionary interpretation should be used. Under such a plain meaning analysis, the meaning of "tribunal" means a "a court." *Id*. at *8. Second, the Seventh Circuit analyzed the meaning of "tribunal" as proposed by the Commission on International Rules of Judicial Procedure. The Court ruled that "foreign or international tribunal" means a "governmental, administrative, or quasi-governmental tribunal operating

pursuant to the foreign country's practice and procedure." *Id*. at *12. Private foreign arbitrations, in other words, are not included. *Id*.

Finally, the Seventh Circuit found that a narrow reading of "tribunal" which holds that it does not apply to private foreign arbitration avoids conflict with the Federal Arbitration Act ("FAA"). *Id*. at *12-13. The discovery assistance authorized by § 1782 is already broader than that afforded by the FAA. *Id*. at *13. The FAA permits the arbitration panel to summon witnesses to testify and produce documents. *Id*. at *13. In contrast, § 1782 permits foreign tribunals and litigants to obtain discovery orders from district courts. *Id*. The Seventh Circuit concluded that the text of § 1782 strongly suggests that a "foreign or international tribunal . . . is a state-sponsored, public, or quasi-governmental tribunal" and that it does not apply to foreign private arbitration. *Id*. at *14.

II. The Next Question – What Satisfies "State-Sponsored" Recognition?

Apart from the legislative intent question surrounding the word "*tribunal*," the other open issue is which types of foreign arbitral bodies may potentially qualify as a state-sponsored and regulated tribunal to permit §1782 discovery as occurred in the *Servotronics* case. For example, could arbitrations occurring before the Indian Council of Arbitration, which was established in 1965 by the Government of India and is overseen in conjunction with the Federation of Indian Chambers of Commerce & Industry qualify for 1782 discovery? Or the more recently established Emirates Maritime Arbitration Centre, which was established by the Dubai Maritime City Authority and Government of Dubai in 2016? More to the point, how different really is the organization, function, and governmental oversight of the U.K. based Chartered Institute of Arbitrators and CIETAC?

Whether such institutions meet the standard to qualify as a state-sponsored arbitral tribunal, despite their private and commercial dispute resolution function, must be addressed by U.S. Courts

on a country by country (and likely tribunal by tribunal) basis. As the above cases make clear, the answer to the question may turn on the location of the Court where the cases are commenced and how broadly a court views the "oversight" powers of the governmental authority regulating the private arbitration. Said another way, will federal district courts have to undertake a factual evidentiary hearing in each and every §1782 proceeding to determine if the arbitral body meets the requirements of "state-sponsored" recognition, such that the Court can then side-step the more troubling question of whether a private arbitration is covered by the word "tribunal."

III. Cases In Progress through the Courts

Similar cases are currently pending before the Third Circuit Court of Appeals and Ninth Circuit Court of Appeals, all of which will be guided by, but not bound, by the decisions from the other Circuit Courts of Appeals. It is unlikely that there will be true clarity on these evolving issues until the U.S. Supreme Court weighs in and resolves the split between the Circuits.