Navigating U.S. Discovery in Foreign Commercial Arbitration Proceedings

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Parties in international arbitration proceedings are increasingly turning to American courts for subpoenas to import facts from the United States. As 28 U.S.C. § 1782 authorizes federal courts to order testimony or produce documents only in aid of proceedings before a "foreign or international tribunal," courts disagree about the applicability of section 1782 beyond proceedings in or under the auspices of foreign courts. Until the Supreme Court settles the issue, parties to international arbitrations should expect jurisdiction-by-jurisdiction disputes about their ability to employ subpoenas to facilitate the resolution of their claims.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court recognized the broad discretion of federal courts to allow international litigants to conduct discovery in the United States, subject to relevancy and proportionality considerations. Although the case did not directly resolve the scope of section 1782, the Court applied the statute to a proceeding before a nonjudicial entity suggesting that "foreign tribunal[s]" include conventional arbitral courts, thereby approving section 1782 discovery in a nonjudicial proceeding.

Before the *Intel* decision, the Second and Fifth Circuits concluded that privately constituted tribunals overseeing international commercial arbitrations lie outside section 1782. In *National Broadcasting Co. v. Bear Stearns & Co.* (*NBC*), 165 F.3d 184, 190 (2d Cir. 1999), the Second Circuit ruled the phrase "foreign or international tribunal," as used in section 1782, was ambiguous and interpreted the legislative history of section 1782 as evidencing a congressional intent "to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." The Second Circuit reasoned that allowing section 1782 discovery in international arbitration would conflict "with the efficiency and cost-effectiveness of arbitration." *Id.* at 190–91. The Fifth Circuit similarly ruled that section 1782 did not apply to private commercial arbitration in *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, 883 (5th Cir. 1999), noting: "Empowering arbitrators, or worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution." *See also El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x. 31, 33–34 (5th Cir. 2009) (reaching same conclusion, after *Intel*).

The Sixth and Fourth Circuits recently reached a contrary conclusion. In *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 730–31 (6th Cir. 2019), the Sixth Circuit ruled that section 1782 permits discovery for use in private commercial arbitrations, concluding: "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 Sixth Circuit also relied on the fact that *Intel* approved section 1782 discovery in a nonjudicial proceeding to support a broad definition of "tribunal." Dismissing the efficiency arguments of the Second and Fifth Circuits, the Sixth Circuit characterized the statutory requirements as a bare minimum threshold and noted the "substantial discretion" of the district courts "to shape discovery under § 1782(a)" if discovery requests pose a threat of undue burden. In *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020), the Fourth Circuit similarly held that parties to a private arbitral proceeding in the United Kingdom could obtain discovery via section 1782. *See also, e.g., HRC-Hainan Holding Co., LLC v. Hu*, No. 19-MC-80277, 2020 WL 906719, at *4 (N.D. Cal. Feb. 25, 2020) (adopting reasoning and conclusion of *Abdul Latif Jameel Transp. Co. Ltd.*), *appeal docketed*, No. 20-15371 (9th Cir.).

The fracture among the federal courts has reached inside the Second Circuit. As part of *In re Children's Investment Fund Foundation (UK)*, 363 F. Supp. 3d 361, 368–69 (S.D.N.Y. Jan. 30, 2019), one Southern District of New York jurist declined to follow *NBC*. As part of a decision now pending before the Second Circuit, a different jurist felt bound by *NBC*. *In re Application of Hanwei Guo*, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019), *appeal docketed*, No. 19-781 (2d Cir.); *see also In re Application of Servotronics*, No. 1:18-cv-07187 (N.D. Ill. Apr. 2019), Dkt. ECF No. 44 (granting section 1782 application), *on appeal*, *Servotronics, Inc. v. Rolls-Royce PLC* (Boeing as intervenors), No. 19-1847 (7th Cir.).

Unless and until the Supreme Court resolves the deepening split among the federal courts, applicants seeking discovery for use in international proceedings should carefully consider the governing case law of the court from which they seek relief to ensure that the "foreign tribunal" requirement does not pose a serious impediment to discovery and the search for the truth. LN