

Circuit Split Intensifies Over Use of 28 U.S.C. § 1782 to Obtain Discovery For Use in Private International Arbitration

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On July 8, 2020, the Second Circuit intensified a recent burgeoning circuit split on whether 28 U.S.C. § 1782 may be used to obtain evidence in support of private international arbitration outside the United States. In particular, it adhered to its 1999 decision in *National Broadcasting Co. v. Bear Stearns & Co.* (“NBC”)¹, that a private arbitration was not a “tribunal” within the meaning of § 1782.²

In its recent ruling, the Second Circuit rejected arguments that a 2004 Supreme Court decision overruled or altered its *NBC* decision that § 1782 permits discovery only to support international or foreign governmental or intergovernmental arbitral tribunals, conventional courts, and other state-sponsored bodies.³

The Second Circuit acknowledged that two other circuits have rejected the *NBC* analysis, but felt bound to adhere to its own precedent, thus making the issue ripe for Supreme Court resolution.

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¹ 165 F.3d 184 (2d Cir. 1999).

² See *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*, —F.3d—, No. 19-781, 2020 WL 3816098, at *1 (2d Cir. July 9, 2020).

³ See *id.* at *1; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

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Background

28 U.S.C. § 1782 authorizes federal courts to compel the production of documents and witness testimony under the Federal Rules of Civil Procedure from any person or entity who “resides” or may be “found” in the judicial district “for use in a proceeding in a foreign or international tribunal.”⁴

In *NBC*, over 20 years ago, the Second Circuit held that a private international commercial arbitration administered by the International Chamber of Commerce was not “a proceeding in a foreign or international tribunal” within the meaning of § 1782.⁵ Finding that the undefined statutory term “tribunal” was ambiguous, the court turned to legislative history and policy, which it found demonstrated that § 1782 discovery was intended for use only before state-sponsored adjudicatory bodies, not private arbitrations.⁶ According to the Second Circuit, a contrary reading would impair the “asserted efficiency and cost-effectiveness” of arbitration.⁷

The Fifth Circuit, in a decision shortly after *NBC*, agreed, holding that § 1782 was ambiguous, and legislative history and policy supported a finding that private arbitral tribunals were outside the scope of § 1782.⁸ Therefore, the Fifth Circuit held, a district court did not have discretion to order discovery under § 1782 related to a proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce.⁹

The Supreme Court’s only decision on § 1782 came five years later. In *Intel*, AMD, a semi-conductor company that had filed an antitrust complaint before the European competition authorities, sought discovery

from Intel Corp. in California for use in that European investigation.¹⁰ The Supreme Court found, in pertinent part, that the Directorate-General for Competition, which is the arm of the European Commission that conducts antitrust investigations and whose decisions are reviewed by the Court of First Instance and then by the European Court of Justice, was a “tribunal” under § 1782.¹¹

Since *Intel*, some circuits have differed on whether private arbitrations fall within § 1782.

In 2009, the Fifth Circuit reaffirmed its previous holding that private international arbitrations do not fall within the scope of § 1782,¹² while two circuits considering the question for the first time, the Sixth and Fourth Circuits, reached opposite conclusions in 2019 and 2020, respectively.¹³

Both the Sixth and Fourth Circuits based their holdings on statutory readings of § 1782, disagreeing with the Second and Fifth Circuit that the text of the statute was ambiguous.¹⁴ Instead, both Courts found, a plain-language interpretation of the text mandated a conclusion that private arbitral tribunals were “tribunals” within the meaning of the statute.¹⁵

The Second Circuit had a chance to revisit the issue in *Hanwei Guo*, and ultimately found that its precedent in *NBC* remained controlling.

The *Hanwei Guo* Case

Hanwei Guo involved an appeal of a denial of a petition pursuant to § 1782 for discovery pertaining to an arbitration before the China International Economic and Trade Arbitration Commission (“CIETAC”).¹⁶

⁴ 28 U.S.C. § 1782.

⁵ *NBC*, 165 F.3d at 185.

⁶ *See id.* at 190.

⁷ *Id.* at 190-91.

⁸ *See Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 883 (5th Cir. 1999).

⁹ *See id.*

¹⁰ *See Intel*, 542 U.S. at 246.

¹¹ *See id.* at 257-58.

¹² *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 33-34 (5th Cir. 2009).

¹³ *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 714 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020).

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See 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*, No. 18-MC-561 (JMF), 2019 WL 917076, at *1 (S.D.N.Y. Feb. 25, 2019), *aff’d sub nom.* No. 19-781, 2020 WL 3816098 (2d Cir. July 9, 2020).

Guo claimed in the arbitration that he had been misled regarding transactions into which he entered related to an IPO of a Chinese company for which the investment bankers had served as underwriters.¹⁷

In affirming the district court, the Court of Appeals rejected Guo's argument that *Intel* overruled *NBC*, finding that the specific question in *NBC*, whether a private arbitral tribunal was a "tribunal" under § 1782, was not an issue considered by the Supreme Court in *Intel*.¹⁸

The Second Circuit also rejected Guo's argument that *Intel's* statutory analysis of § 1782 and the legislative history behind it cast doubt on *NBC*, finding that "*NBC's* thorough analysis" of legislative history and intent "comports with both *Intel's* reiteration of broad principles and its specific analysis of § 1782."¹⁹

In terms of the circuit split on the issue, the Second Circuit opined that while the statutory readings of the Sixth and Fourth Circuit decisions are at odds with *NBC*, neither the Sixth nor Fourth Circuit's rulings "rested on the notion that *Intel* undermined *NBC* or otherwise required a reading of § 1782 that encompass[e] private arbitration."²⁰ Rather, the Second Circuit noted that the Sixth and Fourth Circuits came to their holdings based on their own readings of § 1782, not due to precedent from *Intel*.²¹

Notably, the Second Circuit did not discuss whether it agreed with the Fourth or Sixth Circuit's statutory interpretations. Rather, it referenced these decisions only to support its conclusion that no Circuit has found that *Intel* explicitly overruled *NBC*.

Concluding that it remained bound by *NBC* unless overruled en banc or by the Supreme Court, the Second Circuit, agreeing with the district court that a CIETAC arbitration was properly characterized as a

private international commercial arbitration, affirmed the denial of Guo's petition for non-party discovery.²²

Looking Forward

The Second Circuit's decision affirming its precedent reinforces a 2-2 circuit split. Although neither losing party before the Sixth or Fourth Circuits sought review by the Supreme Court, *Hanwei Guo* may present an attractive vehicle for obtaining a conclusive resolution of the issue.

In the meantime, the circuit split requires parties to international commercial arbitrations to carefully consider their non-party discovery options. In particular, parties to arbitrations seated outside the United States who wish to resort to § 1782 will need to steer clear of courts in the Second and Fifth Circuits and try to find sources of relevant evidence from a non-party that resides or may be found within the Fourth or Sixth Circuits, or hope that they can convince courts elsewhere to follow those circuits' more expansive view of the permissible scope of § 1782. In that regard, they will need to take account of the evolving case law concerning constitutional limitations on what it means to reside or be found in a judicial district.²³

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¹⁷ See *In re Application of Hanwei Guo*, 2020 WL 3816098, at *1. The court decisions do not indicate whether Hanwei Guo obtained the approval of the arbitrators or of CIETAC before filing his § 1782 application in New York, and the Second Circuit's analysis would not have been affected if he had.

¹⁸ See *In re Application of Hanwei Guo*, 2020 WL 3816098, at *5.

¹⁹ *Id.* at *6.

²⁰ *Id.* at *4.

²¹ See *id.*

²² See *id.* at *6-8.

²³ See, e.g., *In re Petrobras Sec. Litig.*, 393 F. Supp. 3d 376, 380 (S.D.N.Y. 2019); *In re del Valle Ruiz*, 939 F.3d 520, 524 (2d. Cir. 2019).