ALERT MEMORANDUM

U.S. District Court Denies Section 1782 Discovery for Use in DIS Arbitration, Highlighting Deepening Circuit Split on Statute's Applicability to Private Commercial Arbitrations

April 3, 2020

On March 17, 2020, the United States District Court for the District of Delaware vacated an order granting a German gas storage operator's application for discovery pursuant to 28 U.S.C. § 1782 ("Section 1782"), holding that the German Arbitration Institute (DIS) arbitration in which the operator sought to use the discovery "is not a 'tribunal' within the meaning of [Section] 1782."[1] In doing so, the District Court sided with the U.S. Courts of Appeals for the Second and Fifth Circuits, both of which have held that Section 1782 does not permit discovery for use in private commercial arbitrations,[2] and diverged from the Sixth Circuit, which has held that it does,[3] and the Fourth Circuit, which agreed with the Sixth Circuit's holding in a more recent case post-dating the District Court's decision.[4]

The District Court's decision highlights the deepening circuit split on this issue, and is instructive for parties applying for Section 1782 discovery in the arbitration context.

This Alert Memorandum provides an overview of Section 1782 discovery, describes the circuit split regarding its applicability to private commercial arbitrations, and summarizes the District Court's decision.

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1 *In re Application of EWE Gasspeicher GmbH*, 19-mc-109-RGA, 2020 WL 1272612, at *3 (D. Del. Mar. 17, 2020).

2 *See National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 190-91 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

3 *See Abdul Latif Jameel Transportation Co. v. FedEx Corp.*, 939 F. 3d 710, 726, 731 (6th Cir. 2019).

4 *See Servotronics, Inc. v. The Boeing Co.*, --- F.3d ---, No. 18-2454, 2020 WL 1501954, at *5 (4th Cir. Mar. 30, 2020).

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Overview of Section 1782

Enacted by Congress to "facilitate the conduct of litigation in foreign tribunals [and] improve international cooperation in litigation,"[5] Section 1782 makes a wide range of U.S. discovery tools available to litigants in foreign proceedings, including document subpoenas and depositions, provided three statutory requirements are met: (1) the person from whom (or the corporation from which) discovery is sought must "reside[]" or be "found" in the judicial district in which the Section 1782 application is made; (2) the discovery sought must be "for use in a proceeding in a foreign or international tribunal"; and (3) the application must be made by the "foreign or international tribunal" or a person or entity with a reasonable interest in obtaining relief in the foreign proceedings.[6]

If these statutory requirements are met, U.S. district courts are permitted, but not required, to grant discovery under Section 1782. To guide judicial decision-making in this regard, the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, the leading authority on Section 1782, articulated four discretionary factors "that bear consideration in ruling on a [Section] 1782 request," including whether the application is an improper attempt to circumvent foreign proof-gathering restrictions.[7]

The Circuit Split

In *Intel*, the Supreme Court suggested that by the term "foreign or international tribunal," the U.S. Congress meant to include within the scope of Section 1782 not only judicial proceedings in conventional courts, but also "administrative and quasi-judicial proceedings abroad."[8] The Supreme Court also hinted, in *dicta*, that the term "tribunal" may include "arbitral tribunals," favorably quoting scholarship to that effect.[9]

Lower courts, however, remain "split as to whether a purely private arbitration would fall within the scope of [Section 1782]."[10]

Prior to *Intel*, both the Second and Fifth Circuits answered that question in the negative, holding that Section 1782 discovery is available only for use in "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[11] Although the Second Circuit "has not weighed in on the issue in light of *Intel*,"[12] the Fifth Circuit has since affirmed its earlier view that Section 1782 does not extend to private commercial arbitrations.[13] Many courts agree, while others have inferred from *Intel* that Section 1782 discovery *does* extend to private commercial arbitrations.[14]

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5 *In re Bayer AG*, 146 F.3d 188, 191 (3d Cir. 1998).

6 *See* 28. U.S.C. § 1782.

7 542 U.S. 241, 264-65 (2004). The other oft-cited discretionary factors are whether the person or entity from whom discovery is sought is a participant in the foreign proceeding, in which case Section 1782 discovery may be deemed unnecessary; the receptivity of the foreign tribunal to U.S. judicial assistance; and whether the discovery requests are unduly intrusive or burdensome. *See id.*

8 *Id.* at 258 (citations omitted).

9 *Id.* (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-27 & nn. 71, 73 (1965)).

10 *In re Kleimar N.V.*, No. 17-CV-01287, 2017 WL 3386115, at *5 (N.D. Ill. Aug. 7, 2017).

11 *See NBC*, 165 F.3d at 190-91; *Biedermann*, 168 F.3d at 882-83.

12 *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521-22 (S.D.N.Y. 2016).

13 *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009) (reasoning that in *Intel*, "the question of whether a private international arbitration tribunal also qualifies as a 'tribunal' under [Section] 1782 was not before the [Supreme] Court").

14 Even district courts within the Second Circuit are split on this question. Citing the broad definition of "tribunal" quoted by the Supreme Court in *Intel*, some district court judges within the Section Circuit have concluded that "the Second Circuit's decision in in *NBC* no longer applies," and that private commercial arbitrations are covered by the statute. *In re Children's Investment Fund Found. (UK)*, 363 F. Supp. 3d 361, 369-70 (S.D.N.Y. 2019); *see also In re Kleimar N.V.*, 220 F. Supp. 3d at 521-22. Others disagree, concluding that *NBC* remains good law and prohibits granting Section 1782 discovery for use in private commercial arbitrations. *In re Application of Hanwei Guo*, 18 MC-

Most prominent among them are the Sixth Circuit and, as of March 30, 2020, the Fourth Circuit. As to the former, in a widely discussed decision issued in September 2019, *ALJ Transportation v. FedEx*, the Sixth Circuit expressly held that Section 1782 permitted discovery for use in private commercial arbitrations based on its reading of the language of the statute.[15]

The Sixth Circuit's decision created a circuit split with the Second and Fifth Circuits, which revolves largely around the extent to which the language in Section 1782 is unambiguous. Whereas the Sixth Circuit held that it is, and thus the statutory language should control, the Second and Fifth Circuits had previously disagreed, ruling instead that recourse must be had to the legislative history of Section 1782 and related policy considerations in order to interpret the term "foreign or international tribunal." In this regard, the Second and Fifth Circuits were persuaded that Congress did not intend the term to encompass private foreign or international arbitrations absent mention of such private arbitrations in the legislative history[16]—something they concluded one would expect to see if Congress intended to change the legal landscape to allow discovery for use in private arbitrations.

In its more recent decision, *Servotronics, Inc. v. The Boeing Company*, the Fourth Circuit dismissed these concerns, concluding that "[t]he current version of the statute, as amended in 1964, . . . manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*."[17] This latter term, the Fourth Circuit suggested, should be interpreted broadly, and extends at the very least to a private arbitral panel convened in England under the rules of the Chartered Institute of Arbitrators.[18] The Fourth Circuit also dismissed the policy concerns raised by discovery target Boeing, including that recourse to Section 1782 would undermine the efficiency of arbitration, reasoning that Section 1782 "is not designed to authorize full discovery in connection with a foreign arbitration proceeding," but something "much more limited."[19]

On the heels of the Sixth Circuit's decision in *ALJ Transportation*, the Fourth Circuit's *Servotronics* decision deepens the circuit split on the applicability of Section 1782 to private commercial arbitrations and suggests that the question is ripe for review by the Supreme Court.

The District Court's Decision

EWE Gasspeicher commenced arbitration under the DIS Rules against Halliburton's German subsidiaries. After filing its statement of claim in the DIS arbitration, EWE Gasspeicher made an *ex parte* application in the U.S. District Court for the District of Delaware for Section 1782 discovery from Halliburton for use in the German arbitration proceedings.

The District Court issued an order granting EWE Gasspeicher's application and Halliburton moved to vacate, arguing that a private commercial arbitration like the DIS arbitration is not a "tribunal" within the meaning of Section 1782.

Acknowledging the circuit split on this issue, and that the Third Circuit has yet to address it, the District Court looked to *Intel* for guidance rather than

561(JMF), 2019 WL 917076, at *3 (S.D.N.Y. Feb. 25, 2019).

15 *ALJ*, 939 F.3d at 726, 731.

16 *See NBC*, 165 F.3d at 190; *Biedermann*, 168 F.3d at 882-83.

17 2020 WL 1501954, at *4 (emphasis in original).

18 In support of this conclusion, the Fourth Circuit stated, advancing an expansive view of the scope of the Federal Arbitration Act, that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised," and thus a product of "government-conferred authority"—not, as Boeing had argued, a purely private proceeding deriving its authority from the agreement of the parties. *Id.* at *4. Reasoning that the Arbitration Act of 1996, which applies in England, Wales, and Northern Ireland, demonstrates a similar level of government support for and oversight of private commercial arbitrations, the Fourth Circuit ruled that the tribunal at issue in *Servotronics* meets Section 1782's definition of "foreign or international tribunal" even under a restrictive definition according to which only entities acting with State authority are covered. *Id.* at *4-*5.

19 *Id.* at *5.

the Courts of Appeals cases discussed above.[20] Citing legislative history explored by the Supreme Court in *Intel* indicating that the Congressional committee that had revised Section 1782 was tasked with recommending procedural revisions "for the rendering of assistance to foreign courts and quasi-judicial agencies," the District Court concluded that the tribunal in the DIS arbitration is neither.[21] The District Court also observed that unlike decisions of the tribunal under scrutiny in *Intel*—the European Commission's Directorate-General for Competition—"the merit of the arbitration decision is not subject to judicial review."[22] For these reasons, the District Court credited Halliburton's argument that a private commercial arbitration like the DIS arbitration is not a "tribunal" within the meaning of Section 1782 and granted the motion to vacate.

The District Court added that "[e]ven if a private commercial arbitration" like the DIS arbitration "were a 'tribunal' within the meaning of [Section] 1782," it "might still vacate the order" based on the *Intel* discretionary factors.[23] In this regard, the District Court noted that EWE Gasspeicher made its application for Section 1782 discovery four months before the deadline for document requests in the DIS arbitration.[24] The District Court also noted that in its procedural order, the tribunal in the DIS arbitration stated that it would "set strict standards with regards to the number of documents requested and their relevance."[25] Considering "the timing of EWE Gasspeicher's application" and "the statements of the arbitration panel," the District Court concluded that permitting EWE Gasspeicher access to Section 1782 discovery "could aid an attempt to circumvent foreign proof-gathering restrictions."[26]

This conclusion, which would appear to be *dicta*, may be inconsistent with well-established case-law from within and outside the Third Circuit, according to which litigants are not required to seek information through the foreign or international tribunal before requesting Section 1782 discovery in the United States.[27] Moreover, there is no requirement under Section 1782 that the discovery sought in the United States be discoverable in the foreign proceeding.[28]

The conclusion is additionally notable in the context of the underlying DIS arbitration proceeding, and specifically Article 27.4 (Efficient Conduct of the Proceedings) and Annex 3 (Measures for Increasing Procedural Efficiency) of the recently revised DIS Rules of Arbitration, effective as of March 1, 2018. Under these provisions, which are applied in a vast number of German-related arbitration disputes, the arbitral tribunal during the mandatory case management conference shall discuss with the parties, *inter alia*, "[r]egulating whether the production of documents can be requested from a party that does not bear the burden of proof, as well as *possibly limiting document production requests generally*."[29]

In view of the generally more conservative approach to document production requests in arbitrations with a German nexus as compared with those in the Common Law context, the District Court's decision is noteworthy for its express consideration of the "strict standards with regards to the number of documents requested and their relevance" applied in the underlying DIS arbitration[30] and its related conclusion that permitting EWE Gasspeicher access to Section 1782 discovery "could aid an attempt to circumvent" the restrictions applied by the tribunal in that DIS arbitration.[31] In short, at least applying the approach taken by the District Court, a party to a DIS or other arbitration in which document production requests

[20] *In re Application of EWE Gasspeicher GmbH*, 2020 WL 1272612, at *2.

[21] *Id.* at *2-*3 (citation omitted).

[22] *Id.* at *3.

[23] *Id.*

[24] *Id.*

[25] *Id.* (citation omitted).

[26] *Id.*

[27] *In re O'Keeffe*, 646 F. App'x 263, 268 (3d Cir. 2016); *see also Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995).

[28] *See Intel*, 542 U.S. at 253.

[29] DIS Arbitration Rules (2018), Annex 3, item E, as referenced in Article 27.4 (emphasis added).

[30] *In re Application of EWE Gasspeicher GmbH*, 2020 WL 1272612, at *3.

[31] *Id.*

are limited generally, including on the basis of burden of proof and relevance considerations, is well advised to consider whether its separate request to obtain discovery via Section 1782 will be helped or instead actually hindered by a showing that the discovery rules applicable in the arbitration would foreclose such discovery. The answer to this question will often depend in large part on which district court is selected to adjudicate the Section 1782 request.[32]

Key Takeaways

The District Court's decision highlights the deepening circuit split on whether private commercial arbitrations are included in the definition of "tribunals" for purposes of Section 1782 and shows that district courts continue to grapple with this question, which is likely to persist until the Supreme Court provides an answer. In the meantime, applications for Section 1782 discovery for use in private commercial arbitrations are more likely to succeed in the district courts of the Fourth and Sixth Circuits, as compared to Fifth Circuit, while the likelihood of success in district courts elsewhere is more unpredictable.

For parties applying for Section 1782 discovery in the arbitration context, the District Court's decision is instructive. It suggests that even if a district court is convinced that Section 1782 applies to private commercial arbitrations, it may nevertheless be wary of granting discovery if in its view the applicant appears to be trying to circumvent the discovery procedures established by the underlying arbitral tribunal. It also suggests that in cases where the arbitral tribunal has indicated that it intends to limit discovery, whether pursuant to prior party agreement or of its own accord, the Section 1782 applicant could, at least in some instances, face an uphill battle convincing the district court that recourse to Section 1782 in the specific case is appropriate. In that respect, the implications of the approach taken by the District Court in the EWE Gasspeicher case, if followed by other district courts, could well have ramifications for many arbitrations, particularly outside of the United States, in which the approach to document requests is conservative or even highly stringent.

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[32] For a recent German-language discussion of Section 1782 in the context of both German litigation and German arbitration, *see also* the Cleary Gottlieb Alert entitled "Section 1782 *U.S. discovery* für den deutschen Zivilprozess – eine unterschätzte Option," dated February 19, 2019.