New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 264—NO. 92
TUESDAY, NOVEMBER 10, 2020

Outside Counsel

Second Circuit Stands Its Ground In Construing 28 U.S.C. §1782

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Ever since the Supreme Court in *Intel Corp. v. Advanced Micro Devices*, Inc., 542 U.S. 241 (2004) sanctioned a liberal interpretation of 28 U.S.C. §1782 ("Section 1782")—the statute permitting U.S. discovery in aid of foreign litigations—domestic litigants, anxious to mitigate the impact of this law, have been keeping the federal courts very busy. A Westlaw search reveals that since *Intel* the U.S. Court of Appeals for the Second Circuit alone has heard about 30 appeals on constructions and applications of the statute, while the districts within the circuit have collectively issued well over 150 decisions on the matter.

Until recently, circuit courts in the country have spoken largely with one voice in defining the contours of the statute. But one issue has recently become a stumbling block to consensus: private international commercial arbitrations.

For 20 years, rulings out of the U.S. Court of Appeals for the Fifth and Second Circuits precluding use of the statute for private foreign arbitrations have represented the sole appellate authority on this issue. In the past year, however, two circuits have broken ranks with their sister courts and, invoking *Intel*, have held that Section 1782 does indeed allow for discovery in aid of such proceedings. These decisions have opened the proverbial floodgates to a tangible increase in the use of this statute.

In July of this year, however, the Second Circuit chose to shore up the dam, at least for those jurisdictions within its province. In *In Re Hanwei Guo* decided on July 9, 2020, the Second Circuit reaffirmed its earlier precedent from 1999 and concluded that even in the face of the Supreme Court's intervening ruling in *Intel*, Section 1782 "does not sweep so broadly as to include private commercial arbitrations."

The Statute And its Expansive Readings

Section 1782 originates in a letters rogatory law of 1855 which curiously never went into force. After the law was passed it was improperly indexed and promptly lost and forgotten as a result. Rediscovered in 1948 the statute was reintroduced in the spirit of international cooperation then pervasive in the post-war years. Revised in 1964 and then again in 1996 the current statute generously provides that "upon the application of any interested person," a district court may order a person "found" in its district "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

Most striking about the law is that the application for judicial assistance need not be made by the foreign tribunal or the parties themselves, but by any "interested person" in that proceeding. As construed by the *Intel* Court, that term encompasses not just the litigants in the case, but a whistleblower or complainant in an investigative phase who may not be pressing for direct relief on its own behalf but simply has a "reasonable interest in obtaining judicial assistance."

Equally important, the "proceeding" for which the discovery is sought need not be pending or imminent; it suffices that it is only "within reasonable

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contemplation." Finally, "for use" does not mean that the evidence sought be discoverable in the foreign proceeding, but only that the tribunal may find it useful.

Following the tone from the top, federal appellate courts in the wake of *Intel* have continued to indulge liberal readings, expanding the boundaries of the statute in the process. For example, in 2014 and 2015, respectively, the U.S. Court of Appeals for the Eleventh and Fifth Circuits concluded that Section 1782 is a valid tool for private litigants to develop pre-suit discovery. In 2016, the Eleventh Circuit ruled that Section 1782 does not preclude extraterritorial discovery. The Second Circuit has followed its sister courts in these constructions, *see Mees v. Buiter* (2d Cir. 2015) and *In re del Valle Ruiz* (2d Cir. 2019), and has also contributed to the trend. In *Brandi-Dohrn v. IKB Deutsche Industriebank AG* (2d Cir. 2012), the Circuit ruled that just as the lack of access to the documents in the foreign proceeding is no bar to Section 1782 discovery, so too admissibility: "While *Intel* concerned the *discoverability* of evidence in the foreign proceeding, we see no reason why it should not extend to the *admissibility* of evidence in the foreign proceeding."

Pre-'Intel' Construction of 'Tribunal'

The source of the recent circuit split is disagreement over the meaning and scope of the phrase "foreign or international tribunal," words that were added in the 1964 amendments. In 1999, before the Supreme Court spoke on the subject, the Second and Fifth Circuits concluded that this term did not encompass private foreign arbitrations.

In *NBC, Inc. v. Bear Stearns & Co., Inc.* (2d Cir. 1999), the Second Circuit found the term "tribunal" to be ambiguous and turned to the legislative record for interpretive guidance. While acknowledging that Congress intended to expand the scope of relevant proceedings beyond conventional courts, it nonetheless concluded that the congressional committees tasked with studying the issue had in mind "only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state." What swayed the court's analysis in particular was the fact that the phrase "international tribunal" derived from an earlier 1930-33 statute that was intended specifically to cover "*intergovernmental* tribunals."

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The appellate panel concluded that the introduction of that parallel term to Section 1782 carried with it the same meaning. The circuit was also animated by policy considerations codified in the Federal Arbitration Act that privilege arbitration as efficient, cost-effective and largely exempt from the scope of discovery available under the federal rules. Accordingly, the Second Circuit concluded that participants in a private arbitration proceeding under the auspices of the Internal Chamber of Commerce could not leverage Section 1782 to access discovery in the U.S.

That same year, 1999, the Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l* (5th Cir. 1999), largely followed the Second Circuit's lead, concluding that Section 1782 "was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration."

The Scope Of 'Tribunal' After 'Intel'

Then came *Intel*. In that decision, Justice Ruth Bader Ginsburg, speaking for the majority, said nothing about whether private arbitral bodies qualify as "tribunals," but her analysis left the door wide open to such a conclusion. The issue before the Court was whether a governmental court of inquiry, the Directorate-General for Competition of the Commission of the European Communities, which had the authority to investigate allegations of antitrust violations in the European Union, fell within the scope of Section 1782. Justice Ginsburg readily concluded that it did, supporting her ruling with two succinct citations: one to the congressional record, which evidenced the Legislature's intent to encompass "administrative and quasi-judicial proceedings" within the sweep of the statute, and the second to an article by Professor Hans Smit, one of the leading scholars in international law at the time the new law was passed.

Ginsburg's footnote 15 made clear that she was leaving ample leeway for future constructions of the term: "Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'" But her academic reference raised more questions than it answered, for Professor Smit

embraced a broad array of definitions for the term "tribunal": "investigating magistrates, administrative and *arbitral* tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts" (emphasis added).

Fifteen years later, the meaning of "tribunal" in the context of Section 1782 has come back into focus. Emboldened by *Intel*'s non-categorical approach to construction of that term, the Sixth and Fourth Circuits recently decided to reject the earlier constructions of the Second and Fifth Circuits, concluding that Section 1782 does indeed contemplate aid to privately convened arbitral panels in foreign jurisdictions. In *Jameel Trans. Co. Ltd. v. FedEx Corp.* (6th Cir. Sept. 19, 2019), the Sixth Circuit found, in contrast to the Second and Fifth Circuits, that the term "tribunal" was *not* ambiguous and clearly embraced private arbitrations, in this case a commercial arbitration conducted under the rules of the Dubai International Finance Centre—London Court of International Arbitration.

In March of this year, the Fourth Circuit also took up the cudgel in further chipping away at the pre-*Intel* rationales of the Second and Fifth Circuits. *Servotronics, Inc. v. Boeing Co*. (4th Cir. Mar. 30, 2020). The decision facing the Fourth Circuit was whether a private arbitration convened under authority of the UK Arbitration Act of 1996 was a "tribunal" for purposes of Section 1782. The court's analysis was shaped in large part by defendant Boeing's argument that the term is confined to entities that "exercise government-conferred authority." The Fourth Circuit adroitly turned this formulation against Boeing, reasoning that the UK Arbitration Act, like the FAA in the U.S., establishes a regulated and judicially supervised framework for private arbitrations that render them products of "government-conferred authority."

On July 9, 2020, the Second Circuit finally returned to the issue, addressing the impact of *Intel* on its earlier precedent. Standing by its 1999 decision, the court emphatically put the brakes on this statutory mission creep. The court's opinion, by now-Chief Judge Debra Livingston for a three-judge panel, did not start from square one but instead focused its attention on whether the Supreme Court's interpretation in *Intel* had changed the framework of analysis so as to cast "sufficient doubt" on its prior decision in *NBC*. The circuit panel concluded that *Intel* did not do so, even in the face of Justice Ginsburg's apparent endorsement of the expansive reading provided by Professor Smit.

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As to that citation, the panel gave it the back of the hand, dismissing it as "a passing reference in dicta," and going so far as to interrogate the writings of Hans Smit to conclude that his reference to "arbitral tribunals" was not intended to include privately convened arbitration panels. The Second Circuit had a tricky fact pattern to confront since the China International Economic and Trade Arbitration Commission had originated as a Chinese governmental authority; but as the Second Circuit concluded, insofar as this Commission had evolved into an institution with a high degree of independence and autonomy it could no longer be considered a state-sponsored authority.

Since the Second Circuit issued its ruling the Seventh Circuit has followed with yet another vote against expanding *Intel*. Addressing a Section 1782 application arising out of the very same arbitration that prompted the Fourth Circuit decision, the Seventh Circuit in *Servotronics, Inc. v. Rolls-Royce PLC* (7th Cir. Sept. 22, 2020) came out the opposite way. Building on the statutory construction arguments that guided the Second and Fifth Circuits, the Seventh Circuit panel added one more compelling point, namely that the "tribunal" language of Section 1782 appears in parallel provisions governing letters rogatory and service of process in foreign litigation which are clearly designed to address only state-sponsored proceedings.

With the battle lines now drawn in five circuits, and the statutory language parsed to within an inch of its life, it will fall ultimately to the Supreme Court *sans* Justice Ginsburg to break the tie. It remains to be seen whether Professor Smit's scholarship still holds sway.