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The Escalating Split Over the Right to Obtain Discovery in the U.S. For Use in Private International Arbitrations Seated Outside the Country

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Parties involved in litigation outside the United States have long had at their disposal a useful tool for obtaining American-style discovery in the U.S. 18 U.S.C. § 1782(a) of the United States Code authorizes a United States District Court to order a person "resid[ing] or found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal ...." 28 U.S.C. § 1782(a).

Prior to 2004, the prevailing view was that § 1782(a) could not be used to obtain discovery in aid of private international arbitration. Then in 2004, the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). The Court held that the European Union's primary antitrust enforcement body, the Directorate-General of Competition for the Commission of the European Communities, was a "tribunal" within the meaning of § 1782(a). *Id.* at 257-58. In reaching this result the Court noted that in 1964, Congress had broadened the statute from merely covering "any judicial proceeding pending in any court in a foreign country" to more expansively covering a "proceeding in a foreign or international tribunal." *Id.* at 248-49. The Court quoted a Senate Committee report stating that Congress used the word "tribunal" in order to "ensure that 'assistance is not confined to proceedings before conventional courts.'" *Id.* at 249 (quoting S. REP. NO. 1580, at 7 (1964), as reprinted in 1964 U.S.C.C.A.N. 3782, 3788). The Court in *dicta* cited to a scholarly article in which Professor Hans Smit of Columbia Law School observed that the word "tribunal" included "investigating magistrates, administrative *and arbitral tribunals,* and quasi-judicial agencies, as well as conventional . . . courts." *Id.* at 258 (quoting Hans Smit, International Litigation Under the United States Code, 65 COLUM. L REV. 1015, 1026-27 (1965) (emphasis added)). The *Intel* Court did not specifically address whether a private international arbitration panel is a "tribunal" within the meaning of the statute, however.

Five years later, in 2009, the United States Circuit Court for the Fifth Circuit (which includes the District of the Canal Zone, Louisiana, Mississippi, and Texas) held that the reference to Professor Smit in *Intel* was mere *dictum*, and provided no authority for the notion that a private international arbitration panel is a "tribunal" within the meaning of § 1782. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa,* 341 Fed. Appx. 31, 34 (5th Cir. 2009). The court thus refused to allow discovery in Texas in aid of an arbitration conducted before a Swiss arbitral panel under the United Nations Commission on International Trade Law. *Id.*

Last year, in September 2019, the United States Circuit Court for the Sixth Circuit (which includes Kentucky, Michigan, Ohio, and Tennessee) reached the opposite result in *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 714 (6th Cir. 2019). The case involved discovery sought in Tennessee in aid of a private arbitration in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA). The Sixth Circuit concluded that the DIFC-LICA arbitration panel qualified as a "foreign or international tribunal." Among other things the court found that dictionary definitions supported a broad reading of the word "tribunal" to include private arbitration panels. The court also found support in court decisions that predated the statute for a broad interpretation of the word. Accordingly, the Sixth Circuit held that the word "tribunal" included private, contracted-for arbitration and that the DIFC-LICA panel was a "foreign or international tribunal" within the meaning of 28 U.S.C. § 1782 (a).

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This year, in March 2020, the Fourth Circuit (which includes Maryland, North Carolina, South Carolina, and Virginia) reached the same result as the Sixth Circuit. *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020) involved discovery sought in South Carolina in aid of a private arbitration in the United Kingdom under the rules of the Chartered Institute of Arbitrators. The Fourth Circuit held that the arbitral tribunal was a foreign tribunal for purposes of § 1782. In reaching this conclusion, the court examined the purpose and history of § 1782, including U.S. 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*." *Servotronics,* 954 F.3d 209, 213 (emphasis original) Citing *Intel*, the Fourth Circuit held that the statute's articulated purpose to provide foreign assistance clearly included all "foreign and international *tribunals*" as a matter of public policy.

Just this month, on July 8, 2020, the Second Circuit (which includes Connecticut, New York, and Vermont) weighed in on the issue, holding that § 1782 may not be used in aid of private international commercial arbitration. *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* (2d Cir. Case No. 19-781, July 8, 2020). The *Hanwei* case involved discovery sought in New York in aid of an arbitration before the China International Economic and Trade Arbitration Commission ("CIETAC"). The court followed its pre-*Intel* decision in *NBC v. Bear Stearns*, 165 F.3d 184 (2d Cir. 1999), which held that a private commercial arbitration administered by the International Chamber of Commerce, a private organization based in Paris, was not a "proceeding in a foreign or international tribunal" within the meaning of § 1782. The court held that the issue whether a private international arbitration tribunal qualifies as a "tribunal" under § 1782 was not before the *Intel* Court, and found that the legislative history and general principles of statutory construction supported limiting the scope of § 1782 to only state-sponsored arbitrations. The court concluded that CIETAC arbitration is private commercial arbitration, as opposed to state-sponsored arbitration, despite the fact that CIETAC was originally founded by the Chinese government.

Until the Supreme Court resolves the split between the Circuits, parties to arbitrations seated outside the United States who wish to make use of § 1782 will need to avoid courts in the Second and Fifth Circuits and instead attempt to seek evidence from non-parties in the Fourth or Sixth Circuits.

Please contact the author or your Miller Canfield attorney to discuss this issue further.