One less gadget in the arbitration toolbox: International and offshore arbitrations are not entitled to US discovery in aid of foreign proceedings

Investment Funds Alert

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A recent decision by the United States Court of Appeals for the Second Circuit makes clear that discovery under 28 USC Section 1782 in aid of foreign proceedings is not available for private international arbitrations. This continues a split among US circuit courts of appeal as to whether purely private arbitrations may utilize the powerful discovery tools available under Section 1782. This ruling, clarifying the law in the Second Circuit (which includes New York) is highly relevant to the private funds and offshore dispute practice areas because arbitrations conducted in major financial and offshore centers, such as London and the Caribbean, will not have the ability to conduct discovery in New York under Section 1782.

On July 8, 2020, the Second Circuit issued an opinion in In Re: Application and Petition of Hanwei Guo for an Order to take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. 1782 (Hanwei Guo) interpreting the scope of 28
U.S.C. § 1782 with respect to private arbitral disputes in light of the Supreme Court's holding in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (Intel). The Hanwei Guo decision sheds some much-needed light on the issue of whether 28 U.S.C. § 1782 authorizes federal courts to compel the production of materials for use by parties in foreign private arbitrations, an issue which has been sharply contested over the past two decades. Namely, the Second Circuit held that 28 U.S.C. § 1782 does not extend to private international commercial arbitrations and declined to compel the production of documents requested by the parties, finding that the international arbitration at issue was a private arbitral proceeding outside of the scope of § 1782.

The outcome of the Second Circuit’s decision in Hanwei Guo has significant implications for the financial services and private funds[1] space. Parties will no longer be able to proceed with private arbitrations outside of the United States and obtain a court order for the production of documents within the Second Circuit. In particular, New York, which has been the preferred venue for financial services and private funds seeking discovery from New York banks and service providers, will no longer facilitate the production of documents for parties pursuing dispute resolution via private arbitral proceedings based out of foreign arbitration hubs such as London, the British Virgin Islands, and the Cayman Islands.[2]

- A primer on 28 U.S.C. § 1782

28 U.S.C. § 1782 allows parties to seek “federal-court assistance in gathering evidence for use in foreign tribunals” [3] by granting district courts with the discretion to “order [a person] 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.”[4] This can be a powerful tool for foreign litigants who frequently utilize US courts to obtain testimony or documents from third parties in support of their claims and defenses.

Multiple statutory requirements must be met under 28 U.S.C. § 1782 to warrant an order compelling discovery under 28 U.S.C. § 1782.[5] The person from whom discovery is sought must “reside (or [be] found) in the district of the district court to which the application is made,” the discovery must be “for use in a foreign proceeding before a foreign or international tribunal,” and the application must be made by “a foreign or international tribunal or any interested person.” [6]

- The Supreme Court’s Intel decision and the subsequent circuit split

In Intel, the seminal Supreme Court case discussing the application of 28 U.S.C. § 1782, the Court opined on the scope of the phrase “for use in a proceeding in a foreign or international tribunal” and suggested that the drafters of § 1782, by replacing the term “judicial proceeding” with “a proceeding in a foreign or international tribunal” meant to encompass “administrative and quasi-judicial proceedings abroad.” [7] In so holding, the court referenced arbitral tribunals in its Opinion. This reference to arbitrations has led courts across the country to grapple with whether the Intel Court, and the legislation’s drafters, intended to include private arbitral proceedings within the ambit of “arbitral tribunals” for purposes of 28 U.S.C. § 1782 discovery.

Although “[a] majority of U.S. courts have held that at least some species of international arbitral tribunals qualify as ‘a foreign or international tribunal’ within the meaning of § 1782,” [8] whether (and if so, which) private, as opposed to public, arbitral tribunals are “foreign tribunals” under 28 U.S.C. § 1782 has been hotly contested. The Fifth Circuit, for example, has uniformly held that § 1782 is inapplicable to private arbitral disputes,[9] whereas the Fourth and Sixth Circuits have taken the position that private commercial arbitrations are tribunals for purposes of § 1782 discovery,[10] The Eleventh Circuit expressly declined to render a determination on the issue,[11] and the remaining circuit courts have yet to address the § 1782’s applicability to private arbitration proceedings.

Prior to the Intel decision, the Second Circuit, in Nat’l Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2nd Cir. 1999) (NBC), had held that § 1782 did not encompass private international arbitrations, citing legislative history and policy considerations in support of its holding. Post-Intel, despite being faced with the question, the Second Circuit declined to rule on the issue of whether a private arbitral forum in a foreign country constitutes a “foreign or international tribunal,” leading to divergent opinions rendered by district courts within the Second Circuit as to whether Intel explicitly or implicitly abrogated the Second Circuit’s holding in NBC.[12] The Second Circuit’s ruling in Hanwei Guo largely resolves this controversy in favor of excluding private foreign arbitrations from the scope of § 1782.

- Background on the Hanwei Guo case

In Hanwei Guo, the Second Circuit considered a petition to compel discovery brought by Mr. Guo, an investor in various “Ocean Entities,”[13] businesses operating in the Chinese music streaming market. Mr. Guo sold his shares in these
Ocean Entities for less than they were worth through a series of transactions that he alleged were “misleading, extortionate, and fraudulent.”[14] This led Mr. Guo to initiate arbitration before the China International Economic and Trade Arbitration Commission (CIETAC)[15] against various entities that he alleged were at fault. CIETAC is a Chinese arbitral body which has jurisdiction over disputes brought by private parties who have elected arbitration through contractual agreement, as well as contractual disputes between Chinese governmental entities and investors.

Mr. Guo filed a petition pursuant to 28 U.S.C. § 1782(a), in the United States District Court for the Southern District of New York, seeking discovery from four investment banks for use in his CIETAC arbitration against the Defendants. The district court denied Mr. Guo’s application on February 25, 2019, concluding that § 1782(a) did not apply to private arbitrations, and that Mr. Guo’s application was foreclosed because CIETAC was “closer to a private arbitral body” than a governmental tribunal or state-sponsored adjudicatory body.[16] Mr. Guo then filed a timely appeal challenging both aspects of the district court’s ruling.

- The Second Circuit’s ruling in Hanwei Guo

On appeal, the Second Circuit began by referencing its 1999 NBC decision, and characterized the NBC holding as establishing that “(1) the statutory text, namely the phrase ‘foreign or international tribunal,’ was ambiguous as to the inclusion of private arbitrations; (2) the legislative and statutory history of the insertion of the phrase ‘foreign or international tribunal into § 1782(a) demonstrated that the statute did not apply to private arbitration; and (3) a contrary reading would impair the efficient and expeditious conduct of arbitrations.”[17] The court compared this holding to Intel and found that NBC remained good law because “[t]he distinct question resolved by NBC – whether a private international arbitration tribunal qualifies as a ‘tribunal’ under § 1782 – was not before the Intel court.” The only language in Intel inconsistent with the holding in NBC was a passing reference to arbitral tribunals in dicta which the Hanwei Guo court held did not “cast sufficient doubt on the reasoning or holding of NBC” and therefore did not “sufficiently undermine [the] prior opinion of [the] Court as to deprive it of precedential force.”[18]

The court went on to say that even assuming cursory dicta could have the effect of abrogating Second Circuit precedent, the reference in Intel to arbitral proceedings was not directly at odds with NBC since it could be read as referring solely to state-sponsored arbitral bodies. Intel’s discussion of § 1782’s legislative history and general principles of statutory construction were also in accord with NBC since both opinions reasoned that the Congressional purpose of § 1782 was to expand the scope of discovery and emphasized the primacy of plain textual meaning.

In applying NBC to Mr. Guo’s petition, the Second Circuit determined that the District Court had properly concluded that the CIETAC arbitration was a private international commercial arbitration falling outside the scope of § 1782(a).[19] Specifically, the court reasoned that “NBC made clear that ‘international arbitral panels created exclusively by private parties’ are not ‘foreign or international tribunals’ within the meaning of § 1782.” Although CIETAC was originally created through state action, the Hanwei Guo court determined that it had since evolved and no longer qualified as a “governmental or intergovernmental arbitral tribunal, conventional court, or other state-sponsored adjudicatory body.”

In making its determination, the court clarified that the foreign or international tribunal inquiry turned on a variety of factors including “the degree of state affiliation and functional independence possessed by the entity, as well as the degree to which the parties’ contract controls the panel’s jurisdiction” and that the governmental origin of the administrative agency was not determinative. When considered as a whole, the court explained that these factors assess “whether the body in question possesses the functional attributes most commonly associated with private arbitration,” i.e. the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body.

With respect to CIETAC, the Hanwei Guo court determined that the arbitral body possessed a high degree of independence and autonomy and a low degree of state affiliation – and was therefore a private arbitral body – because: (1) the arbitrators came from diverse backgrounds and nations and were not selected by or affiliated with the Chinese government; (2) CIETAC administered its arbitration cases separately from the Chinese government; (3) the Chinese government had limited authority to intervene and alter the outcome of an arbitration after the CIETAC panel rendered a decision; (4) CIETAC derived jurisdiction exclusively from the parties’ agreement; and (5) the parties selected their own arbitrators.

Because the Hanwei Guo court found CIETAC to be a private arbitral body, it determined that Mr. Guo could not seek discovery from the four investment banks for use in his CIETAC arbitration under 28 U.S.C. § 1782(a), and therefore denied his petition.
Takeaways

Although the Hanwei Guo decision does not resolve the Circuit split regarding the interpretation of 28 U.S.C. § 1782(a), its import is clear. Private parties to foreign arbitrations seeking to pursue discovery in the United States may be stuck with the limited discovery mechanisms provided for in the rules of the private arbitral body they select. Entities and individuals contemplating private arbitration must therefore think carefully about the procedural mechanisms available when picking an appropriate venue and adjudicatory body to resolve their dispute.

If you have any questions regarding these issues, please contact the authors, your DLA Piper relationship attorney or a member of the DLA Piper Investment Funds team.

[1] The term “private funds” is used in this article to refer to managed private equity funds and hedge funds.


[6] Mees v. Buiter, 793 F.3d 291, 297 (2d Cir. 2015) (quoting Brandi-Dohrm v. IKB Deutsche Industriebank AG, 673 F.3d 76, 80 (2d Cir. 2012); see also In re Bayer AG, 146 F.3d 188, 193 (3d Cir. 1998), as amended (July 23, 1998) (stating that “[t]he prima facie showing mandated by the statute is only that the application be made (1) ‘by a foreign or international tribunal’ or ‘any interested person,’ (2) that it be ‘for use in a proceeding in a foreign or international tribunal,’ and (3) that the person or entity from whom the discovery is sought be a resident of or be found in the district in which the application is filed”).


[9] See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App’x 31 (5th Cir. 2009) (private Swiss arbitral tribunal did not constitute “tribunal” within meaning of statute authorizing district courts to assist discovery efforts before foreign and international tribunals).


[12] See In re Edelman, 295 F.3d 171, 176 (2d Cir. 2002); Chevron Corp v. Berlinger, 629 F.3d 297 (2d Cir. 2011) (declining to reach whether a private arbitration qualifies under Section 1782).


[15] CIETAC was established by the People’s Republic of China in 1954 as part of the China Council for the Promotion of International Trade (“CCPIT”).

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. 2020); see also Nat’l Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2nd Cir. 1999).

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