



U.S. Supreme Court to Review Whether U.S. Discovery Can Be Used in Aid of International Arbitration

For parties involved in a foreign or international dispute, 28 U.S.C. § 1782 (Section 1782) is a powerful tool to obtain documents and testimony from a person or entity located in the United States. It permits a party or other interested person to petition a U.S. District Court to compel discovery for use in a “foreign or international tribunal.” Section 1782, however, does not define a “tribunal,” and courts have been divided on whether the statute can be used in aid of a private commercial arbitration.

Over the past year, U.S. Circuit Courts had the opportunity to bring much-needed clarity to the scope of Section 1782. The courts, however, issued divergent opinions and only solidified the Circuit split on the issue. As a result, the Fourth and Sixth Circuits now permit the use of Section 1782 in aid of a private commercial arbitration, whereas the Second, Fifth and Seventh Circuits do not. On March 22, 2021, the U.S. Supreme Court granted certiorari on this question to finally resolve the issue.

THE INTEL DECISION

The primary authority concerning Section 1782 is the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). In *Intel*, the U.S. Supreme Court held that a district court has discretion whether to grant a Section 1782 application and set forth the factors to be considered. The U.S. Supreme Court also held that the European Commission is a "tribunal" under Section 1782 when it acts as a first-instance decision maker. In reaching that decision, the U.S. Supreme Court analyzed the legislative history of Section 1782 and determined that it applies to "quasi-judicial" proceedings.

THE FOURTH AND SIXTH CIRCUITS PERMIT SECTION 1782 DISCOVERY IN AID OF PRIVATE COMMERCIAL ARBITRATION

In September 2019, the Sixth Circuit held that a private commercial arbitration in Dubai was a "foreign or international tribunal" under Section 1782.¹ The Sixth Circuit reasoned that a dictionary definition of "tribunal," as well as the "historical and continu[ed] usage" of the term in legal writing, includes a private arbitral panel. The Sixth Circuit also relied on the U.S. Supreme Court's reasoning in *Intel* to support its holding that the term "tribunal" applies to non-judicial proceedings. In March 2020, the Fourth Circuit joined the Sixth Circuit in holding that "tribunal" under Section 1782 includes a private commercial arbitration in the United Kingdom.²

THE SECOND, FIFTH AND SEVENTH CIRCUITS REJECT SECTION 1782 DISCOVERY IN AID OF PRIVATE COMMERCIAL ARBITRATION

Despite the Fourth and Sixth Circuit's unified approach, the interpretation that Section 1782 applies to private commercial arbitration remains a minority position.

In decisions issued prior to *Intel*, the Second and Fifth Circuits held that a "tribunal" under Section 1782 did not apply to private arbitration.³ The Second Circuit revisited the issue in 2020, and many expected that the Second Circuit would follow the recent trend set by the Fourth and Sixth Circuits and overrule its prior decision in light of *Intel*. Those predictions did not come true. In July 2020, the Second Circuit affirmed its prior ruling and held that private commercial

arbitrations are outside the scope of Section 1782.⁴ The Second Circuit explained that its prior decision was not overruled by *Intel*, because the question of whether a private arbitration qualifies as a tribunal under Section 1782 was not before the U.S. Supreme Court.

More recently, in September 2020, the Seventh Circuit also rejected the application of Section 1782 to private commercial arbitrations.⁵ In contrast to the Fourth and Sixth Circuits, the Seventh Circuit determined that the dictionary definition of "tribunal" and the statute's legislative history do not resolve whether private arbitral panels are considered "tribunals" under Section 1782. Further, the Seventh Circuit reasoned that a narrow reading of Section 1782 "avoids a serious conflict" with the Federal Arbitration Act,⁶ explaining that if Section 1782 "were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations."

LOOKING AHEAD: THE U.S. SUPREME COURT

The conflicting U.S. Circuit Court decisions have set the stage for resolution of the issue by the U.S. Supreme Court. On March 22, 2021, the U.S. Supreme Court granted a petition for writ of certiorari, in the recent Seventh Circuit case, on the question of whether a "foreign or international tribunal" under Section 1782 "encompasses private commercial arbitral tribunals." The case will be heard in the October 2021 term, with a decision expected by the summer of 2022.⁷

Parties involved in international or foreign commercial arbitration should pursue a global litigation strategy that includes locating all relevant evidence and witnesses. Parties actively involved in an arbitration should closely monitor developments at the U.S. Supreme Court. Until the U.S. Supreme Court finally resolves the scope of Section 1782, a party seeking relevant evidence in the United States should determine whether the Circuit where the evidence is located permits an application for discovery under Section 1782.

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¹ *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710, 720, 731 (6th Cir. 2019).

² *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020).

³ *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999). In 2009, the Fifth Circuit reaffirmed this holding in a non-precedential opinion. See *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009).

⁴ *In Re Guo*, 965 F.3d 96, 109 (2d Cir. 2020).

⁵ *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 693 (7th Cir. 2020).

⁶ 9 U.S.C. §§ 1–15.

⁷ *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2021 WL 1072280 (U.S. March 22, 2021).