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Second Circuit Confirms U.S. Discovery Not Available in Private International Arbitrations

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A ripening circuit split over the availability of U.S. discovery in foreign arbitration proceedings took another step toward a possible Supreme Court showdown with the July 8 decision by the United States Court of Appeals for the Second Circuit in *In re: Application and Petition of Hanwei Guo*, which held that U.S. courts may not order domestic discovery for use in private commercial arbitrations abroad. The decision is consistent with the Fifth Circuit's interpretation of the statute at issue, 28 U.S.C. § 1782, but is at odds with Fourth and Sixth Circuit decisions allowing parties to conduct discovery in the United States for use in foreign arbitrations.

A Supreme Court decision on this issue could have a significant impact on the cost and, ultimately, the use of foreign private arbitrations. Although private arbitration is often chosen by parties to limit costs – including the costs associated with extensive discovery typical of U.S. litigation – § 1782 authorizes a federal district court to order domestic discovery "for use in a proceeding in a foreign or international tribunal." The ongoing circuit split stems from the courts' determinations of whether a "foreign or international tribunal" includes private arbitration proceedings. The circuit courts' interpretation of the statute determines whether such extensive and expensive U.S.-style discovery may be employed in private foreign arbitrations.

Twenty years ago, in *National Broadcasting Co. v. Bear Stearns & Co.,*[1] the Second Circuit decided that § 1782 does not allow for discovery in private arbitrations. The petitioner in *Guo*, however, who requested documents from four investment banks for use in private commercial arbitration before the China International Economic and Trade Arbitration Commission ("CIETAC"), argued that the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc*.[2] abrogated *NBC* and allowed domestic discovery. The petitioner argued in the alternative that arbitrations before CIETAC qualified as an arbitration under a state-sponsored adjudicatory body, and thus fell within the ambit of § 1782.

The Second Circuit rejected both arguments, notwithstanding the Supreme Court *Intel* decision. It first held that "[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," and that the only language arguably supporting Guo's interpretation was found in a parenthetical quotation contained in a footnote in that case. The court expressed doubt as to "whether such a fleeting reference in dicta could ever sufficiently undermine a prior opinion . . . as to deprive it of precedential force," and concluded that the legislative history and general principles of statutory construction supported limiting the scope of §1782 to only state-sponsored arbitrations.

In response to Guo's second argument, the Second Circuit applied *Intel*'s functional approach to determine whether the CIETAC arbitration was private or state sponsored. Rather than focusing solely on the fact that CIETAC was originally founded by the Chinese government, the functional approach requires analysis of several 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." After consideration of these factors, the court concluded that CIETAC was "best categorized as a private commercial arbitration for which § 1782 assistance is unavailable."

Given the clear disagreement among the circuits, resolution of these issues by the Supreme Court can be expected. Until then, parties to private international arbitrations seeking domestic discovery in the Second Circuit would be well-advised to look elsewhere. On the other hand, parties wishing to avoid the burden of such discovery have a confirmed ally in the Second Circuit.

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[1] 165 F.3d 184 (2d Cir. 1999).

[2] 542 U.S. 241 (2004).

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