Kluwer Arbitration Blog

Section 1782 Discovery: California District Court Follows Sixth and Fourth Circuits in Holding Statute Applies to Private Arbitral Tribunals

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A California district court held in February that 28 U.S.C. Section 1782 could be used to seek discovery for use in a private, commercial arbitration, becoming the first district court in the Ninth Circuit to do so, and, following recent decisions in the Sixth and Fourth Circuits, potentially teeing up an even more pronounced split between the U.S. Court of Appeals on the issue.

Section 1782 and the "For Use in a Foreign or International Tribunal" Requirement

28 U.S.C. Section 1782 is a provision of the U.S. Code that allows a United States district court to order a person found or resident in the district to provide information or documents "for use in a proceeding in a foreign or international tribunal." As detailed in previous posts on the Kluwer Arbitration Blog, considerable uncertainty exists regarding the scope of the statute, and particularly whether it can be used to obtain discovery for use in a private, international commercial arbitration.

The uncertainty stems from the U.S. Supreme Court's 2004 decision in *Intel*. There, the Supreme Court suggested in *dicta* that private, commercial arbitrations fell within the scope of Section 1782. However, five years prior, the U.S. Courts of Appeals for the Second Circuit had explicitly held in *NBC* that a commercial arbitration administered by the International Chamber of Commerce (***ICC***) did *not* fall within the scope of "foreign or international tribunal" for purposes of Section 1782. The Fifth Circuit similarly held that same year that an arbitration administered by the Stockholm Chamber of Commerce (***SCC***) was not covered by Section 1782 in *Biedermann*.

Since *Intel*, little clarity has been gained on the subject. The Fifth Circuit, for its part, reaffirmed its pre-*Intel* decision, holding in 2009 in *El Paso Corp.* that Section 1782 could not be used to obtain discovery for use in a private, commercial arbitration taking place in Switzerland. The Eleventh Circuit, on the other hand, seemed to consider that Section 1782 did apply to a private arbitration taking place in Ecuador in its 2014 decision in *Consorcio*; however, that opinion was later vacated on other grounds.

The situation in the Second Circuit is even more complicated. A split has emerged in the last year amongst district courts within the Second Circuit—indeed within the Southern District of New York—on this issue, with some judges holding that *NBC* is still good law (see *Hanwei Guo*), and

others concluding that *Intel* overturned *NBC* and thus that private, commercial arbitrations are covered (see *Children's Investment Fund Foundation*). The Second Circuit has yet to address the issue post-*Intel*, but an appeal of the district court's decision in *Hanwei Guo* is currently pending before the Court (an appeal of *Children's Investment Fund Foundation* was withdrawn after having been filed by the parties).

More recently, two Circuit Courts have found that private, arbitral tribunals are covered by Section 1782. In September 2019, the Sixth Circuit held in *Abdul Latif Jameel* that the statute could be used to seek discovery for use in a UAE arbitration administered by the Dubai International Financial Centre – London Court of International Arbitration (***DIFC-LCIA***), becoming the first Circuit Court post-*Intel* to clearly hold that private, commercial arbitrations *are* covered by Section 1782.

Late last month, the jurisprudence shifted yet again. On March 30th, the Fourth Circuit held in *Servotronics* that Section 1782 could be used to obtain discovery for use in a private arbitral proceeding in the United Kingdom under the auspices of the Chartered Institute of Arbitrators (***CIArb***). Noting that the Fourth Circuit had never considered the issue before, pre- or post-*Intel*, the Fourth Circuit concluded that the Statue reflected Congress' intention to facilitate cooperation with *both* foreign courts and international tribunals. In light of this Congressional intent, it held that the "for use" requirement includes the private, commercial proceedings in the UK.

In *HRC-Hainan Holding Company*, the Northern District of California Follows the Recent Sixth and Fourth Circuit Decisions

Against this backdrop comes *HRC-Hainan Holding Company*, where a U.S. Magistrate Judge sitting in the U.S. District Court for the Northern District of California confronted whether a private arbitration before the China International Economic and Trade Arbitration Commission (***CIETAC***) is a foreign or international tribunal for the purposes of Section 1782. Noting that the Ninth Circuit had not yet decided the issue, the district court focused its analysis on the reasoning contained in the two key opposing cases, *NBC* and *Abdul Latif Jameel*, ultimately concluding that the Sixth Circuit's was the more persuasive.

In the district court's view, the reasoning of the Second Circuit was fundamentally flawed. In the first place, the Second Circuit in *NBC* neglected to properly interpret the ordinary and natural meaning of "foreign or international tribunal", which the district court found includes private arbitrations. Further, the district court found that nothing in the legislative history of the Statute suggested that Congress intended to exclude private arbitrations from the scope of Section 1782, as the Second Circuit had held, noting that the Sixth Circuit had instead found support for a more expansive interpretation in the legislative history. Finally, the district court stated that it was "not as persuaded by public policy concerns as was the Second Circuit", but, in any event, it considered that public policy may well weigh in favour of broader application. Finding that it was in complete agreement with the Sixth Circuit's decision in *Abdul Latif Jameel*, the district court thus held that a CIETAC proceeding was a "foreign or international tribunal" for purposes of Section 1782.

Splits Within and Across Circuits Further Highlight Need for Clarification

The district court's decision in *HRC-Hainan* is the first in the Ninth Circuit to hold that a private, commercial arbitration falls within the scope of Section 1782. However, it is not the first time a district court in the Circuit has considered the issue. District courts in the Ninth Circuit, including the Northern District of California, have twice held post-*Intel* that private, commercial arbitrations—particularly private arbitrations under the AAA-ICDR Rules and ICC Rules—are not covered by Section 1782. The February 2020 decision in *HRC-Hainan* thus tees up another district court split that is in need of clarification.

The unsuccessful defendants in *HRC-Hainan* have filed their notice of appeal to the Ninth Circuit, and a briefing schedule has already been set, with the appellants opening brief due in early May. Thus, the arbitration community should keep an eye on the Second and Ninth Circuits to see if *Abdul Jameel Latif* and *Servotronics* are the exception or the rule. Either way, there is a clear split amongst the Circuits, and decisions from the Second and Ninth Circuits may cause the Supreme Court—if not Congress—to finally weigh in on the issue of whether private, commercial arbitrations are "foreign or international tribunals" within the meaning of Section 1782.

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