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Raising the Stakes of the 28 U.S.C. § 1782(a) Debate: the U.S. Court of Appeals for the Sixth Circuit Holds § 1782(a) Applies to Private Arbitral Tribunals

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Introduction

Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp., decided by the U.S. Court of Appeals for the Sixth Circuit earlier this month, is arguably the first post-*Intel* decision from the U.S. Court of Appeals that "permits discovery for use" in a "private commercial arbitration" under 28 U.S.C. § 1782(a). (Case No. 19-5315, at *3 (6th Cir. 2019).) This decision is likely to stir the pot on the always interesting debate of whether U.S.-style discovery procedures are encroaching upon the oft-defended principles of international arbitration, and whether that is beneficial for international arbitration or simply a byproduct of the increasing complexity of matters in an ever expanding globalized world. Whether one agrees with the decision, as the Sixth Circuit suggested in *Abdul Latif*, "achieving a better policy outcome … is a task for Congress, not the courts". (*Id.*, at *23) (ellipses in original.)

§ 1782(a) and Its Applicability to International Arbitration

Pursuant to § 1782(a), a "district court of the district in which a person resides or is found may order him 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* …" § 1782(a) has been an advantageous tool in an attorney's arsenal to compel a person (or entity) in the United States to provide evidence in an international commercial or investment arbitration seated outside of the United States. (*See e.g.*, Ava Borrasso, *The Intersection of Corruption in International Arbitration and Discovery Pursuant to 28 USC § 1782* (Jul. 18, 2019).) In recent years, the tool seems to only have become sharper.

In the context of international commercial arbitration, the issue nevertheless has been whether a *private* arbitral tribunal or the parties to such an arbitration have standing to make a § 1782(a) request. Unfortunately (although downplayed by *Abdul Latif*) the legislative history is ambiguous, because international commercial arbitration was not as prevalent in 1964 when § 1782 was enacted. This ambiguity has spawned an incredible debate over the scope of § 1782(a), and this debate is now likely to intensify after the Circuit Court split created by *Abdul Latif*, as further discussed below.

The Important Case Law Prior to *Abdul Latif*

For the first (and only) time, the U.S. Supreme Court considered § 1782(a) in *Intel Corp. v. Advanced Micro Devices Inc.*, 542 US 241 (2004). In *Intel*, AMD filed an antitrust complaint against Intel with the Directorate General for Competition of the Commission of the European Communities. The Court, while not expressly addressing the issue of whether a private arbitral tribunal fell within the scope of § 1782(a), held that "the Commission is a § 1782(a) 'tribunal' when it acts as a first-instance decision maker." (*Intel*, 542 US at 246.) Importantly, in regards to how *Intel* would be later interpreted, the Court stated:

> Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint, if the DG-Competition declines to proceed, that decision is *subject to judicial review* by the Court of First Instance and, ultimately, by the court of last resort for European Union matters, the Court of Justice for the European Communities. (*Id.*, at 254 (emphasis added).)

In reaching its holding, the Court briefly considered the term "tribunal", referring in part to late-Professor Hans Smit's definition in his 1965 article entitled *International Litigation Under the United States Code*: "the term 'tribunal' … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts …" (*Id.*, at 258.) Professor Smit was described by then Circuit Judge Ginsberg (who wrote for the majority in *Intel* as Justice Ginsberg and worked under Professor Smit) as the "dominant drafter" of § 1782(a). (*See In re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989).) Omitted from the Court's use of Professor Smit's definition, however, were the words "all bodies exercising adjudicatory powers".

Prior to *Abdul Latif*, only two other U.S. Court of Appeals have considered whether § 1782(a) applies to an international commercial arbitral tribunal, both of which held that it did not. Both decisions, however, were prior to *Intel*.[1)] In *NBC*, the U.S. Court of Appeals for the Second Circuit held that § 1782(a) did not apply to an international commercial arbitral tribunal established under the ICC Rules. (*See NBC v. Bear Stears & Co.*, 165 F.3d 184 (2d. Cir. 1999).) First finding that the term "tribunal" was ambiguous, the Second Circuit next considered the legislative history and purpose of § 1782(a), stating that the legislature "had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state". The Second Circuit also noted the term "international tribunal" was used as a replacement for a prior statute, which limited international tribunals to governmental or intergovernmental arbitral tribunals. Lastly, the Second Circuit considered it relevant that Congress never mentioned international commercial arbitration in the legislative history of § 1782, stating:

> The legislative history's silence … is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention.

Post *NBC*, however, the U.S. District Court for the Southern District of New York (which is within the Second Circuit) has been unable to reach a clear consensus on the issue of whether a private international commercial arbitral tribunal is within the scope of § 1782(a). *See e.g.*, *In re Application of the Children's Investment Fund*, Case No. 18-MC-104 (VSB) (S.D.N.Y. Jan. 30, 2019) (discussed in Lucas Bento, *Section 1782 Discovery for Use in Private Arbitrations: the New York Saga Continues* (Mar. 8, 2019); *see also In re Kleimar N.V.*, 220 F.Supp.3d 517 (S.D.N.Y. Nov. 16, 2016) and *In re Application of Hanwei Guo*, Case No. 18-MC-561 (JMF) (S.D.N.Y. Feb. 25, 2019) (discussed in Julia Sherman, *Section 1782 Discovery: Recent Decisions Highlight Splits in the Second Circuit*).)

The U.S. Court of Appeals for the Fifth Circuit nevertheless reached a similar conclusion as the Second Circuit when considering whether § 1782(a) applied to an international commercial arbitral tribunal established under the SCC Rules. (*See Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).) In reaching its holding, the Fifth Circuit not only considered the legislative history's silence in regards to private international arbitration, but further noted that if § 1782(a) applied to private arbitral tribunals it would be odd for Congress to provide "broader discovery in aid of a foreign private arbitration than is afforded its domestic dispute-resolution counterpart" under the Federal Arbitration Act ("FAA").

Abdul Latif and Its Potential Impact on International Commercial Arbitration

In *Abdul Latif*, the U.S. Court of Appeals for the Sixth Circuit considered whether an international commercial arbitral tribunal established under the DIFC-LCIA Rules in Dubai was a foreign or international tribunal within the scope of §1782(a).

Downplaying the legislative history, the Sixth Circuit in *Abdul Latif* reached a different conclusion than the Second and Fifth Circuits by focusing instead on a textual analysis of the term "tribunal". For example, the Sixth Circuit considered "several reputable legal dictionaries" that have definitions of tribunal "broad enough to include private arbitrations", and found further support "in American courts' historical and continuing usage of the word to describe private arbitrations". (*Id.*, at *11.) In this regard, the Sixth Circuit noted that "courts used the word to describe private, contracted-for commercial arbitrations for many years before Congress added the relevant language to § 1782(a) in 1964". (*Id.*, at *12.) The Sixth Circuit's analysis, in this regard, is somewhat of a departure from the focus of scholarly debates and the analysis in *NBC* and *Biedermann*, which has focused more on the predecessor statutes to § 1782. The Sixth Circuit was, however, unpersuaded and believed that *NBC* and *Biedermann* "turned to legislative history too early in the interpretation process". (*Id.*, at *20.) Even if the Sixth Circuit was to consider the legislative history, the Court concluded that "what the statements make clear is Congress's intent to *expand* § 1782(a)'s applicability". (*Id.*, at *22) (emphasis in original.) Whether that expansion included private arbitral tribunals is still debatable, as international commercial arbitration was little to what it is today. The legislative history indicates that the field of law was not even on Congress's radar at the time.

The Sixth Circuit nevertheless also focused on how its holding comports with the reasoning set-out in *Intel*: "the Supreme Court seems to have primarily focused on the decision-making power of the Commission – and Congress's substitution in 1964 of the broad phrase 'foreign or international tribunal' for the specific phrase 'judicial proceeding in a foreign country' in reaching its conclusion

that the Commission was a 'tribunal'". (*Id.*, at *18.) The Sixth Circuit also found no support in *Intel* for FedEx's argument that state-sponsored arbitrations are the only type of arbitration to qualify under §1782(a). (*Id.*, at *19.)

The Sixth Circuit lastly considered the policy implications of expanding U.S.-style discovery to private international arbitral tribunals. While the Sixth Circuit noted that FedEx "may be correct in its assessment of some of the interests at stake in extending discovery", it noted that this was "a task for Congress, not the courts". (*Id.*, at *22-23.) For example, the Sixth Circuit was not persuaded by FedEx's position (similar to *NBC* and *Biedermann*'s) that a broad definition of tribunal would render § 1782(a) at odds with the FAA. (*Id.*, at *23-25.) Addressing other policy positions advanced by FedEx, including the costs and efficiency of international arbitration compared to U.S.-style discovery, the Sixth Circuit summed up that "none of the policy arguments urged by FedEx Corp. affect our conclusion that the word 'tribunal' is § 1782(a) encompasses private, contracted-for commercial arbitrations of the type at issue here".

The decision in *Abdul Latif* is likely to only increase the debate regarding whether U.S.-style discovery has a place in international commercial arbitration, and it will be interesting to see whether other Circuit Courts consider the issue and adopt the reasoning in *Abdul Latif*. For those not in favor of *Abdul Latif*'s potential encroachment of U.S.-style discovery in international commercial arbitration, perhaps now is the time to petition Congress to reconsider § 1782 and whether it should apply to international commercial arbitrations seated in venues outside of the United States.

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References

?1 The U.S. federal judicial system is set-up with federal District Courts (the lower courts), Court of Appeals, and the Supreme Court. The Court of Appeals are split into 12 circuits, each of which have lower federal District Courts within their jurisdiction. Decisions from the Supreme Court are binding on all the lower courts, including the Court of Appeals. Decisions from each circuit Court of Appeals are only binding on the District Courts within its jurisdiction. For a more detailed discussion, please visit: https://www.justice.gov/usao/justice-101/federal-courts.

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