Second Circuit Reaffirms Federal Courts May Not Order Discovery for Private Commercial Arbitrations Abroad

In *In Re Guo*, No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020), *as amended* (July 9, 2020)[1], the United States Court of Appeals for the Second Circuit evaluated whether the Supreme Court's decision in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), required reconsideration of the Second Circuit's prior holding that 28 U.S.C. §1782(a) is inapplicable to discovery sought in connection with private international commercial arbitrations.[2] *See National Broadcasting Co.* v. *Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*"). After carefully considering the Supreme Court's analysis in *Intel* and recognizing the existence of a circuit split on the issue, the Second Circuit reaffirmed its prior decision, concluding that "nothing in the Supreme Court's *Intel* decision alters our prior conclusion in *NBC* that §1782(a) does not extend to private international commercial arbitrations."

I. Factual Background and Procedural Posture of *In Re Guo*

From 2012 to 2013, Petitioner-Appellant Hanwei Guo ("Guo") invested approximately $26 million in three "Ocean Entities," which were Chinese companies founded by Guomin Xie ("Xie"). Guo then sold his shares in the Ocean Entities in transactions that were allegedly "misleading, extortionate, and fraudulent," receiving a price that was below fair value. One of the Ocean Entities later became part of Tencent Music, one of the largest music streaming platforms worldwide.

In September 2018, Guo initiated arbitration against Xie, Tencent Music, and several other entities before the China International Economic and Trade Arbitration Commission ("CIETAC"), alleging that he was defrauded in the sale of his stake in the Ocean Entities. CIETAC claims that it is independent of the Chinese government, and its arbitrators may "issue awards that Chinese law will recognize as 'final and binding.'"

According to declarations submitted by the parties, CIETAC's jurisdiction concerns only disputes between private parties that have elected CIETAC arbitration through contractual agreement, as well as disputes between investors and Chinese governmental entities. There are two sets of rules promulgated by CIETAC applicable in this matter. Under the rules applicable to private arbitrations, "CIETAC's jurisdiction over any particular matter depends entirely on the agreement of the parties." The CIETAC rules also contemplate discovery and "includ[e] a mechanism by which the arbitration panel may order parties to produce evidence."

In December 2018, Guo applied for discovery pursuant to 28 U.S.C. §1782(a) in the District Court for the Southern District of New York, seeking discovery from Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and Morgan Stanley & Co. LLC. The discovery sought from these banks concerned their role in Tencent Music's initial public offering. On February 25, 2019, the District Court denied the petition. *See In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign*

[1] Unless otherwise specified, quoted statements in this memorandum are taken from this decision.

[2] Section 1782 allows a party to a foreign litigation to apply to a district court to obtain evidence for use in the legal proceeding outside of the United States. Upon application to the district court, "[t]he 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*, including criminal investigations conducted before formal accusation." 28 U.S.C. §1782 (emphasis added). Of the mandatory requirements for a §1782 application is that "the discovery is for use in a foreign proceeding before a foreign [or international] tribunal." (internal quotations omitted). The crux of this court's decision is whether private international commercial arbitrations satisfy the statute's "foreign or international tribunal" requirement.

Proceeding Pursuant to 28 U.S.C. §1782, 2019 WL 917076, at *3 (S.D.N.Y. Feb. 25, 2019). In reaching its holding, the District Court concluded that the Second Circuit's prior decision in *NBC* remained good law despite the Supreme Court's ruling in *Intel*, and that §1782(a) was inapplicable to foreign private arbitrations. The District Court further ruled that CIETAC was closer to a private arbitral body than a governmental adjudicatory body, and discovery pursuant to §1782(a) therefore was not available.

II. The *NBC* and *Intel* Decisions and the Subsequent Circuit Split

The Second Circuit's 1999 decision in *NBC* held that a private arbitration before the International Chamber of Commerce in Paris, France did not qualify as a "proceeding in a foreign or international tribunal for purposes of §1782(a)."[3] That determination was guided by the legislative history of §1782, which the Second Circuit considered due to the ambiguity of the statute. As the Second Circuit observed in *In Re Guo*, "[o]ur decision in *NBC* concluded 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." In reaching this conclusion, the Second Circuit referred to House and Senate reports accompanying the statute, "contemporaneous academic literature" supporting the position that §1782(a) applied to "intergovernmental arbitration and other *state-sponsored* dispute resolution mechanisms," and "policy considerations weighing strongly in favor of preserving the efficiency and cost-effectiveness of private arbitration." The Second Circuit's decision in *NBC* was followed by the Fifth Circuit's decision in *Republic of Kazakhstan* v. *Biedermann Int'l.*, 168 F.3d 880 (5th Cir. 1999), which also held that §1782(a) does not apply to private international arbitrations.

In 2004, five years after *NBC*, the Supreme Court announced its *Intel* decision, which is "the only Supreme Court case to address §1782" and which "clarified numerous aspects of the statute." Of particular relevance to the issue presented in *In Re Guo* was the Supreme Court finding that the Directorate General-Competition of the Commission of the European Communities "as a 'quasi-judicial agenc[y]' with a proof-gathering function, qualifies as a tribunal [under Section 1782] 'to the extent that it acts as a first-instance decisionmaker,' with its decisions reviewed by the Court of First Instances and the European Court of Justice (both of which were clearly 'tribunals')." According to the Second Circuit, "[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 *Intel* decision has led to differing interpretations of §1782 by the federal courts of appeal.[4] The Fifth Circuit, for its part, reaffirmed its prior holding and reasoned that *Intel* did not impact its prior analysis in *Biedermann*. *See El Paso Corp.* v. *La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009). Accordingly, §1782 remains unavailable in the Fifth Circuit to compel discovery for use in a private foreign arbitration. The Sixth and Fourth Circuits, however, have held that §1782 does apply to private international

[3] Section 1782 imposes several requirements, including that "(1) the person from whom discovery is sought resides (or is found) in the district of the district court to which the application is made, (2) the discovery is for use in a foreign proceeding before a foreign [or international] tribunal, and (3) the applications is made by a foreign or international tribunal or any interested person." *Mees* v. *Buiter*, 793 F.3d 291, 297 (2d Cir. 2015) (citation omitted). The *In Re Guo* decision concerns the second of these requirements, as well as whether the CIETAC qualified as a foreign tribunal.

[4] The Second Circuit observed that post-*Intel*, district courts within the Second Circuit have also differed regarding the continuing viability of the *NBC* decision. *See In Re Guo*, at *5 ("Meanwhile, district courts within the Second Circuit have split on the question of whether *NBC* remains intact post-*Intel*. *Compare, e.g., In re Children's Inv. Fund Found. (U.K.)*, 363 F. Supp. 3d 361, 369-70 (S.D.N.Y. 2019), *with, e.g.*, *In re Petrobras Sec. Litig.*, 393 F. Supp. 3d 376, 385 (S.D.N.Y. 2019).").

arbitrations.[5] In reaching their respective holdings, the Sixth Circuit stated that it found the Second Circuit's *NBC* analysis "unpersuasive," and the Fourth Circuit reasoned that the U.K. arbitration at issue "fell within the scope of §1782 even under the construction adopted by the Second and Fifth Circuits" because the "U.K. Arbitration Act of 1996 … is 'clearly' a 'product of government conferred authority.'"

III. The Second Circuit's Decision in *In Re Guo*

The Second Circuit rejected Guo's argument that "*NBC* has been overruled or otherwise undermined by the Supreme Court's decision in *Intel*." Recognizing that a three-judge panel is bound by prior panels' decisions unless overruled by an *en banc* decision or intervening Supreme Court opinion, the panel first considered whether *Intel* cast "sufficient doubt" upon the ongoing viability of *NBC*.[6] In finding that *NBC* remained good law, the panel focused primarily on the fact that "the question of whether foreign private arbitral bodies qualify as tribunals under §1782(a) was not before the *Intel* Court." The panel also was swayed by the fact that both the *Intel* Court and the *NBC* panel "considered some of the same congressional reports" to conclude that "Congress drafted the provision in question with an intent to expand the scope of coverage." Moreover, "[t]he fact that *NBC* went on to determine that this expanding function did not extend so far as to incorporate private arbitration—a question that the *Intel* Court had no occasion to consider—does not render *NBC*'s treatment of legislative history incompatible with that of *Intel*."

Moving to the two questions presented by *In Re Guo*—namely: (i) "whether private international commercial arbitrations are proceedings for which §1782 may be invoked; and [(ii)] if not, whether CIETAC arbitration is a private arbitration and therefore outside the scope of §1782"—the Second Circuit reaffirmed that private international arbitration panels are not "foreign or international tribunals" for purposes of §1782 and clarified that "the 'foreign or international tribunal' inquiry does not turn on the governmental or nongovernmental *origins* of the administrative entity in question." The Second Circuit made clear that qualification as a "foreign or international tribunal" depended on a "range 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. In short, the inquiry is whether the body in question possesses the functional attributes most commonly associated with private arbitrations."

The Second Circuit applied these factors to conclude that CIETAC is analogous to a private arbitration even though its genesis was an act of the state.[7] The Court was particularly focused on the fact that: (i) CIETAC "functions essentially independently of the Chinese government in the administration of its arbitration cases"; (ii) the limited appellate review of CIETAC arbitrations and that "the grounds for setting aside an arbitration under Chinese law cited by Guo overlap extensively with the grounds upon which a party could petition a U.S. court to set aside an arbitration award" in a private, contract-based, arbitration; and (iii) that "the CIETAC panel derives its jurisdiction *exclusively* from the agreement of the parties and has no jurisdiction except by the parties' consent."

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[5] *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc.* v. *Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020).

[6] The impetus for assessing whether *Intel* casts "sufficient doubt" upon *NBC* is that "[t]he Supreme Court need not address the precise issue decided by [a] panel … in order to qualify as an intervening decision that casts sufficient doubt upon a prior ruling as to render it non-binding." Rather, the question is whether the Supreme Court's conclusion on an issue has "broken the link on which [the Second Circuit] premised [its] prior decision or undermined an assumption of that decision."

[7] "A closer inquiry is required where, as here, the arbitral body was originally created through state action, yet subsequently evolved such that it arguably no longer qualifies as a 'governmental or intergovernmental tribunal[,] … conventional court[, or] … other state-sponsored adjudicatory bod[y].'".

IV. Implications

As a practical matter, parties hoping to leverage §1782 to obtain discovery in connection with foreign arbitrations must take care to select carefully an arbitral body that will qualify as a "foreign or international tribunal" under the Second Circuit's decision. Particular attention must be paid to the role of foreign governments in creating and administering the arbitral scheme and whether the respective arbitral body's jurisdiction to resolve the matter flows exclusively from a contractual agreement among the parties or from some broader governmental mandate.

The Second Circuit's decision also increases the likelihood of Supreme Court review of this issue because *In Re Guo* creates a direct circuit split regarding the scope of §1782(a). The Fifth Circuit, like the Second Circuit, has held that §1782(a) does not apply to private international arbitrations and that *Intel* had no effect on its rulings on the topic. The Sixth and Fourth Circuits, however, recently ruled that §1782(a) does extend to private international arbitrations, with the Sixth Circuit at least calling into question the analysis and rationale underlying the Second Circuit's *NBC* decision.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Joel Kurtzberg at 212.701.3120 or jkurtzberg@cahill.com; Peter Linken at 212.701.3715 or plinken@cahill.com; or Grace McAllister at 212.701.3343 or gmcallister@cahill.com; or email publications@cahill.com.