Increased Forum Shopping For US Discovery Likely After Guo

By **Justin Ellis, Michelle Parthum and Jordan Rice** (July 22, 2020, 3:01 PM EDT)

Justin Ellis

Michelle Parthum

Jordan Rice

Title 28 of the U.S. Code, Section 1782, authorizes U.S. district courts to order the production of documents or testimony for use in a proceeding in a foreign or international tribunal.

Section 1782 provides a powerful tool for litigants in foreign proceedings, allowing them to benefit from U.S. discovery rules, which are often far more liberal than those in foreign jurisdictions.

Section 1782 discovery may only be granted if the discovery will be used in a proceeding in a "foreign or international tribunal," a phrase which the statute does not define. In recent years, the circuit courts have divided over whether this phrase encompasses foreign private arbitrations.

On July 9, the U.S. Court of Appeals for the Second Circuit in In re: Guo became the fourth circuit to weigh in on this issue in the wake of the U.S. Supreme Court's 2004 decision in Intel Corp. v. Advanced Micro Devices Inc. With additional courts of appeals poised to rule on the issue in the coming months, the circuit split promises to deepen, increasing the chances that the Supreme Court will step in.

Circuits Applying Section 1782 to Foreign Private Arbitrations

The U.S. Courts of Appeals for the Fourth and Sixth Circuits have held that Section 1782 applies to at least certain foreign private arbitrations.[1] The courts relied on somewhat different reasoning, providing two separate courses that other courts of appeals or the Supreme Court may choose to follow.

The U.S. Court of Appeals for the Sixth Circuit based its conclusion primarily on the text of Section 1782.[2]

The court first observed that the definition of "tribunal" in numerous dictionaries published around the time of the statute's 1964 amendment was broad enough to include private arbitral panels. The court next turned to the common usage of the word "tribunal" in legal writing, concluding that the term has long been used in an expansive fashion that includes private arbitrations.

The court then considered other uses of the word "tribunal" within the statute and found that they did not compel a narrower interpretation of the term.

The Sixth Circuit acknowledged that the U.S. Courts of Appeals for the Second and Fifth Circuits had reached contrary conclusions based upon the statute's legislative history and policy considerations. But it determined that resort to these interpretive aids was unwarranted in light of the statute's clear text.

The Sixth Circuit also found support for its conclusion in the Supreme Court's 2004 decision in Intel Corp. v. Advanced Micro Devices Inc.[3] In Intel, the court held that Section 1782 could apply to a proceeding before the European Directorate-General for Competition, an

executive and administrative body that enforces antitrust law for the EU.

While Intel did not address Section 1782's applicability to foreign private arbitrations, the Sixth Circuit found support for its conclusion in Intel's reasoning.

First, Intel noted that Section 1782 had been amended in 1964 to reach at least some nonjudicial proceedings. Second, in holding that the Directorate-General of Competition fell within Section 1782's scope, Intel noted that it was a quasi-judicial agency with a proof-gathering function that acted as a "first-instance decision maker." Third, Intel approvingly quoted from a law review article written by Hans Smit, a professor who had helped draft the 1964 amendments to Section 1782, which stated that "[t]he term 'tribunal' ... includes ... arbitral tribunals." The Sixth Circuit found nothing in this reasoning that cast doubt on its textual analysis.

In March 2020, the U.S. Court of Appeals for the Fourth Circuit joined the Sixth Circuit, albeit in a narrower ruling.[4] The Fourth Circuit held that a private arbitration in the U.K. qualified as a tribunal under Section 1782.

The Fourth Circuit reasoned that even if "foreign or international tribunal" means only entities that exercise government-conferred authority, the U.K. arbitration in question would satisfy that definition because "U.K. arbitrations are sanctioned, regulated, and overseen by the government and its courts."

The court further held that any expense or delay introduced in foreign arbitrations by making certain U.S. discovery available could be mitigated by the district court's exercise of discretion over the scope of discovery permitted.

Circuits Holding that Section 1782 Does Not Apply to Foreign Private Arbitrations

The Second and Fifth Circuits, on the other hand, have both ruled that foreign private arbitrations do not fall within Section 1782's ambit. Each circuit first reached this conclusion prior to Intel, and in the wake of that decision, each has determined that Intel does not require overruling its preexisting case law on the matter.

This month, the Second Circuit ruled in Guo v. Deutsche Bank Securities Inc. that nothing in Intel altered its prior conclusion that foreign private arbitrations fall outside of Section 1782's scope.[5] In so holding, the Second Circuit revisited and reaffirmed its 1999 decision in National Broadcasting Corp. v. Bear Stearns & Co.[6]

In NBC, the Second Circuit, finding the phrase "foreign or international tribunal" ambiguous, had turned to statutory and legislative history. While the NBC court found substantial support in the legislative record for interpreting this phrase to include "administrative tribunal[s] or quasi-judicial agenc[ies]," the court found it significant that the legislative history contained no reference to private arbitrations.

The NBC court also cited the policy concern that applying Section 1782 to private arbitrations would undermine the efficiency and cost-effectiveness for which arbitration is prized.

In Guo, the Second Circuit held that Intel did not overrule NBC. The Guo court emphasized that Intel had not addressed the question of whether foreign private arbitrations fall within Section 1782's scope.

It then held that "[t]he only language in Intel that is even arguably in tension" with NBC — i.e., the Supreme Court's approving quotation of Smit's defining "tribunal" to include "arbitral tribunals" — was not sufficient to undermine NBC. Not only did the quotation appear in dicta, but Smit's reference to "arbitral tribunals" did not necessarily encompass private arbitral tribunals.

Like the Second Circuit, the Fifth Circuit originally held prior to Intel that that Section 1782 does not apply to foreign private arbitrations. Since Intel, it has reaffirmed that decision — though only in an unpublished, nonprecedential opinion.

Similar to the Second Circuit, the Fifth Circuit's pre-Intel decision relied on legislative history, the meaning of the term "arbitral tribunals" in other statutes, an analysis of Section 1782's purpose and policy arguments.[7]

Following Intel, the Fifth Circuit reaffirmed that precedent.[8] Addressing the Intel court's quotation of the Smit article defining "tribunal" to include "arbitral tribunals," the Fifth Circuit held that nothing in the quotation suggested that the Supreme Court was adopting that definition of the term "tribunal" in full. The Fifth Circuit also noted that the policy concerns it had raised pre-Intel were not considered by the Intel Court.

Looking Ahead

Additional circuits are poised to further deepen this circuit split in the coming months. The issue of whether Section 1782 applies to foreign private arbitrations is presented in cases already argued or being briefed before the U.S. Courts of Appeals for the Third, Seventh and Ninth Circuits.[9]

Given the significant disagreements among lower courts over this issue, Supreme Court review appears increasingly likely. Because the court often prefers to allow issues to percolate in the courts of appeals, it may wait to weigh in until the Third, Seventh and Ninth Circuits issue decisions in the cases pending before them.

But the court could opt to grant review earlier if a petition for certiorari arises from either the Second or Fourth Circuits' recent opinions.[10] Anyone with a stake in the use of Section 1782 to obtain U.S. discovery for use abroad is well advised to keep an eye on certiorari petitions arising from Guo, Servotronics or other pending cases. And practitioners involved in pending Section 1782 disputes should consider raising arguments for preservation purposes as appropriate.

If and when the Supreme Court takes up the issue for review, it could resolve the circuit split in a variety of ways.

Given the increasing embrace of textualist methods at the court, the Sixth Circuit's approach may hold appeal compared to the approach of circuits that have consulted Section 1782's legislative history.

Indeed, the court recently applied a similar textualist approach in Bostock v. Clayton County,[11] holding that the plain text of Title VII of the Civil Rights Act protects individuals from discrimination on the basis of sexual orientation and gender identity, despite legislative history that might have suggested otherwise.

By comparison, if the court concludes that Section 1782's text is ambiguous, the court's focus could shift to a host of issues — for example, Section 1782's legislative history, policy

arguments, the Intel decision and Smit's statement that tribunals include arbitral tribunals, or the extent to which a private arbitration is subject to governmental oversight and regulation.

In the meantime, anyone seeking either to obtain or oppose Section 1782 discovery should think carefully about where relevant evidence is located and which district courts have both jurisdiction and current authority under the split to order such relief.

Given that Section 1782 discovery can be obtained from any jurisdiction in which the target resides or is found, there may be a number of potential jurisdictions in which discovery from a given target can be sought.

Practitioners may thus choose to pursue Section 1782 discovery in certain jurisdictions rather than others, or to select certain discovery targets rather than others. As a result, for the time being, the Fourth and Sixth Circuits will likely see a disproportionate number of applications for Section 1782 discovery in aid of foreign private arbitrations.

Justin Ellis and Michelle Parthum are partners, and Jordan Rice is an associate, at MoloLamken LLP.

[1] The Eleventh Circuit has also considered this issue, initially holding that the private arbitration in question fell within Section 1782's scope. However, the court withdrew that opinion and issued a new opinion taking no position on the matter. See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 993-98 (11th Cir. 2012), vacated and superseded, 747 F.3d 1262, 1270 & n.4 (11th Cir. 2014).

[2] Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019).

[3] 542 U.S. 241 (2004).

[4] Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020).

[5] No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020), as amended (July 9, 2020).

[6] 165 F.3d 184 (2d Cir. 1999).

[7] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 882 (5th Cir. 1999).

[8] El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31 (5th Cir. 2009).

[9] See Servotronics, Inc. v. Rolls-Royce PLC, No. 19-1847 (7th Cir.) (oral argument held Sept. 19, 2019); EWE Gasspeicher GMBH v. Halliburton Co., No. 20-1830 (3d Cir.) (briefing in progress); Storag Etzel GMBH v. Baker Hughes Co., No. 20-1833 (3d Cir.) (briefing in progress); HRC-Hainan Holding Co. v. Hu, No. 20-15371 (9th Cir.) (oral argument

scheduled for Sept. 14, 2020).

[10] Rolls Royce, an intervenor-appellee in the Fourth Circuit's Servotronics case, has indicated in stay motions filed in the Fourth Circuit and district court that it intends to petition for certiorari. See In re Servotronics, Inc., 2020 WL 3051247, at *2 (D.S.C. June 8, 2020).

[11] 140 S. Ct. 1731 (2020).