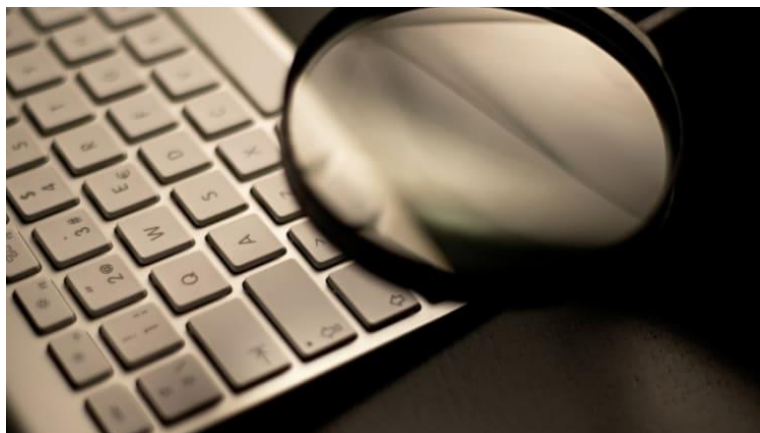


# Two new rulings on US discovery

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*Magnifying glass on computer keyboard (Credit: ThinkStock)*

**Mitchell Hurley, John Murphy and Justin Williams** of Akin Gump consider two recent rulings by US circuit courts that have swept aside assumptions about the availability of US discovery in aid of international arbitrations and in respect of documents held outside the US.

Two decisions by the US court in the past month are likely to have a significant effect on the practice of international arbitration worldwide. Until recently, the availability of US discovery against third parties in aid of foreign proceedings was thought not to extend to international arbitration or to documents held overseas by US persons. Both of those assumptions have now been swept aside, at least in certain circuit courts in the US. The ability now to seek such US third-party discovery represents a significant new tool to be deployed by arbitration counsel in suitable cases. The implications in some instances may be far-reaching.

On 19 September, the Sixth Circuit Court of Appeals approved the use of section 1782 of the United States Code to obtain discovery in connection with a commercial arbitration outside the United States. In doing so, the Sixth Circuit diverged from the Fifth and Second Circuits, which have reached the opposite conclusion. The Sixth Circuit decision arose from a dispute between Abdul Latif Jameel Transportation Company (ALJ) and FedEx International. The parties entered into two contracts, one that specified that disputes would be resolved in Dubai under the rules of the DIFC-LCIA, and one that specified arbitration in Saudi Arabia under the rules of that country. Disputes arose relating to the agreements, and separate arbitrations were brought in each forum.

In connection with the arbitrations, ALJ filed an application for discovery under section 1782 in the US District Court for the Western District of Tennessee, seeking production of documents and deposition testimony from FedEx's US-based affiliate. Under section 1782, a federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon an application by "any interested person." After a hearing, the district court denied the application, holding that neither the DIFC-LCIA nor the Saudi Arabian arbitration panel constituted a "foreign or international tribunal" under the statute.

The Sixth Circuit, after “careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history” of section 1782, reversed the district court and held that the statute permits discovery in aid of private commercial arbitrations occurring outside the United States. The decision hinged on the meaning of the word “tribunal,” which was not defined by the statute. The Sixth Circuit noted that some dictionary definitions of the word were broad enough to encompass private arbitrations, while others were narrower. The court then observed that the word “tribunal” had been commonly used by US courts (including the US Supreme Court) to describe private arbitration for many years before Congress added that word to section 1782 in 1964. The Sixth Circuit likewise determined that nothing in that statute evidenced an intent that “tribunal” should be interpreted to exclude private arbitration.

The Sixth Circuit also found support for a broad interpretation of “tribunal” in a Supreme Court decision from 2004, *Intel Corp v Advanced Micro Devices*. That case involved an application for discovery under section 1782 related to a case brought before the Directorate-General for Competition of the Commission of the European Communities. The Supreme Court held that this body was a “tribunal” under the statute. Among other things, the Supreme Court relied on the legislative history of section 1782, noting that the original statute applied only to a “judicial proceeding pending in any court in a foreign country,” whereas the statute as amended in 1964 applied to a “proceeding in a foreign or international tribunal.” According to the Supreme Court, “Congress understood that change to provide the possibility of US judicial assistance in connection with administrative and quasi-judicial proceedings abroad.”

By contrast, the Second Circuit in *National Broadcasting Co v Bear Stearns* and the Fifth Circuit in *Republic of Kazakhstan v Biedermann* both held (prior to the Supreme Court’s decision in *Intel*) that the meaning of the word “tribunal” was ambiguous and relied on the legislative history of the section to conclude that it did not encompass private arbitrations. The Second Circuit, for example, reasoned that although the House and Senate committee reports stated that “tribunal” was “not confined to proceedings before conventional courts,” it was nevertheless “apparent in the context that the authors of these reports 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 found it noteworthy that the legislative history made no mention of private arbitration. The court indicated it was “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.” The Sixth Circuit’s decision thus establishes a circuit split, which increases the chances that the Supreme Court will weigh in to resolve the issue.

The potential impact of the *ALJ* decision is magnified by a 7 October decision in the Second Circuit, *In re Application of Antonio del Valle Ruiz*. There, the Second Circuit joined the Eleventh Circuit in holding that section 1782 authorises discovery located outside the US, as long as the party from whom discovery is sought has possession, custody, and control of the evidence and is subject to personal jurisdiction in the court where the application was made. In a brief discussion, the Second Circuit rejected the respondent’s contention that the statute should be limited by the canon of statutory construction known as the “presumption against extraterritoriality,” which states that “absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application.” The Second Circuit reasoned that this presumption applied only to statutes that regulate conduct; section 1782, in contrast, is simply a discovery mechanism that does not regulate conduct and does not subject a person to liability, and thus the presumption did not apply.

Both decisions are subject to important limitations. One of the most significant is geography: the *ALJ* decision is binding only on courts within the Sixth Circuit, which includes federal courts in Michigan, Ohio, Kentucky and Tennessee. As discussed above, the Second Circuit (New York, Connecticut and Vermont) and Fifth Circuit (Texas, Louisiana and Mississippi) Courts of Appeal have expressly adopted the opposite rule. An application under section 1782(a) must be brought in the “district court of the district in which a person [from which discovery is sought] resides or is found,” and thus the decision cannot be used to obtain discovery from persons residing or located solely within the Second or Fifth Circuits. Likewise, the *Valle Ruiz* decision is binding only in the Second Circuit, and the Eleventh Circuit (Florida, Alabama and Georgia) is the only other Court of Appeal to address the issue. Both *ALJ* and *Valle Ruiz*, however, may be a persuasive authority that courts in other circuits may take into account.

Another important limitation is that section 1782 can only be used to obtain discovery from persons located within the United States – although, as *Valle Ruiz* makes clear, such discovery may also include evidence

located outside the United States. Last, the statute is permissive, not mandatory: it does not *require* that a district court grant discovery in aid of a foreign proceeding, and district courts retain substantial discretion to determine the scope of discovery allowed, including whether to permit discovery of evidence outside the United States or whether to permit any discovery at all.

Notwithstanding these limitations, it is clear that these two recent decisions of the US circuit courts have the potential to expand the scope of the discovery of evidence in private international arbitration quite significantly. That said, the ambit of these decisions will naturally fall to be further tested as parties to international arbitrations seek to make use of section 1782.

### **Cases referenced**

*In re Application to Obtain Discovery for Use in Foreign Proceeding*, 2019 WL 4509287 (6th Cir. Sept. 19, 2019)

*Republic of Kazakhstan v. Biedermann*, 168 F.3d 880 (5th Cir. 1999)

*National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999)

*Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)

*In re Application of Antonio del Valle Ruiz*, 2019 WL 4924395 (2d Cir. Oct. 7, 2019)