

International Arbitration Alert

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Sixth Circuit Approves Discovery in Aid of Foreign Private Arbitrations

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Key Points

- The 6th Circuit Court of Appeals recently approved the use of 28 U.S.C. 1782(a) to obtain discovery in connection with a commercial arbitration proceeding occurring outside the United States.
- The decision establishes a circuit split, which increases the chances that the Supreme Court will weigh in to resolve the issue.
- Parties who desire certainty regarding the application of Section 1782 to private arbitrations should consider addressing the issue in all future arbitration clauses.

In a recent decision with potentially wide-ranging consequences for private international arbitrations, the 6th Circuit Court of Appeals recently approved the use of 28 U.S.C. 1782(a) to obtain discovery in connection with a commercial arbitration proceeding occurring outside the United States. *In re Application to Obtain Discovery for Use in Foreign Proceeding*, 2019 WL 4509287 (6th Cir. Sept. 19, 2019). In doing so, the 6th Circuit diverged from two other circuit courts that reached the opposite conclusion. See *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). As a result of the decision, discovery from third parties in the United States in aid of foreign international arbitration proceedings may now be available in certain circumstances.

The decision originated from a dispute between Abdul Latif Jameel Transportation Company Ltd. (“ALJ”) and FedEx International (“FedEx”). ALJ and FedEx entered into two contracts, one that specified that disputes would be resolved in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA), and one that specified that disputes would be settled by 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(a) in the United States District Court for the Western District of Tennessee, seeking production of documents and deposition testimony from FedEx’s United States-based affiliate. Under Section 1782(a), a federal district court may order

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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 DIFC-LCIA nor the Saudi Arabia arbitration panel constituted a “foreign or international tribunal” under the statute.

The 6th 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 § 1782(a),” reversed the district court and held that Section 1782 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 6th 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 U.S. courts (including the United States Supreme Court) to describe private arbitration for many years before Congress added that word to Section 1782(a) in 1964. The 6th Circuit likewise determined that nothing in that statute evidenced an intent that “tribunal” should be interpreted to exclude private arbitration.

The 6th Circuit also found support for a broad interpretation of “tribunal” in a Supreme Court decision, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). Intel involved an application for discovery under Section 1782(a) 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(a), 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 U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.” *Id.* at 248-49 (alterations omitted).

In contrast, the 2nd and 5th Circuits 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 2nd 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.” *Nat’l Broadcasting Co.*, 165 F.3d at 189. The 2nd Circuit also found it noteworthy that the legislative history made no mention of private arbitration. *Id.* 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.” *Id.* at 190.

The 6th Circuit’s decision thus establishes a circuit split, which increases the chances that the Supreme Court will weigh in to resolve the issue. Moreover, the decision is subject to important limitations. One of the most significant limitation is geographic: the decision is binding only on courts within the 6th Circuit, which includes federal courts in Michigan, Ohio, Kentucky and Tennessee. As discussed above, the 2nd Circuit

(New York, Connecticut and Vermont) and 5th 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 2nd or 5th Circuits. Likewise, Section 1782 can only be used to obtain discovery from persons located within the United States. Lastly, 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. Parties who desire certainty regarding the application of Section 1782 to private arbitrations should consider addressing the issue in all future arbitration clauses.

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