King & Spalding
Client Alert

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For more information, contact:

Berger, James E.
+1 212 556 2202
jberger@kslaw.com

Sun, Charlene C.
+1 212 556 2107
csun@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-4003
Tel: +1 212 556 2100

Second Circuit Denies Discovery in Support of Private Arbitration

On July 8, 2020, the United States Court of Appeals for the Second Circuit unanimously ruled in *Hanwei Guo v. Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC.*, No. 19-781, 2020 WL 3816098 (2nd Cir. July 8, 2020), that 28 U.S.C. § 1782(a) ("**Section 1782**") may not be invoked in aid of foreign private commercial arbitrations. The decision reaffirmed the Second Circuit's 1999 decision in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) ("**NBC**"), and solidifies the circuit split on whether Section 1782 may be used to aid private commercial arbitration proceedings. The decision directly contradicts recent decisions of the Fourth and Sixth Circuit holding the opposite.

BACKGROUND[1]

The *Hanwei Guo* case concerned a request for discovery in aid of a private arbitration between Hanwei Guo ("**Guo**") and Guomin Xie, Tencent Music Entertainment Group and several related entities before the China International Economic and Trade Arbitration Commission ("**CIETAC**"). The arbitration, held at an arbitral institution established by the People's Republic of China in 1954, was brought pursuant to a Framework Agreement under which Guo allegedly undersold his shares in various music streaming companies due to allegedly "misleading, extortionate, and fraudulent" transactions.[2]

On December 5, 2018, Guo filed an application in the United States District Court for the Southern District of New York to obtain evidence for use in the CIETAC arbitration. The application sought discovery from Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, and Morgan Stanley & Co. LLC. The district court denied Guo's application on the basis that Section 1782 may not be used in aid of private commercial arbitrations. It found that the Second Circuit's 1999 decision in *NBC* was still good law, notwithstanding the U.S. Supreme Court's subsequent decision in *Intel*

Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (U.S. 2004) ("**Intel**"). Based on *NBC*, the court concluded that CIETAC did not qualify as a "foreign or international tribunal" within the meaning of Section 1782. Guo appealed.

THE DECISION

On July 8, 2020, the Second Circuit held (1) that *NBC* remains good law because "*Intel* does not cast 'sufficient doubt' on the reasoning or holding of *NBC*,"[3] and (2) that the CIETAC arbitration qualified as a private commercial arbitration due to various factors, including because "CIETAC possesses a high degree of independence and autonomy, and, conversely, a low degree of state affiliation."[4]

The Second Circuit reaffirmed *NBC*'s findings concerning the statutory text of Section 1782, its legislative and statutory history, and the policy considerations (*e.g.*, interest in preserving efficiency and cost-effectiveness in private arbitration). On that basis, the Court concluded that a private arbitral tribunal does not qualify as a "foreign or international tribunal" within the meaning of Section 1782. Although the Court acknowledged the post-*Intel* circuit split, it observed that "[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."[5] It distinguished the approaches taken in the Fourth and Sixth Circuit on the basis that those decisions "did not suggest . . . that *Intel* overruled or otherwise undermined *NBC*,"[6] or that *Intel* "otherwise required a reading of § 1782 that encompasses private arbitration."[7]

According to the Second Circuit, *Intel*'s reference to an article by Professor Hans Smit (that "the term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts"[8]) was *dictum* that cannot "sufficiently undermine a prior opinion of this Court as to deprive it of precedential force."[9] The Court observed that even if such a "fleeting reference" *could* have the effect of abrogating *NBC*, the language quoted by *Intel* did not undermine the analysis in *NBC*, and likewise could be read "as referring solely to state-sponsored arbitral bodies."[10] The Court further held that "*Intel*'s approach to interpreting § 1782, including its emphasis on the primacy of plain textual meaning, is based on general principles of statutory construction that cast no doubt on our precedent" in *NBC*.[11]

The Second Circuit also analyzed whether a CIETAC arbitration constitutes a private international commercial arbitration. It upheld the district court's finding that CIETAC is "closer to a private arbitral body" than it is to a government tribunal, or other state-sponsored adjudicatory body.[12] It clarified that "the 'foreign or international tribunal' inquiry does not turn on the governmental or nongovernmental *origins* of the administrative entity in question,"[13] but rather on whether the body in question possesses "functional attributes most commonly associated with private arbitration."[14] The Court provided examples of a range of factors, including the "degree of state affiliation and functional independence possessed by the entity, [and] the degree to which the parties' contract controls the panel's jurisdiction."[15] In so doing, the Court rejected the frequently used argument that reliance on domestic courts for enforcement of a "final and binding" award somehow transforms an arbitral panel into a "public entity."[16]

EFFECT OF THE DECISION

In recent years, several district courts in the Second Circuit have questioned whether *NBC* has been effectively abrogated by *Intel*.[17] In some instances, district courts have found that it had.[18] Until now, the Second Circuit had not revisited the issue of whether Section 1782 could be used in aid of private foreign arbitration proceedings in light

of *Intel*.[19] The decision in *Hanwei Guo* resolves the division among the lower courts and authoritatively settles the question that *NBC* remains intact post-*Intel* in the Second Circuit.

The Second Circuit's reaffirmation of its holding in *NBC* also further solidifies the split on this issue between the federal courts of appeal. On the one hand, the Fifth Circuit, like the Second Circuit, has similarly held that Section 1782 assistance could not be used in aid of private arbitration proceedings in the pre-*Intel* case of *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999) ("**Biedermann**"). The Fifth Circuit reaffirmed the *Biedermann* holding in 2009 in the case of *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31 (5th Cir. 2009).[20]

On the other hand, and more recently, the Fourth and Sixth Circuits reached the opposite conclusion. The Sixth Circuit's recent decision in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019) ("**FedEx**") examined the plain meaning of the term "tribunal" in dictionaries, legal writings and other parts of the statute, and found no reason to exclude private arbitral tribunals from that definition. The Sixth Circuit determined that neither the statute's legislative history nor *Intel* provided any basis to diverge from that plain meaning. It noted that the Supreme Court's analysis of whether the Commission in *Intel* was a "tribunal" focused primarily on whether it acted as "a 'first-instance decisionmaker' with the power to bind the parties – an exercise of 'quasi-judicial powers'" – an attribute of any private arbitral tribunal.[21] Moreover, the Sixth Circuit found that the legislative history, which consistently reflects "Congress's intent to **expand** § 1782's applicability," does not indicate "that the expansion **stopped short** of private arbitration."[22] The Fourth Circuit agreed in its recent decision in *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC*, 954 F. 3d 209, 212 (4th Cir. 2020).

The *Hanwei Guo* decision abruptly halts the recent prevailing trend among the New York federal district courts of permitting 1782 discovery in aid of foreign private arbitration proceedings. The Second Circuit's decision to stand firm behind its holding in *NBC* makes it likely that the U.S. Supreme Court will be required to resolve this issue.[23] The circuit split is poised to further deepen, as the issue has been raised in appeals pending before the Ninth and Seventh Circuits as well.[24] Until there is an authoritative ruling from the Supreme Court, parties and practitioners will continue to have to analyze their ability to utilize Section 1782 in aid of private arbitrations on a circuit-by-circuit basis.

[1] The authors would like to thank Erin Collins and Viva Dadwal, who are both associates in King & Spalding's Global Disputes practice, for their contributions to this client alert.
[2] *Hanwei Guo v. Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC.*, No. 19-781, 2020 WL 3816098, at *1 (2d Cir. July 8, 2020).
[3] *Id.* at 5.
[4] *Id.* at 7.
[5] *Id.* at 4.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 5 (quoting *Intel*, 542 U.S. at 258).
[9] *Id.* at 5.
[10] *Id.*
[11] *Id.* at 6.
[12] *Id.* at 2.
[13] *Id.* at 6 (emphasis original).
[14] *Id.*
[15] *Id.*
[16] *Id.* at 7.
[17] *See, e.g.*, *In re Children's Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370 (S.D.N.Y. 2019) (following *Kleimar* to conclude that "foreign tribunal" should be interpreted broadly in light of Intel to include private arbitration); *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) (finding that "[w]hile the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in [*Intel*], suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782.").
[18] *See In re Children's Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361, 369 (S.D.N.Y. 2019) (citing *In re Roz Trading Ltd.*, 469 F.Supp.2d 1221, 1227 (N.D. Ga. 2006); *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) ("While the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in [*Intel*], suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782."); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), as corrected (May 10, 2010), *aff'd sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (agreeing with the Supreme Court's *dictum* in *Intel* and noting that *Intel* postdated *NBC*); *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009)(citing *Intel* for the proposition that the Arbitration Institute of the Stockholm Chamber of Commerce falls within the purview of Section 1782 since it is a "first-instance decision maker.").
[19] *See In re Iraq Telecom Ltd.*, No. 18MC458LGSOTW, 2019 WL 3798059, at *3 (S.D.N.Y. Aug. 13, 2019), reconsideration denied, No. 18MC458LGSOTW, 2019 WL 5080007 (S.D.N.Y. Oct. 10, 2019) ("Because the DIFC is a 'foreign tribunal' sufficient to confer jurisdiction under § 1782 and the parties do not dispute that the requested discovery is relevant to the claims presented in the DIFC litigation, I need not reach this issue of whether private arbitral tribunals were intended by Congress to fall within the ambit of § 1782."); *In re Asia Mar. Pac. Ltd.*, 253 F. Supp. 3d 701, 707 (S.D.N.Y. 2015) ("Assuming, *arguendo*, that a private foreign arbitration proceeding is a 'proceeding in a foreign tribunal,' Petitioner has not established that the discovery sought is for use in that proceeding."); *Chevron Corp v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (declining to reach whether a private arbitration qualifies under Section 1782).
[20] Reasoning that the Fifth Circuit was bound by its holding in *Biedermann* since "the question of whether a private international arbitration tribunal also qualifies as a 'tribunal' under [Section] 1782 was not before the [Supreme] Court." *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009)
[21] *FedEx*, 939 F.3d at 725 n. 9.
[22] *Id.* at 728 (emphasis in original).
[23] It seemed that the U.S. Supreme Court was situated to resolve the issue after the Fourth Circuit's decision in *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC*, No. 18-2454 (4th Cir. 2020); however, it appears that no petition for *certiorari* had been filed as of the deadline on June 28, 2020.
[24] *See e.g.*, *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020); *In re EWE Gasspeicher GmbH*, No. CV 19-MC-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17, 2020); *Servotronics, Inc. v. Rolls-Royce PLC, et al,* No. 19-1847 (7th Cir.).