

Client Alert

September 2019

Appeals Court Holds that Federal Courts May Order Discovery to Aid a Foreign Private Arbitration under 28 U.S.C. § 1782

What Happened: On September 19, 2019, the United States Court of Appeals for the Sixth Circuit held that a party to a private arbitration being conducted overseas may obtain discovery from a federal court in aid of that arbitration pursuant to 28 U.S.C. § 1782.

The Bottom Line: The ruling confirms a circuit split with the Second and Fifth Circuits, each of which had held that the statute does not extend to private arbitrations. The opinion is also a reminder of the potential reach of § 1782 proceedings as well as the unsettled issues remaining regarding the statute's application.

The Full Story

The Sixth Circuit's opinion in *In re Application to Obtain Discovery for Use in Foreign Proceedings*¹ interpreted 28 U.S.C. § 1782, the statute that authorizes federal courts to order discovery in aid of a foreign proceeding. The statute sets forth three requirements before a district court may order such discovery: (1) the party from whom discovery is sought must "reside" or be "found" within the district; (2) the discovery is for use before a "foreign or international tribunal"; and (3) the party seeking discovery must be an "interested person." If the party seeking discovery meets these statutory requirements, the district court may order discovery in its discretion after considering four nonexclusive factors that the Supreme Court set forth in *Intel Corp. v. Advanced Micro Devices, Inc.*²

The Sixth Circuit addressed the second statutory requirement. In the proceedings below, a Saudi corporation had applied to the district court for discovery from FedEx Corporation in connection with a private arbitration pending in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration. The district court denied the application, holding that a private arbitration was not a "foreign or international tribunal" for purposes of the statute.

The Sixth Circuit reversed. Looking to historical usage of the term "tribunal," and disavowing any need to consult the statute's legislative history, the court reasoned that "tribunal" is broad enough to embrace "private, contracted-for, commercial arbitral panels." In doing so, the court rejected a distinction that some courts have drawn between private arbitrations and so-called "state-sponsored" arbitrations established by treaty or an international governmental organization. The court also acknowledged that its opinion was "at odds" with prior decisions of the Second and Fifth Circuits, which had held private arbitrations are not "foreign or international tribunals" for purposes of the statute.³

By openly acknowledging a circuit split, the Sixth Circuit's ruling may provide an opening for the Supreme Court to address 28 U.S.C. § 1782 for the first time since its decision in *Intel* 15 years ago. Although *Intel*

¹ No. 19-5315 (6th Cir. Sept. 19, 2019).

² 524 U.S. 241 (2004).

³ *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999); *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999).

held that an administrative agency could be a “foreign or international tribunal,” it left open the question of whether the term extends to arbitrations. If the case does not come before the Supreme Court, the Sixth Circuit’s ruling will provide a basis for lower courts to extend the statute to private arbitrations, a trend that was underway even before the Sixth Circuit’s decision.

Hunton Andrews Kurth LLP will continue to monitor any developments in this case as well as the law surrounding 28 U.S.C § 1782 in general. In the meantime, please feel free to contact the attorneys listed below for further information.

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