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Federal discovery in international arbitration may be headed for Supreme Court

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Federal law authorizes federal courts to provide discovery assistance to a "foreign or international tribunal" and litigants with an interest in those proceedings. The 2nd Circuit's July 2020 decision holding that "foreign or international tribunal" doesn't encompass private arbitration panels in In re Application and Petition of Hanwei Guo v. Deutsche Bank Securities Inc. exacerbates the existing split among the circuits on this issue.

The 2nd Circuit reaffirmed an earlier ruling that had been called into question by some in light of the U.S. Supreme Court's ruling in Intel Corp. v. Advanced Micro Devices, Inc., in which it expanded the law's scope to include a European Commission Directorate-General's antitrust investigation. There is now a sharp rift among the circuits that has a potentially dramatic impact on international arbitration tactics and strategy when evidence may be found in the U.S.

The 2nd Circuit joins the 5th Circuit, which held that Intel didn't invalidate its earlier ruling that private arbitrations are outside the scope of 28 U.S.C. § 1782, the relevant statute. These circuits go beyond the statute's text, relying heavily on the legislative history and the possible damage done to private international arbitration if U.S. federal discovery is available. The 9th Circuit hasn't ruled on the issue, but several of its district courts have joined the 2nd and 5th circuits.

After Intel, the 4th and 6th Circuits have interpreted "foreign or international tribunal" to include private arbitration tribunals that have some imprimatur from a home government. In Hanwei Guo, the 2nd Circuit considered their precedents but found its own reading of Intel and the legislative history of § 1782 more persuasive.

The 2nd Circuit finds the phrase "foreign or international tribunal" to be ambiguous as to private arbitration, but finds the legislative history from the addition of that phrase into § 1782(a) in 1964 to be clear. The phrase was derived directly from 22 U.S.C. §§ 270-270g, which the 2nd Circuit concludes refers only to governmental or inter-governmental tribunals. It employs what it describes as Intel's "functional approach" to decide whether the arbitration tribunal should be considered governmental on one hand or private on other. The 2nd Circuit defines the inquiry as whether the body in question possesses the functional attributes most commonly associated with private versus governmental tribunals.

The split among the circuits is exacerbated by their differing takes on statutory interpretation. In contrast to the 2nd Circuit, the 6th Circuit focused almost exclusively on the text and the generally accepted definitions of "tribunal," and the 4th Circuit took more of a hybrid approach, relying on the definition of "tribunal" and some of the history of § 1782(a).

The 11th Circuit's precedent complicates the mix even more. Like the 6th Circuit, it didn't go beyond what it determined to be the broad, and Intel-endorsed, meaning of the term "tribunal" to join with the 4th and 6th Circuits that private arbitration tribunals are within the scope of § 1782. While its opinion was withdrawn about 18 months later, the note of withdrawal reads like an endorsement of its prior opinion. Post-Intel district court decisions in the circuit reflect the same textualist view and reach the same conclusion, and its "functional approach" to deciding if a foreign tribunal qualifies, relying on Intel, is dramatically different from the 2nd Circuit's—it examined the functioning of the tribunal as decision-making body, not its connections to a government authority.

The circuit split is big news for two reasons—first, the impact of the split on international arbitration, especially on U.S. parties, and the incentive for forum shopping in enormous. The breath of discovery available under § 1782(a) is up to the discretion of the court, but having U.S.-style discovery in arbitrations in countries with no such procedures—and discovery that can be "one-way" for the U.S. party in that reciprocal discovery may well not be

available from other jurisdictions in which its opponent is found—can have an impact on arbitrations that is hard to overstate.

This creates a compelling incentive to get into the 4th, 6th or 11th circuits' courts. Mr. Guo's case is a good example. He claims he was defrauded into selling his stock in what shortly became Tencent Music, the Chinese streaming service that raised $1.1 billion in a subsequent IPO.

Second, the debate over statutory textual interpretation methods has been playing out in the Supreme Court in important cases. With a dispute among the circuits in which the opinions put on display disagreement about the basics of interpreting the statutory phrase "foreign or international tribunal," the role of legislative history, and the Intel "functional" approach, on a matter important to U.S. and international commerce, the Supreme Court may yet again have to struggle toward a consensus.

Forecasting a decision of a Supreme Court is always a fraught enterprise. There is the possibility the Supreme Court will not want another dispute among its justices over statutory interpretation, but the resolution of this important question will be necessary some time very soon. Until it is resolved forum shopping among the federal circuits will be high on the tactical considerations for international private arbitration.

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