THE "TRIBUNALS" AND TRIBULATIONS OF SECTION 1782: WHAT CONSTITUTES A "FOREIGN OR INTERNATIONAL TRIBUNAL?"

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International Arbitration Alert

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With the continuing globalization of litigation and arbitration, counsel engaged in arbitral proceedings outside of the United States are becoming more familiar with a powerful U.S. statute: 28 U.S.C. § 1782 (titled "Assistance to foreign and international tribunals and to litigants before such tribunals") (Section 1782). Noticeably, there has been a recent flurry of important, and, at times, conflicting decisions from U.S. federal circuit courts related to the availability of Section 1782 to obtain information and documents from third parties in aid of private international arbitration. Most recently, as discussed further below, on 22 September 2020, the Seventh Circuit Court held that a private international arbitral tribunal is not a "foreign or international tribunal" under Section 1782. *Servotronics, Inc. v. Rolls-Royce PLC*, No. 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).

WHAT IS SECTION 1782?

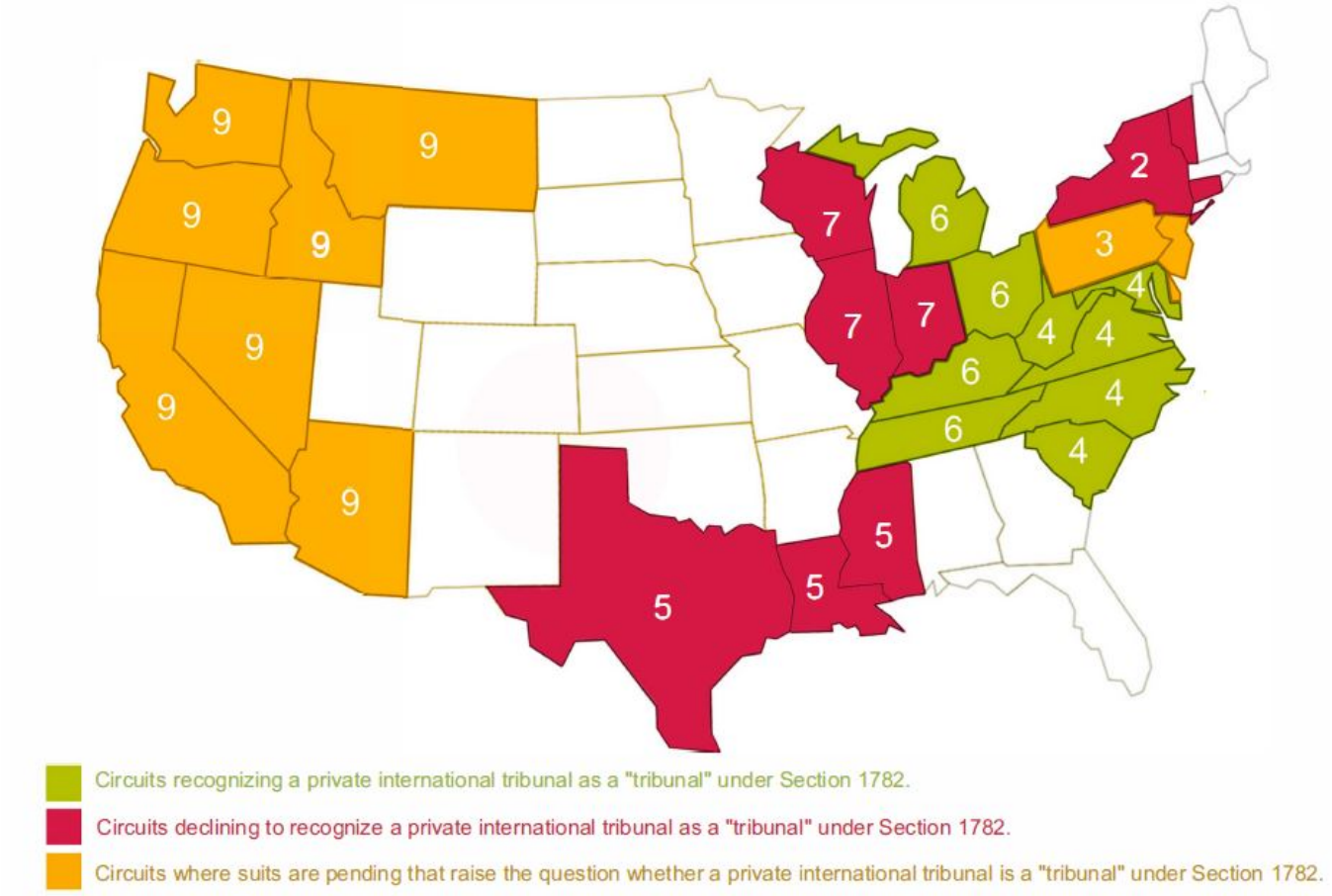
Section 1782 is a federal statute that authorizes a U.S. district court, upon application by a "foreign or international tribunal or . . . any interested person," to order a person found or resident in the U.S. district to "give his testimony or statement or to produce a document or other thing" for use in "*a proceeding in a foreign or international tribunal.*" As a threshold matter, a court presented with a Section 1782 application must determine whether Section 1782 is available to the tribunal or interested person making the request. More particularly, the court must be satisfied that the proceeding where the applicant seeks to use the information qualifies as a "foreign or international tribunal" under Section 1782.

THE *INTEL* DECISION

The U.S. Supreme Court has addressed Section 1782 on only one occasion, in 2004, in its opinion on *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). Among other issues, the U.S. Supreme Court specifically addressed whether the Directorate General for Competition of the Commission of the European Communities (Directorate-General) was a "foreign or international tribunal" under Section 1782, and it concluded that it was. The U.S. Supreme Court reasoned that Section 1782 covers first instance decision-makers that render dispositive rulings subject to judicial review. *Id.* at 546–47. The *Intel* decision, however, left open several significant questions, including whether a private international arbitral tribunal constitutes a "foreign or international tribunal" under Section 1782.

THE SPLIT OF OPINION AMONG U.S. CIRCUIT COURTS

Since the U.S. Supreme Court's 2004 decision in *Intel*, five of the 12 federal circuit courts in the United States have addressed the question whether a private international arbitral tribunal constitutes a “foreign or international tribunal” under Section 1782, and the question is also pending for decision before two additional circuit courts. Three of the five circuit courts to rule thus far have answered the question in the negative and two have answered in the affirmative. In the two cases pending for circuit court decision, one of the lower courts ruled in the negative and one ruled in the affirmative.



The Fourth and Sixth Circuit Courts, in the following decisions, have ruled that a private international arbitral tribunal is a “tribunal” within the meaning of Section 1782.

Circuit	Decision Date	Case Caption	Arbitration Rules
Fourth	2020	*Servitronics, Inc. v. Boeing Co.*, 954 F 3rd 209 (2020)	Chartered Institute of Arbiters (CIArb)
Sixth	2019	*In re: Application to Obtain Discovery for Use in*	Dubai International Financial

Circuit	Decision Date	Case Caption	Arbitration Rules
		Foreign Proceedings (Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.), 939 F.3 710 (2019)	Centre - London Court of International Arbitration (DIFC-LCIA)

In reaching its conclusion in *Abdul Lafif Jameel*, the Sixth Circuit Court took into consideration dictionary definitions of "tribunal," the use of the word "tribunal" in legal writings and the use of the word within the statute. In *Servitronics*, the Fourth Circuit Court found the Sixth Circuit Court's analysis persuasive. Additionally, the Fourth Circuit Court was influenced by the legislative history of Section 1782 as well as the oversight of private arbitrations that exist in England through the UK Arbitration Act which, in the Fourth Circuit Court's view, reflects government-conferred authority.

The Second, Fifth and Seventh Circuit Courts, in the following decisions, have ruled that a private international arbitral tribunal is not a "tribunal" within the meaning of Section 1782.

Circuit	Decision Date	Case Caption	Arbitration Rules
Second	2020	*In re: Application and Petition to Hanwei Guo,* 965 F.3d 96 (2020)	China International Economic and Trade Arbitration Commission (CIETAC)
Fifth	2009	*El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed Apps. 31 (2009)	United Nations Commission on International Trade Law (UNCITRAL)
Seventh	2020	*Servitronics, Inc. v. Rolls-Royce PLC,* No. 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020)	CIArb

The Fifth Circuit Court, in El Paso, was the first circuit court following *Intel* to address the issue of what constitutes a "tribunal" under Section 1782. The Fifth Circuit Court chose to reply on its pre-*Intel* decision in *Republic of Kazakhstan v. Biedermann Intn'l,* 168 F.3d 880 (5th Cir. 1999) (holding that a "tribunal" within the meaning of Section 1782 did not include a private international arbitral tribunal), which it found undisturbed by *Intel* and, therefore, controlling. El Paso, 341 Fed.Appx. at 34. Similarly, the Second Circuit Court, in *Guo*, determined that its pre-*Intel* decision in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (holding that the phrase "foreign or international tribunal" in Section 1782 does not extend to arbitral panels established by private parties) remained good law and applied it to deny the discovery application. *Guo*, 965 F.3d at 103.

Most recently, on 22 September 2020, the Seventh Circuit Court joined the Second and Fifth Circuit Courts in holding that a private international arbitral tribunal is not a "foreign or international tribunal" under Section 1782. *Servitronics*, No. 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020). Based on a statutory context analysis and focused on the phrase "foreign or international tribunal" as used in several statutes, the Seventh Circuit Court

concluded that the phrase “foreign tribunal” meant a “governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.' Private foreign arbitrations, in other words, are not included.” *Id.* at *6.

WHAT'S ON THE HORIZON?

Suits arising under Section 1782 and addressing this issue are currently pending before the Third and Ninth Circuit Courts. *See In re: Application of EWE Gasspeicher GmbH*, No. 20-1830 (3rd Cir. 2020); and *RC-Hainan Holding Company, LLC v. Hu*, No. 20-15371 (9th Cir. 2020). The Third Circuit Court case arises out of a decision by the District Court for the District of Delaware that acknowledged the circuit split and said that, “there are reasonable arguments on both sides.” Nevertheless, the Delaware District Court held that a private commercial tribunal in Germany, convened under the German Arbitration Institute (DIS) Rules of Arbitration, is “not a 'tribunal' within the meaning of Section 1782” since it was neither a foreign court nor a quasi-judicial agency. *In re: Application of EWE Gasspeicher GmbH*, 2020 WL 1272612, at *2 (D. Del. Mar. 17, 2020). Conversely, the Ninth Circuit Court case arises out of a decision by the District Court for the Northern District of California holding that, with respect to an application made in connection with a CIETAC arbitration in China, “the ordinary meaning of 'tribunal' draws the conclusion that § 1782(a) applies to private arbitral tribunals.” *RC-Hainan Holding Co., LLC v. Hu*, 2020 WL 906719, at *7 (N.D. Cal. Feb. 27, 2020).

The split of opinion among the federal circuit courts has practical implications and necessitates strategic consideration. For example, if you represent a party in a private arbitral proceeding taking place outside the United States, you could, in aid of your claims or defenses in that proceeding, utilize Section 1782 to obtain information from a third party located in Maryland, North Carolina, South Carolina, Virginia, West Virginia, Michigan, Ohio, Kentucky, or Tennessee but not from a third party located in Connecticut, New York, Vermont, Indiana, Illinois, Wisconsin, Mississippi, Louisiana, or Texas. And if, by way of further example, you sought information from a third party that was located in both New York and North Carolina, you should consider pursuing your application in North Carolina and avoiding New York.

Given the continuing globalization of litigation and arbitration and the deepening U.S. federal circuit court split around Section 1782, it appears that this issue is ripe for the U.S. Supreme Court to address. Until this issue is resolved, however, parties involved in private international arbitrations who seek discovery of information in the United States should consider carefully where the discovery target is located and, if located in more than one state in the United States, further consider where a Section 1782 application is likely to be most successful. For those parties who seek to reduce the risk of Section 1782 discovery in international arbitral proceedings where they are a party, they should consider explicitly addressing this when drafting their arbitration agreements so as to impose limits on this type of discovery.

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