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International Arbitration Practice
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Second Circuit Holds that 28 U.S.C. § 1782 Does Not Extend to Private Arbitrations

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As was explored in a previous QuickStudy, "*Private Arbitrations and the Use of 28 U.S.C. § 1782: A Patchwork of Availability*," a divide exists among the courts as to whether § 1782 is available for use in private commercial arbitrations.

The Second Circuit's decision in *Nat'l Broad. Co. v. Bear Stearns & Co., Inc.*[1] pre-dates the Supreme Court decision in *Intel Corporation v. Advanced Micro Devices, Inc.*[2] and holds that § 1782 is unavailable for use in connection with private commercial arbitrations. The Fifth Circuit's post-Intel decision in *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*[3] also holds that § 1782 is unavailable. More recently, the Sixth Circuit in *Abdul Latif Jameel Transportation Co. v. FedEx*[4] and the Fourth Circuit in *Servotronics, Inc. v. Boeing Co.*[5] took a contrary view, holding that § 1782 can be used in aid of private commercial arbitrations.

On 8 July, 2020, the schism among the Circuit Courts was reaffirmed with the Second Circuit's decision in *Hanwei Guo v. Deutsche Bank Securities Inc.* In *Hanwei Guo*, the Court considered two issues: (1) does § 1782 extend to private commercial arbitrations, and (2) is an arbitration conducted pursuant to the rules of the China International Economic and Trade Arbitration Commission (CIETAC) a private commercial arbitration?

Section 1782 does not extend to private commercial arbitrations.

In *Hanwei Guo*, Hanwei Guo sought to have the Second Circuit revisit *NBC*, a decision pre-dating the Supreme Court's decision in *Intel*. The thrust of the appeal was that the Supreme Court's reference in *Intel* to an article by Hans Smit describing the term "*tribunal*" to include "*arbitral tribunals*" called into question the continued precedential force of the *NBC* decision.

The Second Circuit held that nothing in the *Intel* decision altered the Court's prior decision in *NBC* that § 1782 does not extend to private commercial arbitrations. Finding that "*NBC's holding remains good law*," the Second Circuit stated:

> *Intel does not cast 'sufficient doubt' on the reasoning or holding of NBC. Critically, the question whether foreign private arbitral bodies qualify as tribunals under § 1782(a) was not before the Intel Court, which considered only whether the Directorate General-Competition, a public entity, qualified as such a tribunal. The only language in Intel that is even arguably in tension with NBC's determination that the statute is limited to state-sponsored tribunals is a passing reference in dicta: namely, a parenthetical quotation of a footnote in an article by Professor Hans Smit, setting forth the proposition that '[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.' We doubt whether such a fleeting reference in dicta could ever sufficiently undermine a prior opinion of this Court as to deprive it of precedential force. (citations omitted)*

The Second Circuit also dismissed Hanwei Guo's argument that *Intel's* discussion of § 1782's legislative history and general principles of statutory construction undermined the *NBC* decision. The Second Circuit, observing that the *NBC* opinion considered the same legislative history as was considered in *Intel*, noted:

1 165 F.3d 184(1999)

2 542 U.S. 241 (2004)

3 341 Fed. Appx. 31 (5th Cir. 2009).

4 939 F.3d 710 (6th Cir. 2019).

5 954 F.3d 209 (4th Cir. 2020).

> *The fact that NBC went on to determine that this expanding function did not extend so far as to incorporate private arbitration—a question that the Intel Court had no occasion to consider—does not render NBC's treatment of legislative history incompatible with that of Intel.*

An arbitration conducted under the CIETAC rules is a private commercial arbitration. Because the Second Circuit determined that private commercial arbitrations are not within the ambit of § 1782, the Court next examined the question of whether an arbitration conducted pursuant to the CIETAC Rules is a private commercial arbitration. The Court held that a CIETAC arbitration is outside the scope of § 1782(a)'s "*proceeding in a foreign or international tribunal*" requirement, thereby foreclosing the use of § 1782.

In reaching this conclusion, the Second Circuit adopted a functional approach and considered a number of factors, including the degree of state affiliation and functional independence possessed by the arbitral entity, the ability of a state to intervene to alter the outcome of an arbitration, and the degree to which the parties' contract controls the panel's jurisdiction. Although CIETAC was originally established by the Chinese government, the Court found CIETAC now functions essentially independently: confidentiality is maintained from all non-participants during and after arbitration and the pool of arbitrators, selected by CIETAC, do not purport to act on behalf of, or have any mandatory affiliation with the Chinese government.

As for the issue of the degree to which a state possesses the authority to intervene or alter the outcome of an arbitration after the panel has rendered a decision, the Court concluded:

> *Because the provisions of Chinese law relied on by Guo merely control the enforceability of arbitrations in China in almost the same manner and to the same extent as the FAA in the United States, they do not convert CIETAC arbitrations into state-sponsored endeavors. Furthermore, the fact that parties to the arbitration in some cases rely on Chinese courts to enforce the "final and binding" arbitration awards is of no import.*

The Court further noted that the jurisdiction possessed by a CIETAC panel derives exclusively from the agreement of the parties and the parties have the ability to select their own arbitrators.

Considering these factors, the Court was "*persuaded that CIETAC panels function in a manner nearly identical to that of a private arbitration panels in the United States.*" Therefore, the court reasoned a CIETAC arbitration is a private commercial arbitration making § 1782 unavailable.

Numerous sources reported that Rolls-Royce PLC, intervenor in the Fourth Circuit's *Servotronics* case, would file a petition for writ of certiorari on or before 28 June 2020.[6] The Supreme Court's docket does not reflect a filing. It is unknown if Hanwei Guo will seek Supreme Court review. What is known is that until the Supreme Court directly addresses the question of whether § 1782 is applicable to private commercial arbitrations, the ability to use § 1782 in the private commercial arbitration context continues to be wholly dependent on the court in which the application is filed.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the author.

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6 Following the Fourth Circuit's ruling, intervenor-appellee Rolls-Royce PLC filed a motion to stay issuance of the mandate pending the filing of a petition for writ of certiorari which was denied on 22 April 2020.