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CLIENT ALERT: US Supreme Court Resolves Circuit Split on Discovery in Aid of Foreign Proceeding

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On June 13, 2022 the Supreme Court remedied a Circuit split with its unanimous Decision in *ZF Automotive US, Inc. v. Luxshare, Ltd*., (596 U. S. ____ (2022), citation pending), holding that 28 U.S.C. § 1782(a), which permits district courts to order discovery "for use in a proceeding in a foreign or international tribunal," is limited to governmental or intergovernmental adjudicative tribunals and does not extend to private foreign arbitration tribunals.

28 U.S.C. § 1782 is a federal statute empowering parties to a "foreign or international tribunal" to seek discovery within the U.S. in connection with that foreign proceeding. Whether the phrase "foreign or international tribunal" encompasses foreign private arbitral proceedings has long been debated and indeed is an issue which split the U.S. Circuit Courts, until June 13th.

In *National Broadcasting Co. v. Bear Stearns & Co*., 165 F.3d 184 (2d Cir. 1999) ("NBC"), the Second Circuit found that a private international arbitration conducted under the ICC arbitration rules did not constitute a "foreign or international tribunal" under Section 1782. The *NBC* court reasoned that the phrase did not clearly include private arbitrations, which was supported by legislative history, and to interpret Section 1782 otherwise would undermine the efficiency of private arbitrations. Later that year, in *Republic of Kazakhstan v. Biedermann International*,168 F.3d 880 (5th Cir. 1999), the Fifth Circuit applied similar reasoning to support its holding that Section 1782 does not encompass private arbitrations.

In 2004, the Supreme Court interpreted the phrase "foreign or international tribunal" in *Intel Corp. v. Advanced Micro Devices*, Inc., 542 U.S. 241 (2004) ("Intel"), but only with respect to a proceeding before the Directorate General for Competition ("DGC"), a division of the European Commission. The Supreme Court explained that the DGC is a first instance decisionmaker, Section 1782 is designed to aid foreign courts and quasi-judicial agencies, and the legislative history of Section 1782 evidenced an intent to permit discovery for foreign administrative and quasi-judicial proceedings. However, the Court did not address the issue with respect to foreign private arbitration panels, which allowed for Circuit Courts to continue applying their own interpretation.

Subsequent to the *Intel* decision, the Fourth and Sixth Circuits held that Section 1782 does encompass private international arbitrations. In *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), the Sixth Circuit allowed for such discovery, explaining that it was unpersuaded by the Second Circuit's *NBC* analysis. The Fourth Circuit later followed the Sixth in *Servotronics, Inc. v. Boeing Co*., 954 F.3d 209, 210 (4th Cir. 2020), , reasoning that arbitrations conducted under the English Arbitration Act are the "product of government-conferred authority," thus falling within the scope of Section 1782.

Then, in July 2020, the Second Circuit reaffirmed that private arbitrations do not fall within the scope of Section 1782 in *In Re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782* (Hanwei Guo v. Deutsche Bank Sec., 965 F.3d 96 (2d Cir. 2020)). In light of the *Intel* holding, the Second Circuit was asked to reconsider its *NBC* Decision. The Second

Circuit found that *Intel* did not cast "sufficient doubt" on either its prior reasoning or its holding in *NBC*. The Second Circuit noted that the Supreme Court did not consider the issue of whether a foreign private arbitral body qualifies as a tribunal under Section 1782. The Second Circuit decision in *Hanwei Guo* crystallized the Circuit Court split, priming the issue to be decided by the Supreme Court.

The Supreme Court has now resolved the split, siding with the Second and Fifth Circuits by holding that foreign private arbitral panels do not fall within the scope of the phrase "foreign or international tribunal", and therefore parties to such arbitrations are not afforded the ability to seek discovery within the U.S. in connection with such proceedings under Section 1782.

Among the Court's reasoning was that "the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end." 596 U. S. ____ (2022) at p.10. "Extending § 1782 to include private bodies would also be in significant tension with the [Federal Arbitration Act (FAA), 9 U. S. C. § 1 *et seq*], which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows." *Id*. at p.11.

The full text of the Decision is available here. If you have any questions about the contents of this alert or would like further information, please feel free to contact the authors, Don Murnane at murnane@freehill.com, Eric Matheson at matheson@freeihll.com or Veronica Dunlop at dunlop@freehill.com.

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