Recent U.S. Federal Court Ruling Permits Discovery in Aid of CIETAC Proceeding

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The U.S. District Court for the Northern District of California has permitted a party in an international commercial arbitration to take depositions and obtain documents from third parties for use in arbitration administered by the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing. See *HRC-Hainan Holding Co. v. Yihan Hu*, Case No. 19-mc-80277-TSH, Order Re: Applicant's Motion to Compel Section 1782(A) Discovery and Respondent's Motion to Quash (N.D. Ca. Feb. 25, 2020). This decision sets the stage for the U.S. Court of Appeals for the Ninth Circuit to potentially consider U.S. law—and in particular 28 U.S. Code Section 1782—as it applies to discovery in private international commercial arbitration proceedings. The district's court's order is now on appeal.

Under Section 1782, parties involved in proceedings before "a foreign or international tribunal" may access tools of the U.S. discovery process, such as document requests and depositions, to gather evidence in the United States to use in a foreign proceeding. 28 U.S.C. 1782(a) provides:

The district court of the district in which a person resides or is found may order him 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 including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international

tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

While it is clear that Section 1782 provides a powerful litigation and investigative tool to parties involved in foreign litigations, questions remain regarding whether it additionally applies to litigants in private international arbitrations. Indeed, there is much debate among U.S. federal courts as to whether Section 1782 applies to international arbitration, with a court from the Ninth Circuit now joining.

Case Snapshot And Key Issue

In September 2019, applicants commenced CIETAC arbitration against Ciming Bo'ao International Hospital Co., Ltd. (Ciming) for misappropriation and breach of contract relating to the applicant's $10 million investment per a collaboration agreement with Ciming to build and equip an in vitro fertilization center at Ciming's hospital in Hainan Province, PRC. Applicants in this case are HRC-Hainan Holding Co., LLC (HRC-Hainan) and D&W Holding Co., LLC (D&W), both Delaware companies, and Hainan HRC Hospital Management and Consulting, Co., Ltd. (HRC-China), a Chinese company 90% owned by HRC-Hainan and D&W. To obtain more documents and information to be used in the CIETAC proceeding, the applicants filed an action in the Northern District of California and served subpoenas on Ciming's 95% shareholder Yihan Hu (Hu)—found to be in California based on certain corporate documents filed with the California Secretary of State listing her address in California—and three California LLCs formed by Hu seeking Section 1782 discovery. In response, Hu and the California parties moved to quash the discovery subpoenas. The key issue presented to the Court was whether the word "tribunal" as used in Section 1782(a) includes a private arbitral tribunal such as CIETAC.

Circuit Splits

The Ninth Circuit has not decided this issue, but a handful of other circuits have and they are split. The Second and Fifth Circuits have held that Section 1782(a) applies to international arbitrations, but only those before governmental or intergovernmental tribunals, and not those established exclusively by private parties.

NationalBroadcasting. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, 883 (5th Cir. 1999). The Sixth Circuit very recently broke with the Second and Fifth circuits, holding that Section 1782(a) does apply to strictly private, nongovernmental arbitrations. *Abdul Latif Jameel Transportation v. FedEx, (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710, 717-731 (Sept. 19, 2019) (hereinafter *ALJ*).

The Second Circuit has concluded that the term "tribunal" "is sufficiently ambiguous that it does not necessarily include or exclude" privately constituted arbitrations. Responding to that ambiguity, the court then looked at the legislative history of Section 1782(a) to determine the meaning of "tribunal" as used in the statute, and concluded that "the legislative history reveals that when Congress in 1964 enacted the modern version of Section 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." *National Broadcasting Co., Inc.*, 165 F.3d 184 at 190. Similarly, the Fifth Circuit has found that there "is no contemporaneous evidence that Congress contemplated extending Section 1782 to the then-novel arena of international commercial arbitration," and therefore concluded that Section 1782 does not apply to private international arbitration. *Kazakhstan v. Biedermann*, 168 F.3d 880 at 881-82.

The Sixth Circuit, however, disagreed and held that while dictionary definitions of "tribunal" are less clear, courts' longstanding usage of the word includes private arbitrations, which is the best reading of the word in the context of Section 1782(a), and therefore, the Court "need look no further [such as to the legislative history] ..." *ALJ*, at 939 F.3d at 727. Nonetheless, the court concluded that the legislative record made clear Congress's intent to expand Section 1782(a)'s applicability. The Sixth Circuit also rejected policy arguments concerning limited discovery and efficiency of international arbitration, noting that the U.S. Supreme Court has made clear that district courts enjoy substantial discretion to shape discovery under Section 1782(a).

Northern District Of California's Ruling

In its Feb. 25 order, the court agreed with the Sixth Circuit analysis in *ALJ*. Specifically, the court found that Section 1782(a) applies to proceedings before private arbitral tribunals such as CIETAC for the following reasons:

- The ordinary and plain meaning of "tribunal" has "long encompassed privately contracted-for arbitral bodies with the power to bind." This interpretation does not conflict with the operative statute, and the Court needs not look further into the legislative history as the Second Circuit did;
- Nevertheless, nothing in Congress's legislative history indicates that private international arbitral tribunals should be excluded from the meaning of "foreign or international tribunal." If anything, legislative record suggests Congress's intent to expand Section 1782(a)'s applicability;
- Citing the U.S. Supreme Court in *Intel v. Advanced Micro Devices*,542 U.S. 241, 260-61 (2004), the court rejected the suggestion that Section 1782(a) applicants must show that U.S. law would allow discovery in domestic litigation analogous to the foreign proceeding; and
- Policy arguments regarding the popularity of private international arbitration's efficient and cost-effective discovery and such characteristics being at odds with U.S.-style discovery must fail. Section 1782(a) allows a district court to merely authorize discovery; it does not require the foreign or international tribunal to accept evidence produced by that discovery, which the tribunal can simply refuse to admit into evidence if it would burden the efficiency of the proceeding. Despite the fact that the value of arbitral tribunals comes from their efficiency and cost-effectiveness, it also comes from their ability to fairly adjudicate disputes based on evidence; if Section 1782(a) can from time to time help those tribunals get the evidence they need to reach more informed decisions, then certainly that serves the purpose of such proceedings.

Court-Assisted Discovery In China

In general, there is no document discovery mechanism under PRC law that is parallel to common law discovery; according to PRC Civil Procedure Law, a party may apply for court-assisted evidence collection if the relevant party is unable to do so due to objective reasons (such as the evidence is controlled by government authorities, the evidence involves state secret, trade secret or private information, etc.).

For parties conducting arbitration proceedings outside of China, PRC courts likewise do not allow document discovery to assist with evidence-gathering. On the other hand, according to a recent reciprocity arrangement between Mainland China and Hong Kong in April 2019, upon request made by a party with accompanying supporting documentation, PRC courts may issue asset/evidence/action preservation orders in assistance of an arbitration proceeding seated in Hong Kong. Nonetheless, under PRC law, evidence preservation only applies to evidence that may be destroyed or lost or difficult to obtain at a later time, which is different than evidence discovery in nature.

In this connection, the CIETAC promulgated an evidence guidance in 2015 which allows a party to CIETAC arbitration proceedings to request document discovery against the other party. However, application of the evidence guidance is subject to parties' agreement and it remains to be seen whether and how the parties in a CIETAC arbitration could utilize such discovery tools in order to obtain evidence from the opposing party in practice.

Given the restrictive and limited discovery rules in the PRC and various other jurisdictions, parties to an international arbitral proceeding or foreign litigation seated in China should be aware of the discovery tools offered by 28 U.S. Code Section 1782 to potentially obtain (or be forced to produce) documents and information that might otherwise not be obtainable.

Authors

Ricardo E. Ugarte
Partner, Yuanda
Chicago
+1 312-558-6130
rugarte@winston.com

M. Imad Khan
Associate, Yuanda
Houston
+1 713-651-2741
ikhan@winston.com