SVAMC LEGAL UPDATE: U.S. SECTION 1782 DISCOVERY IN INTERNATIONAL ARBITRATIONS

Circuit Courts are increasingly divided on whether federal district courts have the authority under US Code Section 1782 to order discovery for use in private, international arbitrations. The growing split may prompt the U.S. Supreme Court to grant *cert* on this issue.

Background:
Under Section 1782, a party can apply to a federal district court for an order requiring a person or entity that "resides or is found" in that district to produce evidence for use in proceedings outside of the U.S. This application, which can be made against parties or third parties, may be used to obtain evidence that that might otherwise be unavailable via the disclosure process in an underlying arbitration. The relevant portion of 28 U.S.C. § 1782(a) states:

> 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.... The order may be made ... upon the application of any interested person.

The debate here centers around whether a privately contracted-for commercial arbitration falls within the definition of a "foreign or international tribunal."

Survey of the Circuits:
Until 2004, it seemed to be settled law that international commercial arbitration tribunals *did not* fall within Section 1782. In 1999, in the case of *National Broadcasting Co. Inc. v. Bear Stearns & Co., Inc.*, the Second Circuit held that a commercial arbitration conducted in Mexico as administered by the International Chamber of Commerce was not a "proceeding in a foreign or international tribunal" within the meaning of Section 1782 such that the district court could not order discovery for it. The Second Circuit reasoned that the legislative history of the statute revealed that it was meant to apply to governmental and intergovernmental arbitrations, conventional court proceedings, and other state-sponsored adjudications. That same year, the Fifth Circuit, in *Republic of Kazakhstan v. Biedermann Intern.*, agreed that Section 1782 did not permit federal district courts to order discovery for private, international arbitration.

In 2004, the Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). *Intel* did not decide the issue in *NBC* and *Biedermann* because *Intel* dealt with whether the Directorate-General for Competition of the European Commission was a foreign or international tribunal. District Court decisions after *Intel* interpreted that decision, however, as implicitly endorsing the notion that international commercial arbitration tribunals *do* fall within Section 1782. Those cases produced a single appellate decision, *Consorcio Ecuatoriano v. JAS Forwarding (USA)*, 685 F.3d 981 (11th Circuit 2012), where the Eleventh Circuit agreed that international commercial arbitration tribunals do fall within Section 1782.

More recently, in 2019 in *In re Application to Obtain Discovery for Use in Foreign Proceedings*, the Sixth Circuit held that district courts could order discovery for use in private commercial arbitrations pending in

other countries. In reaching this holding, the Sixth Circuit relied on the literal meaning of the phrase "proceeding in a foreign or international tribunal." In 2020 in *Servotronics, Inc. v. Boeing Co.*, the Fourth Circuit agreed. The Fourth Circuit reasoned that the current version of the statute was amended to "increase international cooperation by providing U.S. assistance in resolving dispute before not only foreign *courts* but before all foreign and international *tribunals* and rejected the argument that "tribunal" refers only to entities exercising governmental authority.

Consistent with *NBC* and the Fifth and Eleventh Circuit's interpretation, but at odds with the Fourth and Sixth Circuits, in July 2020, in *In re: Application and Petition of Hanwei Guo*, the Second Circuit held that U.S. courts may not order domestic discovery for use in private commercial arbitrations abroad.

The Ninth Circuit May Soon Pick a Side:

Assuming the U.S. Supreme Court doesn't decide for them, the Ninth Circuit may soon have to choose a side in the current Circuit split on this issue. This issue is being presented in *HRC-Hainan Holding Co. LLC et al. v. Yihan Hu et al.*, Case Number 20-15371. It is on appeal from a 2020 Northern District of California decision that denied discovery for use in an arbitration proceeding but permitted it for a court proceeding in China. The case is scheduled for oral argument before the Ninth Circuit in September, and will be one to watch.