

Second Circuit Shortens the Reach of § 1782, Denying Access to Domestic Discovery for Parties in Private Foreign Arbitrations

By: Mackenna White

The Second Circuit on Wednesday held that 28 U.S.C. § 1782(a) cannot be used to support petitions for discovery for use in private foreign commercial arbitrations, settling an issue that has lingered unresolved in the circuit since 2004. The new decision, *In re Guo*, puts the Second Circuit squarely at odds with recent decisions issued by other circuit courts, raising the possibility that the Supreme Court will take up the issue next session to resolve the split. While *Guo* does not impact the ability of parties to foreign public arbitrations and litigations to take § 1782(a) discovery, for now at least, parties to private foreign arbitrations may have to look to more favorable circuits outside New York for relief.

The *Guo* decision cements the Second Circuit’s resistance to allowing discovery in aid of private foreign arbitrations, which was established in its unambiguous 1999 *Nat’l Broadcasting Corp. v. Bear Stearns & Co., Inc.* (“NBC”) decision extending § 1782(a) discovery “only to intergovernmental tribunals.” The Supreme Court’s intervening 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.* created questions regarding whether *NBC* remained good law—and was followed by nearly two decades of diverging opinions, both across circuits and within New York. *Guo* confirmed that *NBC* remains the law of the Second Circuit, reasoning that the issue of whether a private international arbitral body is a tribunal was not before the *Intel* Court and thus did not affect *NBC*’s exclusion of private foreign arbitration from the powers of § 1782(a).

Guo places the Second Circuit's position directly at odds with two recent decisions out of the Fourth and Sixth Circuits allowing § 1782(a) discovery in private commercial arbitrations, *Servotronics, Inc. v. Boeing Co.*, and *In re Application to Obtain Discovery for Use in Foreign Proceedings*, respectively. The appellees in the Fourth Circuit case are expected to file a petition for certiorari to challenge the issue. The Second Circuit's decision increases the likelihood that the Supreme Court will take up the case to resolve the circuit split.

We will continue to monitor these decisions to update our clients on this rapidly evolving area of law.

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