

Parties to Private Commercial Arbitrations Held Overseas May Not Be Able to Utilize US Courts to Obtain Discovery

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The U.S. Court of Appeals for the Second Circuit recently reaffirmed a more than two-decades old decision holding that parties to a private, foreign arbitration proceeding cannot utilize federal courts to compel the production of third-party discovery. Federal law and policy generally favor arbitration agreements, including international arbitration agreements, and U.S. courts are routinely utilized by parties to international agreements to compel adversaries to arbitrate or to enforce foreign arbitration awards. However, at least in the Second Circuit, one area in which U.S. courts may not offer assistance is in obtaining testimony or documents from third parties in support of claims and defenses.

In *In Re: Application and Petition of Hanwei Guo for an Order to take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. 1782*, the Second Circuit considered a petition to compel discovery in the U.S. in connection with a private arbitration proceeding in China. The petition was brought by Hanwei Guo, an investor in several music companies operating in the Chinese music streaming market. Guo invested approximately \$26 million in these companies, but later sold his interest at a loss in a series of transactions alleged to be misleading and fraudulent. Unfortunately for Guo, following the sale of his equity, the streaming companies were acquired by one of the largest music streaming corporations in the world. Guo subsequently initiated an arbitration against the parties involved in the alleged fraud in an attempt to reclaim his equity stake.

Pursuant to the private agreement between the parties, Guo commenced his arbitration before the China International Economic and Trade Arbitration Commission (CIETAC). CIETAC is a private arbitral body originally established by the Chinese government in 1954, but which today functions largely independent of government influence.

To attempt to obtain proof in support of the CIETAC claims, Guo filed a petition in U.S. District Court for the Southern District of New York, seeking to compel the production of material from four U.S. based investment banks involved in the allegedly fraudulent sale transactions. Guo relied upon 28 U.S.C. § 1782, a federal statute that grants district courts the power to order persons and entities in the U.S. to give testimony or produce materials “for use in a proceeding in a foreign or international tribunal.”

The District Court denied Guo’s petition based upon a more than 20-year-old Second Circuit decision, *NBC v. Bear Stearns & Co.* In *NBC*, the Circuit had held that § 1782’s reference to a “foreign or international tribunal” did not include private arbitral bodies. The District Court accordingly found that because CIETAC was not a “foreign or international tribunal,” § 1782 did not afford Guo the right to compel the production of discovery in the U.S.

On appeal, Guo argued that the Supreme Court's decision in *Intel Corporation v. Advanced Micro Devices, Inc.* overruled the Second Circuit's holding in *NBC*. While the *Intel* decision did abrogate some unrelated law in connection with § 1782, the Second Circuit in *Hanwei Guo* found that *Intel* had in fact left the particular rationale and holding of *NBC* intact. Concluding that *NBC* therefore remained good law, the Second Circuit affirmed the District Court's decision and denied Guo's petition.

The Second Circuit's *Hanwei Guo* decision may not be the last word on whether parties to a private, foreign arbitration proceeding can utilize § 1782 to obtain third-party discovery. The Sixth and Fourth Circuits have each allowed parties to foreign private arbitrations to utilize § 1782 to obtain third-party discovery. This circuit split will likely require eventual resolution by the Supreme Court.

Despite the circuit split, the import of the Second Circuit's *Hanwei Guo* decision is clear. Parties entering into international contracts need to thoughtfully consider the consequences of agreeing to private arbitration in other countries, especially when important documents and witnesses are located in the United States. Without the ability to compel the production of third-party discovery under § 1782, parties to a foreign arbitration proceeding may be stuck with the limited discovery mechanisms provided for in the rules of the private arbitral body they select. The result may be the inability to obtain proof to establish claims or defenses and the loss of an arbitration that might otherwise be winnable.

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