CARLTON FIELDS

When Is an Arbitration a Foreign or International Tribunal?

August 05, 2020

Second Circuit affirms Chinese arbitration organization is not a "foreign or international tribunal" under section 1782.

In February 2019, the U.S. District Court for the Southern District of New York denied petitioner Hanwei Guo's discovery application after determining that the China International Economic and Trade Arbitration Commission (CIETAC) did not qualify as a "foreign or international tribunal" under 28 U.S.C. § 1782(a). That ruling primarily was based on the Second Circuit's decision in National Broadcasting Co. (NBC). On appeal *In re Application of Hanwei Guo*, No. 19-781 (2d Cir. July 8, 2020), Guo argued that *NBC* was no longer good law, having been overruled or otherwise undermined by the U.S. Supreme Court's decision in *Intel Corp*. While acknowledging that courts following Intel have reached different conclusions on the issue of whether a private foreign arbitration falls within section 1782(a), the Second Circuit rejected the notion that Intel undermined NBC. Rather, the court declared that NBC remains binding precedent in the Second Circuit.

Turning to the merits of the appeal, the Second Circuit agreed with the district court that a CIETAC arbitration is a private international commercial arbitration, thus falling outside the scope of section 1782(a)'s "foreign or international tribunal" requirement. The court clarified that in determining whether an arbitration is a "foreign or international tribunal," the inquiry does not turn on the governmental or nongovernmental origins of the entity in question, but on whether the body possesses the functional attributes most commonly associated with private arbitration. Considering the relevant factors, the court found that the functional attributes of CIETAC arbitrations clearly fall outside the scope of the tribunals contemplated by section 1782. As a result, the Second Circuit affirmed the district court order denying Guo's petition for discovery.

Republished with permission of the ABA Section of Litigation Committee.

Authored By

Alex B. Silverman

Related Practices

Litigation and Trials