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DEVELOPMENTS IN U.S. LAW REGARDING A MORE LIBERAL APPROACH TO DISCOVERY REQUESTS MADE BY FOREIGN LITIGANTS UNDER 28 U.S.C. § 1782

In these times of global economic turmoil, with the concomitant litigation that will likely follow in jurisdictions around the world, we expect to see an increased need for evidence located within the United States to be used in legal proceedings outside the United States. We explain in this *Commentary* statutory mechanisms available under United States law to obtain such discovery through federal courts, and developments in the courts that make the discovery of such evidence somewhat easier to obtain.

Under 28 U.S.C. § 1782, parties engaged in litigation outside the United States may directly petition U.S. federal courts to compel the production of documents and testimonial evidence for use in foreign or international tribunals, rather than seek such discovery through more indirect methods, such as the issuance of letters rogatory or Hague Convention requests emanating from the foreign court where the underlying litigation is pending. Historically, this statute was conservatively applied. But since the 2004 United States Supreme Court decision *Intel Corp. v. Advanced Micro Devices, Inc.*, federal district courts have granted § 1782 applications more liberally. 542 U.S. 241 (2004).

Still, questions remain regarding precisely when § 1782 may be invoked, including in particular whether it may be used to compel discovery for use in private commercial arbitration. The majority of district court cases decided after *Intel* have allowed the use of § 1782 for private arbitral panels. While these district court decisions are a positive sign for foreign litigants engaged in arbitration, federal appellate courts have not yet ruled on the issue post-*Intel*. The challenge facing advocates is how to navigate this sometimes

uncertain legal landscape for clients seeking evidence within the United States, to be used in non-U.S. litigation.[1]

LEGAL REQUIREMENTS FOR DISCOVERY UNDER § 1782

Section 1782 states, in pertinent part, that

> [t]he 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.

28 U.S.C. § 1782.

To invoke the statute, three basic requirements must be met: (1) the person or entity from whom the discovery is sought must reside or be found in the issuing court's district; (2) the discovery must be for use in a proceeding in a foreign or international tribunal; and (3) the application must be made by a foreign or international tribunal, or by an "interested person." *In re Roz Trading Ltd.,* 469 F. Supp. 2d 1221, 1223 (N.D. Ga. 2006).

The court, however, is not required to grant a discovery request upon fulfillment of these requirements alone. It may also consider discretionary factors, including (1) whether the person from whom discovery is sought is a participant in the foreign proceeding (because there is no need for U.S. judicial intervention where the foreign tribunal itself can compel parties to produce evidence); (2) the nature of the foreign tribunal and the character of the proceeding abroad, including whether the foreign government or the court or agency is receptive to U.S. federal court assistance; (3) whether the request is an attempt to circumvent proof-gathering restrictions or policies in the foreign jurisdiction where the litigation is pending; and (4) whether the request is unduly intrusive or burdensome. *Intel*, 542 U.S. at 264-65.

The statute also limits the discoverability of certain kinds of evidence by requiring, unless otherwise proscribed, all evidence to be gathered in accordance with the Federal Rules of Civil Procedure. 28 U.S.C. § 1782. Traditionally, however, the scope of such discovery is quite broad. All legally applicable privileges, such as the attorney-client privilege, apply to evidence obtained through § 1782. *See Intel*, 542 U.S. at 260, 266.

NEW DEVELOPMENTS IN THE LAW

Section 1782 was first enacted in 1948 "to provide federal court assistance in gathering evidence for use in foreign tribunals." *Intel*, 542 U.S. at 247, 258. Congress modified the statute in 1964, "prompted by the growth of international commerce," to apply not only to proceedings pending in the courts of foreign countries but also to proceedings in "foreign or international tribunal[s]." *Id*. at 248-49.

In the years after the 1964 amendment, federal courts disagreed over the proper application of § 1782. In particular, the lower courts wrestled with issues such as: (1) whether discovery sought in the U.S. must be limited to the type of discovery available in the foreign country at issue; (2) who is eligible to petition for § 1782 discovery; (3) whether proceedings in the foreign tribunal must be pending to warrant § 1782 discovery; and (4) what types of proceedings qualify as "tribunals" under the statute. *See id.* at 253-54. The Supreme Court clarified many of these issues when it examined § 1782 for the first time in *Intel*. *Id.*

In *Intel*, Advanced Micro Devices ("AMD") filed an antitrust complaint against Intel Corporation ("Intel") with the Directorate-General for Competition of the Commission of the European Communities (the "Commission"), the "European Union's primary antitrust law enforcer." *Id.* at 250. The Commission is an administrative body that determines,

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1. An additional issue, of course, is whether the evidence obtained in the U.S. will be admitted for use by the foreign court. In a related *Commentary*, Harriet Territt and Sion Richards of Jones Day London examine the "Effective Use of Discovery Obtained Pursuant to 28 U.S.C. § 1782 in Proceedings Before the English Courts."

after fact finding and review, whether to dismiss a complaint or impose a penalty for violation of Europe's antitrust laws. *Id.* The Commission's final decision is reviewable by the European Court of First Instance and the European Court of Justice. *Id.* at 254-55.

In support of its complaint, AMD filed a § 1782 petition requesting discovery of Intel documents located in the United States. *Id.* at 251. But, while AMD was a complainant to the Commission, it was not an actual party or litigant in the proceeding. *Id.* at 250-52. Consequently, Intel argued that AMD, as a mere complainant, was not an "interested person" for purposes of the statute. *Id.* at 256. Intel further argued that the Commission was not a "foreign or international tribunal," and for that reason the court should not compel production of the documents. *Id.* at 257-58. The Supreme Court disagreed and adopted a fairly expansive definition of who is eligible to petition for discovery under § 1782, including any person with a "reasonable interest in obtaining judicial assistance." *Id.* at 256. The Court also opined that "a foreign tribunal" includes any body that is a "first-instance decision maker," finding that the Directorate-General was just such a body. *Id.*

In *Intel,* the Court also held that § 1782 contains no foreign discoverability requirement, *i.e.*, it was not necessary that the foreign tribunal would allow similar discovery under its own rules. Finally, the Court ruled that a proceeding for which discovery is sought need not be pending or imminent but, rather, a dispositive ruling subject to judicial review must merely be "within reasonable contemplation." *Id.* at 253-54.

On remand after the Supreme Court's decision, the district court found that since Intel was already a party to the Commission's proceeding, the Commission itself could compel Intel to produce the documents in question. *Advanced Micro Devices, Inc. v. Intel Corp.*, No. C 01-7033, 2004 WL 2282320, at *2 (N.D. Cal. Oct. 4, 2004). Furthermore, the court noted that the Commission was not receptive to federal court assistance and the discovery requests appeared to be an attempt by AMD to circumvent the commission's discovery restrictions. *Id.* at *2-3. For these reasons, the district court denied AMD's § 1782 petition. *Id.*

While the particular result in *Intel* was to deny the discovery application, the Court's broader holding expanded the availability of U.S. discovery for foreign litigants. 542 U.S. at 241-67. As a result, many lower courts now more freely award § 1782 discovery. *See, e.g., Roz Trading,* 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006). Even so, some confusion remains concerning the breadth of the evidence discoverable under the statute and whether private arbitral panels constitute "tribunals" under § 1782.

SECTION 1782 DOES NOT IMPOSE A FOREIGN DISCOVERABILITY REQUIREMENT

Prior to *Intel*, many lower courts refused to order the production of evidence under § 1782 where the discovery requested could not be obtained under the rules of the foreign tribunal. *Intel*, 542 U.S. at 259-60. In *Intel*, the Supreme Court rejected this notion. *Id.* The Court also rejected the idea that a § 1782 applicant "must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding," citing the dangers of comparative legal analysis where analogous proceedings may not even exist. *Id.* at 263.

Nevertheless, post-*Intel*, several district courts have held that, while there is no express discoverability requirement under § 1782, the courts still have the discretion to deny discovery where the foreign tribunal is not receptive to U.S. federal court assistance. *See*, *e.g.*, *Schmitz v. Bernstein*, 376 F. 3d 79, 84-85 (2d Cir. 2004).

WHO MAY PETITION FOR DISCOVERY UNDER § 1782?

Under terms of the statute, any "interested person" may apply for § 1782 discovery. Prior to *Intel*, however, the term was not well defined. Some courts held that judicial assistance under § 1782 "includes only 'litigants, foreign sovereigns, and the designated agents of those sovereigns.'" *Intel*, 542 U.S. at 256. The Supreme Court rejected this narrow view, holding definitively that the term "interested persons" is not limited

to private litigants and sovereign agents. *Id.* The *Intel* Court found that a complainant in a European Commission antitrust proceeding, even if not a formal party, was an "interested person" for purposes of the statute because the complainant had a "significant role" in the proceedings, including certain procedural rights, giving him a "reasonable interest in obtaining judicial assistance." *Id.*

WHERE MUST EVIDENCE BE LOCATED FOR § 1782 DISCOVERY?

Under § 1782, documents or testimony can be ordered produced from a person who resides or is found in the district in which the issuing court sits. For purposes of taking testimony, a person's physical presence in the district, even temporarily, is enough to satisfy the requirement. For example, the Second Circuit has found that a person who lives abroad may be compelled to give testimony under § 1782 if served with the order while temporarily visiting the district, even if the order was granted while the person was abroad. *Edelman v. Taittinger*, 295 F.3d 171, 175-80 (2d Cir. 2002).

With regard to documents located abroad, there remains a certain degree of discord among the courts as to what may be compelled, revolving around whether it is sufficient that entities with *control* of the documents (rather than the documents themselves) are located in the district. Several courts have refused, on discretionary grounds, to order the production of documents that are located out of the country or are possessed by foreign affiliates, even if they are under the ultimate control of a person or entity in the United States. *See*, *e.g.*, *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45, 50-52 (D.C. 2005). Conversely, in an analysis more familiar in routine U.S. discovery, the Southern District of New York has held that § 1782 does not prohibit the production of documents physically located outside the United States when the entity with control over the documents resides in the United States. Thus, in *In re Gemeinschaftpraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ) 2006 WL 3844464, at *8 (S.D.N.Y. Dec. 29, 2006), the court ordered a U.S. company to turn over documents under its control but physically located in Germany.

THE APPLICATION OF § 1782 TO PRIVATE ARBITRAL TRIBUNALS

Prior to *Intel*, the Second and Fifth Circuits ruled that § 1782 could not be used to obtain evidence for private commercial arbitrations. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Beidermann Int'l*, 168 F.3d 880 (5th Cir. 1999). While *Intel* did not squarely address whether private arbitrations are "tribunals" within the meaning of the statute, the Supreme Court's decision strongly suggests that arbitrations fall within the statute's scope. *Roz Trading*, 469 F. Supp. 2d at 1224. Following *Intel*, in a trend that will bear watching, several lower courts have now found that the *NBC* and *Beidermann Int'l* decisions are no longer good law. *See, e.g., Roz Trading Ltd.*, 469 F. Supp. 2d at 1228; *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 955 (D. Minn. 2007).

According to the District Court for the Northern District of Georgia, for example, under a plain reading of § 1782, "both the 'common usage' and 'widely accepted definition' of 'tribunal' include private commercial arbitrations." *Roz Trading*, 469 F. Supp. 2d at 1225. Furthermore, the Supreme Court's description of a tribunal as a proceeding resulting in a "dispositive ruling . . . reviewable in court," would include many if not most private arbitrations. *Id*. at 1224-25 (*quoting Intel*, 542 U.S. at 258). The *Roz Trading* court also pointed to dicta in *Intel* where the Supreme Court stated that the term "tribunal" includes "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Id*. (*quoting Intel*, 542 U.S. at 258) (emphasis added). This language was quoted from an article written by Professor Hans Smit, the primary drafter of the most recent version of § 1782. 542 U.S. at 258. The quotation caused many in the legal community to believe that the Court intended for private commercial arbitrations to seek discovery under § 1782.

By contrast, the court in *La Comision Ejecutiva Hidro-Elecctrica del Rio Lempa v. El Paso Corp.*, expressly disagreed with the holdings in *Roz Trading* and *Hallmark*. No. H-08-335, 2008 WL 5070119, at *3-4 (S.D. Tex. Nov. 20, 2008). At issue in *El Paso* was a § 1782 petition to compel discovery

from respondent, El Paso Corporation, for use in a private Swiss arbitration between movant, La Comision Ejecutiva Hidro-Elecctrica del Rio Lempa, and a third party. *Id.* at *1. The *El Paso* court declared that *Intel* "shed no light" on § 1782's application to arbitration. *Id.* According to the *El Paso* court, "the Supreme Court has not addressed the application of § 1782 to arbitral tribunals, not even in dicta." *Id.* The *El Paso* court focused its discussion on the fact that the party seeking discovery in *Intel* "had 'significant procedural rights . . . most prominently, the [party] . . . *may seek judicial review of the Commission disposition of a complaint.*" *Id*. (*quoting Intel*, 542 U.S. at 255). The court went on to say that the Commission at issue in *Intel* was akin to an administrative agency in the United States because it acted as a "quasi-adjudicative proceeding before review by true judiciary powers." *Id.* at *4. According to the court, such a body is a far cry from a private arbitral tribunal that "exists as a parallel source of decision making to, and is entirely separate from, the judiciary." *Id.* The *El Paso* court ultimately found that the holding in *Biedermann Int'l* was consistent with *Intel*, and under both, the petition for § 1782 at issue before the court had to be denied. *Id.* at *6.

No appellate court has addressed the issue since *Intel.* The majority of district courts, however, as well as the International Commercial Disputes Committee of the New York City Bar Association, suggest that the holding in *Intel* encompasses international commercial arbitration under its definition of "foreign tribunal."

CONCLUSION

With an upsurge of litigation and arbitration outside the United States that involves or relates to activity connected to the United States, the need for foreign discovery of testimony and documentary evidence within the United States could well escalate. Section 1782 provides an invaluable tool to help foreign parties obtain such evidence. But while recent case law suggests the courts are taking a more generous approach to awarding discovery under § 1782, ambiguity remains that will warrant case-by-case analysis.

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