BUSINESS LAW TODAY

Taking Discovery in the United States for Use in Arbitration Abroad: Open Questions Under 28 U.S.C. § 1782

By Stuart M. Riback

It is commonly assumed in the United States that arbitration is a faster and cheaper way of resolving disputes than full-blown litigation in the courts. One of the reasons is that discovery in arbitration is usually more streamlined and limited than in plenary court cases.

It may or may not be true that arbitration yields a quicker resolution, but there is a twist. Interestingly, the twist comes into play when the arbitration is held in another country. A federal statute, 28 U.S.C. § 1782, permits persons involved in legal proceedings before tribunals in other countries to seek discovery in the United States in aid of those proceedings. If arbitration outside the United States qualifies as a "tribunal" under Section 1782, then it may well be that more discovery is available in the United States for arbitrations located abroad than for arbitrations held domestically.

But is an arbitration panel a "tribunal" for purposes of Section 1782? That is actually an open question, for which there are three or four possible answers. The discussion below outlines the basics of Section 1782 discovery, then surveys the case law about whether Section 1782 discovery is available in arbitration and, if it is, under what circumstances.

Background: *Intel v. AMD* and 28 U.S.C. § 1782

Under 28 U.S.C. § 1782, an "interested person" may request that a district court authorize discovery in the United States "for use in" foreign litigation even without the foreign tribunal's knowledge or involvement. Section 1782 gained special attention in 2004, when the United States Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466 (2004). In *Intel*, the Court held that Section 1782 conferred broad discretion on district judges to permit foreign litigants to obtain discovery in the United States, subject to certain statutory and prudential guidelines.

In *Intel*, Advanced Micro Devices, Inc. (AMD), had filed a complaint in Europe with the European Commission's Directorate-General for Competition (D-G), claiming that Intel was engaging in various kinds of anticompetitive activity. The D-G enforces the European antitrust laws; it investigates and provides a recommendation to the European Commission (EC), whose decisions as to liability are then reviewable in the European court system. In those proceedings, complainants such as AMD have certain rights, including the right to seek judicial review of certain decisions of the D-G. In the *Intel* case, AMD suggested to the D-G that, in the course of its investigation, the D-G should seek certain documents produced in litigation against Intel in the United States. The D-G declined to do so.

AMD decided that if the D-G wouldn't ask for the documents, AMD would. AMD applied for an order under Section 1782, claiming it was an "interested person" entitled to seek discovery in the United States in aid of the antitrust proceeding in Europe. The district court held that Section 1782 did not authorize the discovery and denied the application. The Ninth Circuit reversed. The Supreme Court granted certiorari.

Before the Supreme Court were a number of issues. First, whether a person seeking discovery under Section 1782 could seek only discovery that would be permitted in the foreign jurisdiction. The circuits had split on that issue. The Supreme Court also addressed whether there had to be an actual legal proceeding pending before Section 1782 could be invoked (circuits had split on this issue as well); what kinds of foreign tribunal proceedings could be the subject of proper Section 1782 applications; and

whether a complainant in an administrative proceeding could be an "interested person" entitled to invoke Section 1782. On each of these issues the Supreme Court came down in favor of permitting the district court discretion to allow discovery. It held that, under Section 1782: (1) AMD was an "interested person" even though not a formal party litigant; (2) a D-G investigation is a "proceeding" in a "foreign or international tribunal" for which discovery can be sought under Section 1782, even at the investigative, predecisional stage, so long as decisional proceedings are "within reasonable contemplation;" and (3) Section 1782 does not require that the discovery materials sought in the United States also be discoverable in the foreign proceeding.

The Supreme Court's reasoning was driven to a great extent by the statutory language. The 1964 amendments to Section 1782 removed the requirement that the foreign proceeding be "judicial," which meant that investigative or regulatory tribunals were covered as well. The Supreme Court's reasoning for treating an investigative or regulatory body as a "tribunal" for purposes of Section 1782 focused on the nature of the D-G: specifically, it accepts submissions of proof and is a "first instance decisionmaker." For that reason, the Supreme Court saw no reason to exclude it from the class of "tribunals" for which Section 1782 discovery is available.

Similarly, in rejecting the contention that Section 1782 permits production only of documents that would be discoverable in the foreign forum, the Court stressed that Congress had liberalized the statute in 1964, so that if it meant to impose a restriction on the scope of discovery, it would have so provided. In the Court's view, any concerns about public policy or fairness between litigants could be addressed by the district courts on a case by case basis in the exercise of their discretion.

Intel thus clarified that the statutory limits on discovery under Section 1782 are actually quite narrow. As a result, most of the litigation about whether to permit discovery under Section 1782 necessarily focuses on the discretionary factors. The Court in *Intel* identified several factors to guide the district courts' discretion:

> First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . .
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> Second, . . . a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance. . . .
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> [Third,], a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.
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> [Fourth], unduly intrusive or burdensome requests may be rejected or trimmed.

These factors should be applied in support of Section 1782's "twin aims of 'providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.'" *Intel,* 542 U.S. at 254, *quoting Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002). A court considering a Section 1782 application thus needs to consider both the statutory requirements and the discretionary factors.

Is Section 1782 Discovery Available For Private Arbitrations?

Statutory Prerequisites Under Section 1782

A district court has power to order Section 1782 discovery where "(1) the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) the discovery [is] for use in a proceeding before a foreign tribunal, and (3) the application [is] made by a foreign or international tribunal or 'any interested person.'" *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2nd Cir. 2004) (*quoting In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996)).

Each of these three elements must be shown in a Section 1782 application. Each raises unique issues. For current purposes, though, the focus is on the second factor: is an arbitration panel in a foreign country ever a "tribunal" for which discovery can be sought under Section 1782? If an arbitration panel can be a "tribunal" under Section 1782, what characteristics must it have?

Intel established that Section 1782 permits discovery in the United States not only in connection with court cases but also in connection with regulatory and administrative proceedings. Before *Intel*, the Second and Fifth Circuits held that Section 1782 did not permit discovery in aid of proceedings in a privately sponsored arbitral tribunal, because Section 1782 was designed to aid only governmentally sponsored tribunals, irrespective of whether they were courts, agencies, government-sponsored arbitration forums, or arbitral forums created by intergovernmental agreement. *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biederman Int'l*, 168 F.3d 880 (5th Cir. 1999). *Intel*, however, cited with approval Professor Smit's statement that "[t]he term 'tribunal' . . . includes . . . administrative *and arbitral* tribunals. . . ." *Intel,* 542 U.S. at 257, *quoting* Smit, *International Litigation under the United States Code*, 65 Colum. L.Rev. 1015, 1026–1027 & nn. 71, 73 (1965) (emphasis added). Does this reference to "arbitral tribunals" include privately-created arbitration panels?

Four Ways to Think About "Tribunals"

The current state of the law is quite unsettled. There are at least four different schools of thought about which kinds of arbitration panels can be considered "tribunals" under Section 1782. The law at the courts of ap-

peals level is especially uncertain. In fact, one court – the Eleventh Circuit – actually issued an opinion on the issue and then retracted it sua sponte. So this issue seems certain to be the focus of attention over the next few years.

1. Some courts say *Intel* didn't change anything.

As noted, the Second and Fifth Circuits had held, five years before *Intel*, that private arbitration panels were not "tribunals" for which Section 1782 discovery is potentially available. These courts reasoned that permitting Section 1782 discovery in private arbitrations would lead to the anomalous situation where arbitrations abroad could have broader discovery than domestic arbitrations governed by the Federal Arbitration Act. They further observed that permitting Section 1782 discovery in purely private arbitrations could undermine the utility of arbitration as a quick, efficient method of resolving disputes. In these courts' view, Section 1782 discovery could be authorized for arbitrations only if the arbitrations were under government auspices, required by treaty or otherwise taking place under governmental authority.

In 2009, the Fifth Circuit considered whether *Intel* dictated a different result and, in an unpublished opinion, concluded that it did not. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31, 2009 WL 2407189 (5th Cir. Aug. 6, 2009). A number of other cases continue to follow this line of reasoning. In the view of these courts, *Intel* did not purport to define which arbitral panels are covered, so there is no reason to depart from the earlier rule. At the very least, however, there is no dispute that governmentally sanctioned arbitral panels are "tribunals" for purposes of Section 1782.

2. Some courts say *Intel* authorizes Section 1782 discovery in private arbitrations.

A number of courts have read the statute broadly, and held that Section 1782 permits assistance even to purely private arbitrations created by contract or other private agreement. These cases rely on the approving reference to "arbitral forums" in *Intel*. Under this reasoning, courts have approved Section *1782 discovery for use in proceedings before such private bodies as the International Chamber of Commerce, the Austrian Economic Chamber*, and even panels created purely by contract. The general theory of these cases is that, under *Intel*, any "first instance decisionmaker" is a "tribunal."

The Seventh Circuit made an almost offhand observation in a recent case that a private arbitration panel in Germany "might be considered to be [a § 1782] tribunal." *GEA Group, AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (7th Cir. 2014). But this was mere dictum in a case decided on other grounds, so it is impossible to say conclusively that the Seventh Circuit follows this school of thought.

3. "Functional analysis."

A third group of cases requires a "functional analysis" that looks at each arbitral panel on a case by case basis to see whether it functions as the sort of tribunal that *Intel* endorsed. Judicial supervision is considered crucial here: even if the panel was created solely by contract, the arbitration may be a tribunal if its decisions can be appealed to the courts.

This approach was pioneered by district courts in Florida in 2009 and 2010. In 2012, the Eleventh Circuit in *Consorcio Ecuatoriano de Telecommunicaciones v. JAS Forwarding, Inc.*, 685 F.3d 987 (11th Cir. 2012), endorsed a very similar approach under which a private arbitration tribunal could qualify as a "tribunal" for Section 1782 purposes based on four factors:

> Consistent with this functional approach, we examine the characteristics of the arbitral body at issue, in particular [1] whether the arbitral panel acts as a first-instance adjudicative decisionmaker, [2] whether it permits the gathering and submission of evidence, [3] whether it has the authority to determine liability and impose penalties, and [4] whether its decision is subject to judicial review.

Interestingly, the Eleventh Circuit's opinion did not require that the available judicial review be plenary or even meet any particular judicial-type standard such as "clearly erroneous," "abuse of discretion," or the like. Rather, it was enough that the judicial review be similar to the review courts in the United States perform under the Federal Arbitration Act. Under this view, presumably most private arbitrations in developed countries would qualify – so there may not be much difference between this view and the view of the courts that permit Section 1782 discovery for private arbitrations generally.

The story does not end there, though. On January 10, 2014, the Eleventh Circuit sua sponte vacated its earlier opinion in *Consorcio Ecuatoriano* and substituted a new one, ___ F.3d ___, 2014 WL 104132 (11th Cir. Jan 10, 2014). The new opinion declined to address the question whether Section 1782 discovery was available for the arbitration. The reason: in that case, the applicant sought discovery under Section 1782 both for contemplated judicial proceedings *and* for an arbitration. Because the contemplated court proceedings were unquestionably to be in a "tribunal," the Eleventh Circuit approved the discovery for that reason. There was thus no need to consider whether a private arbitration also was a Section 1782 "tribunal."

Even though it was withdrawn, the *Consorcio Ecuatoriano* opinion does set forth a sensible post-*Intel* approach to evaluating whether to permit Section 1782 discovery in private arbitrations. The district court opinions that follow a similar approach still stand, of course. Presumably it is only a matter of time until the issue will be addressed again at the court of appeals level.

4. The most minor of minority views.

A fourth position was enunciated in 1994 by a case in the Southern District of New York, which held that Section 1782 requests could be made in support of private

arbitration overseas, but only with the approval of the arbitrators. *In re Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994). This was also the opinion of Professor Hans Smit, who drafted the most recent version of Section 1782. But no subsequent case has adopted this view, and it is probably no longer tenable after *Intel*.

Strategic Considerations

Because of the very unsettled state of the law, a party that wants to take discovery in the United States for use in an arbitration abroad needs to think carefully about how best to achieve its objectives. As in any other case before a foreign decisionmaker, the would-be taker of discovery should consider whether the panel will appreciate or resent that the party went to other forums to get evidence, no matter what the evidence is. Sometimes the gains from having additional information may not be worth alienating the decisionmaker. Obviously, the advice of counsel in the foreign jurisdiction will be invaluable in making this evaluation.

Because of the wide split of authority among the various courts, the choice of where to make the application can be critical. Sometimes there will be no choice in the matter, because the subject of the Section 1782 discovery can be found in only one or two districts. But that will not always be the case. Until the law is harmonized, counsel should try to select the most hospitable forum for the client's needs.

The application for Section 1782 discovery should stress the availability and scope of judicial review in the foreign jurisdiction. A number of courts that have considered the issue have shown a marked willingness to permit Section 1782 discovery for use in private arbitration so long as the arbitration is subject to some form of judicial review. If the private arbitration abroad can be reviewed by a court, it is useful to inform the Section 1782 court of that.

Finally, be sure to tailor the discovery request to the facts of the overseas proceeding. The narrower the request is, the less likely it can be successfully challenged. Because Section 1782 discovery is largely discretionary, it definitely pays to keep things reasonable so that the district court does not suspect overreaching.

Stuart M. Riback is a partner in the New York law firm Wilk Auslander LLP. His practice focuses on corporate and commercial litigation, with an emphasis on securities, intellectual property, and creditors' rights disputes.