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Commentary

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[Editor's Note: As a business litigator with more than 30 years of experience, Stuart M. Riback, Partner at Wilk Auslander LLP, has handled a wide range of complex commercial, securities, intellectual property and creditors' rights disputes. He has represented clients in industries as diverse as hedge fund management, private equity, banking, entertainment, high technology, major league sports, manufacturing, biotechnology, niche lending, media, and aviation. His clients range from individual entrepreneurs and private-equity investors to publicly traded Fortune 100 companies and multinational companies based overseas. Any commentary or opinions do not reflect the opinions of Wilk Auslander, LLP or LexisNexis®, Mealey Publications™. Copyright © 2020 by Stuart M. Riback. Responses are welcome.]

With the uptick in cross-border trade in recent years, the US courts have seen a marked increase in the number of applications under 28 USC § 1782. Section 1782 permits district courts to authorize certain persons to gather evidence in the United States to use in legal proceedings abroad. But can § 1782 be used to gather evidence in support of private arbitrations? The circuits are split.

The Second and Fifth Circuits in 1999 said no and were joined this year by the Seventh Circuit. In these courts' view, § 1782 applies only in support of tribunals whose source of authority is one or more governments. So, it can be used to obtain evidence for proceedings in courts, regulatory agencies, arbitral panels created by treaties or international agreements (such as NAFTA or bilateral investment treaties), or by international organizations such as the European Union. But these circuits do not permit § 1782 evidence-gathering in support of arbitration panels whose authority arises from a contract between the parties.

The Fourth and Sixth Circuits, within the past year, came out the other way. In their view, a private arbitration is a "proceeding in a foreign or international tribunal" every bit as much as a case in court. The Eleventh Circuit in the past has hinted – perhaps more than hinted – that it would permit § 1782 discovery for use in foreign private arbitrations. And the Ninth Circuit just heard argument on the same issue on September 14 of this year.

With this growing split in a growing area of the law, it seems logical to conclude that, sometime in the next very few years, the Supreme Court will resolve the issue. As things stand now, parties to arbitrations in other countries have a powerful incentive to try their hands at forum-shopping if they want to seek evidence in the United States. True, it may not be possible in many cases because § 1782 does limit where applications can be brought. But those limitations may be less restrictive than they first appear, because other case law has broadened each district court's reach.[1] In short, this issue appears to have "certiorari" written all over it: because § 1782 applications have become so common, the current situation – different rules in different parts of the country – is not sustainable for long.

So, what is the right answer? Let's have a look at how this issue came about and the various approaches courts have taken to resolving it. Once we understand the variables, we may be able to offer some tentative guesses.

I. The Supreme Court's one and only pronouncement on § 1782: the 2004 decision in *Intel v. AMD*

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the United States Supreme Court held that

§ 1782 conferred broad discretion on district judges to permit foreign litigants to obtain evidence in the United States, subject to certain statutory and prudential guidelines. By its terms, under § 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.[2]

In *Intel*, 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 to participate in the proceeding and to seek judicial review. 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 § 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 § 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 § 1782 could seek only discovery that would be permitted in the foreign jurisdiction. The circuits had split on that issue.[3] The Supreme Court also addressed whether there had to be an actual legal proceeding pending before § 1782 could be invoked (circuits had split on this issue as well); what kinds of foreign tribunal proceedings could be the subject of proper § 1782 applications;[4] and whether a complainant in an administrative proceeding could be an "interested person" entitled to invoke § 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 § 1782: (a) AMD was an "interested person" even though not a formal party litigant; (b) a D-G investigation is a "proceeding" in a "foreign or international tribunal" for which discovery can be sought under § 1782, even at the investigative, pre-decisional stage, so long as decisional proceedings are "within reasonable contemplation;" and (c) § 1782 does not require that the discovery materials sought in the United States also be discoverable in the foreign proceeding.

The discussion relevant here pertains mainly to the second issue: was the D-G a "tribunal" for purposes of § 1782? It certainly wasn't a court, but the Supreme Court held it didn't have to be. The 1964 amendments had come about as a result of Congress establishing a Rules Commission in 1958 to "recommend procedural revisions 'for the rendering of assistance to foreign courts and quasi-judicial agencies.'"[5] When Congress enacted the Commission's recommendations in 1964, it removed the prior requirement in § 1782 that the foreign proceeding be "judicial," which meant that investigative or regulatory tribunals were covered as well.[6] The Court concluded "[w]e have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit.[7]

Notably, the Court's analysis also quoted from the Senate Report for the 1964 amendments, which in turn quoted a law review article by the Rules Commission's reporter, Professor Hans Smit of Columbia Law School. That quote reads as follows: ""[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[8] There is no explanation of which sorts of "arbitral tribunals" Professor Smit had in mind. It might turn out to be significant that this reference was in the quoted Senate Report, not in the text of the statute, because Justice Scalia's concurrence in the case objected to using legislative history. He would have decided *Intel* exactly the same way, from the face of the statute alone.[9]

Intel thus clarified that the statutory limits on discovery under § 1782 are actually quite narrow. The Court expected that the district court's discretion would fill in the gaps to ensure fairness on a case-by-case basis, and it identified several factors to guide the district courts' discretion.[10] These factors should be applied in support of § 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.'"[11]

The bottom line is that 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 § 1782 application. Each raises unique issues. For current purposes, though, the focus is on the second factor: is a private arbitration panel in a foreign country ever a "foreign or international tribunal" for which discovery can be sought under § 1782? If a private arbitration panel can be a "tribunal" under § 1782, what characteristics must it have?

II. Different views whether private arbitrations are § 1782 "tribunals"

A. Section 1782 is available only for government-sponsored arbitrations

1. The Second and Fifth Circuits

The issue first came up in 1999, five years before *Intel.* In *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999), NBC sought to obtain evidence from Bear Stearns for use in a private arbitration in Mexico. The district court held that the private arbitration was not a "foreign or international tribunal," and the Second Circuit affirmed.

The Second Circuit's analysis began by ascertaining that "foreign or international tribunal" was ambiguous and did not necessarily include or exclude private arbitrations. It then considered the House and Senate Reports for the 1964 legislation that amended § 1782 and noted that neither of them referred to private arbitrations. Also, one of the provisions that the 1964 amendments replaced had used the term "international tribunals" to refer "only to intergovernmental tribunals." The Second Circuit concluded, "we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."[12]

Finally, the Second Circuit observed that domestic private arbitrations are governed by the Federal Arbitration Act, which provides for much more restrictive evidence-gathering than under § 1782. Permitting § 1782 discovery in private arbitrations thus would lead to the anomalous situation where arbitrations abroad could have broader discovery than domestic arbitrations. Because of that, extending § 1782 to foreign private arbitrations would create a possible statutory conflict and interfere with normal classifications of arbitral panels for treaty purposes as domestic, foreign or international. Also, authorizing Section 1782 discovery in purely private arbitrations could undermine the utility of arbitration as a quick, efficient method of resolving disputes.[13]

The Fifth Circuit followed the Second Circuit less than two months later, in *Republic of Kazakhstan v. Biederman Int'l*, 168 F.3d 880 (5th Cir. 1999). Its opinion relies explicitly on the Second Circuit's opinion in *NBC* and tracks its reasoning.

Both these cases predate *Intel*. Recall that *Intel* cited with approval the portion of the Senate Report quoting Professor Smit's view that "[t]he term 'tribunal' . . . includes . . . administrative *and arbitral* tribunals. . . ." *Intel,* 542 U.S. at 257 (emphasis added). Did this reference to "arbitral tribunals" change anything?

The Fifth Circuit weighed in first. In 2009, the Fifth Circuit concluded in an unpublished opinion that *Intel* did not dictate a different result. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009). As the Fifth Circuit explained, nothing in *Intel* addressed the concerns that underlay the 1999 decision, and in any event, *Intel* did not purport to define which arbitral panels are covered, so there is no reason to depart from the earlier rule.

Numerous district courts follow these decisions, even outside the Second and Fifth Circuits.[14] Some continued to adhere to this view even after the Sixth Circuit (and later the Fourth) came out the other way.[15]

In July of this year the Second Circuit weighed in on whether *Intel* changed anything. Like the Fifth Circuit,

the Second Circuit said no.[16] In *In re Guo*, 965 F.3d 96 (2d Cir. 2020), the Second Circuit rebuffed the argument that the two words "arbitral tribunals" quoted in *Intel* had any effect on the earlier decision in *NBC. Intel* dealt with a different issue and did not purport to examine private arbitrations at all. The reference to arbitral tribunals was at best dicta.

2. The Seventh Circuit

In September the Seventh Circuit joined the Second and Fifth. *Servotronics Inc. v. Rolls Royce PLC*[17] arose from an arbitration in England concerning parts that Servotronics had supplied to Rolls Royce for inclusion in airplane engines sold to Boeing. Servotronics sought documents from Boeing in Illinois under § 1782. The district court denied the application and the Seventh Circuit affirmed. (Servotronics also sought depositions in South Carolina – that application led to the Fourth Circuit decision discussed below). Notably, the Seventh Circuit in 2014 had made an offhand observation in dicta 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), which suggested that the Seventh Circuit might end up permitting the § 1782 application. But that isn't what happened: once it had to make a reasoned decision in a case that squarely presented the issue, the Seventh Circuit said no.

The Seventh Circuit began its analysis of § 1782 with a look at the 1958 statute establishing the Rules Commission that ultimately drafted the 1964 revision of § 1782. All of Congress's instructions for the Rules Commission related to intergovernmental agreements and procedures, with no mention of arbitration. The procedures Congress wanted improved were those relating to "foreign courts and quasi-judicial agencies."[18]

Two other provisions that were enacted in 1964 together with the new § 1782 also used the term "foreign or international tribunal." – § 1696, relating to service of papers, and § 1781, relating to letters rogatory. These other provisions also use the term "a proceeding in a foreign or international tribunal" – but did so, as the Seventh Circuit put it, in the context of "matters of comity between governments" (service of papers and letters rogatory). That would appear not to extend to private arbitrations.

There is also internal evidence in § 1782 itself. Section 1782 says that the court may prescribe the procedure to be used for obtaining evidence under § 1782. That procedure "may be in whole or part the practice and procedure of the foreign country or the international tribunal." In the Seventh Circuit's view, this indicates that a "foreign tribunal" is one that follows the practice and procedure of a "foreign country." Private arbitration panels don't qualify – their procedures are not those of a "foreign country."

Finally, there was the sticky question of the Federal Arbitration Act. Using § 1782 for private arbitrations could create conflicts not only with the normal, narrow evidence-gathering procedures authorized by the FAA but also with the parts of the FAA that deal with how American courts handle foreign arbitrations, whether under the New York Convention or otherwise, 9 U.S.C. §§ 201-208, 301-307. Such a collision between statutes can be avoided by treating only a "state-sponsored, public or quasi-governmental" body as a § 1782 "tribunal."[19]

B. Views of courts that permit § 1782 discovery in private arbitrations.

A number of courts have held that § 1782 permits assistance even to purely private arbitrations created by contract or other private agreement. But the rationales for these decisions vary widely.

1. District court authority that *Intel* extended § 1782 to private arbitrations.

The first such case was *In re Roz Trading*, 469 F. Supp.2d 1221 (N.D. Ga. 2006). *Roz* looked at the reasons *Intel* had held that the D-G was a tribunal under § 1782: "it acted as a first-instance decisionmaker, capable of rendering a decision on the merits, and as part of the process that could ultimately lead to final resolution of the dispute."[20] Based on that, the *Roz* court determined that it was consistent with *Intel* to treat the private arbitration as a § 1782 "tribunal," particularly in light of *Intel*'s reference to "arbitral tribunals." A number of other district courts followed suit.[21] The general theory of these cases is that, under *Intel*, any "first instance decisionmaker" is a "tribunal."

These cases rely on *Intel*'s approving reference to "arbitral forums" and its characterization of the D-G as a "first-instance decisionmaker." Arbitral panels are, of

course, first-instance decisionmakers. 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.

2. Circuit-level cases and their progeny

For the circuits that have permitted using § 1782 for private arbitrations, there has been no consensus as to the reasons. There are at least three different views, though one of the opinions has been vacated.

a. The Eleventh Circuit's "functional approach."

The first such circuit-level opinion is the one that was later vacated. The Eleventh Circuit in *Consorcio Ecuatoriano de Telecommunicaciones v. JAS Forwarding, Inc.*, 685 F.3d 987 (11th Cir. 2012) built on the view of the district courts that permitted using § 1782 for private arbitrations, and adopted what it called a "functional approach" under which a private arbitration tribunal could qualify as a "tribunal" for § 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.[22]

The Eleventh Circuit derived these factors from the *Intel* opinion's analysis of the characteristics of the D-G. Interestingly, the *Consorcio* court 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. As the Eleventh Circuit put it, the available judicial review was sufficient even though it "focused primarily on addressing defects in the arbitration proceeding, not on providing a second bite at the substantive apple."[23] Under this view, many if not most private arbitrations in developed countries would qualify.

The Eleventh Circuit in 2014 vacated its *Consorcio* opinion *sua sponte* and substituted a new one.[24] The new opinion declined to address the question whether § 1782 was available for arbitration. The reason: in that case, the applicant sought discovery under § 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 § 1782 "tribunal."

Some lower court opinions seem to have found the Eleventh Circuit's functional approach nevertheless attractive.[25] Some cases have looked at particular arbitration sponsors' rules to see whether they make decisions and whether they are subject to review. These cases have denied § 1782 applications where the foreign arbitration's governing rules required parties to forego later applications for court review, or where the foreign forum was a mediator without decision-making authority.[26]

One problem with a purported "functional analysis" is that different courts may have different ideas about which functions are relevant in determining whether an arbitral tribunal operates like a "court or quasi-judicial agency." One court held in 2009 that under a functional analysis, one relevant factor is the source of the tribunal's authority:

> a functional analysis of the ICC Panel should also consider the origin of its decision-making authority and its purpose. That is, the criteria adopted by Supreme Court for its functional analysis in *Intel* were based, in part, on the particular characteristics of the DG–Competition and the European Commission. . . . The parties selected the ICC Court as an alternative to governmental or state-sponsored proceedings. Because the ICC Panel's authority derives from the parties' agreement, its purpose is fundamentally different than that of a governmental or state-sponsored proceeding.

In re Application of Operadora DB Mexico, S.A. de C.V., 2009 WL 2435750 (M.D.Fla., May 28, 2009). This

court noted that the D-G proceedings in *Intel* were ***precursors*** to court proceedings – unlike arbitrations which are ***alternatives*** to court proceedings. So, a functional analysis could well come to a categorical conclusion that no private arbitrations could qualify: precisely the same result that the Second, Fifth and Seventh Circuits reached, but for a different reason.

b. The Sixth Circuit's textual analysis

Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019) decided that that a Saudi company was not precluded from seeking to obtain evidence from FedEx Corp. under § 1782 in support of a private arbitration in Dubai. The opinion focuses narrowly on the meaning of the word "tribunal," because it believed there was no dispute that the arbitration in question was "foreign or international." Like the Second Circuit, the Sixth found that dictionary definitions from 1964 and earlier were inconclusive because "tribunal" had both a narrow use, referring strictly to a court or court-like body, and a broader one that included any decision-making body. So, it then looked to court usages of the term, and found that American courts and commentators had used "tribunal" to refer to arbitration panels.

Next it looked at other uses of the term in the same statute. In opposing the § 1782 application, FedEx had focused on the provision that the court may prescribe the procedure to be used for obtaining evidence under § 1782. That procedure "may be in whole or part the practice and procedure of the foreign country or the international tribunal." FedEx argued that this showed there had to be a "foreign country's" procedure available, which excludes private arbitration. The Sixth Circuit disagreed, because the language is permissive: the district court ***may*** prescribe those procedures. "The statute's terms do not require that such procedures exist or that a 'foreign tribunal' be a governmental entity of a country that has prescribed such procedures."[27] This is the precise opposite of the Seventh Circuit's view of this language. According to the Seventh Circuit, the necessary premise for this provision is that there must be a foreign country's procedure available.[28]

The Sixth Circuit also looked at the use of "tribunal" in § 1781, which was enacted at the same time as § 1782. Section 1781 empowers the State Department "to receive a letter rogatory issued, or request made, by a foreign or international tribunal." In the Sixth Circuit's view, this is not inconsistent with treating arbitration panels as "tribunals" under § 1782 because arbitrators can make requests for evidence.[29]

c. The Fourth Circuit's unusual approach

In March of this year the Fourth Circuit decided *Servotronics, Inc. v. The Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). This case concerned the same arbitration, and the same parties, as the *Servotronics* case in the Seventh Circuit, discussed earlier. But it came out the opposite way. This gives us the unusual phenomenon of a circuit split in a single dispute.

The Fourth Circuit observed that the Federal Arbitration Act, and foreign country equivalents such as the UK Arbitration Act, endorse arbitration as an alternative to court proceedings and provide for regulation and supervision of arbitration. As a result, "even if we were to apply the more restrictive definition of "foreign or international tribunal" adopted by *Bear Stearns* and *Biedermann* and now advanced by Boeing — that the term refers only to 'entities acting with the authority of the State' — we would conclude that the UK arbitral panel charged with resolving the dispute between Servotronics and Rolls-Royce meets that definition."[30]

The Fourth Circuit dismissed any concerns that permitting § 1782 to be used for foreign arbitrations would create delays and costs that defeat the purpose of arbitration to provide speedy and simple resolution of disputes. In the Fourth Circuit's view, under § 1782 the district court acts on behalf of the foreign tribunal in taking testimony and obtaining documents. "In serving the role given under § 1782(a), a district court functions *effectively as a surrogate* for a foreign tribunal by taking testimony and statements *for use* in the foreign proceeding. When viewed in this light, the district court functions no differently than does the foreign arbitral panel or, indeed, an American arbitral panel." *Servotronics,* 954 F.3d at 215.

III. Advancing through the thicket: some thoughts on resolving the split

As is readily apparent, not only is there a split as to the bottom line result, there is also a split as to the proper analysis of § 1782. For all we know, the Ninth Circuit

will give us yet another, different approach in the near future: it just heard oral argument on September 14 in a case presenting the same issue.[31]

Reading the tea leaves to predict what the Supreme Court is likely to do if it takes a case on this issue is always a risky endeavor. But in my opinion a close analysis of *Intel*, coupled with a reasonable reading of the words of § 1782 in their proper context, points strongly toward an approach very much like the Seventh Circuit's.

Let's start with the process by which the 1964 amendments to § 1782 were enacted. Leave aside the legislative history in the Congressional Record. Congress enacted ***an actual statute*** in 1958 to create the Rules Commission that ultimately recommended the legislation including the 1964 amendment to § 1782. That statute (quoted at length in endnote 18) empowered the Commission to recommend ways to improve "the procedures of our State and Federal tribunals for the rendering of assistance to ***foreign courts and quasi-judicial agencies***." (Emphasis added.) In other words, ***this statute defined the scope of any legislation to be recommended***: it would need to pertain to ways of assisting "foreign courts and quasi-judicial agencies." So from the very beginning of the updating process, Congress was focused on ways of helping government-created bodies. That's what "foreign courts and quasi-judicial agencies" are. Normal usage does not refer to a private arbitration panel as a "quasi-judicial agency."

Next, look at the other statutes that were enacted at the same time. Section 1696 authorizes district courts to order service of papers at the request of a "foreign or international tribunal." It is codified in the part of Title 28 pertaining to service of process. Section 1781, among other things, authorizes the State Department in subsection (a)(1) "to receive a letter rogatory issued, or request made, by a foreign or international tribunal." The State Department is, of course, in charge of the United States' foreign relations – the country's dealings with other countries' governments. It is a stretch to say that under § 1781(a)(1) a foreign private arbitration panel should make requests to the State Department.

It is worth noting in that connection that the governmental agencies acting under § 1781 focus on letters rogatory – requests made by government-established courts – and service of process for foreign courts. 32 CFR §§ 516.10 (e), 516.12(b). The Department of Justice's Office of International Legal Assistance, which represents the State Department in § 1781 matters, discusses "evidence requests" solely in the context of the Hague Convention (which governs letters rogatory). *See* https://www.justice.gov/civil/evidence-requests. None of the agencies that administer these other related and contemporaneously enacted statutes suggest that "foreign or international tribunal" includes private arbitration. There is no reason to think anyone in 1964 would have understood § 1782 any differently.

The key here is focusing on the entire phrase "foreign or international tribunal" and not on the term "tribunal" alone, as the Sixth Circuit did. Because the phrase recurs in three different related statutes – §§§ 1696, 1781 and 1782 – it should be understood as a single contextual unit that was used the same way in all three. The Sixth Circuit understood "foreign or international" as merely descriptive or adjectival, with "tribunal" being the word that had to be defined. More realistically, though, the words "foreign or international" are part of the object that is being defined: a "foreign or international tribunal." After all, that precise phrase is repeated, intact and in full, in all three statutes. And that phrase only makes sense as used in all three statutes if it is limited to governmentally created bodies.

How about *Intel*? Didn't *Intel* hold that the European Commission was a "foreign or international tribunal" because it was a "first-instance decisionmaker?" Yes, but look at the context of *Intel*. There was a structure in which the D-G made the first decision. As *Intel* described the process, "The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. Once the DG-Competition makes its recommendation, the Commission may dismiss the complaint or issue a decision holding the target liable and imposing penalties. The Commission's final action is subject to review in the Court of First Instance and the European Court of Justice." *Intel*, 542 U.S. at 255.

This was the context in which the European Commission was described as the "first-instance decisionmaker." In the words of the Court: "Beyond question the reviewing authorities, both the Court of First Instance and the European Court of Justice, qualify as tribunals. But those courts are not proof-taking instances. Their review is limited to the record before the Commission.

Hence, AMD could "use" evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage." *Intel*, 542 U.S. at 257-58.

In other words, there is a structure in place, created by an international body (the European Union), of which the D-G and the European Commission are the first decisionmakers within that structure. The Supreme Court was not exalting all "first-instance decision-makers" so much as determining that insofar as the European Commission took evidence and made the first decisions in the much longer investigative and adjudicatory process, it was a tribunal for which § 1782 could be used. As noted above, the district court in *In re Application of Operadora DB Mexico, S.A. de C.V.*[32], saw this quite clearly: the D-G proceedings in *Intel* were ***precursors*** to court proceedings – unlike arbitrations which are ***alternatives*** to court proceedings.

The internal evidence in the language of § 1782 also seems to exclude private arbitrations. "The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal," in the words of § 1782. The Seventh Circuit understood this language to imply necessarily that there had to be a "procedure of the foreign country" that could govern the § 1782 evidence-gathering – otherwise, the position makes no sense. Arbitration rules cannot be viewed as "procedure of the foreign country." The Sixth Circuit disagreed because this provision is permissive: nothing requires the district court to provide for using foreign procedure. But this argument is too glib: the language shows that the statute's underlying premise is that the foreign country's procedure would govern the tribunal in question. If § 1782 does assume that – as even the Sixth Circuit appears to admit, 939 F.3d at 723 – then it must follow that arbitral panels are not § 1782 "tribunals."

How about the Fourth Circuit's view that, because private arbitration is governed by statutes that regulate its use and provide for court review, it therefore is under government authorization every bit as much as a NAFTA panel? Simply put, this argument is hard to take seriously. Many, many kinds of transactions and industries are regulated by government. In this view, insurance companies or banks or airlines would be viewed as arms of the state. Clearly that is ridiculous. The fact is, arbitration predated the Federal Arbitration Act and the UK Arbitration Act. It does not owe its existence to government action. It is regulated, but not animated, by government.

Similarly unpersuasive is the notion that the district court simply stands in for the foreign tribunal. *Intel* is quite clear that that is simply not accurate. A district court under § 1782 is ***assisting*** a foreign litigant and providing a good example to others. 542 U.S. at 250. It is not acting as a surrogate for the foreign tribunal. The foreign tribunal need not even be consulted in a § 1782 proceeding.

The bottom line is that the language and structure of § 1782 and the other sections enacted at the same time make sense only if "foreign or international tribunal" refers to bodies created by or at the behest of governments: whether by statute, treaty or other international agreement. Will the Supreme Court agree? It is logical to think we should find out soon enough. Given how stark and growing the circuit split is, and in light of the large and growing number of § 1782 applications, it is fair to assume that the Court will take a case on this subject sooner rather than later.

Endnotes

1. Under a recent Second Circuit decision, a district court can issue subpoenas to persons located anywhere so long as doing so comports with due process. *In re Del Valle Ruiz*, 939 F.3d 520, 528-29 (2d Cir. 2019).

2. Section 1782 provides in relevant part as follows:

   > (a) The 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. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or

statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

3. *Compare Application of Gianoli Adulante*, 3 F.3d 54 (2d Cir. 1993) (no foreign discoverability requirement); *In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998) (same), *with In re Asta Medica*, 981 F.2d 1 (1st Cir. 1992) (evidence sought under § 1782 must be discoverable in forum of underlying dispute); *Lo Ka Chun v. Lo TO*, 858 F.2d 1564 (11th Cir. 1988); *In re Trinidad and Tobago*, 848 F.2d 1151 (11th Cir. 1988) (same).

4. *Compare In re Ishihara Chemical Co.,* 251 F.3d 120, 125 (2d Cir. 2001) (foreign case must be imminent) *with In re Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 691 (D.C. Cir. 1989) (foreign case must be "within reasonable contemplation").

5. *Intel,* 542 U.S. at 257, *quoting* Act of Sept. 2, Pub. L. 85-906, § 2, 72 Stat. 1743 (1958).

6. *Intel,* 542 U.S. at 248, 257-58.

7. *Intel,* 542 U.S. at 258.

8. *Id.*

9. *Intel,* 542 U.S. at 267.

10. 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. . . .

    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. . . . [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.

    [Fourth], unduly intrusive or burdensome requests may be rejected or trimmed.

    Intel, 542 U.S. at 264-65.

11. *Intel,* 542 U.S. at 254, *quoting Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002). *Accord, e.g., Schmitz v. Bernstein Liebhard & Lifshitz*, 376 F.3d 79, 84 (2d Cir. 2004); *al-Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000); *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992); *Application of Gemeinschaftpraxis R. Med. Schottdorf*, 2006 WL 384464, no. M19-88 (S.D.N.Y. Dec. 29, 2006); *In re Grupo Qumma*, 2005 U.S. Dist. LEXIS 6898, 2005 WL 937486, slip op. at 1 (S.D.N.Y. Apr. 22, 2005).

12. *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.,* 165 F.3d at 189-90.

13. *Id.* at 191.

14. *See, e.g.*, *In re: the Application of TJAC Waterloo, LLC*, No. 3:16-MC-9-CAN, 2016 WL 1700001, at *1-2 (N.D. Ind. Apr. 27, 2016); *In re Dubey*, 949 F. Supp. 2d 990 (C.D. Cal. 2013); *In re Grupo Unidos por el Canal, S.A.*, 2015 U.S. Dist. LEXIS 50910, 2015 WL 1810135 (D. Colo. 2015); *In re Grupo Unidos por el Canal, S.A.*, 2015 WL 1815251 (N.D. Cal. Apr. 21, 2015); *In re Application of the Government of the Lao People's Democratic Republic*, 2016 WL 1389764 (D.N. Mar. I. Apr. 7, 2016); *In re Arbitration in London, England,* 2009 WL 1664936 (N.D.Ill. June 15, 2009).

15. *See, e.g.*, *In re Axion Holding Cyprus Ltd.*, 2020 U.S. Dist. LEXIS 171293, 2020 WL 5593934 (D.Del. Sept. 18, 2020); *In re Storag Etzel GMBH*, __ F. Supp.3d ___, 2020 U.S. Dist. LEXIS 63940, 2020 WL 1849714 (D.Del. Apr. 13, 2020); *In re EWE Gasspeicher GmbH*, __ F. Supp.3d ___, 2020 U.S. Dist. Lexis 45850, 2020 WL 1272612 (D.Del. Mar. 17, 2020).

16. *Guo* settled some uncertainty: some district judges in the Second Circuit had come out the other way based on *Intel. See, e.g., In re Kleimar N.V., 220 F.Supp.3d 517, 521–22 (S.D.N.Y. 2016)*; *In re Children's Investment Fund Foundation (UK)*, 363 F.Supp.3d 361 (S.D.N.Y. 2019).

17. __ F.3d __, no. 19-1847, 2020 U.S. App. LEXIS 30333, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).

18. The statutory charge reads in part as follows:

    The Commission shall investigate and study existing practices of judicial assistance and cooperation

between the United States and foreign countries with a view to achieving improvements. To the end that procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies . . . may be more readily ascertainable, efficient, economical, and expeditious, and that the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall—

(a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;

(b) draft and recommend to the President any necessary legislation;

(c) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings; and

(d) perform such other related duties as the President may assign.

Servotronics, slip op. at 5 (*quoting* Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743).

19. *Id.*, slip op. at 6.

20. 469 F.Supp.2d at 1224.

21. *See*, *e.g.*, *In re Winning (HK) Shipping Co.*, 2010 U.S. Dist. LEXIS 54290, 2010 WL 1796579, *7 (S.D. Fla. April 30, 2010); *Babcock Borsig AG*, 583 F. Supp.2d 233 (D. Mass. 2008); *Comision Ejectuvia v. Nejapa Power Co., LLC* (D. Del. Oct. 14, 2008), *app. dism'd as moot*, 341 Fed. Appx. 821, 2009 WL 2358594 (3d Cir. Aug 3, 2009); *In re Hallmark Capital Corp.*, 534 F. Supp.2d 951 (D. Minn. 2007).

22. 685 F.3d at 995.

23. 685 F.3d at 996.

24. 747 F.3d 1262 (11th Cir. 2014).

25. *See, e.g.*, *In re Kleimar N.V. v. Benxi Iron and Steel America, Ltd.*, 2017 U.S. Dist. LEXIS 124437, 2017 WL 3386115, slip op. at 6 (N.D. Ill. Aug. 7, 2017) ("where the tribunal's decision is judicially reviewable, courts tend to find the tribunal within the scope of" § 1782); *In re Pinchuk*, 2013 U.S. Dist. LEXIS 147864, 2013 WL 5574342 (S.D. Fla. Sept. 20, 2013) (citing "functional approach" of Eleventh Circuit).

26. *See, e.g. In re National Syndicate for Electric Energy*, 2014 U.S. Dist. LEXIS 4796, 2014 WL 130973 (E.D. Va. 2014) (conciliator is not a "tribunal"); *In re Finserve Group Ltd.*, 2011 U.S. Dist. LEXIS 121521, 2011 WL 5024264 (D.S.C. 2011) (pre-*Consorcio* case denying § 1782 on grounds that under London Court of International Arbitration rules, "appeals to any judicial authority are generally taken to have been waived.")

27. 939 F.3d at 723.

28. *See* discussion at pp. 7-8, *supra*.

29. 939 F.3d at 722-23.

30. 954 F.3d at 214.

31. *HRC-Hainan Holding Company, LLC, v. Hu*, no. 20-15371 (9th Cir.)

32. *In re Application of Operadora DB Mexico, S.A. de C.V.*, 2009 WL 2435750 (M.D.Fla., May 28, 2009). ■

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