US Discovery in Aid of Foreign or International Proceedings: Recent Developments Relating to Title 28 US Code Section 1782

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1. INTRODUCTION

Section 1782 of Title 28 of the US Code (USC) allows parties involved in disputes outside the United States to obtain documents and oral evidence from companies and individuals within the United States. In 2004, the US Supreme Court rendered a judgment in *Intel Corp v Advanced Micro Devices Inc*,[1] which led to a revival in the use of this powerful statutory tool. In the post-*Intel* world, discovery under s.1782 is easier to obtain and this, combined with the growth of international disputes, has led to heightened interest in this statutory provision. This article briefly summarises the key analytic framework of s.1782 and explores the applicability of the provision in the particular context of international commercial and investment arbitration.

2. THE STATUTE

Section 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals", is a tool for obtaining assistance from US federal courts in gathering evidence from US entities and individuals for use in proceedings before foreign (i.e. non-US) and international tribunals. It provides:

> "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... 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... 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."[2]

3. *INTEL*'S ANALYTIC FRAMEWORK

Intel set forth an analytic framework for the US courts to follow when considering applications under s.1782. There are two basic inquiries. The first is whether the textual prerequisites of the statute have been met. The second concerns the extent and manner of assistance the court should provide if the statutory requirements have been satisfied. To satisfy the threshold requirements an applicant must show:

- The person from whom discovery is sought "resides" (or is found) in the district of the district court to which the application is made. As long as the target of the discovery request is located in the district of the court where the application is filed, this requirement

[1] *Intel Corp v Advanced Micro Devices Inc* 542 U.S. 241 (2004).
[2] Title 28 USC s.1782.

will be satisfied.[3] There is no requirement that presence in the district be permanent or continuous.[4]

- The application is made by a foreign or international tribunal or "any interested person". Any party to a foreign or international proceeding meets this requirement.
- The discovery is "for use" in a foreign or international proceeding. Courts have generally interpreted the "for use" requirement quite broadly, using a number of formulations such as "relevant to the claim or defense of any party, or for a good cause" and relating to "any matter relevant to the subject matter involved in the foreign action".[5]
- The proceeding is before a foreign or international "tribunal". The definition of "tribunal" has attracted the recent attention of courts, litigants, practitioners, and commentators—and it is that issue which is the subject of detailed treatment below.

If a federal court concludes that the applicant meets the threshold requirements, it must then determine whether or not it should exercise its discretion to order discovery.[6] The Supreme Court in *Intel* noted that courts should be guided by the overriding purposes of s.1782—"providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts"—and set forth three considerations to guide courts in making their determinations:

- Whether or not the person from whom discovery is sought is a participant in the foreign proceeding. Courts have noted that:

  > "[T]he need for [s.1782] aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad."[7]

  This is because the foreign tribunal generally has the ability to order the parties to the foreign proceeding to produce documents and make individuals available for depositions. But even where discovery is sought from a party to the foreign proceedings, courts have still granted relief pursuant to s.1782 if other factors indicate that this would be appropriate.[8]
- The nature of the foreign tribunal and whether the foreign tribunal would be receptive to US federal court judicial assistance.[9] Among federal courts, the consensus is that s.1782 relief is appropriate unless the party opposing discovery presents authoritative and affirmative proof that the "foreign tribunal would reject evidence obtained with the aid of [s.1782]".[10]

[3] e.g. *Matter of the Application of Oxus Gold Plc, Re* Misc. No.06-82, 2007 WL 1037387 at * 3–4 (D.N.J. April 2, 2007); *Application of the Procter & Gamble Co, Re* 334 F. Supp. 2d 1112 (E.D. Wis. 2004); *Intel* 542 U.S. 241.

[4] e.g. *Edelman v Taittinger* 295 F.3d 171, 180 (2d. Cir 2002).

[5] e.g. *Fleischmann v McDonald's Corp* 466 F. Supp. 2d 1020, 1029 (N.D. Ill. 2006).

[6] This discretion is built into the first sentence of the statute: "The district court of the district in which a person resides or is found *may* order."

[7] *Intel* 542 U.S. 241 at [264]; also *Application of Grupo Qumma S.A., Re* No. Misc.8-85; 2005 WL 937486 (S.D.N.Y. April 22, 2005).

[8] e.g. *Procter & Gamble* 334 F. Supp. 2d at [1114]–[1115].

[9] *Application of Imanagement Serv. Ltd, Re* No. Misc.05-89, 2005 WL 1959702 at *3 (E.D.N.Y. August 16, 2005); see also *Grupo Qumma* 2005 WL 937486 at *3; *Application of Servicio Pan Americano de Proteccion, Re* 354 F. Supp. 2d 269, 275 (S.D.N.Y. 2004).

[10] e.g. *Imanagement Serv. Ltd* 2005 WL 1959702 at *3; *Application of Guy, Re* No. M.19-96; 2004 WL 1857580 at *2 (S.D.N.Y. August 19, 2004).

- Whether the document request is unduly intrusive or burdensome.[11] Standing alone, this consideration has not typically served as a basis for rejecting a s.1782 application, but rather courts have ordered parties to modify discovery requests to make them less burdensome.[12]

Courts have been faced with numerous other issues, which are generally analysed under the discretionary leg of the *Intel* framework. Issues have included the location of the documents sought by the applicant,[13] the timing of the application in relation to the foreign proceeding,[14] and which party should bear the cost of discovery.[15]

4. DEFINITION OF TRIBUNAL

Pursuant to the terms of the statute, an applicant for relief under s.1782 must show that the proceeding is before (or will be before) a foreign or international "tribunal"; s.1782 does not specify what is meant by "tribunal". Many courts and practitioners have asked what it means. Although it is undisputed that foreign courts are "tribunals" for purposes of s.1782,[16] courts have struggled with how international arbitration tribunals fit within the definition.

In 1999, the influential US Court of Appeals for the Second Circuit held that it included only governmental bodies (including courts, other state tribunals, and investigative authorities acting under the direct authority of a state) and not private commercial arbitration tribunals.[17] In the same year, the Fifth Circuit followed similar logic and reached the same conclusion in *Republic of Kazakhstan v Biedermann International.*[18] However, even these two judgments made clear that arbitral tribunals established by government entities are "tribunals" within the meaning of s.1782.

In *Intel*, the Supreme Court ruled that the Directorate-General for Competition of the EU Commission qualified as a "tribunal" under the statute.[19] It reached this conclusion based on: (1) the plain meaning of the term; (2) the lack of any indication that Congress intended to limit the term in any way; and (3) a functional analysis of the Directorate-General as the initial decision-maker, subject to court review and appeal.

In a recent series of cases, federal courts have had occasion to consider this question in the light of *Intel*. In *Matter of the Application of Oxus Gold Plc, Re*, a New Jersey federal district court held that an arbitration tribunal convened pursuant to the dispute resolution provisions of a bilateral investment treaty under UNCITRAL rules is a "tribunal" under s.1782.[20] Although this foreign arbitration involved private litigants and a private arbitration, it was

[11] *Intel* 542 U.S. 241 at [265].

[12] e.g. *Matter of the Application of Oxus Gold Plc, Re* Misc. No. 06-82, 2006 WL 2927615 (D.N.J. October 10, 2006).

[13] e.g. *Application of Gemeinschaftspraxis Dr Med. Schottdorf, Re* No.M19-88, 2006 WL 3844464 (S.D.N.Y. December 29, 2006); *Norex Petroleum Ltd v Chubb Ins. Co of Canada* 384 F. Supp. 2d 45, 46 (D.D.C. 2005).

[14] *Intel* 542 U.S. 241 at [258]–[259].

[15] *Wilson & Partners Ltd, Re* C.A. No 06-2575, 2007 WL 3268574 (D. Colo. October 30, 2007).

[16] e.g. *Imanagement Services Ltd* 2006 WL 547949 at *2.

[17] *Nat'l Broad. Co Inc v Bear Stearns & Co Inc* 165 F.3d 184 (2d Cir. 1999). District courts within that Circuit had earlier reached the opposite conclusion, e.g. *Application of Technostroyexport, Re* 853 F. Supp. 695, 697 (S.D.N.Y. 1994) ("an arbitrator or arbitration panel is a 'tribunal' under §1782").

[18] *Republic of Kazakhstan v Biedermann International* 168 F.3d 880 (5th Cir. 1999).

[19] *Intel* 542 U.S. 241 at [258]. See also *Application of Microsoft Corp, Re* 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (following *Intel* and concluding that the European Commission is a tribunal).

[20] *Oxus Gold Plc* 2007 WL 1037387 at *4–5.

conducted within the context of a treaty set up by two governments; therefore, the court did not squarely address whether a purely private commercial arbitration was a "tribunal".

In 2006, in *Application of Roz Trading Ltd, Re*, the US District Court for the Northern District of Georgia ruled that a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic Chamber in Vienna qualified as a "tribunal" for purposes of s.1782.[21] The court concluded that *Intel* had rejected categorical limitations on the scope of s.1782 and recognised the breadth of the term "tribunal" as including private commercial panels.[22] The court further found that the plain meaning of the term was "unambiguous"; therefore, the court had no difficulty in holding that a private commercial arbitration tribunal was encompassed by "tribunal" in s.1782.

Relying extensively on *Roz Trading* and noting that *Intel* "implicitly countered" some of the objections to "extending the reach of Section 1782 to private arbitrations", a federal district court in Minnesota held that a private commercial arbitration panel in Israel was a "tribunal".[23] A federal district court in Massachusetts has also adopted the same approach, holding that the ICC is a "tribunal".[24] The court followed the modern trend towards an inclusive reading of the provision, and found that the precise language of s.1782 authorises assistance in connection with an ICC arbitration (although it found that it was authorised to do so, the court exercised its discretion to deny the discovery request, because it desired proof that the tribunal would be receptive to the documents).

In two related cases, federal courts in Delaware and Texas reached opposite conclusions about whether a private commercial arbitration tribunal sitting in Geneva under UNCITRAL rules qualified as a tribunal under s.1782.[25] The federal district court in the District of Delaware concluded that it was authorised to grant an application from La Comision Ejecutiva Hidroelectrica del Rio Lempa, because s.1782 does not differentiate between private commercial arbitration and other types of tribunals.[26] The federal district court for the Southern District of Texas (which sits within the Fifth Circuit Court of Appeals) reached a different conclusion on the respondent's motion for reconsideration. The court found that the Supreme Court in *Intel* was silent on the question of whether a private arbitration tribunal constituted a tribunal under s.1782. Accordingly, the court held that it was obliged to follow the judgment of the Fifth Circuit Court of Appeals in *Republic of Kazakhstan v Biedermann International*, which expressly excluded private arbitral tribunals from the scope of s.1782.[27]

5. CONCLUSION

Many of the issues that have arisen under s.1782 were resolved by the Supreme Court's seminal judgment in *Intel.* The approach that the Court took to those issues has led the majority of the lower courts that have addressed the question to rule that an international

[21] *Application of Roz Trading Ltd, Re* 469 F. Supp. 2d 1221 (N.D. Ga. 2006). The authors of this article, with other Crowell & Moring attorneys, represented the successful applicant in *Roz Trading*.

[22] *Intel* 542 U.S. 241 at [1224]–[1228].

[23] *Hallmark Capital Corp, Re* 534 F. Supp. 2d. 951, 956 (D. Minn. 2007).

[24] *Application of Babcock Borsig AG, Re* C.A. No.08-misc-10128; 2008 WL 4748208 (D. Mass. October 30, 2008).

[25] *La Comision Ejecutiva Hidroelectrica del Rio Lempa v Nejapa Power Co LLC* C.A. No.08-135; 2008 WL 4809035 (D. Del. October 14, 2008); *La Comision Ejecutiva Hidroelectrica del Rio Lempa v El Paso Corp* M.A. H-08-335; 2008 WL 5070119 (S.D. Tex. November 20, 2008).

[26] *La Comision Ejecutiva Hidroelectrica del Rio Lempa* 2008 WL 4809035 (D. Del. October 14, 2008). This has been appealed to the Third Circuit Court of Appeals following the district court's denial of a motion for reconsideration.

[27] *La Comision Ejecutiva Hidroelectrica del Rio Lempa* 2008 WL 5070119 (S.D. Tex. November 20, 2008).

arbitration tribunal is a "tribunal" for the purposes of s.1782. But this view is far from unanimously held and the issue remains one of some controversy in certain federal districts.

From a practical perspective, a party to an arbitration may be able to use s.1782 to its benefit if its opponent or a third party holds relevant documents or other evidence within the United States. For the person holding such relevant evidence in the United States who wishes to resist such an application, the critical question may be to determine whether the evidence is held in a district which is likely to look favourably on a s.1782 application. At root, some may consider s.1782 to be just another tool in the investigatory toolbox of the arbitration practitioner. Others may think it inappropriate to have such involvement by the US courts in the private arbitration process. This balance is one that the US Supreme Court may eventually be called upon to decide.