U.S. DISCOVERY FOR USE IN INTERNATIONAL ARBITRATION: A CATCH-22

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I. Introduction

International arbitration practitioners have long been aware of 28 U.S.C. §1782, a powerful tool, which allows direct access to U.S. courts to obtain evidence for use in foreign legal proceedings. Indeed, the ability of foreign parties to request the aid of a federal district court in discovery matters can often make or break billion-dollar arbitrations. In a nutshell, Section 1782 is a federal statute that allows a litigant before a “foreign or international tribunal” to apply to the U.S. district courts to obtain discovery from a person or entity residing or found in the district where the application is sought. Section 1782 has been traditionally used to obtain evidence for use in foreign civil and criminal proceedings before state courts. But courts also have held that the statute applies to international arbitral proceedings.

The use of Section 1782 in international arbitration poses a question whether it is consistent with the objectives and structure of the proceeding. Indeed, arbitration has often been regarded as a faster and more efficient alternative to a traditional litigation. Such features of arbitration as the narrower scope of disclosures, the ability to limit issues before the arbitrator, and the absence of appellate review are thought to reduce the cost and expedite arbitral proceedings. But the reality could be different -- the cost and time of arbitral proceedings remains to be one of the most serious concerns of the stakeholders. In that regard, the ability of the parties to engage in the broad and intrusive U.S.-style international discovery is not likely to alleviate these concerns. Hence, Section 1782 is a Catch-22 of international arbitration -- while it could potentially allow the parties to obtain evidence that would not be available otherwise, it would also likely to increase the cost and length of proceedings.

The benefits and burdens of Section 1782 have been epitomized in the recent decision by the United States District Court for the Southern District of New York in *In re Ex Parte Application of Kleimaru N.V.* ("Kleimaru") in which the court allowed...
Section 1782 discovery for use in commercial arbitration pending in London under the rules of the London Maritime Arbitrators Association ("LMAA"). In this case, a federal district court in New York held that an arbitral tribunal sitting under the LMAA Arbitration Rules, a private commercial arbitration institution, is a "foreign tribunal" pursuant to 28 U.S.C. § 1782. Notably, the application was made ex parte, which precluded the respondent in the LMAA arbitration from entering its objections before the court at least at the initial stage of New York proceedings. The Kleimar decision is significant because previously Second Circuit ruled that private arbitrations are not covered by Section 1782. The Kleimar adds to the growing number of federal district court cases which have demonstrated a willingness to consider arbitral tribunals to be included within the meaning of Section 1782. It is reasonably expected to have a meaningful impact on the constantly evolving area of international arbitration by expanding the definition of what constitutes a foreign tribunal under Section 1782.

This article explores Section 1782 and its role in international arbitrations, especially in light of the Kleimar. First this article will explore the background and overall structure of Section 1782. Against this backdrop, this article will analyze the landmark case of Intel Corp. v. Advanced Micro Devices, Inc., in which the United States Supreme Court gave broad interpretation of Congress’ intent in enacting the statute. However, because the Supreme Court did not directly address whether private arbitral bodies were "foreign or international tribunals," the next section of this article discusses how Section 1782’s exact application remains controversial and has resulted in a split among the federal courts. Next, this article examines the likely impact of the Kleimar decision and the apparent tension between arbitration and U.S.-style discovery. Finally, the article provides suggestions for international arbitration practitioners to address the potential benefits and disadvantages of Section 1782 discovery.

II. Background and Structure of Section 1782

The statute is the product of nearly 150 years of efforts by Congress to provide federal court assistance in gathering evidence for use in foreign tribunals. The power and scope of the authority, which federal courts have to assist foreign tribunals, has markedly expanded since the law has been adopted. In its present form, 28 U.S.C. § 1782 provides foreign parties a direct access to United States courts to obtain documents and witness testimony avoiding the hurdles of obtaining letters rogatory or pursuing requests under international conventions. Section 1782(a) provides in pertinent part:

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 .... 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 key language bearing on the availability of discovery in aid of foreign arbitration is whether the proceeding is "tribunal" within the meaning of the statute. The statute does not define the term "tribunal," and historically, the courts tended to hold that only national courts could qualify as "tribunals" under 28 U.S.C. § 1782.

Prior to 2004, the predominant view was that private international arbitral bodies were not "foreign or international tribunals" and were therefore outside the scope of Section 1782. In National Broadcasting Co. v. Bear Stearns & Co., the Second Circuit considered whether a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce, a private organization headquartered in France, is not a "proceeding in a foreign or international tribunal" pursuant to 28 U.S.C. § 1782. In National Broadcasting, the Second Circuit ultimately concluded that the scope of the term "foreign or international tribunal" is ambiguous because it does not plainly include or exclude private arbitral tribunals. The court found that "court cases, international treaties, congressional statements, academic writings, and even the Commentaries of Blackstone and Story ... amply demonstrate[ ] that the term ‘foreign or international tribunal[ ]’ does not unambiguously exclude private arbitration panels.” However, the court also found that the breadth of the term does not mandate a conclusion that the term, as used in Section 1782, unambiguously includes private arbitral panels.

In Republic of Kaz. v. Biedermann Int’l, the Fifth Circuit also held that a private arbitral proceeding is not a foreign or international tribunal under Section 1782. The court agreed with the National Broadcasting court, finding that the term "foreign or international tribunal" is ambiguous. Although the court acknowledged Congress’ intention to expand the scope of Section 1782 when it added that term in 1964, it found “no contemporaneous evidence that Congress contemplated extending Section 1782 to the then-novel arena of international commercial arbitration.” In Biedermann, the Fifth Circuit explained:

Empowering arbitrators or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution.... [A]rbitration’s principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration. Moreover, as a creature of contract, both the substance and procedure for arbitration can be agreed upon in advance.... Resort to § 1782 in the teeth of such arguments suggests a party’s attempt to manipulate United States court processes for tactical advantage. Section 1782 need not be construed to demand a result that thwarts private international arbitration’s greatest benefits.

Policy considerations were an important reason that the courts tended to hold that only national courts could qualify as “tribunals” under 28 U.S.C. § 1782. For instance, in Biedermann, the Fifth Circuit explained that “[t]he provision was enlarged to further comity among nations, not to complicate and undermine...
the statutory device of private international arbitration.” The policy considerations also impacted the Second Circuit’s exclusion. Notably, in National Broadcasting, the Second Circuit explained as follows: “In sum, policy considerations of some magnitude reinforce our conclusion, based upon an analysis of the text and legislative history of §1782, that Congress did not intend for that statute to apply to an arbitral body established by private parties.” In National Broadcasting, the Second Circuit was also influenced by the fact that “the popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness – characteristics said to be at odds with full-scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.”

III. The Intel Case: Changing the Legal Landscape

In 2004, the United States Supreme Court not only refused to exclude non-traditionally structured legal proceedings from the scope of the statute but explicitly suggested that the term “tribunal” could include international arbitration. In a seminal case, Intel Corp. v. Advanced Micro Devices, Inc, the underlying dispute involved an investigation by the Directorate-General for Competition (“DG-Competition”) into certain potential violations of European competition law. The investigation was initiated by Advanced Micro Devices, Inc. (“AMD”) by filing a complaint with DG-Competition alleging violation of certain European competition laws by Intel Corporation (“Intel”). AMD then filed a Section 1782 request in the Northern District of California seeking discovery from Intel for use in the DG-Competition investigation. The Court determined that the threshold statutory requirements of Section 1782 are: (1) that the person from whom discovery is sought must reside or be “found” in the district court where the Section 1782 petition was filed; (2) that the discovery must be for use in a “proceeding”; (3) that the “proceeding” at issue must be before a foreign or international tribunal; and (4) that the Section 1782 discovery can be made by the foreign tribunal or by an “interested person.” The Court also held that the grant of relief under Section 1782 is not mandatory and that a district court should consider whether “the person from whom discovery is sought is a participant in a foreign proceeding”; “the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government . . . to U.S. federal-court judicial assistance”; whether “the [Section] 1782(a) request concels an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and whether the request is “unduly intrusive or burdensome.” These discretionary factors are now called the Intel factors.

The main thrust of the decision were holdings on four points that, in hindsight, revolutionized the Section 1782 landscape: (1) whether information sought under Section 1782 must be discoverable in the foreign proceedings in question; (2) who has the right to obtain assistance of U.S. courts; (3) whether the proceeding before a foreign tribunal must be pending or imminent; and (4) whether DG-Competition investigations (and other “quasi-judicial” functions) qualify as legal proceedings contemplated by the statute. In responding to each of these questions, the Court left little doubts that it favored expanded discovery without judicially imposed limitations. First, the Court held that the information sought does not need to be discoverable in foreign proceedings noting that “[b]eyond shielding material safeguarded by an applicable privilege, . . . nothing in the text of §1782 limits a district court’s production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there.” Next, the Court held that the wording of the statute, “‘upon the application of any interested person,’ plainly reaches beyond the universe of persons designated ‘litigant’” to include a person who “possess[es] a reasonable interest in obtaining [judicial] assistance.” The Supreme Court also rejected the view that the foreign proceeding in question must be pending, or even “imminent.” Rather, the Court found that the test was whether “a dispositive ruling . . . [was] within reasonable contemplation.”

Lastly, and importantly for international arbitration, the Court held that DG-Competition was “a foreign or international tribunal” for the purposes of the statute. The Court made it clear that the statutory right of foreign litigants to obtain evidence applies to proceedings in which the tribunal acts as a “first-instance decisionmaker” that render “dispositive rulings” that are subject to some form of judicial review. The Court suggested that the range of “first-instance decisionmakers” could be read in a broad fashion, thereby allowing U.S. courts to issue discovery orders in situations involving “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” Although the Court’s rationale was primarily based on the legislative history of the statute, the Court also cited with approval a scholarly article of one of the drafters of Section 1782, Professor Hans Smit, in which he specifically included arbitral tribunals in the lists of “tribunals” under the statute. In support of this definition, Professor Smit had cited the Senate Report on the 1964 legislation that remained substantively unchanged. Notably, Professor Smit reiterated that “[t]he new legislation also authorizes assistance in aid of international arbitral tribunals.”

Professor Smit was a well-regarded arbitration scholar. Columbia Law School, where he served as a distinguished professor, called him a “towering figure in international arbitration.” Smit was a director of the Project on International Procedure in which at one time U.S. Supreme Court Associate Justice Ruth Bader Ginsburg served as a research associate and associate director. He led efforts to revise Section 1782, which resulted in the 1964 revisions. In his 1998 law journal article, he noted a drastic impact of the revisions. “[I]t greatly liberalized assistance given to foreign and international litigants and tribunals and, in the thirty-five years that followed its enactment, has been applied in scores of cases,” he wrote in the Syracuse Journal of International Law and Commerce. There is little doubt that Professor Smit viewed Section 1782 as a great benefit to international litigants, including parties to international arbitrations. His main concern was that “on occasion, some courts have given [the statute] a construction that is at odds with both its clear text and evident purpose.” But Professor Smit hoped that “over time, the courts
and commentators will fall into line and will apply Section 1782 in a manner consistent with its purpose of facilitating the conduct of litigation with international aspects.” The Intel case proved that Professor Smit’s prediction was prescient.

IV. The Profound Impact of Intel

The Supreme Court’s Intel decision changed the legal landscape. Although the Intel Court stopped short from holding that arbitral tribunals are “tribunals” within the meaning of Section 1782, its expansive reading of the statute and approving reference to the Professor Smit led to an exponential increase in attempts to obtain evidence in the United States in support of foreign arbitral proceedings. To underscore this point, the number of cases under Section 1782, which mentioned words “arbitration” or “arbitral tribunal” grew from 9 before January 2004 to 117 thereafter. But despite the abundance of decisions, the courts are still in disagreement whether foreign arbitral tribunals fall within purview of the statute. This disagreement largely stems from the Supreme Court’s Intel holding omitting direct discussion whether private arbitral bodies were “foreign or international tribunals.” Consequently, the issue remains contentious.

Post-Intel courts continued to express reluctance in applying Section 1782 to international arbitration. Some courts drew the line at whether the arbitration is “private” or “governmental or intergovernmental.” For example, in In re Matter of Application of Otis Gold PLC, the court found that international arbitration under United Nations Commission on International Trade Law (“UNCITRAL”) Rules was tribunal within the meaning of Section 1782 because it was “conducted by the United Nations Commission on International Law, a body operating under the United Nations and established by its member states.” The court did not explain how it found that the arbitration was “conducted by” the UNCITRAL, and the finding seems to be puzzling. Indeed, rather than being an arbitral institution, UNCITRAL is a “subsidiary body of the General Assembly of the United Nations with the general mandate to further the progressive harmonization and unification of the law of international trade.” As international arbitration practitioners are well aware, UNCITRAL Arbitration Rules can be adopted by parties in purely private ad hoc proceedings, which have nothing to do with any “governmental or intergovernmental” institution. Therefore, the artificial distinction between “private” and “governmental” arbitration could lead to confusion given the potential lack of familiarity that some U.S. domestic practitioners and courts have with international commercial arbitration.

Other courts have simply refused to recognize the Intel dicta and analysis apply to arbitrations. For instance, in La Comision Ejecutiva Hidroeléctrica Del Rio Lempa v. El Paso Corp., a Southern District of Texas court found that private arbitral bodies were not covered by Section 1782(a). In this case, the court regarded Intel’s holding as irrelevant because the court claimed that Intel provided no guidance on the specific subject of private international arbitration. The court explained: “The Supreme Court in Intel shed no light on the issue. In fact, the Supreme Court has not addressed the application of § 1782 to arbitral tribunals, not even in dicta. Intel never mentions arbitral
Kleimar, the plaintiff, filed an application to obtain discovery from Vale S.A., a third party, and certain other persons. Thereafter, Kleimar served Vale and allowed Kleimar to seek discovery from Vale S.A., a third party, and certain other persons. Thereafter, Kleimar served Vale with a subpoena and vacate the discovery motion previously granted. As a result of the motion, the question before the court was whether the LMAA, a private arbitral tribunal, was a “tribunal” for purposes of § 1782.58

Ultimately, the U.S. District Court for the Southern District of New York held that an arbitral tribunal sitting under the rules of the LMAA is a “foreign tribunal” under Section 1782. Significantly, Kleimar follows the Intel reasoning that private arbitrations are tribunals for the purposes of Section 1782 because they are proceedings that result in dispositive rulings that are reviewable by a court. As the Kleimar court directly noted, dictum in Intel “suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782.”59 The Kleimar court also noted that the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782, but suggests that including private foreign arbitrations within the reach of §1782 is a foregone conclusion.

The court further noted that several district courts have expressly held that the LMAA is a “foreign tribunals” that falls within Section 1782.60 For these reasons, the court was persuaded by the reasoning of courts that had previously concluded that the LMAA was a foreign tribunal pursuant to Section 1782 and therefore satisfied the statutory requirements.

Kleimar emphasizes the utility of Section 1782 for international arbitration practitioners. First and foremost, Section 1782 discovery is a powerful tool which should always be considered when there is a potential for evidence or witnesses which have a connection with the United States. Such evidence may include, for example, bank account information, third-party contractual documents and emails, corporate documents, and other related evidence.

Moreover, while U.S. courts are used to discovery requests that are generally broader than requests in other countries, Section 1782 requests, especially when made on non-parties, need to be drafted carefully to avoid any undue burden. The request may also need to provide supporting documentation and statements to demonstrate the relevance of such requests to foreign proceedings in support of which the requests are made.

Furthermore, Kleimar crystallizes the need to work with U.S. counsel familiar with international arbitration and Section 1782. As the case In re Roz demonstrates, unfamiliarity with international arbitration could impact the court’s decision-making process.61 As such, it is acutely necessary to have local counsel to guide practitioners through the process.

But Section 1782’s rather liberal approach to discovery could be a Catch-22 for international arbitration. The most obvious issue is that a broad reach of U.S. discovery is at odds with an important objective of international arbitration – making dispute resolution faster and less effective than litigation in state courts.62 Intervention by national courts, which appears to include Section 1782 procedure, is viewed by international arbitration practitioners as one of the worst characteristics of
international arbitration. This intervention could be especially problematic considering that some courts have held that Section 1782 could even be used to reach documents located outside of the United States. It is not difficult to see a concern that Section 1782 discovery could be used to harass and oppress a party, which happened to have a U.S. connection. The Kleimar case demonstrates one of the dangers of Sections 1782 – the uneven ability to obtain evidence. The application in Kleimar was made ex parte, without notice to Dalian. Moreover, it is unclear what would be the utility for Dalian to engage in the New York proceedings if the sought discovery only benefited Kleimar. The discovery in such case could only benefit one side while the other side could take advantage of limited disclosure under conventional arbitration approach.

VI. Conclusion

The Kleimar case reinforces that 28 U.S.C. § 1782 is an important tool for the international arbitration practitioner to consider when evidence or witnesses are located in the United States. Indeed, the possibility of American-style discovery in aid of commercial arbitrations presents opportunities for global practitioners. At the same time, broad discovery creates potentials for abuse. Given the benefits and concerns discussed above, what are the steps for the parties to consider when there is a potential for application of Section 1782? First each party would be well advised to consult with a U.S. counsel familiar with both international arbitration and U.S. discovery proceedings. U.S. discovery could be very different from traditional arbitration disclosure or disclosure proceedings in other jurisdictions. Keep in mind that Section 1782 discovery is discretionary. The court may (i) disallow Section 1782 requests all together; (ii) limit the type or amount of discovery that is ultimately ordered; or (iii) place conditions on the use of discovery such as protective orders imposing strict confidentiality obligations. The parties should also be aware that failure to comply with discovery may result in sanctions, including monetary penalties. Finally, the parties may consider asking the arbitral tribunal to impose procedural limitations on the types of the documents sought pursuant to Section 1782 discovery. Ultimately, Section 1782 could lead to obtaining crucial evidence that could be invaluable to the party’s case.

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3 Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp., 539 U.S. 662, 685 (2010) ("In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.").
6 Id. at 321 ("The Court also finds that the LMAA is a ‘foreign tribunal’ within Section 1782.").
9 For instance, in 1964 Congress amended Section 1782 and noted in the Senate Report: “In 1964, when § 1782 was amended, Congress foresaw a modern world where economic globalization would be the norm. “The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements . . . .” S. Rep. No. 88-1580, at 2 (1964).
11 See Malament, supra note 2 at *1218.
12 165 F.3d 184, 191 (2d Cir. 1999).
13 Id. at 188.
14 Id.
15 Id.
16 168 F.3d 880 (5th Cir. 1999).
17 Id. at 881.
18 Id. at 882.
19 Id. at 883.
20 168 F.3d 880, 883 (5th Cir. 1999).
22 Id. at 190-91.
24 Id. at 246, 250.
25 Id. at 246.
26 Id. at 264-65.
27 Id. at 246-47.
28 Id. at 260.
29 Id. at 256.
30 Id. at 259.
31 Id. at 243.
32 Id. at 238.
33 Id.
35 Id. at 1026 n. 71.
36 Id. at 1027 n. 73.
37 Hans Smit ’58, Towering Figure in International Arbitration, Dies at 84 (January 8, 2012), http://www.law.columbia.edu/media_inquiries/news_events/2012/january2012/hans-smit-obit.
38 Id.
39 Id. at 3.
40 Id. at 3-4.
41 Based on the results of a Westlaw case search.
46 Id. at *483. The court continued to justify its holding by explaining that Intel never mentions arbitral tribunals in the text of the opinion itself. Rather, the court noted, Intel deals with the application of § 1782 to a proceeding before the Directorate-General for Competition (D-G Competition) of the Commission of the European Communities (European Commission or Commission), which enforces European competition laws and regulations.
47 Id. at 486.
48 Id.
49 Id.
50 341 F. App’x 31, 33 (5th Cir. 2009).
51 Id. (emphasis in original).
54 In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 683 E3d 987 (11th Cir. 2012), opinion vacated and superseded sub nom. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 E3d 1262 (11th Cir. 2014).
55 Id. at 995. Subsequently, however, the Eleventh Circuit vacated its prior opinion sua sponte, finding that because the evidence sought was to be used in separate civil and criminal proceedings “within reasonable contemplation,” the court need not address whether the international arbitration proceeding is a “tribunal” under § 1782.
57 Kéanse N.V., 220 F. Supp. 3d at 520.
58 Id. at 520-21.
59 Id. at 521.
61 469 F. Supp. 2d 1221.
63 2015 International Arbitration Survey, supra note 4 at 7.
64 In re Chevron, No. 11-24399-CV, 2012 WL 3636925, at *9 (S.D. Fla. June 12, 2012); In re Vega, 746 F. Supp. 2d 8, 25 (D.D.C. 2010) (exercising discretion to grant discovery of documents in possession, custody or control of the person from whom the documents were requested even though the documents were located abroad).
65 Compare IBA Rules on the Taking of Evidence in International Arbitration, International Bar Association (29 May 2010) arts. 2(3), 3(3)(b) (where the standard applied to evidence requests is that the information must be "relevant to the case and material to its outcome"), with Fed. R. Civ. P. 26(b)(1) (which allows discovery of any information "that is relevant to any party’s claim or defense and proportional to the needs of the case" even if the information sought is itself inadmissible).