MEALEY'S®
International Arbitration Report

The Shifting Availability Of Section 1782 In Support Of Private Foreign Arbitrations

by
Dorit Ungar Black
and
Andrei Vrabie

Holwell Shuster & Goldberg LLP
New York, NY

A commentary article reprinted from the November 2020 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

The Shifting Availability Of Section 1782 In Support Of Private Foreign Arbitrations

By
Dorit Ungar Black
and
Andrei Vrabie

[Editor's Note: Dorit Ungar Black is a founding partner and Andrei Vrabie is an associate with the law firm of Holwell Shuster & Goldberg LLP in New York. Dorit has extensive expertise in international arbitration and cross-border litigation and has litigated in both civil and common law jurisdictions, including before state and federal courts in New York, New Jersey, Delaware, Pennsylvania, and Vienna, Austria. Andrei is an experienced litigator with a transnational focus and significant expertise in cross-border litigation and investigations, and he is currently pursuing an LLM in International Arbitration at Queen Mary University of London. Any commentary or opinions do not reflect the opinions of Holwell Shuster & Goldberg LLP or LexisNexis® Mealey Publications™. *Responses are welcome.]*

I. Introduction

As today's world becomes more globalized, litigation across country borders is an increasingly commonplace occurrence. This expansion of cross-border litigation has turned Section 1782 of Title 28 of the United States Code ("Section 1782") into a powerful tool for foreign litigants seeking discovery in the U.S. in aid of foreign proceedings. Section 1782 discovery is available where: (1) the requesting foreign litigant is an interested person in a foreign proceeding; (2) the proceeding is before a "foreign tribunal;" and (3) the person being compelled to provide discovery is subject to the jurisdiction of the U.S. federal district court where the Section 1782 request has been filed.[1] The subject matter of Section 1782 overlaps somewhat with that of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Convention"), a treaty to which the U.S. is a signatory. However, in contrast to discovery under the Hague Convention, which requires intervention by a foreign court or tribunal via letters rogatory or similar requests, Section 1782 provides a mechanism for obtaining discovery in the U.S. by applying directly to a U.S. district court. Section 1782 thus simplifies the process and provides foreign litigants a less formal and more straightforward method for obtaining judicial assistance from U.S. courts. As an additional advantage, Section 1782 discovery may be granted even before an action is commenced outside the U.S.

The scope of Section 1782 discovery, like U.S. discovery generally, is broad. Foreign litigants may use Section 1782 to compel a person or entity to both produce documents and provide testimony, commonly constrained only by applicable privilege and work-product doctrines. Section 1782 may be used in aid of criminal and civil foreign proceedings, and both parties and non-parties to these foreign proceedings can be compelled to provide evidence. The breadth of Section 1782 discovery is all the more pronounced when compared to the discovery available in the majority of civil law and common law jurisdictions outside of the U.S.[2] Moreover, following the Supreme Court's 2004 opinion in *Intel Corp. v. Advanced Micro Devices, Inc.*[3], it is now established that Section 1782 has no foreign-discoverability requirement: a U.S. court may order production of documents that are unobtainable under the discovery rules in the foreign proceeding's jurisdiction.[4] Similarly, Section 1782 does not require a showing that U.S.

federal law would permit discovery if the foreign proceedings took place in the U.S.[5] Nor must the foreign proceeding be "pending" or "imminent" in order for Section 1782 to apply.[6] Finally, Section 1782 is available not only to parties in foreign proceedings, but also to non-party "interested persons" participating in a foreign proceeding.[7]

Procedural constraints on Section 1782 discovery are similarly lax: the presiding U.S. federal district court judge has wide discretion to apply either U.S. or foreign discovery procedures, and the Section 1782 request may come directly from the foreign litigant or from the foreign tribunal via a direct request to a U.S. federal court or a letter rogatory through consular or diplomatic intermediaries.

Notwithstanding these attractive features, parties to international commercial arbitration rightly invoke Section 1782 with some trepidation. The reason is that a fundamental question regarding Section 1782's applicability to private foreign arbitral proceedings remains uncertain. Specifically, U.S. law is not settled on whether a private arbitral tribunal is a "foreign tribunal" whose proceedings can be aided by a U.S. federal court pursuant to Section 1782.

We examine this issue in further detail below, starting with the statute and its interpretation by the Supreme Court in the *Intel* decision, and then analyzing the different ways U.S. courts across several federal circuits have interpreted Section 1782 as applied to foreign arbitral tribunals in the wake of *Intel*.[8] We conclude by examining the practical and policy implications stemming from these different judicial interpretations.

II. Statutory Framework And The *Intel* Decision

Section 1782, titled "Assistance to foreign and international tribunals and to litigants before such tribunals," is the latest instantiation of federal legislation dating back to the 19th century designed to encourage international cooperation, facilitate the resolution of foreign disputes, and foster international comity by assisting foreign litigants and tribunals with obtaining evidence located in the U.S.[9] Section 1782 reads:

> (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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Whether a party to a private international arbitration may avail itself of Section 1782 turns on whether international arbitration is a "proceeding in a foreign or international tribunal." The contours of this phrase were examined extensively in the *Intel* case.

The *Intel* case related to an antitrust complaint filed by microchip manufacturer Advanced Micro Devices ("AMD") against its competitor, Intel, for alleged violation of European competition law.[10] AMD lodged its complaint with the Directorate-General for Competition ("DG") of the Commission of the European Communities ("Commission").[11] AMD sought to compel Intel to produce documents relating to its complaint

through a Section 1782 application to the U.S. District Court for the Northern District of California.[12] Among other issues the Supreme Court considered was whether AMD's application was made in connection with a "proceeding in a foreign or international tribunal" to which a U.S. court could extend assistance under Section 1782.[13]

The parties disagreed on whether either the DG or the Commission were tribunals within the meaning of Section 1782.[14] The DG is charged with carrying out an exclusively investigatory role, engaging in a preliminary investigation either *sua sponte* or upon receipt of a complaint from an interested person, such as AMD.[15] The DG's preliminary investigation culminates in a decision to either formally pursue a complaint or to decline to do so.[16] If the DG declines to formally pursue an investigation, the complaint is subject to judicial review.[17] If the DG pursues a formal complaint, it undertakes additional investigation and fact-gathering. At the end of this process, the DG recommends to the Commission that: (1) the complaint should be dismissed; or (2) there has been a violation of European competition law and that penalties should be imposed on the target of the investigation.[18] The final determination of the Commission in turn is subject to judicial review.[19]

Writing for a seven-justice majority, Justice Ginsburg determined that the Commission constituted a tribunal for the purpose of Section 1782. Justice Ginsburg examined the meaning of "tribunal" by considering the amendments Congress made to the preceding version of Section 1782, beginning in the 1950s. In 1958, Congress established a Commission on International Rules of Judicial Procedure to recommend procedural revisions "for the rendering of assistance to foreign courts and quasi-judicial agencies" by "investigat[ing] and study[ing] existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements."[20] These recommendations resulted in a 1964 revision of Section 1782.[21] As part of its 1964 amendments to Section 1782, Congress replaced the phrase "'in any judicial proceeding *pending* in any court in a foreign country,'" with "'in a proceeding in a foreign or international tribunal.'"[22] The accompanying Senate Report explained that "tribunal" replaced "court" to "ensure that assistance is not confined to proceedings before conventional courts," but extends to "administrative and quasi-judicial proceedings all over the world."[23]

Examining the Commission in light of Section 1782's legislative and drafting history, the Supreme Court undertook a functional analysis and concluded that the Commission's function indicated it was the type of quasi-judicial body Congress intended to include in the definition of tribunal.[24] The Commission's role as a first-instance decisionmaker, determining whether to accept the DG's final recommendation and sanction the target, was adjudicative in the majority's view.[25] So, too, was the fact that the Commission's function as the exclusive body before which evidence could be admitted into the adjudicative process also qualified it as a "proof-taking instance," and therefore a tribunal under Section 1782.[26] Finally, the majority observed that the Commission's determination following receipt of the DG's final report constitutes a "dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint reviewable in court" and which remains final unless overturned following an appeal.[27] *Intel*'s functional test would arguably comfortably fit most arbitral tribunals. Indeed, whether ad hoc or institutional, and whether focused on private commercial or investor-state disputes, such tribunals are first-instance decision-makers and proof-taking instances; moreover, their awards are final, dispositive, and subject to limited judicial review either at the seat of the arbitration or at the seat of enforcement.[28]

Justice Breyer, the sole dissenter,[29] was concerned that the majority's opinion would increase discovery-related costs and delays, squander U.S. judicial resources, and impose burdens on and sow discord with the very foreign and international tribunals Section 1782 was intended to assist.[30] Justice Breyer's overarching concern on this third point arises because Section 1782 allows not just the foreign tribunals, but also litigants and non-party interested persons, to seek discovery. Justice Breyer further emphasized that the majority's decision contradicted the Commission's own interpretation of its role—*i.e.*, that it was not a tribunal—and therefore frustrated rather than fostered comity.[31] He also provided examples of how the majority's opinion might be misused by litigants or interested persons, such as a foreign private citizen seeking Section 1782 discovery as a way of pressuring an unwilling foreign prosecutor to pursue a criminal case, or a competitor using Section 1782 discovery as a tool for reaping information it could not otherwise obtain. These countervailing considerations arise in connection with Section 1782 discovery in foreign arbitral proceedings as well.

Arbitrators and scholars have repeatedly cautioned against the corrosive effect of injecting expansive U.S.-style discovery into a dispute resolution mechanism that is attractive in part because of its greater speed and lower costs compared to civil litigation.[32]

As the following section demonstrates, *Intel* has influenced U.S. circuit courts on the question of whether Section 1782 is available to private parties engaged in international arbitration. Specifically, when discussing the meaning of "tribunal" in the 1964 amendment to the statute, Justice Ginsburg quoted the 1965 analysis of Professor Hans Smit, an academic she had earlier in her judicial career recognized as the "dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782."[33] In relevant part, Professor Smit's analysis stated: "The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[34]

III. Circuit Splits After *Intel*

Following *Intel*, U.S. circuit courts of appeal and district courts have continued to issue conflicting rulings on the question of whether international commercial arbitration tribunals fall outside of Section 1782's ambit.

On one side of the debate, the Fourth and Sixth Circuits have held that Section 1782 does permit discovery in aid of private international arbitral proceedings.[35] By contrast, the Second, Fifth, and Seventh Circuits have held that Section 1782's broad discovery provisions do not extend to private international arbitral proceedings.[36]

In this section, we analyze the competing approaches taken by several circuit courts after *Intel*, with the goal of creating a roadmap for parties to a private international arbitration seeking to gain greater clarity on where they can and cannot reasonably expect to succeed on this gateway question when attempting a Section 1782 application.

A. The Expansive Approach Of The Fourth And Sixth Circuits

The first circuit court opinion following *Intel* that considered the issue of whether a private international commercial arbitral tribunal falls under Section 1782 was *In re Application to Obtain Discovery for Use in Foreign Proceedings*,[37] in which a Saudi company sought discovery under Section 1782 from FedEx Corporation. That case focused on whether the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA") constituted an international tribunal. The Sixth Circuit determined that the DIFC-LCIA, a private international arbitral tribunal, fell within the ambit of Section 1782.

The Sixth Circuit began by examining the dictionary definition of "international tribunal" and finding ambiguity in that approach.[38] It then considered the use of "international tribunal" in legal writing, determining that "American lawyers and judges have long understood, and still use, the word 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties."[39] Next, it considered other uses of the term "tribunal" within Section 1782 and related sections of the U.S. Code.[40] The Sixth Circuit observed that the word "tribunal" appears only in Sections 1782 and 1781, and that both instances do not foreclose interpreting the term to encompass private international commercial arbitral tribunals.[41] The court further reasoned that Section 1781, which permits transmittals of letters rogatory to the U.S. Department of State from "a foreign or international tribunal," applies to letters rogatory sent by private international commercial arbitral tribunals.[42]

The Sixth Circuit next considered *Intel*. After initially concluding that nothing in *Intel* required it to exclude a private arbitral tribunal from Section 1782's ambit, the Sixth Circuit considered the argument that Section 1782 applies only to "state-sponsored" arbitral tribunals. The latter type of tribunal is one whose authority is derived from a state or from an international agreement among several states. The intergovernmental United States-German Mixed Claims Commission, for example, was created under a treaty between the states and therefore constitutes an international tribunal under Section 1782.[43] By contrast, private arbitral tribunals are those "created exclusively by private parties," such as the International Chamber of Commerce in Paris and the Stockholm Chamber of Commerce.[44] The Sixth Circuit concluded that nothing in *Intel* supported such a distinction.[45] Moreover, while acknowledging that Professor Smit's article, as referenced in *Intel*, was *dicta*, the Sixth Circuit concluded that "the Supreme Court's approving quotation of the Smit article

certainly provides no affirmative support for the contention that Section 1782 excludes private arbitral tribunals."[46]

The Sixth Circuit also examined two pre-*Intel* cases from the Second and Fifth Circuits—*NBC* and *Biedermann*[47]—which we discuss in greater detail below. The Sixth Circuit offered two main critiques of the opinions.[48] *First*, the Sixth Circuit concluded that the Second and Fifth Circuits needlessly turned to legislative history, an inherently unreliable source, instead of simply relying on the definition of "tribunal" as derived from U.S. courts' usage thereof, which supports the inclusion of private arbitral tribunals under Section 1782.[49] *Second*, the Sixth Circuit concluded that both *NBC* and *Biedermann* incorrectly interpreted the legislative history considered. In the Sixth Circuit's view, Section 1782's legislative history revealed Congress's desire to expand, rather than restrict, Section 1782 discovery.[50]

The Sixth Circuit concluded by examining whether policy considerations militated against applying Section 1782 to private arbitral proceedings. It rejected the argument that Section 1782 must be interpreted in a way that ensures that discovery in aid of arbitral proceedings abroad is no more expansive than discovery in aid of arbitral proceedings seated in the U.S. under the Federal Arbitration Act ("FAA").[51] The Sixth Circuit reasoned that to do so would run counter to *Intel*'s rejection of a foreign-discoverability rule, quoting *Intel* for the proposition that Section 1782 should not be read to require a showing "that United States law would allow discovery in domestic litigation analogous to the foreign proceeding."[52] The Sixth Circuit also was unconvinced that allowing Section 1782 discovery would inevitably increase discovery costs and delay because, as *Intel* instructs, a U.S. district court has discretion to decline to authorize discovery or to otherwise significantly narrow the scope of the discovery sought in light of the burdens that would result.[53]

Earlier this year, in *Servotronics, Inc. v. Boeing Co.*, the Fourth Circuit joined the Sixth Circuit in finding that a private international commercial arbitral tribunal—this time an ad hoc tribunal seated in the U.K.— fell under Section 1782's scope.[54] The *Boeing* court began by examining Section 1782's legislative history, noting that Section 1782 "as amended in 1964 . . . manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international tribunals. This policy was intended to contribute to the orderly resolution of disputes both in the United States and abroad, elevating the importance of the rule of law and encouraging a spirit of comity between foreign countries and the United States."

Although acknowledging that the Sixth Circuit in *In re FedEx* issued a decision concluding that the language of Section 1782(a) unambiguously "includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties," the Fourth Circuit did not rest on that reasoning. Instead, rather than departing from *NBC* and *Biedermann*, the Fourth Circuit assumed for the sake of argument that Section 1782 would apply only to state-sponsored arbitrations. Its analysis began by considering whether a U.S.-seated arbitration was a "product of government-conferred authority." To make that determination, the court examined the FAA, which governs U.S.-seated arbitrations. The Fourth Circuit noted that the FAA: (1) establishes the validity, irrevocability, and enforceability of arbitration agreements; (2) establishes procedural mechanisms by which arbitral tribunals may issue summons enforceable in U.S. courts; and (3) provides for judicial enforcement of arbitral awards.[55] The court therefore concluded that "arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised."[56]

The *Boeing* court then examined whether the U.K. Arbitration Act of 1996 ("U.K. Act"), under which the ad hoc arbitral tribunal at issue was organized, evidences similar government-conferred authority over U.K.-seated arbitrations.[57] The U.K. Act permits courts to stay judicial proceedings in favor of arbitration, impose schedules for commencement of arbitrations, remove arbitrators, enforce preemptory orders of a panel, compel testimony, and enforce judgments.[58] The Fourth Circuit concluded this portion of its analysis by stating: "In addition, the U.K. Act regulates the composition of arbitral panels and the appointment to those panels, id. §§ 15, 16; it regulates the power to appoint expert witnesses, take testimony, and receive evidence, id. §§ 37, 38; and it otherwise provides a comprehensive regulation of arbitration and its procedures, through more than 100 different sections. Thus, even to a greater degree than arbitrations in the United States, U.K. arbitrations are sanctioned, regulated, and overseen by the government and its courts."[59]

Like the Sixth Circuit in *In re Fedex*, the *Boeing* court summarily dispatched policy arguments regarding the risk of ballooning discovery costs and delays frustrating arbitration's goals, and the notion that Section 1782 would confer wider discovery for foreign arbitrations than would the FAA for domestic ones. The Fourth Circuit's reasoning substantially mirrored the Sixth's, including a reference to *Intel*'s rejection of the need to show "that United States law would allow discovery in domestic litigation analogous to the foreign proceeding."[60]

B. The Restrictive Approach Of The Second, Fifth, And Seventh Circuits

Most circuit courts of appeal that have considered the issue have not read *Intel* to support the notion that private international arbitral tribunals fall under Section 1782. The Second and Fifth Circuits have consistently relied on a distinction between state-sponsored and private arbitral tribunals. Unlike the Sixth Circuit and (possibly) the Fourth Circuit, the Second and Fifth Circuits have used that distinction to deny parties to private foreign arbitrations Section 1782 discovery while permitting it for parties in "state-sponsored" tribunals.[61] Most recently, on a matter of first impression within that circuit, the Seventh Circuit likewise adopted the Second and Fifth Circuits' approach to hold that 1782 discovery is inapplicable to private foreign arbitrations.[62]

The Second Circuit's seminal pre-*Intel* decision was *NBC*. In *NBC*, the Second Circuit began with a textual analysis, finding that the phrase "foreign or international tribunal" is "sufficiently ambiguous that it does not necessarily include or exclude" a private arbitral tribunal.[63] Finding no clarity in the text, the court considered the same legislative history that would later be examined by the Supreme Court in *Intel*, and concluded that "tribunal" referred to governmental arbitrations but not private ones. The court further bolstered this conclusion by examining precursors to Section 1782, whose definitions of "international tribunal" left "no question that the statute applied only to intergovernmental tribunals."[64] Finally, the Second Circuit reasoned that to extend Section 1782 to private arbitral proceedings would be to frustrate the efficiency and expediency features of arbitration, which require curtailed discovery, and would run counter to the narrower scope of arbitration applied to U.S. arbitration under the FAA.[65]

The Fifth Circuit's leading pre-*Intel* case, *Biedermann*, employed *NBC*'s logic to reach a similar conclusion. There, the Fifth Circuit considered whether the Arbitration Institute of the Stockholm Chamber of Commerce constituted an international tribunal within the meaning of Section 1782. The *Biedermann* court reasoned as follows: (1) the meaning of "international tribunal" is ambiguous and requires consideration of Section 1782's legislative history and underlying policy; (2) there is "no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration;" (3) the United States Code "almost uniformly" uses the phrase "arbitral tribunals" to refer to "an adjunct of a foreign government or international agency;" (4) extending Section 1782 discovery to private foreign arbitrations would result in broader discovery for arbitral proceedings seated abroad than for those seated in the U.S., and "[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart;" and (5) expanding discovery frustrates the efficiency and expediency features of private international arbitrations.[66]

Post-*Intel*, the Fifth Circuit issued an unpublished *per curiam* opinion in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*.[67] *El Paso* concerned the question of whether an ad hoc arbitration under United Nations Commission on International Trade Law (UNCITRAL) arbitration rules seated in Switzerland constituted a proceeding before an international tribunal under Section 1782.[68] In that case, the Fifth Circuit summarily noted that nothing in *Intel* required a reversal of *Biedermann* and that the legislative history and policy considerations that warranted the outcome in *Biedermann* persisted post-*Intel*.[69]

The penultimate—and most robust—opinion in this cohort was issued by the Second Circuit earlier this year in *In Re Guo*. In *Guo*, the Second Circuit followed the Fifth Circuit by reaffirming the *NBC* and *Biedermann* analyses after *Intel*. Utilizing *NBC*'s analytical framework, the *Guo* court determined that: "(1) the statutory text, namely the phrase 'foreign or international tribunal,' was ambiguous as to the inclusion of private arbitrations; (2) the legislative and statutory history of the insertion of the phrase 'foreign or international tribunal' into § 1782(a) demonstrated that the statute did not apply to private arbitration; and (3) a

contrary reading would impair the efficient and expeditious conduct of arbitrations."[70]

In confronting *Intel*, the *Guo* court noted that the Supreme Court had not been asked to determine whether a private arbitral tribunal fell within the ambit of Section 1782. The Second Circuit further observed that the majority's quotation of Professor Smit was a "fleeting reference in *dicta*" that, in any event, did not clearly demonstrate that "tribunal" extended not just to intergovernmental arbitral tribunals but also to private ones.[71] The Second Circuit also cited a different article by Professor Smit from 1962, *i.e.*, prior to Congress's passage of the 1964 amendment, indicating that even Professor Smit understood an arbitral tribunal to be one established under an international agreement between states, rather than a private tribunal.[72] However, the Second Circuit did not address the observation made by its sister circuit in *Biedermann* that "[s]ubsequent articles by Professor Smit [and other scholars], however, champion the majority view of commentators that private commercial arbitrations are within § 1782. *See, e.g.*, Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 5–8 (1998) (discussing application of § 1782 to private arbitrations and criticizing *In re Application of Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y.1997), and *In re: Nat'l Broad. Co.*); Jonathan Clark Green, *Are International Institutions Doing Their Job?*, 90 Am. Soc'y Int'l L. Proc. 62, 70–71 (1996) ('it is hard to think of an international tribunal other than a court or an arbitration panel'); Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 Va. J. Int'l L. 597, 619–20 (1990) ('It is clear . . . that the term "international tribunal" includes an international court, arbitration or other tribunal located in a foreign country.'); Peter F. Schlosser, *Coordinated Transnational Interaction in Civil Litigation and Arbitration*, 12 Mich. J. Int'l L. 150, 170 n. 84 (1990) (scope of 'tribunal' should include international arbitrations)."[73]

In further response to *Intel*, the *Guo* court reasoned that "*NBC*'s refusal to read such a sweeping expansion into the statute in the absence of clear statutory language or any indication of congressional intent is consistent with *Intel*'s observation, in rejecting a foreign-discoverability requirement, that '[i]f Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect.'"[74] Critics would argue that this reasoning turns *Intel*'s presumption on its head. Justice Ginsburg was disinclined to read into Section 1782 a *restriction* on the district court's discretion to assist an international tribunal in light of Congress's motivation to extend Section 1782. The Second Circuit in *Guo* does the opposite, declining to read into Section 1782 an *extension* of the district court's discretion.

Beyond the resounding reaffirmation of *NBC*, the *Guo* opinion identified a novel functional test for determining whether an arbitral institution is private. The facts in *Guo* necessitated this additional level of analysis. The arbitral tribunal at issue, the China International Economic and Trade Arbitration Commission ("CIETAC"), originally had been formed by the Chinese state with funding from the Chinese government, and thus was potentially a "state-sponsored" arbitral tribunal.[75] The *Guo* court drew a distinction between a tribunal originally created by a state and one currently under the control of the state. The functional test the Second Circuit developed considers: (1) "the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body;" (2) "the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision;" (3) whether the arbitral panel "derives its jurisdiction exclusively from the agreement of the parties and has no jurisdiction except by the parties' consent;" and (4) "the ability of the parties to select their own arbitrators."[76] Although CIETAC was founded by the Chinese government, it preserved confidentiality—thereby reducing the risk of Chinese state intervention in proceedings—and drew panels from a pool of arbitrators who were not required to be affiliated with the Chinese government and had diverse citizenships.[77] The Chinese state's role in reviewing CIETAC awards was narrow, similar to that of the U.S. and other nations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[78] CIETAC's panels derived their jurisdictions exclusively from the consent of the parties, compared to "state-affiliated tribunals [that] often possess some degree of government-backed jurisdiction that one party may invoke even absent the other's consent."[79] Finally, the parties to a CIETAC arbitration could select their own panel.[80]

Most recently, the Seventh Circuit in *Servotronics, Inc. v. Rolls-Royce PLC*[81] also adopted a restrictive reading of

1782. Interestingly, *Rolls-Royce* concerned the same plaintiff and arbitral proceeding that the Fourth Circuit held to be covered by Section 1782 in the *Boeing* case examined above.[82] The Seventh Circuit began its analysis by determining that dictionary definitions and legal usage vary too greatly to be dispositive of whether Section 1782's usage of the word *tribunal* extends to private foreign arbitral tribunals. Next, the *Rolls-Royce* court compared the use of the word *tribunal* in Sections 1782 and 1781. In direct contradiction to the Sixth Circuit's reasoning in *In re Fedex*, the Seventh Circuit held that discovery requests via letters rogatory under Section 1781 in fact *do not* extend to private arbitrations.[83] And since "[i]dentical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning," Section 1782 (like Section 1781) does not apply to private arbitral tribunals.[84] The Seventh Circuit reasoned further that a restrictive interpretation of tribunal does not conflict with other usages of the term within Section 1782 itself and has the added advantage of harmonizing with the FAA, which similarly curtails the scope of discovery.[85] The *Rolls-Royce* opinion concluded by making short shrift of *Intel*'s *dictum*, observing that the footnoted explanatory parenthetical did not explicitly refer to *private* foreign arbitral tribunals.

C. Pending Appeals In The Third And Ninth Circuits

As of this writing, two more circuit courts of appeal are slated to consider the availability of Section 1782 for parties to a private international arbitration. A district court opinion declining to apply Section 1782 to a private arbitration is currently on appeal before the Third Circuit.[86] Conversely, a district court opinion in California that followed the Sixth Circuit's reasoning in *In re Fedex* and permitted Section 1782 discovery in connection with a private arbitration is now on appeal before the Ninth Circuit.[87]

IV. Policy And Practical Considerations

Having described the uneven legal terrain and the complexities arising from the circuit splits, we now focus on the practical and policy implications that flow from the expansive and restrictive interpretations of Section 1782's scope with respect to private arbitral proceedings.

As reflected above, the Supreme Court and all U.S. appellate courts considering this issue have been sensitive to the potential for increased costs and delays resulting from Section 1782 discovery. Proponents of the expansive approach point to the permissive language of the statute. Section 1782 imposes no obligation on the district court: "a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so."[88] *Intel*, for example, instructs lower courts to take into consideration whether the U.S. person or entity that is the target of a Section 1782 application is a party in the foreign proceeding—if so, there is less of a reason to order production since the foreign tribunal can order production itself.[89] Indeed, arbitral tribunals have the power to order production and draw negative inferences from a party's failure to provide evidence.[90] Moreover, nothing in Section 1782 prohibits the district court from exercising its discretion by ordering discovery only if the application is made directly by the arbitral panel or with the arbitral panel's consent. This would reduce the risk, highlighted in Justice Breyer's dissent in *Intel*, that the very tribunal Section 1782 is intended to assist opposes the application.[91] *Intel* also instructs lower courts that "unduly intrusive or burdensome requests may be rejected or trimmed."[92] Additionally, only the production of documents and witness testimony can be ordered under Section 1782. Section 1782's scope, therefore, falls short of the full panoply of discovery available under the Federal Rules of Civil Procedure, which includes initial disclosures, requests for admission, and interrogatories.[93]

Proponents of a more restrictive approach would see these safeguards as insufficient for several reasons. *First*, even an unsuccessful Section 1782 application may materially increase costs and cause delay. If the target of a Section 1782 application is a party in the proceeding, additional resources must be devoted to responding to the Section 1782 application. A hard-fought Section 1782 application response could require the target to: retain U.S. counsel; litigate a motion to quash, initially with briefing and oral argument at the district court and possibly also at the circuit court level; lodge objections to the scope of the Section 1782 application; meet and confer with the applicant in an effort at narrowing the scope; and file a motion for a protective order if negotiations with the applicant result in impasse. Under arbitral rules where the loser pays the winner's costs, additional complexity arises as to how the fees relating to litigating a Section 1782 application should be apportioned. *Second*, the pace for resolution of a pending Section 1782 application can be glacial, particularly

if the arbitral tribunal is willing to delay issuance of an award until the Section 1782 evidence is available. The applications giving rise to the cases examined in Part III.B of this article averaged two months from the time of initial application to a disposition at the district court level, and an additional twelve months on average for completion of the appellate court's review. *Third*, as the *Intel* opinion indicated, "Section 1782(a) does not limit the provision of judicial assistance to 'pending' adjudicative proceedings."[94] Consequently, a party to an arbitration may make a Section 1782 application prior to the formation of the arbitral panel, depriving the district court of the ability to consider the views of the tribunal. *Fourth*, there is always the risk that a U.S. judge accustomed to generous U.S. discovery rules will, for example, compel production of voluminous documents with resultant costly and time-consuming reviews for the target. *Fifth*, Section 1782 discovery may give the foreign applicant a strategic advantage over his adversary, who may not have at his disposal a similar mechanism for obtaining discovery to bolster his case.

Setting aside the competing policy considerations, the current circuit split is untenable as a practical matter. At present, all of the district courts in the Sixth Circuit would entertain a Section 1782 application. So, too, would any district court in the Fourth Circuit, at least so long as the Section 1782 applicant can establish that the arbitral tribunal is "a product of government-conferred authority." An applicant would satisfy this requirement by showing that the tribunal is supported by legislation at the arbitral seat analogous to the FAA, the U.K. Act, or presumably any of the various national arbitration laws modeled on the UNCITRAL Model Law on International Commercial Arbitration, which contains detailed provisions on how to facilitate and regulate the conduct of international arbitration proceedings, and to enforce awards arising from those proceedings.[95] And, depending on the outcome of the pending appeals in the Third and Ninth Circuits, additional districts within the U.S. may allow Section 1782 discovery. By contrast, the opposite outcome would attach to an identical application for Section 1782 discovery before the courts of the Second, Fifth, and Seventh Circuits. Indeed, the split is all the more pronounced when considering the contradictory treatment of identical arbitrations under identical agreements by the Fourth Circuit in *Boeing* and the Seventh Circuit in *Rolls-Royce*. In sum, the question of whether Section 1782 permits discovery in aid of private foreign arbitrations is ripe for resolution by the Supreme Court.

Endnotes

1. *See, e.g.*, *Euromepa SA v R Esmerian, Inc.*, 154 F.3d 24, 27 (2d Cir. 1998).

2. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 n.12 (2004). ("Most civil-law systems lack procedures analogous to the pretrial discovery regime operative under the Federal Rules of Civil Procedure. *See* ALI, ALI/Unidroit Principles and Rules of Transnational Civil Procedure, Proposed Final Draft, Rule 22, Comment R–22E, p. 118 (2004) ('Disclosure and exchange of evidence under the civil-law systems are generally more restricted, or nonexistent.')"); Geoffrey C. Hazard Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions,* 73 Notre Dame L. Rev. 1017, 1018–1019 (1998) (same). *See also* Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 235 n.93 (1994) ("The drafters [of § 1782] were quite aware of the circumstance that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence."). *See also* Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DePaul L. Rev. 299, 301–02 (2002) (noting that the concept of an extensive litigant-led process of "discovery" of evidence is inconsistent with civil law litigation procedures, which rely on judicial officers as opposed to the parties to request evidence).

3. *Intel*, 542 U.S. 241 (2004).

4. *See id.* at 259–62. *Cf. id.* at n.7 (describing the circuit split on the question of foreign discoverability).

5. *See id.* at 263 ("We also reject [the Petitioner's] suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Brief for Petitioner 19–20 ('[I]f AMD were pursuing this matter in the United States, U.S. law would preclude it from obtaining discovery of Intel's documents.'). Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here.").

6. *See id.* at 259.

7. *See id.* at 256.

8. *Id.*

9. *See generally*, Brief for the United States of America as Amicus Curiae Supporting Affirmance, 2004 U.S. S. Ct. Briefs LEXIS 110, 2004 WL 214306 at *3–7, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

10. *Intel*, 542 U.S. at 246.

11. *Id.*

12. *Id.*

13. *Id.* at 257–58.

14. *See id.* at 254–25.

15. *Id.*

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. *Id.* at 248 (citing Act of Sept. 2, Pub. L. No. 85–906, § 2, 72 Stat. 1743).

21. *Id.*

22. *Id.*

23. *See id.* at 249 (citing S. Rep. No. 1580, 88th Cong., 2d Sess. 7–8 (1964)).

24. *See id.* at 258.

25. *See id.*

26. *See id.* at 247 (observing that "both the Court of First Instance and the European Court of Justice [*i.e.*, the courts hearing appeals from the Commission's decision to impose liability], qualify as tribunals. But those courts are not proof-taking instances. Their review is limited to the record before the Commission.").

27. *See id.* at 255, n.9.

28. *See, e.g.*, United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, § 34-2; London Court of International Arbitration (LCIA) Arbitration Rules (effective 1 October 2020), § 23-5; The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) Arbitration Rules (January 1, 2017), § 46; Singapore International Arbitration Center (SIAC) Rules 2016, § 32-11; but cf. International Centre for Settlement of Investment Disputed (ICSID) Rule VII.51–55.

29. Justice Scalia filed a concurrence indicating that he read the term "tribunal" to unambiguously extend to the Commission and objected to the majority's reliance on legislative history. *See Intel*, 542 U.S. at 267 (Scalia, J., concurring).

30. *See Intel*, 542 U.S. at 267–69 (Breyer, J., dissenting).

31. *See id.* at 271 ("the Commission has told this Court that it is not a 'tribunal' under the Act. It has added that, should it be considered, against its will, a 'tribunal,' its 'ability to carry out its governmental responsibilities' will be seriously threatened. Brief for Commission of the European Communities as Amicus Curiae 2.") (Breyer, J., dissenting).

32. *See, e.g.,* Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited,* 25 Syracuse J. Int'l L. & Com., 1, 11 (1998); *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190–191 (2d. Cir 1999) ("[t]he 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"); Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 Va. J. Int'l L. 127, 153 (2012) ("[i]f left unchecked, the Americanization of international arbitration or foreign litigation through Section 1782 discovery could threaten to undermine many of the perceived advantages of these alternative forums").

33. *See, e.g., In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (Ginsburg, J.).

34. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1046 n.71 (1965) (emphasis added) cited in *Intel*, 542 U.S. at 258.

35. *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 713 (6th Cir. 2019).

36. *See In Re Guo*, 965 F.3d 96, 101 (2d Cir. 2020), *as amended* (July 9, 2020); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 32 (5th Cir. 2009).

37. *In re FedEx*, 939 F.3d 710, 714 (6th Cir. 2019).

38. *See id.* at 720.

39. *See id.* at 720–22.

40. *See id.* at 722–23.

41. *See id.*

42. *See id.* at 723.

43. *See Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 189 (2d Cir. 1999).

44. *See In Re Guo*, 965 F.3d 96, 102 (2d Cir. 2020), *as amended* (July 9, 2020); *NBC*, 165 F.3d at 186; *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999).

45. *See In re FedEx*, 939 F.3d at 725–26.

46. *See id.* at 725 n.9.

47. *See NBC*, 165 F.3d 184; *Biedermann*, 965 F.3d 96.

48. *See In re FedEx*, 939 F.3d at 726–28.

49. *See id.* at 726–27.

50. *See id.* at 728.

51. *See id.* at 728–32.

52. *See id.* at 729 (quoting *Intel*, 542 U.S. at 261–63).

53. *See id.* at 730–31 (citing *Intel*, 542 U.S. at 265).

54. *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).

55. *See id.* at 213–14.

56. *See id.* at 214.

57. *See id.* at 213–14.

58. *See id.* at 214.

59. *Id.*

60. *See id.* at 214–16 (quoting *Intel*, 542 U.S. at 624-66).

61. *See* Section II.A. and *NBC*, 165 F,3d 184; *Biedermann*, 965 F.3d 96.

62. *See Servotronics, Inc. v. Rolls-Royce PLC*, No. 19-1847, 2020 U.S. App. LEXIS 30333, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).

63. *See NBC*, 165 F.3d at 188-90.

64. *See id.*

65. *See id.* at 191; 9 U.S.C. § 7.

66. *Biedermann*, 168 F.3d at 882-83.

67. 341 F. App'x 31, 32 (5th Cir. 2009).

68. *See id.* at 32.

69. *See id.* at 34.

70. *See Guo*, 965 F.3d at 102, 104.

71. *See id.* at 105.

72. *See id.*

73. *See Biedermann*, 168 F.3d at 882 n.5.

74. *See Guo*, 965 F.3d at 106.

75. *See id.* at 100.

76. *See id.* at 107–08.

77. *See id.* at 107.

78. *See id.* at 107–08.

79. *See id.* at 108.

80. *See id.* (Acknowledging, however, that "[t]his factor is not determinative, as agreements between countries to arbitrate disputes between their citizens may involve selection of the arbitrators by the parties, and such a tribunal may be a 'foreign or international tribunal' notwithstanding this fact.").

81. *Rolls-Royce,* 2020 U.S. App. LEXIS 30333, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).

82. *Compare id. with Boeing*, 954 F.3d 209 (4th Cir. 2020).

83. *Rolls-Royce*, 2020 U.S. App. LEXIS 30333, 2020 WL 5640466 at *4.

84. *Id.* at *5–6.

85. *Id.* at *6.

86. *In re EWE Gasspeicher GmbH*, No. CV 19-MC-109-RGA, 2020 U.S. Dist. LEXIS 45850, 2020 WL 1272612, at *3 (D. Del. Mar. 17, 2020).

87. *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-MC-80277-TSH, 2020 U.S. App. LEXIS 33250, 2020 WL 906719, at *7 (N.D. Cal. Feb. 25, 2020).

88. *Intel*, 542 U.S. at 264.

89. *Id.*

90. UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration §§ 27.3, 30.3; LCIA Arbitration Rules (effective 1 October 2020) § 22.1(v); Arbitration Rules of SCC (January 1, 2017) §§ 31.3, 27(f), 27(h); ICSID V.42(4).

91. *See Intel*, 542 U.S. at 267–69 (Breyer, J., dissenting).

92. *Id.* at 265.

93. *See generally*, Rules 26–37 of the Fed. R. Civ. Pro.

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

95. *See, e.g.*, UNCITRAL-based legislation in Albania, Belgium, Benin, Bhutan, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Comoros, Congo, Côte d'Ivoire, Croatia, Democratic Republic of the Congo, Equatorial Guinea, France, Gabon, Guinea, Guinea-Bissau, Honduras, Hungary, Luxembourg, Malaysia, Mali, Montenegro, Nicaragua, Niger, North Macedonia, Senegal, Slovenia, Switzerland, Togo, United States of America. *See UNCITRAL Model Law on International Commercial Conciliation (2002)*, UNCITRAL, *available at*, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status (last visited Oct. 21, 2020). ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Samuel Newhouse
The Report is produced monthly by

LexisNexis®

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397