3 Ways To Let Arbitrators Control Int'l Arbitration Discovery

By **David Zaslowsky** (May 21, 2020, 3:58 PM EDT)

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Section 1782 of Title 28 of the U.S. Code is a very powerful tool that authorizes the obtaining of discovery in the U.S. for use in foreign proceedings, and use of the statute is increasing. Meanwhile, international arbitration continues to grow as a neutral forum for resolving international disputes.

At the intersection of these two trends is the important question of whether Section 1782 can be used to obtain discovery in aid of private, international arbitration proceedings.

This article looks at the split in the way the courts have answered that question and gives practical advice on what can be done to protect against courts ordering discovery in aid of private, international arbitration, regardless of how the courts ultimately rule on the issue of the applicability of Section 1782 to arbitration.[1]

Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses, in aid of foreign proceedings. The Section 1782 application is typically initiated through an ex parte application and does not require that the foreign proceeding even be pending at the time of the application.

Section 1782 authorizes a district court to grant a petition for judicial assistance if three statutory requirements are met: (1) the request for discovery is made "by a foreign or international tribunal" or "any interested person"; (2) the discovery requested is "for use in a proceeding in a foreign or international tribunal"; and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made.

If these statutory requirements are met, the district court may — although it is not required to — exercise its discretion and grant the petition. The U.S. Supreme Court's only treatment of Section 1782, in Intel Corp. v. Advanced Micro Devices Inc.,[2] identified four nonexclusive factors a district court should consider in exercising its discretion and it is now essentially de rigueur for every Section 1782 decision to discuss those factors.

They are:

- Whether the person from whom discovery is sought is a party to the foreign proceeding — with discovery being much more difficult to obtain from a party;
- The receptivity of the foreign court to U.S. assistance;
- Whether the Section 1782 request conceals an attempt to circumvent foreign truth-gathering restrictions; and,
- Whether the request is unduly intrusive or burdensome.

Prior to the Supreme Court's decision in Intel, there had been two circuit courts that had

addressed the issue of whether Section 1782 may be used in aid of private, international arbitration — National Broadcasting Co. v. Bear Stearns & Co. Inc.[3] and Republic of Kazakhstan v. Biedermann International.[4] Both the U.S. Courts of Appeals for the Second and Fifth Circuits held that Section 1782 was not so available.

In Intel, however, Justice Ruth Bader Ginsburg quoted from an article written by the late professor Hans Smit, the primary draftsperson of the current version of Section 1782, in which he wrote "[t]he term 'tribunal' … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." It has been argued that this was not only dictum, but dictum contained in a parenthetical quotation to a law review footnote.

Nevertheless, after Intel, although numerous courts held that Intel did not overrule NBC and Biedermann, and that Section 1782 was not available in aid of private, international arbitration, there were other courts which held that Section 1782 was so available. At the circuit court level, the Fifth Circuit expressly affirmed that Biedermann remains good law post-Intel.[5] The Second Circuit has not yet addressed the issue post-Intel.

Last year, in Abdul Latif Jameel Transp. Co. v. FedEx Corp., the U.S. Court of Appeals for the Sixth Circuit created a circuit split when it held that Section 1782 could be used in aid of a private, international arbitration.[6] Deciding the issue required the court to determine whether an arbitration fits within the part of the statute that makes it applicable to a "foreign or international tribunal." Since there was no dispute that the arbitration at issue in that case — from the Dubai International Financial Center-London Court of International Arbitration — was foreign, the determinative issue was whether it was a tribunal. The court's analysis was primarily textual.

The court noted that there were several legal dictionaries that contained definitions of "tribunal" broad enough to include private arbitrations. Turning to nonlegal sources, at least two widely used English dictionaries define "tribunal" broadly enough to include private arbitrations.

The court also remarked that American jurists and lawyers have long used the word "tribunal" in its broader sense; a sense that includes private, contracted-for, commercial arbitral panels. And, according to the Sixth Circuit, the courts used the word to describe private, contracted-for commercial arbitrations for many years before Congress added the relevant language to Section 1782 — and still use it that way today.

More recently, in Servotronics v. Boeing Co.,[7] the U.S. Court of Appeals for the Fourth Circuit reached the same conclusion as the Sixth had. The court noted that, in the 1964 changes to the statute, Congress deleted from the former version of the statute the words "in any judicial proceeding pending in any court in a foreign country" and replaced them with the phrase "in a proceeding in a foreign or international tribunal."

According to the Fourth Circuit, Congress understood this to be an increase in international cooperation. Notwithstanding Congress' articulated purpose for increasing such foreign assistance, Boeing/Rolls Royce maintained that tribunal, as used in Section 1782, referred only to "an entity that exercise[s] government-conferred authority." And, from this premise, it reasoned that, because arbitration is a private proceeding "deriv[ing] its authority not from the government, but from the parties' agreement," an arbitral panel is not a tribunal.

The Fourth Circuit said this was too narrow an understanding of arbitration. The court referred to Supreme Court decisions that said that the Federal Arbitration Act elevated

arbitration as a favored alternative to litigation. The act declared arbitration agreements to be valid and enforceable, directed courts to compel arbitration when a contract provides for arbitration and provided for limited review of arbitral awards.

Thus, according to the court, Boeing/Rolls Royce was wrong in its general assertion that arbitration is not a product of "government-conferred authority." The Fourth Circuit held that the district court has the authority to provide, in its discretion, assistance in connection with a private arbitration.

The Fourth and Sixth Circuit holdings create an interesting anomaly. In a domestic arbitration, nonparty discovery is governed by Section 7 of the Federal Arbitration Act, which requires that the arbitrators issue the request for discovery and provides that any such discovery be before the arbitrators.

In contrast, under Section 1782, parties can obtain information without the authority of the arbitrators and can do so through prehearing discovery — rather than before the arbitrators. It is reasonable to ask whether Congress really intended to grant parties to international arbitrations — many of whom are foreign — broader power to seek discovery than parties to domestic arbitration — the large majority of which are American.

In any event, Rolls Royce has already informed the Fourth Circuit that it intends to file a petition for a writ of certiorari with the Supreme Court before a June 28 deadline. In the meantime, there are cases before the Third, Seventh[8] and Ninth Circuits[9] in which the courts are being asked to weigh in on the issue of whether Section 1782 can be used in aid of arbitration.

Consider the situation of two non-U.S. parties, domiciled in countries that have no discovery, to a transaction that has nothing to do with the U.S. and who agreed to arbitrate their dispute because they wanted the matter kept out of the courts. Then, suddenly, one of these non-U.S. parties finds itself dragged into the U.S. courts to defend against discovery under Section 1782. It is safe to say that, for most parties, this was probably something that they never even contemplated.

Absolute clarity will come to this issue if the Supreme Court grants certiorari and issues a decision that holds unambiguously that Section 1782 may not be used in aid of commercial, international arbitration. Absent that, are there steps that can be taken so that parties can have greater control over the issue of whether U.S. discovery will be available in connection with a private, commercial international arbitration?

Three suggestions come to mind. My thoughts in this regard are informed to a great extent by a New York City Bar Association Report prepared by a subcommittee of the International Commercial Disputes Committee that I had the honor to chair.[10] One of our recommendations was that the arbitrators should be the ones who decide whether to allow Section 1782 discovery in aid of international arbitration.

The first suggestion starts with the axiom that arbitration is a creature of contract. It is not unusual for parties to include in their arbitration clauses details about how their arbitration will be conducted, including with respect to discovery. Parties could include in their arbitration clause a provision that states that there shall be no resort to national courts to seek discovery without the consent of the arbitrators and no such evidence obtained without the consent of the arbitrators shall be admissible in the arbitration.

Because courts and arbitrators invariably enforce the agreement of the parties, such a

clause should operate to prevent parties from seeking Section 1782 discovery without the consent of the arbitrators. Indeed, even without such a clause, courts have denied Section 1782 applications on the ground that they first wanted to hear from the arbitrators as to whether they wanted the discovery being sought under Section 1782.[10]

It is also worth considering the flip side. How should a court respond to the argument that a failure of a contract to include such a provision is an indication that the parties did not intend to limit Section 1782 discovery? Such an argument should be rejected.

It is based on the implicit assumption that most contract drafters are aware of Section 1782 and that, therefore, the failure to include a reference to it is an indication that they want the courts to infer something from that absence. But the assumption is incorrect.

The overwhelmingly large majority of U.S. lawyers have never heard of Section 1782 and the percentage of lawyers outside the U.S. with such knowledge is even lower. It would, accordingly, be improper to conclude that the absence of a reference to Section 1782 is evidence of a particular intent.

Second, many arbitrators who sit in international arbitrations have a checklist of items that they raise with the parties during the initial, preliminary conference. They should include in that checklist the issue of using national courts to obtain discovery for use in the arbitration. When that issue is raised during the preliminary conference, the arbitrators should make clear that the parties are not authorized to resort to national courts without the prior consent of the tribunal.

This is significant because two of the Intel discretionary factors are the receptivity of the foreign tribunal to U.S. assistance and whether the Section 1782 request conceals an attempt to circumvent foreign truth-gathering restrictions. Both of those factors should weigh very strongly against an applicant who seeks Section 1782 discovery without the authorization of a tribunal that has specifically ruled that such advanced approval is required.

The third suggestion concerns the role of arbitral institutions. The rules of almost every — if not every — arbitral institution do not provide details about the scope of discovery or the methods of discovery – if any. Rather, the rules provide generally that such matters shall be left to the discretion of the arbitrators. It is plausible to argue — and I have argued in briefs — that, unless the arbitrators authorize resort to national courts for discovery, it is impossible for a court to apply the discretionary factors relating to "receptivity" and "circumventing."

Nevertheless, it is clear from the many courts that have allowed Section 1782 discovery in aid of arbitration without hearing from the arbitrators that they do not accept this argument. If, however, the institutions modified their rules to provide specifically that resort to national courts for discovery shall not be permitted without arbitrator consent (save for an emergency situation), the landscape would be very different. In that situation, by agreeing to arbitrate under the rules of an institution, a party is agreeing to the rules of that institution and therefore would be agreeing that it will not seek Section 1782 discovery on its own.

In sum, Justice Ginsburg's citation to Smit's article in the Intel decision led to the court split on the issue of whether Section 1782 can be used in aid of private, international arbitration. That split will likely not be resolved until the issue finds its way back to the Supreme Court.

In the meantime, there are steps that parties and arbitral institutions can take if they believe that it is the arbitrators who should control discovery in arbitration.

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[1] This article focuses on private, commercial international arbitration. Different considerations apply to investor-state arbitration.

[2] Intel Corp. v. Advanced Micro Devices Inc., 542 U.S. 241 (2004).

[3] National Broadcasting Co. v. Bear Stearns & Co. Inc., 165 F.3d 184 (2d Cir. 1999).

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

[5] See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 Fed. Appx. 31, 33-34 (5th Cir. 2009).

[6] See Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019).

[7] No. 18-2454 (4th Cir. Mar. 30, 2020).

[8] Servotronics, Inc. v. Rolls-Royce PLC, No. 19-1847.

[9] HRC-Hainan Holding Co. v. Hu, No. 20-15371.

[10] http://www.nycbar.org/pdf/report/1782_Report.pdf.

[11] See, e.g., InterGlobe Enters. Private Ltd. v. Khanna, 19-mc-595-PWG (D. Md. Feb. 3, 2020).