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## **Seeking Discovery in U.S. Courts to Aid in Foreign Proceedings**

Litigants outside the U.S. have typically taken comfort from differences that may exist between their jurisdictions and the U.S., with its perceived excesses of class actions, contingency fees, punitive damages and sweeping discovery. While there has been much recent discussion regarding the export of U.S. litigation themes, particularly the advance of class action models, there is one home-grown measure that need not be replicated abroad for foreign litigants to avail themselves of a true U.S. remedy.

Discovery for non-U.S. parties may now become ever more accessible, thanks in part to a broader interpretation of a statute titled "Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals," 28 U.S.C. §1782 (2006).

Dating back more than 150 years, the statute itself is nothing new and conceptually, it is rather uncontroversial. That is, it codifies principles of comity to enable a U.S. district court, under certain circumstances that appear necessary and just, to grant the request of a party seeking the production of evidence for use in a foreign tribunal. Recently, however, the use of this measure appears to be increasing, largely due to a U.S. Supreme Court ruling that, among other matters, the law does not automatically bar a district court from ordering a document production when the material is not otherwise obtainable in the foreign jurisdiction. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

For example, under this decision, a shareholder suing a corporation in Germany alleging the unlawful sale of a subsidiary could obtain documents in the possession and control of the U.S. corporate parent to assist the German court to place a value on the subsidiary and its assets, regardless of whether the documents would be subject to discovery in the German court. This article seeks to explain how the measure's operation and interpretation may still provide opportunities and defenses to practitioners in these circumstances. The article also flags a few potential unintended consequences on the horizon.

### **The Statute's Modern Use and Recent Interpretation**

Section 1782(a) provides that district courts "may" order "a person" residing or found in the district "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 "or upon the application of any interested person," and may prescribe what rules will be followed in taking the testimony or producing the evidence, including the foreign tribunal's practices or procedures. The Federal Rules of Civil Procedure are applied where the order does not otherwise specify. The section also provides that no person may be compelled to testify or produce evidence "in violation of any legally applicable privilege."

Recent decisions suggest that courts engage in a two-stage analysis, *i.e.*, whether they

have the authority to grant the assistance request and whether they should exercise their discretion to grant it. *In re Nokia Corp.*, No. 1:07-MC-47, 2007 WL 1729664, at \*2 (W.D. Mich., June 13, 2007); *In re Grupo Qumma SA*, No. Misc. 8-85, 2005 WL 937486, at \*2 (S.D.N.Y., Apr. 22, 2005).

The threshold requirements that give a district court the authority to grant a 1782 request are (i) the applicant is a foreign or international tribunal or "any interested person"; (ii) the request seeks evidence, either testimony or the statement of a person, or the production of a document or other thing; (iii) the evidence sought is for use in a foreign or international proceeding, and the proceeding is before a foreign or international tribunal; and (iv) the person from whom discovery is sought resides or is found in the district of the court ruling on the application. *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007). The court will also consider whether the material sought is relevant. *In re Costa Rica*, No. 07-20037, 2007 WL 141155, at \*1 (S.D. Fla., Jan. 16, 2007).

Factors bearing on the district courts' exercise of discretion include (i) whether the person from whom discovery is sought is a participant in the foreign proceeding – if so, the need for section 1782 aid is generally not as apparent as when evidence is sought from a nonparticipant who may be outside the foreign tribunal's jurisdictional reach; (ii) whether the 1782 request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States," *Intel*, 542 U.S. at 265; or (iii) whether the requests are unduly intrusive or burdensome.

### ***Intel* and the Incremental Expansion Reflected in the Statute's History**

The issue in the *Intel* case was whether section 1782(a) required the court to assist in the production of evidence. *Id.* at 253. To reach that question, Justice Ruth Bader Ginsburg, writing for the majority, provided a comprehensive review of the law's history, development and underlying policy considerations. While the Court did not say, before remanding the case for further proceedings, whether the documents sought must be produced, it did establish parameters within which the district courts can make such determinations. This history, policy overview and guidance give the practitioner some room for comfort in defending a 1782 request, because they can be used to narrow the law's apparent broad scope and reach.

The statute, as originally enacted in 1855, allowed foreign tribunals to request assistance in gathering evidence by means of letters rogatory delivered through diplomatic channels. Congress amended the law in 1863, 1948, 1949, 1958, 1964 and 1996, broadening its application with the specific goal of improving judicial assistance and cooperation between the United States and foreign nations. The Senate report accompanying the extensive 1964 amendments stated in this regard:

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 and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations

adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects.

S. Rep. No. 88-1580, at 2 (1964), reprinted in 1964 U.S.C.C.A.N. 3783.

Justice Ginsburg observed that over time Congress eliminated the terms “judicial proceeding” and “pending” from the law, replacing them with the phrase “in a proceeding in a foreign or international tribunal.” According to the Court, “Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before conventional courts,’ but extends also to ‘administrative and quasi-judicial proceedings.’” 542 U.S. at 249.

The Court interpreted the removal of the word “pending” to mean that adjudicative proceedings need not be pending or imminent; rather, its removal means that a “dispositive ruling” is “within reasonable contemplation,” or that “the evidence is eventually to be used in such a proceeding.” *Id.* at 259. The Court engaged in this analysis and interpreted the law broadly to conclude that antitrust proceedings, in the investigatory phase, before the Directorate-General for Competition of the Commission of the European Communities did come within the statute’s ambit as “a proceeding in a foreign or international tribunal.”

The Court rejected the responding party’s argument that Section 1782 calls for a threshold showing that the documents sought, if located in the European Union, would have been discoverable by (in this instance) the Commission in the course of its investigation. On this question, the lower courts were split. Characterizing the issue as a “foreign-discoverability limitation,” the Court found that nothing in the statute’s language or its legislative history suggested that Congress intended to impose such a blanket rule on the provision of assistance under Section 1782.

Discussing the responding party’s policy concerns, the Court recognized that “comity and parity may be important touchstones for a district court’s exercise of discretion in particular cases,” but did not permit the insertion of a foreign-discoverability rule into the law’s text. The Court opined that foreign governments would not be offended by a law allowing, “but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions – reasons that do not necessarily signal objection to aid from United States federal courts.” *Id.* at 261. The Court further observed, “Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for an across-the-board foreign-discoverability rule. When information is sought by an ‘interested person,’ a district court could condition relief upon that person’s reciprocal exchange of information.” *Id.* at 262.

The Court also rejected the responding party’s argument that a section 1782 applicant should be required to show that U.S. law would allow discovery in domestic litigation analogous to the foreign proceeding. “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." *Id.* at 263. Moreover, and perhaps most importantly, the Court said that a district court is not required to grant a Section 1782 discovery application "simply because it has the authority to do so." 542 U.S. at 264. Thus, meeting threshold requirements is not enough to support a 1782 request.

A final but notable observation on the basis of Justice Ginsburg's historical account in the *Intel Corp.* is her reliance on Columbia University Law Professor Hans Smit. Professor Smit served as the reporter for the advisory committee that drafted the statute's 1964 rewrite and is an essential source for anyone wrestling with these issues. 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 (1998). Interestingly, Professor Smit does not believe that Section 1782 should be used to obtain tangible evidence located in a foreign country, contending in part that "if American courts were to assume the role of clearing houses for world-wide information gathering, conflicts with foreign countries would inevitably arise." *Id.* at 12. This disagreement may provide practitioners with a starting point in their arsenal of policy arguments in opposition.

### **Strategies for the Practitioner: Lessons Learned Post-Intel**

Because *Intel* expands the measure's interpretation and leaves many questions unresolved, it creates opportunities and obstacles for parties both proposing and opposing a Section 1782 application.

#### ***Offensive Uses***

Given the U.S. Supreme Court's broad reading of Section 1782, litigants in foreign courts have turned to it more frequently to circumvent production restrictions in effect in their jurisdictions, to compel nonparties to the foreign litigation to produce relevant material and to gain access to documents otherwise unavailable because they are located outside the foreign jurisdiction or not within the possession and control of an adversary. A party seeking the assistance of a U.S. court should specify in its section 1782 motion: (i) the person from whom discovery is sought resides or can be found in the district; (ii) a dispositive ruling is within reasonable contemplation or the evidence will eventually be used in a foreign proceeding; (iii) the body before which proceedings will take place is a "tribunal" within the contemplation of the statute; and (iv) those practices and procedures which will be used to take the testimony or produce the evidence.

Section 1782 discretionary factors previously discussed also counsel an "interested person" to explain her need for assistance, *i.e.*, that the information is beyond the foreign tribunal's reach or in the possession of a nonparty, and to show that the request will produce information the foreign tribunal will welcome and the foreign country has no specific policy that the district court's order would circumvent. A Section 1782 request should also be tailored narrowly to avoid dismissal for being unduly intrusive or burdensome and to avoid a reciprocal discovery order or an order to pay costs. See, e.g., *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995) (stating that district court, to ensure procedural parity, can condition relief upon

parties' reciprocal exchange of information); *Kang v. Nova Vision, Inc.*, No. 06-21575, 2007 WL 1879158 (S.D. Fla. June 26, 2007) (ordering applicant to pay up to \$10,000 to cover the respondent's costs).

And, while a Section 1782 applicant is not required to exhaust discovery proceedings in the foreign jurisdiction to obtain relief in the United States, an effort should be made to address what discovery efforts have already been undertaken. See, *In re Digitechnic*, No. 07-414, 2007 WL 1367697 (W.D. Wash. May 8, 2007) (factoring into court's exercise of discretion applicant's failure to attempt any discovery measures in France).

### ***Opposing Production***

Importantly, the Court in *Intel* noted, for example, that the statute expressly protects privileged material, and a good example of a party being able to withhold documents produced under a Section 1782 request on these grounds is *In re the Labor Court of Brazil*, No. 06-4485, 2007 WL 2137777 (N.D. Ill., July 24, 2007) (finding that McDonald's Corp. completed discovery in accordance with court's order, produced a privilege log with sufficient detail and did not waive its asserted privileges in this employment dispute).

And while the Court refused to import a foreign-discoverability rule into the law, it did allow district courts to take the foreign tribunal's discovery practices into account when acting on their discretionary authority under Section 1782. As in domestic discovery disputes, it would appear therefore, that an applicant's ability to obtain the materials sought from another source could be a factor the court will consider in ruling on whether to order discovery under Section 1782.

The party defending a Section 1782 request might also consider seeking a statement from the foreign tribunal setting forth a specific objection to the material sought in the United States. In *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N. D. Cal. 2007), the respondent submitted a letter from the European Commission expressing strong objections to the production of the requested material and stating that such production would prejudice future investigations. The court found that, in the interest of comity and preserving U.S./EU cooperation, the discovery request must be denied.

Further, a district court in Georgia determined, in light of the guidance provided by *Intel*, that private arbitral panels are tribunals within the meaning of Section 1782. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). Assessing whether it should exercise its discretion and grant the 1782 request, the court examined the responding party's status, the likelihood that the tribunal would be receptive to the court's assistance, and the fact that the responding party was probably the only source for at least some of the documents, which had been seized from the applicant by the Uzbek government. The court granted the 1782 request but applied several restrictions so that the production would not be unduly intrusive or burdensome.

In *Nokia Corp.*, a district court in Michigan found that it lacked the authority to grant a 1782 request because the responding party was not located in the district. The parties hotly contested this issue, because the responding party had asserted in venue-related

pleadings in a prior proceeding in another court that it had a place of business in the district. The court said that such allegations were not binding on the responding party in the 1782 action, noting that its "presence in this district was not the ultimate issue [nor was responding party] successful in defending the motion to transfer." *Nokia Corp.*, 2007 WL 1729664, at \*4. The responding party, a German corporation, had subsidiaries in the United States, including one in the district, but the court found persuasive general counsel's declaration that the company and its subsidiaries observed all corporate formalities and were legally distinct entities. The court further ruled that it would not have exercised its discretion in any event, because the responding party was a participant in the licensing dispute in Germany for which the documents were sought, there was no reason to believe that the German court lacked a procedure to compel production and the documents were located abroad.

As to the last factor, the court refused to decide whether documents located outside the United States are subject to production under Section 1782, but cited a number of cases decided both before and after the U.S. Supreme Court issued *Intel*, expressing a range of views on the matter. The Court had no reason to discuss or decide in *Intel* whether district courts can order the production of tangible evidence located in a foreign country; thus, it remains an open question.

A federal judge in Washington denied a 1782 request that sought discovery for use in a licensing dispute being litigated in a French court. *In re Digitechnic*, No. 07-414, 2007 WL 1367697 (W.D. Wash., May 8, 2007). Applying the *Intel* discretionary factors, the court determined that French discovery devices would adequately provide what the applicant sought, the applicant appeared to be attempting to circumvent French discovery rules, and it was likely the request was unduly burdensome.

A district court in Florida also found a 1782 request burdensome and tailored its discovery order accordingly. *Kang v. Nova Vision, Inc.*, No. 06-21575, 2007 WL 1879158 (S.D. Fla., June 26, 2007). The material was sought for use in a shareholder dispute in a German commercial court. The district court found that section 1782 was particularly useful because the responding parties were not parties to the litigation and took note of the substantial amount of case law where courts have found German commercial courts an appropriate forum for 1782 assistance. Nevertheless, acknowledging the responding parties' burdensomeness challenge, the court ordered the applicant to pay part of the expenses incurred in the production, reduced the date range of the requested materials from seven to four years, and ordered the documents to be submitted directly to the German appraiser, bypassing applicant and her attorney to preserve the information's confidentiality.

Based on this brief review of recent decisions, it is fair to say that while litigants appear to resort to the 1782 discovery device more often now that the U.S. Supreme Court has defined its scope and given it a broad interpretation, numerous grounds remain for successfully challenging such requests.

### **The Unintended Consequences from Overly Broad Statutory Interpretations**

Two trends may intersect this broadening of Section 1782 in an unprecedented way. One is the increasing access to justice demands of consumers around the world.

Another is the expansion of document retention and e-discovery obligations. Post-*Intel*, litigants should monitor these emerging synergies that are briefly set out below.

At the moment, the clamor for greater consumer protection and access to justice is reverberating throughout Europe, Latin America and parts of Asia, notably Australia. For example, at last count in Italy, 10 class action bills are pending before their Parliament and last year the Bersani decree lifted the ban on contingency fees. Italian discovery does not permit access to all documents in the possession of another party as in the U.S.; instead Article 210 of the Italian Code of Civil Procedure requires a targeted request. A similar discovery rule exists in Brazil, which has seen several proposals to expand class action standing, not to mention a proposal to permit the recovery of punitive damages.

Whenever discovery exposure is considered, the next question must almost necessarily involve document retention. That is, if there is an increase in reliance upon Section 1782 or an increase in foreign litigation due to the enactment of additional access to justice measures, what document retention obligations follow?

Section 1782 further provides that “[t]o 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.” It is unclear how much of the Federal Rules should be applied, but presumably under Federal Rule 34(a) the requesting parties may seek from their adversaries documents and electronically stored information “which are in the possession, custody or control of the party upon whom the request is served.” Moreover, following the December 2006 amendments, electronically stored information includes “other *data or data compilations stored in any medium* from which information can be obtained.”

Normally, in U.S. litigation, the obligation to preserve discoverable information arises as soon as “the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 175 (S.D.N.Y. 2004). A party must implement a litigation hold to halt any automatic deletion protocols that periodically purge electronic documents, as soon as a party reasonably anticipates litigation. *Id.* Federal Rules of Civil Procedure 37(f) apply if there is a violation of a court order, or if the party failed to take reasonable steps to preserve the information it knew or should have known would be discoverable, and that failure was due to the routine operation of the party’s electronic information system. *Id.* at 177.

In other words, a party is obliged to produce evidence in its control under Section 1782, pending for use in litigation abroad, and the Federal Rules of Civil Procedure are invoked to enforce the process and compliance. The question, then, is whether that party could be sanctioned for noncompliance or the failure to retain responsive documents for the foreign proceedings under the full force of those U.S. procedural rules?

Indeed, courts have construed the concept of “control” quite broadly, unaffected by the location of the evidence. *In re NTL Sec. Litig.*, 2007 WL 241344, \*16 (S.D.N.Y.).

Legal ownership or actual physical possession of the documents at issue is not necessary under Rule 34. Rather, a party is considered to have control of evidence “when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” *Id.* at \*17. Thus, as the Second Circuit has held, “[d]ocuments may be within the control of a party even if they are located abroad.” *Id.*

### **Conclusion: Defenses to Foreign Discovery Still Abound**

While the district courts exercise their discretion in light of the statute’s goals of “providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts,” *Digitechnic*, 2007 WL 1367697, at \*3, they are amenable to an array of challenges to 1782 requests, and the practitioner should not hesitate to bring such challenges to protect her clients’ interests.

Because a district court under *Intel* may, but is not required to grant a Section 1782 request, meeting the threshold requirements is not enough to support the request and much of the debate will focus on the discretionary provisions. Thus, to recap, those opposing production should:

- Argue that the measure seeks to circumvent the foreign proof-gathering restrictions or policies of the foreign court;
- Insist that the request would create a windfall for the foreign litigant, and would also exploit and overburden courts by having them act as “clearing houses for world-wide information gathering” per Prof. Smit and Justice Breyer’s dissenting opinion in *Intel*;
- Demonstrate the burden and intrusion involved in complying; and
- If opposition fails, ensure that privilege is preserved and seek reciprocal exchanges as a condition.

And those proposing production should:

- Tailor the request narrowly;
- Include the need for the information and an account of the exhaustive efforts pursued to seek it from other sources; and
- Demonstrate that the foreign court will accept evidence acquired.

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