Section 1782 Discovery in Aid of Foreign Proceedings: A Powerful But Much Disputed Tool in International Litigation

August 22, 2011

In enacting 28 U.S.C. § 1782, Congress created a mechanism for parties in foreign proceedings to obtain evidence from U.S. companies and residents. Recent contested Section 1782 applications have raised an array of legal questions, including whether it can be used in aid of a foreign arbitration, whether documents sought must be located in the judicial district, and whether the statute is applicable if the discovery contravenes the rules of the forum country.

Section 1782 Basics
Section 1782(a), entitled "Assistance to Foreign and International Tribunals and to Litigants before Such Tribunals," provides, in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be 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.

To invoke Section 1782, an applicant must meet three conditions:

(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or "any interested person."

In re Application of Esses, 101 F.3d 873, 875 (2d Cir. 1996) (per curiam).

In a 2004 decision, the United States Supreme Court clarified the scope of Section 1782 discovery, creating opportunity for its routine use by litigants in international disputes. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259-60 (2004). The Court rejected several proposed categorical limitations on federal courts' authority to order discovery under Section 1782, instead setting forth considerations to govern district courts' exercise of discretion. Those considerations include whether: (1) a foreign court could order the parties to produce the requested evidence; (2) the nature or character of the foreign tribunal and proceeding indicate that the foreign government may not be receptive to U.S. discovery; (3) it appears that the applicant may be attempting to circumvent foreign discovery limits; and (4) enforcing the statute would be "unduly intrusive or burdensome." *Intel*, 541 U.S. at 264-65.

Despite the Supreme Court's effort to provide guidance, disputes abound regarding the scope and applicability of Section 1782 discovery. Some of the more interesting issues are addressed below.

Can Section 1782 Be Used in Connection with a Foreign Arbitration?
Prior to *Intel*, it was unclear whether the phrase "foreign tribunal" was limited to court proceedings in other countries. Certain circuit courts had determined that foreign arbitrations did not constitute "foreign tribunals" and were thus outside the sweep of Section 1782. *See, e.g., Republic of Kazakhstan v. Biederman Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999). In *Intel*, the Supreme Court cast doubt on that view. Although the specific holding concerned the European Commission's antitrust enforcement capacity, a passage of the opinion reviewing Section 1782's legislative history observed that "tribunal" was substituted in place of "judicial proceeding."

Since then, several courts have held that arbitral tribunals are within the reach of Section 1782. *See, e.g., In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010) (*aff'd on other grounds*) (stating that "[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") (emphasis in the original); *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265, 2009 WL 2877156 (D. Conn. Aug. 27, 2009) (finding arbitration proceeding was within purview of Section 1782); *In re*

Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 954-55 (D. Minn. 2007) (granting application for discovery in Israeli arbitration). However, litigants continue to dispute whether private arbitrations fall within the scope of *Intel*. *See, e.g., In re an Arbitration in London, England Between Norfolk Southern Corp., et al.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009).

Can Documents Sought Be Outside the Judicial District?
Another area of significant dispute is whether a Section 1782 application can require the production of documents located outside the judicial district. One line of cases has held that it is irrelevant that the requested information is located elsewhere if person or entity subject to the Section 1782 application resides within the district. *In re Application of Eli Lilly and Co.*, No. 3:09MC296, 2010 WL 2509133, at *4 (D. Conn. June 15, 2010) (granting petition in reliance and concluding that section 1782(a) does not require that the documents be found in the district); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 n.3 (D. Minn. 2007) ("[T]o the extent [local party from whom 1782 discovery was ordered] suggests that the only copies are located in Israel, any such fact would not relieve him of his obligation to produce them if they are nonetheless in his control.") (emphasis in original); *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88, 2006 WL 3844464, at *4 (S.D.N.Y. Dec. 29, 2006) (granting discovery of documents held by a German office of McKinsey because "McKinsey maintains its headquarters in New York, and thus is 'found' within this district"). Other courts, however, have taken the opposite view. *See, e.g., In re Application of Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194, n.5 (S.D.N.Y. 2006).

Would the Discovery Contravene the Discovery Rules of the Forum Country?
Section 1782 litigants often disagree whether the discovery would be admissible in the foreign tribunal. That is important because the Supreme Court held that Section 1782 relief should be granted if the requested discovery would be "of assistance" in the foreign proceeding. *Intel, 542 U.S. at 265*. As a general matter, if the information sought is relevant to the underlying foreign dispute, it is likely that the foreign court would be "receptive" to such evidence. *See In re Servicio Pan Americano de Protection*, 354 F. Supp. 2d 269, 274 (S.D.N.Y.2004) (granting discovery request under Section 1782, in part because "the discovery Pan Americano is seeking would be readily available and relevant to the litigation [in Venezuela]"). Courts have viewed a country's status as a signatory to the Hague Evidence Convention as indicating that its courts would be receptive to Section 1782 discovery. *See, e.g., In re Application of Imanagement Servs. Ltd.*, No. Civ.A. 05-2311, 2006 WL 547949 (D.N.J. Mar. 3, 2006) (noting that Russia and the United States are parties to the Hague Evidence Convention, which "supports a finding that the Russian court may be receptive to the evidence").

Those seeking to avoid the application of Section 1782 invariably point to limitations of discovery and evidence in foreign proceedings and contend that the applicant is seeking to circumvent those restrictions. Faced with that argument, courts tend to restrict discovery only if the forum country has strict "proof-gathering restrictions," which are defined as "substantive limits on the admissibility of discovered evidence." *See Pan Americano*, 354 F. Supp. 2d at 275; *In re Application of Kolomoisky*, No. M.19-116, 2006 WL 2404332 (S.D.N.Y. Aug. 18, 2006) (no indication that applicant, in seeking discovery for Russian proceeding, was attempting to circumvent foreign proof-gathering restrictions or other policies); *Imanagement*, 2006 WL 547949 (no showing that discovery application sought to circumvent Russian proof-gathering restrictions). The Second Circuit has held that only "authoritative proof that a foreign tribunal would *reject* evidence obtained with the aid of Section 1782" warrants a decision to deny the use of the Act. *See Esses*, 101 F.3d at 876 (emphasis in the original). The rejection of such evidence must be "embodied in a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures." *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995).

That a foreign tribunal has a more limited discovery regime is usually not a bar to Section 1782 discovery absent some abuse by the applicant. *See Heraeus Kulzer GmbH v. Biomet, Inc.*, 633 F.2d 591, 594 (7th Cir. 2011). To the contrary, it may be a reason to grant it. *See Pan Americano*, 354 F. Supp. 2d at 274 ("[T]he apparent limitations of Venezuelan discovery rules suggest that the exercise of jurisdiction by this Court may be necessary to provide Pan Americano with the documents it seeks"). Likewise, limitations on the admissibility of evidence may not be cause to deny an otherwise valid Section 1782 application because there may be little harm in granting the discovery if the foreign tribunal retains the discretion later to determine whether to admit the discovered material in evidence. See Imanagement, 2006 WL 547949, at *3 ("Whether the foreign court will ultimately accept the evidence is beyond this Court's ability to determine."); *In re Application of Grupo Qumma*, No. M 8-85, 2005 WL 937486, at *3 (S.D.N.Y. Apr. 22, 2005) ("The Mexican court, rather than this Court, should decide whether the additional evidence is admissible, and it will be in a better position to do so if Qumma is permitted to conduct the requested discovery first").

When the admissibility of particular discovery is in issue, courts tend to grant the discovery. *See, e.g., Euromepa*, 51 F.3d at 1101 (it is "far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in

the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright"); *In re Imanagement Servc., Ltd.*, No. Misc. 05-89, 2005 WL 1959702 (E.D.N.Y. Aug. 16, 2005) (no "authoritative proof" that Russian court would reject any use of evidence gathered pursuant to Section 1782, and Russian court could protect itself from the effects of any unwanted discovery order by simply refusing to admit the evidence).

Conclusion

Following the Supreme Court's *Intel* decision, lower courts continue to grapple with a number of legal issues regarding Section 1782. Given the proliferation of Section 1782 discovery applications in support of foreign disputes, we can expect to see further developments that will refine its scope.