Obtaining U.S. Discovery for Use in Foreign Proceedings under 28 U.S.C. § 1782

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Overview

For parties involved in (or contemplating) dispute resolution proceedings anywhere in the world, U.S. federal law offers a unique and powerful tool to obtain potentially relevant evidence in the United States. A statute known as 28 U.S.C. § 1782 enables such parties to apply directly to a U.S. federal district court for an order authorizing discovery from any individual or entity located in that judicial district—without the cumbersome and time-consuming requirement of first obtaining letters rogatory or letters of request from a foreign tribunal.

The foreign dispute need not have any connection with the United States, and applicants may use section 1782 to obtain discovery from non-parties and (in some cases) even from parties to the foreign proceedings, as long as they are present in the United States. Applicants must satisfy the comparatively modest statutory requirements for section 1782 discovery and additionally must show that certain discretionary factors weigh in favor of granting discovery. Once authorized by the court, section 1782 discovery is governed by the same liberal standards that govern discovery in ordinary U.S. civil litigation under the Federal Rules of Civil Procedure.[i] Some courts have even held that a discovery target located in the United States may be required to produce "responsive documents and information located *outside the United States"* as long as the target has "possession, custody or control" of the materials.[ii]

The availability of section 1782 discovery not only in aid of pending, but also of reasonably contemplated *future* litigation, is well established. A number of courts have also authorized section 1782 discovery in aid of investment treaty arbitrations. But whether section 1782 discovery is available in aid of international commercial arbitrations remains unsettled and varies significantly among the different federal judicial circuits.

Procedure

District courts typically decide applications for section 1782 discovery *ex parte* (*i.e.*, without hearing from or even notifying the individual or entity from whom discovery is sought).[iii] If the court is satisfied that section 1782 discovery is appropriate, it will issue an order authorizing the applicant to serve a subpoena for the production of documents and/or depositions on the target individual or entity. The applicant may enforce the subpoena in the same manner as a subpoena issued in an ordinary civil action.

Once served, the target has the burden of moving to quash (*i.e.*, set aside) the subpoena if it wishes to challenge the propriety of section 1782 discovery.[iv] A final order granting or denying section 1782 discovery is immediately appealable to the court of appeals for the judicial circuit in which the district court sits.[v]

Threshold Statutory Requirements

Every application for section 1782 discovery must satisfy three statutory requirements:

(1) the person or entity from whom discovery is sought must "reside[]" or be "found" in the judicial district in which the court sits;

(2) the discovery sought must be "for use" in a proceeding before a "foreign or international tribunal"; and

(3) the application must have been made by an "interested person" (or by the "foreign or international tribunal" itself).[vi]

Where the applicant seeks discovery from an individual, the first requirement is satisfied if that individual resides within the judicial district in which the court sits.[vii] For corporations and other entities, the first requirement is satisfied if the corporation or entity maintains its principal place of business in that judicial district.[viii] Recent United States Supreme Court precedent sharply curtailing the scope of general jurisdiction over out-of-state companies calls into question whether a corporation can be "found" anywhere *other than* its principal place of business.[ix] On that basis, a district court in the Southern District of New York recently held that a Section 1782 applicant could not obtain discovery from a foreign bank by serving the bank's New York branch where the dispute and discovery sought were unrelated to the activities of the New York branch.[x]

The second requirement is satisfied where the applicant shows that the discovery it seeks will be used in a proceeding before a foreign court or quasi-judicial agency.[xi] The foreign proceeding need not be pending or even imminent, as long as it is "within reasonable contemplation."[xii] On that basis, an applicant may seek section 1782 discovery for use in a pre-suit investigation.[xiii]

Finally, an applicant that is a party to the foreign proceeding will have no difficulty qualifying as an "interested person." Even without formal party status, an applicant with "participation rights" in the foreign proceeding likely also qualifies as an "interested person."[xiv]

Discretionary "*Intel* Factors"

If the applicant satisfies the threshold statutory requirements, district courts have discretion to grant or deny section 1782 discovery after considering the following four factors (known as "*Intel* factors" because they derive from a 2004 United States Supreme Court decision involving the computer chip manufacturer Intel):

(1) whether "the person from whom discovery is sought is a participant in the foreign proceeding" (since the need for section 1782 discovery is "not as apparent" in that circumstance as it is where "evidence is sought from a nonparticipant");

(2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";

(3) whether the request for discovery "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the request is otherwise "unduly intrusive or burdensome."[xv]

No single factor is dispositive, nor is the applicant required to establish that all four factors weigh in favor of granting discovery. For example, courts have sometimes allowed section 1782 discovery even where the target was a participant in the foreign proceeding (particularly where the foreign court lacked authority to order the discovery sought).[xvi] And many courts are reluctant to deny section 1782 discovery based solely on the second and third factors; as a result, courts frequently require a heightened showing that these two factors truly counsel against granting discovery.[xvii] Lastly, the application should be narrowly tailored; the court may deny an application that appears to be nothing more than a speculative "fishing expedition."[xviii]

Unsettled Relationship with International Arbitration

The availability of section 1782 discovery for use in international arbitration (especially international commercial arbitration) remains unsettled and varies significantly among courts in different judicial circuits. Therefore, in cases where district courts in more than one circuit may have jurisdiction to grant section 1782 discovery, applicants should consider carefully which circuit appears most favorable under the existing case law. Yet applicants in many cases will have no real choice of venue because an individual typically "resides or is found" in only one judicial district,[xix] and it is unclear whether a corporation may be "found" anywhere other than the district where it maintains its principal place of business.[xx]

Before *Intel*, the Second Circuit (with appellate jurisdiction over the federal district courts in New York) and the Fifth Circuit (with appellate jurisdiction over the federal district courts in Texas) both held that section 1782 discovery was unavailable for use in (private) international commercial arbitration because an arbitral tribunal does not qualify as a "foreign or international tribunal" under the statute.[xxi] Yet the Supreme Court in *Intel* later interpreted this statutory language broadly, holding that section 1782 discovery was available for use in proceedings before the European Commission in which the Commission exercised "quasi-judicial powers" as "a first-instance decisionmaker."[xxii] And in *dicta*, the Court quoted an excerpt from a scholarly article indicating that the term "tribunal" includes arbitral tribunals.[xxiii]

Following *Intel*, a number of district courts have held that section 1782 discovery is available in aid of investment treaty arbitration because an arbitral tribunal constituted under a bilateral investment treaty meets the statutory definition of a "foreign or international tribunal."[xxiv] The Third Circuit has expressed its agreement with that conclusion.[xxv]

Yet whether section 1782 discovery is also available for use in international commercial arbitration remains controversial post-*Intel*. The Fifth Circuit (the only circuit to have ruled on this issue since *Intel*) has reaffirmed its pre-*Intel* position that section 1782 discovery is unavailable for use in private international arbitration.[xxvi] The Second Circuit to date has not revisited its pre-*Intel* holding to the same effect.[xxvii] However, a district court in the Southern District of New York recently held that the London Maritime Arbitration Association "is a

'foreign tribunal' within Section 1782," reasoning that *Intel* "suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782."[xxviii]

No circuit has unequivocally endorsed the use of section 1782 discovery in aid of international commercial arbitration (although the Third Circuit's endorsement of section 1782 discovery in the investment treaty context can be interpreted as a favorable sign). Among the remaining circuits, the Eleventh Circuit (with appellate jurisdiction over the federal district courts in Florida) has suggested, without deciding, that section 1782 discovery may be available post-*Intel* for use in private international arbitration,[xxix] while the Seventh Circuit (with appellate jurisdiction over the federal district courts in Illinois) has characterized its availability as "uncertain."[xxx]

Absent controlling authority in most circuits, district courts have issued conflicting decisions in post-*Intel* Section 1782 proceedings involving international commercial arbitrations. District courts in the First, Third, Eighth and Eleventh Circuits have granted section 1782 discovery in aid of such arbitrations.[xxxi] And in the Second Circuit, a federal magistrate judge in Connecticut authorized section 1782 discovery for use in a pending arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce under the UNCITRAL rules despite the Second Circuit's pre-*Intel* holding that such discovery is unavailable for use in private international arbitration.[xxxii] Yet in addition to the Fifth Circuit, district courts in the Ninth and Tenth Circuits have denied section 1782 discovery for use in private international arbitrations.[xxxiii] In the Seventh Circuit, district courts have come out on both sides of the issue. [xxxiv]

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[i] *See Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015) ("[A] district court evaluating a § 1782 discovery request should assess whether the discovery sought is overbroad or unduly burdensome by applying the familiar standards of Rule 26 of the Federal Rules of Civil Procedure."). As recently amended, Rule 26 provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1).

[ii] *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1200 (11th Cir. 2016) (emphasis added); *but see In re Kreke Immobilien KG*, No. 13 MISC. 110 NRB, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) ("Within this district, opinion has been divided over whether § 1782 can compel parties to produce documents located outside of the United States.") (collecting cases).

[iii] *Gushlak v. Gushlak*, 486 F. App'x 215, 217 (2d Cir. 2012) ("[I]t is neither uncommon nor improper for district courts to grant applications made pursuant to § 1782 *ex parte*.").

[iv] *Id.*

[v] *See In re Naranjo*, 768 F.3d 332, 346 (4th Cir. 2014) ("Every other circuit court that has considered the jurisdictional issue presented here has found subject matter jurisdiction to hear an immediate appeal from an order on a § 1782 application.") (collecting cases).

[vi] *Brandi–Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2d Cir. 2012) (quoting 28 U.S.C. § 1782(a)).

[vii] Limited exceptions exist in which a district court may exercise jurisdiction over non-residents. For example, personal service on a non-resident individual, while temporarily present within the judicial district, of a subpoena issued pursuant to an existing section 1782 discovery order may suffice. *See In re Edelman*, 295 F.3d 171, 180 (2d Cir. 2002) ("[W]e hold that if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for the purposes of § 1782(a), he is 'found' in that district.").

[viii] *See, e.g.*, *In re Application of Gorsoan Ltd. & Gazprombank OJSC for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding*, No. 13 Misc. 397 (PGG), 2014 WL 7232262, at *5 (S.D.N.Y. Dec. 10, 2014), *aff'd sub nom. Gorsoan Ltd. v. Bullock*, No. 15-57-CV, 2016 WL 3212261 (2d Cir. June 8, 2016) (court had jurisdiction where limited liability company "ha[d] its principal place of business in New York").

[ix] In *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), the United States Supreme Court held that a corporation is subject to general jurisdiction only where it is "at home." *Id.* at 760-61. And absent "exceptional circumstances," a corporation is only "at home" in the jurisdiction where it is incorporated or maintains its principle place of business. *Id.* at 761 n.19. Under *Daimler*, it is therefore unclear whether section 1782 discovery from a corporate entity may be obtained anywhere other than the district in which the corporation maintains its principal place of business. *See* Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344, 389 n.224 (2016) (characterizing *Daimler's* impact on section 1782 discovery as "unclear" and noting that "[p]rior to *Daimler*, a corporation's 'systematic and continuous' contacts with a district were sufficient to subject it to § 1782 discovery there, even if its place of incorporation and principal place of business were elsewhere").

[x] *See Australia & New Zealand Banking Group Ltd. v. APR Energy Holding Ltd.*, No. 17-MC-00216 (VEC), 2017 WL 3841874, *5 (S.D.N.Y. Sep. 1, 2017).

[xi] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

[xii] *Id.* at 259.

[xiii] *See Mees*, 793 F.3d at 301 (an applicant may satisfy the "for use" requirement by "showing that the materials she seeks are to be used at some stage of a foreign proceeding that [i]s within reasonable contemplation"); *Bravo Express Corp. v. Total Petrochemicals & Ref. U.S.*, 613 F. App'x 319, 322 (5th Cir. 2015) (section 1782 "only requires the foreign proceeding to be in 'reasonable contemplation'") (citation omitted); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014) ("The future proceedings must be more than speculative . . . and a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time.") (internal quotation and citation omitted).

[xiv] *Intel*, 542 U.S. at 256.

[xv] *Id*. at 264-65.

[xvi] *See, e.g.*, *In re Ex Parte Application of Qualcomm Inc.*, 162 F. Supp. 3d 1029, 1039 (N.D. Cal. 2016) ("The issue of whether an entity is a participant [in the foreign proceeding] is not dispositive; *Intel* puts it in the context of whether the foreign tribunal has the authority to order an entity to produce the disputed evidence."); *In re Judicial Assistance Pursuant to U.S.C. Sec. 1782 ex rel. Macquarie Bank Ltd.*, No. 2:14-CV-0797 (GMN) (NJK), 2014 WL 7706908, at *3 (D. Nev. June 4, 2014) (even if the target is a participant in the foreign proceeding, the first factor "militates in favor of granting § 1782 relief" where "the foreign tribunal's procedural rules may not allow for the discovery sought"); *cf. In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (section 1782 discovery "is both unnecessary and improper" where the evidence in question "is available to the foreign tribunal").

[xvii] *See Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 10100 (2d. Cir.1995) ("[A] district court's inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782."); *In re Application of Elvis Presley Enterprises LLC for an Order to Take Discovery Pursuant to 28 U.S.C. § 1782*, No. 15-MC-386 (DLC), 2016 WL 843380, at *5 (S.D.N.Y. Mar. 1, 2016) (requiring a "greater showing . . . to demonstrate that [the applicant] is attempting to dodge foreign proof-gathering restrictions"); *In re Mesa Power Grp., LLC*, 878 F. Supp. 2d 1296, 1305 (S.D. Fla. 2012) ("Absent a persuasive showing that a section 1782 applicant . . . is actively seeking to circumvent the foreign tribunal's discovery methods and restrictions . . . this factor does not counsel against section 1782 relief."). Some courts have even shifted the burden with respect to the second and third factors onto the party resisting discovery. *See, e.g.*, *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597 (7th Cir. 2011) ("Once a section 1782 applicant demonstrates a need for extensive discovery for aid in a foreign lawsuit, the burden shifts to the opposing litigant to demonstrate, by more than angry rhetoric, that allowing the discovery sought (or a truncated version of it) would disserve the statutory objectives."); *In re Application of Gorsoan Ltd. & Gazprombank OJSC for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding*, No. 13 Misc. 397 (PGG), 2014 WL 7232262, at *7 (S.D.N.Y. Dec. 10, 2014), *aff'd sub nom. Gorsoan Ltd. v. Bullock*, 652 F. App'x 7 (2d Cir. 2016) ("[T]he weight of authority indicates that the party opposing the Section 1782 application bears the burden of proving the non-receptivity of the foreign tribunal.").

[xviii] *See Ahmad Hamad Algosaibi & Bros. Co. v. Standard Chartered Int'l (USA) Ltd.*, 785 F. Supp. 2d 434, 438 (S.D.N.Y. 2011) ("[A]s with discovery requests in domestic litigation, if a court 'suspects that the [§ 1782 discovery] request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request.'") (quoting *In re Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77, 79 (2d Cir.1997)).

[xix] Limited exceptions to this rule exist. *See supra*, n.vii.

[xx] *See supra*, n.ix.

[xxi] *See Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 186 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999).

[xxii] *Intel*, 542 U.S. at 258.

[xxiii] *Id.* (quoting Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026–27 & nn.71, 73 (1965)).

[xxiv] *See In re Application of Mesa Power Group, LLC*, No. 2:11–mc–280 (ES), 2012 WL 6060941, at *5 (D.N.J. Nov. 20, 2012) (finding that "an international arbitration with Canada under the arbitration rules of UNCITRAL and NAFTA . . . . constitutes a foreign or international tribunal for the purposes of 28 U.S.C. § 1782"); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *aff'd sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) ("[I]nternational arbitral bodies operating under UNCITRAL rules constitute 'foreign tribunals' for purposes of Section 1782."); *In re Veiga*, 746 F. Supp. 2d 8, 22-23 (D.D.C. 2010) (agreeing that an arbitration "conducted under the Bilateral Investment Treaty between the United States and Ecuador and under UNCITRAL rules . . . . falls within the metes and bounds of § 1782(a)").

[xxv] *See In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011) ("[U]se of the evidence uncovered in a section 1782 application in the BIT arbitration to 'attack' the [Ecuadorian court] unquestionably would be 'for a use in a proceeding in a foreign or international tribunal.'").

[xxvi] *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009) ("Because [w]e cannot overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent, we remain bound by our holding [the court's pre-*Intel* decision] in *Biedermann.*") (internal quotations and citation omitted, first alteration and emphasis in original).

[xxvii] Moreover, the Second Circuit in *Chevron Corp. v. Berlinger*, 629 F.3d 297, 310–11 (2d Cir. 2011) declined to reach the issue of whether an arbitral tribunal established under a bilateral investment treaty is a "foreign or international tribunal" for purposes of section 1782.

[xxviii] *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016).

[xxix] *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) (acknowledging the potential impact of *Intel* but leaving "for another day" resolution of whether international commercial arbitration qualifies as a proceeding before a foreign tribunal).

[xxx] *GEA Grp. AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (7th Cir. 2014) (opining in *dicta* that whether a foreign arbitral tribunal qualifies as "a foreign or international tribunal" is "uncertain"; an arbitral tribunal "might be considered such a tribunal," or it "might not").

[xxxi] *See, e.g.*, *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) ("There is no textual basis upon which to draw a distinction between public and private arbitral tribunals . . . ."); *Comision Ejecutiva Hidroelectrica del Rio Lempa v. Nejapa Power Co., LLC*, No. CIV.A. 08-135-GMS, 2008 WL 4809035, at *1 (D. Del. Oct. 14, 2008) ("[T]he Supreme Court's decision in *Intel* . . . indicate[s] that Section 1782 does indeed apply to private foreign arbitrations."); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 956 (D. Minn. 2007) ("[T]his Court believes that the better approach to this issue is to reject any inflexible rule that would categorically exclude all private arbitrations from the definition of 'tribunal.'"). *See In Re Application of Pola Mar., Ltd.*, No. CV416-333, 2017 WL 3714032, at *2 (S.D. Ga. Aug. 29, 2017) (granting Section 1782 application in aid of an arbitration before the London Maritime Arbitration Association).

[xxxii] *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 (JBA), 2009 WL 2877156, at *3-4 (D. Conn. Aug. 27, 2009) (finding that "[a] reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, a body operating under the United Nations and established by its member states, and purely private arbitrations established by private contract.") (internal quotation and citation omitted); *see also In re Asia Mar. Pac. Ltd.*, No. 15 Civ.-2760 (VEC), 2015 WL 5037129, at *5 & n.8 (S.D.N.Y. Aug. 26, 2015) (noting that pre-*Intel* Second Circuit precedent "exclud[ing] private foreign arbitrations from the scope of qualifying § 1782 proceedings" has been "called into question by dictum in *Intel,*" following which "it is unclear whether private foreign arbitration proceedings qualify for § 1782 discovery").

[xxxiii] *See, e.g.*, *In re Application of Grupo Unidos or El Canal SA*, No. 14MC80277JSTDMR, 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015) ("Having reviewed the language of Section 1782, its legislative history, and the above cases, this court concludes that private arbitrations established by contract do not fall within the meaning of 'tribunal' under Section 1782."); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-MC-00226-MSK-KMT, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015) ("After reviewing Intel and the relevant cases, this court finds that a private arbitration does not fall within the meaning of 'foreign or international tribunal' under § 1782.").

[xxxiv] Compare *In re Arbitration between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd.*, 626 F. Supp. 2d 882, 886 n.4 (N.D. Ill. 2009) (noting that it is "not unreasonable to suppose that if the *Intel* Court had intended its holding to extend § 1782 to purely private arbitrations, it might have made some mention of the Second and Fifth Circuit authority expressly holding the contrary") *with In re Kleimar N.V v. Benxi Iron & Steel Am., Ltd.*, No. 17-CV-01287, 2017 WL 3386115, at *6 (N.D. Ill. Aug. 7, 2017) (concluding that "[b]ecause the decisions of the LMAA tribunal are judicially reviewable under English law, the tribunal constitutes a 'foreign tribunal' for purposes of § 1782.").