DISCOVERY IN THE UNITED STATES IN AID OF FOREIGN LITIGATION PURSUANT TO 28 U.S.C. § 1782

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The ability to obtain U.S.-style discovery against U.S.-based parties for use in proceedings in other countries is an increasingly important tool for lawyers engaged in litigation and arbitration around the world. Recent developments in the law, which goes by the catchy name 28 U.S.C. §1782, have made this device more readily available to non-U.S. litigants. What follows is a discussion of the statute and its requirements, a discussion at the history and policy behind the statute that allows such discovery and a brief look at the considerations relevant to an application for such discovery.

The Statute

28 U.S.C. § 1782 authorizes discovery assistance to litigants or other "interested persons" in proceedings before foreign and international tribunals and assistance to the tribunals themselves. The statute, in relevant part, provides:

> 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... The order may be made…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.

28 U.S.C. § 1782(a). Such an application must be made to the federal district court in the district in which the party from which discovery is sought is "found" or located. Id.

District courts have the authority to grant a discovery request so long as the following statutory requirements are met: (i) the discovery sought is for use in the foreign proceeding; (ii) the court is in the district where the party from whom discovery is sought is "found" or located; and (iii) the party seeking discovery is a foreign tribunal

or an "interested person" within the meaning of the statute. See generally, Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S.Ct. 2466 (2004).

Brief History of United States Courts' Aid to Foreign Tribunals

The United States has had the concept of assisting foreign tribunals since 1855. The goal, of course, has always been to foster international cooperation, which United States courts know as "comity." Originally, the mechanism was to allow foreign governments to use "letters rogatory" to seek deposition testimony, before a U.S. government official, to be used in actions for money or property abroad. These letters rogatory were transmitted through diplomatic channels. This mechanism worked well enough for the 19th century, but not for the pace of 20th century international commerce.

The United States Congress expanded this right in 1948, in light of the significant chances that were occurring to commerce in the post-war, Marshall Plan era. This 1948 amendment dropped the requirement that foreign government make the request, allowed the testimony to be taken in front of anybody designated by the court and allowed discovery in aid of any "civil action" in any country with which the U.S. was "at peace." "Civil action" was later changed to "judicial proceeding." The procedure was further recast in 1964, when the U.S. Congress added the right to seek discovery of documents and allowed parties to seek discovery for use in any "proceeding in a foreign or international tribunal, " in order to extend the reach to assist in administrative and quasi-judicial proceedings. The U.S. Congress' last significant change came in 1996, when Congress added "criminal investigation conducted before a formal accusation" to the proceedings that such discovery can assist.

The most important expansion of 28 U.S.C. § 1782 came in 2004, and was made not by the U.S. Congress, but by the U.S. Supreme Court. In its decision in Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S.Ct. 2466 (2004), the Supreme Court allowed AMD discovery from Intel in aid of an antitrust complaint AMD had filed with the EC's Directorate-General for Competition. In its interpretation of the statute, the Intel Court made two important departures from the requirements traditionally imposed by the lower courts. First, the Intel Court held that Section 1782 did not require that the foreign court or tribunal allow for the same sort of discovery, nor did it have to show that U.S. law would allow the discovery sought in an analogous U.S. proceeding. Second, the Intel Court ruled there was no requirement that the foreign proceeding be pending or even imminent. Third, the Intel Court set forth several discretionary factors that courts are to consider on such an application, including: (i) whether the person from whom discovery is sought is a party to the foreign proceeding; (ii) "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"; (iii) whether the petitioner is attempting to use Section 1782 as an attempt to circumvent discovery restrictions or policies in the forum country; and (iv) whether the discovery requests are "unduly intrusive or burdensome."

Considerations Relevant to an Application for Discovery Pursuant to 28 U.S.C. § 1782

Whether The Foreign Action Was a "Proceeding" Before a Section 1782 Foreign Tribunal.

Generally, where a foreign court acts as a "first-instance decisionmaker," it qualifies as a Section 1782 foreign tribunal, and discovery may be obtained for a

proceeding in that court. See Intel, 542 U.S. at 258, 124 S.Ct. 2466. See also, In re Merck & Co., Inc**.** 197 F.R.D. 267 (M.D.N.C. 2000) ("A proceeding includes any proceeding in which an adjudicated function is being exercised or is imminent"), citing Lancaster Factoring Co., Ltd. v. Mangone, 90 F.3d 38 (2d Cir. 1996).

B. Whether the Party from Which Discovery is Sought Was "Found" in the District.

Courts look to traditional United States jurisdictional law in determining what it means for a party to be "present" or "found" in a district. Courts have applied the traditional factors for exercising jurisdiction over a party in the context of Section 1782 discovery.

> [T]he question of what it means to be found in a particular locale is already the subject of well-settled case law on territorial jurisdiction. In Burnham v. Superior Court of California…the Supreme Court authorized the exercise of personal jurisdiction based on nothing more than physical presence…It is consistent construction to endow the phrase "or is found" in § 1782 with the same breadth as that accorded it in Burnham.

In re Edelman, 295 F.3d 171 (2d Cir. 2002), citing Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105 (1990) (plurality opinion).

C. Whether the Party Seeking Discovery is an "Interested Person" Within the Meaning of Section 1782.

The party seeking discovery must be a party to a proceeding before a foreign or international tribunal, which includes administrative and quasi-judicial proceedings. "An interested person includes a party to the foreign litigation, whether directly or indirectly involved." Merck & Co., Inc**.,** 197 F.R.D. 267, citing Lancaster Factoring Co., Ltd. v. Mangone, 90 F.3d 38 (2d Cir. 1996).

D. Whether the Discretionary Factors Established By The Supreme Court and the Underlying Policy Of Section 1782 Support the Belgian Company's Petition For Discovery In Aid of The Cayman Action.

As set forth above, the factors include: (i) whether the person from whom discovery is sought is a party to the foreign proceeding; (ii) "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"; (iii) whether the petitioner is attempting to use Section 1782 as an attempt to circumvent discovery restrictions or policies in the forum country; and (iv) whether the discovery requests are "unduly intrusive or burdensome." Intel, 542 U.S. at 264-65, 124 S.Ct. at 2483.

Courts are also to consider whether granting discovery pursuant to Section 1782 meets the "twin aims" 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." Malev. v. Hungarian Airlines v. United Tech. Int'l Inc., 964 F.2d 97, 100 (2d Cir. 1992). See also, Intel, 542 U.S. at 252, 124 S.Ct. at 2476. Section 1782 is particularly suited to circumstances such as these, in which discovery is needed from third parties in order to assist parties to international business disputes in litigating their claims before foreign tribunals. See, e.g., Lancaster Factoring Co. Ltd. v. Mangone**,** 90 F.3d 38 (2d Cir. 1996) (Court ordered debtor's former attorney to produce financial information pursuant to 28 U.S.C. § 1782 for use in an Italian bankruptcy proceeding).

E. Other Considerations for the Court.

The need for Section 1782 aid increases where the party from which discovery is sought cannot be made a party to the foreign proceedings. As the Intel Court found: "when the person from whom discovery is sought is a participant in the foreign proceeding…the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." Intel, 542 U.S. at 264, 124 S.Ct. at 2471. The Intel Court found further that non-participants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid." Id.

Interestingly, section 1782 does not impose a requirement that the material sought in the United States be discoverable under the laws of the foreign jurisdiction. Intel, 542 U.S. at 253, 124 S.Ct. at 2476. Although the admissibility of evidence in the foreign proceeding may be a "relevant consideration," courts must distinguish between admissibility and discoverability in considering whether to grant discovery. To deny a discovery petition could deprive a petitioner "of any opportunity even to try to offer the evidence." In re Application of Grupo Qumma, S.A. de C.V., 2005 WL 937486 (S.D.N.Y. April 22, 2005). Instead, it is for the foreign tribunal to determine admissibility, and that tribunal "will be in a better position to do so if [a petitioner] is permitted to conduct the requested discovery first." Id. Likewise, the Court need not examine admissibility requirements under the law of the foreign forum. Instead, to grant Section 1782 petition the Court needed only consider whether the materials sought were discoverable under U.S. law.

CONCLUSION

With its previous limitations substantially removed, 28 U.S.C. § 1782 can be extremely useful for obtaining documents and deposition testimony, consistent with the broad U.S. discovery rules, to assist parties in foreign proceedings. We have had success assisting foreign lititgants with this process.