The U.S. Supreme Court's Expansion of 28 U.S.C. § 1782: Is the Door Now Open to Discovery in Aid of Foreign Arbitration Proceedings?

Joshua D. Rievman
E. Anne Musella
Hoguet Newman Regal & Kenney, LLP
10 East 40th Street
New York, New York 10016-0301
U.S.A.
(212) 689-8808

Introduction

The statute known as 28 U.S.C. § 1782 has long authorized discovery assistance to litigants or other "interested persons" in proceedings before foreign tribunals, and to the tribunals themselves. The statute does not define "foreign tribunals," and as recently as 1999, the Fifth and Second Circuit Courts of Appeals had ruled that such discovery assistance was not available to parties before foreign arbitration panels, largely because they found that such arbitration panels were not "foreign tribunals." In 2004, however, in its decision in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466 (2004), the United States Supreme Court expanded the right to use Section 1782 in several important ways, including by expanding the definition of "foreign tribunals." While the question of whether Section 1782 applies to arbitration panels was not before the Supreme Court in Intel, the Court's analysis strongly suggests that Section 1782 discovery assistance should be available to parties before foreign arbitration panels, because such panels qualify as "foreign tribunals". Recently, a United States District Court agreed, raising the question of whether the Supreme Court has now opened the door for use of this device to provide discovery assistance in foreign arbitrations.

This article explores the assistance available under 28 U.S.C. § 1782 generally, and analyzes the decisions suggesting that the statute applies to foreign arbitration. The article then examines the considerations that courts use to evaluate Section 1782 applications. It further discusses the contexts in which Section 1782 have been used to date, including a look at its use to assist parties to foreign arbitration enforcement proceedings before foreign courts.

The Statute

28 U.S.C. § 1782 authorizes discovery assistance to litigants or other "interested persons" in proceedings before foreign and international tribunals and 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 United States District Court in the district in which the party from which discovery is sought is "found" or located. Id.

United States 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" in the foreign proceeding within the meaning of the statute. Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466 (2004). Although Section 1782 vests authority in the U.S. District Courts to order discovery for use in foreign proceedings, the statute does not require them to do so. Courts instead are instructed to consider several discretionary factors, as well as the overall policy of the statute, before authorizing discovery, including whether the request for discovery 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.

The Statute's Legislative History

United States federal law has embraced the concept of assisting foreign tribunals since 1855. The goal, of course, has always been to foster international cooperation in the interests of 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 Nineteenth Century, but was plainly insufficient for the pace of Twentieth-Century international commerce.

The United States Congress expanded this right in 1948, in light of the significant changes that were occurring to commerce in the post-war, Marshall Plan era. This 1948 amendment eliminated 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." Importantly, 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. This change went to the heart of the Supreme Court's recent suggestion that foreign arbitrations might qualify for Section

1782 assistance. The U.S. Congress' last significant change came in 1996, when Congress expressly added "criminal investigation conducted before a formal accusation" to the list of 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 (2004), the Supreme Court allowed AMD discovery from Intel in aid of an antitrust complaint AMD had filed with the Directorate-General for Competition of the Commission of the European Communities (the "Commission").

In its interpretation of the statute, the Intel Court made several important departures from the requirements traditionally imposed by the lower courts. Most importantly for the purposes of this article, the Intel Court made important findings about the nature of a foreign tribunal in a ruling that the Commission qualified as such a tribunal. Along the way it expressly stated, albeit in dicta, that the definition of "tribunal" includes "arbitral tribunals." Intel, 542 U.S. at 258, 124 S. Ct. at 2479. Second, the Intel Court expressly abrogated existing case law by holding 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. Third, the Intel Court ruled that the statute imposes no requirement that the foreign proceeding be "imminent" or even "pending." Rather, the foreign proceeding need only be in "reasonable contemplation" to warrant discovery under Section 1782. Intel, 542 U.S. at 246, 124 S. Ct. at 2473. See also In re Request for Legal Assistance from the Netherlands in the Criminal Matter of Robert Wilhelm and

Others, 470 F. Supp. 2d 409 (S.D.N.Y. 2007). Fourth, the Intel Court also established several discretionary factors that courts are to consider on such an application.

Intel's Effect on the Availability of Section 1782 in Private Foreign Arbitrations

The Intel Court's expansion of the definition of "foreign tribunal," and inclusion of "arbitral tribunal" was a departure from the law that existed at the time. Five years before the Supreme Court's decision in Intel, both the Second Circuit (which covers New York, Connecticut and Vermont) and the Fifth Circuit (which covers Texas, Louisiana and Mississippi) had each expressly ruled that 28 U.S.C. § 1782 did not apply to private arbitrations. See National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Intern., 168 F.3d 880 (5th Cir. 1999). Although the issue of whether an arbitration panel is a "foreign tribunal" was not before the Supreme Court in Intel, the changes made by the Intel Court were so sweeping, at least one court has ruled, that there is now sufficient authority to determine that foreign arbitral panels are in fact "tribunals" within the statute's scope. In re Roz Trading Ltd., 469 F. Supp.2d 1221 (N.D.Ga. 2006) (finding arbitration panel is "foreign tribunal" eligible for 28 U.S.C. § 1782 discovery based on Intel.) See also In re Matter of Application of Oxus Gold PLC, 2007 WL 1037387 (D.N.J. 2007) (granting Section 1782 discovery where only an arbitration was pending, noting information could be used in another proceeding, not yet pending).

In Intel, the Supreme Court held that the Commission was a "tribunal" within the meaning of § 1782. The Court observed that the Commission "is the European Union's primary antitrust law enforcer," accepts antitrust complaints and conducts preliminary investigations, and that its decisions are "subject to review in the Court of First Instance

and the European Court of Justice." Intel 542 U.S. at 250-55, 124 S. Ct. at 2466. Ultimately, the Intel Court reasoned that the Commission "is a § 1782(a) 'tribunal' when it acts as a first-instance decisionmaker" capable of rendering a decision on the merits, and as part of the process that could ultimately lead to final resolution of the dispute. Id. at 246-47, 124 S. Ct. at 2466.

The Supreme Court's rationale for finding the Commission to constitute a "tribunal" are instructive. The Supreme Court examined the statute's legislative history, noting that, in a 1964 amendment to Section 1782, "Congress deleted 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'." Intel, 542 U.S. at 248-49, 124 S.Ct. 2466 (citations omitted). Citing to the statute's legislative history, the Court found that "Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and *quasi-judicial proceedings abroad]*." Id. at 258, 124 S.Ct. 2466 (emphasis added) (citation omitted). The Court also supported this finding by citing a scholarly article's definition of "tribunal": "[t]he term 'tribunal' ... includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional ... courts." Id., (quoting Hans Smit, Int'l Lit. Under the United States Code, 65 Colum. L.Rev. at 1026-27 (1965) (emphasis added)). Because the subject of arbitration was not before the Intel Court, this is merely dicta, but the import is clear: first-instance decisionmakers that are at least quasi-judicial and fit the traditional definition of "tribunal" are "foreign tribunals" under Section 1782.

In Roz Trading, the Northern District of Georgia relied on the Intel Court's analysis in holding that an arbitration panel composed under the International Arbitral

Centre of the Austrian Federal Economic Chamber in Vienna ("the Centre") was a "foreign tribunal" within the meaning of Section 1782. In re Roz Trading Ltd., 469 F. Supp.2d 1221, 1224-28 (N.D.Ga. 2006). "Although the Supreme Court in Intel did not address the precise issue of whether private arbitral panels are 'tribunals' within the meaning of the statute, it provided sufficient guidance for this Court to determine that arbitral panels convened by the Centre are 'tribunals' within the statute's scope." Id. at 1224. In reaching this conclusion, the Roz Trading Court prepared a careful analysis and was persuaded by several factors, including the Supreme Court's use of the definition of "tribunal" to include "arbitral tribunals." Id. at 1224-25. The Roz Trading Court was further persuaded by the Supreme Court's determination that the Commission constituted a "tribunal" when it acted as a "first-instance decisionmaker" in a proceeding "that leads to a dispositive ruling." Id. at 1225. In concluding that the Centre's arbitration panels are foreign proceedings, the Roz Trading Court ruled that the arbitration panel at issue met each of the Supreme Court's criteria:

> The Centre's arbitral panels are similarly "first-instance decisionmaker[s]" that issue decisions "both responsive to the complaint and reviewable in court." Respondent does not dispute that the Centre "is constituted to hear disputes, weigh evidence, and issue rulings that will finally bind the parties in accordance with its Rules ..." (citation omitted) Respondent also does not dispute that the Centre's orders "are enforceable in Austrian courts ..."(Id.) The Centre, when examined under the same functional lens with which the Supreme Court in Intel examined the DG-Competition, must necessarily be considered a "tribunal" under § 1782(a).

Roz Trading, 469 F. Supp.2d at 1225.

The Roz Trading Court held further that the decisions of the Second and Fifth Circuits in Nat'l Broad Co. and Republic of Kazakhstan, respectively, were "materially

impacted by the Supreme Court's ruling in Intel, in light of the Supreme Court's embrace of a common sense definition of "tribunal," its careful analysis of the statute's legislative history, and its express rejection of "categorical limitations" on the scope of Section 1782. Roz Trading, 469 F. Supp.2d at 1227-28; see also Intel, 542 U.S. at 256, 124 S.Ct. 2466. In sum, Roz Trading makes a compelling case for the application of 28 U.S.C. § 1782 to private foreign arbitration proceedings.

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

There are three primary statutory considerations that a party should address in any Section 1782 application.

A. Whether the Foreign Action is a "Proceeding" Before a Section 1782 "Foreign Tribunal"

As made clear above, where a foreign tribunal hearing the dispute acts as a "first-instance decisionmaker," it qualifies as a Section 1782 foreign tribunal, and discovery may be obtained for a proceeding before such tribunal. See Intel, 542 U.S. at 258. Thus, as discussed, the Commission is a "tribunal" within the meaning of Section 1782(a), id; just as a "private institution whose proceedings are voluntary and arbitral" such as the Centre also qualifies as a Section 1782 tribunal, see In re Application of Roz Trading Ltd., 469 F. Supp. 2d 1221 (N. Dist. Georgia 2006), as is a prosecutor's office even before formal accusations. See, e.g., In Request for Legal Assistance from the Netherlands in the Criminal Matter of Robert Wilhelm and Others; 470 F. Supp. 2d 409 (S.D.N.Y. 2007).

B. Whether the Party from Which Discovery is Sought Is "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. Likely many of you from outside of the United States have encountered this doctrine in representing your clients with dealings here. This topic is the subject of a great amount of nuanced decisional law, but a brief summary might be helpful to you.

Due process requirements of the United States Constitution are met so long as a defendant (or a respondent to a Section 1782 application) has "certain minimum contacts" with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945) (citations omitted); see also Hanson v. Denckla, 357 U.S. 235, 250-54 (1958). That is, in any plenary action in the untied States, a plaintiff must show first that the foreign party has the "minimum contacts" with the forum as necessary to warrant the forum court's exercise of personal jurisdiction, and second, that "the assertion of jurisdiction comports with traditional notions of fair play and substantial justice – that is, whether it is reasonable under the circumstances of a particular case." Chew v. Dietrich, 143 F.3d 24, 28 (2d Cir. 1998) (alterations, citations and quotation marks omitted), quoted in Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP, No. 03 Civ. 0613, 2004 WL 2848524, at *6 (S.D.N.Y. Dec. 9, 2004).

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. For example, an agent of a trustee in a foreign bankruptcy proceeding, although "indirectly" involved in the bankruptcy, qualifies as an "interested person" under the statute. Lancaster Factoring Co., Ltd. v. Mangone, 90 F.3d 38 (2d Cir. 1996). "A foreign legal affairs ministry, attorney general, or other prosecutor, fits squarely within the § 1782 interested person category." Federal Procedure, Lawyers Edition, 10B Fed. Proc., L. Ed. § 26:929 (November 2007).

The Discretionary Factors Established By The Supreme Court

The Supreme Court in deciding Intel made clear that "§ 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance" in aid of a foreign proceeding. The Intel court set forth the following non-exhaustive list of factors for a district court to consider in reaching its decision: (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.

A. *Whether a Person From Whom Discovery is Sought is a Party to the Foreign Proceeding*

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.

B. *Receptivity to U.S. Federal-Court Judicial Assistance*

"Courts have determined that the receptivity of a foreign court to U.S. federal judicial assistance may be inferred from the existence of treaties that facilitate cooperation between the U.S. federal judiciary and the foreign jurisdiction." In re Application of Imanagement Services Ltd., No. Civ. A. 05-2311, 2006 WL 54949 *1, *4 (D.N.J. Mar. 3, 2006), citing In re Servicio Pan Americano de Proteccion, 354 F. Supp. 2d 269, 274 (S.D.N.Y. 2004). It is important to note that a federal district court will find a lack of receptivity on the part of a foreign government or tribunal only "by affirmative evidence," such as express statements in amicus briefs, or an express request from a governmental body. Id. (citations omitted).

C. *Whether the Petitioner is Attempting to Circumvent Foreign Discovery Restrictions*

Echoing their preference to enforce Section 1782 against non-parties to the foreign proceeding, federal district courts frown upon the use of Section 1782 to circumvent the foreign tribunal's limitations on discovery. The United States District Court for the Northern District of California granted third-party motions to quash Microsoft's subpoena of documents to be used in a European Commission hearing to enforce Microsoft's compliance with an earlier decision. In re Application of Microsoft Corporation, 2006 WL 825250 (N. Dist. Cal. Mar. 29, 2006). As part of its analysis, the Court considered the Intel factors, and ultimately found that Microsoft's third-party

subpoenas were "an attempt to circumvent specific restrictions" the European Commission had imposed upon Microsoft – namely, that certain information the Commission had gathered and used to monitor Microsoft's compliance had been deemed confidential by the Commission, and could be disclosed to Microsoft only in compliance with the Commission's procedures. The Microsoft Court noted that the situation at bar involved not only "a foreign tribunal's general rules and procedures governing proof gathering…[but also] a tribunal's specific order restricting a specific litigant's ability to gather evidence." Id.

This factor is likely to be the weakest link in applications to obtain such discovery in aid of a private arbitration, because as the Second Circuit found in Nat'l Broad. Co., that discovery under Section 1782 is broader than that available under arbitration schemes, such as the Federal Arbitration Act. National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 187-88 (2d Cir. 1999). Yet just as courts have complete discretion to order discovery under Section 1782, they also have "complete discretion in prescribing the procedure" for such discovery. Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995) (citation omitted). "If a district court is concerned that granting discovery under § 1782 will engender problems in a particular case, it is well-equipped to determine the scope and duration of that discovery." Application of Esses**,** 101 F.3d 873 (2d Cir. 1996). Courts have opined that "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." Euromepa, 51 F.3d at 1101 (citations omitted).

D. *Whether the Discovery Requests Are "Unduly Intrusive or Burdensome"*

In re Edelman, 295 F.3d 171 (2d Cir. 2002) makes it clear that Section 1782 may subject a foreign party to a deposition. Whether documents physically located outside of the United States are discoverable in a Section 1782 proceeding is less clear. The case law suggests that Section 1782 in not the proper tool to discover documents located outside of the U.S. See Norex Petroleum Ltd. V. Chubb Insurance Co. of Canada, 384 F. Supp. 2d 45 (D.D.C. 2005). In contrast, however, the United States District Court for the Southern District of New York recently permitted discovery of a McKinsey report and related documents published in Germany, reasoning that the express language of Section 1782 did not preclude it. In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf, ___ F. Supp.2d ___, 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006). The Court reasoned that, although the documents were physically located in Germany, McKinsey, who was "located" in the U.S. would suffer no undue hardship from procuring documents located in its German office. In reaching its decision, the Court emphasized the discretionary nature of the consideration, in a nod to the contrary authority that exists on this issue:

> Although the Court held in In re Application of Sarrio S.A., No. M9-372 (RPP), 1995 WL 598988, at * * 2-3 (S.D.N.Y. Oct. 11, 1995), that § 1782 does not extend to the discovery of documents located abroad, on appeal the Second Circuit expressly declined to rule on the issue and overruled the district court's decision on other grounds, 119 F.3d 143 (2d Cir.1997). More recently, in In re Microsoft, 428 F.Supp.2d. 188, 192-93 (S.D.N.Y.2006) (CM), the district court stated in dicta, but without analysis, that the scope of § 1782 is limited to domestically located documents. Id. at 194 n. 5. Although there is some support for this proposition in the legislative history, see S.Rep. No. 1580, 88th Cong., 2d Sess. (1964) (stating that the intent of the 1964 amendments to § 1782 was "to clarify and liberalize existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and

> documentary evidence in the United States") (emphasis added), this passage is at best ambiguous on the issue of whether documents abroad could be obtained through affiliated parties located in the United States, and should not be used to supplant the otherwise non-restrictive language of § 1782. See Intel, 542 U.S. at 260; In re Gianoli Aldunate, 3 F.3d at 59. Further, while certain policy considerations may counsel in favor of not allowing § 1782 to be used as an instrument to compel discovery of documents located abroad, see Sarrio, 1995 WL 598988, at * 2 (noting Professor Hans Smit's concerns that § 1782 would be used to interfere with foreign procedures and place undue burden on United States courts), such considerations cannot supplant the policy expressed by Congress in the plain words of the statute. Rather, for the reasons explained in the text above, such considerations should be weighed on a case-by-case basis along with the other discretionary factors.

In re Application of Gemeinshcaftspraxis, 2006 WL 3844464 at *5, fn.13.

Other Considerations for the Court

Intel and other Section 1782 cases make it clear that the discretionary factors discussed above are not exhaustive. Overall, courts must also 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.

To further those aims, Section 1782 does not impose requirements that the material sought in the United States be admissible under the laws of the foreign jurisdiction. Intel, 542 U.S. at 253. Admissibility of the evidence in the foreign proceeding may be a relevant consideration; however, courts have warned that 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 at *1 (S.D.N.Y. April 22, 2005). United States courts must also avoid an admissibility analysis for reasons of judicial and economic efficiency. In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil, 466 F. Supp.2d 1020 (N.D. Ill. 2006). 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." Grupo Qumma, 2005 WL 937486 at *3.

Uses of Section 1782

Section 1782 has been analyzed and used extensively in a wide range of foreign proceedings including, but not limited to: foreign antitrust controversies (Intel, 542 U.S. 241; Microsoft, 2006 WL 825250 at *1) divorce proceedings (Lopes v. Lopes, 180 Fed. Appx. 874 (11th Cir. 2006)); labor and employment disputes (Labor Court of Brazil, 466 F. Supp. 2d at 1020); and securities litigation (Edelman, 295 F.3d at 171). Section 1782 discovery is particularly effective for 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). Finally, a United States District Court recently applied 28 U.S.C. § 1782 to assist a private arbitration in Austria, and made a persuasive case that the Supreme Court's decision in Intel opened the door to private foreign arbitrations, once and for all. Roz Trading Ltd., 469 F. Supp.2d at 1224-28. It is too soon to tell whether or not other Courts will follow Roz Trading.

What is clear, though, is that Section 1782 is a useful tool to assist efforts to enforce foreign arbitration awards. For instance, last year we were asked to assist a Belgian company that had won a large arbitration award in Switzerland against four Chinese companies. The companies had no assets in New York, so obtaining a confirmation of the award based on *in rem* jurisdiction would have been a waste of resources. The client had learned that the Chinese companies, in an attempt to render themselves judgment-proof, had sold their assets to affiliated individuals for a fraction of the actual value of the assets. These individuals, in turn, had agreed to sell them to a leading U.S. retailer through a shell company in the Cayman Islands, for their true value, which was about twenty times the sale price to the individuals. The Belgian company brought an action in the Cayman Islands, and obtained a worldwide freezing or Mareva injunction, against the four Chinese companies, the individuals and the Cayman Corporation. In support of the Cayman action, the Belgian company wanted discovery from the U.S. retailer.

We obtained expedited relief pursuant to 28 U.S.C. § 1782, which ordered the requested discovery from the retailer to be produced within a matter of days. As a result, the client gained valuable information for the Cayman proceeding, and also learned that the Cayman structure had been partially abandoned in favor of one involving a company in Mauritius. This led to a successful application for an injunction in Mauritius.

Conclusion

With its previous limitations substantially removed by Congress and the Supreme Court's decision in Intel, 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. And these proceedings just might include private arbitrations, consistent with the Intel court's reasoning. In addition, Section 1782 remains a useful tool for the enforcement of foreign arbitral awards.