ALERT MEMORANDUM

The Use of U.S. Discovery Tools in International Arbitration

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The scope of discovery in international arbitration is generally narrower than that available to litigants in the United States. However, 28 U.S.C. § 1782 ("Section 1782") makes a wide range of U.S. discovery tools available to litigants in foreign proceedings, where certain preconditions are satisfied.

Recent appellate decisions suggest a growing circuit split between U.S. Courts of Appeals on the issue of whether arbitration proceedings should qualify for assistance under the statute. The Fifth Circuit has ruled against Section 1782 assistance for arbitration proceedings, the Third and Eleventh Circuits have suggested (but not decided) that private arbitrations could qualify for assistance, while the Seventh Circuit has conceded that the law is unsettled.

Intervention by the U.S. Supreme Court may be required before this issue is finally decided. For the moment, this means that it is crucially important for a potential Section 1782 applicant to:

(i) understand the criteria that must be met in order to successfully qualify for assistance; and

(ii) consider carefully the case law in the U.S. federal district and circuit where the application will be made.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

FRANKFURT

Richard Kreindler
+49 69 97103 160
rkreindler@cgsh.com

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

LONDON

Christopher Moore
+44 20 7614 2227
cmoore@cgsh.com

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

NEW YORK

Jonathan Blackman
+1 212 225 2490
jblackman@cgsh.com

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

1. Overview of Section 1782 assistance

Section 1782 provides foreign litigants access to broad U.S. discovery tools including oral and written examinations of individuals and corporations (called depositions), as well as the production of documents, including both hard copy and electronically stored information.[1]

An application for discovery under Section 1782 is subject to a two-tiered review. First, the U.S. trial court must assess whether the application satisfies the three mandatory requirements set forth in the statute's text. If so, the court may grant the application but it is not required to do so. Second, the court must satisfy itself that in the light of the four discretionary factors set forth in the U.S. Supreme Court decision *Intel Corp. v. Advanced Micro Devices, Inc.*[2] it is proper in the circumstances to make a Section 1782 order. Before discussing Section 1782's mandatory requirements and the discretionary *Intel* factors, we will first provide an overview as to how a Section 1782 application is typically made.

2. The basics of a Section 1782 application.

A Section 1782 application should explain to the court the facts necessary to demonstrate that the statutory requirements are met and to convince the court that it should exercise its discretion to grant the request. The application should specify the evidence sought and the reasons for seeking it.

A standard Section 1782 application comprises:

- a memorandum of law explaining why the application satisfies the three mandatory requirements and why the four discretionary factors weigh in favor of granting the application;
- a declaration made by one of the applicant's attorneys, which attaches supporting evidentiary materials, if any, as well as the documentary and/or testimonial subpoenas that the applicant is seeking permission to serve on the target of discovery;[3] and
- a proposed order for the court to endorse, giving the applicant permission to serve the subpoena(s) on the target of discovery.

Whether the Section 1782 application (or a subsequent motion to quash) is granted or denied, it is immediately appealable to the Court of Appeal for the federal judicial circuit in which the district court that heard the application is located.[4] The Court of Appeal will likely serve as the final arbiter of the application, as the U.S. Supreme Court hears only a small fraction of the petitions that it receives.

3. Section 1782 Statutory Prerequisites

There are three prerequisites to a court's invocation of Section 1782. The court must find all of the following:

1 Fed. R. Civ. P. 30-31, 34.

2 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

3 A subpoena is a document that commands the recipient to produce documents or to appear at a particular place and time to testify. If the recipient fails comply without an adequate excuse, he/she/it may be held in contempt of court. Fed. R. Civ. P. 45(g).

4 *Chevron Corp. v. Berlinger*, 629 F.3d 297, 306 (2d Cir. 2011) ("an order granting or denying discovery […] constitutes the final resolution of a petition to take discovery in aid of a foreign proceeding under 28 U.S.C. § 1782 […] [and] is immediately appealable under [28 U.S.C.] § 1291, regardless of the fact that the suit in another tribunal, to which it relates, remains unadjudicated"); *see also 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").

(1) that the party seeking to invoke Section 1782 is an "interested person" with a reasonable interest in U.S. judicial assistance or is a "foreign or international tribunal;"

(2) that the evidence is sought for use in a foreign or international proceeding; and

(3) that the person or entity targeted for the production of evidence "resides" or "is found" in the court's district.

If a court concludes that any of these elements is lacking, it cannot grant the application.

a. "interested person" or "foreign or international tribunal"

Section 1782 requires that the applicant must be either an "interested person" or the "foreign or international tribunal." The category of interested persons entitled to seek assistance under Section 1782 is not confined to the litigants themselves, but extends to anyone who "possess[es] a reasonable interest in obtaining [judicial] assistance."[5] For example, in *Intel*, the Supreme Court concluded that the complainant who triggers a European Commission investigation should be considered an interested person under Section 1782. In another case, a district court held that village officials in Tanzania who signed a complaint brought on behalf of their villages qualify as interested persons because they "are the officials directing and authorizing the litigation."[6]

b. "proceeding in a foreign or international tribunal"

The U.S. courts are divided on whether arbitrations, particularly private arbitrations such as those under the aegis of institutions like the ICC, qualify as the kind of "foreign or international tribunal" covered by Section 1782. However, it is clear based on legislative history that Congress intended the term to extend beyond conventional courts. The last amendment to the statute noted that it was made to ensure "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings."[7]

A few illustrative decisions suggest that proceedings entitled to assistance under Section 1782 must be both objective and capable of adjudicating fact and law.[8] Although international arbitral tribunals satisfy both criteria, controversy still remains over whether they qualify for Section 1782 assistance. There are now a number of court decisions in support of the position that arbitral tribunals are within the scope of Section 1782, though this was not always the case. Importantly,

5 *Intel*, 542 U.S. at 256.

6 *Minis v. Thomson*, No. 14-91050-DJC, 2014 WL 1599947, at *3 (D. Mass. 2014).

7 *Intel*, 542 U.S. at 249.

8 *See, e.g., In re Letter of Request From Government of France*, 139 F.R.D. 588, 590 (S.D.N.Y. 1991) (proceedings before a *juge d'instruction* in France *qualified* where the *juge* determined if there was sufficient to evidence to require the accused to stand trial and did not have "an institutional interest in a particular result"); *Fonseca v. Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980) (Superintendent of Exchange Control in Colombia was *not entitled* to assistance because he represented the government's interest in enforcing its capital controls); *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (Indian Income Tax Officer *not qualified* because he had a dual role, encompassing both "making the government's argument as well as […] evaluating it"); *In re Letters Of Request To Examine Witnesses From The Court Of Queen's Bench For Manitoba, Canada*, 59 F.R.D. 625 (N.D. Cal. 1973) *aff'd* 488 F.2d 511 (9th Cir. 1973) (rejecting a request for assistance from a Canadian Commission of Inquiry tasked with investigating the development of a forestry and industrial complex and making recommendations because it did not have any power to make binding adjudications of fact or law).

two U.S. Courts of Appeals confronting the issue in the late 1990s reached the opposite conclusion.[9] However, the U.S. Supreme Court's *Intel* decision, issued in 2004, included dicta suggesting that both Courts of Appeals might have gotten it wrong. Specifically, the court quoted with approval a passage from an article by Hans Smit, the lead drafter of Section 1782, which stated:

> "The term 'tribunal' [...] includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[10]

A number of district (*i.e.*, trial) courts have subsequently inferred from the language quoted above a willingness to extend Section 1782 assistance to foreign arbitral tribunals.[11]

In contrast, other courts have been willing to extend Section 1782 assistance to arbitral tribunals as long as they were constituted pursuant to an arbitration clause in an international treaty, such as a bilateral investment treaty.[12] Though the proceedings before these tribunals remain purely private, the fact that they are "being conducted within a framework defined by two nations"[13] has given courts comfort that the tribunals are sufficiently close to a conventional, state-sponsored tribunal to fall within Section 1782's ambit.

Though the weight of post-*Intel* authority initially favored granting Section 1782 assistance to arbitral tribunals, a number of recent decisions have reached the opposite result and the issue remains unsettled under U.S. law.[14] Skirmishes regarding the scope of Section 1782 have, for the most part, been played out at the district court level. Only one Court of Appeal has directly weighed in on the proper reading of Section 1782

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9 *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).

10 *Intel*, 542 U.S. at 258 (emphasis added).

11 *See, e.g., In re Owl Shipping, LLC*, No. 14-5655, 2014 WL 5320192, at *2 (D.N.J. 2014); *Government of Ghana v. ProEnergy Services LLC*, No. 11-9002-MC, 2011 WL 2652755, at *3 (W.D. Mo. 2011); *In re Application of Winning (HK) Shipping Co., Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at **9-10 (S.D. Fla. 2010); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 239 (D. Mass. 2008); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 955 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006).

12 *In re Oxus Gold plc*, No. 06-02-GEB, 2007 WL 1037387, at *5 (D.N.J. 2007); *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 260 (D. Mass. 2010); *In re Mesa Power Group LLC*, No. 11-MC-270-ES, 2013 WL 1890222, at *6 (D.N.J. 2013).

13 *In re Oxus Gold plc*, 2007 WL 1037387, at *5.

14 *See, e.g., GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (7th Cir. 2014) (noting that arbitral tribunals "might be considered" qualifying tribunals "[o] r [they] might not – the applicability of section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain"); *see also In re Operadora DB Mexico, S.A. de C.V.*, No. 09-CV-383, 2009 WL 2423138, at *11 (M.D. Fla. 2009) (denying request for discovery in aid of foreign arbitral proceedings); *In re an Arbitration In London, England*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (same); *In re Grupo Unidos Por El Canal, S.A.*, No. 14-mc-00226, 2015 WL 1810135, at *8 (D. Colo 2015) (same); *In re Application of Grupo Unidos Por El Canal S.A.*, No. 14-mc-80277, 2015 WL 1815251, at *8 (N.D. Cal. 2015) (same); *In re Dubey*, 949 F. Supp. 2d 990, 993-996 (C.D. Cal. 2013) (same).

in the wake of *Intel*.[15] If and when others do so, there is no guarantee that they will interpret the statute in the same way.[16]

c. "resides or is found"

Finally, although the language of the statute refers only to where the target person or entity "resides or is found," and not to the physical location of the evidence to be produced, a number of courts have concluded that Section 1782 does not permit discovery of documents located outside the United States.

In applying the first requirement, a court must consider what it means to "reside" or "be found" in a federal judicial district.[17] The answer differs depending on whether the target of discovery is an individual or a corporation.

To determine if an individual "resides" in a district, courts look at ownership of property in the district, time spent in the district and other indicia of a permanent or semi-permanent presence in the district.[18] The individual "is found" in the district if they can be served with a subpoena while physically present in the district.[19] Corporations "reside" or can be "found" in the district where incorporated or headquartered. Attempts to seek discovery from the corporation elsewhere, such as in a district where the corporation has significant business activities,[20] may be risky in light of recent U.S. Supreme Court precedent limiting which courts are entitled to exercise personal jurisdiction over corporate defendants.[21]

4. <u>Courts retain significant discretion whether to grant a Section 1782 request.</u>

Once a court concludes it has the power to grant a Section 1782 request, it remains in the court's discretion whether in fact to do so. For the most part, courts consider four issues in making this decision:

> (1) whether the person or entity targeted for the production of evidence is a participant in the foreign proceeding;
>
> (2) the nature of the foreign tribunal, the character of the foreign proceedings, and the "receptivity" of the foreign tribunal to U.S. judicial assistance;

15 *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009) (holding that the *Biedermann* decision remains good law and was not overruled by *Intel*).

16 *See, e.g., Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 fn. 4 (11th Cir. 2014) (suggesting without deciding that Section 1782 applies to private arbitral tribunals); *In re Chevron Corp.*, 633 F.3d 153, 161 (3d Cir. 2011) (same).

17 There are 94 federal judicial districts including at least one in each state and one for each of the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam and the Northern Mariana Islands. Many of the more populous states have multiple districts, including New York, which has two separate districts covering New York City and its surroundings as well as two more districts for the other parts of the state.

18 *See, e.g., In re Kolomoisky*, No. M19-116, 2006 WL 2404332, at *3 (S.D.N.Y. 2006).

19 *In re Edelman*, 295 F.3d 171, 180 (2d Cir. 2002).

20 *See, e.g., In re Application Of Republic Of Kazakhstan*, 110 F. Supp. 3d 512 (S.D.N.Y. 2015) (granting discovery application made in New York against Clyde & Co. LLP, a law firm headquartered in London, on the basis of its U.S. partners' "daily practice of law in this jurisdiction," which gave it "the requisite 'systematic and continuous' presence to be 'found' here for purposes of section 1782").

21 *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

(3) whether the Section 1782 request is an attempt to circumvent a foreign country's or the United States' policies or discovery limitations; and

(4) whether the request is unduly burdensome or intrusive (in which case the court may either deny the request or alter it).

Because each judge exercises discretion differently, there remains a fair amount of uncertainty about how any given court may rule on a Section 1782 application, even when the law of the selected jurisdiction otherwise supports granting the application.

a. Target of discovery is a party to the foreign proceeding

First, if the person or entity targeted for discovery is party to the foreign proceeding, courts are less willing to order Section 1782 discovery, on the theory that the foreign tribunal could itself order discovery.

b. Receptivity of the foreign tribunal

Second, absent contrary "authoritative proof," courts are less likely to grant discovery if the foreign tribunal is not "receptive" to the evidence or if they conclude the discovery is an attempt to evade U.S. or foreign proof-gathering restrictions. [22]

For example, one district court refused to grant a Section 1782 application where the German Ministry of Justice and the Bonn Prosecutor both requested that the application be denied because, among other things, it would jeopardize an ongoing criminal investigation.[23] Another district court denied relief under Section 1782 where it was sought in aid of an antitrust investigation by the European Commission and the Commission, through the Directorate-General for Competition, sent a letter strongly opposing the application.[24]

c. An attempt to circumvent foreign proof-gathering restrictions

Third, courts are unlikely to grant assistance if the Section 1782 application is being sought in bad faith, to get around "foreign proof-gathering restrictions or other policies of a foreign country or the United States."[25] In one illustrative case, a party had requested the production of certain documents through procedures provided by the foreign tribunal and then made a parallel application for those same documents via Section 1782. The court noted that if the foreign tribunal granted the party's request, then the Section 1782 application would be moot, and if the foreign tribunal denied the party's request, then granting the Section 1782 application would circumvent a "foreign proof-gathering restriction."[26] Accordingly, the court concluded that this factor weighed against granting the discovery sought.

This factor can also be relevant in more innocent circumstances. For example, a district court denied in part a Section 1782 application that sought discovery on both liability and damages issues in aid of patent

22 *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1100 (2d Cir. 1995).

23 *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004).

24 *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006).

25 *Intel*, 542 U.S. at 265.

26 *Microsoft*, 428 F. Supp. 2d at 195.

infringement proceedings in Germany because the proceedings were still in the liability phase and, under German law, "a plaintiff is not entitled to any discovery on damages until it prevails in the liability phase."[27] The court reasoned that permitting damages discovery in the U.S. before liability had been established in the German proceedings "would undermine [the] specific policy underlying German law's bifurcations of patent infringement actions."[28]

d. Unduly intrusive or burdensome requests

Finally, the court may consider whether the discovery request is unduly intrusive or burdensome, in which case the request "may be rejected or trimmed."[29] Where a court determines that a Section 1782 request is overbroad, it is likely to narrow the request or direct the applicant and the target of discovery to negotiate in an effort to reformulate the request in a way that is acceptable to both parties, rather than denying the request outright.[30]

5. Generally applicable limits on discovery might constrain the ability to obtain evidence otherwise allowed under Section 1782.

Two aspects of Section 1782 discovery may present particular challenges to foreign litigants:

First, the Federal Rules of Civil Procedure only allow discovery of documents within the producing party's "possession, custody, or control."[31] U.S. courts have taken divergent views on the degree of "control" that is necessary to require a producing party to produce documents held by a foreign affiliate.

Second, with respect to the request for a deposition, under the Federal Rules, a person may be compelled to attend a deposition under a subpoena only if the deposition will occur (1) within 100 miles of where the witness lives, is employed, or regularly transacts business in person, or (2) within the state where he or she lives, is employed, or regularly transacts business in person if the witness is a party or one of its officers.[32]

6. Conclusion

Section 1782 provides a powerful tool to litigants in non-U.S. proceedings to obtain broad, U.S.-style discovery in support of their claims and/or defenses. The law on Section 1782 is fast evolving, with courts being forced to adapt to ever more creative litigants desperate to open the door to the wealth of information potentially available under this statute. Whether courts will remain as accommodating to Section 1782 requests as they have in the past, or whether they will increasingly resort to the discretionary *Intel* factors in order to stem the rising tide of applications, remains to be seen.

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27 *Siemens*, 2013 WL 5947973, at *4.

28 *Siemens*, 2013 WL 5947973, at *4.

29 *Intel*, 542 U.S. at 265.

30 *See, e.g., Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 597-598 (7th Cir. 2011).

31 Fed. R. Civ. P. 34(a)(1)

32 Fed. R. Civ. P. 45(c).