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***45 A NEW WORLD OF DISCOVERY: THE RAMIFICATIONS OF TWO RECENT FEDERAL COURTS' DECISIONS GRANTING JUDICIAL ASSISTANCE TO ARBITRAL TRIBUNALS PURSUANT TO 28 U.S.C. §1782**

I. INTRODUCTION

Prior to 2004, federal courts were in agreement that international arbitral tribunals did not fall within the ambit of 28 U.S.C. §1782 (“§1782”), the statute dealing with judicial assistance to foreign tribunals and litigants. Instead, U.S. judicial assistance to arbitral tribunals was governed solely by the Federal Arbitration Act (“FAA”),¹ and applicable state arbitration statutes. In 2004, the Supreme Court decided *Intel v. Advanced Micro Devices*,² broadly interpreting nearly every aspect of §1782. *Intel* held that parties before foreign tribunals could request information that is not discoverable pursuant to the rules of the foreign jurisdiction, as well as information that is not discoverable in similar U.S. proceedings. *Intel* also held that parties may request information even if a foreign proceeding is not yet pending or even imminent. Although *Intel* did not address whether arbitral tribunals are entitled to judicial assistance pursuant to §1782, many scholars have suggested that *Intel*'s expansive interpretation of the statute supports a reading of §1782 to include international arbitral tribunals.

At the end of 2006, two district courts relied on *Intel* to hold that arbitral tribunals are entitled to judicial assistance pursuant to §1782.³ These holdings were in stark contrast to pre-*Intel* federal court decisions, and more importantly, have many negative ramifications for parties to arbitral proceedings and several policies underlying arbitration. Allowing parties to international arbitral proceedings to utilize §1782 will create a huge disconnect between parties' discovery rights and obligations in domestic and international arbitration. It will also create dissonance between judicial assistance available to arbitrating parties in the United States and other countries with judicial assistance statutes. The use of §1782 would give parties to arbitral proceedings the ability to seek broad pre-hearing discovery from third parties without arbitrators' approval--a power *46 unparalleled by U.S. domestic arbitration or the judicial assistance schemes of foreign countries.

Giving parties to international arbitrations access to judicial assistance pursuant to §1782 will undermine many of the policies underlying arbitration, including the freedom to contract, reduced cost, efficiency and the arbitrators' ability to control discovery. These principles will be undermined by trying to fit arbitral tribunals within §1782, which was clearly not drafted with the unique nuances of arbitration in mind, and is not equipped to address them. U.S. courts should certainly have a mechanism in place by which they can grant judicial assistance in aid of international arbitration. Section 1782, however, as it was interpreted by *Intel*, is not the proper mechanism. The principles underlying arbitration require a closely-tailored mechanism for judicial assistance to international arbitral proceedings.

This article explores the ramifications of the recent decisions interpreting §1782 to allow judicial assistance to international arbitral tribunals, and parties to arbitration proceedings. Section II provides a brief history of §1782. Section III analyzes the federal court decisions prior to *Intel* that interpreted §1782 not to include arbitral tribunals. Section IV discusses the U.S. Supreme Court's decision in *Intel*, including the parties' arguments, the European Commission's appearance as amicus curiae, and the high court's holding. Section V discusses the two recent district court opinions that relied on *Intel* to hold that §1782 does, indeed, allow district courts to grant judicial assistance to arbitral tribunals. Section VI analyzes the ramifications of these recent decisions in light of *Intel*'s broad interpretation of §1782, including (1) the disconnect between parties' discovery rights and obligations in international and domestic arbitral tribunals, governed by the FAA; (2) the dissonance between broad judicial assistance and pro-arbitration principles such as efficiency and cost-effectiveness; and (3) the stark difference between U.S. judicial assistance to international arbitrations and the judicial assistance available in foreign jurisdictions. I conclude that while U.S. judicial assistance to international arbitrations is necessary, a more tailored statute that addresses the unique nuances of arbitration is superior to trying to fit arbitration tribunals into §1782.

II. SECTION 1782: A BRIEF HISTORY

Section 1782 of Title 28 of the United States Code is the statutory provision that grants U.S. district courts the authority to provide assistance to international and foreign tribunals.⁴ Congress first provided judicial assistance to foreign ⁴⁷tribunals in 1855 through the use of letters rogatory via diplomatic channels.⁵ Over the next 100 years, amendments continually broadened the ability of U.S. courts to provide judicial assistance by eliminating previous statutory requirements.⁶ In the late 1950s, Congress acknowledged that an increase in international commercial and financial transactions required a “comprehensive study” of the optimal level of judicial assistance.⁷ Congress created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to U.S. and foreign judicial assistance practices.⁸

In 1964, Congress adopted the Commission's suggested legislation, which resulted in a complete revision of §1782.⁹ One of the most notable amendments was that federal district courts could order the production of documents or testimony “for use in a proceeding in a foreign or international *tribunal*.”¹⁰ This quoted language replaced “judicial proceedings pending in any *court* in a foreign country with which the United States is at peace.”¹¹ The 1964 Act's legislative history stated that Congress used the word “tribunal” to ensure that “assistance is not confined to proceedings before conventional courts,” but also extends to “administrative and quasi-judicial proceedings all over the world.”¹² The legislative history also stated that district courts should be guided by the statute's “twin aims of providing efficient means of assistance to participants in ⁴⁸international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.”¹³

In its current form, §1782(a) reads as follows:

- (a) 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 prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.¹⁴

III. FEDERAL COURTS BEFORE *INTEL* WERE UNWILLING TO INTERPRET §1782 TO INCLUDE ARBITRAL TRIBUNALS

A. Wading into the Water: The First Two District Court Decisions

Prior to the Supreme Court's decision in *Intel*, the few federal courts that had addressed the question of whether §1782 authorized judicial assistance to arbitral tribunals were in agreement that it did not. In 1994, the U.S. District Court for the Southern District of New York was the first court to address the issue after §1782's overhaul in 1964.¹⁵ In that case, Technostroyexport, a foreign economic association organized pursuant to Russian law, entered into various sales contracts and an agency contract with International Development and Trade Services, Inc. ("IDTS"), a New York corporation. IDTS allegedly stopped paying Technostroyexport for minerals received. Pursuant to an arbitration clause in the sales contracts, Technostroyexport initiated an arbitration in Moscow against IDTS claiming breach of the sales contracts. IDTS then sought arbitration in Stockholm pursuant to the agency contract's arbitration clause, also alleging breach of contract.

In an ex parte application, Technostroyexport petitioned the district court to subpoena documents and depositions from IDTS's president and director for use in the Moscow arbitration proceeding, which the court did. IDTS filed a motion to vacate the order granting discovery and quashing the subpoenas issued by the court, arguing that the parties can only apply to the arbitral tribunals for permission to take discovery, and that both Russian and Swedish law allow *49 judicial assistance only when the arbitral tribunal itself, as opposed to the parties, requests information. Technostroyexport, on the other hand, argued that those foreign law provisions applied only to evidence sought within Russia or Sweden, and that it was entitled to discovery located in the United States pursuant to §1782.

The court granted IDTS's motion to vacate its previous order granting discovery. While the court concluded that "[a]n arbitrator or arbitration panel is a 'tribunal' under §1782," it held that only a "ruling from a foreign arbitrator that discovery should take place" would "empower" the district court to enforce that ruling under §1782.¹⁶ The court reasoned that while it would enforce a ruling by arbitrators ordering discovery, it would not order discovery requested by a party. The court emphasized deference to arbitrators' ability to govern arbitration proceedings without unsolicited court intervention.¹⁷ The court also noted that both Russian and Swedish law "make it clear that questions about the obtaining of evidence in arbitration proceedings are to be determined by the arbitrators," and "it is the arbitrators, not the courts, who are to decide the question of what discovery is to be obtained in arbitration proceedings."¹⁸

The Southern District of New York had occasion to revisit the issue again several years later in *Application of Medway Power Limited*.¹⁹ In that case, an arbitration between Medway Power Limited and two other companies was pending in the United Kingdom. Medway petitioned the district court for an order requiring General Electric Company ("GE"), which was not a party to the arbitration, to produce documents for use in the arbitration. Medway submitted a letter from the arbitrator stating that GE's documents "are relevant and necessary for the fair determination of the dispute."²⁰

The court first concluded that an arbitration was not a "tribunal" for the purposes of §1782, and that the statute was intended to assist "official, governmental bodies" as opposed to "creatures of contract."²¹ The court then analyzed whether arbitrators have the power to compel non-parties to testify pursuant to U.S. or U.K. law, and concluded that they do not. Hence, the court held that "[i]n a case dealing with the delicacies of international comity, I am loath to approve a petition under §1782 that would empower arbitrators with *50 authority they would not have in the United States, or, to my knowledge, in the United Kingdom."²² The court expressed concern that "§1782 was not enacted to create an end run for arbitrators."²³

B. National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.

The first court of appeals to address the issue was the Second Circuit in 1999 in its widely-cited decision, *National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*²⁴ In that case, National Broadcasting Company ("NBC") sought discovery from third-party financial institutions for use in an arbitration proceeding between NBC and Azteca, S.A. de C.V. ("Azteca"), a Mexican company, administered by the International Chamber of Commerce ("ICC") in Mexico City. The district court initially granted the subpoena requests, then subsequently quashed the subpoenas, reasoning that "foreign or international tribunal" in §1782 does not encompass private international commercial arbitration.²⁵ The Second Circuit affirmed the lower court's order quashing NBC's subpoenas on the third parties, holding that private arbitration was not a "tribunal" under §1782.

After concluding that the term “tribunal” was ambiguous because it could be interpreted to include or exclude arbitral tribunals, the court analyzed §1782's legislative history and found that the statute's drafters only intended to provide assistance to governmental authorities.²⁶ The court held that the drafters contemplated “administrative or investigative courts, acting as state instrumentalities or with the authority of the state” when expanding the statute's *51 language in 1964 from “judicial proceeding in any *court* in a foreign country” (emphasis added by the court) to “foreign or international tribunal.”²⁷

The court also considered whether interpreting §1782 to include arbitration tribunals would conflict with the FAA.²⁸ The court noted that the FAA grants only arbitrators the right to seek judicial assistance,²⁹ while §1782 would give the right to “any interested persons.” The court also observed that the FAA allows judicial assistance only for testimony before the arbitrators or “material” physical evidence,³⁰ whereas §1782 allows discovery of any information “for use” in a foreign or international tribunal. A third difference the court observed is that the FAA confers enforcement authority of an arbitrator's subpoena only in the district in which the arbitration panel sits, as opposed to §1782, which allows judicial assistance from a district court in any jurisdiction in which the requested information or individual is found.³¹

The court also expressed concern over §1782 judicial assistance and the pro-arbitration policies of efficiency and cost effectiveness. The court noted that “[t]he popularity of arbitration rests in considerable part on its asserted efficiency and cost-effectiveness-characteristics said to be at odds with full scale litigation in the courts, and especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure.”³²

C. *Republic of Kazakhstan v. Biedermann International*

The Fifth Circuit had occasion to decide the issue that same year in *Republic of Kazakhstan v. Biedermann International*.³³ The Republic of Kazakhstan and Biedermann International were parties to arbitration proceedings before the Arbitration Institute of the Stockholm Chamber of Commerce. Kazakhstan asked the U.S. District Court for the Southern District of Texas to order Murdock Baker, an individual who was not a party to the arbitration, to submit to a deposition and produce documents for use in the arbitration. The district court ordered Kazakhstan's requested discovery, which the Fifth Circuit subsequently stayed and ultimately reversed.

*52 Similar to the Second Circuit's reasoning in *National Broadcasting Company*, the court held that the term “tribunal” was not meant to include “every conceivable fact-finding or adjudicative body,” and noted the statute and legislative history's lack of any mention of arbitration tribunals.³⁴ One interesting point the court made was that private arbitrations constituted a “then-novel arena” in 1964, when §1782 was overhauled and amended to include the term “tribunal.”³⁵ The court concluded that it was doubtful that the drafters meant to include a form of private international dispute resolution rarely utilized at that time. The court also considered the discrepancies between domestic and international arbitration that would result if §1782 were interpreted to include arbitration proceedings, as discussed in *National Broadcasting Company*. Finally, the court discussed the principles underlying arbitration that favor “speedy, economical and effective means of dispute resolution” and expressed concern that “arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.”³⁶

IV. *INTEL v. ADVANCED MICRO DEVICES*

In 2004, the U.S. Supreme Court chose to interpret §1782 for the first time in the 150 years since the statute was enacted.³⁷ Although the case had nothing to do with arbitration, it has ended up being a catalyst for recent federal decisions reversing pre-*Intel* caselaw holding that arbitration tribunals fall within §1782's ambit. A discussion of the factual background and the Court's legal analysis and holding is necessary to understand *Intel*'s impact on the issue of whether arbitration tribunals fall within §1782.

In October 2000, Advanced Micro Devices, Inc. (“AMD”) filed a complaint with the Directorate-General for Competition (“DG-Competition”) alleging that Intel Corporation (“Intel”) had abused its dominant position in the European market through various anticompetitive practices.³⁸ The European Commission, the executive and administrative organ of the European Communities, polices competition law and policy through the DG-Competition.³⁹ The DG-Competition *53 investigates alleged violations of the European Union’s competition laws in response to complaints filed by market actors, such as AMD, or on its own initiative.

If, after a preliminary investigation, the DG-Competition decides *not* to pursue a complaint, it produces a written decision that is subject to judicial review by the EC Court of First Instance, and ultimately by the EC Court of Justice. Parties to subsequent judicial review of DG-Competition findings do not have an opportunity to submit evidence to the judicial tribunals. The only time in which parties can submit evidence is during the investigative stage before the DG-Competition.

If the DG-Competition decides to pursue the complaint, it will serve the targeted company with its preliminary views that a violation of competition laws has occurred, and advise the company of its intent to recommend an adverse decision. The alleged violator then has the right to take part in a non-adversarial information-gathering hearing. The decision regarding whether a violation occurred, issued after the information-gathering hearing, is also subject to judicial review.

After filing its complaint with the DG-Competition, AMD recommended to the DG-Competition that it seek discovery of documents that Intel had produced in a U.S. private antitrust suit several years before.⁴⁰ The DG-Competition declined to act on AMD’s recommendation, and AMD subsequently petitioned the U.S. District Court for the Northern District of California for an order directing Intel to produce the documents pursuant to §1782.

A. The Lower Court and Appellate Court Decisions in Intel

The district court denied AMD’s §1782 request based largely on the fact that the DG-Commission was not an adjudicative body, and therefore not a “tribunal” overseeing a “proceeding” within the meaning of §1782.⁴¹ On appeal, the Ninth Circuit reversed the district court, holding that the DG-Competition was a “proceeding before a tribunal” within the meaning of §1782. The court also concluded that because the DG-Competition’s recommendations are adopted by *54 the EC Commission, “a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties” and because “EC decisions are appealable to the Court of First Instance and then the Court of Justice,” the discovery was sought for a proceeding “leading to quasi-judicial proceedings.”⁴²

The court also held that §1782 did not contain a foreign discoverability requirement, hence, information requested pursuant to §1782 need not be discoverable under the laws of the foreign jurisdiction. The fact that AMD was not entitled to the requested discovery under the DG-Competition’s rules did not, therefore, automatically foreclose AMD from requesting them pursuant to §1782. To support its conclusion, the court reasoned, “[w]e find nothing in the plain language or legislative history of §1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding ... Had Congress wished to impose such a requirement on parties, it could have easily done so.”⁴³ The Ninth Circuit reasoned that “allowance of liberal discovery seems entirely consistent with the twin aims of §1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts.”⁴⁴

B. The High Court’s Decision in Intel

1. Arguments before the Court from Far and Wide

Intel petitioned the U.S. Supreme Court for a writ of certiorari, which the high court granted.⁴⁵ In a self-admitted “highly unusual” step for the Commission of the European Communities (“EC”), it filed amicus curiae briefs in support of Intel, both in support of the Court granting certiorari and on the merits supporting reversal of the Ninth Circuit decision.⁴⁶ Using strong

language, the EC stated to the Court that it was “deeply concerned” that §1782, as interpreted by the Ninth Circuit, would “directly threaten the Commission's enforcement mission in competition law and possibly interfere with the Commission's responsibilities in other areas of regulatory concern,” and ultimately “become a threat to foreign sovereigns if interpreted expansively by this Court.”⁴⁷

*55 The EC expressed concern that the Ninth Circuit's holding would undermine its Leniency Program, which reduces penalties for companies that report competition violations. The EC worried that allowing parties before it to utilize §1782 would discourage companies from coming forward to report violations for fear of subsequent discovery.⁴⁸ The EC also expressed concern that allowing complainants before it to utilize §1782 would undermine its cooperation and existing agreements with U.S. antitrust agencies, such as the Department of Justice and Federal Trade Commission, through which the agencies share information.⁴⁹

The EC opined that the DG-Competition was not a “tribunal” for purposes of § 1782, and with regard to its function, the EC described itself as follows:

Neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights as between private parties. *It never performs the functions of a tribunal*, because it never decides the merits of any dispute between the complainant and the target The Complainant is not a party to the Commission's investigations Only at the very end of the process, when the Commission acts on DG Competition's final recommendation to abandon the investigation or make a finding of infringement, does the investigative function blur into decision making. But while the line between prosecutorial and adjudicative functions in the last stage of the proceeding may be less sharp than that which exists in United States practice, *that modest convergence in no way converts the Commission into a “tribunal” of the sort contemplated in Section 1782.*⁵⁰

Finally, the EC pointed out that “the discovery sought by AMD is information that the Commission has thus far declined to seek on its own behalf,”⁵¹ and that “other channels exist for the [EC] ... to obtain information located in the United States if the Commission considers it necessary It is the Commission's clear preference ... to rely on the formal mechanisms that it has carefully negotiated with the United States specifically for ... cooperation in competition law enforcement.”⁵² The EC emphasized that “this is a very serious matter” and warned that allowing complainants before the DG-Competition to utilize §1782 “would be a breach of the principle of international comity.”⁵³

An adjudicative proceeding would only be initiated if the DG-Competition concluded that it would not further investigate and AMD decided to request *56 review of that conclusion by the Court of First Instance, or if the DG-Competition found that Intel had acted anti-competitively and Intel then sought judicial review of that decision. Intel argued that this resulted in any adjudicative proceeding as “purely speculative” at the current investigative stage of the DG-Competition's proceedings.⁵⁴ Intel emphasized the EC Commission's argument that to interpret the DG-Competition as a “tribunal” would “open [§1782] to discovery requests in connection with virtually *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review.”⁵⁵ Intel also pointed to decisions by European courts concluding that the EC Commission is not a “tribunal” for the purposes of European treaty interpretation.

As its initial argument, AMD posited that the DG-Competition was a “tribunal” because “its proceedings result in a final decision on the merits of a complaint, determining the legal rights of a party, and possibly imposing penalties.”⁵⁶ AMD placed more emphasis on its second argument that because on appeal, “the Court of First Instance can only consider evidence that was proffered to the Commission, ... it is only now, before the EC acts on the complaint, that such evidence may be obtained and submitted.”⁵⁷ It claimed that its pending request for discovery was for use both in the investigative stage and the subsequent judicial review stage of the DG-Competition's findings. Essentially, AMD argued that the DG-Competition was a tribunal, but even if it wasn't, the resulting judicial review of its decision by the EC court was, which was one of the proceedings for which it sought evidence.

2. *The Supreme Court's Holding*

Six of the Supreme Court justices filed a majority opinion holding that AMD could utilize §1782 because it was an “interested person,” the DG-Competition was a “tribunal” and a reasonably contemplated “proceeding” existed.⁵⁸ The court agreed with AMD’s argument that the European courts with the power to review the DG-Competition’s findings were “tribunals,” and because the investigative stage was AMD’s only opportunity to submit evidence that would end up before those courts on a potential appeal, the discovery sought was “for *57 use” in a foreign tribunal.⁵⁹ In what is essentially dicta, the Court also held that when the EC Commission acts on the DG-Competition’s recommendations it is making a decision, and is a “tribunal” to the extent it acts as a “first decisionmaker.”⁶⁰ It is important to note, however, that the Court based its holding on the fact that evidence before the courts reviewing the EC decision could only be gathered at the investigative stage before the DG-Competition.

Several other aspects of the Court’s decision impact whether the word “tribunal” in §1782 should include arbitral tribunals. The Court agreed with the Ninth Circuit that §1782 contained no threshold requirement that the information sought be discoverable in the foreign jurisdiction. The Court interpreted §1782’s legislative history to leave the decision to the district court’s discretion, and noted that the district court could tailor its order in response to concerns about fairness or comity.⁶¹ The Court also held that the information requested pursuant to §1782 need not be discoverable in a comparative U.S. proceeding. The Court also concluded that §1782 allows district courts to grant requests for evidence when an adjudicative proceeding is “within reasonable contemplation,” as opposed to in process or pending.⁶² In dicta, the Court quoted an article from Professor Hans Smit stating that “the term ‘tribunal’ ... includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”⁶³ This led the Court to conclude that Congress meant to have “tribunal” interpreted quite broadly. The importance of the Court’s holding in these areas is addressed in Section VI below.

The Court espoused four factors for district courts to consider when ruling on §1782 requests. The first factor distinguished between requests for a *non*-party to produce information and for a *party* to produce information. Because a foreign tribunal has jurisdiction over parties before it, the need for §1782 aid was not as great as when information from a non-party was requested, which may be outside the foreign tribunal’s jurisdictional reach. Second, the Court restated §1782’s legislative history that the court may take into account “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.”⁶⁴ Third, the court can consider whether the requesting party is *58 attempting to circumvent foreign proof-gathering restrictions or policies. Fourth, district courts may reject or tailor “unduly intrusive or burdensome requests.”⁶⁵

The lone voice of Justice Breyer spoke in a dissenting opinion. Justice Breyer rejected the majority’s reliance on district courts’ case-by-case analysis on the grounds that discovery and discovery-related judicial proceedings are expensive and cause delay. The alternative he offered to reliance on district courts’ discretion is the following rule:

[A] court should *not* permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, *and* (2) the discovery would not be available under domestic law in analogous circumstances.⁶⁶

With regard to whether the DG-Competition was a “tribunal,” Justice Breyer proffered the logical rule that “when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute’s word ‘tribunal’ is in serious doubt, then a court should pay close attention to the foreign entity’s own view of its ‘tribunal’-like or non-‘tribunal’-like status.”⁶⁷

The Court remanded to the district court, which applied the Court's four factor test and ultimately rejected AMD's §1782 request in its entirety, reasoning that the EC Commission had jurisdiction of Intel, as a party to its proceedings, and therefore, U.S. judicial assistance was less necessary.⁶⁸ The district court also based its holding on the fact that the EC Commission clearly did not want the discovery, and AMD was attempting to circumvent the EC Commission's discovery proceedings.⁶⁹

V. POST-INTEL SPECULATION REGARDING WHETHER “TRIBUNAL” NOW INCLUDES ARBITRAL TRIBUNALS AND CONFIRMATION OF A CHANGE OF HEART BY TWO FEDERAL COURTS

In the three years following the *Intel* Supreme Court decision, scholars have contemplated the possibility that, given the court's broad interpretation of the term “tribunal,” arbitral panels now fall within §1782.⁷⁰ It was not until the end of *59 2006, however, that these scholars' premonitions came to fruition, and two U.S. district courts ruled that after *Intel*, arbitral proceedings are “tribunals” entitling parties to judicial assistance pursuant to §1782.⁷¹

A. *In re Oxus Gold PLC*

In *Oxus Gold*, the facts stemmed from a mining agreement in the Kyrgyz Republic (“the Republic”) gone bad. Norox Mining Company, a subsidiary of Oxus, a U.K. international mining group, entered into a joint venture with the State enterprise, Kyrgyzaltyn Joint Stock Company, to create the Talas Gold Mining Company (“TGMS”). TGMS was created for the purpose of developing a gold deposit in the Republic. The Republic granted TGMS a license for the right to mine the deposit, which it subsequently suspended and ultimately revoked as a result of TGMS failing to abide by its license obligations. TGMS instituted several proceedings against the Republic's licensing agency challenging the agency's action. Oxus subsequently initiated arbitration proceedings against the Republic pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”) Rules, claiming that the Republic violated a bilateral investment treaty (“BIT”) between the United Kingdom and the Republic.

On August 11, 2006, Oxus filed an *ex parte* application with the New Jersey district court to obtain the deposition of Jack Barbanel, the managing director of SIG Overseas Ltd., a corporate finance and private equity group acting as the managing firm for a competitor who had subsequently entered into negotiations with the Republic to take over the mining operations. Oxus claimed the requested discovery would be used in the arbitration proceeding it had instituted against the Republic, as well as the pending foreign court proceedings in Kyrgyz courts. The court granted the request that same day. On September 5, 2006, Mr. Barbanel filed a motion to vacate the §1782 order, which U.S. Magistrate Judge Hughes denied by an order issued October 11, 2006, holding that the UNCITRAL *60 arbitration proceedings constituted a “foreign or international tribunal” within §1782.⁷²

Magistrate Judge Hughes first relied on *Intel*'s interpretation of §1782's legislative history, that “Congress introduced the word ‘tribunal’ to ensure that ‘assistance is not confined to proceedings before convention courts,’ but extends also to ‘administrative and quasi-judicial proceedings.’”⁷³ The court emphasized that the international arbitration at issue was “being conducted by [UNCITRAL], a body operating under the United Nations and established by its member states.”⁷⁴ The court also found it salient that the proceedings had been authorized by both the United Kingdom and the Republic in order to adjudicate disputes relating to their BIT. Ultimately, the proceedings were sufficiently governmental to be characterized as a “tribunal.” The court distinguished *National Broadcasting Company* on the grounds that it was an international arbitration “created exclusively by private parties” and administered by the ICC, “a private organization.”⁷⁵ Hence, its holding did not fall far outside the pre-*Intel* courts' view of §1782 as excluding assistance to *private* arbitration tribunals.

Mr. Barbanel appealed the magistrate judge's order granting §1782 discovery. On April 2, 2007, District Court Judge Garrett Brown dismissed the appeal, affirming the magistrate judge's October 11 opinion.⁷⁶ On appeal, Mr. Barbanel argued that §1782 does not apply to private arbitration proceedings, and that the arbitration in question was not being conducted by UNCITRAL, but instead that the arbitral panel consisted of three private individuals chosen by parties with no involvement by sovereign nations.⁷⁷ Conversely, Oxus emphasized that the arbitration was expressly provided for by the BIT between the

United Kingdom and the Republic, and therefore conducted “pursuant to adjudicatory authority vested by an international agreement among sovereign entities.”⁷⁸ Siding with *Oxus*, the district judge held as follows:

Article 8 of the BIT Agreement between the United Kingdom and Kazakhstan specifically mandates that disputes between nationals of the two countries would be resolved by arbitration governed by international law. The Arbitration at issue in this case, between two admittedly private litigants, is thus being conducted *61 within a framework defined by two nations and is governed by the [UNCITRAL Rules].⁷⁹

Mr. Barbanel also argued that the requested discovery was not relevant to the pending Kyrgyz court proceedings, and would not be admissible in those proceedings. The district court judge agreed with the magistrate judge's previous ruling that the requested discovery was indeed relevant to Kyrgyz court proceedings, and that the court need not consider admissibility when ruling on §1782 requests.⁸⁰

B. *In re Roz Trading Ltd.*

Just two months after the New Jersey district court decided *Oxus*, the U.S. District Court for the Northern District of Georgia also held that an arbitration proceeding was a “tribunal” for the purposes of §1782.⁸¹ Unlike *Oxus Gold*, the arbitration panel in *Roz Trading Ltd.* was the International Arbitral Centre of the Austrian Federal Economic Chamber (the “Centre”), a private arbitration tribunal in Vienna, Austria. In that case, Roz Trading Company was involved in a pending arbitration proceeding with The Coca-Cola Export Company (“CCEC”), a subsidiary of Coca-Cola Company, before a panel at the Centre. Roz Trading had entered into a contract with CCEC in connection with a joint venture between CCEC and the government of Uzbekistan. After the Uzbekistan government allegedly seized Roz Trading's interest in the joint venture, Roz Trading's employees fled Uzbekistan fearful for their lives. Roz Trading initiated arbitration proceedings against CCEC for breach of the contract related to the failed joint venture.

Roz Trading then petitioned the district court to compel Coca-Cola Company to produce documents for use in the arbitration proceeding pursuant to §1782. The court noted that the issue of whether the arbitration proceeding at the Centre was a “tribunal” under §1782 was an “interesting” issue of “first impression.”⁸² The court pointed out that *Intel* “did not address the precise issue of whether private arbitral panels are ‘tribunals’” but concluded that “it provided sufficient guidance for this Court to determine that arbitral panels convened by the Centre are ‘tribunals’ within the statute's scope.”⁸³ The court traced *Intel*'s analysis of §1782's text and legislative history, and emphasized its holding that the DG-Competition constituted a tribunal “to the extent that it acted as a first-instance *62 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.”⁸⁴

Applying *Intel*'s characterization of the DG-Competition as a tribunal, the court reasoned that the Centre's arbitration panels are first-instance decision-makers that “issue decisions ‘both responsive to the complaint and reviewable in court.’”⁸⁵ Hence, “[t]he 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.”⁸⁶ Rather than addressing the Second Circuit's concerns in *National Broadcasting Company* and the Fifth Circuit's concerns in *Republic of Kazakhstan*, the court simply concluded that “[t]he Supreme Court's decision in *Intel* undermines the reasoning of *National Broadcasting Company*” that “incorrectly concluded that Congress intended to limit the availability of judicial assistance under §1782 to governmental ... proceedings.”⁸⁷

After concluding that the Centre's arbitration panel was a tribunal, and that the other statutory factors were met, the court then analyzed the discretionary factors set forth by *Intel* to determine whether it should exercise its discretion to order the requested discovery. The court noted that Roz Trading was requesting information from Coca-Cola Company, a non-party that the Centre's arbitral panel did not have jurisdiction over, which weighed in favor of discovery.

In a flawed analysis of the second *Intel* factor considering offense to foreign tribunals, the court relied on the Centre's Rules of Civil Procedure to conclude that no offense would be taken to the requested discovery. Article 589 of the Centre's Rules of Civil Procedure states that “[t]hose judicial acts *considered necessary by the arbitrators* but which they have no jurisdiction to undertake will be carried out by the State Court which has jurisdiction *on the application of the arbitrators* The Court to which the application is made shall accede to it insofar as it is not legally inadmissible.”⁸⁸ The court concluded that “[t]he Centre's Rules embrace discovery sought through mechanisms such as §1782,”⁸⁹ while ignoring the Rule's requirements that the requested information be considered necessary and applied for by the *arbitrators*, and be legally admissible. Accordingly, the district court granted Roz Trading's request for discovery. *63 Coca-Cola Company has appealed the order,⁹⁰ and it is likely that the Eleventh Circuit will be the first court of appeals to rule on the issue after *Intel*.

VI. SECTION 1782, AS INTERPRETED BY THE U.S. SUPREME COURT IN *INTEL*, IS NOT THE ANSWER TO U.S. JUDICIAL ASSISTANCE FOR INTERNATIONAL ARBITRAL TRIBUNALS

Intel interpreted nearly every term in §1782 broadly.⁹¹ Pursuant to *Intel*, “interested parties” can request discovery regardless of whether the foreign tribunal wants or will use the requested information, even if a proceeding before the foreign tribunal is not yet in process, and the information sought need not be discoverable in the jurisdiction of the foreign tribunal or in similar U.S. proceedings. Hence, applying §1782 to arbitral tribunals would mean allowing any “interested party” to a foreseeable arbitration to use §1782 to obtain discovery to which it is not entitled pursuant to the agreed-upon rules of the arbitration, the law of the jurisdiction in which the arbitration will proceed, or the United States. Further, the requesting party could request the information without having asked the arbitration panel to subpoena the evidence or after an arbitration panel had refused to subpoena the evidence, and without seeking approval from the arbitration panel.

Based on these strange results, §1782, as interpreted by *Intel*, is not the best vehicle for U.S. courts to provide judicial assistance to international arbitral tribunals in obtaining evidence.

A. *The Supreme Court's Holding in Intel Focused on the Fact that AMD had to Produce Evidence before the DG-Competition in Order to Get it Reviewed by the Courts on Appeal*

Before courts rush to interpret *Intel's* broad reading of §1782 to include arbitral tribunals, what *Intel* actually held regarding “tribunal” should be considered. The Court relied on AMD's argument that it could only submit evidence to be considered by EU judicial tribunals reviewing the EC Commission's findings during the DG-Competition's investigative stage. That the EU Court of First Instance is certainly a “tribunal” was beyond doubt, and therefore, AMD's request was for discovery for use in a foreign tribunal. It did *64 *not* hold that “tribunal” should include non-governmental agencies. Accordingly, the district court's conclusion in *Roz Trading* that private arbitral tribunals are “tribunals” does not logically flow from the *Intel* decision.

B. *Resulting Divergence between Domestic and International Arbitration*

One major ramification of the recent decisions allowing discovery pursuant to §1782 to parties before arbitral tribunals is the resulting incongruence between arbitrators' and parties' rights under the FAA and pursuant to §1782. The FAA is the main statute governing domestic and international arbitration in the United States. The statute was enacted in 1925 and has remained relatively unchanged.⁹² Commentators have called for reforms to the FAA to respond to the unique nuances of international arbitration.⁹³ Because the FAA is a “barebones” structure covering only the most basic aspects of arbitration procedure, “gap-filling” is often done by judicial decisions and agreements between parties.⁹⁴ Filling the FAA's discovery gaps with §1782 is a far inferior solution to amending the FAA or enacting a new arbitration statute dealing with international arbitration specifically.

Using §1782 will result in a huge disconnect between the rights and obligations of parties arbitrating before international arbitral panels that qualify as “international tribunals” pursuant to §1782 and parties to arbitrations before non-“international

tribunals.” This incongruence means that parties before “international” arbitral tribunals requesting discovery will have substantial advantages over parties in domestic arbitrations. Likewise, parties to international arbitral proceedings will have substantially heightened discovery obligations by being forced to argue and comply with §1782 requests. The Second Circuit’s concerns in *National Broadcasting Company* are still very real, and must be addressed before §1782 can function as a logical grant of judicial assistance to arbitral tribunals. One consequence of this demarcation between “international” and “domestic” arbitration could be parties negotiating the nationality of arbitrators and the geographical location of the arbitration with the aim of creating either domestic or international arbitration to ensure or avoid the use of § 1782.⁹⁵

The resulting major differences between international and domestic arbitrations are as follows: (1) parties to “international” arbitration proceedings *65 are entitled to compel non-party witnesses to produce testimony and documents, whereas that right is solely with the arbitrators in domestic arbitration; (2) the scope of information available to parties pursuant to §1782 could be much broader than the scope of available information pursuant to the FAA; and (3) domestic arbitrators can request court assistance only within the judicial district in which the panel sits.⁹⁶

1. Giving Parties Power Traditionally Reserved for Arbitrators

Section 7 of the FAA provides, in part, as follows:

*The arbitrators selected ... may summon in writing any person to attend before them as a witness ... and ... to bring with him or them any ... document ... deemed material as evidence in the case [I]f any person ... so summoned ... shall refuse or neglect to obey said summons, upon petition the [U.S.] district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person, ... or punish said person ... for contempt ...*⁹⁷

This language gives *only arbitrators* the power to compel testimony or document production, and provides for judicial intervention if the arbitrators’ requests are not complied with. Hence, in domestic arbitration, the parties themselves have no right to request discovery, only the arbitrators.⁹⁸ Under the district courts’ recent readings of §1782, any “interested person” could petition a district court to compel evidence. This would create a vast divide between parties’ rights in international, as opposed to domestic, arbitral proceedings.

This problem has prompted several scholars to suggest that parties must obtain arbitrators’ approval before petitioning a U.S. court for judicial assistance *66 pursuant to §1782.⁹⁹ This judicial modification of §1782’s textual requirements is doubtful after *Intel*’s hyper-textual approach to interpreting §1782’s requirements. The Supreme Court specifically rejected imposing “categorical limitations” on §1782 because such limitations would be at odds with the plain language of the statute.¹⁰⁰ The Court explicitly refused to require discoverability in the foreign or international tribunal, even after the EC Commission appeared before it and told the court point blank that it did not want the requested discovery. Therefore, it is doubtful that federal courts will ever require arbitrators’ approval before parties can make §1782 requests.

2. Parties to International Arbitration Proceedings may be Entitled to a Broader Scope of Evidence than Parties to Domestic Proceedings

Section 1782 allows an interested party or tribunal to request assistance in obtaining any evidence “for use” in an international or foreign proceeding.¹⁰¹ *Intel* made it very clear that §1782 does not require that the evidence sought be discoverable in either the foreign jurisdiction or in a similar proceeding in U.S. court. Accordingly, the potential scope of information available to a requesting party is expansive. Conversely, §7 of the FAA allows arbitrators to request, and U.S. district courts to compel, information that is “deemed material” to the arbitral proceeding.¹⁰² Arguably, two very different standards for what is discoverable may emerge depending on whether the arbitration is “international” or “domestic.”¹⁰³

Another potential difference between discovery pursuant to §1782 and pursuant to the FAA is pre-hearing discovery from non-parties. Such discovery is clearly allowed pursuant to §1782, and in fact, courts are instructed to favor requests for non-party discovery over requests for discovery from parties to foreign litigation.¹⁰⁴ As for the FAA, there is currently a circuit split regarding whether pre-hearing discovery from non-parties is allowed.¹⁰⁵ The result of this *67 divergence is that pre-hearing discovery of non-parties is definitely allowed if the parties are arbitrating before an “international tribunal” and possibly allowed, depending on the circuit in which the tribunal is sitting, in “domestic” arbitration.

3. Parties to International Arbitration Proceedings can Utilize the Assistance of any U.S. District Court, while Domestic Arbitrators can only Utilize the Assistance of the District Court in which the Arbitration Proceeding is Pending

Section 7 of the FAA empowers a district court to compel non-complying third parties to produce documents or testimony for use in an arbitration proceeding only if the witness is situated in the district in which the arbitration is being held.¹⁰⁶ Section 1782, on the other hand, allows any interested person to petition the U.S. district court “in which a person resides or is found.”¹⁰⁷ This gives parties to international arbitration proceedings the ability to request information from any person or corporation anywhere in the United States, as opposed to only in the jurisdiction in which the arbitration proceeding is pending.¹⁰⁸

C. Effect on Underlying Principles of Arbitration

The United States, like many other countries, has expressed strong support for arbitration as an alternative dispute resolution mechanism that is a cost-effective and efficient alternative to litigation.¹⁰⁹ The central question is to what extent reading §1782 to include judicial assistance to parties in arbitral proceedings is harmonious or dissonant with the policies underlying arbitration. While some courts and commentators have argued that pro-arbitration policies are at odds with interpreting §1782 to include arbitration tribunals, others insist that they are harmonious.¹¹⁰

Since efficiency, cost, and the parties' ability to control the choice of law and scope of discovery comprise the impetus initially driving the explosion of *68 arbitration, one must ask whether these goals are undermined by allowing parties to seek broad discovery pursuant to §1782, and stripping arbitrators of the exclusive power to order discovery. It is hard to see how giving parties recourse to seek discovery without arbitrators' approval that is outside the jurisdiction of the arbitral panel increases efficiency or keeps costs down.¹¹¹ Rather, after *Intel's* broad interpretation of the statute, expansively reading §1782 to include arbitral tribunals is guaranteed to increase parties' costs by dealing with §1782 in negotiating arbitration clauses, bringing and defending §1782 requests in court, and reconciling parties' new found power with traditional ideas about arbitrators' control over discovery and choice of law agreements between parties. Parties to arbitration utilizing §1782 would also likely face challenges to the enforcement of arbitral awards based on a court's denial or granting of a §1782 request before or during the arbitration. One of the hallmarks of arbitration's efficiency and cost effectiveness includes the relatively narrow chance of disturbing a final arbitral award, which would be undermined should §1782 provide a new avenue for challenging awards.¹¹²

Applying §1782 to arbitral tribunals further blurs the line between litigation and arbitration.¹¹³ When a party can be compelled to arbitrate by a court, parties can use courts to compel both each other and non-parties to produce discovery not requested by the arbitrators, and parties can use the courts to enforce arbitral awards, one begins to wonder where the line between private ends and public begins. As the costs and burdens of arbitration look more and more like the costs and burdens of litigation that are the main factors in arbitration's popularity, arbitration becomes a less enticing alternative.

D. Potential to Undermine Parties' Contracting Provisions

Many arbitration clauses provide parties with very limited to no discovery rights should arbitration occur.¹¹⁴ One would assume that §1782 would not be *69 available to parties in such circumstances,¹¹⁵ but that is not at all clear under the current

state of the law. Because, pursuant to *Intel*, district courts cannot reject §1782 requests solely on the ground that the requested information is not discoverable in the foreign tribunal, it is very plausible that a party could obtain information from its opponent in contravention to the parties' arbitration clause or the rules of the arbitration tribunal. Such a result would certainly run counter to arbitration as a “creature of contract”¹¹⁶ by which parties can control the scope and extent of discovery, thereby keeping costs down and expediting a decision. Pursuant to *Intel's* rejection of a foreign discoverability requirement, even an arbitration clause with a specific clause stating that neither party will be entitled to utilize §1782 would not be sufficient language, by itself, for a U.S. district court to reject a §1782 request from one of the parties to a subsequent arbitration.

One scholar has argued that not allowing parties to international arbitration to utilize §1782 “discriminates unfairly against a party that has signed an arbitration agreement” because “if it had not done so, it could have brought its action in a foreign court and have benefited from recourse to §1782.”¹¹⁷ When considering that the purpose of arbitration is to allow parties to contract *out* of judicial discovery rights and obligations it becomes apparent that the opposite is true. It would be unfair to force parties that have gone to the trouble of incorporating an arbitration clause into their contract in order to avoid court involvement to be subject to court-mandated discovery after all.¹¹⁸

E. The Recent District Courts' Interpretation of §1782 to Include Arbitral Tribunals Puts the United States at Odds with Other Countries' Judicial Assistance to Arbitration Statutes

In 1985, UNCITRAL published a model law for countries to follow relating to several aspects of international arbitration, including judicial assistance. *70 Specifically, Article 27 of the UNCITRAL Model Law on International Commercial Arbitration addresses judicial assistance as follows: “The arbitral tribunal *or a party with the approval of the arbitral tribunal* may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”¹¹⁹ Many countries have enacted arbitration laws in accordance with the UNCITRAL Model Law. Hence, many countries allow only arbitrators or parties with the approval of the arbitrators to request judicial assistance in taking evidence for use in an arbitration proceeding.¹²⁰

Article 27 and the statutes of those countries following it are in stark contrast to §1782 as applied to arbitral tribunals, as §1782 does not have any requirement that “interested persons” requesting evidence pursuant to the statute first seek the arbitrators' approval before requesting the evidence. In fact, U.S. courts have repeatedly held that §1782 does not contain a quasi-exhaustion requirement, *71 which means that requesting parties need not have sought the requested evidence from the foreign tribunal itself before petitioning a U.S. court.¹²¹

Canada and England both have statutes granting their courts discretion to provide judicial assistance to foreign courts and tribunals.¹²² English courts have explicitly held that the English judicial assistance statute does not allow its courts to provide judicial assistance directly to foreign or international arbitral tribunals.¹²³ Logically, English courts have applied England's Arbitration Act to requests for evidence by international arbitral tribunals, which, as noted above, requires the permission of the tribunal or agreement by the parties.¹²⁴ Although Canadian courts have not yet explicitly issued a similar holding, case law suggests that a foreign or international arbitral tribunal could only seek judicial assistance by requiring that a court in the local jurisdiction request the evidence.¹²⁵ Interpreting §1782 to include arbitral tribunals would put the United States in an anomalous position, and allow judicial assistance directly to arbitrating parties unavailable in any other jurisdiction in the world.

VII. CONCLUSION

While the U.S. should certainly have a mechanism in place to provide judicial assistance to international arbitral tribunals, such a mechanism should be carefully drafted with the nuances of arbitration in mind. Such a mechanism should require arbitrators' approval before a party can request judicial assistance, be in keeping *72 with the discovery rules that the parties agreed upon in their arbitration clause, and be allowed only after arbitration proceedings have been initiated. Due to *Intel's* broad reading of §1782, none of these important features can reasonably be read into §1782 as applied to arbitration

tribunals. Instead, parties to arbitration proceedings can likely use §1782 before arbitration has been initiated, without arbitrators' approval, and even if the arbitration clause specifies that such parties are not entitled to utilize §1782.

These results would give parties to international arbitration proceedings a vastly different set of rights and obligations than parties to domestic arbitration or those seeking judicial assistance from foreign courts. Accordingly, instead of trying to shove a square peg (international arbitration) into a round hole (§1782), §1782 should be interpreted *not* to include arbitral tribunals, and a more nuanced and tailored statute should be created to address judicial assistance to international arbitral tribunals.

Footnotes

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¹ Federal Arbitration Act, 9 U.S.C. §1, et seq. (2004).

² 542 U.S. 241 (2004).

³ The two district court cases are *In re Oxus Gold PLC*, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F.Supp.2d 1221 (N.D. Ga. 2006).

⁴ 28 U.S.C. §1782 (2004). For a comprehensive history of the evolution of §1782 from its inception in 1855 to the present, see the Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel v. Advanced Micro Devices, Inc.*, 2004 WL 214306 (Jan. 30, 2004). The Supreme Court decision in *Intel* also traces the evolution of the statute. 542 U.S. 241 (2004). See also Roger J. Johns & Anne Keaty, *The New and Improved Section 1782: Supercharging District Court Discovery Assistance to Foreign and International Tribunals*, 29 Am. J. Trial Advoc. 649 (2006).

⁵ Act of March 3, 1855, ch. 140, §2, 10 Stat. 630.

⁶ See Act of March 3, 1863, ch. 95, §1, 12 Stat. 769 (eliminating the requirement that the government of a foreign country be a “party or have an interest in the proceedings”); Act of May 24, 1949, ch. 139, §93, 63 Stat. 103 (replacing the term “civil action” with “judicial proceeding” when characterizing the type of foreign proceeding in which U.S. courts could provide assistance).

⁷ S. Rep. No. 2393, 85th Cong. 2d Sess. 3 (1958).

⁸ Act of Sept. 2, 1958, Pub. L. No. 85-906, §2, 72 Stat. 1743.

⁹ *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2 (1963); Act of Oct. 3, 1964, Pub. L. No. 88-819, §9, 78 Stat. 997.

¹⁰ 28 U.S.C. 1782(a) (emphasis added).

- 11 Act of May 24, 1949, ch. 139, §93, 63 Stat. 103 (emphasis added).
- 12 S. Rep. No. 1580, 88th Cong. 2d Sess 7-8 (1964). In 1996, §1782 was subsequently modified to add “criminal investigations conducted before formal accusation” to “foreign or international tribunal” to allow for assistance to war-crimes tribunals. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §132(b), 110 Stat. 486.
- 13 S. Rep. No. 1580.
- 14 28 U.S.C. §1782(a) (emphasis added).
- 15 *In re Application of Technostroyexport*, 853 F.Supp. 695 (S.D.N.Y. 1994).
- 16 *Id.* at 697.
- 17 *Id.* at 695 (“[a]rbitrators govern their own proceedings, generally without assistance or intervention by a court. Whether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules (as distinct from court rules) and by what the arbitrators decide.”)
- 18 *Id.* at 698-99.
- 19 985 F.Supp. 402 (S.D.N.Y. 1997).
- 20 *Id.* at 403.
- 21 *Id.*
- 22 *Id.* at 404.
- 23 *Id.* at 405.
- 24 165 F.3d 184 (2d. Cir. 1999).
- 25 *Application of National Broadcasting Co., Inc.*, 1998 WL 19994 (S.D.N.Y. Jan. 21, 1998).
- 26 *Id.* For a detailed analysis and critique of the court's reasoning regarding whether arbitral tribunals are “tribunals,” see Steven A. Hammond, *The Art of Missed Opportunity: How U.S. Courts Declined to Assist Private International Arbitral Tribunals under the U.S. Law Authorizing Discovery in Aid of Foreign and International Proceedings*, 17(4) J. Int'l Arb. 131 (2000); Scott Boesel, *Arbitration Bodies Should be Considered Tribunals Under §1782: An Analysis of NBC v. Bear Stearns & Co.*, 63 Alb. L. Rev. 637 (1999); Thurston K. Cromwell, *The Role of Federal Courts In Assisting International Arbitration: National Broadcasting Co. v. Bear Stearns & Co.*, 2000 J. Disp. Resol. 177. For an analysis of the lower court's decision in *National Broadcasting Company*, see Laurence Shore, *Re the Application of National Broadcasting Company, Inc. and NBC Europe, Inc., United States District Court for the Southern*

District of New York, January 21, 1998, 1(7) Int'l A.L.R., 244-47 (1998).

27 165 F.3d at 189.

28 9 U.S.C. §7.

29 165 F.3d at 187.

30 *Id.*

31 *Id.* at 187-88.

32 *Id.* at 190-91.

33 168 F.3d 880 (5th Cir. 1999). For a detailed analysis and critique of the court's reasoning regarding whether arbitral tribunals are “tribunals,” see Hammond, *supra* note 26, at 137-43.

34 *Id.* at 882-83.

35 *Id.* at 882.

36 *Id.* at 883.

37 542 U.S. 241 (2004). See also Daniel A. Losk, *Section 1782(A) After Intel: Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 Cardozo L. Rev. 1035 (2005) (noting that *Intel* was the first time in 150 years that the Supreme Court has interpreted §1782).

38 The facts leading up to the *Intel* Supreme Court decision are set forth in several court documents, including the Supreme Court decision itself at 542 U.S. 241.

39 A thorough description of the function and structure of the DG-Competition can be found in the Brief of the Commission of the European Communities as Amicus Curiae in Support of Petitioner, *Intel v. Advanced Micro Devices*, 2002 WL 32157391 (Nov. 15, 2002) [hereinafter First EC Brief], and the Brief of Amicus Curiae of the Commission of the European Communities Supporting Reversal, *Intel v. Advanced Micro Devices*, 2003 WL 23138389 (Dec. 23, 2003) [hereinafter Second EC Brief].

40 542 U.S. at 249. The documents in the previous U.S. case, *Intergraph Corp. v. Intel Corp.*, 3 F.Supp.2d 1255 (N.D. Ala. 1998), were subject to a protective order, and thus, not available for use outside that litigation.

41 *Advanced Micro Devices, Inc. v. Intel Corp.*, 2002 WL 1339088 (N.D. Ca. Jan. 7, 2002).

42 *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664 (9th Cir. 2002).

43 *Id.* at 669.

44 *Id.*

45 *Intel Corp. v. Advanced Micro Devices, Inc.*, 540 U.S. 1003 (Nov. 10, 2003).

46 First EC Brief, *supra* note 39; Second EC Brief, *supra* note 39. The EC declared its submissions were “highly unusual” in the Second EC Brief, *supra* note 39, at 1.

47 Second EC Brief, *supra* note 39, at 2.

48 First EC Brief, *supra* note 39, at 3.

49 *Id.* at 4.

50 Second EC Brief, *supra* note 39, at 7-9 (emphasis added).

51 *Id.* at 4.

52 *Id.* at 11.

53 First EC Brief, *supra* note 39, at 4.

54 Brief for Petitioner, *Intel v. Advanced Micro Devices*, 2003 WL 23138394 (Dec. 31, 2003), at 28-29.

55 *Id.* at 29-30.

56 Brief for Respondent, *Intel Corp. v. Advanced Micro Devices*, 2004 WL 297864 (Feb. 13, 2004), at 34.

57 *Id.* at 36.

58 Justice Scalia concurred with the majority, and Justice O'Connor did not take part in the case. As discussed below, Justice Breyer dissented.

59 *Intel Corp.*, 542 U.S. at 247.

60 *Id.* at 258-59.

61 *Id.* 260-61.

62 *Id.* at 259.

63 *Id.* at 258 (emphasis added) (quoting Hans Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015 (1965)).

64 *Id.* at 264.

65 *Id.* at 265.

66 *Id.* at 270 (emphasis in original).

67 *Id.* at 269.

68 *Advanced Micro Devices v. Intel Corp.*, 2004 WL 2282320 (N.D. Ca. Oct. 4, 2004).

69 *Id.*

70 For example, one scholar viewed the court's heavy reliance on the writing of Columbia law professor Hans Smit, who had advocated the position that the 1964 amendments to §1782 were intended to include arbitral tribunals, as signaling the Court's implied acceptance of that position. Losk, *supra* note 37, at 1038 (“[a]dmittedly, ... the Court quoted with tacit approval a Columbia Law Review article by Professor Smit -- the leading authority on §1782 -- stating that, among other bodies, ‘the term “tribunal” ... includes ... arbitral tribunals’”). *See also* Jane Wessel, *A Tribunal by Any Other Name: U.S. Discovery in Aid of Non-U.S. Arbitration*, 8(4) Int'l A.L.R. 139 (2005). Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 Am. Rev. Int'l Arb. 295 (2003); Barry Garfinkel & Yuval Miller, *The Supreme Court's Reasoning in Intel Calls into Question Circuit Court Rulings on Inapplicability of 28 U.S.C. §1782 to International Commercial Arbitration*, 19(8) Int'l Arb. Report 17, 25 (2004).

71 *In re Oxus Gold PLC*, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F.Supp. 2d 1221 (N.D. Ga. 2006).

72 2006 WL 2927615.

73 *Id.* at *5.

74 *Id.* at *6.

75 *Id.*

76 *In the Matter of the Application of Oxus Gold PLC for Assistance Before a Foreign Tribunal*, MISC 06-82 (D.N.J. April 2, 2007) (unpublished memorandum opinion dismissing Mr. Barbanel's appeal of Magistrate Judge Hughes' Denial of Respondent's Motion to Vacate the Court's Order of August 11, 2006).

77 *Id.* at 7-8.

78 *Id.* at 8.

79 *Id.* at 9-10.

80 *Id.* at 13-14.

81 469 F.Supp. 2d 1221.

82 *Id.* at 1224.

83 *Id.*

84 *Id.*

85 *Id.* at 1225.

86 *Id.*

87 *Id.* at 1227.

88 *Id.* at 1229 (emphasis added).

89 *Id.*

90 *In re Roz Trading Ltd.*, 2007 WL 120844 (N.D. Ga. Jan. 11, 2007) (order in which district court denied Coca-Cola Company's motion to stay its order pending appeal).

91 *See Losk*, *supra* note 37 at 1046-47 (“the Supreme Court in *Intel* delivered a broad, liberal interpretation of the availability of judicial assistance. The Court gave virtually every element of § 1782(a) an expansive interpretation, thereby expanding the number of parties, tribunal bodies, and circumstances under which such assistance may be granted.”).

92 Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233 (Fall 2006).

93 *Id.* at 235.

94 *Id.* at 238.

- 95 See [National Broadcasting Company](#), 165 F.3d at 191. Relying heavily on *National Broadcasting Company*, the Fifth Circuit voiced the same concerns in *Republic of Kazakhstan*, 168 F.3d at 882-83.
- 96 The Second Circuit in *National Broadcasting Company* and the Fifth Circuit in *Republic of Kazakhstan* both discussed these three ways that international arbitration privileges would differ from domestic privileges pursuant to the FAA. 165 F.3d at 187-88; 168 F.3d at 883.
- 97 9 U.S.C. §7 (emphasis added).
- 98 See [National Broadcasting Company](#), 165 F.3d at 187-88; [Republic of Kazakhstan](#), 168 F.3d at 883. Even proponents of allowing parties before arbitral tribunals to use §1782 acknowledge the problems associated with reading the statute not to require arbitrators' approval. See [Losk](#), *supra* note 37, at 1055, 1068 (“extending assistance to the parties when the arbitrators have not requested the information risks undermining the arbitration by unnecessarily increasing expenses, delaying the process and inviting abuse”); [Smit](#), *supra* note 70, at 324 (“for a federal court to order disclosure by a party to the arbitral proceedings may interfere with the manner in which the arbitral tribunal may wish to proceed. As a general rule, a federal court should therefore be reluctant to order disclosure by a party to the arbitral proceedings in the absence of an arbitral directive or request that the information sought be disclosed.”).
- 99 [Losk](#), *supra* note 37, at 1065; [Smit](#), *supra* note 70, at 324.
- 100 542 U.S at 255.
- 101 28 U.S.C. § 1782(a).
- 102 9 U.S.C. §7.
- 103 See [National Broadcasting Company](#), 165 F.3d at 189; [Republic of Kazakhstan](#), 168 F.3d at 883. See also [Losk](#), *supra* note 37, at 1055-56.
- 104 [Intel](#), 541 U.S. at 264 (“when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), 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”).
- 105 See [Drahozal](#), *supra* note 86, at 239. *In re Security Life Ins. Co.*, 228 F.3d 865 (8th Cir. 2000) is an example of a court permitting pre-hearing discovery from a non-party, and *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004), is an example of a court not permitting pre-hearing discovery from a non-party. [Drahozal](#), *supra* note 86, at 239, n. 51.
- 106 9 U.S.C. §7. See also [Application of Medway Power Limited](#), 985 F.Supp. at 404.
- 107 28 U.S.C. §1782(a).
- 108 See [National Broadcasting Company](#), 165 F.3d at 189; [Republic of Kazakhstan](#), 168 F.3d at 883. See also [Losk](#),

supra note 37, at 1055.

109 See *e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985).

110 Losk, *supra* note 37, at 1060. For examples of the former position, see *National Broadcasting Company*, 165 F.3d 184 and *Technostroyexport*, as well as Shore, *supra* note 26. For examples of the latter position, see Smit, *supra* note 70; Losk, *supra* note 37; Wessel, *supra* note 70, at 144.

111 *But see* Wessel, *supra* note 70, at 144 (reasoning that allowing courts to decide whether to grant judicial assistance on a “case-by-case” basis would ensure that inefficient discovery would not be granted).

112 *But see* Losk, *supra* note 37, at 1066-67 (arguing that allowing §1782 in arbitration proceedings would increase “procedural safeguards and due process” at the enforcement stage).

113 See, *e.g.*, Shore, *supra* note 26, at 246.

114 See, *e.g.*, *High-Quality Results, High-Quality Processes: Top In-House Counsel Discuss The Continuing Challenges In Commercial Arbitration*, 24 *Alternatives to High Cost Litig.* 182 (2006).

115 See, *e.g.*, Wessel, *supra* note 70 (“[t]here is no reason in principle why the parties could not agree in their arbitration agreement to limit their use of alternative discovery procedures such as [§1782]”).

116 985 F.Supp. at 403.

117 Smit, *supra* note 70, at 314.

118 As succinctly stated by the Second Circuit in *National Broadcasting Company*, “[I]f the parties to a private international arbitration make no provision for some degree of consensual discovery inter se in their agreement to arbitrate, the arbitrators control discovery, and neither party is deprived of its bargained-for efficient process by the other party's tactical use of discovery devices”). 165 F.3d at 191. See also Losk, *supra* note 37, at 1069 (arguing that “parties should remain free to opt out of such assistance, thereby ensuring their freedom to contract and reaffirming arbitration's flexibility”). If parties do want the right to take discovery pursuant to the federal rules, they can easily contract to have those rules govern.

119 UNCITRAL Model Law on International Commercial Arbitration (1985), Art. 27 (emphasis added). Countries that have enacted laws based on this model law include Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia, Canada, Chile, Croatia, Cyprus, Denmark, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Paraguay, Peru, the Philippines, Poland, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; Zambia, and Zimbabwe. Available at UNCITRAL website http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html. See also Fabien Gélinas, *Arbitration and the Challenge of Globalization*, 17 J. Int'l Arb. 117 (2002) (noting that the UNCITRAL Rules have been very successful and 40 jurisdictions have adopted them). It is noteworthy that although the

UNCITRAL Model Law applies to international commercial arbitration, it applies only to international arbitral tribunals located in the enacting state. Hence, unless modified by the enacting state to include arbitral tribunals located outside the state, it has a similar scope of application to the FAA. England's arbitration statute is an example of one that includes judicial assistance to arbitral tribunals outside England. Arbitration Act 1996 (Eng.), 1996 CH 23 [June 17, 1996], Sec. 2(3)(a).

- ¹²⁰ For example, Germany's Arbitration Law, enacted in 1998, allows an arbitral tribunal or a party *with the approval of the tribunal*, to apply to German courts for assistance in taking evidence. Arbitral Proceedings Reform Act, as amended, June 1, 1998, Tenth Book of the Code of Civil Procedure Arbitration Procedure, Secs. 1025 - 1066. See Gregor Kleinknecht, *A Guide to Arbitration in Germany*, I.C.C.L.R. 1998, 9(11), 328-333. Similarly, England's arbitration statute grants parties to arbitration the ability to seek judicial assistance securing evidence, but only with the permission of the tribunal or agreement by all parties." Arbitration Act 1996 (Eng.), 1996 CH 23 [June 17, 1996], Sec. 43.
- ¹²¹ See, e.g., *Malev Hungarian Airlines v. United Technologies Int'l Inc.*, 964 F.2d 97 (2d Cir. 1992).
- ¹²² The Evidence (Proceedings in Other Jurisdictions) Act, 1975, c. 34, §1, et al; Canada Evidence Act, R.S.C., c. E-10, §43.
- ¹²³ *Viking Insur. Co. v. Rossdale*, [2002] 1 Lloyd's Rep. 219, [2002] 1 W.L.R. 1323 (Q.B.).
- ¹²⁴ See *supra* note 120. See also Ben Valentin & Dominic Spencer Underhill, *Securing Evidence for Foreign Arbitrations*, (1)(6) Int'l A.L.R. 205 (1998) (discussing the English Arbitration Act 1996).
- ¹²⁵ Michael Penny, *Letters of Requests: Will a Canadian Court Enforce a Letter of Request from an International Arbitral Tribunal?*, 12 Am. Rev. Int'l Arb. 249, 255 (2001) ("[I]t now seems reasonably clear that a Canadian court will enforce a request for evidence from a foreign or international arbitral tribunal if the request is brought through a traditional court within the jurisdiction in which the proceedings are taking place"). Arguably, applying Canada's judicial assistance statute to arbitral tribunals would not be as problematic as applying §1782, as Canada entertains requests only from courts and tribunals directly, as opposed to from parties before foreign courts and tribunals. For a discussion of interpreting the Canadian judicial assistance statute to include arbitral tribunals, see Frédéric Bachand, *L'Intervention du Juge Canadien Avant et Durant un Arbitrage Commercial International* 169-70 (2005).

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