

INTERNATIONAL ARBITRATION

Expert Analysis

Using Section 1782 to Obtain Evidence For International Arbitration Proceedings

Section 1782 of Title 28 of the U.S. Code—entitled “Assistance to foreign and international tribunals and to litigants before such tribunals”—permits a party to foreign (i.e., non-U.S.) proceedings to apply directly to a U.S. federal court for an order requiring “a person” who “resides or is found” in the United States 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.”

Section 1782 can be a powerful tool for parties to foreign proceedings, enabling them to apply directly to a U.S. court to seek evidence they might not be able to obtain in any other way. Moreover, U.S. courts have rejected several attempts to impose restrictions of the use of §1782. Thus, it is not necessary that foreign proceeding be pending at the time of the §1782 application, but rather, it is sufficient that it be in “reasonable contemplation.” *Intel v. AMD*, 542 U.S. 241, 259 (2004). In addition, it is not necessary to obtain the permission of the foreign tribunal before making

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a §1782 application. *In re Malev*, 964 F.2d 97, 101 (2d Cir. 1992).

Section 1782 is routinely used by parties to foreign lawsuits to obtain evidence located in the United States. However, there is currently a debate in the U.S. courts regarding whether

The debate on the use of §1782 for international arbitration is ripe for resolution.

§1782 can be used to obtain evidence for international arbitration proceedings. In *In re Kleimar N.V.*, 2016 WL 6906712 (SDNY Nov. 16), the district court for the SDNY recently weighed in on that debate. The court granted a §1782 application for evidence for use in an international arbitration proceeding under the rules of the London Maritime Arbitration Association.

Kleimar offers an opportunity to review the current state of the law on §1782 in the international arbitration context.

Debate and Discord

U.S. district courts analyzing whether to grant §1782 applications proceed in two parts: first, they consider whether the facial requirements of the statute are satisfied (e.g., Does the person from whom evidence is sought “reside” in the district?) and, if so, second, courts consider whether and how to exercise their discretion in deciding whether to grant the application. *In re Application of Grupo Qumma, S.A.*, 2005 WL 937486, at *1 (SDNY April 22, 2005).

The debate over the use of §1782 in international arbitration concerns an issue that falls within the first part of a court’s analysis: Is an international arbitration tribunal “a foreign or international tribunal” for the purposes of §1782?

In considering how U.S. courts have answered this question, the starting point is a decision of the Second Circuit in 1999 in the case of *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999). In that case, the Second Circuit held that §1782 applied only to “governmental” bodies, like a foreign

court, such that a “private” international arbitration panel—in that case an ICC arbitral tribunal sitting in Paris—was not a “foreign or international tribunal” for the purposes of that statute. The Fifth Circuit reached the same conclusion later that year. *In re Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880 (5th Cir. 1999). And for the next five years, it seemed settled that §1782 could not be used in the international arbitration context.

However, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004)—the only time the U.S. Supreme Court has considered §1782—the court injected uncertainty into the area. While *Intel* did not involve an application for evidence for use in an international arbitration proceeding, in the course of its decision the Supreme Court quoted with approval an article written by Prof. Hans Smit, a principal draftsman of the 1964 amendments to §1782, which had revised the statute to add the words “foreign or international tribunal.” In that article, Smit wrote that the term “tribunal” included “investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies.” Whether Justice Ruth Bader Ginsburg, who wrote the opinion in *Intel*, realized that she was casting doubt on an apparently settled issue regarding §1782 when she quoted that portion of Professor Smit’s article is not clear. In a column in this journal shortly after the *Intel* decision, I wrote that the court’s reliance on Smit’s views “could leave it open to §1782 applicants in future cases to argue that, in the Supreme Court’s view, the term ‘tribunal’ includes an arbitral panel.” John Fellas, “The U.S. Supreme Court Rules on Section 1782,” in *NYLJ*, Aug. 18, 2004.

It did not take too long for such applicants to appear. Just two years later, the

District Court for the Northern District of Georgia rejected the decisions of the Second and Fifth Circuits and, relying on *Intel*, held that an arbitration tribunal operating under the auspices of the International Arbitral Centre of the Austrian Federal Economic Chamber was a “foreign or international tribunal” within §1782. *In re Roz Trading*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

Since then, there has been discord in the law. Some courts have followed *Roz*, holding that an international arbitration tribunal is “foreign or international tribunal.” See, e.g., *In re Hallmark Capital*, 534 F. Supp. 2d 951 (D. Minn. 2007); *In*

Unlike §1782, which permits a party to apply directly to a U.S. court for evidence without the authorization of the arbitrators even before an arbitration proceeding is pending, §7 of the FAA permits a party to apply to a U.S. court only to enforce a subpoena issued by the arbitrators in a pending proceeding.

re Application of Babcock Borsig AG, 583 F. Supp. 2d 233 (D. Mass. 2008); *In re Winning (HK) Shipping Co.*, 2010 WL 1796579 (S.D. Fla. April 30, 2010). *Kleimar* joins that line of cases.

Other courts have drawn a distinction between “governmental” and “private” international arbitration tribunals, and have held that, while “governmental” tribunals qualify as “foreign or international tribunals” for the purposes of §1782, “private” tribunals do not. More specifically, several courts have held that arbitrations arising out of private contracts are “private” and so do not

fall within the scope of §1782. See, e.g., *In re Grupo Unidos Por El Canal S.A.*, 2015 WL 1815251 (N.D. Cal. April 21); *In re Arbitration in London, England*, 626 F. Supp. 2d 882 (N.D. Ill. 2009); *In re Operadora DB Mex., S.A. de C.V.*, 2009 WL 2423138 (M.D. Fla. Aug. 4); *La Comisión Ejecutiva Hidroeléctrica Del Rio Lempa v. El Paso*, 617 F. Supp. 2d 481 (S.D. Tex. 2008). And some courts have held that arbitrations arising out of investment treaties are “governmental” and so do fall within the scope of §1782. See, e.g., *In re Oxus Gold PLC*, 2007 WL 1037387, at *5 (D.N.J. April 2, 2007).

Moreover, several circuit courts since *Intel* have explicitly declined to reach the issue of whether an international arbitration tribunal is covered by §1782. *Chevron v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (“We do not reach the argument” that a treaty arbitration between Chevron and Ecuador falls within §1782.); *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) (“We decline to answer” whether an arbitral panel is a tribunal within §1782.); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed.Appx. 31, 34 (5th Cir. 2009) (in an unpublished opinion, declining to revisit *Biedermann* since *Intel* left its rationale unchanged).

Current State of the Law

The current state of the law on the use of §1782 in the international arbitration context is a case study on how law can evolve in the most arbitrary of ways. After all, the *NBC* court’s decision to hold that §1782 does not apply to private arbitral tribunals involved a case directly on point—an application for evidence for use in an ICC arbitration proceeding in Paris. And the Second

Circuit's decision was based on a thorough examination of the text of the statute, a rigorous review of its legislative history, and a considered analysis of its underlying policy. By contrast, the Supreme Court's decision in *Intel* did not involve the international arbitration context at all, but, instead, a proceeding before the Directorate-General for Competition of the Commission of the European Communities. Moreover, the *Intel* court offered no analysis on the question of whether an arbitration panel is a "tribunal": no examination of the text, no review of the legislative history, and no consideration of policy. Some courts have been critical of the arbitrary way the law on §1782 has developed as a result of *Intel*. See, e.g., *Grupo Unidos*, 2015 WL 1815251 at *8 ("[t]wo words from a law review article quoted by the Supreme Court in support of a different proposition have spawned disharmony in the courts regarding whether §1782 applies to private arbitrations established by contract"); *Comisión Ejecutiva*, 617 F. Supp. 2d at 485 ("Smit does not speak for the Supreme Court. Smit's opinion is not even Supreme Court dicta.").

It is worth trying to take stock of the current state of the law on the use of §1782 in the international arbitration context. Whether §1782 can be used in that context depends on two significant factors: the nature of the arbitral proceedings and where in the United States the person from whom evidence is sought "resides or is found."

First, as noted, some courts have held that §1782 can be used to obtain evidence for use in investment treaty arbitrations on the theory that such arbitrations are "governmental" rather than "private." Thus, as the law stands now, depending on the district, there

is a good chance that a district court will entertain a §1782 application for evidence for use in an investment treaty arbitration.

Second, the other important factor relevant to a party's ability to rely upon §1782 in the international arbitration context is geography, namely, where the target of the application "resides" or is "found." This is because a §1782 application is made to the district court of a district where a person "resides or is found." And, as noted, some district courts have permitted parties to rely on §1782 to obtain evidence for use in private arbitral proceedings. Thus, if the person from whom evidence is sought resides or is found in a district where a court that has permitted such reliance, there is a reasonable chance that a §1782 application will be entertained. (I say "reasonable" only because the decision of one district court is not binding authority on another district court.) Moreover, some district courts have taken a broad view of what it means for a person to "reside" or be "found" in a district—rejecting the view that it requires actual residence or physical presence in a the district where the courts sits—but holding, instead, that "significant contacts" with the state can be enough. See, e.g., *Kleimar*, 2016 WL 6906712 at *2 ("Vale has significant contacts with New York such that Vale resides or is found in New York for the purposes of §1782.").

Conclusion

The debate on the use of §1782 for international arbitration is ripe for resolution. In this author's view, the Second Circuit got it right in *NBC*. This is because it is a hallmark of arbitration that the arbitrators have the exclusive authority to control the process

by which the case before them is to be resolved. That principle is reflected in the Federal Arbitration Act (FAA), which applies to international arbitration proceedings (as well as those involving interstate commerce) seated in the United States. Thus, under §7 of the FAA, it is possible for a party to seek the assistance of the courts to obtain evidence. However, unlike §1782, which permits a party to apply directly to a U.S. court for evidence without the authorization of the arbitrators even before an arbitration proceeding is pending, §7 permits a party to apply to a U.S. court only to enforce a subpoena issued by the arbitrators in a pending proceeding. In other words, §7 of the FAA reflects the principle that it is ultimately for the arbitrators to determine—through their decision as to whether to issue a subpoena and, if so, its scope—what evidence it is appropriate to obtain through court assistance, based, presumably, on their view on what evidence is material to the outcome of the case before them. By contrast, §1782 has the potential to take that important decision out of the hands of the arbitrators and place it into the hands of a party, and a U.S. court, which will have far less familiarity with the underlying arbitration than the arbitrators.