The Arbitration Review of the Americas

2019

Discovery in Aid of Arbitration under 28 USC 1782

The Arbitration Review of the Americas

2019

The Arbitration Review of the Americas 2019 provides an unparalleled annual update – written by the experts – on key developments. It is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also to put theory into context – which makes the report of particular value to those conducting international business in the Americas today.

GAR Global Arbitration Review

Discovery in Aid of Arbitration under 28 USC 1782

Jonathan I Blackman and **Jessica Stiefler**
Cleary Gottlieb Steen & Hamilton

Summary

This article addresses the use of section 1782 of Title 28 of the United States Code (Section 1782), which provides for US court assistance in evidence-gathering in foreign proceedings, to obtain discovery for use in private international arbitration. Initially, the law appeared settled that Section 1782 was not available for this purpose. The Supreme Court's decision in Intel Corporation v Advanced Micro Devices, Inc (Intel)[1] changed this understanding and the lower US courts are now divided on whether Section 1782 can be used in aid of arbitration. Where potential evidence is available from a person within the jurisdiction of a court that does permit this use, Section 1782 can be a powerful tool to obtain US-style disclosure that goes far beyond what is typically permitted under international arbitration rules and practices.

THE STATUTE

Section 1782 allows the federal district courts in certain circumstances to assist with discovery 'for use in a proceeding in a foreign or international tribunal.' Specifically, Section 1782(a) states in relevant part:

> 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 be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . 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 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.

The provision's antecedents stretch back to 1855 and evince a consistent effort by Congress to facilitate foreign courts' evidence-gathering in the United States,[2] and, since the early 20th century, a similar desire to assist at least some non-judicial fora.[3] Its current version was enacted in 1964 in response to recommendations made by the Commission on International Rules of Judicial Procedure (the Commission),[4] which proposed the revisions as part of an effort to induce reciprocal procedural reforms by foreign jurisdictions.[5] The new language significantly expanded the type of discovery available under Section 1782[6] and the types of foreign or international proceedings for which such discovery could be used.[7]

District courts are permitted to order discovery under Section 1782 when three conditions are met. First, the target of the discovery request 'resides or is found' in the district where the court sits. Second, the discovery requested is 'for use in a proceeding in a foreign or international tribunal'. And third, the request is made by a foreign or international tribunal 'or upon the application of any interested person'. Once a district court determines that these three prerequisites are satisfied, the decision to order discovery and in what form is left to its discretion, as informed by consideration of several factors set out by the Supreme Court in Intel.

Whether Section 1782 can be used in arbitration turns on the second prerequisite – whether the arbitration qualifies as 'a proceeding in a foreign or international tribunal'. If it does, then

the US court may permit US-style discovery subject to its weighing of the Intel factors in each particular case.

The prerequisite – 'for use in a proceeding in a foreign or international tribunal'

It seems fair to divide into three categories the arbitrations that could conceivably receive a federal court's assistance under Section 1782:8

• interstate arbitration – that is, an arbitration between two nation states;

• investor–state arbitration, which, although involving a private party, is the product of treaties among nation states; and

• international commercial arbitration, which is a pure creature of contract.

There can be little doubt that the first type of international arbitration, interstate arbitration, is covered by Section 1782. Although rare, its origins far predate the statute,9 and the legislative history suggests that Congress intended Section 1782 to incorporate and replace certain laws enacted specifically in response to an arbitration between the United States and Canada in the 1930s.10 But there is real controversy about whether the latter two categories of arbitration involving private parties are covered by the statute.

The early answer to the question was a resounding 'no' – at least with respect to international commercial arbitration. In 1999, in NBC v Bear Stearns & Co (NBC), the Second Circuit held that 'Congress did not intend for [Section 1782] to apply to an arbitral body established by private parties'.11

NBC involved an application by one party to an arbitration administered by the International Chamber of Commerce (ICC) and sited in Mexico to subpoena documents from certain investment bank third-parties doing business in Southern District of New York.12 To decide whether an ICC arbitral tribunal was a 'foreign or international tribunal', the court reviewed Section 1782's legislative history for evidence of Congress's intent, and it also considered a law review article by Hans Smit discussed in the relevant Senate report.13 Professor Smit, who served as the director of the Columbia Law School project that aided the Commission, wrote in 1962 that 'an international tribunal owes both its existence and its power to an international agreement'.14 Based on the legislative history's silence about the issue and Smit's apparent understanding of the term 'international tribunal', the court concluded that Congress intended Section 1782 to reach only 'governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies'.15 It expressly declined to attribute any weight to subsequent writings by Smit, in which he opined that Section 1782 should be read to allow courts also to assist private arbitrations. These later writings, the court reasoned, could not have influenced Congress, coming, as they did, after the statute's enactment.16

That the NBC court's search for any mention of international commercial arbitration in Section 1782's legislative history turned up empty is unsurprising. When the statute was enacted in 1964, the United States had yet to ratify either the New York Convention or the Panama Convention and international commercial arbitration was in its infancy. Similarly, at that time, investor-state arbitration was virtually unknown.17

For arbitration practitioners, the more persuasive aspect of NBC may be its policy analysis, to which the court turned to 'reinforce' its conclusion.18 The court noted that '[t]he popularity of arbitration rests in considerable part on its asserted efficiency and cost effectiveness',

qualities said to be 'especially at odds with the broad-ranging discovery made possible by the Federal Rules of Civil Procedure'.19 And it further noted that parties to an international commercial arbitration may agree ex ante on the scope of discovery, and generally these agreements lead the parties to expect far less discovery than they would have in US civil litigation.20 These expectations would be defeated if one party could unilaterally avail itself of the expansive discovery available through the Federal Rules by recourse to Section 1782. Lurking behind this warning may also have been a concern that the parties' expectations of parity or equality of arms could be defeated, since the district court's jurisdiction is limited to those persons residing or 'found' in the district, creating the risk that one party could obtain evidence unavailable to the other party simply because of the location of that evidence.

Less than two months after NBC, the Fifth Circuit followed suit in Republic of Kazakhstan v Biedermann International (Biedermann).21 On facts very similar to those of NBC, 22 the court reviewed Section 1782's legislative history and, like the Second Circuit, concluded that '[t]here is no contemporaneous evidence that Congress contemplated extending section 1782 to the then-novel arena of international commercial arbitration'.23 Turning to policy considerations, it echoed those of the Second Circuit and took a dim view of court-ordered discovery assistance to international arbitral tribunals generally.

Empowering arbitrators or, worse, the parties in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution. The course of the litigation before us suggests that arbitration's principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.24

After NBC and Biedermann, the question of Section 1782's unavailability for private international arbitration seemed resolved. This changed in 2004, when the Supreme Court decided Intel.25 Intel did not involve arbitration at all, but it proved to be the opening to a much more friendly view of the use of Section 1782 in aid of arbitration.

In Intel, the question was whether a 'foreign or international tribunal', for purposes of Section 1782 discovery, included the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities. Although the DG-Competition is not a court, the Supreme Court held that its proceedings were sufficiently judicial in nature that they should fall within the ambit of Section 1782, because the legislative history of the statute suggested that Congress wished to extend Section 1782 to 'quasi-judicial proceedings'.26 As further support for this understanding, it quoted a 1965 article by Hans Smit: '[t]he term “tribunal” . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, criminal and administrative courts'.27 Ironically, the latter was precisely the type of authority the court in NBC had rejected because it post-dated the enactment of the statute.

Having decided that DG-Competition was a 'foreign or international tribunal' covered by Section 1782, the Supreme Court went on to set forth four non-exhaustive factors to guide district courts' discretion in providing for discovery under the statute. The first factor is whether the target of the discovery is a participant in the foreign proceeding. US court-ordered discovery is less likely needed against a participant because the foreign or international tribunal will have jurisdiction over him and may order the discovery itself. The second factor is the nature of the foreign tribunal and whether this tribunal is likely to be receptive to assistance from a US court. The third factor is whether the Section 1782 request

conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. And the fourth factor is whether the request is unduly burdensome or intrusive.[28]

Despite the fact that its only reference to arbitration was the quotation from Smit's 1965 article, Intel opened the way to some US lower courts taking a more favorable view of using Section 1782 in private commercial arbitration. In the first case to take up the issue, In re Roz Trading Ltd (Roz), a court in the Northern District of Georgia stated that Intel had 'provided sufficient guidance for this court to determine that arbitral panels convened by the [International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna] are "tribunals" within the statute's scope'.[29] Roz started a line of conflicting decisions in the Eleventh Circuit[30] that culminated – at least for now – with a panel of that court first holding unequivocally that the tribunal in an international commercial arbitration 'is a foreign tribunal for purposes of the statute',[31] only to withdraw and replace the decision a year-and-a-half later with an opinion in which it expressly declined to reach the issue.[32]

Division exists within the Second Circuit as well. Although NBC is still good law in that circuit, having never been overruled,[33] in 2009, a magistrate judge in the District of Connecticut, which is one of the lower courts in that circuit, concluded that an international commercial arbitration held under auspices of the Arbitration Institute of the Stockholm Chamber of Commerce was covered by Section 1782 because the arbitral tribunal had not issued any orders precluding discovery and the proceeding was taking place under UNCITRAL rules.[34] Neither of these factors were meaningful under NBC's analysis – nor for that matter Intel's[35] – but the decision was not appealed and the case has been cited by other courts.[36]

In a more recent decision, In re Ex Parte Application of Kleimar NV (Kleimar), a court in the Southern District of New York, which is also located in the Second Circuit, found that a series of private commercial arbitrations occurring in London before the London Maritime Arbitration Association (LMAA) qualified as proceedings before a 'foreign tribunal' within the meaning of Section 1782.[37] In reaching this conclusion, the court in Kleimar suggested that NBC was no longer controlling because of Intel's arbitration dicta.[38] While observing that some of the uncertainty on this issue was the result of the Second Circuit's failure to weigh in on the continued validity of NBC in the 13 years since the Intel decision,[39] the court in Kleimar then took the unusual step, for a district court, of assuming that a court of appeal decision in its own circuit was no longer binding precedent. Having made this assumption, the court in Kleimar relied on two out-of-circuit decisions that had allowed discovery pursuant to Section 1782 for LMAA arbitrations, cursorily stating that it found their reasoning 'persuasive'.[40]

The same divergence of authority exists elsewhere. In the First, Third, Eighth, and DC Circuits, district courts have held that at least some types of private arbitral tribunal are within the ambit of the statute,[41] while their counterparts in the Fifth, Seventh, Ninth and Tenth Circuits have held that at least some types of private arbitral tribunal are not covered.[42] In one striking instance, the same arbitration proceeding has produced conflicting decisions in different district courts.[43]

Post-Intel decisions in the courts of appeals themselves have varied. As noted above, the Eleventh Circuit took up the question, but ultimately decided to save it for a later day.-[44] The Seventh Circuit has merely noted in passing that 'the applicability of Section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain'.[45] The Third Circuit has stated that use of materials gathered through Section 1782 discovery in an investor–state arbitration 'unquestionably would be "for use in a proceeding in a foreign or

international tribunal",'46 but it did so without any analysis or citation.47 And the Second Circuit, when given an opportunity either to endorse or cabin NBC in the context of an investor–state arbitration, declined.48 Only the Fifth Circuit has directly addressed the applicability of Section 1782 in the wake of Intel, and it stood firmly behind its previous decision in Biedermann.49

Further complicating the landscape is the effort by some district courts to distinguish investor–state arbitrations from international commercial arbitrations, ostensibly on the greater role nations play in establishing the former. There may be merit to the exercise,50 but in practice courts have often relied on entirely extraneous factors in determining that Section 1782 should be applied. In In re Oxus Gold PLC (Oxus Gold),51 for example, the court based its decision to grant discovery on the parties' use of UNCITRAL rules in their investor–state arbitration.52 It is not clear whether the court believed this factor was important because it thought that use of the rules signified that the United Nations was involved, or because, as it implied, it thought the UNCITRAL rules themselves constitute a type of 'international law'.53 In any event, both premises are false.54 Notwithstanding its analytical flaws, Oxus Gold has been repeatedly cited by courts for the proposition that investor–state arbitrations qualify as 'foreign or international tribunals'.55

Most of the other investor–state arbitration cases to date relate to a dispute between Chevron and certain Ecuadorian parties, which included an arbitration between Chevron and Ecuador pursuant to a bilateral investment treaty between Ecuador and the United States. Because the discovery Chevron sought in multiple district courts through Section 1782 was also for use in civil and criminal proceedings in Ecuador – which clearly satisfied the statute's requirement – courts did not need to determine whether the arbitration was captured as well.56 Many courts nonetheless did so, but usually in cursory dicta.57

The principal disagreement among the district courts about whether they may authorise discovery for use in either type of private arbitration centers on two aspects of Intel. First, the Supreme Court's quotation of Hans Smit's 1965 article in which he defined 'tribunal' to include 'arbitral tribunals'. Several courts have read the relevant passage of Intel to simply provide a list of all adjudicatory bodies covered by Section 1782.58 Their rationale is that because the Supreme Court 'quoted approvingly language that included "arbitral tribunals with the term's meaning in Section 1782(a)",' it must have endorsed the entirety of that language.59 Other courts have vigorously disputed that the Supreme Court intended Smit's article to support anything more than the proposition for which it was cited – that Congress intended Section 1782 to cover quasi-judicial bodies.60

Second, there has been a tendency for courts to compare the characteristics of the arbitral tribunal at issue in their cases with those of DG-Competition in Intel, often in woefully uniformed ways.61 However, other courts have pointed out that the qualities the Supreme Court considered important in characterising DG-Competition as a foreign tribunal were necessarily driven by the facts of that case, which entailed questions about DG-Competition's adjudicative function, but left no doubt as to its state character.62

The discretionary factors

Courts that construe Section 1782 as allowing for discovery in international commercial or investor–state arbitration often apply the four Intel factors in a mechanical fashion, analysing each in turn and declining to discuss any additional factors.63 Very seldom has the fact that the foreign proceeding is an international arbitration been meaningfully considered. Indeed,

for the two factors that are most likely to be affected by this fact – the receptivity of the tribunal to assistance and efforts to circumvent foreign proof-gathering rules – the most common scenario has been a lack of evidence pointing in either direction.64 Thus, much of the debate has been about which party has the burden of introducing evidence on these factors. The traditional rule has been that the target of the discovery request must prove that the foreign tribunal is not receptive to assistance or that the proponent of the discovery is acting in bad faith.65 Recent decisions, especially in the District of Massachusetts, however, have called this into question.66

One court, however, expressly adjusted its analysis of the discretionary factors to account for the fact that the foreign tribunal was a private international arbitral tribunal. In In re Application of Chevron Corp, the court noted that the arbitration at issue, 'is authorised by a treaty between the United States and Ecuador and, as far as this court understands, there is nothing to indicate that the international tribunal's processes are inadequate to obtain the discovery sought here'.67 It continued, 'since international arbitrators usually control the discovery process, this court believes it should exercise at least some restraint before granting the instant Section 1782 application'.68 The court then criticised the applicant, Chevron, for not disclosing the arbitral tribunal's 'discovery practices and needs'.69

At least one other court has suggested that even if Section 1782 were to allow for discovery in a purely private international arbitration, the discretionary factors would weigh against court-ordered discovery in aid of such a proceeding.70 In In re Application by Rhodianyl, a court in the District of Kansas concluded that the parties' private arbitration in France did not constitute a 'foreign tribunal' for purposes of Section 1782.71 Considering the discretionary factors in dicta, the court observed that since the parties had voluntarily entered into private international arbitration and had thereby 'specifically eschewed any desire for "American-style"discovery or productions of documents,' the nature and character of the parties' chosen arbitral forum would have weighed against an award of substantial discovery.72 Further, the court noted that the tribunal in that case was unlikely to be receptive to substantial additional discovery.73

CONCLUSION

The best that can be said 14 years after Intel is that there is no consensus on whether Section 1782 can be used for evidence-gathering in international arbitration. It may seem remarkable that so many courts have permitted its use in arbitration, when neither the statutory text nor the legislative history support that use, and when the whole concept of US-style discovery is antithetical to the much more restrained scope of disclosure permitted under the IBA Rules and international arbitration practice. Nonetheless, should a participant in an international arbitration be fortunate enough to find itself in a position in which it can obtain non-party evidence from a person in a US jurisdiction which has taken the view that Section 1782 is applicable to international arbitration, it has at its disposal a significant tool for evidence-gathering that is not available anywhere else in the world.

Notes

1 542 US 241 (2004).
2 See, eg, Act of 2 March 1855, Chapter 140, section 2, 10 stat. 630 (authorising appointment of federal commissioner to examine witnesses upon receipt of letter rogatory from foreign court).
3 See, eg, Act of 3 July 1930, Chapter 851, section 1–4, 46 stat. 1005–1006 (authorising members of international tribunals and commissions to subpoena attendance and testimony of witnesses and production of documents).

4 Congress created the Commission to 'study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements'. Act of 2 September 1958, Pub. L 85–906, section 2, 72 stat. 1743.
5 See HR Doc., No. 88–88, at 20 (1963).
6 See S Rep. No. 88–1580 (1964), reprinted in 1964 USCCAN 3783, 3788 (Senate Report) (noting extension of judicial assistance beyond testimony and statements to documents and tangible evidence).
7 See id. (noting extension beyond assistance to 'conventional courts' to include 'administrative and quasi-judicial proceedings').
8 See SI Strong, 'Discovery Under 28 USC section 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration', 1 Stan. J Complex Litig. 295, 301 (2013).
9 Id.
10 See Senate Report at 3784–85 (commenting that section 1782 will expand on soon to be repealed 22 USC section 270–270(c)); Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 Colum. L Rev. 1264, 1264 (1962) (noting origin of section 270 et seq).
11 165 F3d 184, 191 (2d Cir. 1999).
12 See id at 186.
13 See id at 190.
14 See id (quoting Smit, supra note 10, at 1267).
15 Id.
16 See id at 190 No. 6 (addressing Hans Smit, American Assistance to Litigation in Foreign and International Tribunals, 25 Syracuse J Int'l L. & Com. 1 (1998)).
17 See Strong, supra note 8, at 304–05 and No. 48–49.
18 NBC, 165 F3d at 191.
19 Id at 190-91.
20 See id at 191.
21 168 F3d 880 (5th Cir. 1999).
22 Although the arbitration at issue in Biedermann involved a state party, it appears to have been an international commercial arbitration of purely contractual origin. See Obj. of Biedermann Int'l to the Rep. of Kazakhstan's Application for Expedited Assistance Pursuant to 28 USC section 1782 at 1, In re Application of the Republic of Kazakhstan, No. 980425 (ED Tex., 13 November 1998).
23 Biedermann, 168 F3d at 882.
24 Id at 883.
25 542 US 241 (2004).
26 In concluding that DG-Competition proceedings were 'quasi-judicial' in nature, the Supreme Court observed that the DG-Competition acted as a 'first-instance decision maker' whose decisions to decline to pursue a complaint, to dismiss a complaint, or to hold the target liable '[were] subject to judicial review' by the Court of First Instance and, ultimately, by the European Court of Justice. 542 US at 254, 258.
27 Id at 258 (quoting Hans Smit, International Litigation under the Unites States Code, 65 Colum. L Rev. 1015, 1026–27 (1965)) (emphasis added).
28 Id at 264.
29 469 F Supp, 2d 1221, 1224 (ND Ga 2006).
30 Compare In re Application of Operadora DB Mexico, SA, No. 09-CV-383, 2009 WL 2423138 (MD Fla, 4 August, 2009) (holding that an ICC arbitration pending in Mexico is not covered by section 1782) and In re Finserve Group, Ltd, No. 11-MC-2044, 2011 WL 5024264 (DSC 20 October 2011) (expressing doubt that an international commercial arbitration in London is covered) with In re Application of Winning (HK) Shipping Co, No. 09-MC-22659, 2009 WL 179579 (SD Fla., 30 April 2010) (holding that an international commercial arbitration in London is covered by section 1782) and In Re Application of Pola Mar., Ltd, No. CV416-333, 2017 WL 3714032, at *2 (SD Ga. 29 August 2017), objections overruled sub nom. In re Pola Mar., Ltd, No. CV416-333, 2018 WL 1787181 (SD Ga., 13 April 2018) (same).
31 Consorcio Ecuatoriano v JAS Forwarding (USA), 685 F3d 987, 990 (11th Cir. 2012), vacated and superseded 747 F3d 1262 (11th Cir. 2014).

32 See Consorcio Ecuatoriano v JAS Forwarding (USA), 747 F3d 1262, 1269–70 (11th Cir. 2014).
33 See Operadora, 2009 WL 2423138, at *11 ('This Court is confident that the Supreme Court would not have . . . reversed NBC and Biedermann – without even acknowledging their existence – in a parenthetical quotation supporting an unrelated proposition.'); In re Application by Rhodianyl SAS, 2011 US Dist. LEXIS 72918, at *48-49 (D Kan., 25 March 2011) ('The court agrees with those decisions finding it extremely doubtful that the [Supreme] Court would have intended its opinion to throw open the interpretative doors of section 1782 to reach purely private arbitrations, since such an interpretation would effectively overrule – without any analysis or even mention of – two prominent decisions finding that that statute had no such application, NBC and Biedermann'.).
34 See OJSC Ukrnafta v Carpatsky Petroleum Corp, No. 09-MC-265, 2009 WL 2877156, at *4 (D Conn., 27 August 2009).
35 It is difficult to understand how either factor bears on the question of whether a tribunal presiding over a private arbitration qualifies as a 'foreign or international tribunal' for the purposes of the statute. The tribunal's orders respecting discovery may relate to the discretionary factors discussed in Intel, but they do not affect the nature of the tribunal. Similarly, the parties' agreement to use one type of arbitration rules – eg, UNCITRAL – over another type of rules has little if anything to do with the tribunal's function or the source of its authority. The Ukrnafta court's invocation of the UNCITRAL rules may signal that it erroneously believed that the United Nations was somehow sponsoring or involved with the arbitration – a frequent misconception among district courts interpreting section 1782. See Strong, supra note 8, at 307-08.
36 See, eg, In re Application of Chevron Corp, 709 F Supp. 2d 283, 291 and No. 45 (SDNY 2010) (citing Ukrnafta for the proposition that district courts 'have followed the Supreme Court's dictum and held that international arbitral bodies operating under UNCITRAL rules constitute "foreign tribunals" for the purposes of section 1782.'), aff'd on other grounds sub nom. Chevron Corp v Berlinger, 629 F3d 297 (2d Cir. 2011); In re Application of Winning (HK) Shipping Co Ltd, No. 09-22659-MC, 2010 WL 1796579, at *7 (SD Fla., 30 April 2010) (agreeing with Ukrnafta's premise that 'a reasoned distinction can be made between arbitrations such as those conducted by . . . a body operating [under] the United Nations and established by its member states and purely private arbitrations established by private contract.'). Like other cases of this ilk, the court in Winning seems to have been under the misapprehension that UNCITRAL Rules arbitrations are conducted by some kind of state-created body, when of course they are not.
37 No. 16-MC-355, 2016 WL 6906712, at *1-2 (SDNY 16 November 2016).
38 See id at *2 ('While the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in [Intel] suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782.').
39 See id (citing Chevron Corp v Berlinger, 629 F3d 297 (2d Cir. 2011)).
40 Id. at *2–3 (citing In re Owl Shipping, LLC, No. 14–5655, 2014 WL 5320192, at *2 (DNJ 17 October 2014) and In re Application of Winning (HK) Shipping Co Ltd, No. 09–22659, 2010 WL 1796579, at *9–10 (SD Fla., 30 April 2010)). Owl Shipping's discussion of this issue is limited to citation to In re Application of Winning. See 2014 WL 5320192, at *2. For its part, the court in Winning concluded that the LMAA tribunal was a foreign tribunal for purposes of section 1782 because its decisions were supposedly subject to judicial review under England's Arbitration Act 1996, rendering the LMAA a 'quasi-judicial' body akin to the DG-Competition in Intel. See 2010 WL 1796579, at *8–10. At least two courts since Winning have likewise found LMAA arbitral tribunals to qualify as foreign tribunals under such a functional analysis. See In Re Application of Pola Mar., Ltd, No. CV416-333, 2017 WL 3714032, at *2 (SD Ga., 29 August 2017) ('[A]wards by the LMAA are reviewable by the English Courts pursuant to the English Arbitration Act of 1996.'); In re Kleimar NV v Benxi Iron & Steel Am., Ltd, No. 17-CV-01287, 2017 WL 3386115, at *5–6 (N.D. Ill., 7 August 2017) ('[J]udicial review of the LMAA proceedings exists.'). In this respect, Winning and the other courts appear to have substantially overstated the scope of judicial reviewability of arbitral decisions under English law, and to have conflated the possibility of some form of judicial review with the mandatory right of review discussed in Intel. While the Arbitration

Act 1996 provides for judicial review of questions of law when the underlying contract is governed by English law, parties can and often do exclude such review through agreement in advance. See Arbitration Act 1996 c. 23, section 69(1) (Eng.). Even absent such an exclusion agreement, the English courts may grant leave to appeal an arbitral award only where four narrowly defined prerequisites are satisfied. See id. section 69(3)(a)–(d). In all other respects, judicial review under the Arbitration Act 1996 is limited to procedural defects, similar to the provisions of the Federal Arbitration Act in the United States.

41 See, eg, Chevron Corp. v Shefftz, 754 F Supp. 2d 254 (D Mass. 2010); In re Babcock Borsig AG, 583 F Supp. 2d 233 (D Mass. 2008); In re Application of Owl Shipping LLC, No. 14-CV-5655, 2014 WL 5320192 (DNJ 17 October 2014); In re Application of Mesa Power Group, No. 11-MC-270, 2013 WL 1890222 (DNJ 19 April 2013); Comisión Ejectuiva Hidroeléctrica v Nejapa Power Co., No. 08-C.A.-135, 2008 WL 4809035 (D Del., 14 October 2008); In re Oxus Gold, PLC, No. 06-MC-82, 2007 WL 1037387 (DNJ 2 April 2007); Gov't of Ghana v ProEnergy Servs. LLC, No. 11-MC-9002, 2011 WL 2652755 (WD Mo. 6 June 2011); In re Hallmark Capital Corp., 534 F Supp. 2d 951 (D Minn. 2007); In re Application of Reis Veiga, 746 F Supp. 2d 8 (DDC 2010).

42 See, eg, La Comision Ejecutiva Hidroelectrica v El Paso, 617 F Supp. 2d 481 (SD Tex. 2008); In Re TJAC Waterloo, No. 16-MC-9-CAN, 2016 WL 1700001 (ND Ind., 27 April 2016); In re an Arbitration in London, 626 F Supp. 2d 882 (ND Ill. 2009); In re Arbitration between Norfolk S Corp., Norfolk S Ry. Co., & Gen. Sec. Ins Co. & Ace Bermuda Ltd, 626 F Supp. 2d 882 (ND Ill. 2009); In Re Application of the Government of the Lao People's Democratic Republic, 15-MC-00018, 2016 WL 1389764 (N Mar., I, 7 April 2016); In re Application of Grupo Unidos or El Canal SA, No. 14-MC-80277, 2015 WL 1815251 (ND Cal., 21 April 2015); In re Application of Dubey, 949 F Supp. 2d 990 (CD Cal. 2013); In re Application of Grupo Unidos Por El Canal, SA, No. 14-MC-00226, 2015 WL 1810135 (D Col., 17 April 2015).

43 Compare Comisión Ejecutiva Hidroeléctrica v Nejapa Power Co., No. 08-C.A.-135, 2008 WL 48909035 (D Del., 14 October 2008) ('[T]he Supreme Court's decision in Intel (and post-Intel decisions from other district courts) indicate that Section 1782 does indeed apply to private foreign arbitrations.'), appeal dismissed as moot 341 Fed. App'x 821 (3d Cir., 3 August 2009) with La Comision Ejecutiva Hidroelectrica v El Paso, 617 F Supp. 2d 481 (SD Tex. 2008) (holding that under 'controlling precedent' of Biedermann, the same arbitration tribunal is outside the scope of the statute), aff'd. sub nom. El Paso Corp. v La Comision Ejecutiva Hidroelectrica, 341 Fed. App'x. 31 (5th Cir., 6 August 2009).

44 See supra text accompanying notes 31–32.

45 GEA Grp. AG v Flex-N-Gate Corp., 740 F3d 411, 419 (7th Cir. 2014).

46 In re Chevron Corp., 633 F3d 153, 161 (3d Cir. 2011) (quoting Section 1782).

47 Furthermore, this statement was not needed to support the discovery order under section 1782 in that case, since the discovery sought was also to be used in civil and criminal proceedings before Ecuadorian courts that clearly qualify as 'foreign tribunals' for the purposes of the statute. See id at 159.

48 See Chevron Corp. v Berlinger, 629 F3d 297, 310–11 (2d Cir. 2011) (stating with respect to appellant's claim that the arbitration was outside the scope of Section 1782, 'we do not reach the argument . . . it is clear that the Lago Agrio litigation and the criminal prosecutions of Pérez and Reis are covered by the statute. These proceedings provided an adequate basis for the district court's protection order.'). Following Berlinger, at least one district court in the Second Circuit has ordered section 1782 discovery in aid of investment treaty arbitration. See Order, In re Application of Julio Miguel Orlandini-Agreda, No. 17-MC-00654 (SDNY, 29 September 2017), ECF No. 7 (granting ex parte motion for discovery from a New York-based law firm in aid of anticipated investment treaty arbitration against Bolivia).

49 See El Paso Corp. v La Comision Ejecutiva Hidroelectrica, 341 Fed. App'x 31, 34 (5th Cir., 6 August 2009) ('The question of whether a private arbitration tribunal also qualifies as a "tribunal" under Section 1782 was not before the Court . . .. Because we cannot overrule the decision of a prior panel unless such ruling is unequivocally directed by the controlling Supreme Court precedent, we remain bound by our holding in Biedermann.' (quotation marks omitted, emphasis in the original)).

50 See Strong, supra note 8, at 332–38 (recognising that, although both investor–state and international commercial arbitration depend on a mixture of public and private grants of jurisdiction, the public grant of jurisdiction to investor-state arbitration is more direct); id at

353 (acknowledging that investor–state arbitration may entail greater public interests in the outcome or process of the proceeding than do international commercial arbitrations).
51 No. 07-MISC-82, 2007 WL 1037387 (DNJ, 2 April 2007).
52 See id at *5.
53 See id.
54 See Strong, supra note 8, at 307–08.
55 See, eg, In re Application of Dubey, 949 F Supp. 2d 990, 994 (CD Cal. 2013); In re Application of Mesa Power Group, No. 11-MC-270, 2013 WL 1890222, at *5 (DNJ, 19 April 2013); In re Application of Reis Veiga, 746 F Supp. 2d 8, 22 (DDC 2010); In re Application of Chevron Corp., 709 F Supp. 2d 283, 291 & No. 45 (SDNY 2010), aff'd. on other grounds sub nom. Chevron Corp. v Berlinger, 629 F3d 297 (2d Cir. 2011).
56 See Chevron Corp. v Berlinger, 629 F3d 297, 310–11 (2d Cir. 2011); In re Chevron Corp., No. 7:10-MC-00067, 2010 WL 4883111, at *2 n.2 (WD Va., 24 November 2010).
57 See, eg, In re Chevron Corp, 633 F3d 153, 161 (3d Cir. 2011); Chevron Corp. v Shefftz, 754 F Supp. 2d 254 (D Mass. 2010); In re Application of Reis Veiga, 746 F Supp. 2d 8, 22 (DDC 2010); In re Chevron Corp., No. 3:10-CV-00686, 2010 WL 8767266, at *2 (MD Tenn., 17 August 2010).
58 See, eg, Gov't of Ghana v ProEnergy Servs. LLC, No. 11-MC-9002, 2011 WL 2652755, at *3 (WD Mo., 6 June 2011); In re Babcock Borsig AG, 583 F Supp. 2d 233, 238–39 (D Mass. 2008); In re Hallmark Capital Corp., 534 F Supp. 2d 951, 955–56 (D Minn. 2007); In Re Roz Trading Ltd, 469 F Supp. 2d 1221, 1225 (ND Ga. 2006).
59 See Roz Trading, 469 F Supp. 2d at 1225; see also Hallmark, 534 F Supp. 2d at 955 ('[T]he Court cited Prof. Smit's 1965 article no less than six times, all apparently with approval.').
60 See, eg, In re Application of Operadora DB Mexico, SA, No. 09-CV-383, 2009 WL 2423138, at *11 (MD Fla., 4 August 2009); In re an Arbitration in London, 626 F Supp. 2d 882, 885 (ND Ill. 2009); La Comision Ejecutiva Hidroelectrica v El Paso, 617 F Supp. 2d 481, 486 (SD Tex. 2008).
61 See, eg, In Re Application of Pola Mar., Ltd, No. CV416-333, 2017 WL 3714032, at *2, *2 No. 5 (SD Ga., 29 August 2017) (concluding that the mere possibility of review 'by a true judicial body' brings a purely private arbitration within the ambit of section 1782); In re Kleimar NV v Benxi Iron & Steel Am., Ltd, No. 17-CV-01287, 2017 WL 3386115, at *5–6 (ND Ill., 7 August 2017) ('[T]he driving concern remains the issue of reviewability: where the tribunal's decision is judicially reviewable, courts tend to find the tribunal within the scope of the statute.'); In re Application of Winning (HK) Shipping Co., No. 09-MC-22659, 2009 WL 179579, at *8 (SD Fla., 20 April 2010) ('[T]he arbitral body in this instance actually acts as a first-instance decision maker whose decisions are subject to judicial review.'); Babcock Borsig AG, 583 F Supp. 2d at 38 ('The ICC, like the European Commission, is a first-instance decision-maker that conducts proceedings which lead to a dispositive ruling.' (quotation marks omitted)).
62 See, eg, Operadora, 2009 WL 2423138, at *10 ('[T]he criteria adopted by [the] Supreme Court for its functional analysis in Intel were based, in part, on the particular characteristics of the DG-Competition and European Commission. The Supreme Court did not consider whether additional criteria would be relevant if it were to consider a different kind of proceeding.'); La Comision Ejecutiva, 617 F Supp. 2d at 486 ('[T]he fact that the D-G Commission acted as a quasi-adjudicative proceeding before review by true judiciary powers makes it an animal of a very different stripe from an arbitral tribunal.').
63 See, eg, In Re Application of Pola Mar., Ltd, No. CV416-333, 2017 WL 3714032, at *2, *2 No. 5 (SD Ga., 29 August 2017); In re Application of Mesa Power Group, No. 11-MC-270, 2013 WL 1890222 (DNJ, 19 April 2013); In re Application of Winning (HK) Shipping Co., No. 09-MC-22659, 2009 WL 179579, at *10 (SD Fla., 30 April 2010); OJSC Ukrnafta v Carpatsky Petroleum Corp., No. 09-MC-265, 2009 WL 2877156, at *5 (D Conn., 27 August 2009).
64 See, eg, Finserve Group, Ltd, No. 11-MC-2044, 2011 WL 5024264, at *3 (DSC, 20 October 2011); Ukrnafta, 2009 WL 2877156, at *5; In re Babcock Borsig AG, 583 F Supp. 2d 233, 241 (D Mass. 2008).
65 See, eg, In re Chevron Corp., 633 F3d 153, 162 (3d Cir. 2011); In re Application of Reis Veiga, 746 F Supp. 2d 8, 24 (DDC 2010).
66 See In re Application of Chevron Corp, 762 F Supp. 2d 242, 252 (D Mass. 2010) ('[T]his court is reluctant to readily impose the burden of proving "non-receptivity" on a respondent to a Section 1782 application.' (emphasis in the original)); Chevron Corp v Shefftz, 754 F

Supp. 2d 254, 261 (D Mass. 2010) (noting 'two views' on burden); In re Babcock Borsig AG, 583 F Supp. 2d 233, 241 (D Mass. 2008) (denying a Section 1782 application where 'neither party has presented authoritative proof regarding the receptivity of the ICC to the discovery materials requested'); see also Finserve, 2011 WL 5024264, at *3 (same).
67 Application of Chevron Corp., 762 F Supp. 2d at 251.
68 Id.
69 Id.
70 See In re Application by Rhodianyl SAS, 2011 US Dist. LEXIS 72918, at *52 (D Kan., 25 March 2011).
71 See id at *43–50.
72 Id at * 52.
73 Id.

CLEARY GOTTLIEB

Jonathan I Blackman jblackman@cgsh.com
Jessica Stiefler jstiefler@cgsh.com

One Liberty Plaza, New York, NY 10006, United States

Tel: +1 212 225 2000

https://www.clearygottlieb.com/