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# US Law Allows Discovery for Foreign Proceedings

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Fearing the burdens of U.S. court litigation, many foreign companies doing business with American counter-parties insist on forum selection clauses that call for resolution of disputes outside of U.S. courts, either in foreign courts or international arbitration. High on the list of objectives may be avoiding U.S.-style discovery, which can justifiably strike fear into the hearts of non-U.S. companies. However, before congratulating themselves too heartily, such companies should consider the often overlooked provisions of a U.S. statute that authorizes U.S. courts to order discovery for use in certain foreign legal proceedings.

The statute, codified at 28 U.S.C. § 1782, is entitled “Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals.” Enacted in 1948 with the “twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts,” *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992), the statute provides:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, 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.

In 2004, the Supreme Court decided *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004), which became a landmark case on section 1782, and remains the only 1782 case to make its way to the High Court. AMD, which filed an antitrust complaint against Intel with the Directorate-General for Competition of the Commission of the European Communities, alleged that Intel had violated European competition law. AMD sought discovery from Intel under section 1782 in California. The district court found that the statute did not authorize the requested discovery but the appellate court reversed. *See Advanced Micro Devices, Inc. v. Intel Corp*., 292 F.3d 664 (9th Cir. 2002). The Supreme Court affirmed the appellate court’s holding authorizing the requested discovery, resolving

several previously unsettled issues under 1782.

The Court in *Intel* held that section 1782 may be invoked where (1) the discovery is sought from a person residing in the district of the court to which the application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the applicant is a foreign or international tribunal or an "interested person." Importantly, the Court found that section 1782 does not impose a "foreign discoverability" requirement, and that "foreign or international proceeding" includes quasi-judicial and administrative proceedings, even if not yet pending, as long as they are reasonably contemplated and potentially subject to judicial review.

The Court also clarified the standard for district courts to exercise their discretion (courts "may order" requested discovery) in determining whether to order discovery in a particular case:

(1) whether the person from whom discovery is sought is a participant in the foreign proceeding, and thus 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; (2) 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; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is unduly intrusive or burdensome.

Since *Intel*, many litigants have invoked section 1782, giving rise to a rich jurisprudence on application of the four discretionary factors identified by the Supreme Court, and raising other important issues that remain unsettled. Chief among the unsettled issues is whether and when the statute's "foreign or international tribunal" language applies to private arbitration tribunals.



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