Muddy Waters in the Land of Section 1782

By Lawrence W. Newman and David Zaslowsky

Regular readers of this column will recall that, over the years, we have closely followed the development of the law under Section 1782 of Title 28 of the U.S. Code (Section 1782).[1] In this article, we use the occasion of the 10th anniversary of the Supreme Court's lone Section 1782 decision to discuss the significant uncertainty that remains concerning an issue spawned by that decision.

To start, a reminder about the statute. Section 1782 authorizes a district court to grant a petition for judicial assistance—ordering the production of documents, as well as depositions of witnesses—if three statutory requirements are met: (1) the request for discovery is made "by a foreign or international tribunal" or "any interested person"; (2) the discovery requested is "for use in a proceeding in a foreign or international tribunal"; and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made. If these statutory requirements are met, the district court may—although it is not required to—exercise its discretion and grant the petition.

Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses. The Section 1782 application is typically initiated through an ex parte application and does not require that the foreign proceeding even be pending at the time of the application.

In Aid of Arbitration

The Supreme Court's only treatment of Section 1782 is that in *Intel Corp. v. Advanced Micro Devices*.[2] Prior to that decision, the question of whether Section 1782 could be used in aid of international arbitration—that is, whether an "arbitral tribunal" qualified as an "international tribunal" for purposes of the statute—had been answered in the negative. See *Nat'l Broad. Co. v. Bear Stearns & Co.*[3] and *Republic of Kazakhstan v. Biedermann International*.[4] But the Intel opinion appeared to open the door on that issue when it included the following quotation from an article written by the primary draftsman of the revised version of the statute:

> [T]he term 'tribunal'…includes investigating magistrates, administrative *and arbitral tribunals*, and quasi-judicial agencies, as well as conventional…courts.[5]

As a result, after *Intel*, whether Section 1782 could be used in aid of international arbitration became the subject of debate, with the courts rendering varying decisions.

One of the earliest decisions to hold that Section 1782 could be used in aid of arbitration was *In re Application of Oxus Gold*.[6] There, a district court in New Jersey reasoned that, "[t]he international arbitration at issue is being conducted by the United Nations Commission on International Law [UNCITRAL], a body operating under the United Nations and established by its member states." This important part of the decision was clearly in error. In fact, the UNCITRAL Rules are a set of rules that can be used in non-administered arbitrations, but neither the United Nations nor UNCITRAL plays a role in arbitrations conducted under those rules. Nevertheless, *Oxus Gold* was

frequently cited and numerous other decisions also held that Section 1782 could be used in aid of private, commercial arbitration.[7]

There were also many district court decisions that went the other way. In *In re Operadora DB Mexico*,[8] for example, a district court held that Section 1782 does not apply to an arbitration conducted under the arbitration rules of the International Chamber of Commerce.[9] Adding to the confusion, some decisions held that Section 1782 could be used in "state-sponsored" arbitration but not private arbitration, without indicating whether "state-sponsored" meant investor-state arbitration or something else.[10] Another decision quoted from the misguided language of the Oxus Gold decision in concluding that private arbitrations do not fall under Section 1782 although "state-sponsored" (such as those "under" UNCITRAL) do. [11]

With such uncertainty at the district court level, might the circuit courts provide clarity? An inquiry on this score begins sensibly with the Second and Fifth Circuits, to see whether they adhered to their pre-Intel decisions. The Second Circuit has not, since *Intel*, taken up the issue of the use of Section 1782 in aid of arbitration. The Fifth Circuit, in contrast, had occasion to consider the issue in 2009. The court declined to reconsider its earlier Biedermann decision regarding the non-application of Section 1782 to private international arbitration because, it said, *Intel* did not deal with any of the concerns that were at issue in *Biedermann*. *Biedermann*, therefore, remained good law.[12]

More recently, the Fifth Circuit addressed the issue again.[13] In one of the many Chevron-related Section 1782 cases, the Republic of Ecuador sought 1782 discovery from a non-party named Connor. Chevron, despite, having used 1782 against Ecuador in many cases across the country, opposed the request. The district court denied the request, believing that *Biedermann* controlled its decision. On appeal, the Fifth Circuit reversed, relying on the principle of judicial estoppel. Because, in its own efforts to obtain 1782 discovery to use against Ecuador, Chevron had argued that 1782 may be used to seek discovery in aid of a bilateral investment treaty (BIT) arbitration, it was estopped from arguing that the same BIT arbitration could not support Ecuador's request for 1782 discovery.

Significantly, however, the Fifth Circuit did not decide the issue of whether the Biedermann decision applied to BIT or other investor-state arbitration: "[W]e need not and do not opine on whether the BIT arbitration is an 'international tribunal.'"[14] Therefore, even in the Fifth Circuit, there is uncertainty as to whether that court will ultimately distinguish between commercial and investor-state arbitrations for purposes of deciding whether to permit discovery under Section 1782.

One other circuit that has weighed in on this issue was not as reserved as the Fifth Circuit. When a Chevron-related Section 1782 case came before the U.S. Court of Appeals for the Third Circuit, it observed that use in a BIT arbitration of evidence uncovered through a section 1782 application "unquestionably would be 'for a use in a proceeding in a foreign or international tribunal.'"[15] The conclusion was unsupported by any analysis, yet remains as circuit court authority in support of the argument that 1782 discovery may be obtained in aid of an investment arbitration.

On the issue of using Section 1782 in aid of a commercial arbitration, the Eleventh Circuit stands (or, more properly, stood) alone at the circuit court level as endorsing the practice. The dispute in *Consorcio Ecuatoriano de Telecomunicaciones v. JAS Forwarding (USA)*,[16] arose out of a foreign shipping contract billing dispute between CONECEL and Jet Air Service Equador S.A. (JASE). CONECEL filed an application in the Southern District of Florida under Section 1782 to obtain discovery for use in a foreign proceeding in Ecuador—namely, a pending arbitration brought by

JASE against CONECEL for non-payment under the contract, as well as contemplated civil and private criminal suits that CONECEL was considering bringing against two of its former employees. The district court relied on the contemplated suits in Ecuador to justify the Section 1782 discovery, referring to the holding in *Intel* that it is sufficient if the foreign proceedings are "reasonably contemplated." The Eleventh Circuit sidestepped this reasoning and held that the private arbitration case then underway qualified as an "international tribunal." This decision was the only appellate level decision to support the argument that 1782 could be used in aid of private, commercial arbitration and it quickly became the main authority in support of those advocating for the use of Section 1782 in aid of commercial arbitration.

What the Eleventh Circuit giveth, however, the Eleventh Circuit also taketh away. Just a few weeks ago, the Eleventh Circuit, s*ua sponte*, issued a new decision to replace its 2012 decision. In its new decision, the court adopted the reasoning of the district court and held that the Section 1782 application was justified based on the suits that CONECEL was contemplating bringing. In footnote 4 of the decision, the court hinted that it might in the future hold that Section 1782 discovery is available in aid of arbitration. Significantly, though, because of the "sparse" record on the issue before the court, the Eleventh Circuit explained that "we leave the resolution of the matter for another day."

The Waters Remain Muddied

To recap, when Justice Ginsburg included in the Intel decision the excerpt quoted above from the article by Professor Hans Smit—her former Columbia Law School colleague and the primary draftsperson of the current version of Section 1782—thoughtful followers of Section 1782 practice recognized immediately that the statement, albeit in dictum, would be fodder for those wanting to try again to use Section 1782 in aid of arbitration. Not surprisingly, some courts have gone one way and some the other on the issue of whether *Intel* indeed authorized the use of Section 1782 in aid of arbitration. Other courts ruled that the statute could be used in support of "state-sponsored" arbitrations only, without defining that term.

Within the past 12 months, matters have been made even less clear. The Fifth Circuit called into question whether its limitation on the use of Section 1782 in aid of arbitration would apply to investment arbitration. And the Eleventh Circuit voluntarily withdrew its opinion that had held that Section 1782 could be used in aid of commercial arbitration.

Consider this as well: A recent Seventh Circuit case concerned the issue of whether a district judge had authority to allow discovery in a federal court case to proceed when the fruits of that discovery might be relevant to, and might even be used as evidence in, a pending commercial arbitration proceeding in Germany. In a comment that is clearly dictum, Judge Richard Posner remarked about the possibility that, independent of any discovery in the lawsuit, the party to the German arbitration could have used Section 1782 to obtain discovery in aid of the arbitration. He wrote:

> Flex-N-Gate could have asked the district judge to provide evidence to "a foreign or international tribunal," as district judges are authorized to do by 28 U.S.C. §1782. The German panel conducting the arbitration between GEA and Flex-N-Gate might be considered such a tribunal. (Or might not—the applicability of section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain.)[17]

Yes, this was dictum. But when a jurist as prominent as Posner notes the uncertainty around the issue of the use of Section 1782 in aid of arbitration, it is telling.

Perhaps the next 10 years will bring more clarity than the first 10 years after *Intel*. It should not, however, be surprising if such clarity will be achieved only through another visit to the Supreme Court.

Endnotes:

1. For example, "Recent Developments Under Section 1782," New York Law Journal, Oct. 13, 2011; "Intel §1782: Discovery in International Arbitration," New York Law Journal, Jan. 29, 2007.
2. 542 U.S. 241 (2004).
3. 165 F.3d 184 (2d. Cir. 1999).
4. 168 F.3d 880 (5th Cir. 1999).
5. 542 U.S. at 258 (emphasis added).
6. No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006).
7. See, e.g., *In re Babcock Borsig*, 583 F.Supp.2d 233, 240 (D. Mass. 2008); *In re Application of Winning (HK) Shipping*, No. 09-22659-MC, 2010 U.S. Dist. LEXIS 54290, (S.D. Fla. April 30, 2010); *Ghana v. Proenergy Services*, 2011 U.S. Dist. LEXIS 75029 (W.D. Mo. June 6, 2011).
8. No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *8–12 (M.D. Fla. Aug. 4, 2009).
9. See also, *In re Arbitration in London, England*, 626 F.Supp.2d 882 (N.D. Ill. 2009.
10. *In Re Application of Prabhat K. Dubey*, 2013 U.S. Dist. LEXIS 83972 (C.D. Cal. 6-7-13).
11. *In Re Norfolk Southern*, 626 F.Supp.2d 882 , (N.D. Ill 2009).
12. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 2009 U.S. App. LEXIS 17596, (5th Cir. Aug. 6, 2009).
13. *Ecuador v. Connor*, 708 F.3d 661 (5th Cir. 2013).
14. Id. at 658.
15. *In re Chevron*, 633 F.3d 153 (3d Cir 2011).
16. 685 F.3d 987 (11th Cir. 2012).
17. *GEA Group v. Flex-N-Gate,* No. 13-2135 (7th Cir. Jan. 10, 2014).

Lawrence W. Newman *and* ***David Zaslowsky*** *are lawyers in the New York office of Baker & McKenzie. They are co-authors of "Litigating International Commercial Disputes" (West Group) and can be reached at lawrence.w.newman@bakermckenzie.com and david.zaslowsky@bakermckenzie.com, respectively.*