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Despite 2nd Circ. Ruling, Discovery Statute's Reach Grows

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These are the days of quarantine life.

In this time of COVID-19, when every day seems to bring new travel restrictions for Americans, it is nice to know that there are some things we can still count on. Lawyers keep litigating, and thanks to a curious statute, Title 28 of the U.S. Code, Section 1782, we can do so with extraterritorial effect.

For those not familiar with Section 1782, it is a mechanism that permits any interested person in a legal proceeding outside the U.S. to obtain discovery both in and outside the U.S. for use in the foreign proceeding. The permitted discovery is broad and includes both written and testimonial evidence. For litigators and clients involved in cross-border disputes, especially during a global pandemic, this is a need-to-know statute.

On July 8, the U.S. Court of Appeals for the Second Circuit handed down an important ruling on the breadth of Section 1782. In In re: Application and Petition of Hanwei Guo, the court held that Section 1782 does not apply to private, international commercial arbitrations.[1]

The petitioner Hanwei Guo had invested approximately $26 million in several music streaming companies in China, but had sold his interests at a loss in a series of transactions. After his sale, these companies were acquired by Tencent Music, one of the largest music streaming services in the world.

Claiming that he was misled, extorted and defrauded, Guo initiated arbitration against Tencent Music and several other entities before the China International Economic and Trade Arbitration Commission. Guo filed a Section 1782 petition in the U.S. District Court for the Southern District of New York, seeking documents from four investment banks relating to their work on the Tencent Music initial public offering.

In affirming the district court's order denying Guo's discovery request, the Second Circuit held that Section 1782 does not "sweep so broadly as to include private commercial arbitration," and thus the China International Economic and Trade Arbitration Commission arbitration does not qualify as a

"foreign or international tribunal" eligible to serve as a the basis for a Section 1782 discovery request.[2]

While this decision has already created much fanfare, this limitation on the statute is in fact the exception to the rule. Since the 2004 U.S. Supreme Court ruling in Intel Corp. v. Advanced Micro Devices Inc.,[3] Section 1782 has been interpreted broadly by circuits across the country, with the Second Circuit leading the charge.

Over one-third of post-Intel appellate decisions interpreting the statute have come from this influential circuit court, and a majority of them have been endorsing an expansive breadth of the statute's reach. To borrow Shakespeare's words: "Though she be but little, she is fierce!"[4]

Section 1782 provides a far-reaching means for companies to obtain U.S.-style discovery for use in foreign proceedings, and every lawyer with clients looking to avail themselves of the use of the statute should understand its contours and its power.

By its very terms, Section 1782 permits a U.S. district court to order discovery for use in a proceeding in a "foreign or international tribunal."[5] The discovery must be taken "in accordance with the Federal Rules of Civil Procedure."[6] Essentially, it operates to extend third-party subpoena power under Federal Rule of Civil Procedure 45 to the context of international disputes.

As long as the statutory requirements are satisfied, a U.S. district court has broad discretion to order both the production of documents and the deposition of witnesses in aid of foreign proceedings.[7]

What is more, the subpoena can be issued ex parte and served upon a U.S. company with a charge to provide extensive discovery, the results of which can be used in one or more pending or forthcoming proceedings abroad, ranging from patent lawsuits, to criminal investigations and indictments, to determinations of paternity.[8]

Also like a third-party subpoena under Rule 45, a subpoena can be challenged with a motion to quash, a request for a protective order, or a non-party's request to intervene. Many companies have successfully defeated such discovery requests, but many have not, and have had to spend extensive time and money and effort to produce the requested information, and even sit for depositions.

For example, Chevron Corp. was successful in obtaining a series of Section 1782 petitions to acquire key documents and evidence to assist in its defense of a high-profile multibillion dollar environmental lawsuit in Ecuador.[9]

This statute flew under the radar for many years, since its inception in 1948, in the wake of World War II as a means for the U.S. to provide assistance to foreign courts in discovery procedures in hopes of fostering a cooperative relationship among courts in different countries.[10]

It came to the forefront when the Supreme Court took up the first and only case in which it has squarely addressed this statute.[11]

In Intel v. Advanced Micro Devices, the respondent had filed an antitrust complaint with the European Commission, alleging that Intel was using its size to unfairly dominate the computer microprocessor market.[12] To support its case, AMD filed a petition under Section 1782 seeking access to documents that it could use to support its EU antitrust challenge.

In affirming the U.S. Court of Appeals for the Ninth Circuit's decision below granting AMD's request for discovery, the Supreme Court listed what are now known as the Intel factors, setting forth the discretionary factors for courts to consider.[13]

In the 15 years since the Intel holding, many district courts and circuits have analyzed the contours of the statute's requirements, with overwhelmingly expansive reasoning and rulings.[14]

In practice, even after applying the statutory and discretionary factors, the bounds of this statute are vast: The Supreme Court refused to mandate categorical limitations on the statute and explained that the discovery needn't be admissible in foreign court;[15] it needn't be for a currently pending foreign proceeding or even require a showing of imminent threat;[16] and it doesn't limit "interested persons" to litigants in the foreign proceeding — but rather extends to anyone with a reasonable interest in obtaining evidence.[17]

The Second Circuit has even expanded the reach of the statute to permit discovery into documents and witnesses located abroad, so long as the entity has U.S. contacts sufficient to establish personal jurisdiction consistent with due process, such as the activities of an office located within the forum. [18]

In last year's In re: del Valle Ruiz decision, investors in a failed bank sought documents under Section 1782 from Banco Santander SA and its New York affiliate, Santander Investment Securities Inc., relating to its bid and purchase of the failed bank for use in an EU lawsuit challenging the government-forced sale of the bank.

The Second Circuit held that Section 1782 does not categorically bar seeking evidence located abroad, and that the district court was correct in ordering Santander to provide documents located abroad relating to its purchase of the failed bank.

The Valle Ruiz court further noted that if the Spanish parent company, Banco Santander SA's contacts in the forum state were the proximate reason for the evidence sought, then it too would have been subject to the court's jurisdiction.

In many ways, the Second Circuit's recent ruling in Guo runs contra to the tenor of the Second Circuit's prior rulings, which have tended to interpret the scope of discovery available under Section 1782 ever more expansively.[19] The Guo decision that private arbitration is outside the scope of 1782 is almost certainly expected to be petitioned for certiorari.[20]

There is a circuit split on this very holding, with the Second Circuit following the U.S. Court of Appeals for the Fifth Circuit, while two recent holdings by the U.S. Courts of Appeal for the Fourth and Sixth Circuits have extended Section 1782 to international private arbitrations.[21] In addition, the Ninth Circuit will presumably soon weigh in on one side or another of this split, as it is currently hearing this issue on appeal.[22]

Given the uniqueness of this statutory discovery mechanism, and the diverging outcomes in Intel's follow-on progeny, litigators seeking to avail themselves of this discovery tool should be well versed in circuit-specific holdings in order to best leverage its power.

Litigation strategy surrounding Section 1782 applications includes:

- Deciding in which jurisdiction to serve an application;

- Considering which U.S. subsidiary of a foreign company to serve to create a jurisdictional hook;
- Determining whether to seek written or also testimonial evidence, domestically within the U.S. or abroad;
- Considering the potentially privileged nature of material that is shielded from discovery;
- Timing a Section 1782 request relative to parallel foreign proceedings;
- Assessing whether any of the discovery sought is subject to a protective order in U.S. litigation, and
- Evaluating whether the discovery sought falls within the statute of limitations for a foreign cause of action, among others.

The case law across circuits addresses each of the above questions and diverges in certain aspects that will answer the questions, based on the factual scenarios involved.

In these days of travel and other restrictions, many U.S. litigators and courts are grappling with the very real boundaries being imposed on the justice system by the global pandemic. Multiple district courts have continued or promulgated variant procedures for jury trials based on virus-related concerns.

U.S. District Judge Leonard Stark of the U.S. District Court for the District of Delaware on July 2 ruled that a jury trial would need to proceed with all witness testimony via videoconference, in part because of witnesses traveling from abroad. Though then, last week, the court continued the trial to a date yet to be determined.

U.S. District Judge Rodney Gilstrap of the U.S. District Court for the Eastern District of Texas had to continue a jury trial at the last moment because all the witnesses for one party lived in the United Kingdom and were banned from traveling to the U.S.

And U.S. District Judge Alan Albright of the U.S. District Court for the Western District of Texas has repeatedly adjourned a jury trial originally scheduled for June until at least September — and possibly beyond.[23]

Section 1782 discovery breaks down these barriers. Even in light of the disruptions due to the COVID-19 pandemic, district courts have been consistently issuing rulings on Section 1782 petitions at a speedy clip.[24]

Indeed, on July 8, a Northern District of California court ordered Intel to respond to a subpoena from Apple U.K. to assist Apple U.K. in defending a patent infringement suit against Optis Cellular Technology LLC before the U.K. High Court.[25]

The patents at issue involve processor chips incorporated into iPhones and iPads, and the discovery sought by Apple is relevant to determine whether Intel has a license to, or was authorized to, practice any of the patents at issue, which in turn may protect Apple products that use Intel chips.

As best they can, U.S. courts are proceeding to administer justice and operate as close to business as usual as they can. Section 1782 helps them do this. It permits U.S. discovery to proceed and provides assistance to authorize foreign litigants to obtain broad and sweeping discovery both in and even

outside the U.S. in some instances.

Those who have used this statute understand its incredible power across a panoply of litigation types. We should all know its metes and bounds as a matter of course, but particularly in these unprecedented times.

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[1] In re: Guo, No. 19-781, — F.3d —, 2020 WL 3816098 (2d Cir. July 8, 2020).

[2] See also 2nd Circ. Nixes Doc Bid for Music Co. Arbitration.

[3] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

[4] A Midsummer Night's Dream, Act III, sc. ii, l. 325 (1595-96).

[5] 28 U.S.C. § 1782.

[6] Id.

[7] Id. The three statutory requirements are: (1) the request for discovery is made "by a foreign or international tribunal" or by "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 court in which the request has been made.

[8] See, e.g., In re Qualcomm Inc., No. 18-MC-80104-VKD, 2018 WL 3845882 (N.D. Cal. Aug. 13, 2018) (granting Qualcomm's Section 1782 petition to obtain discovery from Apple in connection with 20 patent infringement lawsuits Qualcomm filed against Apple in Germany); In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings, 773 F.3d 456 (2d Cir. 2014) (affirming the district court's Section 1782 decision ordering the production of discovery for use in a foreign criminal investigation); In re Letter Rogatory from Local Court of Ludwigsburg, Fed. Republic of Ger. in Matter of Smith, 154 F.R.D. 196 (N.D. Ill. 1994) (ordering blood test to determine paternity under Section 1782); In re Letter of Request From Local Court of Pforzheim, Div. AV, Fed. Republic of Ger. (No. 5 C 34183), 130 F.R.D. 363 (W.D. Mich. 1989) (same).

[9] Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014).

[10] The so-called "twin aims" of Section 1782 are to provide efficient assistance to participants involved in international disputes and to serve as an example to foreign countries to encourage them to provide similar assistance to our courts. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 669 (9th Cir. 2002).

[11] Beyond its decision in Intel, the U.S. Supreme Court briefly stayed an order granting discovery under Section 1782 issued by the Northern District of California and affirmed by the Ninth Circuit — but then

vacated its stay without opinion within 48 hours. See FibroGen, Inc., v. Akebia Therapeutics, Inc. , No. 15A252 (U.S. Aug. 31-Sept. 2, 2015); see also 793 F.3d 1108 (9th Cir. 2015).

[12] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

[13] Id. The discretionary factors are: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding," because "the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant"; (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 otherwise "unduly intrusive or burdensome."

[14] See, e.g., AIS GmbH Aachen Innovative Solutions v. Thoratec LLC, 762 Fed. App'x 447 (9th Cir. 2019) (affirming District Court's grant of petitioner's request for production of three samples of heart pumps for use in a foreign patent infringement litigation); In re Ex Parte Application of TPK Touch Solutions (Xiamen) Inc., No. 16-80193-DMR, 2016 WL 6804600 (N.D. Cal. Nov. 17, 2016) (granting Section 1782 application directed to products that may be prior art to patent asserted in Chinese litigation); In re Request for Int'l Judicial Assistance from the Norrkoping Dist. Court, Sweden, 219 F. Supp. 3d 1061 (D. Colo. 2015) (granting Swedish Court's Section 1782 petition for an order to secure DNA evidence from a U.S. resident for use in a paternity proceeding in the Swedish Court); IPCom GMBH & Co. KG v. Apple Inc., 61 F. Supp. 3d 919 (N.D. Cal. 2014) (denying motion to quash Section 1782 petition for license agreements for use in a German patent lawsuit).

[15] Intel Corp., 542 U.S. at 263.

[16] Id. at 247, 249.

[17] Id. at 246.

[18] In re: del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019).

[19] In re Accent Delight Int'l Ltd., 869 F.3d 121 (2d Cir. 2017) (holding that a Section 1782 petitioner is not required to have a claim for relief pending before foreign tribunal); Mees v. Buiter, 793 F.3d 291 (2d Cir. 2015) (holding that Section 1782 petitioners need not show that the requested discovery is "necessary" to their legal position); Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76 (2d Cir. 2012) (holding that Section 1782's "for use" requirement does not include a foreign admissibility requirement).

[20] See 2nd Circ. Arbitration Discovery Ruling Ripe for High Court.

[21] El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31 (5th Cir. 2009); In re Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

[22] HRC-Hainan Holding Co. LLC v. Yihan Hu, No. 20-15371 (9th Cir. 2020).

[23] Sunoco Partners v. Powder Springs et al., No. 1:17-cv-01390 (D. Del.); SAS Inst. Inc. v. World

Programming Ltd., No. 2:18-CV-00295-JRG (E.D. Tex.); MV3 Partners LLC v. Roku, Inc., No. 6-18-cv-00308 (W.D. Tex.). Conversely, in a different case not subject to the same federal travel restrictions, Judge Gilstrap denied the plaintiff's motion to continue a July 6 trial date in part because the defendant's South Korea-based witnesses were already in Marshall — but the parties then settled immediately thereafter. See Image Processing Techs. LLC v. Samsung Elecs. Co., No. 2:20-cv-00050 (E.D. Tex.).

[24] See, e.g., In re ex parte Application of Apple Retail UK Ltd., No. 20-MC-80109-VKD, 2020 WL 3833392 (N.D. Cal. July 8, 2020); In re Fund for Prot. of Inv. Rights in Foreign States , No. 19 MISC. 401 (AT), 2020 WL 3833457 (S.D.N.Y. July 8, 2020); In re Rodriguez Guillen , No. 20-MC-102 (ALC), 2020 WL 3497002 (S.D.N.Y. June 29, 2020).

[25] In re ex parte Application of Apple Retail UK Ltd., No. 20-MC-80109-VKD, 2020 WL 3833392 (N.D. Cal. July 8, 2020). Based on the explicitly "unopposed" status of the Section 1782 petition, it appears possible that Intel and Apple had arranged in advance for Intel to produce the discovery sought by Apple.