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Discovery from Non-Parties (Third-Party Discovery) in International Arbitration

by

CHARLES OWEN VERRILL JR

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by CHARLES OWEN VERRILL Jr*

1. INTRODUCTION

International arbitration rules and many arbitration laws usually provide procedures that permit tribunals to order *parties* to disclose documents and other materials to the other parties.¹ More complex are the rules that determine opportunities to obtain discovery from persons that are not party to the arbitration (third-party discovery). This article will review third-party discovery under the Federal Arbitration Act (FAA) and the provisions of the US Code s.1782 that authorise US courts to act in aid of actions before foreign tribunals.

Section 1782 has unique interest at this time because it figured prominently in the EU antitrust investigation of Intel that was initiated on request from Advanced Micro Devices (AMD). Early in that investigation, AMD filed a s.1782 request in the US District Court to obtain evidence from US sources for submission to the DG-Competition of the European Commission (EC). This request ultimately led to the Supreme Court's decision in *Intel Corp v Advanced Micro Devices Inc*² which appeared to significantly expand the scope of s.1782. Ironically, after AMD won on key legal issues in the Supreme Court, the District Court on remand exercised its discretion and denied the request for judicial assistance.

This paper first describes the FAA non-party discovery rules and the split among the federal appellate courts concerning the authority of arbitrators to order prehearing discovery from non-parties. Next, it provides an analysis of the meaning of the terms "interested party" and "tribunal"—terms that were controversially interpreted by the Supreme Court in *Intel* and are essential to the application of s.1782. Finally, it discusses the "discretionary" factors used by the federal courts in deciding whether to grant a s.1782 request even when the statutory criteria are met. The opportunity to exercise this discretion seems to rebut the argument that the Supreme Court's interpretation of s.1782 gives participants before foreign tribunals more discovery rights in the United States than are available to the parties in arbitrations covered by the FAA.

2. THIRD-PARTY DISCOVERY UNDER THE FAA

Section 7 of the FAA, 9 U.S.C. § 7, states that arbitrators, or "a majority of them", may summon *any* person to,

"attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document or paper which may be deemed material as evidence in the case".

If the person summoned fails to appear, s.7 provides that the arbitrators may petition the US District Court in the district where the arbitrators are sitting to compel attendance or punish such person for failure to comply with the summons. A number of cases have reviewed the

* A paper delivered at the Third Dublin Arbitration Forum, June 12, 2009. I am grateful to my colleagues at Wiley Rein, Tessa Capeloto and Charles Capito, who were of invaluable assistance in the research and writing.

¹ See generally Gary Born, *International Commercial Arbitration* (The Hague: Kluwer Law International, 2009), 2 Vols, p.1892.

² *Intel Corp v Advanced Micro Devices Inc*, 542 U.S. 241; 124 S. Ct. 2466 (2004).

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scope of authority given to arbitrators under s.7. The case law is clear that arbitrators have authority to issue subpoenas to summon non-parties to give testimony and provide evidence *at a hearing*.³ The federal courts are, however, divided on the authority of arbitrators pursuant to s.7 when there is a prehearing discovery request for a deposition or document production from a non-party.

3. THE EIGHTH CIRCUIT'S IMPLICIT POWER DOCTRINE

An expansive interpretation of the s.7 authority of arbitrators was adopted in *Security Life Insurance Co of America, Re.*⁴ In that matter, the petitioner objected to the arbitrators' order, arguing that it was not a party to the arbitration and that s.7 did not authorise prehearing discovery. The court disagreed (at 870–871):

“Although the efficient resolution of disputes through arbitration necessarily entails a limited discovery process, we believe the interest in efficiency is furthered by permitting a party to review and digest relevant documentary evidence prior to the arbitration hearing. We thus hold that implicit in an arbitration panel's power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing. We believe the panel's exercise of this implicit power was proper whether or not Transamerica is ultimately determined to be a party.”

The elegant simplicity of this implicit power rationale for prehearing discovery is, however, unique to the Eighth Circuit.⁵

4. THE IMPLICIT POWER DOCTRINE IS REJECTED ELSEWHERE

Other federal courts have read the FAA literally and reject the “implicit power” doctrine. In *COMSAT Corp v National Science Foundation*,⁶ for example, the arbitrators issued a subpoena to the National Science Foundation (NSF), a non-party, requiring it to produce “all documents” related to the project involved in the dispute. NSF objected to the requests and notified COMSAT of its intent not to comply. The magistrate judge entered an order requiring NSF to comply and NSF appealed to the District Court, which affirmed the magistrate judge's order. NSF appealed to the Court of Appeals for the Fourth Circuit, which reversed the lower court's order.

The Fourth Circuit read the text of the FAA literally in concluding that the statute did not grant arbitrators the authority to demand that non-parties produce documents during prehearing discovery. It emphasised (at 276) that parties to arbitration agreements “forego certain procedural rights attendant to formal litigation . . . [including] a limited discovery process”. The court did acknowledge that, in complex cases, efficiency may be degraded if the parties could not “review and digest relevant evidence prior to the arbitration hearing”. Thus, “a party might, under unusual circumstances, petition the district court to compel pre-arbitration discovery upon a showing of *special need or hardship*” (emphasis added). The court did not define “special need”, but stated that the party must demonstrate that the information it seeks is otherwise unavailable. In that case, the documents were available through the Freedom of Information Act (FOIA) process that COMSAT had started, and, as such, COMSAT could not show a “special need or hardship”. Judge (now Supreme Court Justice) Alito of the Third Circuit agreed with a literal reading of s.7 in his opinion in *Hay*

³ *Stolt-Neilson Transp. Group Inc v Celanese AG*, 430 F.3d 567 (2d Cir. 2005).

⁴ *Security Life Insurance Co of America, Re*, 228 F.3d 865 (8th Cir. 2000).

⁵ The implicit power doctrine was also adopted in *Meadows Indemnity Co Ltd v Nutmeg Ins. Co*, 157 F.R.D. (M.D. Tenn 1999).

⁶ *COMSAT Corp v National Science Foundation*, 190 F.3d 269 (4th Cir. 1999).

*Group Inc v E.B.S. Acquisition Corp.*⁷ In that case, an employer commenced an arbitration against a former employee for violating a “do not compete” clause. The employer served subpoenas for documents from a third party, which objected. The employer then moved the District Court to enforce the subpoenas. That court granted the motion but the appellate court reversed. According to the Third Circuit, an arbitrator’s authority over non-parties under s.7 “is strictly limited to that granted by the Federal Arbitration Act” (at 4060). The court examined the language of s.7 and noted specifically that it permits a court to summon a non-party,

“to attend before them or any of them as a witness *and* in a proper case *to bring with him or them* [relevant documents]” (at 407) (emphasis in opinion).

The court interpreted this to “unambiguously restrict” the subpoena power to situations in which the witness has been called to appear at a hearing before the arbitrators. The court acknowledged that other courts have implied a power to issue “documents only” subpoenas under the FAA, but disagreed with their “‘power-by-implication’ analysis” because the statute “implicitly withholds [that] power” (at 408–09).⁸ The court also disagreed with the dicta in COMSAT concerning a possible exception in cases of “special need or hardship” concluding that “while such a power might be desirable, we have no authority to confer it”.

The court—having decided that the text of s.7 is “straightforward”—then turned to the question of whether the “result is absurd”, and decided it was not. The opinion cited as a guide to interpretation the fact that the Federal Rules of Civil Procedure did not allow prehearing document production until they were expressly amended to allow such discovery in 1991. Before that, courts did not infer authority to compel prehearing discovery. Similarly, if Congress considered it desirable for arbitrators to have the power to order prehearing document production, then the statute should be amended. Turning to policy considerations, the court observed that the requirement that document production be made at an actual hearing could discourage fishing expeditions and act as an incentive for parties to limit the scope of discovery (at 409). The “policy argument” that the interest of “efficiency” was furthered by allowing parties to review all the documents did not, in the court’s opinion, supersede that statutory text. In any event, the statute was clear and did not authorise “documents only” subpoenas to non-parties.

In a concurring opinion, Judge Chertoff stated that “our opinion does not leave arbitrators powerless to require advance production of documents when necessary to allow fair and efficient proceedings”. In those circumstances, the arbitrators, or a majority of them, could order a third-party witness to appear before them or a single arbitrator with documents under s.7. While this procedure could cause inconvenience to the parties and arbitrators, that would not necessarily be a “bad thing”, since it would induce them “to weigh whether advance production is really needed”. This suggested procedure was later endorsed by the Second Circuit in *Life Receivables Trust v Syndicate 102 at Lloyd’s of London*,⁹ which arose out of an arbitration seeking payment of an annuity. At the request of the Syndicate, the arbitration panel issued a subpoena requiring a non-party to produce documents pursuant to s.7. On appeal from the District Court’s refusal to quash the subpoena, the Second Circuit reversed the order concluding that “*section 7* does not enable arbitrators to issue pre-hearing document subpoenas to entities not parties to the arbitration proceeding” (at 212):

“Hay Group signaled what one commentator has called an ‘emerging rule’ that ‘the arbitrator’s subpoena power under 7 does not include the authority to subpoena nonparties or third parties for prehearing discovery even if a special need or hardship is shown.” (216.).

⁷ *Hay Group Inc v E.B.S. Acquisition Corp.*, 360 F.3d 404 (3d Cir. 2004).

⁸ See fn.3 above and the accompanying text.

⁹ *Life Receivables Trust v Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008).

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Moreover, the court affirmed the Second Circuit's holding in *Stolt-Neilson Transp. Group Inc.*¹⁰

“that arbitral *section 7* authority is not limited to witnesses at merits hearings, but extends to hearings covering a variety of preliminary matters”.

In summary, the Eighth Circuit authorises orders to produce documents by non-parties prior to a hearing, based on the “implicit power” it reads into s.7. In contrast, the Fourth Circuit has adopted a narrow reading of s.7, possibly subject to the “special need or hardship” exception. Then there is the Second Circuit's narrow reading of s.7, yet its liberal interpretation of what constitutes a hearing, which was mentioned by the concurring judge in the Third Circuit's strict construction of s.7. Because of this Circuit conflict, there is a reasonable possibility that—if presented with a petition for writ of certiorari concerning a decision granting or denying s.7 pre-hearing discovery—the Supreme Court would grant review.

5. THE AUTHORITY OF US COURTS TO ORDER DISCOVERY IN AID OF INTERNATIONAL ARBITRATION

The US judicial system has a long history of aiding foreign courts to obtain evidence from domestic persons. The first federal legislation on this subject was enacted by Congress in 1855. It authorised federal courts to appoint “a United States Commission designated to make the examination of witnesses on receipt of a letter rogatory from a foreign court”. At that time, the law required that the letter rogatory be forwarded through diplomatic channels. Over subsequent years, the law was amended many times, including an amendment in 1948 (28 U.S.C. § 1782), which allowed district courts to designate persons to preside at depositions for use in any civil action pending in any court in a foreign country with which the United States was at peace.¹¹ Subsequently, Congress established a Commission on international rules of judicial procedure to evaluate judicial assistance between the United States and foreign countries. The Rules Commission recommended, and Congress enacted, amendments to s.1782 that provided for assistance in obtaining documentary and other tangible evidence as well as testimony in assistance of foreign proceedings. A significant change made in 1964 was that the words “in any judicial proceeding pending in any foreign court” were replaced with the words “in a proceeding in a foreign or international tribunal”.

Then, in 1996, s.1782(a) was amended to read:

“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 testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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 the 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.”

¹⁰ *Stolt-Neilson Transp. Group Inc.*, 430 F.3d at 577–79.

¹¹ This summary is adopted from the detailed history in *Intel Corp v United States*, 542 U.S. 241 (2004) at 246 et seq. See also Smit, “International Litigation under the United States Code” (1965) 65 *Columbia L.R.* 1015; Losk, “Section 1782(a) After Intel” (2005) 27 *Cardozo L.R.* 1035, 1040–43.

To obtain an order from a district court under this statute, an applicant must satisfy the following requirements: (1) the person from whom discovery is sought must reside in the district or be located in the district; (2) the discovery must be for use in a foreign or international tribunal proceeding; and (3) a request for an order can be made by the foreign or international tribunal or by an interested person. Since the 1964 amendment, considerable controversy has developed over the terms “interested persons” and “foreign or international tribunal”—terms which were not clarified in the 1996 amendments. In *Intel*, the court clearly defined the “interested persons” that are eligible to request assistance, but left open the door to ongoing debate over the scope of the definition of tribunal.¹²

6. INTEL APPEARS TO CLARIFY AND EXPAND THE ROLE OF JUDICIAL ASSISTANCE

AMD filed a complaint with the EC DG-Competition alleging that Intel had abused its dominant position in the European microprocessor industry. It urged the DG-Competition to seek judicial assistance in obtaining records from a litigation in Alabama involving Intel’s actions in the US market for microprocessors. After the DG refused to seek such assistance, AMD filed a s.1782 petition with the District Court for the district where the evidence was located. This request was denied, but the decision was reversed by the Ninth Circuit. The Supreme Court then granted *certiorari* to consider three issues: (i) does s.1782 make discovery available to complainants, such as AMD, who do not have the status of private litigants and are not sovereign agents? (ii) was the DG-Competition a “tribunal”? and (iii) must a proceeding be pending or at least imminent? This article discusses the first two of these issues.¹³

Interested person

The *Intel* opinion interpreted the phrase “any interested person” to,

“include not only litigants before foreign or international tribunals but also foreign and international officials, as well as any other person whether such person be designated by foreign law or international convention or merely possesses reasonable interest in obtaining assistance” (at 247).

The Supreme Court first noted that the “complainant” who triggered the EC investigation had a significant role in the process. The applicant had the right to submit information to the DG-Competition and could appeal a dismissal of the complaint:

“Given these participation rights, a complainant “[possesses] a reasonable interest in obtaining [judicial assistance] and therefore qualifies as an “interested person” within any fair construction of that term.” (At 256.).

Thus, the test is whether the applicant has a “reasonable interest” in the proceeding, a determination that will be left to trial judges.

Since *Intel*, several district court opinions have dealt with the interested party requirement of s.1782. On very similar facts, the district court in *Application of Microsoft Corp, Re*¹⁴

¹² For a discussion of *Intel*, 542 U.S. 241 (2004) and the subsequent cases see Billor and Suskin, “May Courts Assist Private International Arbitration” on Law.com, available at <http://www.law.com/jsp/PubArticle.jsp?id=1202429179322> [Accessed December 4, 2009].

¹³ With respect to the third issue the court flatly rejected the holding of some lower federal courts that a proceeding must be pending or at least imminent. Instead, all that is required is that a proceeding must be “within reasonable contemplation” (*Intel Corp v United States*, 542 U.S. 241 (2004) at 259).

¹⁴ *Application of Microsoft Corp, Re* 428 F. Supp. 2d 188 (S.D.N.Y. 2006).

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deemed Microsoft to be an international party because it was the subject of an investigation by the DG-Competition.

The “reasonable interest” standard was applied in *Application of Oxus Gold Plc for Assistance Before a Foreign Tribunal, Re*,¹⁵ where the non-party petitioner filed an ex parte application pursuant to s.1782 to acquire discovery from the respondent. The court agreed that the definition of an “interested person” extended beyond the scope of a designated litigant. Although the petitioner was not a named party in the foreign proceedings, it was an interested party because it had a substantial financial stake in the proceeding and would submit information in support of its case.

Pre-Intel decisions on the meaning of international tribunal

While there has never been any question that foreign courts are tribunals within the meaning of s1782, there was, prior to *Intel*, considerable dispute as to whether international arbitration tribunals were included in this definition. Two federal appellate court decisions examined this issue in detail and concluded that s.1782 does not extend to private or commercial international tribunals.

In *Application of the Republic of Kazakhstan v Biedermann International*,¹⁶ the court held that s.1782 does not apply to private international arbitrations. Because the meaning of “foreign or international tribunal” in s.1782 was ambiguous, it analysed the history and purpose of the statute and found no evidence that Congress intended to extend s.1782 to international commercial arbitration. In addition, almost all other references in the US Code to “arbitral tribunals” “concern an adjunct of a foreign government or international agency”, rather than commercial or private disputes (at 882). It next compared private international to US arbitrations (at 883) and found that domestic arbitrations restrict a party’s ability to compel discovery, and that reading s.1782 to permit broader discovery rights for parties in private international arbitrations would be contrary to congressional intent. Finally, the court noted that the arbitration process was intended “as a speedy, economical, and effective means of dispute resolution”. Permitting parties to engage in “burdensome discovery” battles would frustrate that purpose. Notwithstanding these findings, the court also observed (in a footnote) that the majority of commentators believed that private commercial arbitrations are tribunals within the meaning of s.1782.

A similar result was reached in *National Broadcasting Co v Bear Stearns & Co*,¹⁷ which held that s.1782 does not extend to private commercial arbitrations. Rather, it only includes governmental bodies—i.e. conventional courts, other state tribunals, and investigative authorities. First, the court concluded that,

“the legislative history of the statute reveals that when Congress enacted the modern version of Section 1782 in 1964, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies” (at 190).

Moreover, the legislative history’s silence with regard to private tribunals reinforces the conclusion that Congress did not intend what would have otherwise been “a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties”. Further, requiring complex discovery in private commercial arbitration would “arguably conflict with the strong federal policy favouring arbitration as an alternative means of dispute resolution”. Finally, permitting 28 U.S.C. §

¹⁵ *Application of Oxus Gold Plc for Assistance Before a Foreign Tribunal, Re* 2006 U.S. Dist. LEXIS 2.

¹⁶ *Application of the Republic of Kazakhstan v Biedermann International*, 168 F.3d 880, (5th Cir. 1999).

¹⁷ *National Broadcasting Co v Bear Stearns & Co*, 165 F. 3d 184 (2d Cir. 1999).

1782 to extend to private international tribunals would be inconsistent with the more limited scope of FAA s.7, and thus give parties in international tribunals more discovery rights than are available domestically.

Both these decisions were influenced by the possibility that an expansive interpretation of “tribunal” would give participants in foreign arbitrations greater third-party discovery rights than s.7 of the FAA grants parties to domestic arbitrations.

***Intel* changes the game**

Neither *Kazakhstan* nor *NBC* were mentioned in the *Intel* majority opinion, which specifically addressed the meaning of tribunal as used in s.1782. Most courts have agreed with the proposition that “the Supreme Court in *Intel* delivered a broad, liberal interpretation of the availability of judicial assistance” including the meaning of “tribunal”.¹⁸ With only one exception, the federal courts have interpreted *Intel* to include private arbitration within the meaning of tribunal in s.1782.

In *Intel*, after noting that the claimant had significant procedural rights before the DG-Competition (a government body), the majority opinion focused on the draft of the Rules Commission, which Congress adopted, in evaluating the meaning of tribunal in s.1782. The entire discussion of the rationale for the expansive interpretation of the word “tribunal” follows.

Moreover, when Congress established the Commission on International Rules of Judicial Procedure in 1958, it instructed the Rules Commission to recommend procedural revisions “for the rendering of assistance to foreign courts and *quasi-judicial agencies*” (emphasis added). *Section 1782* had previously referred to “any judicial proceeding”. The Rules Commission’s draft, which Congress adopted, replaced that term with “a proceeding in a foreign or international tribunal”. Congress understood that change to “provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]”:

“The term “tribunal”... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”; in addition to affording assistance in cases before the European Court of Justice; §1782, as revised in 1964, ‘permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers’. See also European Commission *Amicus Curiae* 9: ‘When the Commission acts on DG Competition’s final recommendation... the investigative function blur[s] into decisionmaking. We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decision maker, from §1782(a)’s ambit.’” (*Intel* at 258).

In sum, the majority concluded that the statute permits federal district courts to provide assistance to a complainant or other “interested person” in a foreign proceeding that leads to a dispositive ruling, i.e. in which the tribunal acts as a first instance decision maker. And, by citing extensively from Professor Smit, an expert in international arbitration

(“the term ‘tribunal’... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts”),

the majority clearly intended to endorse an expansive meaning of “tribunal”. Whether or not these are “dicta” in the formal sense, the clear implication of the majority’s opinion is that an inclusive definition of tribunal should be followed by federal courts.

¹⁸ See, e.g. Losk, “Section 1782(a) After Intel” (2005) 27 *Cardozo L.R.* 1035.

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Concurring in the result, Scalia J. criticised the majority's "improper" and "unnecessary" citation to the "words of a Senate Committee Report". In his view, the "statute—the only sure expression of the will of Congress—says what the court says it says" (at 267). This suggests that in his view "tribunal" should be given its ordinary meaning, without historical or legislative analysis. He would accept the same expansive reading of "tribunal" intended by the majority.

Post-Intel decisions

Subsequent to *Intel*, federal courts have been divided on whether to accept the expansive meaning of "tribunal" in s.1782, particularly in the context of private arbitration. *Intel* was cited favourably in *Oxus*, where the petitioner sought documents and testimony with regard to an international arbitration pursuant to a bilateral investment treaty (BIT) conducted under UNCITRAL rules. The court noted the holding in *NBC*, that "international arbitral panels created exclusively by private parties, such as private commercial arbitrations administered by the [ICC]", are not included within the statute's meaning but concluded that arbitrations pursuant to BITs are not "created exclusively by private parties" and are, therefore, before a "foreign or international tribunal" (at 14–15).

Going one step further, the district court in *Roz Trading Ltd, Re*¹⁹ rejected the *NBC* holding concerning private arbitrations. It ruled that the International Arbitral Centre of Austrian Federal Economic Chamber in Vienna is a tribunal that falls within the scope of the statute. The court found that the "Centre's arbitral panels were first-instance decision-makers who issued decisions both responsive to the complaint and reviewable in court". In *the Application of Hallmark Capital Corp*²⁰ involved a private Israeli arbitration. Both of these decisions relied on the *Intel* interpretation of the meaning of the word "tribunal".

In 2008, two district courts considered whether private arbitration is covered under s.1782 and reached dramatically opposite results, differing in their interpretation of the *Intel* majority's views on the meaning of foreign tribunal and its discussion of the legislative history of s.1782. In one, the court gave an expansive definition to tribunal citing favourably the majority's opinion, while the other dismissed that part of the opinion as "mere" dicta not worthy of consideration.

In *Application of Babcock Borsig AG for Assistance Before a Foreign Tribunal, Re*,²¹ the petitioner moved to compel a nonparty to produce documents and give testimony for use in a potential arbitration before the ICC Court of Arbitration. Relying heavily on *Intel*, the court concluded that the ICC was a "tribunal" for purposes of s1782, a "first-instance decision-maker" that conducted proceedings which led to a dispositive ruling, because it had authority to hear the dispute, weigh evidence and issue a decision. It noted that the Supreme Court found that the Commission was a "tribunal" because,

"it act[ed] as a first-instance decision-maker' in a 'proceeding that leads to a dispositive ruling, i.e. a final administrative action both responsive to the complaint and reviewable in court'" (at 238).

It also noted that "tribunal" is frequently used to describe arbitral bodies (a comment which echoes the Scalia concurrence) and cited testimony by the author of the 1964 amendment to s.1782, which had been cited favourably by the majority in *Intel*. The court criticised and distinguished "pre-*Intel*" decisions (such as *NBC*) that did not find private international tribunals included within s.1782, specifically finding that "there [was] no textual basis upon

¹⁹ *Roz Trading Ltd, Re*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

²⁰ *In the Application of Hallmark Capital Corp*, 5343 F. Supp. 2d 951 (D. Minn. 2007),

²¹ *Application of Babcock Borsig AG for Assistance Before a Foreign Tribunal, Re*, 583 F. Supp. 2d 233, 2008 U.S. Dist. LEXIS 105454 (D. Mass. 2008).

which to draw a distinction between public and private arbitral tribunals” (at 239–40).²² The court focused, and relied on, the *Intel* majority’s discussion of the legislative history of s.1782 and the fact that it “favorably” quoted Professor Smit. While the court observed that, as a formal matter, the Smit quotation in *Intel* is dicta, its considered inclusion “offers meaningful insight regarding the Supreme Court’s view of arbitral bodies in the context of § 1782(a)” (at 12–13). In light of this, the court concluded that the rationale in *NBC* and *Kazakhstan* was neither persuasive nor worthy of consideration.

A contrary result was reached in *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v El Paso Corp.*,²³ which involved a private arbitration in Geneva; the identity of the tribunal was not mentioned. The petitioner moved to compel discovery from a third party for use before the foreign tribunal under s.1782. The court initially granted the motion but, on reconsideration, reversed its decision and denied the discovery request, relying on *Kazakhstan*. It noted that before *Intel* the “prevailing view” was that private international arbitration was not included in the scope of s.1782. It acknowledged that some courts had extended *Intel* to private international arbitrations within s.1782,²⁴ but insisted that the Supreme Court’s *Intel* decision had “shed no light on” whether s.1782 applied to arbitration tribunals. It distinguished private arbitration in noting that the Supreme Court focused on the fact that the party seeking discovery in *Intel* had significant procedural rights, including the right to seek judicial review. This marked a significant difference from commercial arbitration even where the New York Convention is applicable. Thus, the Commission in *Intel* was “an animal of a very different stripe from an arbitral tribunal” because it acted before review by a judicial body, while an arbitral tribunal “exists as a parallel source of decision-making to, and is entirely separate from, the judiciary”. It emphasised that “the Supreme Court has not addressed the application of Section 1782 to arbitral tribunals, not even in dicta”. Commenting on the *Intel* majority’s discussion of the meaning of tribunal, it said:

“Consequent with *Intel*’s line of direction, it comes as no surprise that arbitral tribunals make not so much as a cameo appearance, but more that of an ‘extra’ in *Intel*’s consideration of the scope of § 1782 tribunals. . . . Here lies the trap for the unwary traveler. Because in between agreeing with Congress’ report that § 1782 applied to administrative and quasi-judicial agencies Smit, not Congress, and not the Supreme Court, was of the opinion § 1782 also applied to arbitral tribunals. The Supreme Court gave no indication they agreed with Smit on this issue, now before the district court.”

In the end, the district court concluded that the Supreme Court had not adopted the author’s view as its own: “Smit does not speak for the Supreme Court”, the Supreme Court was quoting Smit only as an “extra”. In contrast, the court favourably cited and relied on the Fifth Circuit’s decision in *Kazakhstan*, which held that private international arbitrations were outside the scope of s.1782: “Thus the course charted for this court is clear.”

After this paper was delivered, the Court of Appeals for the Fifth Circuit affirmed the district court’s decision in *El Paso*. In an unpublished opinion “that is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4”, the Appellate Court noted that the district court relied on the Fifth Circuit’s decision in *Kazakhstan* (which preceded *Intel*), that none of the concerns raised in *Kazakhstan* were considered in *Intel*, that *Kazakhstan*

²² Notwithstanding the finding that the ICC was a “tribunal” under US Code s.1782, the court denied the motion to compel but without prejudice, leaving open the possibility of reconsidering its decision should the proceedings at the ICC progress, *Babcock*, 583 F. Supp. 2d at 241–43. The court exercised restraint in denying the motion because Babcock Borsig A.G. could have taken steps before the ICC to compel discovery of the same materials but had failed to do so.

²³ *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v El Paso Corp.*, 617 F. Supp. 2d 481, 2008 U.S. Dist. LEXIS 94395 (S.D. Tex. 2008).

²⁴ See *Roz Trading Ltd*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006) and *Application of Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007).

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was not irrevocably overruled by *Intel*, and that *Kazakhstan* remains binding in the Fifth Circuit.

Several months before the Fifth Circuit's affirmation of the district court in *El Paso*, the district court for the Northern District of Illinois, relying on *Kazakhstan*, held that a private arbitration panel considering an insurance claim in London was not a tribunal within the meaning of s.1782, *Norfolk Southern Corp v Gen. Sec. Ins. Co.*²⁵ Two months later, a district court in Florida concluded that a private arbitral panel constituted under the ICC did not qualify as a foreign or international panel under s.1782, primarily because the ICC panel's authority derived from a private agreement between the parties to resolve their disputes at the ICC Court. In *Operadora DB Mex. SA, Re.*,²⁶ the court also cited *NBC* and *Kazakhstan* to support its conclusion,

“that the origin of the ICC Panel's authority and its purpose militate against classifying it as a foreign or international tribunal under § 1782”.

This leaves the state of authority on the scope of the meaning of foreign tribunal in s.1782 ambiguous. Some courts have adopted the expansive definition in *Intel* and found foreign tribunals to be covered by s.1782. Others have rejected *Intel* and rely on the pre-*Intel* Court of Appeals decisions in *NBC* and *Kazakhstan* in concluding that private arbitration panels are not foreign tribunals for purposes of s.1782. The only post-*Intel* Appellate Court decision which affirmed a lower court that relied on *NBC* and *Kazakhstan* was not published and declared not to be precedent by order of the court. Therefore, there is still room for counsel seeking to use s.1782 for judicial assistance in private international arbitration to convince the court that *Roz Trading* and *Babcock Borsig* are the more appropriate interpretations of *Intel* at least outside the Second and Fifth Circuits.

7. DISCRETIONARY APPLICATION OF SECTION 1782

Intel emphasised that the legislative history of s.1782 does not suggest that Congress “intended to impose a blanket-foreign discoverability rule”. The Senate report observes that s.1782(a),

“leaves the issuance of an appropriate order to the discretion of the court, which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable” (at 260–61).

The majority then discussed a number of the factors that a district court would consider in exercising the discretion authorised by s.1782.

First, the court responded to the argument raised by *Intel* that a US court should not grant a discovery request under s.1782 if the foreign government would not permit discovery in similar circumstances (the so-called “foreign discoverability limitation”). Rejecting this contention, the court stated that while,

“comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign discoverability rule into the text of Section 1782(a)” (at 261).

Going further, the court questioned “whether a foreign government would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance”. It was further noted that a

²⁵ *Norfolk Southern Corp v Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009).

²⁶ *Operadora DB Mex. SA, Re.*, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. August 1, 2009).

“foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture or traditions—reasons that do not necessarily signal objection to aid from United States federal courts”.²⁷

The court concluded that a foreign discoverability rule would serve only to thwart s.1782(a)’s objective to assist foreign tribunals in obtaining information that the tribunals may find useful but, for reasons having no bearing on international courts, they cannot obtain under their own laws.”

There was a sequel to *Intel*. On remand, the district court denied AMD’s discovery request.²⁸ The district court found that the party against whom the request was made was already a participant in the foreign proceeding and that the foreign tribunal (the EC) had jurisdiction over it. Secondly, the EC amicus briefs indicated that it did not “need or want” the court’s assistance in the matter. Thirdly, the district court found that the discovery request was an attempt to circumvent the EC’s decision not to seek discovery. It also found the request unduly intrusive and burdensome.

Federal courts have distilled from *Intel* four “discretionary factors” to apply in deciding whether to grant s.1792 discovery requests. *In the Application of Fischer Advanced Composite Components AG for an Order of Discovery pursuant to 28 M.S.C. §1982*,²⁹ stated that district courts should exercise their discretion under s.1782,

“in light of the twin aims of the statute: providing effective assistance to participants in international litigation, and encouraging foreign countries by example to provide assistance to our courts”.

The court then identified four factors it distilled from *Intel*:

- (1) whether the person from whom discovery is sought is a participant in the foreign proceeding;
- (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign court to US federal-court judicial assistance;
- (3) whether the 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 subpoena contains unduly intrusive or burdensome requests.

Other courts have described the *Intel* factors in more or less similar ways, although not all of them specify the number of factors with the same precision. The Court of Appeals for the Second Circuit in *Schmitz v Bernstein*,³⁰ affirmed the district court’s decision to deny a discovery request where the German Government made it known that it was not receptive to the discovery request and believed that granting it would “jeopardize German sovereign rights” (at 84). Moreover, the party against whom the request was made was “for all intents and purposes” a participant in the German litigation. The Appeals Court affirmed the district court’s decision to deny, rather than narrow, the request, because it was reasonable to conclude that a narrower request was not possible given Germany’s objections.

In *London v Does*,³¹ the Ninth Circuit affirmed the district court’s decision to grant the discovery request under s.1782. Using the *Intel* factors, the district court determined that the party against whom the request was made (Yahoo) was not a participant in the foreign

²⁷ *Intel*, 542 U.S. 241 at 61; the court again cited Smit.

²⁸ *Advanced Micro Devices Inc v Intel Corp*, 2004 U.S. Dist. LEXIS 21437 (N.D. Cal. 2004).

²⁹ *In the Application of Fischer Advanced Composite Components AG for an Order of Discovery pursuant to 28 M.S.C. §1982*, 2008 M.S. Dist. Lexis 103220.

³⁰ *Schmitz v Bernstein*, 376 F.3d 79 (2d Cir. 2004).

³¹ *London v Does*, 2008 U.S. App. LEXIS 11428 (9th Cir. 2008).

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proceedings and “absent this discovery, the evidence sought may be unattainable by the French court” (at 4). The court also found that the request was not an attempt to avoid foreign evidence rules and was not unduly intrusive or burdensome and that the information sought was vital to the party’s case in the foreign tribunal. Finally, citing the discretionary factors from *Intel*, the district court denied the discovery request in *Babcock Borsig*, after finding that the ICC was a tribunal for purposes of s.1782. With regard to the first *Intel* factor, the court concluded that while the party against whom the request was made was a nonparticipant in the foreign proceeding, it may have been possible for the requestor to secure the documents under the foreign tribunal’s procedures. There was no proof of the international tribunal’s (ICC) receptivity to the requested materials. Therefore the court exercised its discretion and denied the request. It reserved judgment on the question whether it might reconsider its decision if it received an indication from the ICC at a later stage that this material would be beneficial.

8. CONCLUSION

The federal courts’ treatment of s.7 of the FAA and s.1782 provides valuable guidance to practitioners involved in international arbitrations. For example, those contemplating applying for third-party discovery under s.1782 should carefully consider how the foreign tribunal is likely to view such a request. Under the *Intel* line of cases, US courts place considerable weight on whether the foreign tribunal is agreeable to the request and whether the request may be seen as an attempt to circumvent the foreign tribunal’s discovery rules. However, many questions are unanswered. Will the Supreme Court settle the dispute among the circuit courts as to whether s.7 permits “documents only” discovery requests? In the meantime, how much credence should be given to the Fourth Circuit’s “special need or hardship” standard? More broadly, which of the two provisions provides the most viable option for parties seeking to obtain third-party discovery?

One conclusion does seem evident. The concern expressed in *Khazakstan* and *NBC*, that a liberal interpretation of “interested person” and “tribunal” in s.1782 would give parties to foreign private arbitrations more discovery rights than are available under s.7, is not a significant issue given the broad discretion of district court judges under s.1782, even where the statutory criteria are met.