Post-Intel cases considering the application of 28 U.S.C. § 1782 to obtain evidence in the U.S. in aid of a private international arbitration
Statutory language of 28 U.S.C. § 1782

Authorizes a district court to order a person to testify or produce documents for use before a foreign or international tribunal:

"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. . . ."

28 U.S.C. § 1782

Requirements:

- the request must be made by a foreign or international tribunal, or by any interested person
- the request must seek evidence (testimony or statement of a person or production of a document or other thing)
- the evidence must be for use in a proceeding in a foreign or international tribunal
- the person from whom discovery is sought must reside or be found in the district of the district court to which the application for assistance is made
Examples of breadth of 28 U.S.C. § 1782

- application may be made by an “interested party”
- application may be made *ex parte*
- application is not confined to “pending” adjudicative proceedings → pre-action discovery?
- discovery sought need not be discoverable where foreign or international tribunal is located
- no requirement of reciprocity/reciprocal arrangements
Debate as to meaning of “foreign or international tribunal” in 28 U.S.C. § 1782(a)

- Before *Intel*, commentators urged a reading of “tribunal” that included a foreign or international arbitral tribunal

- Courts adopted a more restrictive view, carving out private international arbitration from the meaning of “tribunal” in Section 1782:
  - *National Broadcasting Co. v. Bear Stearns & Co.*, 65 F.3d 184 (2d Cir. 1999)
**Issue:** whether Section 1782 applies to a proceeding before the EC Director General for Competition

- antitrust suit by Advanced Micro Devices against Intel
- AMD sought discovery of documents Intel had produced in a private lawsuit in Alabama federal court
- district court denied AMD’s application; Ninth Circuit reversed

**Result:** Supreme Court interpreted Section 1782 to permit discovery of the documents and remanded for further consideration by the district court
Meaning of the term “foreign or international tribunal” in 28 U.S.C. § 1782:

- interpreted broadly – found that the decision-making body of the EC Director General for Competition constituted a “tribunal” under Section 1782
- rationale – EC body was a “first-instance decision maker” and Section 1782 had been enacted “for the rendering of assistance to foreign courts and quasi-judicial agencies”
Discretionary factors:
- whether the party from whom discovery is sought is a party to the foreign proceeding
- nature of the foreign tribunal, character of the proceeding underway abroad, and receptivity of the foreign situs to U.S. judicial assistance
- whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign government or the U.S.
- whether the request is “unduly intrusive or burdensome”
Cases after *Intel* applying Section 1782 to foreign arbitrations

- UNCITRAL arbitration between Oxus Gold and the Republic of Kyrgyzstan pursuant to a BIT constituted a “foreign or international tribunal” under Section 1782

- private arbitration convened by the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna constituted a “foreign or international tribunal” under Section 1782
Cases after *Intel* applying Section 1782 to foreign arbitrations

*In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007)

- Applied 28 U.S.C. § 1782 to private Israeli arbitral body to allow discovery from a non-party resident of Minnesota


- Applied 28 U.S.C. § 1782 to grant *ex parte* application for discovery in connection with a private arbitration under the UNCITRAL arbitration rules
Cases after *Intel* applying Section 1782 to foreign arbitrations


- Applied 28 U.S.C. § 1782 to ICC arbitration; relied on *Intel* in finding that the “ICC is a ‘tribunal’ within the meaning of § 1782(a)”
- denied discovery sought


- Refused to apply 28 U.S.C. § 1782 to private arbitration
Cases after *Intel* applying Section 1782 to foreign arbitrations

- Refused to apply 28 U.S.C. § 1782 to an ICC arbitration

*El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 2009 WL 2407189 (5th Cir. Aug. 6, 2009)
- Refused to apply 28 U.S.C. § 1782 to private arbitration conducted under the UNCITRAL arbitration rules

- Applied 28 U.S.C. § 1782 to an arbitration governed by the UNCITRAL rules of arbitration
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