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Alert | International Arbitration & Litigation

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Does Section 1782 Apply to Discovery in Private International Commercial Arbitration Proceedings?

Life sciences companies should pay attention to an ongoing action in Delaware that could have implications for whether they can obtain (or be subjected to) U.S. discovery in international arbitration under 28 U.S.C. § 1782. Section 1782 is a powerful tool that permits litigants to obtain broad discovery in the United States for use in international arbitrations, which traditionally do not provide for or allow significant discovery. But U.S. courts have found that not all international arbitrations qualify under this statute. While courts have permitted Section 1782 to be used in connection with investor-State arbitration, they have wrestled with whether to apply the statute in the context of international arbitration between two private, commercial parties. The statute states in pertinent part: "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, . . . 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."

On Sept. 16, 2019, heavily redacted versions of filings made in Delaware district court by European venture capital firms TVM Capital, Wellington Partners, and Cipio Partners were made public. These filings show that a group of life sciences investors applied to a Delaware court for discovery in aid of a

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Munich-seated proceeding at the German Arbitration Institute, or DIS. The identity of the respondent is not known.

While most details of the dispute have been redacted, the filings indicate the petitioners were parties to a contract whereby they agreed to relinquish certain shares in exchange for payments tied to clinical trials. The petitioners say they are preparing an international commercial arbitration over a counterparty's breach of the contract and seek discovery of documents relating to clinical trials that will support their case.

The outcome is uncertain. Petitioners may be optimistic that their application will be granted, since on two prior occasions the Delaware district court has appeared willing to apply Section 1782 to a private international commercial arbitration proceeding, even if one of those decisions was in a case that also involved foreign courts[1], and the other decision was overturned at the appellate level on unrelated grounds.[2] In addition, petitioners will take heart from the Supreme Court's discussion of permissive application of the statute to foreign tribunals as set forth in *Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258, which emphasizes the importance of the tribunal being a "first-instance decisionmaker." Private commercial arbitration tribunals meet this criterion.

Moreover, within the past month the Sixth Circuit issued a decision that is helpful to the petitioners, and all other life sciences companies hoping to seek discovery under Section 1782 for use in their international arbitrations. On Sept. 19, 2019, the Court of Appeals for the Sixth Circuit held that Section 1782 discovery proceedings may be ordered in furtherance of a private commercial arbitration outside of the United States. In *Abdul Latif Jameel Transportation Company Ltd. v. FedEx Corp.*, the court held that Section 1782(a)'s reference to a "foreign or international tribunal" included a private commercial tribunal based in the United Arab Emirates under the rules of the Dubai International Financial Centre-London Court of International Arbitration.[3]

The Sixth Circuit wrestled with the definition of "tribunal" for much of its decision. The court investigated the use of the word "tribunal" by American lawyers and judges, and concluded that the word was used "to encompass privately contracted-for arbitral bodies with the power to bind contracting parties."[4] An investigation into the context of the statutory text (and the Supreme Court's decision in *Intel*) did not provide a more limited interpretation, and therefore the court was comfortable concluding that "the text, context, and structure of [Section] 1782(1) provide no reason to doubt the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties."[5]

Still, despite these positive signals from *Intel* and the Sixth Circuit, the issue of whether parties can obtain discovery under Section 1782 for use in their private commercial international arbitrations is far from settled, and may ultimately require further Supreme Court guidance. Outside of Delaware, there is a jurisdictional divide as to whether private commercial international arbitration panels constitute "tribunals" for the purposes of Section 1782. While a handful of district courts have found that Section

[1] *See Pinchuk v. Chemstar Prods. LLC*, No. 13-mc-306-RGA, 2014 U.S. Dist. LEXIS 86781 at *5-6, 13, (D. Del. June 26, 2014) (noting that "the four *Intel* factors favor granting discovery" for proceedings at the Cyprus courts and the LCIA but ultimately holding that the discovery of documents based in Cyprus was not appropriate on other grounds).
[2] *See Comisión Ejecutiva, Hidroelectrica Del Rio Lempa v. Nejapa Power Co., LLC*, No. 08-135, 2009 U.S. Dist. LEXIS 90291, at *3 (D. Del. Oct. 14, 2008) ("[T]he Supreme Court's decision in *Intel* (and post-*Intel* decisions from other district courts) indicate that Section 1782 does indeed apply to private foreign arbitrations."), *vacated on other grounds*, 341 Fed. App'x 821 (3d Cir. 2009).
[3] *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), No. 19-5315, 2019 U.S. App. LEXIS 28348 (6th Cir. Sept. 19, 2019).
[4] *Id.* at *22-23.
[5] *Id.* at *25-26.

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1782 is applicable to private commercial arbitrations,[6] appellate courts – up until September 2019 – had uniformly found that Section 1782 was not applicable to private commercial arbitrations.[7] Therefore, interested parties should continue to monitor developments at the district and circuit court level.

GT's international arbitration attorneys, who work closely with the firm's 600+ person litigation group, have significant experience in litigating Section 1782 actions. In the *Chevron v. Ecuador* international arbitration alone, more than 50 orders and opinions involving Section 1782 were generated. If you have any questions about whether your clients can or should seek discovery for use in aid of a foreign arbitration please contact the attorneys listed below.

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[6] *See e.g., In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 238-40 (D. Mass. 2008) (finding Section 1782 appropriate to aid International Chamber of Commerce (ICC) proceeding); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (finding Section 1782 appropriate to aid Israeli arbitral panel); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224-25 (N.D. Ga. 2006) (finding International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna qualified as a tribunal within the meaning of Section 1782); *In re Iraq Telecom*, No. 18-MC-458 (LGS) (OTW), 2019 U.S. Dist. LEXIS 136321 (S.D.N.Y. Aug. 13, 2019) (finding Section 1782 appropriate in support of an ICC proceeding). *But see In re Operadora DB Mexico, S.A. DE C.II.*, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. Aug. 4, 2009) (noting that Section 1782 did not apply to an ICC arbitration); *Norfolk S. Corp. v. Gen Sec. Ins. Co.*, 626 F. Supp. 2d 882 (N.D. III. 2009) (holding that private arbitrations not sponsored by states do not qualify as "tribunals" under Section 1782).

[7] The Fifth and Second Circuits both have held that private commercial arbitration tribunals do not qualify as "tribunals" for the purposes of Section 1782. *See El Paso Corp. v. La Comision Ejecutiva Hidroelecctrica*, 341 Fed. Appx. 31 (5th Cir. 2009), *affirming* 617 F. Supp. 2d 481 (S.D. Tex. 2008); *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2nd Cir. 1999).

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