BROWN GAVALAS & FROMM LLP

NEW YORK OFFICE
555 FIFTH AVENUE
NEW YORK, NY 10017
TEL: (212) 983-8500
FAX: (212) 983-5946

NEW JERSEY OFFICE
1118 CLIFTON AVENUE
CLIFTON, NJ 07013
TEL: (973) 779-1116
FAX: (973) 779-0739

www.browngavalas.com
pskoufalos@ browngavalas.com

Section 1782 discovery proceedings in federal courts in the United States

I. *Statutory requirements and discretionary factors*:

U.S. law permits federal courts to grant assistance in obtaining documents and testimony located in the U.S. "for use in a proceeding in a foreign or international tribunal." This procedure, known as a Section 1782 proceeding, can be used to obtain documents and testimony from third parties located within the jurisdiction of the U.S. court even if the evidence could not be obtained under the discovery rules applicable to the foreign proceeding.[1] In recent years, maritime litigants worldwide have turned to Section 1782 to obtain U.S.-based evidence, including financial information held by banks in New York.

Section 1782 relief is available to an "interested person" who is most often, but not exclusively, a litigant in a foreign proceeding.

To obtain Section 1782 discovery, the party seeking the discovery must satisfy three conditions. Once these conditions are met, the court still has the final discretion as to whether to allow the discovery in aid of a foreign proceeding. The three factors are:

- the party from whom discovery is sought must be found in the jurisdiction where the Section 1782 petition is filed;
- the discovery must be intended for use in a proceeding in a foreign or international tribunal; and
- the person seeking discovery must be an "interested person" in the foreign proceeding (which includes a party).

Even where an applicant meets these three threshold requirements, a court still has discretion as to whether to grant Section 1782 relief. The US Supreme Court, in *Intel v.*

---

[1] § 1782 Assistance to foreign and international tribunals and to litigants before such tribunals

(a) 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 . . . 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.

Advanced Micro Devices, Inc., 542 US 241 (2004), identified four factors to guide a court's discretion:

(1) whether the person from whom evidence is sought is a participant in the foreign proceeding;

(2) whether the foreign tribunal is receptive to U.S. judicial assistance;

(3) whether the petitioner is improperly trying to use this section to get around restrictions in foreign courts; and

(4) whether the request for evidence is overly broad.

The federal courts in NY, which regularly consider section 1782 petitions, do not "rubber-stamp" these requests and scrutinize them closely.

II. *Are foreign private arbitrations "foreign tribunals"*?

A developing issue of substantial import to the maritime bar is whether foreign private arbitration is a "foreign or international tribunal" within the meaning of Section 1782.

In the Second Circuit, the answer to that question has been a decisive "No" since the court's decision in *National Broadcasting Corp. v. Bear Stearns*, 165 F. 3d 190 (2d Cir. 1999). There, the court held that a ICC arbitration was not covered by Section 1782 and that the statute applied only to governmental bodies, like a foreign court.

That same year, the Fifth Circuit, in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F. 3d 88 (5th Cir. 1999), aligned itself with the Second Circuit holding that Section 1782 does not apply to private international arbitrations—in that case, an arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce.

Then, along came the Supreme Court's *Intel* decision, and Justice Ginsburg's infamous dictum referencing a law review article by the head of the Rules Commission that oversaw the 1964 revisions to Section 1782 in which the phrase "foreign or international tribunal" was added to the statute. Prof. Hans Smit's law review article, in describing the change to the statute, included the term "arbitral tribunals" as among the foreign and international tribunals that the amended statute was intended assist in obtaining evidence.[2]

Since *Intel*, there has been what some commentators describe as "discord in the law" on the issue, with some courts making a distinction between "private" arbitral and "governmental" tribunals. In addition, multiple district courts have held that arbitrations

---

[2] The actual language from the Court's decision is: "Congress understood that change to "provid[e] the possibility of U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]."S. Rep. No. 1580, at 7-8; see Smit, International Litigation 1026-1027, and nn 71, 73 ("[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts".

involving investment treaties, usually between a private investor and a foreign state or agency, constitute Section 1782 tribunals.

Alas, in 2011, the Second Circuit had a chance to take a position on this issue in *Chevron v. Berlinger*, 629 F. 3d 297 (2d Cir. 2011), but specifically declined to do so. The Eleventh Circuit, in *Consorcio Ecuatoriano de Telecomunicaciones SA v. JAS Forwarding (USA)*, 747 F. 3d 1262 (11th Cir. 2014), also specifically declined to answer whether a private arbitral tribunal was within the purview of the statute.

District courts remain divided on the issue with some finding the *Intel* court's reference to Prof. Smit's article to be an inadequate basis for a broad expansion of the statute. Other courts have noted that inclusion of private arbitral panels within the scope of Section 1782 has the potential of flooding the courts with Section 1782 applications.

Nevertheless, several district courts have bucked the trend and have come down squarely on the side that private arbitrations are covered by the statute. The most recent decision is *In re Kleimar*, 2005 WL 937486 (S.D.N.Y. Nov. 16, 2016). There, Judge Marrero considered that the dictum in *Intel* suggested the Court "may consider" foreign private arbitral tribunals to fall within the statute. The court thus concluded that a private arbitration before the LMAA was covered by Section 1782. *See also In re Owl Shipping, LLC*, 2014 US Dist. LEXIS 148088 (D.N.J. Oct. 17, 2014) (approving Section 1782 discovery in aid of LMAA arbitration proceedings); *In re Winning (HK) Shipping Co. Ltd.*, 2010 US Dist. LEXIS 54290 (S.D. Fla. Apr. 30, 2010) (LMAA tribunal covered by Section 1782).

Other courts approving Section 1782 in the context of private arbitrations are: *In re Application of Roz Trading Ltd.,* 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (post-*Intel*, international commercial arbitral panel located in Austria was a tribunal within the meaning of Section 1782 because the body acted as a first-instance decision maker); *In re Application of Hallmark Capital Corp.,* 534 F. Supp. 2d 951 (D. Minn. 2007) (pursuant to the *Intel* ruling, Section 1782 now applied to private tribunals).

A word of caution: there are an equal number of district courts that have reached the opposite conclusion, and the Circuit Courts of Appeal have not (yet) come around to the position favoring use of Section 1782 in private arbitrations.

May 3, 2017