CROSS-BORDER DISCOVERY DISPUTES AND 28 U.S.C.1782

LEVELING THE PLAYING FIELD

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With the rise of multinational corporations and increased globalization, it is increasingly common for American companies to find themselves involved in litigation abroad. Most foreign or international tribunals' pretrial procedures are vastly different, especially in regard to discovery and proof-gathering – with many taking a hostile view of the United States' liberal approach to pretrial discovery.

In an effort to promote cross-border judicial assistance, the Legislature created a mechanism in 28 U.S.C. § 1782 whereby a foreign tribunal or litigant can petition a U.S. federal court for discovery from a U.S.-based individual or entity located in that court's jurisdiction for use in the foreign proceedings. The Legislature took the first step with the aim that other nations would follow suit and provide similar means of assistance to our courts. Unfortunately, they largely did not. This created an environment where a foreign litigant could avail itself of liberal, American-style discovery here while simultaneously hiding behind the more restrictive discovery rules where the action is pending, thereby creating a discovery imbalance.

When the foreign party has no U.S. presence, or at least no information here relevant to the proceedings, the American party can find itself without recourse. Outright opposition to a Section 1782 application is a Herculean task, rarely successful when the statutory requirements are met. This article explores another – often overlooked – option available to American parties who find themselves on the receiving end of a 1782 request. Instead of outright opposition to the discovery application, the American party can argue that the court should condition any grant of aid to the foreign applicant on the foreign party engaging in reciprocal discovery under the Federal Rules for use in the foreign proceedings. This will not only maintain the procedural parity between the parties, but could also give the American party access to information it would not otherwise be able to obtain in the foreign proceedings.

THE SECTION 1782 APPLICATION, THE STATUTORY REQUIREMENTS, AND THE INTEL FACTORS

A section 1782 request for judicial assistance is initiated by the applicant petitioning the federal district court where the discovery sought is located. There is no notice requirement to the party from whom the discovery is sought, and courts often solely rely on the allegations contained in the application and grant the application *ex parte*. When this is the case, the court will provide the receiving party a certain amount of time to object to the discovery or seek other relief, such as moving to quash the application or modify it.

The initial inquiry by the receiving court focuses on section 1782's four statutory requirements:

1. The request must be made by a foreign tribunal or by any interested person.
2. The request must seek evidence.
3. The evidence must be "for use in a proceeding in a foreign or international tribunal."
4. The person from whom discovery is sought must reside and be found in the district of the district court ruling on the application for assistance.

In the seminal 2004 case *Intel Corp. v. Advanced Micro Devices, Inc.*, the United States Supreme Court held that when the four statutory requirements are met, the district court is authorized, *but not required*, to grant a section 1782 discovery application.[1] The Supreme Court then outlined four non-exhaustive factors to guide the district

court's discretion, known as the *Intel* factors:

1. Whether the person from whom discovery is sought is a participant in the foreign proceeding, because the need for section 1782 aid generally is not as apparent 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 section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.
4. Whether the request is otherwise unduly intrusive or burdensome.

Practically speaking, the courts tend to grant the discovery aid when the statutory requirements are met, unless the discretionary factors heavily weigh against doing so. Instead of taking an obstructionist tack – which risks an outcome were your opponent reaps the benefit of broad discovery here with no commensurate benefit to the American entity – there is another option.

If the American party believes, on balance, engaging in reciprocal American-style discovery would be beneficial to it (for example, if the foreign litigant has information which it cannot obtain through the discovery procedures in the foreign jurisdiction), then the American party can petition the district court to condition its grant of discovery aid on the foreign party engaging in reciprocal discovery under the Federal Rules.

This approach has been endorsed by the Supreme Court and one of the principal architects of 28 U.S.C. § 1782, and applied a number of times by courts in the Second Circuit.[2] Taking this approach alleviates the concern many courts have expressed over the practical effect of granting one-sided discovery and thereby creating a discovery imbalance in the foreign proceedings. While the Second Circuit has led the way with this approach since the early 1990s, other Circuits have been slow to follow suit. However, there is no reason this tactic cannot be advanced in other Circuits, provided an appropriate *Intel* argument is advanced.

ARGUING FOR RECIPROCAL DISCOVERY: MAKE YOUR OPPONENT LOOK UNREASONABLE

When you or your client first receives notice that your foreign adversary is seeking discovery assistance pursuant to section 1782, you should begin laying the groundwork for seeking reciprocal discovery. The strategy suggested by these authors is based largely on commentary by Professor Hans Smit, the "chief architect" of section 1782, whose writings on the subject have been relied upon by the Supreme Court. Professor Smit has argued that reciprocal discovery is warranted when there is "evidence that the American party seeks, but the foreign party effectively withholds." This goes to the heart of the third *Intel* factor. Upon receiving notice of a section 1782 application, after determining what "discovery" has already occurred in the foreign tribunal, the American party should send a letter to the foreign litigant offering to engage in reciprocal discovery (and noting this would avoid court intervention). Keep in mind this letter may be an exhibit in support of your request for reciprocal discovery, so your client should appear to be simply making a reasonable request, which could be rejected only if the 1782 applicant is attempting to circumvent foreign proof-gathering restrictions and create a discovery imbalance.

Professor Smit noted just such a catch-22 in his commentary on the purpose behind giving the district court wide discretion in granting its assistance:

> [The drafters of s 1782] realized that a satisfactory solution would be reached by the imposition of such a condition [for reciprocal discovery], since both parties would then have the benefit of the same American discovery, **with the foreign party unable to complain of its having to extend to the American party what it itself, with the help of an American court, sought from it.**[3]

Throughout this process, every action should be designed to make your client appear ready and willing to engage in fair, reciprocal discovery, while the other side looks like an obstructionist attempting to gain a strategic edge in the foreign proceedings.

Further support for your request for reciprocal discovery can come from an expert in the foreign jurisdiction's laws who can explain in an affidavit the foreign discovery rules and the status of the proceedings. And just because you are seeking reciprocal discovery does not mean you are foreclosed from objecting to discovery requests that fall outside the ambit of discoverable information under the Federal Rules, or those which are "unduly intrusive or burdensome." To that end, in preparing your reciprocal request from the foreign litigant, you should try to mirror their unobjectionable requests as much as possible. The authors recommend submitting the reciprocal request in writing in early communications with American counsel for the foreign litigant.

It is important to note that despite the section 1782 application, the court does not have the authority to *order* the foreign litigant to engage in reciprocal discovery. Instead, the court can *condition* its grant of discovery aid on the foreign litigant *engaging* in reciprocal discovery. If the foreign litigant refuses, you do not have the obligation to provide one-sided discovery, thereby maintaining procedural parity in the foreign proceedings.

With a well-crafted strategy, an American party can prevent the foreign litigant from using section 1782 as a sword and the foreign restrictions on proof-gathering as a shield. American entities involved in litigation abroad should be aware of this often overlooked option, and continue to educate the courts about their ability to maintain a discovery balance in the proceedings abroad by conditioning relief upon reciprocal discovery. While the Legislature's aim in enacting section 1782 may never be fully realized, a wider adoption of this remedy would at least help alleviate the unintended consequence of creating a discovery imbalance abroad.

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1 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466 (2004).
2 *See, e.g., In re Esses*, 101 F.3d 873, 876 (2d Cir. 1996); *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101-02 (2d Cir. 1995); *Application of Consorcio Minero, S.A. v. Renco Group, Inc.*, 2012 WL 1059916 (S.D.N.Y. Mar. 29, 2012); and *Minatec Finance S.A.R.L. v. SI Group Inc.*, 2008 WL 3884374 (N.D.N.Y. Aug. 8, 2008).
3 Smit, "Recent Developments in International Litigation," 35 S. *Tex. L. Rev.* 215, 237-38 (1994).