

Playing Offense:

Obtaining Evidence From US-Based Individuals and Corporations Pursuant to 28 U.S.C. § 1782

Presented by:

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Overview of Section 1782

Who may seek Section 1782 discovery?

- “A foreign or international tribunal”; or
- “Any interested person” (e.g. a party involved in, or contemplating, Swiss litigation).

From whom is discovery available?

- Any individual or entity that “resides or is found” in the judicial district in which the court sits.

Note: Unclear to what extent a foreign corporation that maintains a branch or office within the judicial district is “found” there.



Overview (cont'd)

What types of discovery are available?

- Production of a “document or other thing” (e.g. DNA evidence); and
- Witness testimony

For what purpose?

- Must be “for use in a proceeding in a foreign or international tribunal.”

Note: This includes “criminal investigations conducted before formal accusation.”

Discretionary “*Intel* Factors”

- (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding”;
- (2) “the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance”;
- (3) whether the request for discovery “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and
- (4) whether the request is otherwise “unduly intrusive or burdensome.”

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

Broad Scope

“For use” requirement interpreted broadly

- Section 1782 discovery available in aid of **future** litigation if foreign proceedings are “within reasonable contemplation.”

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

- Practical application: pre-suit investigations.

Section 1782 allows for broad, US-style discovery

- Federal Rules of Civil Procedure usually determine the scope of discovery.

But court may direct that “the practice and procedure of the foreign country” shall apply “in whole or part.” 28 U.S.C. § 1782(a).

Procedure

Section 1782 applications can be made *ex parte*

- If satisfied that applicant has made a *prima facie* showing, court will issue order authorizing service of a subpoena.
- Target then has the burden of moving to quash the subpoena.

Possibility of appeal

- District court's order is immediately appealable to court of appeals.
- But stay of discovery pending appeal is not automatic.

N.B.: Build in sufficient time for this process to play out!

Relationship with Hague Evidence Convention

Close coordination between Swiss and US counsel is essential:

- From a **US perspective**, there is no need to resort to the Convention or involve the Swiss courts at all.
- But from a **Swiss perspective**, a Hague Evidence Convention request may be necessary/advisable.

Hague Evidence Convention Procedure:

- Swiss court directs letter of request to Office of International Judicial Assistance at the US Department of Justice.
- Typically handled by an Assistant US Attorney (“AUSA”). But a Section 1782 application with the US court is the only way the AUSA can **compel** discovery from a hostile witness.

Discovery in Aid of International Arbitration

Whether Section 1782 discovery is available in aid of foreign arbitral proceedings remains unsettled.

- Before *Intel*, several courts had held that a foreign arbitral tribunal was not a “foreign tribunal” under Section 1782.
- But in *Intel*, the US Supreme Court in *dicta* suggested that the term “tribunal” may include arbitral tribunals.
- Post-*Intel*, the lower courts have issued conflicting decisions.
 - Careful analysis of the case law in the judicial circuit/district where the individual or entity from whom discovery is sought “resides or is found” is essential!

Thank You.

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