28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts

By Michael Campion Miller, Alejandro G. Rosenberg, and Michael Stoll

Over the past 65 years, under the auspices of 28 U.S.C. § 1782, American courts have become increasingly willing to allow foreign litigants to seek discovery within the United States for use abroad. This trend represents a marked shift from the earliest days of the republic, when the process for obtaining discovery within the United States was too fraught with procedural and practical hurdles to contemplate.

"Then": International Judicial Assistance Over the Years

1780–1854: International Judicial Assistance Permitted But Not Practiced

Around the time of the American Revolution, English and American courts recognized two means by which foreign litigants could seek to obtain evidence in the United States for use abroad: letters rogatory and commissions. A letter rogatory, or letter of request, was and remains today a letter from one court to another seeking that court's official assistance. If the request was granted, the court appointed a commissioner to obtain the evidence sought by the requester. Although recognized as legitimate means for pursuing evidence for use abroad, letters rogatory and commissions do not appear to have received actual judicial assistance with any regularity. In fact, searches have returned no reported cases in which a U.S. court responded to foreign letters rogatory or otherwise assisted a foreign commissioner.[1] Nevertheless, case law indicates that U.S. courts believed that they could exercise this power "for the purpose of aiding in the administration of justice."[2]

The absence of a clear judicial track record for letters rogatory in these early years does not come as much of a surprise, however. For instance, imagine what a London merchant in 1785 would have to do to depose a former clerk who had moved to Philadelphia. How would the London merchant even find local counsel to assist with the case? Even if the merchant could find local counsel, conducting this process via letter and sailboat would take months, at least, and probably prove far too time-consuming a task to undertake.

1855: A Failed Attempt to Provide Judicial Assistance

In 1855, the attorney general of the United States issued an opinion concluding that U.S. courts lacked statutory authority to execute letters rogatory submitted by foreign government officials.[3] To remedy this, later that year, Congress enacted a statute granting federal courts the authority to execute letters rogatory by appointing commissioners to compel witnesses to testify "in the same manner" as they testify in federal court.[4] But in a comedy of errors that would make today's Congress blush, a series of indexing mishaps resulted in the act literally becoming lost and accordingly disregarded by the federal courts.[5]

1863–1948: The "Lost Years" of U.S. Discovery in Aid of Foreign Cases

In 1863, apparently unaware of the act that it had just passed—and perhaps more focused on pressing domestic matters—Congress enacted another statute governing discovery requests from foreign courts. The act passed in 1863 significantly curtailed the availability of discovery assistance for foreign cases. Perhaps as a thinly veiled message to countries offering support for the Confederacy, the 1863 act allowed federal courts to execute letters rogatory only if the United States and the foreign country for which discovery was sought were "at peace." The 1863 act also provided that the foreign government must be a party to or have an "interest" in the case for which discovery was requested. Assistance in obtaining discovery was also limited to actions for the "recovery of money or property." Over the next 75 years, federal courts generally denied requests for discovery for use abroad, citing the statute's limits. Again, no reported federal case exists in which discovery was permitted.[6]

1948–1958: The Birth of 28 U.S.C ∫ 1782

In 1948, while reviewing the federal judicial code, Congress stumbled upon the act that had been passed—and misplaced—in 1855. Perhaps inspired by the spirit of globalization and international cooperation that prevailed after World War II—construction of the United Nations building in Manhattan was scheduled to start the following

year—Congress re-adopted the more generalized approach of the 1855 act and rejected the constraints placed on judicial assistance by the 1863 act.

The re-adoption, codified in 28 U.S.C. § 1782, allowed for the deposition of any witness residing in the United States to be used in any civil action in a foreign country's court, provided that the United States was at peace with the foreign country. Thus, Congress extended federal judicial assistance while removing some previous limitations on the foreign country's relationship to the matter.[7]

Then, in 1949, Congress replaced the term "civil action" with the phrase "judicial proceeding" and removed the word "residing" from the statute. The situation in 1949 thus allowed federal courts to compel witness testimony of any witness located, even temporarily, in the United States to be used in pending foreign judicial proceedings so long as the foreign country was "at peace" with the United States.[8]

In the ensuing 15 years, federal courts began to open their doors and provide discovery assistance, but some viewed § 1782 as too narrow to allow for genuine assistance.[9] In 1958, Congress undertook efforts to restructure the statute in a way that would allow it to better meet modern commercial needs; the result was that the statute took its modern form.

1964: The Emergence of Modern ∫ 1782

After six years of study, a congressional commission proposed a complete revision of the nascent 28 U.S.C. § 1782 in order to promote "[w]ide judicial assistance ... on a wholly unilateral basis" and to provide "equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[10] Congress passed the revised statute in 1964.

As amended, § 1782 provided that, upon request by "a foreign or international tribunal or upon the application of any interested person," federal district courts "may order" the production of documents or testimony "for use in a proceeding in a foreign or international tribunal."[11] The revision deleted language limiting assistance to nations that are at peace with ours and substituted the word "tribunal" for the word "court" to ensure that "assistance is not confined to proceedings before conventional courts" but also extends to "administrative and quasi-judicial proceedings all over the world." This change was the result of an important and prescient recognition by Congress that the staging areas for international litigations were in the process of moving beyond the courthouse.

Section 1782 stood until 1996, when it was modified to allow for its use in criminal investigations conducted before a formal accusation was made in court.

"Now": 28 U.S.C. § 1782 and the Great Leap Forward

One of Congress' primary goals in overhauling 28 U.S.C. § 1782 was to encourage foreign countries to adjust their procedures to match ours. Despite this noble intent, Congress' vision of U.S. litigants getting discovery assistance from foreign tribunals is still closer to an ideal than to a reality.[12] But, increasingly, thanks to a progressive and still-evolving body of federal case law, Congress' goal of employing fair and effective procedures for foreign litigants seeking U.S. discovery has come to fruition—a sharp change from previous laws that were no more than useless appendages to the federal code. Foreign litigants and other "interested persons" are now better positioned than ever before to get U.S. discovery assistance from the federal courts, and, for the first time, U.S. practitioners have the opportunity to lend their international clients meaningful assistance in obtaining discovery.

The Favorable Statutory Language of ∫ 1782

Modern-day applicants for U.S. discovery have two primary advantages over their

predecessors: the plain language language in § 1782 and its liberal construction.

Section 1782, as amended, sets a very modest threshold for obtaining U.S. discovery assistance. In order to qualify, a requesting party need only meet three basic statutory requirements:

- The person or entity from whom discovery is sought must either "reside" or be "found in" the judicial district where the request is directed.
- The discovery must be "for use in a proceeding in a foreign or international tribunal."
- The applicant must either be a "foreign or international tribunal" or qualify as an "interested person."[13]

Provided these conditions are met, a district court is authorized—but not required—to order discovery.[14]

Section 1782, as amended, also allows foreign litigants to avail themselves of a more democratic process for seeking judicial assistance. Foreign or international tribunals may still pursue judicial assistance through conventional diplomatic channels.[15] But in a stark departure from historical precedent, under the current section, "any interested person" has the right to make direct application for discovery to the district court where the evidence is believed to reside without resort to letters rogatory, treaty provisions, or other appeals to a foreign tribunal.

The categories of discovery available under the statute are also quite broad, in keeping with the Federal Rules of Civil Procedure, which serve as the default procedural rules.

Liberal Construction of § 1782

The second edge possessed by the modern-day applicant for U.S. discovery is the emergence of a body of federal jurisprudence that is highly conducive to international requests for judicial assistance. The Supreme Court case of *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241 (2004), is the leading case involving § 1782 and the case that is most singularly responsible for the great leap forward in American responsiveness to international requests for judicial assistance.

Intel centered on a dispute between archrivals in the microprocessor business: Advanced Micro Devices (AMD) and Intel Corp. AMD filed a complaint with the European Commission's Directorate-General for Competition (DG-Competition), the European Union's primary enforcer of antitrust regulations, alleging that Intel monopolized the market in Windows®-capable microprocessors. To prove the violation, AMD asked the DG-Competition to seek discovery of some 600,000 pages of documents produced by Intel in the course of a private antitrust action in Alabama. When the DG-Competition refused to request discovery, AMD made an independent application to the U.S. District Court for the Northern District of California—where both Intel and AMD are headquartered—for its assistance in obtaining the discovery AMD was seeking. The district court initially rejected AMD's request, but the Ninth Circuit reversed, and certiorari was granted.

In a 7-1 majority opinion authored by Justice Ruth Bader Ginsburg, the U.S. Supreme Court remanded the case back to the district court and, in so doing, equipped federal courts with a new set of discretionary factors to guide the application of § 1782.[16] But, more important from the standpoint of foreign litigants seeking U.S. discovery, the Court made several pronouncements that considerably widened the availability of international discovery assistance under § 1782:

- The Court refused the invitation of some circuit judges to graft onto § 1782 a "foreign-discoverability requirement"—a requirement that any discovery pursued by a foreign litigant or other interested person be discoverable under the laws of the foreign jurisdiction. "While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases," the Court explained, "they do not permit our insertion of a generally-applicable foreign-discoverability rule into the text of § 1782."
- The Court interpreted § 1782 so broadly that Advanced Micro Devices—the complainant that instigated the European Commission's investigation of Intel—was deemed to be an "interested person" within the meaning of § 1782, although not yet a "litigant" in any foreign proceeding. And the European Commission was deemed a "tribunal," even though AMD's complaint had yet to progress beyond the investigative stage.
- The Court rejected the view that § 1782 applies only to "pending" or "imminent" proceedings in favor of the more charitable view, previously espoused by Justice Ginsburg on the D.C. Circuit, that adjudicative proceedings need only be "within reasonable contemplation."[17]

Other, lesser known developments in case law have only added to the utility of § 1782 for foreign litigants.[18] Federal courts, including the Supreme Court, have flatly rejected, as contrary to congressional intent, a reciprocity requirement that would condition § 1782 discovery on whether the requesting tribunal would honor a reciprocal request from a U.S. court.[19] Nor does a foreign litigant seeking § 1782 discovery need to exhaust all available remedies in the foreign jurisdiction before seeking relief under § 1782.[20] And, in the wake of the *Intel* decision, some district courts have held that judicial assistance under § 1782 extends to nonjudicial arbitral bodies and their participants.[21] Finally, district courts regularly grant ex parte applications for discovery, dispensing with the notice requirements that have traditionally been a bedrock principle of the Federal Rules of Civil Procedure.[22]

Conclusion

For years, the process of seeking discovery in the United States for use in foreign proceedings was like flinging a message in a bottle into the ocean and hoping it would wash up on American shores. Those days are history. Congress and the federal courts have collaborated to create a useful mechanism for obtaining U.S. discovery for use abroad in the form of 28 U.S.C. § 1782. With a

knowledgeable federal practitioner and a reasonable window of time to allow judicial processes to unfold, foreign litigants can expect more help from U.S. courts than ever before. **TFL**

Michael Campion Miller is a partner at Steptoe & Johnson LLP. Alejandro G. Rosenberg and Michael Stoll are associates at the same firm.



Endnotes

[1]*See* Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 Va. J. Int'l L. 597, 600 (1989).

[2]*McKenzie's Case*, 2 Parson's Selected Equity Cases 227, 228 (Pa. Ct. Com. Pl. 1843).

[3]*See* 7 Op. Att'y Gen. 56 (1855); Brief for the United States as Amicus Curiae Supporting Affirmance in *Intel*, 124 S. Ct. 2466 (2004), 2004 WL 214306 at *3.

[4]*See* Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.

[5]Stahr, *supra* note 1 at 601; Harry L. Jones, *International Judicial Assistance, Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953).

[6]Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769. *See* Stahr, *supra* note 1 at 602; Jones, *supra* note 5 at 540–541.

[7]Act of June 25, 1948, Pub. L. No. 80-773, ch. 646 § 1782, 62 Stat. 949.

[8]Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103.

[9]*See, e.g.*, Jones, *supra* note 5 at 516.

[10]See Stahr, *supra* note 1 at 604 (citing Commission on International Rules of Judicial Procedure, *Fourth Annual Report to the President for Transmission to Congress*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 19 (1963)).

[11]*See* Act of Oct. 3, 1964, § 9(a), 78 Stat. 997; Senate Report No. 1580, 88th Cong., 2d Sess. 7–8 (1964).

[12]*See, e.g.*, Marat A. Massen, Note, *Discovery for Foreign Proceedings After* Intel v. Advanced Micro Devices: *Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. Cal. L. Rev. 875, 885 (2010) ("The perceived intrusiveness of American discovery has led civil law nations to enact blocking statutes or other legal obstacles to American encroachment on their legal systems.").

[13]28 U.S.C. § 1782.

[14]*Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 247 (2004); *see also Esses v. Hanania*, 101 F.3d 873, 876 (2d Cir. 1996).

[15]There is, as practitioners know, another method for obtaining discovery to assist foreign litigation: the Hague Convention on the Taking of Evidence in Civil or Commercial Matters, 23 U.S.T. 2555,T.I.A.S. No. 7444, 847 U.N.T.S. 231. Under the Hague Evidence Convention, the U.S. Department of State and the U.S. Department of Justice receive and transmit letters of request to the courts. Moore's Federal Practice § 28.12. But the process is notoriously inefficient and "may take six months to a year, if not longer." Moore's Federal Practice § 28.12; *see* Anand S. Patel, *International Judicial Assistance: An Analysis of* Intel v. AMD *and its Affect on § 1782 Discovery Assistance*, 18 Fla. J. Int'l L. 301, 303 (2006) ("Section 1782 generally provides a far less cumbersome procedure for obtaining discovery assistance than other available foreign tools."). It is also only available to litigants in signatory countries.

[16]The *Intel* Court articulated four discretionary factors to guide district courts in their analyses of § 1782 requests: (1) whether the persons from whom discovery is sought are participants in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign entity to judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the requested information is unduly burdensome or intrusive. *See Intel*, 542 U.S. at 264.

[17]*Id.* at 253, 256–263.

[18]Section 1782 discovery may be confined to documents and testimony in the United States. *Compare In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007) (legislative history supports conclusion that § 1782 was intended to aid in "obtaining oral and documentary evidence in the United States"), with *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *8 (S.D.N.Y. Dec. 29, 2006) (ordering a U.S. company to turn over documents under its control but physically located in Germany).

[19]*See John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985) ("[T]he unilateral character [of § 1782] does not require reciprocity as a predicate to the grant of a discovery order."); *Societé Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 529–530 (1987).

[20]*See, e.g.*, *Euromepa S.A. v. R. Esmerian Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995); *In re Malev*, 964 F.2d 97, 100 (2d Cir. 1992).

[21]*See In re Oxus Gold PLC*, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

[22]*See, e.g.*, *In re Imanagement Svcs. Ltd.*, 2005 WL 1959702, at *1 (E.D.N.Y. Aug. 16, 2005).