# Kluwer Arbitration Blog

## The Renewed Debate on the Limits of Discovery Under Section 1782

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United States Code Title 28 Section 1782(a) is well-known to practitioners who have participated in international arbitral proceedings involving U.S. parties. The provision governs the judicial assistance U.S. federal courts can provide in foreign discovery. It states, in relevant part, that federal trial courts "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 court may issue the order "pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal, or upon the application of any interested person…."

In a recent decision, the U.S. District Court for the Northern District of Illinois ruled that a "private" international arbitration tribunal was not entitled to judicial assistance under Section 1782 because it is not a "foreign or international tribunal." An appeal from that decision is pending before the U.S. Court of Appeals for the 7th Circuit. As Lucy Reed noted in a previous post, U.S. court rulings are inconsistent on the eligibility of international tribunals for discovery assistance under the statute. An affirmation of the District Court's decision may lend support to the view that only certain tribunals are eligible for such assistance, and affect the choice of forum by parties to international arbitration.

Specifically, in In re Arbitration in London, England between Norfolk Southern Corp. et al. and Ace Bermuda Ltd., ("Norfolk") one of the parties to an ICC arbitration filed a motion under Section 1782 with the U.S. District Court for the Northern District of Illinois, asking the court to order the deposition of the other party's former counsel. The court reviewed the motion against the backdrop of the most recent, and leading, U.S. Supreme Court case on Section 1782(a), Intel v. Advanced Micro Devices, 542 U.S. 241 (2004) ("Intel").

Notably, the Supreme Court in Intel did not address directly the question of whether private arbitral tribunals fall within Section 1782. As the Norfolk court recognized, however, in the wake of Intel, most federal courts in the United States have adopted a liberal interpretation of "foreign or international tribunal," and have considered private arbitral tribunals as such. Still, the Norfolk court sought to curb the scope of 1782 by reading certain limitations into the statute, and by drawing a distinction between the "foreign tribunal" in Intel (European Commission Directorate General-Competition) and the tribunal in the case before it (International Chamber of Commerce arbitral tribunal).

According to the Norfolk court, Section 1782 covers only "state-sponsored" arbitration. To illustrate the meaning of that term, the court noted that "a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL … and purely private arbitrations established by private contract." The distinction, according to the court, is that UNCITRAL is "a body operating under the United Nations and established by its member states." This is sufficient to render UNCITRAL arbitration "state-sponsored," and therefore within the purview of the statute. Furthermore, Norfolk found that the Supreme Court in Intel had "emphasized" the availability of judicial review as a factor in determining whether the administrative agency before it was a "foreign or international tribunal." Since judicial review of private arbitral awards is very limited, the court reasoned that private arbitral tribunals are not contemplated by Section 1782.

Whatever its merits, if upheld, this ruling could affect the choice of forum by arbitration parties planning to obtain evidence or witness testimony from the United States. To ensure the availability of Section 1782 discovery, such parties might seek actively to arbitrate under the auspices of "state-sponsored" organizations— although further clarification likely will be necessary as to the meaning of "state-sponsored" in light of the Norfolk court's example regarding UNCITRAL. As its mandate suggests, UNCITRAL is a UN administrative body, not a government-founded forum for the resolution of disputes in the mold of, say, ICSID or the Permanent Court of Arbitration. This leaves open to question, among others, whether the court in Norfolk meant that the mere use of arbitral rules established by any state-founded or -affiliated institution, legislative/administrative body, or arbitral forum, extends the "state sponsorship" mantle over the entire arbitration for purposes of Section 1782.

The Norfolk ruling also touches upon a public policy debate regarding the grounds for, and the desirability of, Section 1782 discovery in private international arbitral proceedings. This debate likely will influence the decision of the 7th Circuit, before which the issue is now pending. For its part, the court in Norfolk appears focused on the notion, which finds some support in the origins of Section 1782, that discovery under the statute is meant as a discretionary act of comity by the United States judiciary towards other jurisdictions. Such jurisdictions can be national or supra-national (e.g. European Union, United Nations), but they must be based on the exercise or relegation of sovereign authority. Jurisdiction by purely private fiat (e.g. private contract) is not entitled to the statutory benefits of Section 1782.

In further support of rendering Section 1782 unavailable to parties in private arbitration, other U.S. courts have raised the potentially adverse impact of U.S.-style discovery on the arbitration parties' choice of procedural rules, including limited discovery. If Section 1782 were to be used indiscriminately in private arbitration, it could serve as an end run around mutually agreed discovery limitations. Moreover, by violating party autonomy, broad discovery under Section 1782 can be disruptive and burdensome, thereby undermining the very assistance it is meant to provide.

Finally, the liberal use of Section 1782 could end up inundating U.S. courts with discovery requests. International arbitration is still expanding at a high rate, with the strong support of several legal systems, including in the United States. A commensurately increasing number of requests for production of evidence under Section 1782 eventually may cause U.S courts to shoulder a significant logistical burden—a result that pro-arbitration policies generally aim to avoid.

The above arguments illustrate one side of the issue—and do not necessarily carry the day. Despite its emphasis on "state-sponsored" proceedings, Norfolk did not elaborate sufficiently on which proceedings may qualify as "state-sponsored" (perhaps deferring to the judgment of the Court of

Appeals). Nor did the court address the argument that private international arbitration is also in a sense "state-sponsored" through the numerous national laws that support it, and the enforcement of arbitral awards by national courts.

Moreover, arguments concerning the potential for abuse of Section 1782 seem to underestimate the abilities of U.S. judges, who possess wide latitude to limit requests under the statute; and the astuteness of arbitrators, who can decipher which evidence to admit and/or to consider. As for the criticism that a widely construed Section 1782 would "open the floodgates" of discovery requests, it requires further empirical substantiation, and ignores the fact that U.S. courts receive such requests routinely from parties before them. Increased access to discovery in arbitration might simply encourage parties keen on broad discovery to pursue arbitration and to rely on the courts merely for discovery requests—thereby decreasing, rather than increasing, the courts' overall costs. At any rate, the debate over logistical costs may be more relevant in the context of future congressional debates on the statute (which Norfolk may instigate), and not of court judgments that must interpret the statute as currently worded.

Finally, perhaps the strongest argument in favor of using Section 1782 in all arbitrations is that it allows parties to avail themselves of the U.S. federal court system—one of the most open and transparent in the world—to gather the best evidence possible for their case. So long as the parties behave responsibly, U.S. courts exercise their discretion prudently, and arbitral tribunals supervise the process, Section 1782 can be a tool for the fair, effective, and swift resolution of arbitral disputes.

In conclusion, five years after the Supreme Court's decision in Intel, certain important issues remain unsettled with respect to Section 1782. In attempting to resolve one of these issues, the court in Norfolk issued a decision with significant implications for parties to arbitration. Pending the 7th Circuit's opinion, the question remains: should Section 1782 be available to private international tribunals, and if not, what connection should such tribunals have with "state-sponsored" proceedings to avail themselves of the statute?

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