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U.S. Court Rules Ex Parte Section 1782 Discovery Petitions Remain Subject to Due Process Safeguards

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28 U.S.C. § 1782(a) allows U.S. federal district courts to order discovery against any person or entity "found" in the U.S. "for use" in a proceeding in a "foreign or international tribunal" upon application by "any interested person." In 2004, the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* held that the district courts should consider four factors (often called the "***Intel* factors**") to guide their analysis, including (1) whether the respondent is a participant in the foreign proceeding; (2) the "character" of the foreign proceedings and the receptivity of the foreign court to U.S. federal court assistance; (3) whether the Section 1782 request attempts to circumvent foreign proof-gathering restrictions; and (4) whether the request is "unduly intrusive or burdensome."

In practice, many district courts grant these discovery orders on an *ex parte* basis, forcing respondents to petition the district court to reconsider their decision or request to invalidate (*i.e.*, "quash") the discovery order. In *Banca Pueyo SA et al. v. Lone Star Fund et al.*, the question arose whether challenges to discovery orders issued on an *ex parte* basis are considered under the Section 1782 statutory requirements and the *Intel* factors or solely under Rule 45 of the Federal Rules of Civil Procedure ("**FRCP**") as subpoenas issued against third-parties. On December 13, 2022, the U.S. Court of Appeals for the Fifth Circuit ruled that respondents have a right to challenge these *ex parte* discovery orders under Section 1782's statutory factors and the *Intel* factors, rather than solely under the analysis of Rule 45. This article provides a brief background on Section 1782, explains the Fifth Circuit's decision, and explains the differences in resisting a Section 1782 order via FRCP Rule 45 or through Section 1782's statutory criteria and the *Intel* factors.

Section 1782, and the Distinct Analyses Under Section 1782 and Rule 45

Originally enacted in 1964, and historically a minor procedural statute, Section 1782 gained significant attention following *Intel v. AMD* and become known as a key tool in international litigation because of the access it can provide to supporting documentation. Empirically, requests for discovery under Section 1782 have exploded since *Intel*, with a Lexis Advance search of "28 U.S.C. 1782" across the federal courts yielding 1745 cases between 2004 and 2022 compared with 206 cases between 1964 and 2004. A diversity of petitions has led to a diversity of interpretations,

with district and appellate courts differing in opinion about the contours of the "for use" requirement under the statute, the types of proceedings to which the statute applies, and the extraterritorial reach of Section 1782 discovery orders. Arbitration practitioners will likely also be familiar with the Supreme Court's recent ruling that privately-constituted international commercial arbitration tribunals are not "foreign or international tribunals" for purposes of the statute (ending a lengthy Circuit split), as well as recent cases discussing the availability of Section 1782 discovery in aid of investor-State arbitration under the ICSID Convention.

Litigants have also successfully sought Section 1782 discovery on an *ex parte* basis against respondents. *Ex parte* applications give respondents no notice or opportunity to be heard. This ordinarily leaves respondents with two options to resist the resulting orders: (1) a motion to vacate (or reconsider) the underlying Section 1782 order, or (2) a motion to quash the discovery orders under Rule 45 of the U.S. Federal Rules of Civil Procedure. These options are not exclusive and the Section 1782 petition must satisfy both 28 U.S.C. 1782(a) and FRCP Rule 45.

In practice, the two approaches are quite distinct, considering different requirements and with different parties bearing the burden of proof. A motion to vacate or reconsider argues that the underlying Section 1782 application failed to meet the statutory requirements (*i.e.*, the "interested person", "found", "for use" and "foreign or international tribunal" requirements described above) or that the discretionary *Intel* factors do not support the discovery sought. The burden of proof for showing the sufficiency of the Section 1782 petition is on the original petitioner seeking discovery. A motion to quash under Rule 45, however, considers whether the subpoena (1) fails to allow a reasonable time for compliance, (2) requires a respondent to travel more than 100 miles from their residence, (3) requires disclosure of privileged information, or (4) imposes an "undue burden" on the respondent, balancing the relevance of the discovery sought, the requesting party's needs, and the potential hardship to the respondent. The respondent bears the burden of persuading the court that the subpoena runs afoul of these requirements.

These analytical differences can lead to disproportionate prejudice in applications granted on an *ex parte* basis. By limiting *ex parte* respondents to a Rule 45 motion to quash rather than a motion to vacate or reconsider, the underlying Section 1782 petition evades adversarial testing against the statutory requirements and discretionary *Intel* factors, and the burden of proof is switched to the respondents, rather than the Section 1782 petitioners. In effect, the Section 1782 petition is presumptively valid, and respondents must persuade the Court that it is unduly burdensome, rather than simply showing that the petitioner failed to meet the statutory requirements or discretionary factors in the first instance.

Side-Stepping Due Process in *Banca Pueyo v. Lonestar*

This inadvertent evasion is precisely what occurred in *Banca Pueyo v. Lonestar*, where the lower court refused to consider the litigant's challenge to the underlying Section 1782 application in its motion for reconsideration, erroneously ruling that the proper mechanism for contesting the Section 1782 petition was solely through a motion to quash under Rule 45. While the lower court allowed the respondent to file a renewed motion to quash under Rule 45, the court summarily dismissed any challenge to the Section 1782 order's compliance with the statutory requirements or *Intel* factors, ruling that the court had previously considered those issues when granting the order on an *ex parte* basis.

On appeal, the Fifth Circuit ruled that the lower court's analysis was in error. The Court found that due process principles protected the rights of respondents resisting *ex parte* discovery orders. As a result, those respondents were not limited to filing a motion to quash under Rule 45, but could also challenge the sufficiency of Section 1782 petitions under the statutory criteria and/or the discretionary *Intel* factors. The Fifth Circuit held that Section 1782 petitions are not "immune from adversarial testing" and an *ex parte* approval of discovery may be tested directly, rather than through a motion to quash the approved discovery order. The Court reasoned that the lower court's error risked curtailing respondents' legal rights and ran afoul of *Intel v. AMD*, where the Supreme Court urged district courts to "ensure an airing adequate to determine what, if any, assistance is appropriate." The Court finally explained that *ex parte* petitions were "not unusual" and that limiting adversarial testing would only encourage "gamesmanship and even more *ex parte* applications."

The Fifth Circuit's ruling is consistent with the other U.S. Circuit Courts of Appeal, with no other Circuit Court having accepted that Section 1782 discovery orders are limited to analysis under FRCP Rule 45. The decision comes as welcome reminder that, even though *ex parte* § 1782 discovery orders may be (and frequently are) issued, they are still subject to the same due process safeguards as other decisions and are not immune from challenge on the sufficiency of the underlying petition or the ultimate subpoenas.

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