

Reinsurance

Section 1782: Big News For International Reinsurance Arbitrations

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Commentary

Section 1782: Big News For International Reinsurance Arbitrations

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There is big news in the world of private international arbitration, and this news should be of particular interest to those engaged in reinsurance disputes. It should now be considerably easier for parties embroiled in a foreign dispute to obtain disclosure from non-parties in the United States. This could be especially helpful to reinsurance arbitrations with a London or Bermuda seat that are in need of evidence from witnesses who are not subject to the arbitration clause. Disclosure applications in such disputes can be made to U.S. federal courts under 28 U.S.C. § 1782 ("Section 1782"), and recent developments in U.S. law hold great promise for their success. Although relief under Section 1782 in private international arbitrations is not a certainty, Section 1782 has come to light as a less-cumbersome and more helpful alternative to current procedures for accessing third-party disclosure.

Section 1782 has several noteworthy features in addition to not needing to apply to the courts in the foreign jurisdiction for letters rogatory or the like. An applicant need not obtain the approval of an arbitration tribunal before making its Section 1782 request directly to the U.S. federal court. Also, relief under this statute can be requested by an "interested party"

before an arbitration has been initiated, as long as an arbitration is reasonably contemplated. The application can be made on an *ex parte* basis, meaning that the adversary and the party from whom the discovery is sought do not need to be notified in advance of the filing.

Moreover, although a controversial point, relief under Section 1782 is technically broader than what is available in U.S. arbitrations subject to the U.S. Federal Arbitration Act ("FAA").¹ The latter grants authority to arbitrators to compel evidence from U.S. third parties, but the parties to the arbitration — and certainly not parties merely contemplating litigation — have no ability on their own to subpoena testimony and documents. Additionally, an applicant for Section 1782 relief may conceivably obtain disclosure broader than what it would have been entitled to in the foreign jurisdiction under foreign rules, as U.S. federal standards of relevance, i.e., what appears reasonably calculated to lead to the discovery of admissible evidence, can be significantly more liberal than the rules of disclosure in certain foreign jurisdictions.

Section 1782 is not new but only recently has attracted attention in commercial arbitration circles. Since 1964 the statute has provided assistance to foreign tribunals, litigants, and parties anticipating arbitrations in gathering evidence from persons residing or located in the United States.² At that time, the U.S. Congress amended Section 1782 to assist "foreign or international tribunals" and not just "judicial proceedings in any court" as the statute was enacted in 1958. This change caused much controversy as to whether *private* arbitration tribunals and *private* par-

ties could take advantage of this statute. Two federal appellate courts that issued decisions in 1999 rejected this proposition, holding that Section 1782 assistance extended only to *governmental* entities acting as state instrumentalities or with the authority of the state and thus was not available to those involved in private foreign arbitrations deciding commercial disputes.

In 2004, however, the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), took an expansive view of “foreign or international tribunal,” albeit only in *dicta*. This was enough to encourage four federal district courts — as well as several commentators and the New York City Bar — to endorse an interpretation of Section 1782 that would allow a party to a private international arbitration to obtain disclosure from U.S. third parties under U.S. discovery rules. While no definitive pronouncement has yet come from a U.S. circuit court, these recent developments regarding Section 1782 suggest that tribunals, litigants, and parties contemplating arbitration may have increased access to disclosure in private international disputes. Correspondingly, U.S. non-parties may have increased exposure to disclosure demands from such foreign disputes.

These developments are particularly meaningful for parties to international arbitrations in the reinsurance and insurance industry when a U.S. party plays an important role in the transaction but is not a party to the contract and thus is outside the reach of the disclosure process. This is frequently the case when companies or business associations form captive insurers, negotiate reinsurance for their captives, and handle their claims, yet do not sign the reinsurance agreement and thus are not within the authority of an arbitration tribunal acting in a contract dispute. Section 1782 may be employed to obtain evidence from the captive’s parent. It may also be used in contingent cost insurance arrangements where non-party, related entities originate and service the business underlying the insurance and are likely to have information critical to the dispute. Section 1782 may be a useful mechanism in these situations. It may also be used to compel disclosure in traditional insurance and reinsurance situations where non-party intermediaries, agents, and pool managers play an important role in the placement and management of the business at the heart of the dispute. Section 1782 may well be a blessing for the disclosure applicant in these situations

— and, correspondingly, a curse for the recipient of the disclosure demand.

NBC And Biedermann

This anticipated use of Section 1782 in private arbitrations was a long time coming. For the last decade, Section 1782 relief was off-limits to private litigants and tribunals in foreign arbitration proceedings, at least according to the Second and Fifth Circuit Courts of Appeals. The decisions of these courts in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) (“NBC”), and *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999) (“Biedermann”), were clear that Section 1782 did not extend to international arbitrations with no public or governmental affiliation.

In *NBC*, the U.S. Court of Appeals for the Second Circuit upheld the district court’s ruling that a private commercial arbitration in Mexico administered by the International Chamber of Commerce did not qualify as a “proceeding in a foreign or international tribunal” under Section 1782(a), thereby precluding NBC from compelling third-party financial institutions to produce documents. The appellate court reasoned that the language of the statute, i.e., “foreign or international tribunal,” was sufficiently ambiguous so as not to include or exclude the arbitral panel at issue.³ Turning to the legislative history and purpose of Section 1782 to resolve the perceived ambiguity, the Court concluded that the drafters of the revised statute intended “tribunals” to include only “governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state.”⁴ Additionally, the Court reasoned that the drafters’ silence with respect to private dispute resolution proceedings such as arbitration meant that Congress did not intend an extension of the statute to private arbitrations.⁵

The *NBC* Court did not find it appropriate to authorize discovery in foreign arbitration proceedings that would be broader than what U.S. arbitration panels would be allowed under the Federal Arbitration Act (“FAA”).⁶ The FAA allows *arbitrators only* to subpoena witnesses and direct those witnesses to bring documentary evidence with them to an arbitral hearing within a 100-mile radius of where the witness can be found. Also, the federal courts are split on interpreting the FAA to allow documents and testimony to

be compelled from third parties before the arbitration hearing takes place.⁷ There is no similar restriction under Section 1782.

The Court of Appeals for the Fifth Circuit in *Biedermann* adopted the *NBC* reasoning. The *Biedermann* court, too, made much of the fact that federal courts under Section 7 of the FAA enforce arbitrators' subpoenas only and only within the district in which the arbitrators, or a majority of them, are sitting.⁸ The Court referred to the *NBC* Court's point that third-party pre-hearing discovery may not be available in certain federal courts.⁹ The *Biedermann* court did not think it likely that Congress intended that federal courts would give broader discovery rights to foreign arbitrations than to those at home.¹⁰ There was simply no evidence, according to the Court, that Congress revised Section 1782 in 1964 to accommodate private international arbitrations. Rather, the statute was expanded to help foreign government-sanctioned tribunal and to further "comity among nations."¹¹

Neither the *NBC* nor *Biedermann* Courts thought much of the opinion of Professor Hans Smit, considered by some to be the "dominant drafter" of the revision to Section 1782 in 1964.¹² Professor Smit asserted repeatedly that the "substitution of the word 'tribunal' for 'court' was deliberate, claiming that the drafters wanted to make the assistance provided for available to all bodies with adjudicatory functions. Clearly, private arbitral tribunals come with the term the drafters used."¹³ Other commentators agreed with Smit,¹⁴ but the *NBC* and *Biedermann* Courts dismissed Smit's view as not relying on "any special knowledge concerning legislative intent"¹⁵ and as unsupported by any contemporaneous notes that private commercial arbitrations were contemplated at the time Section 1782 was revised.¹⁶ Moreover, the *NBC* Court saw potential problems with determining what was an *international or foreign tribunal*. Smit had said that the statute would apply if any of the parties or arbitrators were not citizens or residents of the U.S., or if the arbitration was held outside of the U.S. or under foreign laws.¹⁷ The *NBC* Court thought that this interpretation would lead parties to game the system by appointing a non-U.S. arbitrator to render a purely domestic dispute an international or foreign arbitration.¹⁸ There would be more disputes, according to the Court, as the parties debated

the correct characterization of the tribunal and the availability of Section 1782 and thus provide another reason why the statute's scope should not include private arbitrations.

Intel

Five years later, however, came the decision of the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The Supreme Court's decision in *Intel* made several pronouncements on Section 1782 that cast doubt on the narrow views held by the Second and Fifth Circuit Courts.¹⁹ The Court first decided that an applicant for Section 1782 relief need not be a party to a pending or imminent proceeding. Rather, the Court found that "interested persons" entitled to invoke the statute could be those parties who reasonably contemplated that the requested evidence would be used in an adjudicative proceeding.²⁰

Additionally, the Court rejected the idea that the discovery permitted by the federal court under Section 1782 should not be broader than what would be permitted in the foreign jurisdiction. The U.S. Congress which enacted the statute did not impose such a restriction, according to the Court, and there is no reason to believe that a country that did not have the discovery mechanisms available in the United States would be offended at their use. Moreover, reasoned the Court, the foreign arbitration tribunal could always place restrictions on the admission of evidence gathered under U.S. rules to maintain whatever parity it thought was appropriate with local procedures.²¹

Most noteworthy about the *Intel* decision, however, was the ruling about the types of foreign tribunals covered by the statute. Because *Intel* concerned the issue about whether Section 1782 could be used in connection with a complaint before the European Commission, the executive and administrative organ of the European Communities,²² the issue of whether *private* international arbitrations were covered under the statute was not squarely before the Court. However, in determining whether the European Commission qualified as a tribunal under the statute, the Court found that Section 1782 relief had been extended to "quasi judicial" agencies, as recorded by the U.S. Senate in its legislative report and by Professor Smit.²³ Because the European Commission not only

conducted investigations but acted as a “first-instance decisionmaker,” the Court reasoned it exercised quasi-judicial powers and was included within Section 1782’s ambit.²⁴

The Court’s broad reading of “tribunal,” its refusal to place categorical limitations on the statute’s applicability, and its rejection of making comparisons between foreign and domestic disclosure law, called into question the decisions in *NBC* and *Biedermann*. Four federal courts did just that in the wake of *Intel* and have laid the groundwork for arguments that Section 1782 should be available in private arbitrations.

Oxus Gold

The first such decision was that of the U.S. District Court for New Jersey in *In re Oxus Gold PLC*, No. 06-82-GEB, 2007 WL 1037387 (D.N.J. Apr. 2, 2007). *Oxus Gold* arose from an international arbitration between private litigants disputing alleged violations of an international bilateral investment treaty. The Court upheld the magistrate’s decision to grant the petitioner’s Section 1782 application based on the broad definition of “tribunal” in *Intel* and the fact that the arbitration was required by an international treaty, rather than by a private contract as in *NBC*. While not rejecting *NBC* or *Biedermann*, the Court stretched their requirement that an arbitration tribunal for Section 1782 purposes had to be a governmental or intergovernmental adjudicatory body. Because the arbitration in *Oxus Gold* was being conducted pursuant to the adjudicatory authority and procedures specified in an agreement between nations, the Court found that the magistrate’s ruling that the arbitration panel was a foreign tribunal for Section 1782 purposes was not “clearly erroneous or contrary to law.”²⁵

Roz Trading

The U.S. District Court for the Northern District of Georgia took an even bolder position by upholding the finding that Section 1782 could be used in private international arbitrations and by criticizing *NBC* and *Biedermann* as inconsistent with the U.S. Supreme Court’s guidance in *Intel*. At issue in *In Re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006), was whether Section 1782 relief would be available to a private international arbitration before a private institution whose proceedings were voluntary. The Court

found that “common usage” and the “widely accepted definition” of “tribunal” as used in the 1964 revision to the statute encompassed private foreign arbitration panels.²⁶ According to the Court, there was no basis in the text of Section 1782 to distinguish between public and private arbitration tribunals. Because the term “tribunal” was not ambiguous, the Court said it was unnecessary and unpersuasive for the Second Circuit Court in *NBC* (and the Fifth Circuit Court in *Biedermann*) to have examined the statute’s legislative history as to the definition of “tribunal” and to impose its own interpretation of that term.²⁷ However, even if the statute’s legislative history were considered, the Court found that the 1964 amendments opened up Section 1782 to administrative and quasi-judicial proceedings. Also, in light of *Intel*, the Court found that the tribunal at hand acted as a “first-instance decisionmaker” that issues decisions “both responsive to the complaint and reviewable in court.” As such, according to the Court, it must be considered a tribunal under Section 1782.²⁸

Hallmark And Babcock

The next year, the U.S. District Court for the District of Minnesota also embraced the *Intel* ruling — noting that the views of Professor Smit had been cited approvingly six times by the *Intel* Court — and concluded that the assistance provided by Section 1782 could extend to private foreign arbitration panels. In *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951 (D. Minn. 2007), the Court rejected the *NBC* and *Biedermann* view that the potential differences in discovery between what would be allowed under the FAA and the foreign arbitration worked against permitting Section 1782 to be available in private foreign arbitrations.²⁹ The Court also relied on the common-usage definition of “tribunal” and agreed with the *Roz Trading* Court’s observation that Congress in enacting the 1964 statutory amendments could easily have put the word “governmental” before “tribunal” to indicate that private arbitrations did not qualify for relief under the statute.³⁰

Similarly, the U.S. District Court for the District of Massachusetts *In re Babcock Borsig AG*, No. 08-mc-10128-DPW, 2008 WL 4748208 (D. Mass. Oct. 30, 2008), rejected the reasoning of the decisions in *NBC* and *Biedermann*. Although the Babcock Court ultimately denied the Section 1782 application on discretionary grounds,³¹ the Court found that the

private arbitral body operated by the International Chamber of Commerce qualified as a “tribunal” under the statute as a “first instance decisionmaker” that conducts proceedings “which lead to a dispositive ruling.”³² The Court specifically rejected the reasoning in *NBC* and *Biedermann* which made a distinction between public and private tribunals, finding that that reasoning had been rejected by the U.S. Supreme Court in *Intel*.³³

A Dissenting View: *El Paso*

One federal court, however, has not jumped on the Section 1782 bandwagon, nor could it realistically be expected to depart from controlling precedent in its circuit. In *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, Misc. Action No. H-08-335, 2008 WL 5070119 (S.D. Tex. Nov. 20, 2008), the U.S. District Court for the Southern District of Texas first granted a Section 1782 application but then reversed its order, claiming an error on its part and citing its lack of authority to consider Section 1782 relief in a private international arbitration.³⁴ On the motion for reconsideration, the court gave its reasons for belatedly disagreeing that *Intel* gave the “green light” to federal courts to grant Section 1782 applications in private arbitrations. Likely the most influential reason for the court’s reversal, however, was the *Biedermann* ruling in the Fifth Circuit. As the court explained, in *Biedermann*, “the Fifth Circuit [spoke] precisely on this issue and resolved that ambiguity against use of Section 1782 for arbitral tribunals. Thus, the course charted for this court is clear.”³⁵

New York City Bar

Taking a different view, however, and supporting the availability of Section 1782 in private foreign arbitrations was the New York City Bar, whose International Commercial Disputes Committee published a Report on the issue in 2008 (“28 U.S.C. § 1782 As A Means of Obtaining Discovery In Aid of International Commercial Arbitration - Applicability And Best Practices” (the “Report”). Albeit lacking judicial clout, the legislative review and analysis in the *Report* may well have some influence as courts face this issue in the future, perhaps even in the world outside of New York.

The *Report* squarely rejected the reasons advanced by the *NBC* and *Biedermann* decisions for denying Sec-

tion 1782 assistance in private arbitrations.³⁶ However, presumably to placate concerns expressed by those courts and commentators³⁷ opposed to an expansive view of Section 1782, the *Report* suggested that federal district courts use the discretionary authority they have under the statute in considering Section 1782 applications and grant those applications only with certain restrictions.

For example, the *Report* recommends certain “best practices” such that Section 1782 discovery be granted only if the application has been approved by the tribunal, ostensibly to keep the parameters of the discovery under the tribunal’s control and direction.³⁸ This would mean that applications made by interested parties before the tribunal had been constituted would likely fail, even though the statute permits such discovery. Also, to avoid litigation on the issue of whether an arbitration was a *foreign* or *international* proceeding within the purview of the statute, the *Report* proposes an objective test based on the seat of the arbitration. This would mean that only arbitrations located outside the United States would be eligible proceedings under Section 1782. These self-imposed restrictions may indeed make it easier for a court in the Second or Fifth Circuits to take issue with the *NBC* and *Biedermann* rationale, but this remains to be seen in the cases to come.

The State Of Play

Notwithstanding the “best practice” recommendations of the New York City Bar, Section 1782 remains on the books with all of its features and awaits invocation by parties engaged in or at least reasonably contemplating private international arbitration. The argument for the statute’s availability will be easier in Georgia, New Jersey, Minnesota, and Massachusetts where the federal courts have indicated their receptivity to Section 1782 relief in private proceedings. However, a convincing argument can certainly be made in the Second and Fifth Circuits for departing from *NBC* and *Biedermann*, assuming appeals are taken from the district courts in those circuits whose hands may be tied at present. It is indeed possible that the U.S. Supreme Court’s ruling in *Intel* and the reasoned opinions of the federal courts addressing the issue since *Intel* will change the state of play in those jurisdictions. It may be just a matter of time.

Endnotes

1. 9 U.S.C. § 1-16 (1999).
2. Section 1782 of Title 28 of the United States Code, entitled "Assistance To Foreign And International Tribunals And To Litigants Before Such Tribunals," provides in pertinent part that:

The district court 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, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.
3. *NBC*, 165 F.3d at 188.
4. *Id.* at 189.
5. *Id.* at 189-190.
6. *Id.* at 191.
7. *Id.* at 188.
8. *Biedermann*, 168 F.3d at 883.
9. *Id.* at 883 & n.8.
10. *Id.* at 883.
11. *Id.*
12. Professor Smit served as Director of the Columbia Law School Project on International Procedure, the entity that drafted the 1964 revisions to Section 1782 and functioned as the reporter for the U.S. Commission and Advisory Committee on International Rules of Judicial Procedure. Professor Smit has been referred to as the "dominant drafter of, and commentator on" the 1964 revision of Section 1782 and its "chief architect." *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 689 (D.D.C. 1989); *In re Application of Euromepa*. 51 F.3d 1095, 1099 (2d Cir. 1995).
13. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l & L. Com. 1, 1-6 (Spring 1998); *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 Am. Rev. Int'l Arb. 295, 314 (2003).
14. E.g., Lawrence W. Newman, "Obtaining Evidence in the United States for Foreign Proceedings," 90 Am. Soc'y Int'l L. Proc. 62, 70 (March 27-30, 1996) ("it is hard to think of an international tribunal other than a court or an arbitration panel"); Walter B. Stahr, "Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings," 30 Va. J. Int'l L. 597, 619-20 (Spring 1990) ("[i]t is clear . . . that the term 'international tribunal' includes an international court, arbitration or other tribunal located in a foreign country."); Peter F. Schlosser, "Coordinated Transnational Interaction in Civil Litigation and Arbitration," 12 Mich. J. Int'l L. 150, 170 n.84 (Fall 1990) (the scope of 'tribunal' should include international arbitrations).
15. *NBC*, 165 F.3d at 190 & n.6.
16. *Biedermann*, 168 F.3d at 882 & n.4.
17. Hans Smit, 25 Syracuse J. Int'l & L. Com. at 1-6, as cited in *NBC*, 165 F.3d at 190, n.9.
18. *NBC*, 165 F.3d at 191, n.8.
19. *Intel* involved an antitrust complaint filed against Intel Corporation with the Directorate-General for Competition of the European Commission (the "Commission"). The complainant asked the Commission to compel Intel to produce documents that it had produced in a private antitrust lawsuit in Alabama. The Commission declined to seek judicial assistance from U.S. courts, so the complainant filed a Section 1782 application seeking production of the documents. The U.S. District Court for the Northern District of California denied the application. The U.S. Court of Appeals for the Ninth Circuit reversed that determination and remanded the case. The Supreme Court accepted the case to

- resolve “the question whether Section 1782(a) contains a foreign-discoverability requirement.” *Intel*, 542 U.S. at 253.
20. *Id.* at 256.
21. *Id.* at 259-263.
22. *Id.* at 258.
23. Justice Ginsburg examined the legislative history of Section 1782 and quoted the 1965 article authored by Professor Smit, which states that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” *Id.* at 258, citing Hans Smit, “*International Litigation Under the United States Code*”, Colum. L. Rev. 1015, 1026-27, n. 71, 73 (1965).
24. 542 U.S. at 258.
25. *Oxus Gold*, slip op. at *5.
26. *Roz Trading*, 469 F. Supp. 2d at 1225.
27. *Id.* at 1228 & n.6.
28. *Id.* at 1225-6.
29. *Hallmark*, 534 F. Supp. 2d 951, 956-957.
30. *Id.* at 954.
31. Although the *Babcock* Court noted that Section 1782 authorized it to order the requested third party discovery without waiting for an arbitration to be pending or imminent and without knowing whether the tribunal would be receptive to it, the Court did not order the discovery at that stage, perhaps questioning whether this application represented a tactical maneuver more than a sincere need for the third-party discovery, as the Court cited the “bad blood” between the parties and the fact that two years had passed after the alleged misconduct had been discovered with no arbitration having been demanded. *Babcock*, slip op. at *8.
32. *Id.* at *4.
33. *Id.* at *5.
34. *El Paso*, slip op. at *1-2.
35. *Id.* at *5.
36. *Report* at 25-27.
37. Certain practitioners and commentators do not agree that extending Section 1782 aid to private international arbitrations is a good idea. *E.g.*, Eric Schwartz & Alan Howard, *International Arbitration Discovery Applications to Rise?*, 237 N.Y.L.J. 4 (2007) (noting that, if applicable to arbitration proceedings, Section 1782 “opens the door to possible judicial interference by U.S. courts with the arbitral process, contrary to the parties’ legitimate expectations when agreeing to arbitration” and hands foreign companies operating outside the jurisdiction of U.S. courts “a weapon against U.S. opponents that could not, in turn, be deployed against them”); Anna Conley, “*A New World of Discovery: The Ramifications of Two Recent Federal Courts’ Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782*,” 17 Am. Rev. Int’l Arb. 45, 46, 72 (2006) (opining that extending Section 1782 relief will “give parties to international arbitration proceedings a vastly different set of rights and obligations than parties to domestic arbitrations or those seeking judicial assistance from foreign courts” and will “undermine many of the policies underlying arbitration”).
- One commentator echoed the policy concern that “a broad reading of Section 1782 would yield the anomalous result that parties to foreign arbitrations could obtain broader discovery than parties to proceedings before ‘domestic arbitration panels’ could under Section 7 of the Federal Arbitration Act (FAA).” John Fellas, “*Using Section 1782 in International Arbitration*,” 23 Arbitration International 379, 399-400 (2007). The author argued that “if [S]ection 1782 were to apply to international arbitration, different standards for the taking of evidence would apply to international and domestic arbitrations without there being any principled reason for the difference.” *Id.* at 400-01. Another commentator opposed allowing parties to apply for Section 1782 relief without the tribunal’s approval, noting: “extending assistance to the parties when

the arbitrators have not requested the information risks undermining the arbitration by unnecessarily increasing expenses, delaying the process, and inviting abuse." Daniel A. Losk, "Section 1782(A) After Intel: Reconciling Policy Considerations And

A Proposed Framework To Extend Judicial Assistance To International Arbitral Tribunals," 27 Cardozo L. Rev. 1035, 1062-1068 (November 2005).

38. Report at 29-36. ■

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