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Foreign Discovery Ruling May Provide New Defense Tool

By **Alexander Lawrence and David Hambrick** (August 7, 2020, 1:21 PM EDT)

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For more than a half a century, Title 28 of the U.S. Code, Section 1782 has provided a powerful tool to obtain U.S.-style discovery for use in non-U.S. proceedings.

In recent years, some courts have interpreted Section 1782 broadly, and discovery applications under the statute have become increasingly common — a boon for litigants seeking evidence to use in disputes abroad and a bane for the targets of discovery.

Those attempting to resist subpoenas issued pursuant to Section 1782 have had few reliable defensive options. Under the leading U.S. Supreme Court case, Intel Corp. v. Advanced Micro Devices Inc.,[1] they typically have found themselves at the mercy of a multifactor test that affords courts considerable discretion.

But a new decision from the U.S. District Court for the Southern District of Florida may change this in some cases. In the case, In re: Motransa,[2] a discovery target facing a Section 1782 application employed a novel strategy that disrupted the usual analysis and circumvented Intel. In this first-in-the-nation decision, the discovery target succeeded in kicking the Section 1782 proceeding to arbitration.

Section 1782 Discovery

Section 1782 empowers federal district courts to grant applicants the authority to issue subpoenas in the U.S. to obtain documents and/or testimony in aid of non-U.S. proceedings. Specifically, an applicant pursuing Section 1782 discovery must establish that:

- The discovery is "for use in a proceeding in a foreign or international tribunal."
- The applicant is an "interested person" in that proceeding.
- The person from whom the discovery is sought resides or is otherwise found in the district of the court where the application is filed.[3]

If the applicant satisfies all these statutory requirements, a district court has the discretion to grant or deny the application after considering the following factors established by the Supreme Court in Intel:

- Whether the discovery sought is within the non-U.S. tribunal's jurisdictional reach and, thus, accessible without resort to Section 1782;
- The nature of the non-U.S. tribunal, the character of the proceedings abroad, and the receptivity of the non-U.S. government or the court or agency abroad to U.S. federal court judicial assistance;
- Whether the applicant's request conceals an attempt to circumvent non-U.S. proof-gathering restrictions or other policies of a non-U.S. country or the U.S.; and
- Whether the request is unduly intrusive or burdensome.[4]

Recent Cases

Several recent cases have interpreted Section 1782 expansively.

For example, the U.S. Court of Appeals for the Second Circuit has held that the requirement in Section 1782(a) that the discovery target "resides or is found" within a district is met when the district court has personal jurisdiction over the person or entity consistent with due process.[5]

In other words, as long as there is some basis for personal jurisdiction over the person or entity — general or specific personal jurisdiction — the statutory requirement is met. Some district courts have adopted an even more relaxed standard and held that mere presence of an office in the district is sufficient.[6]

Regarding the extraterritorial reach of Section 1782, both the Second Circuit and the U.S. Court of Appeals for the Eleventh Circuit have held that there is no per se bar to the extraterritorial application of Section 1782, and district courts may exercise their discretion as to whether to allow such discovery.[7]

Regarding the use of Section 1782 in aid of private commercial arbitrations seated outside the U.S., the U.S. Court of Appeals for the Sixth and Fourth Circuits have recently permitted such applications,[8] creating a circuit split by rejecting the longstanding view of the Second and Fifth Circuits.[9] The U.S. Courts of Appeals for the Third, Seventh and Ninth Circuits also have pending cases in which this issue is squarely before them.[10]

In re: Motransa

For several decades, Motransa SA, an Ecuadorean-licensed truck distributor, had been the exclusive distributor of International brand trucks in Ecuador for Navistar Inc., a Delaware corporation transacting business from its office in Miami, Florida. This arrangement was formalized in an exclusive distributor agreement containing the following arbitration provision:

Except as is otherwise expressly provided herein, all disputes, controversies or differences arising between the parties out of or in relation to or in connection with this agreement, or any breach or default hereunder (including, but not limited to, a dispute concerning the existence or continued

existence of this agreement, and the validity of the arbitral provision) which cannot be settled amicably shall be subject to arbitration.[11]

When Navistar appointed Austral Cia. Ltda. as an additional distributor of International brand trucks in Ecuador, Motransa contemplated bringing a civil action against Austral in Ecuadorian court for tortious interference with Motransa's relationship with Navistar.

In support of this contemplated action, Motransa sought the assistance of the U.S. District Court for the Southern District of Florida under Section 1782.

Specifically, Motransa asked the court to order Navistar to produce "communications and agreements between Navistar and the third-party distributor that would reveal how the distributor was able to secure a relationship with Navistar, in contravention of applicant's exclusive distributor agreement with Navistar."[12]

Motransa attached as an exhibit to its Section 1782 application a copy of the exclusive distributor agreement containing the arbitration provision, but Motransa's application did not reference or identify the arbitration provision.[13]

Navistar moved to compel arbitration pursuant to the arbitration provision and stay the district court proceedings pending arbitration, arguing that "even the threshold question of whether there is a 'dispute' that is arbitrable is a question the parties expressly delegated to the arbitration panel to decide."[14] Motransa argued that a Section 1782 action is not a "dispute" and that Navistar should not avoid its discovery obligations by invoking an arbitration provision that only applies to adversarial suits.[15]

In a report and recommendation, U.S. Magistrate Judge Lauren Louis concluded that:

The parties have a valid and enforceable agreement to arbitrate, contained in the agreement applicant attached to its application to explain its request for relief under 28 U.S.C. [Section] 1782. Motransa may contest that its demand for discovery in aid of a foreign action is arbitrable, but it will have to arbitrate that dispute as it agreed to do.[16]

In support of this conclusion, Judge Louis noted, inter alia, that the Federal Arbitration Act embodies "the strong federal policy in favor of enforcing arbitration agreements" and that the Supreme Court has mandated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[17]

She further emphasized that the arbitration provision at issue contained a "delegation provision" by which the parties agreed to arbitrate gateway questions of arbitrability. Judge Louis explained that, where the parties have agreed to a delegation provision, the district court retains only the jurisdiction to determine if the provision itself is invalid, i.e., if it is subject to defeat based on fraud, duress, unconscionability or another contract defense.[18]

U.S. District Judge Federico Moreno then adopted Judge Louis's report and recommendation and granted Navistar's motion to compel arbitration. According to Judge Moreno,

It is ... of no moment that Motransa seeks the discovery to aid litigation against a third-party because this proceeding seeks discovery from Navistar, which is a party to the agreement ... the parties

delegated the issue of arbitrability to the arbitrator and this court's jurisdiction is limited to determining viability of that clause, which is not being contested.[19]

Practical Implications

Tortious interference with exclusive distribution rights is a familiar fact pattern in many jurisdictions. So, too, is the strategy Motransa contemplated — challenging the third-party infringer in national courts with evidence obtained pursuant to Section 1782 as ammunition. For litigants hoping for U.S.-style discovery in such disputes, Motransa serves as a cautionary tale. Going forward, it gives suppliers a new tool for resisting such applications.

The case also teaches a more general lesson: For any contracting party eager to avoid U.S.-style discovery or those who prefer the efficiency advantages of arbitration, it is now clear that a well-crafted delegation clause in an arbitration provision can provide a powerful tool in responding to Section 1782 discovery applications.

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

[2] In re Application of Motransa S.A., No. 19-25026-CIV, 2020 WL 4251147, at *1 (S.D. Fla. June 24, 2020), report and recommendation adopted sub nom. In re Motransa, S.A., No. 19-25026-CIV, 2020 WL 4251145 (S.D. Fla. July 24, 2020).

[3] 28 U.S.C. § 1782(a).

[4] 542 U.S. 241, 264-65 (2004) (internal quotations and citations omitted).

[5] In re del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019).

[6] See, e.g., Super Vitaminas, S. A., No. 17-MC-80125-SVK, 2017 WL 5571037 (N.D. Cal. Nov. 20, 2017), at *3 & n.1 (N.D. Cal. Nov. 20, 2017) (finding that "Microsoft is ... 'found' in this District for purposes of § 1782 because it maintains two offices in this District"); but see In re da Costa Pinto, No. 17-22784-MC, 2019 WL 3409488, at *6 (S.D. Fla. May 16, 2019) ("[T]o 'reside' or be 'found' in a district for purposes of § 1782, a corporate entity must at the very least be subject to the court's general jurisdiction").

[7] See Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016) (holding that Section 1782 extends to evidence abroad); In re del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019).

[8] Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019) (permitting Section 1782 discovery in aid of a Dubai-seated tribunal constituted under the DIFC-LCIA Arbitration Rules); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020) (permitting Section 1782 discovery from residents of South Carolina for use in a private arbitration seated in the United Kingdom).

[9] Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184, 188, 190-91 (2d Cir. 1999) ("NBC") (holding that the legislative history of Section 1782 reveals that Congress did not intend to allow discovery under Section 1782 for use in private commercial arbitration and that such discovery "would be at odds with the efficiency and cost-effectiveness of arbitration"); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (same); see also In re Guo, No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020), as amended (July 9, 2020) (reaffirming NBC).

[10] In re: Servotronics, Inc., No. 1:18-cv-07187 (N.D. Ill. Apr. 22, 2019), appeal filed sub nom. Servotronics, Inc. v. Rolls-Royce PLC, No. 19-1847 (7th Cir.); HRC-Hainan Holding Co., LLC v. Yihan Hu, No. 19-mc-80277-TSH, 2020 U.S. Dist. LEXIS 32125, at *2 (N.D. Cal. Feb. 25, 2020), appeal filed sub nom. In re: Application of HRC-Hainan Holding Co., LLC, No. 20-15371 (9th Cir. Feb. 28, 2020); In re Storag Etzel GmbH, No. CV 19-MC-209-CFC, 2020 WL 1849714 (D. Del. Apr. 13, 2020), appeal filed sub nom. In re: Application of Storag Etzel GmbH, No. 20-01833 (3d Cir. May 7, 2020); In re EWE Gasspeicher GmbH, No. CV 19-MC-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17, 2020), appeal filed sub nom. In re: Application of EWE Gasspeicher GmbH, No. 20-01830 (3d Cir. May 8, 2020).

[11] 2020 WL 4251147, at *1.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id. at *3.

[17] Id. (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).

[18] Id. at *2.

[19] 2020 WL 4251145, at *2.