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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

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Discovery in Aid of Foreign Proceedings

As commercial disputes take on an increasingly global cast, those involved in foreign proceedings have been resorting with greater frequency to the mechanism provided by 28 U.S.C. §1782 for obtaining discovery in the United States for use in distant tribunals.

Through its 2004 decision in *Intel Corp. v. Advanced Micro Devices Inc.*,¹ the Supreme Court provided substantial guidance as to how requests for discovery under §1782 should be evaluated, and several recent decisions from the U.S. District Court for the Southern District of New York have filled in additional detail.

Statutory Requirements

Section 1782 provides in pertinent part that a district court may order a person who resides or is found in the district 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 §1782 order may be made pursuant to a letter rogatory issued or request made by the foreign tribunal, or upon application of any “interested person.”

Courts have distilled three basic requirements for discovery to be authorized under §1782: (1) that the person from whom discovery is sought resides or is found in the district; (2) that the discovery is for use in a proceeding before a foreign tribunal; and (3) that the application is made by the foreign tribunal or by an interested person.² The Supreme Court has instructed that a court is not required to grant a §1782 discovery application “simply because it has the authority to do so,”³ setting out additional discretionary considerations which should inform the decision about whether and under what circumstances an order should be granted.

First, the court should consider whether the person from whom discovery is sought is a participant in the foreign proceeding, bearing in mind that the need for intervention under §1782 will be less strong where the foreign tribunal could order the requested relief itself and more apparent where resort to §1782 is the only available means for obtaining the evidence sought. Second, the

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district court should consider the nature of the foreign tribunal, the character of the proceedings, and the degree to which the foreign body would be receptive to intervention from the U.S. federal courts. As part of this analysis, district courts should evaluate whether a §1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of either the foreign jurisdiction or the United States. As with other discovery requests, courts will also consider whether a §1782 request is unduly intrusive or burdensome.⁴

Although the relevant factors on a §1782 application are not subject to dispute, litigants have debated, and courts in the Southern District have thus found occasion to interpret, many of these mandatory and discretionary considerations.

‘Found in’ the Jurisdiction

For example, in *In re Godfrey*,⁵ the respondents successfully moved to quash subpoenas for both testimony and documents issued pursuant to §1782. Although the petitioners had claimed in their ex parte application that the respondents were “found” in the district, on subsequent motions to quash, four of the five respondents presented evidence sufficient to cast in “grave doubt” the accuracy of those assertions. Two of the three individuals submitted declarations that they had resided in Russia for many years and had been present in the Southern District of New York infrequently in the past year. The two Russian businesses that were subpoenaed had no operations in New York.

The petitioners argued that these four respondents were nevertheless “found” in New York because they had been served in a manner that would subject them to jurisdiction under New York state law. They relied for this argument on *In re Edelman*,⁶ in which the U.S. Court of

Appeals for the Second Circuit held that one who is personally served with a §1782 subpoena while present in the district is “found” here for purposes of §1782 on the theory that if so-called “tag jurisdiction” satisfies due process, it must also be sufficient for requiring compliance with a discovery mechanism. Southern District Judge Jed S. Rakoff observed that *Edelman* did not stand for the broader proposition that discovery under §1782 was subject to the vagaries of individual states’ rules of service, and was thus inapposite because none of the respondents was personally served in New York. He went on to hold that four of the five respondents were not “found” in New York under any definition of that term because the manner in which they had been served would not have subjected them to personal jurisdiction in any event.⁷

The fifth respondent was personally served while in the district and was thus “found” here for purposes of §1782. Judge Rakoff held, however, that the subpoena for his deposition ran afoul of Fed. R. Civ. P. 45(c)(3)(A)(ii) which protects an individual from having to travel more than 100 miles from his home or business, and quashed the subpoena on that basis.⁸

Location of Documents

In *Godfrey*, Judge Rakoff also held that the §1782 subpoena could not reach documents located abroad—a question on which there is a split of authority within the Southern District. Judge Rakoff adopted the majority view that although §1782 does not expressly limit its reach to documents located in the United States, Congress intended such a limitation in order to establish a “harmonious scheme” under which evidence in a given country is obtained through proceedings in that country.⁹ He noted that a contrary ruling would interfere with international courts by making available evidence that could not be obtained through the jurisdiction in which the documents were located, and might turn the American courts into “clearing houses” for litigants all over the world.

Southern District Judge Barbara S. Jones reached the opposite conclusion in her decision in *In re Gemenschafts-Praxis*,¹⁰ where she held that “Section 1782 requires only that the party from whom discovery is sought be ‘found’ here; not that the documents be found here.” She observed that reading a “document-locale” requirement into the statute would be at odds with the Supreme Court’s instruction that §1782 should only be

read to include requirements that are plainly provided for in the text of the statute.¹¹ She declined to impose an absolute ban on ordering discovery of documents located abroad, holding instead that the location of documents should be at most a discretionary consideration in the context of discerning the burden of producing the requested material.

• *For Use in a Foreign or International Tribunal*

Recently, in *In re Sveaas*,¹² the target of a §1782 subpoena sought to resist providing the requested discovery arguing that it was not “for use” in various pending foreign proceedings because the discovery was not relevant to the petitioner’s claims in those actions. The petitioner had instituted actions in Norway and France seeking to enforce contracts for the purchase of a Brancusi sculpture after it was sold to another purchaser. He sought discovery from two individuals located in the United States under §1782, one of whom agreed to provide limited information and the other of whom opposed the §1782 application. That putative witness argued that he had no relevant knowledge of the earlier contracts, and that the information sought from him concerning subsequent events was irrelevant to the validity of those contracts.

Although Judge John F. Keenan accepted in principle that the §1782 application turned on the relevance of the materials sought, he noted that the proper scope of discovery under §1782 is governed by Fed. R. Civ. P. 26(b) which defines relevance extremely broadly.¹³ He concluded that given this broad permissive standard and the factual dispute as to the relevance of the discovery sought, it would be inappropriate to deny the application.

Discretionary Factors

• *‘In re Microsoft’ and ‘In re Gemeinschafts-Praxis’*

Judge Colleen McMahon’s decision in *In re Microsoft Corp.*¹⁴ and Judge Jones’s decision in *In re Gemeinschafts-Praxis*¹⁵ demonstrate the latitude courts have in applying the discretionary factors set forth in *Intel*.

In *In re Microsoft Corp.*, Microsoft sought to obtain documents for use in antitrust proceedings against it before the European Commission (the commission)—the executive and administrative organ of the European Communities. Microsoft initially made requests for documents directly to the commission on two separate occasions, but the day after it filed its second request, sought and obtained an ex parte order pursuant to §1782 for leave to serve subpoenas on IBM, the law firm of Clearly Gottlieb Steen & Hamilton and one of its partners. Those subpoenas sought documents constituting or summarizing communications between these respondents and the commission relating to Microsoft’s compliance with an earlier order of the commission.

Through a letter to IBM’s counsel, the commission objected to Microsoft’s application and expressed an interest in intervening in the §1782 proceedings as an amicus curiae. The commission conveyed its surprise that Microsoft had turned to a U.S. court for access to documents that it had only the day before requested from

the commission. It also asserted that Microsoft’s “rights of defence” were adequately protected by the commission’s rules and that the §1782 application was “not objectively necessary but rather an attempt to circumvent the established rules” in proceedings before the commission.

In moving to quash the subpoenas, the respondents (with the exception of the individual Cleary partner, who neither lived nor worked in New York) did not dispute that the threshold statutory requirements for a §1782 order were met. Instead, they persuaded Judge McMahon that the discretionary factors militated against the requested discovery. Specifically, they argued successfully that while IBM and Cleary were not participants in the commission’s proceeding, the documents sought by Microsoft were within the commission’s reach—and were, in fact, encompassed by Microsoft’s most recent request for documents to the commission. Judge McMahon noted that the “relevant inquiry is whether the evidence is available to the foreign tribunal. In this case, it is. Thus, §1782 aid is both unnecessary and improper.”¹⁶

Judge McMahon also found that consideration of the “receptivity” of the commission to the U.S. federal-court assistance cut sharply against Microsoft’s §1782 request, noting the commission’s objections to the request. She concluded that Microsoft’s application was a “blatant end-run” around foreign proof-gathering restrictions.¹⁷ She observed that Microsoft’s application for these documents from the commission was sub judice, and that if the commission granted the request, the §1782 application would be moot, and that if it denied the request, the §1782 application would constitute a clear circumvention of the commission’s procedures—a result expressly prohibited by *Intel*.¹⁸

Judge Jones took a more permissive view of the §1782 application in *In re Gemeinschafts-Praxis*, where the petitioner, a partnership operating a German medical laboratory, sought a report by the consulting firm McKinsey Co. based upon which the laboratory’s fees were reduced. Judge Jones rejected the argument that had prevailed in *In re Microsoft Corp.*, that the availability of documents to the foreign tribunal cut against a §1782 order, holding that the proper focus is not on the documents, but on the target of the discovery request. She reasoned that “[w]hen the target of discovery is not a party the foreign tribunal may be less inclined—even if it is empowered—to compel third-party discovery or [as in that case] to compel the production of material subject to a third-party’s confidentiality restrictions.”¹⁹

In considering the receptivity of the foreign tribunal in *Gemeinschafts-Praxis*, Judge Jones stressed, in reliance on the Second Circuit decision in *In re Euromepa S.A.*,²⁰ that a court should not conclude that a foreign tribunal would be unreceptive to a §1782 subpoena absent “authoritative proof” that U.S. court assistance is not welcome. In *Gemeinschafts-Praxis*, the respondent argued that the foreign tribunal had already declined to order production of the McKinsey report. The petitioner countered that the foreign court had requested the document and observed that it would have liked to have the document, but that it was not empowered to compel its production.

Judge Jones declined to resolve the competing interpretations of the foreign court’s position, observing that the foreign court could simply exclude the report from consideration if it so chose. She also concluded that there was no effort to circumvent foreign law, despite the fact that the §1782 application was a “last resort” to acquire discovery that the petitioner could not obtain abroad. Far from being an improper attempt to circumvent foreign restrictions, Judge Jones found that “in some respects, [this] is precisely the type of assistance that the statute was designed to afford.”²¹

Conclusion

As these recent decisions from the Southern District of New York demonstrate, §1782 is a potent discovery tool for foreign litigants—providing not just an opportunity to obtain evidence that may be outside the reach of a foreign jurisdiction, but also access to permissive discovery tools and procedures that may be more expansive and efficient than those afforded by the foreign tribunal for which the discovery is sought.

1. 542 U.S. 241 (2004).

2. See, e.g., *In re Esses*, 101 F.3d 873, 875 (2d Cir. 1996); *In re Sveaas*, 249 F.R.D. 96, 105-106 (S.D.N.Y. 2008) (Keenan, J.); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 192 (S.D.N.Y. 2006) (McMahon, J.).

3. *Intel*, 542 U.S. at 264.

4. *Id.* at 264-5.

5. 526 F.Supp.2d 417 (S.D.N.Y. 2007) (Rakoff, J.).

6. 295 F.3d 171 (2d Cir. 2002).

7. For example, the subpoena for one individual was left at the home of his mother, where he had not lived since high school, and another individual as well as one of the institutional respondents were “served” at the New York offices of an affiliated, but legally separate company where an office manager allegedly represented, without authority, that he was authorized to accept service.

8. 526 F.Supp.2d at 422-23. See also *Edelman*, 295 F.3d at 178; *Microsoft*, 428 F.Supp.2d at 193 n.3.

9. Hans Smit, “American Assistance to Litigation in Foreign and International Tribunals,” 25 *Syracuse J. Int’l L. & Com.* at 11 (1998). See also *In re Sarrjo*, 119 F.3d 143, 147 (2d Cir. 1997); *In re Nieri*, 2000 WL 60214 (S.D.N.Y. Jan. 24, 2000) (Knapp, J.).

10. 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006).

11. *Id.*, at *5 (citing *Intel*, 542 U.S. at 260).

12. 249 F.R.D. 96 (S.D.N.Y. 2008).

13. *Id.* at 106-07 (citing *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

14. 428 F. Supp.2d 188.

15. 2006 WL 3844464.

16. 428 F. Supp.2d at 194.

17. Judge McMahon treated the receptivity of the foreign tribunal and degree to which the §1782 request circumvents proof-gathering restrictions as separate factors for consideration, although *Intel* appears to have treated them as part of the same consideration, and there is clear overlap between the two.

18. Judge McMahon went on to find that the §1782 request was also unduly intrusive and burdensome to the extent it requested documents that were confidential under the Commission’s rules or privileged under U.S. law.

19. 2006 WL 3844464, at *5.

20. 51 F.3d 1095 (2d Cir. 1995).

21. 2006 WL 3844464, at *7.