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INTERNATIONAL LITIGATION DISCOVERY OPPORTUNITIES EMERGE AS SUPREME COURT DECANTS NEW WINE IN OLD BOTTLES; TASTINGS VARY.

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The Supreme Court decision in Intel Corporation v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004)("Intel") has reinvigorated and expanded possibilities for international litigants seeking discovery in the United States. The Intel opinion breathed new life into 28 U.S.C. § 1782(a), an old statute that has been on the books since 1942. When the Intel decision was first announced critics decried the breadth of the holding and its potential for abuse. Eighteen months of experience now suggest that savvy counsel can exploit its possibilities and simultaneously limit its scope. Properly applied, §1782 creates new opportunities for aggressive discovery when the materials sought are located in the United States regardless of the location of the underlying proceeding. Frequent participants in international litigation and arbitration who fail to heed these lessons do so at their peril.

Section 1782(a) provides:

> 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 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.

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I. BREADTH OF THE INTEL DECISION. The Supreme Court decision gave broad definition to (1) "interested person," (2) "proceeding," and (3) "foreign international tribunal," all essential elements of the statutory scheme. Fourth, the Supreme Court declined to impose any requirement that the material sought in discovery would even be discoverable under the law governing the foreign proceeding. Those four issues formed the focus of the Court's analysis of Advanced Micro Devices' ("AMD") discovery request to Intel regarding the European Commission's antitrust investigation into Intel's European microprocessor business. That investigation by the European Commission's Directorate-General Competition ("DG Competition") was instigated by a complaint filed by AMD. The DG Competition is the European Union's primary antitrust law enforcer with jurisdiction over anticompetitive agreements and abuse of market position issues.

1. Who Qualifies As An "Interested Person?" In opposing the discovery, Intel argued that AMD was not an "interested person" within the meaning of § 1782(a) because AMD was not a litigant, foreign sovereign, or designated agent of the sovereign. Intel asserted that "complainants" before the EU Commission were accorded only limited rights, and even pointed to the caption of the statute, entitled "Assistance to foreign and international tribunals and to litigants before such tri-

bunals." Justice Ginsburg, writing for the Court, had little trouble in rejecting the caption argument: "the caption of a statute cannot undo or limit that which the text makes plain." 542 U.S. at 256. Justice Ginsburg also had no hesitation in concluding the term "interested person" encompassed those beyond mere "litigants." The Court quoted with approval the Smit treatise on international litigation and arbitration that the phrase included those who "possess a reasonable interest in obtaining the assistance" of international tribunals.

2. What Constitutes A Foreign Or International Tribunal? Intel next argued that the DG Competition did not constitute a "foreign or international tribunal" within the meaning of § 1782(a). Again, the Supreme Court answered the question broadly. The Court acknowledged the legislative history of Congress' 1958 request that the Rules Commission recommend revisions for "rendering assistance to foreign courts and quasi-judicial agencies." Id. at 257. Prior to the 1958 amendments § 1782(a) referred only to "any judicial proceeding." The Intel majority read the 1958 amendment as evidence of Congress' desire to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad." The European Commission's amicus brief also highlighted that when "the Commission acts on DG Competition's final recommendation . . . the investigative function blurs into decisionmaking." Thus, the Court discerned no basis to exclude the European Commission from the universe of foreign or international tribunals within the ambit of § 1782(a).

Perhaps the most surprising aspect of the Intel decision was its holding that a district court can invoke § 1782(a) to compel production even if the material would not have been discoverable in the foreign forum.

3. Must The Proceeding Be Pending? One of the reasons the Supreme Court granted certiorari in Intel was to resolve a split among the Circuits on whether the dispute between the foreign "tribunal" must be pending or at least imminent for an applicant to invoke § 1782(a). Compare In re Letter of Request From Crown Prosecution Service, 870 F.2d 686, 691 (D.C. Cir 1989)(proceeding must be within reasonable contemplation) with In re Ishihari Chemical Co., 251 F.3d 120, 125 (2d Cir. 2001)(proceeding must be imminent). In rejecting the narrow Ishihari interpretation that the proceeding must be imminent, the 8-1 majority focused on the 1964 amendment that eliminated the requirement that a proceeding be "judicial;" it also deleted language concerning "pending" proceedings. The Court also noted the explicit language of § 1782(a) that authorized assistance for "criminal investigations conducted before formal accusation" and concluded the amendment was intended to authorize "a broad range of discovery."

4. Must § 1782(a) Materials Be Discoverable Abroad? Perhaps the most surprising aspect of the Intel decision was its holding that a district court can invoke § 1782(a) to compel production even if the material would not have been discoverable in the foreign forum. After holding nothing in the words of the statute imposed such a "foreign discoverability" rule, the Supreme Court addressed two policy considerations presented by Intel: (1) avoiding offense to foreign governments; and (2) maintaining parity between litigants. With respect to the first issue, the Court noted that it doubted foreign governments would take offense at a rule that permitted, but did not require, federal court assistance. It also noted that even considerations of comity did not permit the Supreme Court to "insert" a foreign discoverability rule into the text of § 1782(a). Concerns about the

second issue parity were ameliorated by noting that federal district courts could condition relief on the applicants willingness to provide reciprocal discovery, or the foreign tribunal's ability to place conditions on the use of the information so discovered.

> ...some applicants have utilized § 1782(a) to obtain discovery subject to protective orders entered in U.S. patent infringement or antitrust litigation for use in parallel foreign proceedings.

II. INTEL'S AFTERMATH. The Intel decision was originally greeted with widespread concern over its breadth, echoing the critique in Justice Breyer's dissent. These critics argued that the majority's interpretation would lead to abuse and vast volumes -- even "fishing expeditions" -- of expensive, time-consuming proceedings collateral to the purpose of the federal docket. 542 U.S. at 268. Eighteen months of experience now demonstrate that those fears have been largely unfounded. The Court's admonition that §§ 1782(a) "authorized but did not require" discovery, and the Court's guidance with respect to discretionary criteria, combine to construct a workable regime.

The Intel majority's guidance on those discretionary criteria appears largely responsible for the measured application of the reinvigorated statute. In fact, many courts have applied the Intel test as a "two-step inquiry;" the first step is to examine whether the threshold elements of "foreign tribunal," "interested person," and "pending (or within reasonable contemplation) proceeding" are satisfied. Only if those necessary elements are fulfilled does the court entertain the second step -- the determination of whether the application should be granted when viewed through the lens of the "discretionary considerations." See In re Application of Grupo Qumma 2005 U.S. Dist. LEXIS 6898, at *3. (S.D.N.Y.)(§ 1782 presents two inquiries). In the exercise of its sound discretion in step two, the Intel Court advised that § 1782(a) assistance is less needed when the party from which discovery is sought is a participant in the foreign proceeding since the foreign tribunal can order production of the "evidence." 542 U.S. at 264. Second, the district court can consider the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the tribunal to reciprocal assistance to the United States' courts. In particular, lower courts should consider whether the § 1782(a) request constitutes an effort to circumvent "foreign proof-gathering restrictions." Id. Similarly, burdensome requests can be either rejected or trimmed. In sum, the Court admonished that lower court discretion should be guided by the "twin aims of the statute;" (1) to provide "efficient means of assistance to participants in international litigation in our federal courts," and (2) to encourage "foreign countries by example to provide similar means of assistance in our courts."

While there is ample room for roguery, these considerations seem to fashion reasonable results. Since the Intel decision in June 2004 through January 31, 2006, there have been eleven reported cases where litigants sought to invoke § 1782(a). Four applications were granted in full; four applications were granted with limitations; three were denied in full. It is worth noting that two of the petitions granted were based on ex parte applications. With the exception of Intel itself, all of the reported cases involve applications related to pending foreign proceedings; no applicant has yet sought to test the parameters of when a proceeding is "within reasonable contemplation." That is not to say that creative litigants are not attempting to exploit the extended reach of § 1782(a). For example, some applicants have utilized § 1782(a) to obtain discovery subject to pro-

tective orders entered in U.S. patent infringement or antitrust litigation for use in parallel foreign proceedings. Others simply seek to benefit from the generally broader scope of discovery provided by the Federal Rules of Civil Procedure than most foreign procedural systems. Creative litigants can well envision the possibilities for mischief in proceedings before the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), or the International Centre for Dispute Resolution (ICDR) of the AAA. Whether or not documents obtained through a § 1782(a) application are admissible before those "foreign tribunals," mere access to the data and information obtainable through such a petition may well give the aggressive applicant a leg up in such arbitrations.

CONCLUSION

Savvy participants in international arbitration and litigation will realize the potential that the Supreme Court's 2004 Intel decision creates for obtaining discovery in the United States for disputes or investigations abroad. The real winners under the new § 1782(a) regime will be those who comprehend the nuances of the Intel guidelines and marshal them to their own advantage. Failure to do so will only ensnare the unwary in needless discovery disputes and procedures and place them at a relative disadvantage to those who comprehend and exploit the possibilities that the invigorated § 1782(a) presents.

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