Advance Sheet

STATUTE WITHOUT A HOME

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Not much about 28 U.S.C. § 1782 would likely catch the attention of most litigators going about their daily business. Chances are they will never encounter the statute in their entire careers, so irrelevant is it to ordinary litigation. The statute provides a mechanism for discovery in the United States by persons caught up in litigation abroad and is wholly inapplicable to domestic proceedings. Moreover, there is nothing about the discovery provided to these foreigners that would strike an ordinary practitioner as unusual or different from what is customary in regular practice in the U.S. A non-factor, it seems, for parties and practitioners alike, especially those that keep their matters close to home.

If there were any feature of the statute that would seem to be worth remarking on, it might be that it expressly calls for oversight by a federal judge. This might stir some feelings of envy by the U.S. litigator who pines for a more hands-on approach to discovery by his local judiciary, even if judicial oversight of day-to-day discovery can be a two-edged sword. But the statute's uniqueness in having this oversight mechanism would seem to be easily explained by the need to give comfort to a foreign party having to traverse the unfamiliar ground of American discovery. That foreign entity would be told by its U.S. lawyer that there is nothing here but what is typical in civil litigation in the United States, garden-variety discovery under Rules 26–37 of the Federal Rules of Civil Procedure.

Still, given how the business world has been contracting in recent decades, section 1782 may at least be worth knowing about and pondering over a bit. Should you ever have a client that gets caught up in some kind of proceeding abroad and would benefit from internal information about an adverse party located here, it is a kind of secret weapon. Whereas the foreign proceeding might be one in which nothing like American discovery is permitted, your client can seek out its adversary here in the United States, and section 1782 promises access to a world of information that it might otherwise find unavailable. There are traps here for the incautious, however. Should your client have business both in the United States and in foreign countries, an overseas litigant can nail your client here with full-fledged discovery for use abroad, in proceedings not just taking place, but also concerning something relating only to business, in that foreign jurisdiction. More than one foreign executive accustomed to unconstrained visits to his holdings or lawyers in the United States has been unhappily confronted by the proverbial sleazy process server, who steps out from behind a potted plant at a restaurant or social venue to hand the executive a document or deposition notice under 28 U.S.C. § 1782.

Also, if you regularly serve overseas clients, section 1782 has a tendency to gum up international litigation strategies. It is not uncommon to find that it is easier and cheaper to pursue litigation against another party by filing abroad. The decision to take this approach will likely be dominated by substantiative law concerns, but it may offer the additional bonus that the litigation there may proceed without the possibility of American-style investigations into documents or the testimony of witnesses. Should the opposing party become aware of section 1782, however, you can find that your best laid discovery-free plans will come to naught.

Moreover, there's a little-noticed element of section 1782: it is silent on the scope of what must be produced. If it is as broad as practice in the U.S. allows, using our relevance and burden standards, it may extend to documents or even witnesses not directly involved, or expected to participate, in the foreign proceeding. Even if there is a judge appointed by the statute to regulate the application of the discovery rules and protect against its open-ended provisions, there are no guaranties she will have any understanding of the foreign proceeding or see any reason

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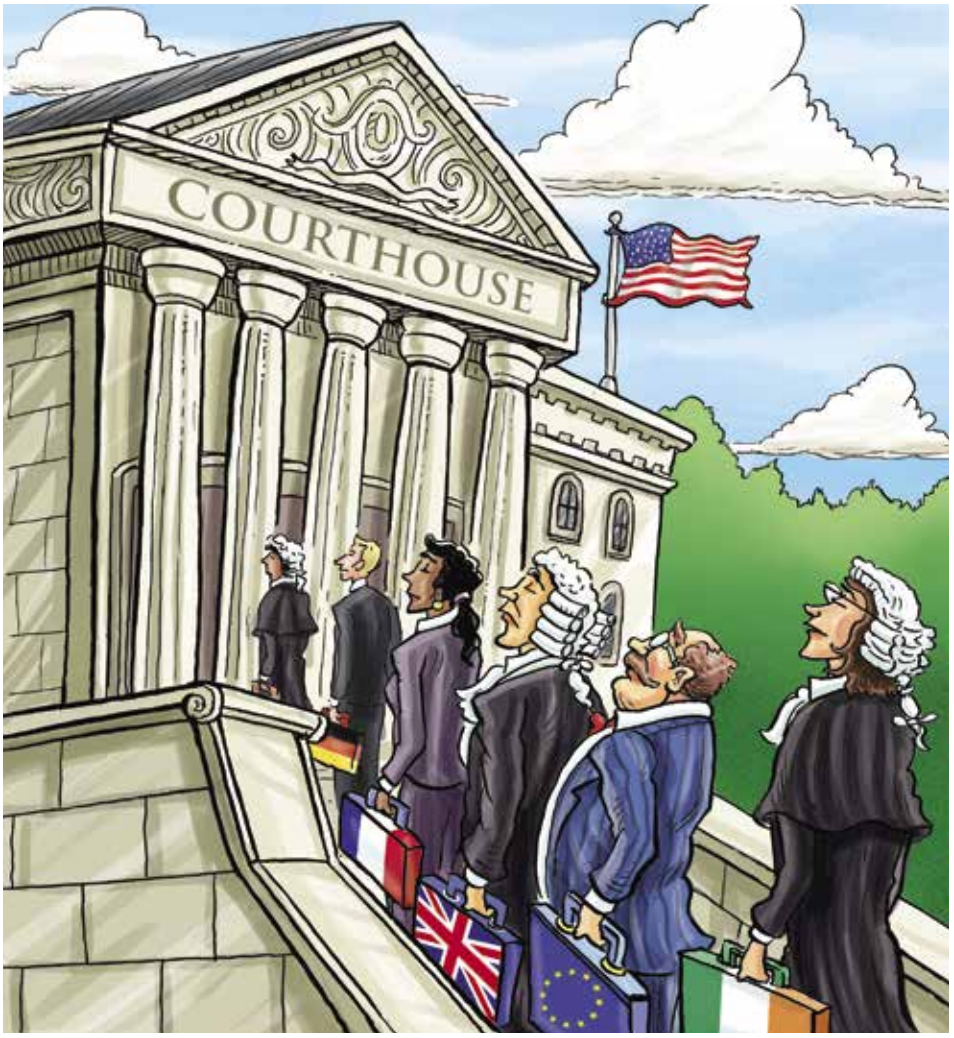

to limit the statute's discovery options on that or any other ground.

In fact, there is nothing in section 1782 to ensure that discovery is limited to what a tribunal abroad might allow or find helpful. This highlights what is so peculiar about the seemingly anodyne language of the statute. It exists "in aid of" foreign proceedings even where those foreign proceedings have not expressed any need or desire for U.S. assistance. In fact, the statute seems likely to aid not a foreign tribunal, but one party or the other to the foreign proceeding, regardless of whether the tribunal itself would view that as particularly helpful to its deliberations. Often, were the parties confined to the proceeding abroad, no such discovery opportunity would have been available to either of them. But once one of them has stepped onto our shores, whether for a slight purpose or a great one, it would suddenly become susceptible to the full treatment U.S. discovery affords, on a kind of presumption that the foreign jurisdiction is discovery-deficient in some way.

But if the foreign tribunal wanted such help, might it not have asked for it? If it wanted parties there to have access to our type of discovery techniques, why did it not provide for it in the first place? Section 1782 assumes away such questions and, in doing so, seems almost officious or meddlesome, providing foreign tribunals with assistance they seemed not to need or want, or at least deemed unworthy of providing for themselves. In effect, it is fair to ask how this statute "aids" foreign proceedings at all, allowing unexpected discovery, otherwise unknown and uncalled for, and possibly only to one lucky party that has been fortunate enough to find an adverse party wandering upon our shores.

Intel Corp v. Advanced Micro Devices

Never really pondering this possibility, the U.S. Supreme Court, on the one occasion it had—or took—to construe section 1782's terms, treated the provision and its anomalies as of no real interest at all. In *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (1993), Advanced Micro Devices (AMD), a technology company, found itself with reason to complain about Intel's competitive practices in Europe and made an application to the U.S. District Court for the Northern District of California for discovery in aid of a matter before the Directorate-General for Competition of the European Commission. This was not litigation per se, not even a pending "proceeding," as Justice Ginsburg pointed out in her majority opinion in *Intel*, though possibly it could lead to one. Nevertheless, AMD presumably believed it could gain an advantage in the European Commission's proceedings, now or in the future, by helping itself by way of section 1782 to internal information Intel might house domestically bearing on competitive issues.

The district court found the whole exercise inappropriate, rejecting the application on the ground that the foreign forum itself provided for no discovery. The Ninth Circuit reversed and remanded, instructing that the district court should rule on the merits of the discovery requests. At that point, the Supreme Court decided it needed to get in on the act so as "[t]o guide the District Court on remand [with] considerations relevant to the disposition in question." Why any intervention by the top court was necessary is a little unclear. But what followed was an even bigger head-scratcher.

The Court's 7–1 decision (Justice O'Connor took no part) launched into as fine a display of statutory construction as one could ask for, deciding that the

Illustration by Chad Crowe

language of the statute itself imposed no restraint on the discovery permitted based on whether the foreign proceeding itself would permit discovery. The statutory language, Justice Ginsburg concluded from her crystalline analysis, left no doubt that Congress did not impose such a requirement. Peeking too at the legislative history, the Court concluded that no such restriction was intended either. The Court therefore ruled that the statute unquestionably gave a party interested in the European Union administrative matter the opportunity to proceed with discovery here.

There is something of the "ugly American" about section 1782.

Sounding a familiar theme, Justice Scalia disparaged any resort to the legislative history, preferring to rely solely on the statutory language. So he concurred in the result but not in Justice Ginsburg's opinion. Only Justice Breyer was troubled. Convinced that some policy concerns maybe bore on the statutory analysis, he declared himself in favor of wanting to limit the statute with a presumption of no discovery when the foreign proceeding itself did not permit it, though with the litigant still being able to show it should be permitted anyway.

Why Does the Statute Exist?

No one really thought even a little beyond the statutory provision itself. Even if the Court thought them irrelevant, as perhaps they were, given the statutory language, Justice Breyer's scruples might have led them all to ask, as even Justice Breyer did not, *why* the statute exists at all. What exactly was Congress thinking in wanting to aid a forum like the Directorate-General that did not want to help itself? How did allowing AMD to do discovery in this matter "aid" the foreign proceeding and not just advantage AMD? Why provide to foreign litigants, or (as in the case of the Directorate-General matter) not just litigants, what a foreign tribunal seemed not to want to provide itself?

To this question might be added, more fundamentally, why *didn't* the foreign tribunal provide for itself? Perhaps the Court perceived this question as making them as improperly officious as Congress itself was being. It's not just that the detour into the legislative history Justice Scalia objected to offered no clue on the matter. Given the clear statutory language, the whole undertaking seemed largely irrelevant. Congress is wont to do what it will do. Section 1782 is on the books, and once properly construed, that was the end of the matter, and the Court seemed to think it was done.

As maybe it was. Still, it's striking that, after *Intel*, section 1782 presents the very odd circumstance of permitting American discovery techniques to be used by an interested party in all kinds of proceedings by foreign commissions and tribunals that had not themselves asked for the information and might or might not even find the information helpful or appropriate. How was that really in "aid" of the foreign commission's activities? Was that for the district court to figure out? On what basis? *Intel* never says. Indeed, by ruling that the statute did not permit the district court to summarily rule against discovery on the ground that it was not asked for and maybe not permitted abroad, the Court seemed to be tilting the statute toward permitting the discovery. A reverse presumption is the one Justice Breyer seemed to favor. But in neither case did what's really problematic about the statute ever get addressed. So much for providing a "guide" of "considerations" helpful to the district court's determination.

Instructed by this obtuse approach, subsequent courts interpreting the statute have focused on which types of foreign proceedings are those the statute applies to, rather than the sense of what Congress, aided by our courts, was doing. Recently, that question has focused on whether discovery can be sought against a person or company found within the United States when the foreign proceeding is an arbitration. A dispute about discovery in this context would at least make sense to American practitioners well familiar with the fact that, in most circumstances, there is less likely to be discovery permitted in arbitration.

But again, what was or was not permitted under Justice Ginsburg's approach in *Intel* has found itself repeated in its progeny. The question was put, again, as one of pure statutory construction. Does a foreign tribunal that section 1782 sits "in aid of" include arbitrations or not? Thus, in a 2020 decision, the Second Circuit found that the statute was not intended to apply to a commercial arbitration under a Chinese alternative dispute resolution (ADR) mechanism, upholding an earlier decision, to the effect that arbitrations are not included, against the charge that *Intel* had somehow cast doubt on the limitation. *In re Application and Petition of Hanwei Guo* (2d Cir. July 2020). Other circuits see it differently, believing that the type of proceeding was just another way to circumvent the statutory grant, and on that basis have applied the statute more broadly. There is now a split in the lower courts that the Supreme Court has been asked to decide. *Servotronics v. Rolls Royce PLC* (7th Cir. Dec. 2020).

Should the Court take the case, it may wish to go beyond all this finely spun statutory interpretation chatter. The need is perhaps nicely underscored by a story recounted by an American professor teaching Chinese students in China about the virtues and pitfalls of the American jury system. To his surprise, he was informed by one student that Chinese proceedings have "juries" too, ordinary citizens who help to make the decision in regular (presumably criminal) matters. Perplexed, the professor asked his Chinese counterpart what the student was referring to. "Oh,"

she replied, "those are [Communist] party members, stationed next to the judge to ensure a proper outcome."

Discovery and Foreign Proceedings

Foreign proceedings are, in more than one sense, foreign. What happens there, and how, may bear no resemblance to our American lawsuits. Even without the great differences between the proceedings in a democratic country and those in a communist one, it pays to stop and consider *why* discovery is often absent in foreign proceedings. The best way to understand this is to consider the reasons it exists in our own. First, we operate within an adversary system. This truism can obscure the host of assumptions underlying it. In the Anglo-American judicial context, we seek the truth through the clash of (at least) two interested parties, in a genuine dispute, making the best arguments they can for one outcome or another, to be decided by a neutral and passive decision maker who weighs the arguments and is charged with reaching a reasonable conclusion based on what is presented to her solely in the proceedings themselves. Discovery allows the parties a shared record on which to make those arguments, ensuring that they work from the same facts, even as they argue what those facts mean. While one advocate may have greater skill than another in shaping that meaning, both sides, in theory at least, are provided with the same opportunity to do so. The belief, or at least the hope, is that this process is most likely to get closest to the truth.

Second, the thinking behind the great expansion of discovery provided by the federal rules reflected a belief that, especially in commercial cases, if each party within the adversary system knows all of what the other party knows, there is more likely to be a settlement. Rational decision makers can look at the whole picture, calculate the risks, and find a solution, or even *the* solution, that well compromises the parties' different perspectives. And this logic has proved correct. Not for nothing has the number of trials of commercial cases shrunk to almost nothing. Reasonable businesspeople in possession of all the facts can usually resolve the matter in a rational way, even if now it is sometimes the cost of discovery, rather than any underlying damages, that dominates the analysis.

The biggest problem with section 1782 is that it allows discovery that makes sense in these circumstances, where it serves reasonable goals, to be used in a context where those considerations simply don't matter or may not apply. Outside of a few common-law countries, most jurisdictions decide matters on an investigative model rather than an adversarial one. The decision maker does not rely on the parties to present what's necessary to decide the case and is certainly not limited to what they provide. Take the very tribunal involved in *Intel*, a European Union commission proceeding. It is difficult to understand what "aid" American discovery would provide to its activities. Typically, a commission of this kind would itself have ample means to seek out the facts, demanding information from one party or the other as necessary for its investigation. Certainly, it is true that the parties are entitled to assist the tribunal in conducting its inquiry. But discovery, American-style, seems hardly the right mechanism to do so. Indeed, the risk is that this may turn out merely to advantage the party with access to the American discovery without advancing the proceeding at all. In short, discovery does not exist in such cases, not because Europeans were not advanced enough to provide for it, but rather because it is inconsistent with, and even wholly alien to, their different pattern of decision-making.

Nor is there the same need to encourage settlement, as in our system. Commercial lawsuits, indeed lawsuits of all kinds, are less common and take place in a different context. And an entity like the European Commission will surely have its own agenda, which may not cohere with what either "party" there might prefer. Where the mode of decision will be quite a different one, the value and use of settlement techniques supported by discovery like that in our own country may never apply. Not for nothing do Europeans often find our mediation processes completely baffling. And in this context, section 1782 may make the proceeding rather unequal and, in some more basic sense, one-sided and unfair.

It is high time for the courts to perhaps point out to Congress that it has put in place something that just simply makes no sense.

There is, as a result, something of the "ugly American" about section 1782. It's not just that Americans seem to be providing aid where it is not wanted. It is that Americans are assuming that what happens abroad is in some way the same as what happens in American litigation, even when the proceedings could not be more different. One might hope that this is what the Second Circuit had in mind when ruling that section 1782 does not extend to arbitrations, particularly in the potentially more repressive context of Chinese ADR. The proceeding may just be too "foreign," in the end, for American litigation techniques to make sense. Perhaps the court of appeals recognized that there was something more fundamentally askew here, cloaking its concerns in the statutory construction garb that *Intel* demands. Regardless, it is high time for the courts to perhaps point out to Congress that it has put in place something that just simply makes no sense. ■