

Chapter 3: State Courts and Document Production

By Laurence Shore

1. INTRODUCTION – THE PROBLEM STATED

The participants in an international arbitration – parties, arbitrators and counsel – have traditionally sought a relationship with State courts that is not unlike the relationship desired by teenage children (and more than a few adult children) with their parents: do not intervene, unless you are specifically asked to do so, and then act only as specifically directed. Indeed, the most highly preferred seats in international arbitration – e.g. Paris, Geneva, Zurich, London, Stockholm and New York – have attained their stature largely because the State courts at the seat have a reputation for supporting the principle of arbitral autonomy. These courts are supportive but non-interventionist.

However, at least in one respect, namely the gathering of evidence, some arbitral participants have been frustrated on occasion by the lack of a State court mechanism to provide more direct support for arbitral proceedings. This frustration may arise in relation to third parties or the arbitral parties themselves.

First, consider the possible frustration arising from the following third-party scenario. Assume that the arbitral seat is Tel Aviv, Israel. A US corporation has brought an ICC case against a Dutch corporation. The former chief executive officer of the Dutch corporation resides in Minneapolis, Minnesota. She holds documents and other information arguably relevant to the arbitral proceedings, but she is not interested in making this information or herself available to either party to the arbitration or to the arbitral tribunal. The Dutch corporation has no apparent ability to compel its former chief executive officer to cooperate and supply the evidence. Change one fact in this scenario: assume that the former chief executive officer resides in Paris or in London instead of Minneapolis.

There is another third-party scenario to take into account. Assume that the arbitral seat is Vienna, Austria. A US corporation, which is the subsidiary of another US corporation, is the respondent in an ICC case brought by a Dutch corporation. The parent company holds documents that are arguably relevant to the arbitral proceedings, but the parent has no interest in making these available to the parties or to the arbitral tribunal. Also consider changing one fact in this scenario: the subsidiary and parent are French or English or Saudi instead of US corporations.

There is then a potential evidentiary frustration regarding an arbitral party. Assume that you represent a Brazilian company, which has commenced an ICC case against a US corporation. Sao Paulo is the seat of the arbitration. You are concerned that the US respondent may terminate the employment of certain key individuals who know things that are adverse to their employer's position so that these individuals will not be available as witnesses in the arbitration. Also consider changing one fact in this scenario: the respondent is a Dutch or English corporation instead of a US corporation.

The participants in an international arbitration have historically faced insuperable difficulties in obtaining or compelling evidence in circumstances similar to those of the three scenarios given above, where the seat of the arbitration is in a jurisdiction other than where the evidence is located. State court mechanisms have not been routinely available to assist in the production of documentary evidence or witness evidence. With the increased complexity and size (including the amounts at stake) of disputes in international arbitration, this unavailability of State court assistance has been a matter of acute frustration in a growing number of cases. Recently, however, there have been well-publicized State court procedures in two common law jurisdictions, the United States and England, which have been used to assist foreign arbitral tribunals in the gathering of evidence. The US procedure, 28 U.S.C. Section 1782 ("Section 1782") is arguably very broad; the English procedure, Section 44(2)(a) of the Arbitration Act 1996 ("Section 44(2)(a)"), is more

limited in scope regarding the evidence that can be obtained.

While these recent US and English State court mechanisms may alleviate certain frustrations, they (Section 1782 in particular) also raise the unwelcome spectre of State court interference in the international arbitral process and a concomitant lessening of the arbitral tribunal's authority over a key aspect of arbitral case management. Moreover, these mechanisms raise the possibility of a material imbalance in the scope of evidence available to parties to an arbitration. For example, evidence located in the United States and subject to the provisions of Section 1782 is more obtainable than similar evidence located in another jurisdiction. To some, it may be appropriate that the jurisdiction viewed as plaguing international arbitration by foisting upon it the broad "discovery" approaches of its litigation system has at least opened its courts to supporting the production of evidence for use in foreign arbitral proceedings. This appropriateness nonetheless comes at the expense of extending the role of State courts in evidence gathering in arbitration, thereby blurring the boundary between international arbitration and State court litigation.

A number of commentators on international arbitration procedure have depicted a tension between, on the one hand, the objective of reaching an expeditious result based on the reasonably available evidence adduced by the parties and, on the other hand, the possibility of reaching a sounder result based on a more comprehensive evidence-gathering exercise. Traditionally, the former objective has been favoured, particularly by arbitrators from a civil law background, partly because more comprehensive evidence-gathering might be impracticable. Section 1782 offers the prospect, in the case of evidence located in the United States, of rethinking this impracticability, with the attendant implications for time and cost of the arbitral process and the arbitrators' ability to efficiently manage their cases. Are Section 1782 and, albeit less so, Section 44(2)(a) so threatening to the arbitral process that parties should make it a practice point in drafting arbitration clauses to expressly keep the arbitral tribunal in the saddle in relation to the parties' ability to pursue these provisions? Or is the concern that has been expressed over the potential use of Section 1782 exaggerated: are the indications that US courts will take a pragmatic approach in ruling on such applications and that the courts have little interest in transforming document production "best practice" in arbitration, as represented by the 1999 IBA rules on the Taking of evidence in International Commercial Arbitration?

2. THE US POSITION AND HOW IT HAS EVOLVED (OR DEVOLVED)

Section 1782 states as follows:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

a. *NBC v. Bear Stearns*

The background to the statute – or at least the Second Circuit’s perspective on the background – is set out in *NBC v. Bear Stearns*.¹ The question before the Second Circuit was “whether a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce, a private organization headquartered in France, is a ‘proceeding in a foreign or international tribunal’ as those words are used in 28 U.S.C. Section 1782.”² The court answered this question in the negative and accordingly upheld the District Court’s ruling that third parties to the arbitration were not subject to Section 1782 and had no obligation to produce documents to be used in the arbitration.

The analysis in *NBC* may be summarized as follows:

- The term “foreign or international tribunals” neither unambiguously excludes or includes private arbitral panels.
- Accordingly, one must look to legislative history and purpose to determine the meaning of the term in the statute.
- The current version of Section 1782 was enacted in 1964 as part of legislation to implement a series of changes in domestic proceedings to accommodate international proceedings.
- The new Section 1782 replaced a Section 1782 that had provided limited evidence-gathering assistance to foreign courts, as well as another statute (“Section 270-270c”) that conferred certain powers on members of “international tribunals”.
- The legislative history shows, however, that the revisers “had in mind only governmental authorities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state”.
- The absence of a reference to private dispute resolution in the legislative history “strongly suggests” that Congress did not consider arbitration in drafting the new Section 1782 and that this is also the case for the revision to Section 270-270c.
- The popularity of arbitration is due in large part to its asserted efficiency, which is said to be at odds with broad-ranging discovery.
- If the parties make no provision for discovery in their arbitration agreement, the arbitrators control discovery, and neither party is deprived of efficient process by the use of tactical discovery devices.
- Thus, policy considerations reinforce the legislative history conclusion: Congress did not intend for Section 1782 to apply to a private arbitral tribunal.

It may well be – indeed, as explained below, the Supreme Court later came to the conclusion – that the Second Circuit misread the legislative history of 1964 in reaching its holding that the term “foreign or international tribunals” has a restrictive meaning. However, the policy considerations identified by the Second Circuit (the final three bullet points in the paragraph above) still resonate today among arbitration practitioners who are concerned about importing US-style “discovery” into international arbitration.

In any event, the Second Circuit in *NBC* seemed to have resolved a conflict among district judges within its own Circuit regarding the meaning of “foreign or international tribunals”, with the Southern District of New York having previously stated, in *In re Technostroyexport*,³ that an arbitral panel came within the definition and then taking the opposite position in *In re Medway Power Ltd.*⁴

b. Other circuits pre-2004

At least one other Federal circuit, prior to a major Supreme Court decision in 2004 (see below), also addressed the question of Section 1782’s possible applicability to international commercial arbitration. The Fifth Circuit’s position in *In re Republic of Kazakhstan* was similar to that taken by the Second Circuit in *NBC*.⁵ Other Federal circuits considered other issues relating to Section 1782, though in circumstances where the question of arbitration did not arise, because the foreign request did not emanate from an arbitral tribunal. There were significant circuit splits on whether

a “foreign discoverability” requirement inhered in the statute; i.e. whether the evidence that could be obtained under Section 1782 was limited to the type of evidence that could be obtained under proceedings in the foreign jurisdiction. The First and eleventh Circuits determined that such a requirement did exist, whereas the Second, Third, Ninth Circuits did not find a “discoverability requirement”, and the Fourth and Fifth Circuits rejected the requirement in instances where the applicant was a foreign judge/sovereign. The landscape changed and became much clearer when the US Supreme Court decided to look at Section 1782.

c. *Intel v. AMD*⁶

Advanced Micro Devices, Inc. (“AMD”) filed a complaint against Intel Corporation (“Intel”) with the European Commission. To support that complaint, AMD applied under Section 1782(a) to the US District Court for the Northern District of California for an order requiring Intel to produce potentially relevant documents. The Supreme Court held that the District Court had the authority to entertain AMD’s request, though the District Court was not required to grant the assistance sought. The Supreme Court also ruled that Section 1782 did not require that the proceedings for which discovery was sought be pending or imminent; rather, the proceedings need only be in “reasonable contemplation.” Moreover, the Supreme Court sided with the Second, Third and Ninth Circuits in deciding that there was no “discoverability requirement” (see above) under the statute.

For arbitration practitioners, the big thrill (or central horror) of *Intel* was not its holdings but its observations on legislative history. Essentially, the Supreme Court rejected the historical analysis of the Second Circuit in *NBC* and appeared to adopt Professor Hans Smit’s long-held view that the term “tribunal” in Section 1782 includes arbitral tribunals.⁷ The Court also noted that in “light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding ‘in a foreign or international tribunal.’”

Suddenly, then, in a case that had nothing to do with international arbitration, the Supreme Court appeared to invite the application of Section 1782 to arbitral tribunals. Professor Hans Smit’s 1965 *Columbia Law Review* article had been quoted with clear approval, and the NBC analysis could not be sustained after this decision. The new landscape would soon be explored, as the four cases briefly discussed below demonstrate.

However, it should be kept in mind, as the below cases also demonstrate, that the Supreme Court in *Intel* did not intend for Section 1782 applications simply to be granted on a nod by district courts. The Supreme Court stated that the authority to grant a Section 1782 request did not mean that the district court was required to do so. The Supreme Court further supplied some factors that the district courts should consider in determining how to exercise their discretion. These factors included: whether the discovery was sought from parties versus third parties (with the Court suggesting that seeking evidence from third parties would probably be more justifiable, given that the foreign tribunal already had the parties under its jurisdictional reach); whether the nature of the foreign tribunal and the character of the foreign proceedings weighed in favour of granting the application; whether the application “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States”; and whether the evidence requests are “unduly intrusive or burdensome”, in which case they could be rejected or trimmed. The Supreme Court added that the foreign tribunal “can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate.” In short, when the Supreme Court opened the Section 1782 evidence window in international arbitration, the Court also clearly indicated that the window had a relatively narrow opening. The district courts have, thus far, accepted both the opening of the window and the narrowness of the opening, and arbitral tribunals of course retain the ability to condition their acceptance of the Section 1782 information in a manner to maintain party equality.

d. The post-Intel cases and the current US position

In re Oxus Gold PLC:⁸ A magistrate judge permitted the applicant, a claimant in a BIT arbitration against the Kyrgyz republic, to obtain documents and deposition testimony for use in the arbitration and related court proceedings. The judge relied on *Intel* in deciding that the arbitral tribunal met the Section 1782 definition. The judge also noted that an investment treaty tribunal even met the NBC standard for the applicability of Section 1782. The chief judge of the

District Court affirmed the magistrate judge's decision.

In re Roz Trading Limited:⁹ The applicant was involved in a Vienna Chamber arbitral proceeding (with a Vienna seat) and sought documents from Coca-Cola, whose subsidiary was also involved in the arbitration. The applicant alleged that because a joint venture had been terminated in Uzbekistan, it had no access to its corporate documents and wanted an order compelling Coca-Cola to produce documents for the arbitration proceedings. The Court granted the application. It followed *Intel* in determining that the Vienna Chamber was a tribunal under the statute. As for the evidence requested, the Court followed the factors that *Intel* had set out (as discussed above) and determined that, because the applicant could not bring Coca-Cola into the arbitration, because the Vienna Chamber is an international commercial body that must rely on State courts to aid it (this is specifically contemplated in Austrian procedural rules) and because Coca-Cola was the only source for some of the documents, the application would be granted, though with certain limitations imposed by the Court. This is precisely the approach contemplated by *Intel*.

In re Hallmark Capital Corp.:¹⁰ The magistrate judge relied on *Roz Trading* and *Intel*. The applicant requested an order permitting discovery from an individual for use in an Israeli arbitration proceeding. The applicant was the claimant in the arbitration; the individual was the chairman of the board of the respondent in the arbitration and was not a party in the arbitration. The judge observed that the individual resided in Minnesota, that the Israeli arbitration constituted a tribunal under Section 1782 and that the court had the discretion to grant the application. The court granted the application and required that the individual produce documents, answer interrogatories and be deposed.

Most recently, in *In re Babcock Borsig AG*,¹¹ the US District Court for the District of Massachusetts considered a Section 1782 application arising from an anticipated private foreign arbitration between German and Japanese corporations, in which the German corporation sought to compel an American third-party corporation to produce documents and give testimony for use in the potential arbitration. The Japanese and American corporations objected. Despite holding that it had the authority to grant the discovery request, the court denied the request on discretionary grounds. This approach is also in line with *Intel*. The judge commented that the denial was not necessarily for all time: if certain documents did not become available through the normal party channels in the course of the potential ICC arbitration, the applicant could reapply.¹²

As the above, albeit summary, review indicates, the US courts have taken an extremely circumspect approach to the application of Section 1782 in the context of international arbitral proceedings. It is difficult to discern the march of US-style discovery over arbitration's hallowed grounds – leaving aside the arbitral tribunal's authority to use, pursuant to the comments in *Intel*, its own power to repel the insertion of any intrusive discovery into the arbitral proceedings.

3. THE ENGLISH APPROACH: SECTION 44(2)(A) ARBITRATION ACT 1996

England's provision on State court evidentiary assistance to arbitral tribunals, albeit significantly more limited than Section 1782, reads as follows:

“(1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.

(2) Those matters are –

(a) the taking of the evidence of witnesses;

(b) the preservation of evidence;

...

(d) the sale of any goods the subject of the proceedings;

(e) the granting of an interim injunction or the appointment of a receiver.”

Pursuant to Section 2(3) of the Arbitration Act 1996, Section 44 applies even if the seat of the arbitration is outside England and Wales or Northern Ireland (or no seat has been designated or determined).

The limitations of Section 44(2) are immediately apparent in that the court is not given a general power to order a third party to produce documents. In *Assimina Maritime v. Pakistan Shipping*,¹³ Mr Justice Colman made this clear: Section 44 does “not include an order for disclosure by a non-party of documents relevant to an issue in the arbitration. ... Accordingly, it is only where it can be shown that a question arises in relation to a particular document or documents of a non-party which need to be inspected or photocopied [see the other provisions of Section 44] that an order under this section can be made.”

Moreover, in *Commerce and Industry Insurance Co. of Canada v. Lloyd's Underwriters*,¹⁴ the Court explained that Section 44(2)(a) could not be used to support an arbitration seated in the United States where the purpose of the application was not to obtain specific evidence but instead to take a US-style discovery deposition.¹⁵ Thus, even though Section 44(2) offers the prospect of State court assistance in relation to witness evidence, the English courts have clarified that the scope of any such witness examination will be tightly controlled.

CONCLUSIONS

Section 1782, *post-Intel*, clearly places the United States in an “outlier” position in terms of the level of State court evidence-gathering assistance that may be available to foreign arbitral tribunals. In the examples given in the introduction to this paper, the location of the individual or entity in the United States as opposed to almost any other jurisdiction would mean that document production may be obtained. Witness evidence may also be obtained, though in this respect the existence of Section 44(2)(a) of the English Arbitration Act 1996 diminishes to some degree the outlier position of the United States.

Is the US outlier position so extreme that some arbitration clause drafting points to address the potential intrusion of Section 1782 should become a regular checklist item when such clauses are being negotiated? Some commentators urge that this should be considered, and that lawyers should advise their clients to insert language to the effect that no party shall make a Section 1782 application (or a Section 44(2)(a) English Arbitration Act application) without the prior consent of the opposing party or the permission of the arbitral tribunal (in the event that the opposing party withholds consent). I would question the usefulness of this language becoming a checklist item for clause drafting. First, neither of these evidence-gathering provisions has become or threatens to become an excessively dangerous feature in the arbitration landscape. Secondly, as the Intel court commented, an arbitral tribunal will in any event be able to place a constraint on abusive fishing expeditions by imposing conditions on admissibility to maintain any necessary measure of parity.

From *Intel* and subsequent district court cases, it is apparent that Section 1782 applications will be closely scrutinized by US judges, who are taking to heart the Intel admonition that the authority to entertain such an application does not require that the application be granted, and that the guidance on the exercise of discretion as set out in *Intel* should be carefully and systematically applied. Section 1782 may become an important evidence-gathering option in the world of arbitration, but this is consistent with relatively low use and even lower success rate of applications. That is, Section 1782 applications should only be made and granted in instances of acute frustration and materiality to outcome. These applications should be monitored by arbitral tribunals and viewed with particular scepticism by district courts when not endorsed by the arbitral tribunal. Section 1782 therefore should not and probably will not become a regular feature of international arbitration, and decisions like the recent *Babcock Borsig* case will help in dampening the document production “no page left unturned and unproduced” dreams of arbitration counsel.

Section 1782 should be welcomed by international arbitration practitioners – if US courts continue to indicate a cautious and pragmatic approach to the exercise of their discretion in making orders on the provision of testimony or the production of documents. Moreover, if arbitrators are robustly proactive in exercising their authority over evidence gathering and admissibility, any potential threat posed by Section 1782 is greatly diminished.

The sky is not falling because of Section 1782, *post-Intel*. International arbitration has survived the “unnatural compromise” between civil law/common law document production as set out in the 1999 IBA rules on the Taking of evidence in International Commercial Arbitration. Section 1782 can actually strengthen international arbitration if it provides a mechanism, in particular cases, for arbitral tribunals to be given the evidence that they need – and would not otherwise receive – in order to reach sound results under the applicable law.

END NOTES

1. *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).
2. For arbitrations seated in the United States, the Federal Arbitration Act, 9 U.S.C. Section 7, provides a mechanism to compel third-party witnesses to appear and their documents to be produced in the arbitration, with the assistance (including contempt powers) of the US district courts:

“9 U.S.C. § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators ... may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators ... and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.”

But see the discussion below of the US circuit split on the meaning of this section.

3. *In re Technostroyexport*, 853 F.Supp. 695 (S.D.N.Y. 1994).
4. *In re Medway Power Ltd.*, 985 F. Supp. 402 (S.D.N.Y. 1997).
5. *In re Republic of Kazakhstan*, 168 F.3d 880 (5th Cir. 1999).
6. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).
7. H. Smit, ‘International Litigation under the United States Code’, 65 *Columbia Law Review* (1965) p. 1015.
8. *In re Oxus Gold PLC* (D.N.J. October 11, 2006; April 2, 2007).
9. *In re Roz Trading Limited*, 469 F.Supp. 2d 1221 (N.D. Ga. 2006).
10. *In re Hallmark Capital Corp.* (D.Minn. June 1, 2007).
11. *In re Babcock Borsig AG*, 2008 WL 4748208.
12. The Second Circuit’s recent decision in a 9 U.S.C. Section 7 case, *Life receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210 (2d Cir. 2008), underscores the unavailability of this mechanism for arbitrators in certain circuits of the United States who seek to compel third parties to produce documents to the parties (and the tribunal) prior to a hearing. The eighth, Sixth and Fourth Circuits permit such pre-hearing discovery from third parties. The Second Circuit has now joined the Third Circuit in refusing it: “Documents are only discoverable in arbitration when brought before arbitrators by a testifying witness.” *Ibid.*, at 216. Section 7’s presence requirement “forces the party seeking the nonparty discovery – and the arbitrators authorizing it – to consider whether production is truly necessary.” *Ibid.*, at 218. In taking this restrictive view of the operation

of Section 7 of the Federal Arbitration Act, the Second Circuit, in following the Third Circuit, has indicated that pre-hearing discovery in arbitrations (many of which may be international) will not track US court litigation.

13. *Assimina Maritime v. Pakistan Shipping* [2004] ewHC 3005 (Commercial Court).
14. *Commerce and Industry Insurance Co. of Canada v. Lloyd's Underwriters* [2002] 1 Lloyd's rep. 219.
15. See Merkin, *Arbitration Act 1996*, 3rd edition (2005) p. 117.

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