‘Intel’ 15 Years Later: Trends and Best Practices

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By **Nancy Chung, Christopher Egleson, Christina Chianese and David Kanter** | May 17, 2019

The United States as long been a favorable forum for broad, expansive discovery. Since the 1964 enactment of a modern formulation of 28 U.S.C. §1782, it has also technically been a forum for broad discovery for use in foreign proceedings. In its current formulation, §1782 permits discovery from any person that “resides or is found” in the relevant district “for use in a proceeding in a foreign or international tribunal.” It was not until 2004, however, that the U.S. Supreme Court, in *Intel Corporation v. Advanced Micro Devices*, 542 U.S. 241 (2004), clarified the broad scope of discovery permitted under the statute. Among other expansive holdings, the court clarified that §1782 discovery may be sought even prior to the initiation of foreign proceedings, so long as future proceedings are “within reasonable contemplation.” Id. at 258-59.

That creates risk. Indeed, foreign parties can seek discovery from domestic parties claiming they will soon initiate foreign proceedings when, in reality, they seek exploratory discovery before suing a target, potentially even in the United States. Financial institutions, asset managers, and consultants are particularly vulnerable targets, as their business practices have a broad global footprint, and they are often viewed as deep pockets for a significant recovery in litigation. For these reasons and others, it is important for practitioners to be aware of the breadth and consequences of §1782 discovery, and to have thoughtful strategies in response.

Trends in §1782 Discovery: Then and Now

There was a time when §1782 was lightly used. Indeed, for the 15 years preceding *Intel*, there are only approximately 130 federal decisions even citing the statute. But since *Intel*, there has been a pronounced uptick in §1782 litigation. For the nearly 15 years that have elapsed since *Intel*, there are more than 850 federal decisions citing the statute. And even that number may be too low. Many §1782 cases do not result in a published or reported decision at all, as these cases are often initiated on miscellaneous dockets on an ex parte basis. That means many more §1782 applications may be summarily granted before the discovery target even has notice or an opportunity to respond.

Perhaps unsurprisingly given that financial institutions, asset managers, and consultants often find themselves as the target of discovery in aid of foreign litigation, the center of gravity for post-*Intel* §1782 discovery has been the Southern District of New York (SDNY). The SDNY has issued more §1782 decisions than any other U.S. district court. Of the approximately *750* post-*Intel* district court decisions citing §1782, more than 140 were issued by the SDNY. Accordingly, by rough estimates, it appears that as much as 20 percent of all §1782 litigation may take place in the SDNY.

Moreover, even over the 15 years since *Intel*, there seems to be a generally consistent upward trend in the volume of §1782 litigation within the SDNY: The number of SDNY decisions substantively engaging with §1782 range from just three decisions to as many as 14 in 2018. This may suggest that we are not even yet at the high watermark of aggressive attempts by parties to seek discovery in aid of foreign proceedings.

A Particular Trap: §1782 and Pre-Litigation Discovery

A key feature of §1782 discovery in the post-*Intel* era certainly contributing to its increasing use is that discovery maybe granted in aid of foreign proceedings not yet pending but merely "within reasonable contemplation." *Intel*, 542 U.S. at 258-59. In the Second Circuit, for a foreign proceeding to be within reasonable contemplation, "the applicant must have more than a subjective intent to undertake some legal action." *Certain Funds, Accounts and/or Inv. Vehicles v. KPMG*, 798 F.3d 113, 123 (2d Cir. 2015). That is, the foreign proceeding "cannot be merely speculative," and so the applicant "must present" at least "some concrete basis" to "determine that the contemplated proceeding is more than just a twinkle in counsel's eye." Id. at 123-24.

Even so, when viewed from the perspective of parties seeking discovery, this is a forgiving standard. So while the mere retention of counsel and discussions between a party and a client about the possibility of initiating litigation is generally insufficient to establish "reasonable contemplation," id. at 124, some courts have held that not much more is needed to satisfy the standard. For instance, in one recent case, *In re Hansainvest Hanseatische Inv.-GMBH*, No. 18-mc-310 (RJS), 2018 WL 7500304, at *3 (SDNY Dec. 17, 2018), hiring foreign litigation counsel, retaining experts, sending a detailed demand letter, and counsel's affirmative representation at oral argument that foreign litigation would be initiated soon was sufficient. In another recent case, *In re Furstenberg Finance SAS, 18-mc-44 (JGK)*, 2018 WL 3392882, at *4 (SDNY July 12, 2018), still less was sufficient: The "reasonable contemplation" standard was satisfied where the applicants merely filed declarations swearing that they intended to initiate a foreign proceeding and articulated a specific legal theory on which they intended to rely. While the Second Circuit has not yet weighed in on these precise circumstances, these precedents are likely only to embolden future §1782 litigants.

This has very real consequences: While the majority of granted §1782 petitions continue to be premised on ongoing foreign proceedings, for the last two years alone there are at least six decisions from the SDNY where the court concluded that foreign proceedings were at least "within reasonable contemplation." See, e.g., *In re Hansainvest Hanseatische Inv.-GMBH*, 2018 WL 7500304, at *3; *In re Furstenberg Finance SAS*, 2018 WL 3392882, at *4; *In re Alghanim*, 17-mc-406 (PKC), 2018 WL 2356660, at *3 (SDNY May 9, 2018); *In re Mangouras*, 17-mc-172, 2017 WL 4990655, at *5 (SDNY Oct. 30, 2017); *In re Grynberg*, 223 F. Supp. 3d 197, 201 (SDNY 2017); *In re Kiobel*, 16 Civ. 7992 (AKH), 2017 WL 354183, at *3-4 (SDNY Jan. 24, 2017), rev'd on other grounds, *Kiobel v. Cravath, Swaine & Moore*, 895 F.3d 238 (2d Cir. 2018). There are likely even more. Because §1782 petitions are typically made ex parte, application can be granted before the target has an opportunity to oppose, or in circumstances where a target fails to oppose seeing no viable defense to the requested discovery under the permissive standard. That means there are likely successful discovery applications not captured by formal judicial opinions.

Best Practices: Proactive, Practical and Protective

All of the foregoing underscores that sophisticated institutions, managers, consultants particularly vulnerable to attack given the global footprints of their businesses must be more vigilant than ever. A few best practices are useful to keep in mind.

- Be Proactive. Most §1782 applications are filed ex parte which can put the discovery target on an immediate back foot. The target may not know of the application before it is granted, and then is left to fight the uphill battle of either moving to quash the subpoena or seeking an appropriate protective order. By monitoring dockets for new applications, discovery targets have the opportunity to intervene before an ex parte application is granted, creating a more level field and potentially better prospects for success in resisting the discovery.
- Be Practical. Although the standard is arguably permissive, the grant of discovery is to some extent discretionary and courts are empowered to "guard against the specter that parties may use §1782 to investigate whether litigation is possible before launching it," in evaluating applications. *In re Sargeant, 278 F. Supp*. 3d 814, 823 (SDNY 2017). Discovery targets should not lose sight of this feature, or shy away from presenting the court with facts that may sway its decision when the application is viewed in the interest of justice.

- Be Protective. A key protection for any §1782 discovery target is a well-crafted and forward looking protective order that will limit the litigant's use of the discovery in future proceedings. In particular, strict prohibitions on use of discovery in support of U.S. litigation can serve to create barriers to future U.S. litigation, including if the provisions are stringent enough to prevent the litigant from making allegations in a complaint based on information learned through the §1782 discovery.

While it remains to be seen what the next 15 years will bring, employing these strategies will help vulnerable discovery targets to manage risk against what over time has proven to become a more permissive and extensively used tool for U.S. discovery.

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