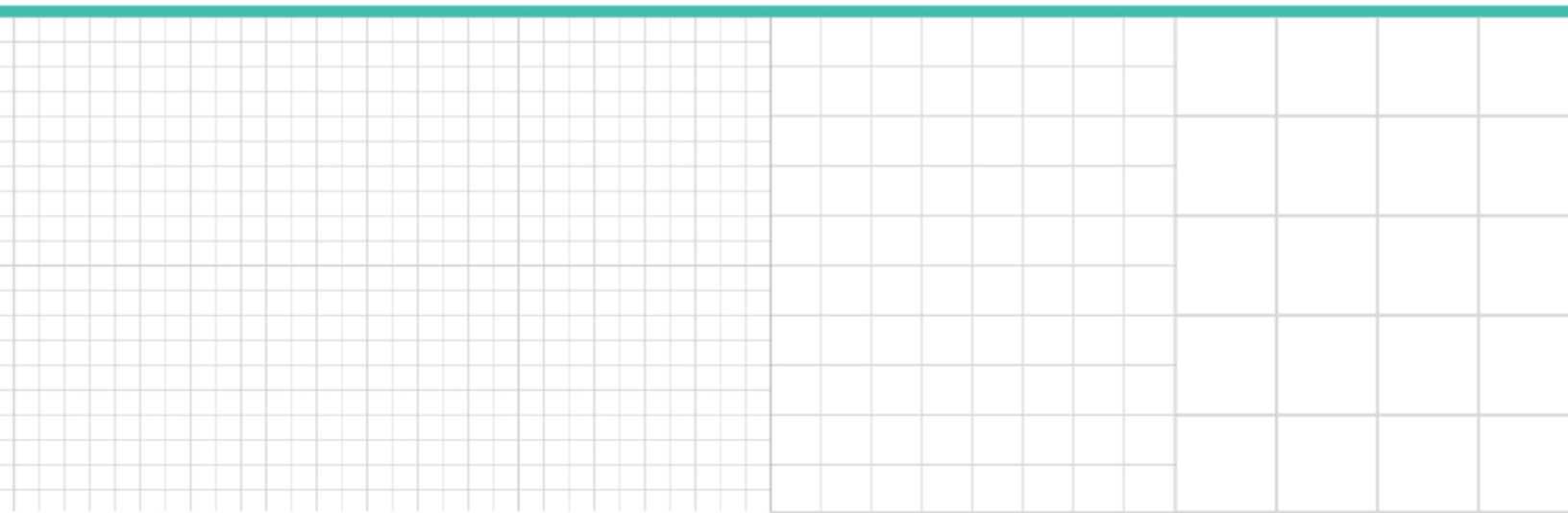


Professional Perspective

**Section 1782 Litigation:
Dissecting Personal
Jurisdiction & Scope of
'Tribunal'**

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Section 1782 Litigation: Dissecting Personal Jurisdiction & Scope of 'Tribunal'

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For Section 1782 discovery to apply, the court must establish personal jurisdiction over the responding party. This issue has not been treated uniformly by courts across the country. In addition, courts have disagreed on what constitutes a foreign tribunal in the context of Section 1782, and this issue has been the focus of extensive litigation.

This installment of a three-part series on Section 1782 litigation focuses on the following questions:

- Must there be a showing of personal jurisdiction for a respondent to be considered “in the district of the court” as required by the statute?
- Are foreign arbitration panels a type of foreign “tribunal” within the ambit of Section 1782?

Personal Jurisdiction

Section 1782 allows discovery to be made of a person who “resides or is found” in the district court to which the application is made. Whether this requires the district court to have personal jurisdiction over the respondent is an unsettled question that has been answered in conflicting ways in different federal districts. As Intel was headquartered in the Northern District of California, the district in which AMD brought its Section 1782 application against Intel, this question was not before the Supreme Court, so *Intel Corp. v. Advanced Micro Devices, Inc.*, [542 U.S. 241](#) (2004) provides no guidance.

Corporate Respondents

Personal jurisdiction is divided into “general jurisdiction,” which allows the state's courts to hear all claims against that person,” and “specific jurisdiction,” which allows only claims that arise from the person's activities in the forum state.

This question has gained importance since the Supreme Court's decisions in *Daimler AG v. Bauman, et al.*, [571 U.S. 117](#) (2014) and *BNSF Ry. Co. v. Tyrrell*, [137 S. Ct. 1549](#) (2017). In *Daimler*, the Supreme Court held that a court could exercise general jurisdiction to hear all claims against an out-of-state corporate defendant only if its contacts were so “continuous and systematic as to render it essentially at home” in the state.

The “paradigm all-purpose forums” were the corporation's jurisdiction of incorporation and the jurisdiction where its principal place of business is located, although the court left open the possibility that “in an exceptional case ... a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State.” Following *BNSF*, in which the Supreme Court fully endorsed its opinion in *Daimler*, it appears difficult to envisage what the “exceptional case” might be.

Where a Section 1782 application is made against a non-U.S. corporate respondent, it is unlikely that the applicant will satisfy the *Daimler/BNSF* test for general jurisdiction as it would require demonstration of a sufficient link between the claim and the respondent's activities in the forum state.

Accordingly, in a case involving a foreign corporate respondent, the specific district court's approach to the question of personal jurisdiction will be critical to the success of the application.

Southern District of New York

Although the Second Circuit has not yet ruled on the issue, in a number of recent cases, judges sitting in the Southern District of New York have refused to grant a Section 1782 application on the basis that the court lacked personal jurisdiction over the respondent.

In *Australia and New Zealand Banking Group Limited v. APR Energy Holding Limited*, 17-MC-00216 (S.D.N.Y. Sept. 1, 2017), applicant APR Energy Holding Limited made a Section 1782 application seeking discovery from Australia and New Zealand Banking Group Limited for use in Australian proceedings to which ANZ was not a party. Judge Caproni held that there was “no meaningful distinction from a constitutional standpoint between a subpoena issued to a nonparty pursuant to Rule 45 [of the FRCP] and a subpoena issued to a nonparty pursuant to Section 1782.”

As the Second Circuit had “held unequivocally that a federal court must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under [FRCP] 45,” the court held that it had no jurisdiction to issue a subpoena against ANZ unless APR could demonstrate that the court had personal jurisdiction over ANZ. As the court had neither general (because ANZ was a foreign corporation with its principal place of business in Australia) nor specific (because APR’s claims were unrelated to ANZ’s contacts with New York) jurisdiction over ANZ, APR’s application was denied.

This decision has been followed in two other recent cases in the SDNY: *In re Sargeant*, [278 F. Supp. 3d 814](#), 820-21 (S.D.N.Y. 2017) (holding that foreign litigation funder did not reside and was not found in New York despite having an office in New York, because that was insufficient to establish general jurisdiction under *Daimler* and *BNSF*); and *In re Fornaciari*, No. 17-mc-521, (S.D.N.Y. Jan. 29, 2018) (refusing to grant a Section 1782 application against a foreign bank that had an office in the district as it was not at “home” in the district and the discovery was unrelated to its connections with the forum).

There are post-*Daimler* cases to the contrary in the SDNY, in which courts have found that a foreign corporation is “found” in the district on the basis of systematic and continuous activities in the district. See, e.g. *In re Kleimar N.V.*, [220 F. Supp. 3d 517](#), 521 (S.D.N.Y. 2016) (corporation “found” in district based on trading activity on New York Stock Exchange, presence of agent for service of process, ties to indirect wholly-owned subsidiary licensed to do business in New York, and conduct of “systematic and regular business in ... New York”); *In re Republic of Kazakhstan*, [110 F. Supp. 3d 512](#), 515 (S.D.N.Y. 2015) (“daily practice of law in this jurisdiction” by New York-based partners gave English law firm “the requisite systematic and continuous presence to be found here for purposes of Section 1782”)

However, neither *Kleimar* nor *Republic of Kazakhstan* discuss *Daimler* or otherwise mention personal jurisdiction, and both also predate *BNSF*. Moreover, absent a showing that the foreign claim had sufficient connections to the forum to create specific jurisdiction over the respondent, the kinds of contacts listed in those two cases are precisely the types of contacts that were found insufficient in *Daimler* and *BNSF* to create general personal jurisdiction.

If the court in *Kleimar* and *Republic of Kazakhstan* had required a showing of personal jurisdiction, the outcome would likely have been different. When this issue finally comes before the Second Circuit, the outcome will have huge significance for Section 1782 applications in the Southern District of New York, which, for many foreign corporations, particularly financial institutions, is the principal location of their contacts with the U.S.

No Requirement of Personal Jurisdiction

Courts in other circuits, especially in the Ninth Circuit, have grounded the availability of Section 1782 on the corporation engaging in activity within the district, without conducting a personal jurisdiction analysis. See, e.g., *Grupo Mex. SAB de CV v. SAS Asset Recovery, Ltd.*, [821 F.3d 573](#), 575-77 (5th Cir. 2016) (Cayman Islands company “indisputably ‘resides or is found in’ the district” based on the fact that it had office space and personnel there); *In re Super Vitaminas, S.A.*, No. 17-mc-80125-SVK, (N.D. Cal. Nov. 20, 2017) (corporation “found” in the district because it maintained offices there); *In re TPK Touch Sols. (Xiamen) Inc.*, No. 16-mc-80193-DMR, (N.D. Cal. Nov. 17, 2016) (same); *In re Republic of Ecuador*, Nos. C 11-80171, C 11-80172 (N.D. Cal. Sep. 23, 2011) (same); *In re Qualcomm Inc.*, [162 F. Supp. 3d 1029](#), 1036 (N.D. Cal. 2016) (“Through

these in-district offices, [the corporations] conduct systematic and continuous local activities and thus may be found within the Northern District for the purposes of Section 1782.”)

Notably, of the post-*Daimler* cases cited above, only the *Super Vitaminas* court referred to *Daimler* and then only in a cursory footnote. (“Other districts apply a more stringent standard for determining whether a corporation is “found” in a district for purposes of § 1782. See *In re Sargeant*, No. 17MC374, [2017 WL 4512366](#), at *4 (S.D.N.Y. Oct. 10, 2017) (adopting *Daimler* AG standard such that a corporation must have affiliations “continuous and systematic as to render [it] essentially at home in the forum [s]tate,” in order to be found in the district under § 1782). However, the Court is unaware of any Northern District of California cases adopting this standard, and thus finds that Microsoft is found in this District.”)

Application to Individual Respondents

While *Daimler* may assist corporate respondents to quash subpoenas under Section 1782 in certain jurisdictions, it does not assist individual respondents. In *In re Edelman*, [295 F.3d 171](#) (2d Cir. 2002), the Second Circuit held that, if an individual is served with a subpoena while physically present in the district of the court that issued the discovery order, he is “found” in that district for purposes of Section 1782. The unfortunate respondent in *Edelman* was a French citizen temporarily on business in New York City, who was served with a subpoena in a New York City art gallery. The *Edelman* court relied on *Burnham v. Superior Court of California*, [495 U.S. 604](#) (1990), in which the Supreme Court authorized the exercise of personal jurisdiction over an individual based on mere physical presence in the jurisdiction. (“[if] so-called tag jurisdiction is consistent with due process, we do not think that § 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more.”).

However, absent personal service, an individual is not found in the district merely because he or she spends time there. The distinction is neatly illustrated by *In re Godfrey*, [526 F. Supp. 2d 417](#) (S.D.N.Y. 2007), in which the petitioners applied under Section 1782(a) for subpoenas against three foreign executives of a foreign corporation. Although the corporation had an office in New York and all three executives travelled to New York from time to time, the court upheld the subpoena only against the executive who had been personally served while in New York, ruling that only he was “found” in the district for the purposes of Section 1782.

Therefore, it may be advisable for individuals who hold information that is relevant to foreign litigation to minimize travel to the U.S., particularly if that information is located in the U.S.

Foreign Arbitration Panels

Modern international disputes are frequently resolved in arbitration conducted by private arbitral bodies, not in proceedings conducted by courts. There is a circuit split regarding whether (and, if so, which) private arbitral bodies count as “foreign tribunals” for the purposes of Section 1782. This split derives in part from dicta in the *Intel* case, which did not involve an arbitral panel, in which the Supreme Court quoted with approval the following passage from an article by Hans Smit, who played an integral role in drafting the 1964 amendments to Section 1782: “The term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”

Some courts have applied the *Intel* dicta to allow Section 1782 discovery in support of private arbitrations generally. Others have declined to apply those dicta (on the basis that *Intel* was a case about the status of the European Commission when it acted as a decision-making body, not about arbitral tribunals) or have focused on whether the arbitral bodies’ decisions are judicially reviewable (focusing on *Intel*’s holding that a federal district court could provide assistance to a complainant in a European Commission proceeding that led to a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court).

Circuit Court Decisions

Only two circuit courts—the Second Circuit and the Fifth Circuit—have ruled on whether foreign arbitral panels are “foreign tribunals.” In the pre-*Intel* cases of *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, [165 F.3d 184](#) (2d. Cir. 1999) and *Republic of Kazakhstan v. Biedermann Intern.*, [168 F.3d. 880](#) (5th Cir. 1999), both the Second and Fifth Circuits, citing legislative history and policy considerations, held that Congress did not intend Section 1782 to apply to private international arbitrations.

In particular, both circuit courts considered that Congress could not have intended to allow persons interested in private international arbitrations to have recourse to more extensive discovery tools than the limited method under the Federal Arbitration Act, [9 U.S.C. § 1](#) et seq., that governs federal district court assistance in obtaining evidence in domestic arbitrations; allowing such extensive discovery would undermine the efficiency of arbitration; and applying Section 1782 to private international arbitrations could create a new category of discovery disputes relating to the categorization of a tribunal as foreign, domestic or international (*NBC*, 165 F.3d at 191-92; *Biedermann*, 168 F.3d.).

Of these two courts, only the Fifth Circuit has ruled on this issue following *Intel*. In *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, [341 Fed. Appx. 31](#) (5th Cir. 2009), the Fifth Circuit followed its *Biedermann* decision in upholding the district court's decision to quash subpoenas seeking discovery in support of an international arbitration in Geneva conducted under United Nations Commission on International Trade Law arbitration rules. The Second Circuit, in contrast, declined to rule on this issue when it was raised in the 2011 case of *Chevron Corp v. Berlinger*, [629 F.3d 297](#) (2d Cir. 2011).

Other circuit courts that confronted this issue have likewise punted when asked to decide this question. For a short time, the Eleventh Circuit was the only circuit court to have ruled that private arbitral tribunals could constitute foreign tribunals, holding that courts should adopt *Intel*'s functional approach to constructing the term “tribunal.” *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, [685 F.3d 987](#), 995 (11th Cir. 2012) (“*Consortio I*”).

(“Consistent with this functional approach, we examine the characteristics of the arbitral body at issue, in particular whether the arbitral panel acts as a first-instance adjudicative decisionmaker, whether it permits the gathering and submission of evidence, whether it has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review.”)

However, less than two years later, the Court *sua sponte* vacated its earlier opinion and refused to answer this question. *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, [747 F.3d 1262](#), 1270, n.4 (11th Cir. 2014) (“We decline to answer this substantial question on the sparse record found in this case.”). Likewise, in *GEA Group AG v. Flex-N-Gate Corp.*, [740 F.3d 411](#), 419 (7th Cir. 2014), the Seventh Circuit merely noted that “the applicability of Section 1782 to evidence sought for use in a foreign arbitration proceeding is uncertain.”

District Court Decisions

Outside the Fifth Circuit, where the law is clear, district court decisions have proven to be a mixed bag. Notwithstanding the Second Circuit's decision in *NBC*, two district courts in that circuit have held that private arbitral tribunals may - in certain circumstances - constitute tribunals under Section 1782.

In *Kleimar*, Judge Marrero, sitting in the Southern District of New York, held that the London Maritime Arbitration Association was a “foreign tribunal” for purposes of Section 1782. *Kleimar*, 220 F. Supp. 3d at 521. Judge Marrero noted that “dictum of the Supreme Court in *Intel* ... suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782.” He also noted that the Second Circuit had not ruled on this issue in light of *Intel*. Finally, he was persuaded by post-*Intel* cases from other courts, which held that the LMAA was a “foreign tribunal” within the meaning of Section 1782. *Kleimar*, 220 F. Supp. 3d at 522. See *In re Owl Shipping, LLC*, No. 14-5655, 2014 U.S. Dist. LEXIS 148088, [2014 WL 5320192](#), at *2, [2014 BL 292057](#), 2 (D.N.J. Oct. 17, 2014) (“Second, the discovery sought is for use in a proceeding before the London Maritime Arbitrators Association, which constitutes a foreign tribunal under Section 1782.”).

Similarly, the Connecticut District Court held that the Arbitration Institute of the Stockholm Chamber of Commerce conducting a private arbitration under UNCITRAL rules was a foreign tribunal because the AISCC's decision was subject to judicial review by the Swedish courts and because "a reasoned distinction can be made between arbitrations such as those conducted by UNCITRAL, a body operating under the United Nations and established by its member states, and purely private arbitrations established by private contract." *OJSC Ukrnafta v. Carpatsky Petroleum Corp.*, 2009 U.S. Dist. LEXIS 109492, *11-12, [2009 BL 365309](#), 4 (D. Conn. Aug. 27, 2009).

Until the Second Circuit rules on whether, post-*Intel*, private arbitral bodies are foreign tribunals for purposes of Section 1782, parties and their advisors face a frustrating lack of clarity on how district courts in the Second Circuit will rule on Section 1782 applications in support of foreign private arbitrations.

Outside the Second Circuit, the first post-*Intel* case to hold that international arbitral tribunals were "tribunals" under Section 1782 was in *In re Roz Trading*, [469 F. Supp. 2d 1221](#) (N.D. Ga. 2006) (holding that the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna is a foreign or international tribunal with the meaning of Section 1782). *Roz* was thereafter followed by *In re: Application of Hallmark Capital Corp.*, [534 F. Supp. 2d 951](#), 957 (D. Minn. 2007) (holding that a private Israeli arbitral body was a "tribunal" for purposes of the statute) and *In re Application of Babcock Borsig AG*, [583 F. Supp. 2d 233](#), 241 (same with respect to the International Chamber of Commerce).

Other courts have drawn a distinction between private commercial arbitrations (to which Section 1782 does not apply) and state-sponsored arbitral bodies. See, for example, *In re Grupo Unidos Por El Canal, S.A.*, 2015 U.S. Dist. LEXIS 50910, *21, [2015 BL 110215](#), 9 (D. Col. Apr. 17, 2015). ("A reasoned distinction can be made between purely private arbitrations established by private contract and matters being adjudicated by state-sponsored adjudicatory bodies of the type presented to the Supreme Court in *Intel*."); *In re Dubey*, [949 F. Supp. 2d 990](#), 993-95 (C.D. Cal. 2013) (private arbitrations contractually agreed on by parties do not fall within Section 1782); *In re Arbitration in London, England*, [626 F. Supp. 2d 882](#), 886 (N.D. Ill. 2009) (§ 1782 applied to state-sponsored arbitral bodies that were subject to reviewability, and private arbitration was not included); *In re Operadora DB Mex., S.A.*, 2009 U.S. Dist. LEXIS 68091, *35, [2009 BL 166426](#), 13 (M.D. Fla. Aug. 1, 2009) ("Because the ICC Panel's authority derives from the parties' agreement, its purpose is fundamentally different than that of a governmental or state-sponsored proceeding."); *In re Oxus Gold*, 2007 U.S. Dist. LEXIS 24061, [2007 WL 1037387](#), at *1, [2007 BL 237647](#), 5 (D.N.J. Apr. 2, 2007) (arbitration panel constituted under UNCITRAL rules pursuant to United Kingdom-Kyrgyz Republic bilateral investment treaty was a "tribunal").

The reasoning in these cases is often flawed. For example, neither the United Nations nor UNCITRAL conduct arbitrations, and the UNCITRAL rules are simply procedural rules, used only in *ad hoc* (non-administered) arbitrations, and parties are free to adopt them as part of their dispute resolution framework. The tribunal in *OJSC Ukrnafta* was precisely the type of private arbitration established by private contract that, on the district court's reasoning, should not have qualified as a tribunal. Likewise, there seems little principled reason to distinguish between investment treaty arbitration and commercial arbitration, as both typically involve arbitrators and rules chosen by the parties, with only limited recourse to local courts. Until the Supreme Court considers this issue, parties outside the Fifth Circuit will continue to face uncertainty over district courts' receptivity to a Section 1782 request in support of international arbitration.

Practice Pointers

When responding to a Section 1782 application, if possible, argue that the court does not have personal jurisdiction

Corporate respondents in the Southern District of New York have successfully resisted Section 1782 applications on the grounds that the court lacks personal jurisdiction over the respondent. While no circuit court has opined on this issue, foreign corporations headquartered outside the U.S. should, where possible, argue that the court lacks personal jurisdiction, first, to knock out the application at the first hurdle and, second, to preserve the issue for appeal.

When seeking discovery in aid of foreign arbitration, if possible, do not file in the Fifth Circuit

In the 2009 *El Paso Corp.* case, despite having the chance to reconsider its position in light of *Intel*, the Fifth Circuit followed its 1999 *Bierdermann* precedent and held that foreign arbitral tribunals were not “foreign tribunals” within the meaning of Section 1782. At the present time, therefore, Section 1782 applications filed in the Fifth Circuit in support of foreign arbitrations appear doomed to fail.

When seeking discovery in aid of foreign arbitration, focus on Intel’s functional factors

A Section 1782 application should include a sworn declaration or affidavit setting out how the foreign arbitral tribunal satisfies the functional test set forth by the Supreme Court in *Intel* and applied in the vacated *Consortio I* decision. District courts have adopted the functional test in determining whether a particular foreign arbitral tribunal is a foreign tribunal.