28 U.S.C. Section 1782(a) - The Good Samaritan for Taking Evidence in the USA for Foreign Arbitrations - A Comparative Analysis

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1. Introduction

Evidence which a party is able (or often un-able) to present plays a critical role in international arbitration. Evidence largely involves documentary evidence, witness testimony and expert witness opinions that could be written and/or oral. Taking of evidence in an international arbitration proceeding is relatively straightforward when parties present documents that are in the custody of parties, and examine witnesses who are employed with the parties or have some relation with the parties, and voluntarily agree to produce documents or provide their testimony during the
However, a unique problem arises in international arbitration when the documents are in the custody of persons who are not parties to the international arbitration, or when the witnesses are third parties who are not employed or have a relationship with the parties to the arbitration, or for any other reason, do not agree to depose voluntarily in international arbitration proceedings. The arbitral tribunal lacks power to compel such production or deposition, even where the documents are relevant and material to the outcome of the case.

In such cases, the role of national courts having jurisdiction over the third parties comes to the fore. If the third parties fall within the jurisdiction of the courts at the seat of arbitration, the courts at the seat could provide assistance to the arbitration proceedings if its civil procedural laws provide for such assistance, and parties agree to seek recourse to the civil procedural laws or the arbitral tribunal imposes a direction on the parties to seek such evidence by application to the courts at seat. If the third parties fall beyond the jurisdiction of courts at the seat, the arbitral tribunal and/or the parties requesting the presentation of such evidence might be required to take recourse to courts in whose jurisdiction the person resides or is found.

The problem of gathering evidence is therefore unique to international arbitration as opposed to domestic arbitration and litigation. It implies recourse to the civil procedural laws of the relevant country upon agreement of parties or a direction imposed by the arbitral tribunal. However, civil procedural laws may not offer a clear remedy to arbitral tribunals or parties in seeking assistance in international arbitration. In the USA, 28 U.S.C. Section 1782 (S. 1782(a)) has come to the fore and under fire with regard to “assistance (by courts) to foreign and international tribunals,” to gather evidence from persons residing or found in the jurisdiction of courts in the USA.

The language of S. 1782(a) has been considered far from clear. There is no consensus on the interpretation of S. 1782(a) and whether it can be used to depose witnesses or order production of documents for assistance to a foreign arbitral tribunal. This article attempts to throw light on the contours of seeking assistance under S. 1782(a); the comparative position in India, United Kingdom and Australia; and practical considerations for parties in international arbitration proceedings.

2. **S. 1782(a)**

S. 1782 provides:

“Assistance (by courts) 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.”

3. The Issue

The bone of contention in an application under S. 1782(a) is, can a non-USA party rely on S. 1782(a) to discover facts from a person residing in the USA for use in a commercial arbitration pending in a foreign country.

4. Application of S. 1782(a) to Arbitral Tribunals

S. 1782 came into force in 1948. Originally, it was confined to ‘produce a document or other thing for use in a proceeding in a judicial proceeding’. In 1964, the term ‘judicial proceeding’ was amended to ‘a proceeding in a foreign or international tribunal’.

Since then, several courts in the USA have considered applications under S. 1782(a) in the context of assistance to an international tribunal. The epicenter of the issue lies in affording a broad interpretation to the term ‘foreign or international tribunal’ to include arbitral tribunals, or a narrow interpretation to apply only to judicial and quasi-judicial tribunals.

One of the earliest decisions on the ambit of S. 1782(a) arose in the case of National Broadcasting Co. v. Beare Sterns and Co.[i] in the year 1999. The Second Circuit Court stated that the text of S. 1782(a) was ambiguous, and adopted a narrow interpretation to exclude arbitral tribunals. It considered the legislative history of S. 1782(a) and stated that there was a lack of intention on the part of Congress to cover private arbitration within the phrase “foreign or international tribunals.” It also took into account policy considerations and stated a broader interpretation would impact the efficiency and cost-effective nature of arbitration. The decision was followed by the Fifth Circuit in the case of Republic of Kazakhstan v. Biedermann, where the Court ruled that S. 1782 requests only applied to “governmental or
However, in 2004, the US Supreme Court threw some light on the possibility to interpret S. 1782(a) broadly in the case of Intel Corporation vs. Advanced Micro Devices Inc. The case did not concern a foreign arbitration. It involved anti-trust proceedings before the European Commission. Hence, it does not squarely cover the issue and hence, does not settle the issue. However, the US Supreme Court considered the legislative history of the S. 1782(a) and observed in an *obiter dicta* that the amendment made in 1964 could extend the ambit of a foreign or international tribunal to include foreign arbitral tribunals. Additionally, the Court considered the language of the provision and stated that the presence of the word ‘may’ offers discretionary power to the courts to permit or deny discovery under S. 1782(a).

The Court laid down certain factors to be taken into consideration by courts while deciding an application under S. 1782(a). These factors include: (i) whether the person from whom discovery is sought is a participant in the foreign proceeding (since S. 1782(a) aid is generally relevant when the party is a non-participant in a proceeding, as opposed to a party who is a participant in a foreign proceeding over which the arbitral tribunal has jurisdiction); (ii) the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign government to receiving U.S. federal court judicial assistance; (iii) whether the S. 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of that country or the U.S.; and (d) whether the requests are unduly intrusive or burdensome.[iii] The lone dissent was given by Justice Breyer, where he stated that the Court had read and extended the scope of the provision to an extent beyond what the Congress would’ve actually intended.

While legislative history does serve as an aid to interpretation of the object and ambit of a provision, courts have increasingly relied on the language of the statutory provision to interpret its ordinary meaning and purpose. In *Intel*, Justice Scalia stated, “the Court’s disposition is required by the text of the statute. None of the limitations urged by petitioner finds support in the categorical language of 28 U. S. C. §1782(a). That being so, it is not only (as I think) improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report, which, inter alia may be contradicted elsewhere. Accordingly, because the statute - the only sure expression of the will of Congress - says what the Court says it says, I join in the judgment.”

The first case to apply the *Intel* decision to arbitral tribunals was the case of *In re Roz Trading*. [iv] Roz Trading entered into a joint venture agreement with the Government of Uzbekistan and a subsidiary of Coca Cola. Due to violent seizure of Roz’s interests in the joint venture, its employees had fled Uzbekistan without carrying essential corporate documents. Under the joint venture agreement, parties had agreed to arbitration of disputes in Austria. Roz filed an application under S. 1782(a) before the District Court in Georgia to compel Coca Cola to produce evidence for use before the arbitral tribunal in Austria. The court relied upon *Intel* and held that an arbitral tribunal fell within the meaning of ‘tribunal’ in S. 1782(a). The Court exercised discretion to allow Roz’s application and held that an order for
discovery was appropriate where the practical availability of documents requested through other means of discovery was uncertain.[v]

In Re Roz Trading was subsequently followed in the case of In re Hallmark Capital Corporation, concerning an arbitration seated in Israel. It was also followed in the case of Re Oxus Gold involving investment treaty arbitration.

5. Recent Cases extending S. 1782(a) to Arbitral Tribunals

More than 15 cases have arisen under S. 1782(a) before the circuit courts and the district courts, resulting in divergent rulings. However, two recent cases of September 2019 and March 2020 have re-ignited the controversy on interpretation of the language of S. 1782(a), tending towards adopting a broader interpretation of the word “tribunal” in S. 1782(a).

In Abdul Latif Transportation (ALJ) Co. v. FedEx Corp.,[vi] ALJ (a Saudi Arabian corporation) entered into two contracts with FedEx International Incorporated (“FedEx International”), a subsidiary of FedEx Corp. Each contract became the subject of a commercial arbitration - one pending in United Arab Emirates (“UAE”), and another in the Kingdom of Saudi Arabia. ALJ filed an application for discovery under S. 1782(a) against FedEx Corp. in the United States District Court for the Western District of Tennessee at Memphis (where FedEx Corp. was headquartered).

ALJ sought a subpoena for documents from FedEx Corp. and deposition testimony of a corporate representative of that company. Although FedEx Corp. was not a party to either of ALJ’s contracts with FedEx International, ALJ sought many pieces of information. ALJ alleged that FedEx Corp. was involved in contract negotiations and performance of the two contracts between ALJ and FedEx International. The US District Court denied ALJ’s request. It stated that “foreign or international tribunal in S. 1782(a) did not encompass either of the two arbitrations” instituted by both parties respectively.

On appeal to the Sixth Circuit, the Court was faced with an issue as to whether the statute used the words “foreign or international tribunal” in a literal sense to include a commercial arbitration. Since the arbitration in Saudi Arabia was dismissed, the court only addressed the availability of discovery for the arbitration in UAE. Parties had agreed to arbitration under the LCIA-DIFC Rules.

It held that that the DIFC-LCIA Arbitration panel is a foreign or international tribunal, and the district court may order S. 1782(a) discovery for use in the proceeding before that panel. It focused on the meaning of ‘tribunal’, and acknowledged that it was ‘hotly disputed’. The Court stated that in determining the meaning of a statutory provision, it must first look to its language, giving the words their ordinary meaning. The ordinary meaning is to be determined retrospectively: i.e. from the time Congress enacted the statute, and discern the meaning from that point in the past. The court considered meaning of the word ‘tribunals’ from evidence of usage of the word preceding its enactment i.e. the sense in which courts used a particular word or phrase. It held that American lawyers and courts in the USA had long used the word 'tribunal' “to encompass private arbitral bodies with the power to bind the contracting parties.”
The Court also relied on dictionaries existing at the time the provision came into force, subsequent dictionaries, the language and design of the statute as a whole, and the context in which the words were used. The court held that there was no ambiguity in the phrase “foreign or international tribunal,” and concluded that S. 1782(a) encompasses private, contracted-for commercial arbitrations.

The latest decision with respect to interpretation of S. 1782(a) arose in March 2020 in the case of Servotronics vs. Boeing, filed before the US District Court of South Carolina (US District Court). Servotronics (a New York electronics supplier) supplied a valve for an engine manufactured by Rolls Royce. The engine was installed in a Boeing-787 Dreamliner aircraft. During testing, the engine caught fire and caused damage to the aircraft. Boeing filed a case against Rolls-Royce for damages, which was settled by Rolls-Royce. Thereafter, Rolls-Royce initiated arbitration against Servotronics in London for indemnification, by claiming that the damage was caused to the aircraft engine due to the allegedly faulty valve supplied by Servotronics.

Servotronics filed an application under S. 1782(a) in the US District Court to obtain testimony of three current and ex-employees of Boeing. It stated that one employee was the chairperson of the Boeing Incident Review Board that investigated the fire, while the other employees had participated in troubleshooting the aircraft engine that caught fire. Servotronics claimed that their evidence would be relevant for the arbitration proceedings between Rolls-Royce and Servotronics in the UK.

The District Court held that S.1782 did not apply to foreign private commercial arbitrations, and dismissed the application. In appeal, the Fourth Circuit reversed the order of the District Court and held that, for the purposes of S. 1782(a), a private arbitration in the United Kingdom can be considered as a ‘foreign or international tribunal’. The Court stated, “Courts must act as an effective surrogate for the benefit of arbitrators and must take evidence if considered necessary by the arbitral tribunal”. It remanded the application to the District Court to decide on merits of the application. From the latest decisions on S. 1782(a), it could be said that courts in the USA are leaning towards providing assistance to international arbitral tribunals. Rolls Royce has filed an appeal against the decision in the US Supreme Court. The decision is awaited at the time of writing.

6. **Other jurisdictions**

In India, the Indian Arbitration and Conciliation Act came into force in 1996 (Indian A&C Act). It is based on the UNCITRAL Model Law. Part I of the Indian A&C Act deals with arbitrations seated in India. Part II deals with recognition and enforcement of awards in arbitrations seated outside India. Section 27 of the Indian A&C Act, provided in Part I, provides court assistance in taking evidence. It states:

27. **Court assistance in taking evidence.**—

1. *The arbitral tribunal, or a party with the approval of the arbitral tribunal, may apply to the Court for assistance in taking evidence.*

2. *The application shall specify—*

   a. *the names and addresses of the parties and the arbitrators;*
(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,—

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(3) The Court may, within its competence and according to its rules on taking evidence, execute the request by ordering that the evidence be provided directly to the arbitral tribunal.

(4) The Court may, while making an order under sub-section (3), issue the same processes to witnesses as it may issue in suits tried before it.

(5) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitral tribunal during the conduct of arbitral proceedings, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitral tribunal as they would incur for the like offences in suits tried before the Court.

(6) In this section the expression “Processes” includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Since S. 27 of the Indian A&C Act is provided in Part I of the Indian A&C Act, it was available for arbitrations seated in India. However, the amendment to Section 2(2) of the Indian A&C Act in 2015 extended the scope of S. 27 in Part I of the Indian A&C Act to arbitrations seated outside India, subject to an agreement to the contrary by the parties. The relevant provisions is provided below:

“2(2) This Part shall apply where the place of arbitration is in India.

Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.”

Thus, parties involved in arbitration proceedings outside India could take recourse to S. 27 of the A&C Act to compel production of documents or testimony of witnesses in India. In order to seek assistance, the arbitral tribunal, or a party with the approval from the arbitral tribunal, may approach the courts. The evidence may be ordered to be given directly to the arbitral tribunal. The Court can also issue processes to include commissions for the examination of witnesses. Further, a failure to abide by the order of the court directing such production or deposition is considered as contempt of court. S. 27 is not adjudicatory in nature. It has a discretionary power where it must exercise discretion in granting assistance to the tribunals. Thus, unlike USC S. 1782(a) which appears to be open to ambiguity, S. 27 of the Indian A&C Act provides a clear recourse to courts for gathering evidence in
foreign seated arbitrations.

In the United Kingdom, Section 43 (3) of the English Arbitration Act, 1996 states that the Court procedures with respect to securing attendance of witnesses before the arbitral tribunal to give testimony or produce documents, could be used only where the arbitral proceedings are conducted in England, Wales or Northern Ireland. Further, an application can be made to the English courts only where all parties agree to the use of court procedures or with the permission of the arbitral tribunal. This is a narrower provision than S. 27 of the Indian A&C Act and 28 U.S.C. S. 1782(a).

7. **Practical Considerations for Parties in International Arbitration**

Convincing the arbitral tribunal on the merits of the application for production would go a long way in seeking assistance of courts. In any application concerning production of documents, at the outset, the arbitral tribunal decides as to whether or not it must order production of the requested documents based on relevance and materiality of the documents sought. Additionally, the arbitral tribunal would also consider factors such as unreasonable burden, proportionality and considerations of fairness and equality. The arbitral tribunal would weigh the materiality of the outcome against proportionality, including the cost and burden involved in complying with the arbitral tribunal’s order to compel production of documents. This is a discretionary remedy.

Hence, depending on the party requesting or resisting an application for document production or third-party deposition, and the facts and circumstances of the case, it would be worthwhile to demonstrate the existence of the aforesaid factors. In a case where a party resisting the application for production – does so on the basis that the documents requested are not in its possession but in possession of a third party, or refuses to produce the documents even after the tribunal orders its production – taking court’s assistance becomes necessary. It would be ideal if the interested party had the approval of the tribunal in making an application for Court assistance.

The Party requesting such documents could also urge the arbitral tribunal to make an adverse inference against the party refusing to produce the documents despite orders of the Tribunal. This could be an indirect way to compel production of documents. However, the issue of adverse inference is often decided at the conclusion of the arbitral proceedings where-after the affected party may have no option open to re-agitate the issue, in the event the arbitral tribunal does not make an adverse inference.

One might question the civil procedure rules of sophisticated jurisdictions that do not impose upon courts to provide assistance to international arbitral tribunals. However, as stated by the US Supreme Court in *Intel*, there is no need for foreign governments to be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditional reasons that do not necessarily signal objection to court assistance. Further, the fact that a country has not adopted a particular discovery procedure does not necessarily imply that it
would take offense at its use.[vii] As stated In re Application of Asta Medica,[viii] “Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation.”

[i] 165 F 3d 184 (2nd Cir 1999)
[ii] 168 F.3d 880 (5th Cir 1999)
[iii] Intel, 542 U.S. 241 at 264-65
[v] Ibid, pp 1229-1230
[vii] Intel, Opinion of the Court, page 17
[viii] S. A., 981 F. 2d 1, 6 (CA1 1992)

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