Leveraging Liberal American Discovery Rules in Non-U.S. Cases

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ARTICLE OUTLINE

As every international litigator should know, American courts have the ability to compel the production of evidence for use in international proceedings under Title 28 of the United States Code. In the last five years, there has been a significant increase in applications filed with courts under the governing statutory provision, 28 U.S.C. § 1782. As a consequence, there is a good deal of new decisional law that deserves a close look.

Section 1782 is now widely recognized as a potential game-changer for non-U.S. litigators: in the appropriate circumstances, they can take advantage of liberal U.S. discovery rules to obtain evidence against an opponent or adverse third-party witness. By way of a somewhat dramatic example, a French CEO on vacation in New York can be served with a deposition subpoena relating to litigation in Argentina, to which she is not a party. Without intervention by U.S. counsel, the CEO may find herself in a seven-hour deposition in Manhattan, facing court sanctions and/or contempt if she does not appear. Startlingly, the foreign proceeding need not even be filed and pending; it is enough that the litigation be "in reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247, 124 S. Ct. 2466, 159 L. Ed. 2d 355, 71 U.S.P.Q.2d 1001, 2004-1 Trade Cas. (CCH) ¶ 74453, 64 Fed. R. Evid. Serv. 742, 58 Fed. R. Serv. 3d 696 (2004).

I. Overview of the statute and its requirements

U.S. law does not prevent a person or entity within the U.S. from voluntarily providing evidence for use in a non-U.S. proceeding. *See* 28 U.S.C. § 1782(b). In the absence of voluntary cooperation, however, § 1782(a) provides that "a foreign or international tribunal" or "any interested person" may apply for an order from a U.S. district court requiring the provision of testimony or documents by a person who "resides or is found" in the district, so long as the evidence sought is "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a).

If these predicate statutory requirements are met, § 1782 "authorizes, but does not require, a federal district court to provide assistance." *Intel Corp.*, 542 U.S. at 255. Under *Intel*, federal district courts must consider four discretionary factors to determine if assistance is warranted: (1) whether aid is sought to obtain discovery from a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance; (3) whether the applicant is attempting to use § 1782 to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the discovery requests are unduly intrusive or burdensome. *Intel Corp.,* 542 U.S. at 264-65.

A district court's discretion in applying the *Intel* factors "must be exercised in light of the twin aims of the statute: providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts." *Symeou v. Hornbeam Corp.* (*In re Hornbeam Corp.),* No. 17-658-cv, 722 Fed. Appx. 7, 10 (2d Cir. 2018) (internal quotation marks omitted). There is no statutory requirement that the applicant seek the permission of the foreign tribunal before seeking discovery in the United States. Courts have rejected "such a quasi-exhaustion requirement," reasoning that it lacks support in the statute and "runs counter to its express purposes." *Mees v. Buiter*, 793 F.3d 291, 303, 43 Media L. Rep. (BNA) 2045 (2d Cir. 2015) (internal quotation marks omitted).

Section 1782 petitions are regularly filed on an *ex parte* basis.

> Consequently, orders granting § 1782 applications typically only provide that discovery is 'authorized,' and thus the opposing party may still raise objections and exercise its due process rights by challenging the discovery after it is issued via a motion to quash, which mitigates concerns regarding any unfairness of granting the application *ex parte*.

In re: Ex Parte Application Varian Medical Systems International AG, No. 16-mc-80048, 2016 WL 1161568, at *2 (N.D. Cal. 2016). A court that grants a discovery request sought through the § 1782 application "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." 28 U.S.C. § 1782(a). To the extent the court does not order otherwise, "the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a). In practice, this is the typical outcome: U.S. rules, those with which the court is most familiar, govern.

The district court order will typically appoint a person, often one of the attorneys who filed the application, to take the evidence sought. Under the statute, the appointee "has power to administer any necessary oath and take the [sought] testimony or statement." 28 U.S.C. § 1782(a). In the case of a § 1782 request by a foreign government, the court may appoint an Assistant U.S. Attorney to take evidence.

II. Drafting and filing the § 1782 request

Section 1782 requests can be initiated in one of two ways: (1) a letter rogatory issued from a non-U.S. tribunal may be delivered directly to the district court (usually included as part of an application prepared by a party or other interested person); or (2) an interested person may make an application directly to the district court. Both letters rogatory and applications from interested persons are usually considered by a district court *ex parte*; accordingly, the requesting party generally serves the documents on the entity or individual from whom discovery is sought, as well as on the other parties to the underlying foreign action. Orders granting or denying applications for discovery are immediately appealable pursuant to 28 U.S.C. § 1291. *Bouvier v. Adelson (In re Accent Delight International Ltd.)*, 869 F.3d 121, 128 (2d Cir. 2017), for additional opinion, see, 696 Fed. Appx. 537 (2d Cir. 2017); *Fuhr v. Credit Suisse AG*, 687 Fed. Appx. 810, 814–15 (11th Cir. 2017) (*per curiam*).

The application should consist of a petition or notice of motion; a memorandum of law; a proposed order or the subpoena to be issued by the court; and an affidavit or declaration. The moving papers must explain what discovery is sought; how the requirements of § 1782 have been met; and why the district court should exercise its discretion to compel disclosure. Accordingly, the moving party should set out any facts about the non-U.S. proceeding that may be relevant to the district court's decision to order the discovery, including (1) the nature of the foreign action; (2) the applicant's interest in the action; (3) the location and address of the person whose material or testimony is being sought; (4) and the relevance of and need for the material or testimony. If a letter rogatory from the non-U.S. court is included as part of the application, it must be translated into English.

III. Meeting the statutory requirements

A. Does the person "reside" or is she "found" in the district?

A court has authority to grant a § 1782 application when the person from whom discovery is sought "resides" or "is found" in the district to which the application is made. These terms are not defined by statute.

1. Corporations

Until recently, courts considering whether a corporation resides or is found in the relevant district applied a general jurisdiction test, asking whether the corporation engaged in substantial and continuous business in the state. The Supreme Court's decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 131 S. Ct. 2846, 180 L. Ed. 2d 796, Prod. Liab. Rep. (CCH) P 18654 (2011) and *Daimler AG v. Bauman*, 571 U.S. 117, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) changed this jurisprudence: for corporate defendants, general jurisdiction is present only in the state of its incorporation or its principal place of business. Where a corporation is not incorporated in the state, and does not have its principal place of business there, general jurisdiction will be present only in the exceptional case where the entity's "operations" in the forum are "so substantial and of such a nature as to render the corporation at home in the State." *Daimler AG*, 571 U.S. at 139 n.19. In *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558, 198 L. Ed. 2d 36, 41 I.E.R. Cas. (BNA) 1809 (2017), the Supreme Court ruled that a corporation was not "at home" in a state even though it had "over [2000] miles of railroad track and more than [2000] employees" there. *BNSF Ry. Co.*, 137 S. Ct. at 1599.

The Southern District of New York, where many if not most § 1782 applications are filed and litigated, has adopted a restrictive view of the statutory terms "reside" and "found," following Supreme Court precedent. For example, in *In re Sargeant*, 278 F. Supp. 3d 814, 821 (S.D. N.Y. 2017), the court denied an *ex parte* application for the issuance of a subpoena under § 1782, holding that a foreign corporation was not at home in New York, as required by *Daimler*, even though it had a New York office. The court reasoned that "if a business entity could be subject to personal jurisdiction anywhere it maintains a physical presence—*i.e.*, an office—then *Daimler*'s holding would be rendered meaningless." *In re Sargeant*, 278 F. Supp. 3d at 821. And it held that to be subject to discovery under § 1782, "a corporate entity must at the very least be subject to the court's general jurisdiction under *Daimler*." *In re Sargeant*, 278 F. Supp. 3d at 821.

Sargeant reflects the uniform thinking of the Southern District. *See, e.g.*, *Matter of Fornaciari for Order to Take Discovery Pursuant to 28 U.S.C. § 1782,* No. 17mc521, 2018

WL 679884, at *2 (S.D. N.Y. 2018) ("[T]o the extent [the applicant] premises general jurisdiction on the mere existence of Royal Bank's offices in this District, [that] argument is foreclosed by *Daimler.*"); *Australia and New Zealand Banking Group Limited v. APR Energy Holding Limited,* No. 17-mc-00216, 2017 WL 3841874, at *2 (S.D. N.Y. 2017), appeal withdrawn, 2018 WL 1611651 (2d Cir. 2018) (court had no reason to consider if ANZ Bank was "found" in the district because enforcement of the subpoena against the bank would violate its due process rights under *Daimler*). In *Sae Han Sheet Co., Ltd. v. Eastman Chemical Corp.,* No. 17 CIV. 2734, 2017 WL 4769394, at *7 (S.D. N.Y. 2017), the court, citing *Daimler*, ruled that although the company "had substantial and continuous contacts with New York by making sales here and transporting [products] through its ports," these contacts did not make the company "at home" in New York. *Sae Han Sheet Co., Ltd.*, 2017 WL 4769394, at *7. The court also rejected the argument that registering to do business in New York subjects a corporation to the state's general jurisdiction.

Other jurisdictions have taken a more liberal view of the statutory requirements, even post-*Daimler. See, e.g.*, *Super Vitaminas, S. A.*, No. 17-MC-80125, 2017 WL 5571037, at *2 (N.D. Cal. 2017) (Microsoft "found" in district because it maintained two offices there) (internal quotation marks omitted); *Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd.*, 821 F.3d 573, 575–77 (5th Cir. 2016) (Cayman Islands company "resides or is found" in the district based on the fact that it had office space and personnel there) (internal quotation marks omitted).

Specific personal jurisdiction, as opposed to general jurisdiction, "concerns a non-resident defendant's contacts with [the state] only as those contacts relate [ ] to the plaintiff's cause of action." *Wertheim Jewish Education Trust, LLC v. Deutsche Bank AG,* No. 17-CV-60120, 2017 WL 6313937, at *8 (S.D. Fla. 2017) (second alteration in original) (emphasis and internal quotation marks omitted). However, "[t]he case law regarding specific personal jurisdiction in the context of nonparty discovery requests is sparse and unsettled." *Australia and New Zealand Banking Group Limited*, 2017 WL 3841874, at *5. And "[w]hether section 1782's requirement that the person be found or reside in the district equates to a requirement that the court have personal juris-

diction over the person in order to enforce a section 1782 subpoena is unclear." *Australia and New Zealand Banking Group Limited*, 2017 WL 3841874, at *3. Generally, a court will have personal jurisdiction if there was proper service, there was a statutory basis to exercise personal jurisdiction, and the exercise of jurisdiction comports with due process. This means personal jurisdiction over a corporation will exist "if the corporation's activities within the jurisdiction of the court are closely related to the lawsuit or . . . to [the] subpoenas . . . issued within the jurisdiction." *Australia and New Zealand Banking Group Limited*, 2017 WL 3841874, at *5 (third alteration in original) (internal quotation marks omitted). That test has been applied to a non-party. *See Gucci America, Inc. v. Weixing Li*, 135 F. Supp. 3d 87, 98–99 (S.D. N.Y. 2015).

This too is a developing area of law with respect to § 1782 applications. The key question is whether personal jurisdiction alone—contacts with a jurisdiction that relate to the dispute—in the absence of general ("at home") jurisdiction, is enough for purposes of the § 1782 "found" test. (While this jurisdictional issue was squarely raised in the Second Circuit appeal in *Australia and New Zealand Banking Group Limited v. APR Energy Holding Limited*, that appeal was recently withdrawn.)

2. Individuals

The key ruling as to individuals is *Edelman v. Taittinger (In re Edelman)*, 295 F.3d 171, 52 Fed. R. Serv. 3d 1226 (2d Cir. 2002), which holds that an individual is "found" in a judicial district under § 1782 if he is personally present there. In *Edelman*, a French citizen was personally served with a subpoena while visiting an art gallery New York, after a § 1782 application had been filed and a court had ordered the taking of depositions. The Second Circuit ruled that "if a person is served with a subpoena while physically present in the district of the court that issued the discovery order, then for the purposes of § 1782(a), he is 'found' in that district." *In re Edelman* at 180. It reasoned that tag jurisdiction was sufficient to subject a person to liability, therefore it was sufficient to subject a potential witness to discovery. *In re Edelman* at 179. One court has opined that *Edelman* "merely represents a common sense holding," and "does not indicate an intention to make the availability of discovery

under § 1782 subject to the vagaries of individual states' rules of service of process and personal jurisdiction." *In re Application of MTS Bank,* No. 17-21545, 2017 WL 3276879, at *5 (S.D. Fla. 2017) (internal quotation marks omitted). Whether the individual must be found in the district at the time of the court's grant of a § 1782 order is not clear.

Edelman, a pre-*Daimler* decision, remains good law when applied to individuals. See *In re RSM Production Corporation,* No. 17mc213, 2018 WL 1229705 (S.D. N.Y. 2018) (No jurisdiction where target individual not served with process while physically present in the district, as required by *Edelman*). The *Edelman* decision relied on the Supreme Court plurality opinion in *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 608, 110 S. Ct. 2105, 109 L. Ed. 2d 631 (1990), upholding the exercise of personal jurisdiction based on the traditional practice of "tagging" an individual who was temporarily in the state. The court in *In re Sargeant* explained that "*Edelman* does not control the outcome" in cases involving corporate respondents, "because *Burnham's* holding applied only to individuals, not corporate entities." *In re Sargeant*, 278 F. Supp. 3d at 821; *see Martinez v. Aero Caribbean*, 764 F.3d 1062, 1067–69, 1071 (9th Cir. 2014) (service of summons and complaint on foreign defendant's vice president while he was in California did not provide personal jurisdiction over defendant since "*Burnham* does not authorize tag jurisdiction over corporations").

Individuals may also be subject to jurisdiction if they "reside in" the relevant district. This can be a straightforward inquiry: a lawyer who works on Chambers Street and lives in Tribeca clearly resides in the Southern District of New York. But the issue of residency (equated sometimes with domicile) can be more opaque. In these circumstances, to determine whether an individual resides in a district, courts consider these factors: "(1) the location of a spouse or children, (2) ownership of property, (3) location of filing for tax purposes, (4) amount of time spent in the United States, and (5) location of full time employment." *In re Matter of Application of Oxus Gold PLC,* No. MISC. 06-82, 2006 WL 2927615, at *5 (D.N.J. 2006). In *In re Oxus Gold*, the court held that the respondent, who leased an apartment in New Jersey, was registered to vote in New Jersey, and travelled to New Jersey from Russia two months a year to vacation in the

state with his family, had sufficient contacts to be a resident of the state. The decisions vary with the facts. *See, e.g.*, *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 193 (S.D. N.Y. 2006) (Dutch national did not reside in New York for the purposes of § 1782; he resided in Brussels and worked full time in his firm's Brussels office even though he was a partner at a New York firm and a member of the New York bar.).

It is an open question whether a U.S. court can compel a witness served with a § 1782 subpoena via "tag jurisdiction" to return here from a foreign home to provide testimony. Similarly, it is unsettled whether a corporation that is held to reside, or be found, in the U.S. can be compelled to bring a corporate officer, director or agent from outside the U.S. to testify when the testimony is for use in a foreign proceeding.

B. Is the request made by "an interested person" or a foreign or international tribunal?

The term "interested person" is broadly construed. It extends beyond litigants to foreign and international officials as well as any other person who possesses a "reasonable interest" in obtaining judicial assistance. *Intel Corp.*, 542 U.S. at 256–57 (internal quotation marks omitted). *See, e.g.*, *In re Ex Parte Application of Jommi,* No. C13-80212, 2013 WL 6058201, at *3 (N.D. Cal. 2013) ("Petitioner is the complainant in the criminal proceeding and thus an interested person for purposes of § 1782(a)."). At least one court has ruled that a sovereign is an "interested person" for purposes of § 1782. *In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, 110 F. Supp. 3d 512 (S.D. N.Y. 2015). The court observed that while "[s]everal courts have found that a sovereign is not a 'person' who can be ordered to produce documents . . . those cases do not address whether a sovereign can use section 1782 to *obtain* discovery." *In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. § 1782*, 110 F. Supp. 3d at 515 (emphasis omitted).

The interested person requirement "considerabl[y] overlap[s]" with the "for use in a proceeding" requirement, discussed below. *Certain Funds, Accounts and/or Investment Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 118 (2d Cir. 2015) (internal quotation marks omitted). Accordingly, the fact that an individual or entity may have a financial interest in

the outcome of a proceeding does not confer interested person status. *Certain Funds, Accounts and/or Investment Vehicles* at 119 (providing example of entities that may have a financial interest in litigation "to which they have no direct connection").

C. Does the discovery request seek testimony or the production of a document or "other thing"?

Section 1782 permits the taking of a deposition or an unsworn statement. It also encompasses requests for documents or "other things." Several courts have held that the statute does not permit service of interrogatories or requests for admissions. *See, e.g.*, *Fleischmann v. McDonald's Corp. (In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil)*, 466 F. Supp. 2d 1020, 1033, 25 I.E.R. Cas. (BNA) 1482 (N.D. Ill. 2006).

The statute contains its own limitation regarding privileged documents or testimony: "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." 28 U.S.C. § 1782(a). In addition, the general rules governing discoverability in U.S. cases provide for challenges based on privilege. Fed. R. Civ. P. 26(b)(1), 45(c)(2)(A).

D. Is the evidence sought *for use in a proceeding* in a foreign or international tribunal, including criminal investigations?

1. The "for use" requirement

"[T]he question under the statute is whether an application may make 'use' of the discovery sought, not whether the foreign tribunal will ultimately find it 'useful,' a consideration that comes into play only in the context of the discretionary *Intel* factors." *In re an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, No. 17-1466, 2017 WL 3708028, at *4 (D.D.C. 2017). Accordingly, the " 'for use' requirement "is not an exacting one.' " *In re an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, 2017 WL 3708028, at *4. Rather, "the burden imposed upon an application is *de minimis*." *In re an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding*, 2017 WL 3708028, at *4 (internal quotation marks omitted).

This requirement can be met even if there is no pending foreign proceeding, so long as a proceeding is reasonably contemplated. *See Intel Corp.*, 542 U.S. at 258–59. To demonstrate that the action is within reasonable contemplation, an applicant "must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye." *Certain Funds, Accounts and/or Investment Vehicles*, 798 F.3d at 123–24; *accord Mees*, 793 F.3d at 298 (evidence is of use if it will be employed "with some advantage or serve some use in the proceeding," but "not necessarily something without which the applicant could not prevail"); *see also LEG Q LLC v. RSR Corporation,* No. 3:17-cv-1559, 2017 WL 3780213, at *6 (N.D. Tex. 2017) (test met where applicant was in the process of pre-action correspondence that typically precedes a shareholder derivative action); *In re Kiobel,* No. 16 CIV. 7992, 2017 WL 354183, at *3 (S.D. N.Y. 2017) (test met where summons drafted, legal aid applied for, and steps taken to toll the limitations period). In *Optimal Inv. Servs., S.A. v. Berlamont (In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings)*, 773 F.3d 456 (2d Cir. 2014), the court of appeals found that discovery was available to a Swiss criminal complainant who sought documents that would "provide to a Swiss investigating magistrate overseeing a criminal inquiry related to a Bernard Madoff 'feeder fund' in Switzerland." *In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings*, 773 F.3d at 457.

On the other hand, in *Sargeant*, the court held that potential proceedings that might or might not be brought, depending on what discovery turned up, were "embryonic" and thus not "within reasonable contemplation." *In re Sargeant*, 278 F. Supp. 3d at 823 (internal quotation marks omitted). And in *Certain Funds, Accounts and/or Investment Vehicles,* 798 F.3d at 120, the court held that the "for use" requirement was not met where applicants "had no means of injecting the evidence into the proceeding since they were not parties or sufficiently related to parties, and lacked participation rights."

Courts disagree as to whether § 1782 can be used to obtain documents located overseas. The language of the statute "requires only that the party from whom discovery is sought

be 'found' here; not that the documents be found here." *In re Stati,* No. 15-MC-91059, 2018 WL 474999, at *5 (D. Mass. 2018) (internal quotation marks omitted). In *Sergeeva v. Tripleton International Limited*, 834 F.3d 1194, 95 Fed. R. Serv. 3d 985 (11th Cir. 2016), the Eleventh Circuit ruled that § 1782 reaches "responsive documents and information located outside the United States" in the "possession, custody, or control of" the compelled party. *Sergeeva* at 1200. The court reasoned that

> the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a *per se* bar to discovery under § 1782. To hold otherwise would categorically restrict the discretion Congress afforded federal courts to allow discovery under § 1782 'in accordance with the Federal Rules of Civil Procedure.' 28 U.S.C. § 1782(a). This, we cannot do.

Sergeeva, 834 F.3d at 1200. Under Eleventh Circuit law, therefore, the statute can be used to compel production of documents in the possession, custody or control of foreign affiliates. Other courts, however, have concluded that § 1782 does not reach documents located abroad. *See In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d 1029 (N.D. Cal. 2016) (collecting cases rejecting an extraterritorial application of § 1782).

There is no disagreement that the statute does not apply when a non-party seeks evidence within the foreign court's jurisdiction. *See In re Application of RSM Production Corporation v. Noble Energy, Inc.*, 195 F. Supp. 3d 899, 907 (S.D. Tex. 2016) ("[T]he court does not believe it appropriate to order the parent company to produce documents and deponents from the Israeli office of its subsidiary [for use in an Israeli proceeding]."); *In re Barnwell Enterprises Ltd*, 265 F. Supp. 3d 1, 15–16 (D.D.C. 2017) ("[T]he Court sees no reason to reject Petitioner['s] application out of hand[,] simply because it might require the production of documents currently located in Kenya or France. Of course, to the extent that Petitioners are seeking physical documents from ECP that are in the possession of ECP Africa and located in the jurisdiction of the Ugandan or Mauritian courts, their application will be denied.").

A person who has lawfully obtained discovery for use in a foreign proceeding is not prohibited from using that discovery elsewhere, unless the district court has so ordered. The

Second Circuit observed, in *Bouvier v. Adelson (In re Accent Delight International Ltd.)*, 869 F.3d 121 (2d Cir. 2017), for additional opinion, see, 696 Fed. Appx. 537 (2d Cir. 2017), that courts have authority to issue § 1782 orders that restrain the parties from using the discovery for other purposes, including as evidence in other litigation. "These common restrictions would be superfluous if Section 1782 by its own terms prohibited successful applicants from using the documents elsewhere." *In re Accent Delight International Ltd.* at 135.

2. The "foreign or international tribunal" requirement

Section 1782 requires that the information or documents sought be "for use in a proceeding in a foreign or international tribunal." Congress' use of the term "tribunal" was intended to "ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.' " *Intel Corp.*, 542 U.S. at 249, 258 (the types of proceedings for which discovery may be sought include "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts") (internal quotation marks omitted). Courts generally look to whether the foreign proceeding is adjudicative in nature. *See In re Stati*, 2018 WL 474999, at *4 (D. Mass. 2018) ("The Stockholm court is acting as a neutral, adjudicative decision-maker as opposed to performing a prosecutorial function.").

The statute, however, also applies when the evidence sought is for "criminal investigations conducted before formal accusation," a textual addition made in 1996. 28 U.S.C. § 1782(a). The Second Circuit, applying this language, concluded that § 1782 applied to a Swiss criminal investigation conducted before formal accusation by a Swiss magistrate. *Optimal Inv. Servs., S.A. v. Berlamont (In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings)*, 773 F.3d 456 (2d Cir. 2014). The court observed that "[t]he Swiss criminal investigation . . . is exactly the type of proceeding that the 1996 amendments to the statute were intended to reach." *In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings* at 461; *see*

also Lazaridis v. International Centre for Missing and Exploited Children, Inc., 760 F. Supp. 2d 109, 113 (D.D.C. 2011), aff'd, 473 Fed. Appx. 2 (D.C. Cir. 2012) (denying discovery but opining that a Greek criminal investigation conducted by a magistrate fell within the compass of the statute), *aff'd per curiam*, 473 Fed. Appx. 2 (D.C. Cir. 2012).

While courts have ruled that investor-state arbitration panels (those that arise from treaty obligations in bilateral or multilateral investment treatises) are covered by § 1782, courts are divided as to whether private international arbitrations constitute tribunals. *Compare In re Application of Grupo Unidos por el Canal S.A., Applicant,* No. 14-mc-80277, 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015) ("Having reviewed the language of Section 1782, its legislative history, and the above cases, this court concludes that private arbitrations established by contract do not fall within the meaning of 'tribunal' under Section 1782."), *with In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D. N.Y. 2016) (tribunal constituted under the auspices of the London Maritime Arbitration Association, a private international arbitration panel, qualified as a " 'foreign tribunal' " for § 1782 purposes; discussing conflict in the cases and observing that *dictum* in *Intel* "suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782").

Because it is unclear whether a private arbitration constitutes a § 1782 tribunal, and equally unclear whether the arbitrator must approve a § 1782 application prior to filing, a district court's denial of a discovery request may render the arbitral award unenforceable under the New York Convention, which requires that the parties be given a "full opportunity" to present their case. *See* New York Convention art. V(1)(b) (1958).

IV. Meeting the discretionary requirements

" '[A] district court is not required to grant a [section] 1782(a) discovery application simply because it has the authority to do so.' " *In re Barnwell Enterprises Ltd*, 265 F. Supp. 3d 1, at *8 (D.D.C. 2017) (alterations in original) (quoting *Intel Corp.*, 542 U.S. at 264). Rather, even if the statutory requirements are met, the court must determine whether to exercise its discretion in light of the purposes of the statute, and the four *Intel* factors. *In re Barnwell*

Enterprises Ltd, 265 F. Supp. 3d 1; *see, e.g.*, *MetaLab Design Ltd. v. Zozi International, Inc.,* No. 17-mc-80153, 2018 WL 368766, at *4 (N.D. Cal. 2018) ("Although the statutory factors have been satisfied, the Court exercises its discretion under *Intel* and [denies] the Application."). Courts have recognized, however, that "it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees*, 793 F.3d at 302 (internal quotation marks omitted).

A. Is the person from whom discovery is sought a non-participant in the foreign proceeding?

It is well-settled that "the need for § 1782 assistance is more apparent when discovery is sought from a non-participant." *In re Application of MTS Bank*, 2017 WL 3276879, at *7 (S.D. Fla. 2017) (brackets and internal quotation marks omitted). This is because a "foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence." *Intel*, 542 U.S. at 264; *see also HT S.R.L. v. Velasco*, 125 F. Supp. 3d 211, 223 (D.D.C. 2015) (a participant in a foreign proceeding is obviously more likely to be subject to discovery in that proceeding than a non-participant). Some courts have ruled that the key question is whether the evidence is obtainable through the foreign proceeding, whether or not the target is a participant. *In re Judicial Assistance Pursuant to 28 U.S.C. 1782 by Macquarie Bank Ltd.,* No. 2:14-cv-00797, 2015 WL 3439103, at *6 (D. Nev. 2015); *In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d at 1039 (courts must "focus on whether the evidence is available to the foreign tribunal, because in some circumstances, evidence may be available to a foreign tribunal even if it is held by a non-participant to the tribunal's proceedings") (internal quotation marks omitted).

The issue can become thorny when it involves corporate parents and subsidiaries. In *In re Kreke Immobilien KG,* No. 13 Misc. 110, 2013 WL 5966916 (S.D. N.Y. 2013), the court denied discovery where a subsidiary was a participant in the foreign proceeding, but the parent target was not; the court rejected as "untenable" the notion that the parent could "somehow be a nonparticipant in the foreign action." *In re*

Kreke Immobilien KG, at *5. *But see In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 466 F. Supp. 2d 1020, 25 I.E.R. Cas. (BNA) 1482 (N.D. Ill. 2006) (discovery allowed from American parent when its wholly-owned subsidiary was a party in the foreign proceedings, since the parent and subsidiary were two separate legal entities).

B. What is known about the foreign tribunal, the proceedings, and the receptivity of the foreign government or court to assistance from the U.S. court?

"When the parties do not provide evidence showing that a foreign court would reject evidence obtained under Section 1782, courts tend to allow discovery." *In re Koninklijke Phillips N.V.,* No. 17-mc-1681, 2018 WL 620414, at *2 (S.D. Cal. 2018). Courts look for "authoritative proof that a foreign tribunal would *reject* evidence obtained with the aid of § 1782." *In re Kreke Immobilien KG*, 2013 WL 5966916, at *5 (emphasis added) (internal quotation marks omitted). For example, in *In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d at 1040, the court found that this factor strongly favored the respondents because the amicus brief filed by the Korean Fair Trade Commission ("KFTC") asked the court to deny the *ex parte* motion and represented that it had no need or use for the requested discovery. "It may be true that the KFTC's views are not dispositive," wrote the court, "but the KFTC is clear that it is not at all receptive to U.S. federal-court judicial assistance in this matter." *In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d at 1040. Local "blocking statutes," meaning laws enacted by other countries to frustrate the taking of evidence in the United States, may also be evidence that the foreign court would reject any evidence obtained via § 1782. On the other hand, many U.S. courts have declined to give effect to these statutes. *See, e.g.*, *Bodner v. Paribas*, 202 F.R.D. 370, 374–75 (E.D. N.Y. 2000).

C. Is the request an attempt to circumvent foreign proof-gathering limits?

The third *Intel* factor asks whether the § 1782 request is "an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States."

Intel Corp., 542 U.S. at 264–65. This factor is rather amorphous, and its application has been somewhat counterintuitive. For example, courts are not required to determine if an applicant has exhausted its discovery attempts abroad, and there is no requirement that the evidence sought in the U.S. be discoverable under the laws of the foreign country. *Gorsoan Limited v. Bullock*, 652 Fed. Appx. 7, 9 (2d Cir. 2016). Further, a District Court cannot refuse to issue a discovery order simply because the foreign tribunal has not yet had the opportunity to consider the discovery request. *Gorsoan Limited v. Bullock*, 652 Fed. Appx. 7.

Nonetheless, "a perception that an applicant has 'sidestepped' less-than-favorable discovery rules by resorting immediately to § 1782 can be a factor in a court's analysis." *In re Cathode Ray Tube (CRT) Antitrust Litigation,* MDL No. 1917, 2013-1 Trade Cas. (CCH) ¶ 78229, 2013 WL 183944, at *3 (N.D. Cal. 2013). Where a foreign court has requested the information, there is a presumption that the application is not an attempt to circumvent foreign proof-gathering limits. *See Malsaeng Co. v. Young-Sung Kim (In re Request for International Judicial Assistance from the National Court Administration of the Republic of Korea),* No. C15-80069, 2015 WL 1064790, at *2 (N.D. Cal. 2015) ("[T]he [foreign] court requested the information, so it is clear that it is receptive to this court's assistance and that the request is not an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."); *accord Digital Shape Technologies, Inc. v. Glassdoor, Inc.,* No. 16-mc-80150, 2016 WL 6995881, at *3 (N.D. Cal. 2016); *cf. In re Harbour Victoria Inv. Holdings Ltd. Section 1782 Petitions,* No. 15-mc-127, 2015 WL 4040420 (S.D. N.Y. 2015), appeal withdrawn, (2nd Cir. 15-2624) (Jan. 6, 2016) (holding that § 1782 discovery request was "an attempt to evade an unfavorable discovery ruling by another Judge of this Court or to engage in a fishing expedition to identify other foreign venues in which to bring suit"); *Jiangsu Steamship Co., Ltd. v. Success Superior Ltd.,* No. 14 CIV. 9997, 2015 A.M.C. 884, 2015 WL 3439220, at *5 (S.D. N.Y. 2015) (denying application and observing the possibility that petitioner was "trolling for assets in U.S. institutions in order to decide whether it [was] worth [its] while to commence a London arbitration in the first place").

D. Is the request overbroad or unduly burdensome?

The final *Intel* factor asks whether the discovery requested is "unduly intrusive or burdensome." *Intel Corp.*, 542 U.S. at 265. The same standards that govern requests under the Federal Rules of Civil Procedure govern here, including obligations to meet and confer on the scope of the evidence sought. (Of course, the application itself may be filed *ex parte*, without the obligation to meet and confer.)

Discovery requests must be "proportional" considering "the issues at stake in the action . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). "[U]nduly intrusive or burdensome requests may be rejected or trimmed." *Intel Corp.*, 542 U.S. at 265. "Requests are unduly intrusive and burdensome where they are not narrowly tailored, request confidential information and appear to be a broad 'fishing expedition' for irrelevant information." *In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d at 1043 (citation omitted). District Courts may also deny or limit requests seeking documents covered by a privilege, such as the attorney-client privilege, or containing a party's confidential information. *Intel Corp.*, 542 U.S. at 265; 28 U.S.C. § 1782(a). Under the Federal Rules, discovery can also be denied where the discovery requests are vague and overbroad; duplicative, vexatious or unreasonably cumulative; or irrelevant. Fed. R. Civ. P. 26(b).

A court can consider the location of the discovery when assessing this fourth discretionary factor. *See Nikon Corporation v. ASML US Incorporated*, No. MC-17-00035, 2017 WL 4024645, at *1 (D. Ariz. 2017), aff'd, 707 Fed. Appx. 476 (9th Cir. 2017), ("the court may consider whether the requested materials are located outside the United States" as part of the analysis whether intrusive or burdensome (internal quotation marks omitted)), *aff'd sub. nom.*, *Nikon Corp. v. ASML U.S. Inc. (In re Application Pursuant to 28 U.S.C. § 1782 to Take Discovery of ASML U.S., Inc.)*, 707 Fed. Appx. 476 (9th Cir. 2017). For example, courts have refused, on discretionary grounds, to compel U.S.-based entities to turn over documents in the possession of non-U.S.-based affiliates or parents. *See, e.g.*, *Norex Petroleum Ltd. v. Chubb Ins. Co.*

of Canada, 384 F. Supp. 2d 45, 52 (D.D.C. 2005); *Kestrel Coal Pty. Ltd. v. Joy Global, Inc.*, 362 F.3d 401, 405, 58 Fed. R. Serv. 3d 124 (7th Cir. 2004).

V. Defending against the use of § 1782

Corporations, including banks that are branches of foreign entities, and subsidiaries whose parent corporations are domiciled abroad, should pay particular attention to the post-*Daimler* jurisprudence construing the statutory terms "found" and "reside." District Court rulings in cases like *In re Sargeant* and *Australia and New Zealand Banking Group Limited* provide grounds to defeat compliance with § 1782 subpoenas.

There are also several ways counsel might avoid discovery by prescient drafting of agreements. In international arbitrations covered by the statute, the parties may agree to an arbitration clause specifying that discovery requests relating to the arbitration must be approved by the tribunal; in the alternative, they may address § 1782 in the discovery plan. When drafting contractual arbitration or forum selection clauses, the parties may (1) exclude the use of § 1782; (2) select the substantive and procedural law of the forum; or (3) explicitly reject the application of U.S. discovery rules. Of course, discovery targets might also consider the most obvious course of conduct, i.e., avoiding U.S. travel to minimize prima facie grounds for granting a § 1782 application.

Counsel for the target may also file, in the appropriate U.S. district court, a motion to quash the grant of judicial assistance, arguing that the § 1782 statutory requirements have not been met, and/or that the discretionary factors militate against granting the application. Courts, applying these discretionary factors may deny discovery requests even when the four statutory requirements are present. *See, e.g.*, *In re Ex Parte Application of Qualcomm Incorporated*, 162 F. Supp. 3d at 1035 ("[W]hile Qualcomm's applications satisfy Section 1782's statutory requirements, the *Intel* considerations weigh against granting Qualcomm's requested subpoenas.").

Some countries, Australia for one, have issued anti-suit injunctions to prevent parties from filing § 1782 applications. *See Jones v. Treasury Wine Estates Ltd.* [2016] FCAFC 59 (13 April 2016)(Austl.). On May 8, 2017, the Federal Court of Australia, for the first time, permitted parties in an Austra-

lian proceeding to seek evidence in the U.S. via § 1782. *See Lavecky v. Visa Inc.* [2017] FCA 454 (8 May 2017)(Austl.). The court emphasized the importance of seeking prior approval from the Australian court, and explained the factors that should shape a court's decision, including the importance of the evidence to the applicant's case, and whether there were other means to obtain the evidence. A party to Australian proceedings who has filed a § 1782 application with a U.S. court, but has not asked the Australian court for approval first, could well have his or her petition enjoined by the Australian tribunal, once that tribunal has been notified of the application. Moreover, the court in *Lavecky* limited the scope of the discovery that it would authorize applicants to seek to document production. A § 1782 application seeking testimony would presumably provide another ground for enjoining the application.

Conclusion

It is evident from the published court decisions that § 1782 is being used with greater frequency than in the past, and for good reason: the statute provides an *ex parte* procedure for securing evidence in the U.S. that might not be available in an action before a foreign tribunal, even when the foreign litigation has not yet been commenced, but is only reasonably contemplated. An individual who simply passes through a U.S. district, on work assignment or holiday, may be served with a subpoena and be required to testify or produce documents, despite being a national of another country and a stranger to the foreign lawsuit. From the vantage point of plaintiffs suing in countries such as Germany and France with limited (or no) pre-trial discovery, the statute is too good to be true.

But there are traps here, especially jurisdictional ones. The statutory "found or reside" requirement for corporations, which at one time was a general jurisdiction inquiry, easily met when a corporation did business in a district or a bank had a branch there, now is much more limited. It provides jurisdiction only when a corporation is incorporated in the state or has its principal place of business there or, in the exceptional case, where the entity's "operations" in the forum are "so substantial and of such a nature as to render the corporation at home in the State." The question of specific

jurisdiction's role in the context of § 1782 applications is currently unresolved.

In addition, the courts are split on several key issues, including the applicability of the statute to private arbitrations and whether the statute can be used to secure documents located overseas. Practitioners, therefore, need to keep a close eye on the decisional law as it evolves.