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28 U.S.C. §1782 – AN INFORMATION GATHERING TOOL:SUPPORTING GLOBAL DISPUTES WITH AN EFFECTIVE MEANS FOR DISCOVERY FROM THIRD PARTIES

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1. EXECUTIVE SUMMARY

When a dispute is pending in a foreign, non-U.S. tribunal, discovery (or disclosures) will take place pursuant to the local procedures applicable in the forum where the case is being heard. Jurisdictions other than those in the United States may structure the discovery process very differently from U.S. law. Many European civil law countries place an emphasis on the role of the judge presiding over a case, allowing the judge to play a key role in the process and request information from the parties on the court's own motion. By nature, this can be very limiting from the perspective of a party. In contrast, the United States system is adversarial and party driven by nature; judges take a back seat in the discovery process.

It is in that context that 28 U.S.C. §1782 ("Section 1782") plays a role. In short, Section 1782 allows for U.S. courts to assist foreign tribunals in gathering evidence. Importantly, this assistance can be requested not only by the tribunals but a variety of persons. In fact, "any interested person" may apply to a federal district court to gather evidence under Section 1782. The product of such discovery may be used in the foreign tribunal, at least from the U.S. perspective. What is more, discovery under Section 1782 need not be directed at a party to the proceeding in the foreign court (indeed, a respondent's status as a party in a foreign dispute will generally run against the availability of Section 1782 discovery in the U.S.). The key requirement is that the respondent is "found" in the U.S. district where the Section 1782 application is filed.

As we will see in more detail below, Section 1782 is generally applied liberally and its requirements allow for creative application to serve a variety of strategic goals and purposes along the way, including the gathering of information, evidence, establishing connections between entities, patterns, and asset positions as well as following transfers and conveyances. Section 1782 can be used strategically before and during litigation. It can also be combined with other vehicles and ancillary proceedings so as to be an extremely powerful tool to maximize a party's advantage using U.S.-style discovery.

Below, we take a deep dive into the facets of Section 1782 and go into further detail regarding elements, application and current development of the law. Stay tuned.

2. PURPOSE & UTILITY

Section 1782 "'is the product of congressional efforts, over the span of [more than] 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals.'" *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)*, Inc., 747 F.3d 1262, 1269-70 (11th Cir. 2014) (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004)).

When faced with a dispute in today's globalized world, frequently involving parties across continents, countries and time zones, an equally global response is key to building substantive evidence, managing and evaluating recovery, and investigating the asset and security positions of the counterparty. Developing a successful litigation strategy begins with gathering the knowledge needed to take decisive action. Title 28, Section 1782 of the United States Code ("U.S.C.") allows for exactly that – an information gathering tool used to obtain discovery from third parties located in the United States.

In practice, Section 1782 enables a party to file an application to obtain a court order for a person or entity "to give [...] testimony [...] or to produce a document [...] for use in a proceeding in a foreign or international tribunal [...]." See 28 U.S.C. §1782. The Applicant moves a federal district court for an order allowing the Applicant to issue discovery subpoenas to third parties. Not only can these "1782 Applications" be *ex parte*, meaning without the involvement of the respondent entities of which discovery is sought, they are also liberally granted. Section 1782 has seen a significant increase in usage since the U.S. Supreme Court's widely cited, seminal decision in *Intel Corporation v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), where the Court arguably provided law firms across the country with good grounds to argue in favor of including international

arbitration under Section 1782's umbrella of covered foreign proceedings. This point has since become contentious.
Accordingly, this article explores some of the intricacies of 1782 Applications, the state of the law in the U.S., and its utility in all phases of international litigation and dispute resolution.

3. STATUTORY BASIS

The 1782 Application is based in U.S. federal law and as such applies in all states in the United States, although its interpretation may differ based on precedent developed in the several federal circuits. Section 1782 is found in Title 28 of the U.S.C. which contains statutes on judiciary and judicial procedure such as law on evidence and depositions with regard to foreign tribunals, countries and parties. On its face, Section 1782 contemplates a proceeding before an international or foreign tribunal in which an interested person makes a request for discovery directed at a third-party entity located in the U.S. In particular, 28 U.S.C. §1782 states:

> 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. [...]

28 U.S.C. §1782(a).

From simple observation of the language, Section 1782 goes beyond formal requests by foreign courts and letters rogatory and, perhaps most

importantly, allows "any interested person" to file an application increasing the scope of the section quite substantially. On first look, Section 1782 seems to contemplate a *pending* proceeding before a foreign or international tribunal. However, case law has interpreted the requirements differently, highlighting the need to consider carefully what constitutes an international or foreign tribunal under the rule and what sort of proceeding or stage in litigation allows for the application of Section 1782.

A district court receiving a 1782 Application will only order compliance with discovery requests when the applicant filed the action in the district where the respondent can be found. This is a jurisdictional requirement. Whether a respondent under Section 1782 can be "found" in a district generally turns on whether they are subject to personal jurisdiction in the district where the action is filed. For corporations and business entities, this inquiry focuses on where the entity is incorporated and where it has its principal place of business but may extend to where it conducts substantial systematic and continuous activities as set out further below.

A court may consider an application *ex parte,* and when it orders compliance with discovery requests, the applicant can serve subpoenas *ad testificandum* and *duces tecum* on the respondent requiring the production of documents or availability for depositions in the framework allowed by the order. In the international context, and particularly for lawyers at home in other jurisdictions, this is an immensely powerful opportunity, in effect allowing U.S. style discovery.

4. HOW DO THE COURTS SEE IT? INTERPRETATION OF THE REQUIRED ELEMENTS AND LIMITS TO APPLICABILITY

4.1. **Found in the District**

A district court may only compel a person (meaning an individual or entity) to produce testimony or documents if the person resides or is found in the district.

What is understood by residing or being found in a district varies for individuals and business entities but is generally held to "extend to the limits of personal jurisdiction consistent with due process." See *In re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019).

For due process purposes, two types of jurisdiction are allowed: general and specific. General jurisdiction results from a person's "continuous and systematic" contacts with the state that renders the person at home there. An individual is at home where she is domiciled. Most commonly, a corporation is subject to the general personal jurisdiction of the courts in the states of its incorporation and its principal place of business. See *Daimler AG v. Bauman*, 571 U.S. 117, 137-38 (2014). At the furthest extent of general jurisdiction, a corporation may be found where their affiliations with the state are so continuous and systematic, so substantial, as to render them essentially at home in the forum State. *Id.* at 139. In effect that means businesses can be found under Section 1782 where they are incorporated, have their principal place of business, or where substantial systematic and continuous activities otherwise would render them at home, see, e.g., *In re Inversiones y Gasolinera Petroleos Valenzuela S. de R.L.*, 2011 WL 181311, at *7 (S.D. Fla. Jan. 19, 2011).

Regarding individuals, transient jurisdiction seems to remain available. For the purpose of compelling testimony, mere physical presence in the district, even if temporary, may be enough to satisfy this requirement regarding individuals (tag jurisdiction), see *In re Edelman*, 295 F.3d 171, 178 (2d Cir. 2002).; *In re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019). In fact, the court in *Edelman* supports that even a non-U.S. resident individual currently present in a district may be served with an order even when that order was issued during an earlier time while the non-resident individual was not in the district. *Id.* at 180. An individual may therefore be served where they are domiciled or can be served in a manner that satisfies transient jurisdiction.

Further, a person (entity or individual) can be found where specific jurisdiction can be established. The fair warning requirement of due process is satisfied when a defendant has purposefully directed its activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-473

(1985). "Translated to account for a § 1782 respondent's nonparty status," a court has specific personal jurisdiction over the respondent "where the discovery material sought proximately resulted from the respondent's forum contacts." See *In re del Valle Ruiz*, 939 F.3d at 530.

Therefore, to find specific jurisdiction, a court will look to whether a person subject to a 1782 Application has purposefully established contacts with the district where the 1782 Application was filed, and there must be a significant nexus or causal relationship between those contacts and the discovery sought.

In summary, the above generally enables an applicant to file against any individual or entity present in the U.S. as long as a district is chosen where the respondent can be found, e.g., a district where the business is operating from (has its nerve center), the business ties to the district are systematic and continuous as to render a business at home there, or a district where an individual is domiciled, to name a few.

However, this does not overcome the corporate separation between distinct entities. It is likely challenging to obtain an order against a U.S. entity in a district and order production of documents in possession and control of a related entity abroad, see, e.g., *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45, 52 (D.D.C. 2005). This is unsurprising since discovery vehicles generally rely on possession and control by the respondent over the matter requested. However, entities should be wary of temporary control over documents such as shared servers, common data flow, email chains, and open data structure, see, e.g., *In re Application of Schmitz*, 259 F. Supp. 2d 294, 296-97 (S.D.N.Y. 2003)). It is important to note that where a person is found in the district, it may be compelled to turn over documents, even when such documents are located outside the U.S., to the extent they are in the person's "possession, custody, or control", see *In re del Valle Ruiz*, 2019 WL 4924395, at *8 (2d Cir. Oct. 7, 2019); *Sergeeva v. Tripleton Int'l. Ltd.*, 834 F.3d 1194, 1197 (11th Cir. 2016). There may be opportunities to broaden this.

For the parties involved in international disputes it is this permissive, U.S.-style discovery that lends itself to efficient intelligence gathering. To summarize the utility, Section 1782 allows a party to a foreign proceeding or any interested person to obtain documents which are located in the U.S. *or* a foreign country if

the respondent third party is within the U.S. judicial district and can be found there for the purposes of personal jurisdiction.

4.2. Who is considered "any interested person"?

Although the status as a party or criminal complainant is sufficient to satisfy the "interested person" requirement of Section 1782, such a direct involvement is not necessary to qualify as an interested party. In short, interest is any stake in the proceeding. See *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, LLP*, 798 F.3d 113, 120 (2d Cir. 2015) ("[A]n established right to provide evidence … may be sufficient to make an otherwise stranger to [a] proceeding an interested person.").

The Supreme Court clarified that any interested person is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials and any other person who possesses a "reasonable interest" in obtaining judicial assistance, such as a corporation that made the complaint triggering a governmental investigation of the party involved in the foreign litigation. See *Intel*, 542 U.S. at 256-57.

This inquiry is highly fact-intensive and may turn on the law in the jurisdiction where the proceeding is pending, e.g., to the extent that a certain jurisdiction grants a third party a right to provide evidence or would perhaps consider a third party a permissive participant in the proceeding, but not enforce joining a party. The analysis depends on the involvement of the party in question in the foreign proceeding and will often depend on the local law. However, the rule is broad and generally encompasses third parties with an interest in the proceeding.

4.3. The "for use" requirement. How is the term "tribunal" to be understood?

As stated, 1782 Applications picked up in number in the wake of the Supreme Court's *Intel* decision in 2005. *Intel* also remains the cornerstone of one of the most intriguing disputes regarding Section 1782 within the legal community that reaches back many years beforehand.

The positions generally fall into two camps. One side argues that "for use" in a "tribunal" should be understood broadly, encompassing private arbitration proceedings. The other side opposes this and finds the term tribunal should be limited and understood exclusive of private proceedings. Prior to *Intel*, the U.S. Court of Appeals for the Second Circuit held that Section 1782 did not encompass private international arbitration. See *Nat'l Broad. Co. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1998). It was not alone in holding that position. Indeed, the Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) reached a similar conclusion. Even after the Supreme Court had ruled in *Intel,* the Fifth Circuit did not depart from this position in its 2009 decision in *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa,* 341 Fed. Appx. 31 (5th Cir. 2009). *El Paso* held that nothing in the *Intel* decision affected the analysis in *Biedermann*. The Fifth Circuit's argument was that the Supreme Court in *Intel* never really considered the issue of what would fall under the term "tribunal," criticizing cases finding private arbitrations to be included on the basis that:

> The question of whether a private international arbitration tribunal also qualifies as a "tribunal" under § 1782 was not before the [Supreme Court]. The only mention of arbitration in the Intel opinion is in a quote in a parenthetical from a law review article by Hans Smit. That quote states that "the term 'tribunal' ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Nothing in the context of the quote suggests that the Court was adopting Smit's definition of "tribunal" in whole.

El Paso, 341 Fed. Appx. at 35.

Notwithstanding the Second Circuit's decision in *Bear Stearns*, some district court judges within the Second Circuit have been open to arguments which allowed Section 1782 to be used in connection with foreign private arbitrations.

In that regard, in *In re Children's Inv. Fund Found. (UK),* 363 F. Supp. 3d 361 (S.D.N.Y. 2019), *appeal withdrawn sub nom. In re Application of Children's Inv. Fund Found. (UK),* No. 19-397, 2019 WL 2152699 (2d Cir. Mar. 19, 2019), a district court in the Southern District of New York found that a tribunal established pursuant to the rules of the London Court of International Arbitration (LCIA) was a "foreign or international tribunal" for purposes of Section 1782. The court reasoned that since *Bear Stearns*, the Second Circuit had not considered the question and agreed with a district court decision from Georgia in that *Intel* effectively displaced *Bear Stearns* on this question. *Cf. In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006). A prior decision in the Southern District of New York supported this view and result, see *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517 (S.D.N.Y. 2016).

The above courts agreed that the *Intel* court reviewed the legislative history of Section 1782 and found legislative intent to broaden the scope of the term "tribunal." *Intel* noted specifically that "[t]he legislative history of the 1964 revision … reflects Congress' recognition that judicial assistance would be available whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, *or other nature*." *Intel,* 542 U.S. at 259 (emphasis added).

Interestingly, shortly after *In re Children's Fund* was decided, a judge in another district court for the Southern District of New York, applying *Bear Stearns*, held in *In re Application of Hanwei Guo*, 18-MC-561, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) that a China International Economic and Trade Arbitration Commission ("CIETAC") arbitration did not qualify as a "foreign or international tribunal" within the meaning of Section 1782. The court observed that although CIETAC was originally established in the 1950s by an entity of the Chinese government, today it is a non-governmental organization functioning substantially in the form of a private body. *Id.* at *1. This decision was appealed.

In early July of 2020, the Second Circuit returned its decision in the matter *In Re Guo*, No. 19-781, 2020 WL 3816098 (2d Cir. July 8, 2020). There, the Second Circuit held that *Intel*'s dicta did not render *Bear Stearns* inapplicable. The Second Circuit found itself bound to its ruling in *Bear Stearns* and affirmed the district court's ruling which had concluded that CIETAC arbitration is a private

international commercial arbitration outside the scope of § 1782(a)'s "proceeding in a foreign or international tribunal" requirement.

In particular, and of interest, the Second Circuit analyzed factors which it deemed to distinguish purely private arbitration from arbitrations which might be considered government sponsored:

1. the extent to which the arbitral body is internally directed and governed by a foreign state or intergovernmental body;
2. the degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision (expressly finding that mere power to enforce award under NY convention to be insufficient);
3. the nature of the jurisdiction possessed by the panel and whether it relied entirely on parties' consent or possessed some degree of government-backed jurisdiction that one party may invoke even absent the other's consent; and
4. the ability of the parties to select their own arbitrators.

In Re Guo, 2020 WL 3816098, at *7.

This recent decision generally seems to put private commercial arbitration outside the scope of 1782 Applications in the Second Circuit.

However, a good number of federal appellate courts disagree. In 2019, the Sixth Circuit took a contrary view in *Abdul Latif Jameel Transportation Co. v. FedEx.*, 939 F.3d 710 (6th Cir. 2019), finding that "tribunal" included a private arbitral tribunal. To reach this decision, the Sixth Circuit relied on interpretation of the statutory language and criticized the pre-*Intel* decisions as "turning to legislative history too early in the interpretations process, [and even if the court would follow the same approach and consider the legislative history] what the statements make clear is Congress's intent to expand § 1782(a)'s applicability." *ALJT* at 726. In the Fourth Circuit, the decision in *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2020) sets equally permissive precedent arguing that

"arbitration in the United States is a congressionally endorsed and regulated process that is judicially supervised. And it was developed as a favored alternative to the judicial process for the resolution of disputes [...]," thereby making it a "government-conferred authority" under U.S. law and, even under the strict Second Circuit precedent, a tribunal. See *Servotronics*, 954 F.3d at 214. The court makes similar observations about the panel charged with arbitrating

> In serving the role given under § 1782(a), a district court functions effectively as a surrogate for a foreign tribunal by taking testimony and statements for use in the foreign proceeding. When viewed in this light, the district court functions no differently than does the foreign arbitral panel or, indeed, an American arbitral panel. The UK Arbitration Act of 1996 authorizes arbitrators to have the benefit of subpoenaed testimony and documents, with court enforcement, if necessary. See UK Act § 43. Similarly, under the FAA, American arbitrators have the benefit of subpoenaed testimony and documents through the enforcement of the courts. See 9 U.S.C. § 7; see also Fed. R. Civ. P. 45.

the matter in *Servotronics,* an arbitration panel in the UK governed by the Arbitration Act of 1996. *Id.* at 215. Among other points, the court states:

Servotronics, 954 F.3d at 215.

With that analysis in mind, one can see how there might be an argument that the interaction between some arbitrations and a particular body of arbitral law could perhaps satisfy the factors noted by the Second Circuit in *In re Guo,* perhaps where a heightened degree of governmental involvement can be shown.

Nonetheless, there remains a substantial dispute as to the interpretation of tribunal on the district court level beyond the Second Circuit. Some courts in other circuits have been skeptical about whether private arbitration tribunals are covered by Section 1782, and some have even found that they are not. See, e.g., *In re Finserve Grp. Ltd.*, No. CA 4:11-MC-2044-RBH, 2011 WL 5024264, at *2

(D.S.C. Oct. 20, 2011) (having "very serious concerns with finding that private arbitration organizations are 'foreign tribunals' under [§ 1782]"); *In Re Application of Gov't of Lao People's Democratic Republic*, No. 1:15-MC-00018, 2016 WL 1389764, at *5 (D. N. Mar. I. Apr. 7, 2016) ("[I]f Congress had meant to broaden § 1782 to include private arbitral bodies, it would have done so expressly."). Other courts, however, have held that the Supreme Court's *Intel* decision altered the legal landscape, making private arbitration tribunals covered by Section 1782. See, e.g., *In re Owl Shipping, LLC*, No. 14-5655 (AET)(DEA), 2014 WL 5320192, at *2 (D.N.J. Oct. 17, 2014); *In re Application of Mesa Power Group, LLC*, 878 F. Supp. 2d 1296 (S.D. Fla. 2012); *In re Application of Babcock Borsig AG*, 583 F.Supp.2d 233, 238 (D. Mass. 2008); *HRC-Hainan Holding Company v. Hu*, 2020 U.S. Dist. LEXIS 32115 (N.D. Cal. Feb. 25, 2020).

Given the divergence of court decisions, particularly the circuit split that has now been firmly entrenched by the recent decision in the Second Circuit, it is inevitable that the Supreme Court will be called upon to answer definitively whether the word "tribunal" includes a private arbitration tribunal.

Until the Supreme Court decides this issue, the area remains to be navigated locally. The local law in the district needs to be examined, and counsel should endeavor to pursue entities and individuals based on the applicable law in the district where they may be found (or be prepared to press a contrary position on appeal). That said, the recent Second Circuit decision in *In re Guo* is clearly a setback for the applicability of Section 1782 in the context of foreign, private arbitration proceedings.

For now, the threshold viability of a 1782 Application will continue to be wholly dependent upon the court in which the application is filed. That notwithstanding, arbitration proceedings before quasi-governmental institutions are generally accepted to meet the "tribunal" requirement.

It should be noted that "for use" does not seem to restrict further use of the obtained evidence in other proceedings, provided the initial Section 1782 purpose existed in good faith. The Second Circuit in *In re Accent Delight Int'l Ltd.*, 869 F.3d 121 (2d Cir. 2017) held that discovery is not limited to a particular foreign action, or by the type of relief sought. The court ruled that Section 1782 does not prevent an applicant who has obtained discovery under the statute

with respect to one foreign proceeding from using the discovery elsewhere unless the district court has ordered otherwise. *In re Accent*, 869 F.3d at 135. The court relied on the Eleventh Circuit's decision in *Glock* to support its holding. In *Glock*, the court stated that there is no language of Section 1782 or legislative history that limits later uses of evidence that has been properly obtained. See *Glock v. Glock, Inc.*, 797 F.3d 1002, 1007 (11th Cir. 2015). The court in *Glock* held that "parties may use any evidence they lawfully possess," and that if a plaintiff were to "obtain documents in discovery from a defendant in one case, nothing precludes [him] from using that evidence in a wholly separate lawsuit against the same defendant or a different party." See *Glock*, 797 F.3d at 1007.

This last facet is a key component when considering ancillary proceedings in the United States such as actions for security or even for recovery. Based on the authority above, Section 1782 discovery goes beyond its usability in foreign proceedings.

4.4. Whether a pending proceeding in an international or foreign tribunal is required

From study of the text of the statute alone, one could be tempted to conclude that a pending proceeding is required when, in fact, reference to "pending" (which had been an express part of the statute's language) was deleted during Congress' amendments, see *JAS Forwarding*, 747 F.3d 1262, 1270 (11th Cir. 2014). Ultimately, courts have found that proceedings need not be pending, they only need to be "reasonably contemplated." *JAS Forwarding*, 747 F.3d at 1270 (quoting *Intel*, 542 U.S. 241, 258 (2004)); see also *Mees v. Buiter*, 793 F.3d 291 (2d Cit. 2015) (a foreign proceeding need not be pending so long as it is within "reasonable contemplation").

However, as far as contemplated proceedings are concerned, this raises an interesting consideration. It may be that a party is not entirely certain whether an arbitration clause applies to their dispute or it may contemplate or even prefer filing in court in a foreign country. If that party finds itself looking to obtain discovery from a party in a district in the Second or Fifth Circuit, it could only do so if the underlying proceeding was not before private arbitration, but before a

tribunal such as a court. However, a proceeding has not been initiated at that point. When a proceeding is only contemplated, a party might (and if in good faith) argue that court proceedings are contemplated, thereby opening a path to Section 1782 applications in the Second or Fifth Circuit even when ultimately arbitration could be compelled. May this party file a 1782 Application in the Second or Fifth Circuit on the basis of a closely contemplated future proceeding in a foreign court? Perhaps even based on the argument it would likely need to file a court proceeding to compel arbitration. At least where the intent to file in court exists and the filing is made in good faith with particular care to lay out why a court proceeding is reasonably contemplated, the requirements to file a 1782 Applications seem to be met in the above. It should be noted that *ex parte* filings require a high degree of care and responsiveness to the court in any case, and every filing must of course be made in good faith.

4.5. Factors a Court may consider in deciding whether to grant the 1782 Application

There is no blanket foreign discoverability rule under Section 1782. Therefore, a district court is not necessarily precluded from ordering discovery when the materials requested are not discoverable under the laws governing the foreign tribunal. See *Intel*, 542 U.S. at 260-61. This is part of the reason why U.S.-style discovery can be brought to bear in the 1782 Application context.
However, courts have discretion to deny or fashion their own discovery orders. There are four important factors a court may consider when exercising its discretion to grant or deny a discovery request/application:

1. Whether the documents or testimony sought are within the non-U.S. tribunal's jurisdictional reach and would be accessible even without the assistance of Section 1782. A prime example of this factor would be that the non-party that is the respondent in the 1782 Application proceeding in the U.S. is itself party to the litigation abroad.

Where a third party is not involved in the litigation before a foreign tribunal, a court will likely find this factor to militate in favor of allowing the 1782 Application, since discovery against the third party would likely have to be obtained in the United States. See, e.g., *In re Chevron Corp.*, No. 1:10-MI-0076-TWT-GGB, 2010 WL 8767265 (N.D. Ga. Mar. 2, 2010).

2. Whether the nature of the non-U.S. tribunal, the character of the proceeding abroad, or the foreign government or court is receptive to U.S. federal court assistance. This primarily looks at whether potential evidence would be admissible in the foreign proceeding. The requesting party should at least have a good faith belief that the materials can be used as evidence in the foreign proceeding, see *In re Gemeinschaftpraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *7 (S.D.N.Y. Dec. 29, 2006)).

   A discretionary factor as to whether district courts should order persons to give their testimony or statements or to produce documents or other things for use in proceedings in foreign or international tribunals requires district courts to inquire into the nature of the foreign proceedings and the receptiveness of the foreign tribunals to United States court assistance. Importantly, the burden is generally seen as being on respondents to such orders to furnish authoritative proof that the foreign tribunals would reject evidence obtained with the aid of the statute authorizing such orders. See *In re Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243 (S.D.N.Y. 2018) (citing *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095 (2d Cir. 1995)).

However, this does not mean that the inquiry turns on admissibility, in fact, "for use" in a tribunal contemplates use of evidence gathered in a Section 1782 proceeding far beyond entering the evidence in a foreign trial. Applicants are not required to exhaust all available remedies in the foreign jurisdiction before filing a Section 1782 application. *Mees v. Buiter*, 793 F.3d 291, 303 (2d Cir. 2015). Use of evidence is not synonymous with admissibility. See *Glock*, 797 F.3d 1002 ("A party may use evidence—whether or not it is admissible in court under the Federal Rules of Evidence—to develop a theory of the case, to prepare a complaint, to lead it to admissible evidence, to help it to settle a case, and to accomplish other aspects of prosecuting or defending a case. That fact, however, does not mean that the court will admit the evidence or even that the evidence is potentially admissible.")

3. Whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign tribunal/ country's law.

   This is a bad faith exclusion, though Section 1782 does not generally require a party to seek evidence elsewhere first. See, e.g., *In re Application of Mesa Power Group, LLC*, 878 F. Supp. 2d 1296, 1305 (S.D. Fla. July 13, 2012) ("Absent a persuasive showing that a section 1782 applicant . . . is actively seeking to circumvent the foreign tribunal's discovery methods and restrictions, which showing has clearly not been made here, this factor does not counsel against section 1782 relief."); *In re Application of Winning (HK) Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *10

(S.D. Fla. Apr. 30, 2010) (concluding that where no evidence or case law submitted to the court showed that the foreign court would be unreceptive to federal-court judicial assistance or that a request concealed an attempt to circumvent foreign proof-gathering restrictions, the second and third factors weighed in favor of granting the application).

4. Whether the request contains unduly intrusive or burdensome demands. This last requirement is of general concern in discovery requests. Where a court instead finds that the request appears to be sufficiently limited in scope and narrowly-tailored to satisfy the requirements of § 1782(a), the factor will support granting a 1782 Application.

   Since a respondent is free to object to all or any part of the issued subpoena, and may move to quash the subpoena or seek relief from the court for any burdensome or overly intrusive requests, this factor favors granting an application unless a showing to the contrary is made. "This is significant because Section 1782 'ex parte applications are typically justified by the fact that the parties will be given adequate notice of any discovery taken pursuant to the request and will then have the opportunity to move to quash the discovery or to participate in it.'" *In re Chevron*, 2010 WL 8767265, at *5 (quoting *In re Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991)).

Intel, 542 U.S. at 264-65.

Further, district courts may also reject requests for the production of materials covered by a legally applicable privilege, such as the attorney-client privilege. It should be noted that courts generally treat the *Intel* factors with care and restraint, see, e.g., *Kiobel by Samkalden v. Cravath, Swaine & Moore LLP*, 895

F.3d 238, 245 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 852, 202 L. Ed. 2d 582 (2019) (The Court is mindful that "[t]he Intel factors are not to be applied mechanically.").

4.6. **Summary**

As we have seen, the applicability of 1782 Applications is generally broad and far reaching (in large part thanks to the Supreme Court's decision in *Intel*); however, the case law in regard to most requirements is generally local in nature and may therefore vary district by district. The extent to which Section 1782 can be employed effectively will depend on the circumstances in the particular case. Especially in light of the circuit split regarding the "tribunal" requirement, a resolution is highly anticipated by lawyers across the United States.

5. ALTERNATIVE AND COMPLEMENTARY DEVICES

1782 Applications allow for discovery from third parties to foreign proceedings. From a more traditional perspective that means obtaining documents and deposition testimony from third parties in the United States. For example, a U.S. subsidiary of a European company will produce communications it holds in its possession that may offer valuable information on the European counterparty's intent in dealing with the applicant. The utility is obvious, especially in the context of permissive U.S.-style discovery.

However, we have highlighted how Section 1782 can lead to even more utility: there is arguably no restriction on obtaining discovery of material even when kept abroad, see *In re del Valle Ruiz*, 2019 WL 4924395, at *8 (2d Cir. Oct. 7, 2019). This can also allow for insight into corporate structures, banking records, trading patterns and security positions worldwide. As we have noted, the term interested parties is usually understood broadly allowing for some flexibility when initiating Section 1782 applications for discovery from entities in the U.S., even for material kept abroad. A creative approach to Section 1782 can prove immensely advantageous for parties involved in (contemplated) litigation.

For example, Section 1782 can obtain information from U.S. banks or other financial institutions showing historical wire transfer records, asset transfers and involved parties. This has a wide array of application like building evidence to support allegations for veil piercing/ alter ego relationships, fraudulent transfers and can potentially be used to build a case for asset seizure or concealment. Indeed, the latter might encompass use of evidence both in the proceedings abroad as well as in U.S. ancillary proceedings.

In that regard, most states in the U.S. have enacted a version of the Uniform Fraudulent Conveyance Act ("UFCA"), the Uniform Fraudulent Transfers Act ("UFTA") or the most recent Uniform Voidable Transactions Act ("UVTA") that provide a creditor with the means to reach assets a debtor has transferred to another person to keep them from being used to satisfy a debt. The U.S. Bankruptcy Code contains similar provisions in the bankruptcy context. Under the UFCA, UFTA, or UVTA a court will usually look for "badges of fraud" such as insolvency as a consequence of the transfer, lack or inadequacy of consideration, insider relationships, the existence of a threat of litigation, and the kind of transaction undertaken. If a fraudulent transfer can be shown, the conveyance may be voided, and the creditor may be able to satisfy its claim against the fraudulently transferred property.

Another example is veil piercing/alter ego allegations. If 1782 Applications lead to the discovery of, *inter alia*, some type of common ownership, comingling of funds, shared bank accounts, and/or a disregard for corporate forms between closely cooperating companies (whether parent-subsidiaries or otherwise related companies) there could be grounds to argue that the counterparty in the foreign proceeding and a respondent entity in the U.S. are alter egos. Alter ego allegations can be used to effectively pressure an adversary in giving security or even open ways of recovery and access to assets formerly unknown and unknowable (usually those of the alter ego of the counterparty). Thus, if compelling circumstances exist, one may be able to "pierce the corporate veil" of a company to reach debtors that would otherwise be protected from liability by the corporate form.

Asset seizure is another tool that might be readily combined with Section 1782 Applications. When considering this strategy, intelligence on the adversary

(including potential findings hinting to an alter ego scenario) is best coupled with strong enforcement action. This can be done by attaching tangible or intangible property through attachment proceedings under state law as a way to obtain security and jurisdiction over a defendant.

The traditional set of enforcement tools is expanded when maritime disputes are concerned, i.e., those involving maritime contracts and/or vessels. For example, under Rule B of the Supplemental Rules to the Fed. R. Civ. P. ("Rule B"), a party can attach tangible and intangible property of a counterparty (or its alter ego) to obtain jurisdiction over and security from the counterparty. Rule B essentially looks to whether the filing party can show a valid prima facie maritime claim against the counterparty and that the counterparty cannot be found in the district where the property is located.

If a 1782 Application (relating to a maritime dispute) yields information giving rise to an alter ego scenario or leads to the discovery of bank accounts or other readily attachable property in a U.S. district, Rule B attachment actions might be initiated with accuracy. This could enable proceedings against entities that have been used to thwart chances of recovery, such as shell companies and debtors that are purposefully undercapitalized. Rule B is a very effective enforcement tool in its own right but particularly effective when paired with Section 1782 discovery that effectively gathers information on an entity's property and asset situation. Under Rule B the plaintiff can attach virtually all property it can find in a district, including accounts receivable at third party garnishees, bank accounts and other accounts at financial institutions, physical property and so on.

A Rule B action is one of the enforcement tools found in maritime law, another is the Rule C arrest of a vessel under the Supplemental Rules. Rule C is narrower compared to Rule B because it does not allow the attachment of just any property. Rule C can be used to enforce a maritime lien or certain statutory rights against property in rem, meaning the action is filed against the thing (the vessel) that the plaintiff seeks to arrest. However, the court's in rem jurisdiction applies only to the vessel or other property subject to the lien. There is no associated or sister ship arrest regime in the U.S., although *Rule B* can be used as a functional

equivalent as it can be used to attach "other property" of the defendant such as other vessels.[1]

In summary, Section 1782 is only one arrow in a quiver of several, effective enforcement and intelligence-gathering tools that can be deployed to obtain vital information, post security, increase the number of potential debtors if alter ego allegations can be maintained successfully, or allow for a creditor to fight back against fraudulent transfers. The tools may depend on the kind of claims asserted and should be tailored to the parties, facts and claims involved to provide for a maximum of effectivity and build on the strengths of each case individually.

6. A PRACTICAL EXAMPLE OF HOW 1782 APPLICATIONS CAN BE USED

To offer a practical example for how a Section 1782 action can be employed, consider a setting where a minority shareholder ("SH") with considerable equity in a company ("Co.") is faced with an impending sale of Co. by the majority shareholder ("MH"). Usually, sales of companies are based on valuations undertaken by banks or other financial professionals. If SH is unhappy with the result of the valuation and is forced to sell its shares losing considerable amounts of money in the stock it holds, and SH disputes such valuation, a claim might follow.

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[1] Maritime liens can arise in several circumstances and are defined in the Federal Maritime Lien Act and the Ship Mortgage Act (46 U.S.C. §§ 31301-31343), a lien may encompass certain items aboard a ship as well and can be enforced by a district court as long as the property is in the district.

If that underlying claim must be brought outside the U.S., but the relevant bank can be found in the U.S., Section 1782 may be very useful.

Basically, as an interested party in a foreign proceeding, SH seeks discovery from third parties, i.e., the bank or others, in the United States. SH can utilize U.S.-style discovery to probe communications between the parties, potentially take depositions of key players involved in the valuation and can pursue document discovery regarding the basis of the valuation, prior valuations and communications. SH is no longer relegated to the means of discovery in a foreign court and does not have to rely on court-initiated requests to U.S. courts to trigger discovery in the U.S. If appropriate and in case the factual findings support this, SH may even consider filing for ancillary proceedings in the U.S. fueled with the discovery obtained in the Section 1782. Ultimately, Section 1782 provides an effective means for gathering information.

7. EXPECTED FUTURE DEVELOPMENTS

Given the recent Second Circuit ruling in *In Re Guo,* and several circuits positioning themselves in the past couple of years firmly establishing a circuit split on the question whether private arbitration qualifies as a "tribunal" under Section 1782, perhaps the most important future development will come in form of the Supreme Court taking up the issue for review in the coming years.
There is strong opposition to the Second and Fifth Circuit on this issue. In 2019, the Sixth Circuit took a contrary view in *ALJT*, 939 F.3d 710 (6th Cir. 2019), finding that "tribunal" included a private arbitral tribunal. In the Fourth Circuit, the decision in *Servotronics,* 954 F.3d 209 (4th Cir. 2020) stands out. Congress' legislative intent seems to indicate that a broad understanding was intended,

the Court arguably suggested this position in *dicta* already, see *Intel*, 542 U.S. at 258. What is more, arbitral awards are final judgments that are subject to enforcement by U.S. courts. A party faced with judgments by foreign courts or international tribunals on the one hand, and private arbitral awards on the other, are functionally in a very similar position, see, e.g., *Servotronics,* 954 F.3d 215; *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

The Second Circuit in *In Re Guo* relied on several arguments in opposition, among them that they too favor a broad understanding of the term as had Congress in legislating. The court also considered several factors to distinguish private arbitration panels from government sponsored tribunals, including the source of the panel's jurisdiction, the extent to which the arbitral body is internally directed and governed by a state or intergovernmental body, and the extent a state or intergovernmental body possesses the authority to intervene to alter the outcome of an arbitration. *In Re Guo*, No. 19-781, 2020 WL 3816098, at *1-2; 7-8 (2d Cir. July 8, 2020).

The resolution of this circuit split will be awaited by many. For the scope of Section 1782, an outcome supporting private arbitration as tribunals would support the ongoing trend and use of Section 1782 applications and further entrench its role in international litigation.

Another area that could undergo development is the extraterritorial reach of Section 1782 for the discovery of documents. See *In re Schottdorf*, 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006) ("Section 1782 requires only that the party from whom discovery is sought be 'found' here; not that the documents be found here."). There is some disagreement on whether documents located abroad can be requested under Section 1782, see, e.g., *Norex Petroleum Ltd v. Chubb Ins. Co. of Canada*, 384 F. Supp. 2d 45, 50-51, 52-53 (D.D.C. 2005); *Four Pillars Enterprises Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1079 (9th Cir. 2002) (citing *In re Sarrio S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) (addressing the issue only in *dicta*). Though courts in the Second Circuit seem to have embraced extraterritorial reach since, see *In re Hulley Enterprises, Ltd.*, 358 F.Supp.3d 331, 334 (S.D.N.Y. 2019), the matter is not settled.

8. CONCLUSION

Section 1782 is a valuable tool for gathering information from third parties to disputes pending or contemplated before foreign tribunals. Respondents to 1782 Applications will be faced with U.S.-style discovery that has the potential of bringing to light vital information. In addition, Section 1782 can be used in conjunction with other, ancillary proceedings to form a robust global litigation strategy.

Please note that the above does not constitute formal legal advice and should only serve as a source of general information regarding the topics discussed. We encourage the reader to reach out and get in touch with us. We are happy to discuss the Ins and Outs of Section 1782 and other tools mentioned in this article.

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