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Obtaining Evidence in the U.S. for Use in a Foreign Proceeding

Parties to a non-U.S. proceeding may obtain evidence in the United States for use in the foreign proceeding. There are several ways to obtain such evidence, including the following:

- Obtaining the evidence from a person within the United States voluntarily. Unlike in some countries, a person in the United States is allowed to voluntarily give testimony or documents for use in a foreign proceeding.[1]
- Through an evidence-taking treaty such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, such treaties are limited because they are only available to persons from signatory countries. It may also be more cumbersome to seek evidence through diplomatic channels.
- Making a direct request to a federal district court for an order compelling evidence from a person within the United States.

This memorandum focuses on the last method, and examines the procedure and requirements for making a direct request to a U.S. district court.

Direct requests under 28 U.S.C. § 1782

Under United States law, specifically 28 U.S.C. § 1782 ("Section 1782"), the federal district court of the district where a person resides or is found, may order that person to give testimony or a statement, or to produce a document or thing, for use in a proceeding in a foreign or international tribunal. Section 1782 also applies to evidence sought for use in foreign criminal investigations conducted before a formal accusation.[2]

The federal district court may make such an order pursuant to one of the following:

- A letter rogatory, which is a formal request for judicial assistance from a court of one country to the court of another country.
- A request by a foreign or international tribunal.
- An application by any interested person.[3]

The "twin aims" of this statute are to provide an efficient means of assistance to participants in international litigation and to encourage foreign countries, by example, to provide similar means of assistance to U.S. courts.[4]

Threshold requirements for authorizing a federal district court to compel evidence in the United States pursuant to Section 1782

There are three key requirements that must be met before a federal district court is authorized to compel discovery in the United States pursuant to Section 1782:

- First, the person from whom the evidence is sought must "reside" or be "found" in the district of the court to which the application is made.
- Second, the evidence sought must be "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."
- Third, the request or application to compel evidence must be made by the foreign or international tribunal, or by "any interested person." A "person" from whom discovery may be compelled under Section 1782 includes an individual, corporation, company, association, firm, partnership, society and joint society.[5] For purposes of Section 1782, a "person" **does not include** the government or a governmental agency.[6]

These requirements and other considerations are discussed below.

First threshold requirement: The person "resides or is found" in the district of the court to which the Section 1782 application is made

Under Section 1782, a federal district court may compel testimony or documents only from a person who resides in or is found in that court's district. Physical presence in the court's district is generally sufficient to establish the "resides or is found" requirement. Indeed, an individual who lives and works abroad, but is served with a Section 1782 discovery order compelling his or her testimony while visiting the U.S., may still be required to provide testimony even if the discovery order was signed while the individual was abroad.[7]

A corporation "resides or is found" in a district where the corporation is either incorporated or headquartered. Alternatively, a corporation is "found" in a district if the corporation maintains "systematic and continuous" activities there, even if its headquarters and place of incorporation are located elsewhere.[8]

Second threshold requirement: The discovery is for use in a "proceeding" in a foreign or international tribunal

For purposes of Section 1782, a "proceeding" includes any proceeding in which an adjudicated function is being exercised or is imminent, such as a civil lawsuit.[9] However, Section 1782 relief is not limited to imminent or pending proceedings, but is also available where a dispositive ruling, reviewable by the courts, is within reasonable contemplation.[10] For example, a federal district court may provide assistance under Section 1782 to a complainant in a European Commission proceeding that leads to a final administrative action both responsive to the complaint and reviewable in court (*i.e.*, a dispositive ruling).[11] The language of Section 1782 also explicitly states that a foreign proceeding includes "criminal investigations conducted before formal accusation."[12]

One issue that has not been definitively resolved by the courts is whether Section 1782 applies to foreign private arbitration proceedings. Two separate Courts of Appeals have held that discovery under Section 1782 is not available for use in private arbitration proceedings.[13] Although not expressly addressing the issues of whether private arbitrations are proceedings, in 2004, the United States Supreme Court stated that Section 1782 authorizes assistance to a proceeding that leads to a dispositive ruling.[14] Additionally, the Supreme Court noted, but did not definitively rule, that the term "tribunal" includes, among other things, administrative and arbitral tribunals and quasi-judicial agencies.[15] Since then, many district courts have granted discovery applications made pursuant to Section 1782 in aid of private arbitrations, relying on the language in the Supreme Court's decision. The two Courts of Appeals, however, have not overturned their prior decisions that Section 1782 aid is not available for private arbitrations.[16] Accordingly, whether discovery may be compelled under Section 1782 for use in a private arbitration proceeding will depend on the district court in which the evidence is located.

Third threshold requirement: Application is made by a foreign tribunal or by "any interested person"

A discovery order under Section 1782 may be requested by a foreign tribunal or by "any interested person." "Any interested person" is not limited to litigants. Rather, an applicant who "possesses a reasonable interest in obtaining judicial assistance" qualifies as an "interested person" for purposes of Section 1782. Thus, for example, a complainant before the antitrust division of the European Commission may seek to compel discovery in the United States under Section 1782.[17]

District courts have broad discretion under Section 1782 to deny or limit discovery

Although a district court has the authority to grant a discovery order under Section 1782, it is not required to do so. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the United States Supreme Court set out four factors[18] that should be considered by a court when deciding to grant, deny or limit a Section 1782 request:

- Whether the discovery sought is within foreign tribunal's jurisdictional reach.
- 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.
- Whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.
- Whether the discovery request is unduly intrusive or burdensome.

First *Intel* factor: The foreign tribunal's jurisdictional reach

Under the first *Intel* factor, a district court should consider whether the discovery sought can be obtained through the procedures of the foreign tribunal.

For example, discovery from a participant in the foreign proceeding is generally available in the tribunal where the foreign proceeding is conducted. In contrast, discovery from a non-participant may be outside the foreign tribunal's jurisdictional reach, thus rendering it unobtainable without Section 1782 aid.[19]

In some cases, even if the evidence is within a foreign tribunal's jurisdictional reach, the limitations of the tribunal's own discovery rules may favor granting a Section 1782 application. In such a case, a district court may grant an applicant discovery pursuant to Section 1782 even against a person that is a party in the foreign proceeding.[20] However, an applicant need not have exhausted the discovery options in the foreign country before seeking assistance in the United States.[21]

Second *Intel* factor: The receptivity of the foreign tribunal

Under the second *Intel* factor, the focus is on the receptivity of the foreign tribunal to receiving U.S. federal court judicial assistance. In cases where the foreign government or tribunal expressly objects to U.S. judicial assistance, the district court is likely to deny a Section 1782 application. For example, in one case, there were specific requests from the German Ministry of Justice and the Bonn Prosecutor to deny the discovery sought pursuant to a Section 1782 application because there were concerns that granting discovery would jeopardize an ongoing German criminal investigation. The Second Circuit Court of Appeals held that, faced with such requests, the district court properly denied the Section 1782 request.[22]

However, the second *Intel* factor does not require that the discovery sought in the Section 1782 application actually be used in the foreign court or international tribunal. Thus, a Section 1782 request may be granted even if the discovery sought is not admissible as evidence in the foreign proceeding.[23]

Third *Intel* factor: Circumventing foreign proof-gathering restrictions or other policies of a foreign country, or the United States

If it appears that an applicant seeking discovery under Section 1782 is attempting to abuse the procedure in some way, the district court is likely to deny the request. One court has explained that such potential abuses include the following:

- Seeking discovery in the U.S., even if that discovery is available in the foreign jurisdiction, thereby forcing the applicant's adversary to proceed in two separate court systems.

- Seeking discovery that the foreign tribunal would not admit into evidence, as an attempt to harass the other party. However, as mentioned above, if there is a legitimate need for the discovery, a showing of admissibility in the foreign tribunal is not required.

- Swamping the foreign court with documents obtained from the U.S. Because civil jury trials are not available in many countries, those jurisdictions have a much more permissive admissibility standard as compared to the U.S. The fear is that numerous documents, which would be discoverable but not admissible in the U.S., would have to be admitted in, and unduly burden, the foreign court.

- Seeking discovery of which the foreign tribunal would necessarily disapprove because of the potential undue expense incurred by the adversary or third party in responding to U.S. discovery demands.

- An imbalance of available discovery that would unfairly advantage the Section 1782 applicant. In other words, one party in a foreign proceeding might be able to use the broad U.S. discovery procedures, which may not be available to the

adversary, who would be limited to the narrow procedures of the foreign tribunal.[24]

Notwithstanding these potential abuses, a district court is not required to automatically deny a Section 1782 request simply because there is some threat that the abuses may occur. Thus, there is no blanket rule, for example, that the information sought under Section 1782 also be discoverable in the foreign tribunal.[25] Additionally, an applicant is not required to exhaust the available discovery procedures in the foreign tribunal before seeking assistance under Section 1782.[26] Finally, reciprocal discovery is not required before a Section 1782 request may be granted.[27]

Where an applicant makes a good faith showing in its Section 1782 request, the district court will typically curtail the threat of abuse by limiting or conditioning the discovery.

A Section 1782 request is subject to United States discovery limits

If a request under Section 1782 is granted, the manner in which the discovery proceeds is determined by the applicable U.S. federal rules.[28] For example, documents that must be produced pursuant to a Section 1782 order exclude privileged information. Additionally, if the discovery request is unduly burdensome or intrusive, the court may deny the Section 1782 application or modify the request.

Procedure for making a direct Section 1782 request

A party or any interested person may make a Section 1782 application to a U.S. district court without a letter rogatory or any other involvement from the foreign or international tribunal. Typically, the application is made *ex parte* in the district court where the evidence sought is located.

Once the court orders that a subpoena be served to compel testimony or the production of documents, the person subject to the subpoena may object by making a motion to quash or modify the subpoena.

Contact us

If you wish to learn more about obtaining evidence in the United States for use in a non-U.S. proceeding, please contact us by email (hta@hgtlaw.com or jooyun@hgtlaw.com) or by telephone (+1 646-453-7290).

ENDNOTES

1. 28 U.S.C. § 1782(b).
2. 28 U.S.C. § 1782(a).
3. *Id.*
4. *See Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998) (internal quotation marks and citation omitted).
5. *See Al Fayed v. C.I.A.*, 229 F.3d 272, 274 (D.C. Cir. 2000).
6. *Id. See also In re Al Fayed*, 91 F. Supp. 2d 137, 141 (D. D.C. 2000).
7. *See Edelman v. Taittinger*, 295 F.3d 171, 178, 180 (2d Cir. 2002).
8. *See In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007).
9. *In re Merck & Co., Inc.*, 197 F.R.D. 267, 270 (M.D.N.C. 2000) (citing *Lancaster Factoring Co., Ltd. v. Mangone*, 90 F.3d 38 (2d Cir. 1996)).
10. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).
11. *Id.* at 255.
12. 28 U.S.C. § 1782(a).
13. These are the Second and Fifth Circuit Courts of Appeals. *See Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).
14. *See Intel*, 542 U.S. at 255.
15. *Id.* at 258.
16. In fact, the Fifth Circuit expressly affirmed that *Republic of Kazakhstan v. Biedermann Int'l* remains good law. *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 Fed. Appx. 31, 34 (5th Cir. 2009). The Second Circuit declined to revisit the issue. *Chevron Corp. v. Berlinger*, 629 F.3d 297, 310 (2d Cir. 2011). However, in a related case, the Third Circuit agreed, without analyzing that the same arbitration at issue in the Second Circuit *Chevron* decision was a proceeding in an international "tribunal." *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011).
17. *Intel*, 542 U.S. at 256.
18. *See id.* at 264-65.
19. *See id.* at 264.
20. *In re Servicio Pan Americano de Proteccion,* 354 F. Supp. 2d 269, 274 (S.D.N.Y. 2004)
21. *Euromepa*, 51 F.3d at 1098.
22. *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004)
23. *Brandi-Dohrn*, 673 F.3d at 82; In re Asta Medica, S.A., 981 F.2d 1, 7 n.6 (1st Cir. 1992); *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 138 (3d Cir. 1985); *In re Request for Judicial Assistance from the Seoul Dist. Criminal Court*, 555 F.2d 720, 723 (9th Cir. 1977).
24. *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, 594-95 (7th Cir. 2011).
25. *Intel*, 542 U.S. at 260-61.
26. *Euromepa*, 51 F.3d at 1098.
27. *Id.* at 1102.
28. *Gov't of Ghana v. ProEnergy Servs., LLC*, 677 F.3d 340, 343 (8th Cir. 2012).

APPENDIX: Full text of Section 1782

28 U.S.C. § 1782 states:

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.