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## WHITE - COLLAR LAW

### Using 28 U.S.C. § 1782 to Level the Field in International Litigation

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*Special to the Legal*

In the World Series, the home team gets to play by its rules: In American League stadiums, teams use the designated hitter, and in National League stadiums, pitchers bat for themselves. Litigation often features a similar home-field advantage, as the site of litigation determines the rules of the contest. As litigation becomes increasingly international, clients more and more face litigation in tribunals outside of the United States, including foreign courts and regulatory bodies, multilateral institutions and international arbitration, many of which have different procedures than American courts.

One notable difference between most foreign jurisdictions and the United States is the scope of discovery. Many foreign legal systems perceive American-style discovery as unduly intrusive and unnecessarily expensive. In those systems, discovery is often limited and a litigant might not have the opportunity to collect materials that it needs, either from its adversary or from third parties. Often, non-governmental parties may not compel materials from non-parties. Fortunately, U.S. law provides a way for litigants in foreign proceedings to obtain discovery through U.S. courts.

Under 28 U.S.C. § 1782, district court can order a person who resides or can be found in the district to give testimony or to produce documents for use in a proceeding in a foreign tribunal, including pre-indictment criminal investigations.



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In 2004, in *Intel Corp. v. Advanced Micro Devices Inc.*, the Supreme Court held that Section 1782 does not impose a “foreign discoverability” requirement. That is, a party can obtain through Section 1782 material that is not discoverable in a foreign proceeding. That ruling makes Section 1782 a valuable resource to parties that find

themselves in a foreign proceeding with limited discovery.

A party seeking to obtain discovery under Section 1782 files a petition, typically ex parte, and the court authorizes service of appropriate subpoenas. The recipient of the subpoena then may move to quash the subpoena. The Section 1782 petition must demonstrate that: the person from whom discovery is sought resides in or is found in the judicial district; the discovery is for use in a proceeding before a foreign tribunal; and the application is made by an “interested person.”

A person can be “found” in a judicial district if he is served with a subpoena while physically present in the district, even if he does not reside there. However, courts generally will enforce the limits of Federal Rule of Civil Procedure 45, including the 100-mile limit on depositions, if a person is served in a district in which he does not reside. In addition, a witness probably cannot be compelled to produce documents located outside of the United States, even if the witness himself is here.

Whether a matter is a “proceeding before a foreign tribunal” raises questions of what constitutes a “tribunal” and what is a “proceeding” before that tribunal. A “tribunal” encompasses more than just courts. Arbitration panels and administrative agencies acting in an adjudicative capacity are also included. In addition, the Supreme Court’s decision in *Intel* explained that a “proceeding” need not be pending or even imminent for Section 1782 to apply. Instead, a judicial proceeding need only be “within reasonable contemplation,” such as

a criminal or enforcement investigation that might lead to charges.

An “interested person” is anyone with a reasonable interest in obtaining discovery, likely meaning anyone with a right to submit evidence. This includes litigants, who are the most common example of interested persons, but it also describes others who might have an interest in a foreign proceeding. For example, in *Intel*, AMD, as the complainant before the European Commission, had the right under European law to submit evidence for the commission’s review. Thus, even though the commission and Intel were the parties to the European proceeding, AMD was an “interested person” under Section 1782.

A district court may in its discretion grant a discovery request under Section 1782. In exercising that discretion, the court should be guided by Section 1782’s twin aims: providing efficient means of assistance to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to our courts. The Supreme Court has identified four factors for courts to consider in the

exercise of their discretion: whether the documents or testimony sought are within the foreign tribunal’s jurisdictional reach, and thus accessible absent judicial assistance under Section 1782; the nature of the foreign tribunal, the character of the proceedings under way abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court 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; and whether the subpoena is unduly intrusive or burdensome.

In many ways, these factors collapse into an inquiry of whether the information is available and useful in the foreign proceeding. If it is available, then the first factor will counsel against granting discovery. On the other hand, if the information is beyond the reach of the foreign tribunal, courts will be more likely to permit discovery. Moreover, if the rules of a foreign proceeding expressly bar discovery of the requested information, or rules of evidence

before that tribunal imply that the information should not be discoverable, then courts here will generally refuse to permit discovery. However, the mere fact that the evidence’s admissibility in the foreign proceeding is subject to challenge is not enough to overcome a request, as long as the foreign tribunal does not have a clear policy against gathering or considering such evidence. In addition, courts typically refuse discovery if a foreign court or government expressly opposes the Section 1782 request. Courts also might reject a discovery request if it appears that a petitioner seeks to undermine the efficiency of arbitration by engaging in broad discovery.

Section 1782 can be a useful tool to moderate the differences between litigation in the United States and foreign proceedings. However, the statute has limits, and those who seek to invoke it must be careful not to overreach. Used correctly, the statute can substantially level the playing field for litigants finding themselves on unfamiliar turf. •

