

YOU ARE INVITED!
COME TAKE DISCOVERY IN THE UNITED STATES

**AN OPEN INVITATION FOR OBTAINING U.S. DISCOVERY FOR USE IN
NON-U.S. TRIBUNALS PURSUANT TO 28 U.S.C. § 1782**

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What is 28 U.S.C. § 1782?

An American law designed to allow participants in foreign legal proceedings to come to the United States and take American style discovery from people and information sources located in the U.S.

- ❖ Section 1782 governs the production of evidence in the United States for use in a foreign proceeding.**
- ❖ It provides exclusive subject matter jurisdiction to federal courts to rule on discovery applications submitted under Section 1782.**
- ❖ No Letters Rogatory required.**

What is the purpose of this law?

- ❖ To provide equitable and efficient discovery procedures in US courts for the benefit of participants in adjudicative proceedings outside the US; and,**
- ❖ To encourage other countries to provide similar means of assistance to US courts.**



What can you get with Section 1782 Discovery?

❖ Statements and witness testimony recorded by stenographic and video means

❖ Documents

- **Emails and correspondence**
- **International Wire Transaction Records (all U.S. Dollar wires transit the U.S.)**
- **Corporate Formation Documents**
- **Shareholder Meeting Records**
- **Board of Director Meeting Records**
- **Business Transaction Records**
- **Accounting Records**
- **Employment Records**
- **Intellectual Property Records**
- **Property/Real Estate Transaction Records**
- **Banking and Credit Card Records**
- **Phone Records**
- **Attorney Records (that are not subject to attorney-client privilege)**
- **Medical Records**
- **Travel Records**
- **Education Records**

28 U.S.C. § 1782 Discovery

The applicant must satisfy three statutory requirements:

- 1) The “person” from whom discovery is sought must “reside” or be “found” in the district of the court to which the application is made.
- 2) The request must be made “by a foreign or international tribunal or upon the application of any interested person.”
- 3) The evidence sought must be “for use in a proceeding in a foreign or international tribunal.”



28 U.S.C. § 1782 Discovery

Statutory Requirement No. 1

The “**person**” from whom discovery is sought must “reside” or be “found” in the district of the court to which the application is made.

What is a “**person**” for the purposes of 28 U.S.C. § 1782?

- ❖ Actual people.
- ❖ Corporations and business entities qualify as a "person" under Section 1782, as the United States Code defines a "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.
- ❖ Not the United States, its agencies, or political subdivisions.
- ❖ Not foreign governments.

Significant cases:

Al Fayed v. Cent. Intelligence Agency, 229 F.3d 272, 276-77 (D.C. Cir. 2000) (The statute does not explicitly exclude or include the government and found that the petitioner had failed to provide any "affirmative evidence to disturb the presumption that 'person' excludes the sovereign.")

In re Gushlak, 2011 U.S. Dist. LEXIS 91912, at *26 (E.D.N.Y. Aug. 17, 2011) (“Petitioner does not provide the requisite ‘affirmative showing’ that the government should be considered a ‘person’ under § 1782.”)

28 U.S.C. § 1782 Discovery

Statutory Requirement No. 1

The “person” from whom discovery is sought must **“reside” or be “found” in the district** of the court to which the application is made.

- ❖ For purposes of 28 U.S.C. § 1782, a company is found where it is incorporated, headquartered or where it is engaged in "systematic and continuous activities." *In re Godfrey*, 526 F. Supp. 2d 417, 422 (S.D.N.Y. 2007) (citation omitted).
- ❖ “[I]f 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.” *Edelman v. Taittinger (In re Edelman)*, 295 F.3d 171, 180 (2d Cir. 2002) (French citizen “found” in New York while visiting art gallery and served with subpoena.)



28 U.S.C. § 1782 Discovery

Statutory Requirement No. 2

The request or application must be made “by a foreign or international tribunal or upon the application of any **interested person.**”

- ❖ An “interested person” means having “significant ‘participation rights’ in a proceeding ‘possesses[ing] a reasonable interest in obtaining judicial assistance.” *RTI Ltd. v. Aldi Marine Ltd.*, 523 F. App’x 750, 751 (2d Cir. 2013).
- ❖ “No doubt litigants are included among, and may be the most common example of the ‘interested persons’ who may invoke §1782”. *Intel*, 542 U.S. at 256.
- ❖ “The underlying policy of § 1782 also supports the conclusion that a foreign government may initiate discovery thereunder.” *In re Republic of Ecuador*, 2010 U.S. Dist. LEXIS 132045, at *16 (N.D. Cal. Dec. 1, 2010).
- ❖ “A foreign legal affairs ministry, attorney general, or other prosecutor, ...fits squarely within the section 1782 ‘interested person’ category.” *See In re Request for Assistance from Trinidad & Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988).

Significant cases:

Lancaster Factoring Co. Ltd. v. Mangone, 90 F.3d 38 (2d Cir. 1996) (finding agent of a foreign bankruptcy trustee was an "interested person" within meaning of Section 1782).

In re Certain Funds, Accounts, &/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC, 2014 WL 3404955, at *1 (S.D.N.Y. July 9, 2014) (“[P]etitioners are not interested. . . . Petitioners do not have any existing role in those proceedings and have failed to demonstrate that they have a right to submit evidence to the foreign tribunals in question.”)

In re Coffman, 766 F.3d 1246, 1250 (11th Cir. 2014) (holding that a § 1782 applicant “is not an ‘interested person’ because he fails to allege a ‘reasonable interest’ in establishing the record”).

28 U.S.C. § 1782 Discovery

Statutory Requirement No. 3

The evidence sought must be “**for use** in a proceeding in a foreign or international tribunal.”

What does “for use” mean?

- ❖ “[A]n applicant may seek discovery of any materials that can be made use of in the foreign proceeding to increase her chances of success.” *Mees v. Buiter*, 793 F.3d 291, 299 (2d Cir. 2015).
- ❖ “The ‘for use’ requirement is not limited to the actual receipt of materials into evidence in the foreign proceeding. Section 1782(a) contains no requirement that particular evidence be admissible in a foreign proceeding to be considered ‘for use in a proceeding in a foreign or international tribunal.’” *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 77 (2d Cir. 2012).



28 U.S.C. § 1782 Discovery

Statutory Requirement No. 3

The evidence sought must be **“for use** in a proceeding in a foreign or international tribunal.”

- ❖ “[T]he ‘proceeding’ for which discovery is sought under § 1782(a) **must be in reasonable contemplation, but need not be ‘pending’ or ‘imminent.’**” *Intel*, 542 U.S. at 247 (2004).
- ❖ “[A] district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time. . . . At a minimum, a § 1782 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 &/or Inv. Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 124 (2d Cir. 2015).

Significant cases:

In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago, 848 F.2d 1151, 1156 (11th Cir. 1988) (“If ... the request is a ‘fishing expedition’ or a vehicle for harassment, the district court should deny the request.”), *abrogated on other grounds by Intel Corp.*, 542 U.S. at 249;

Jiangsu S.S. Co. v. Success Superior Ltd., No. 14 Civ. 9997(CM), 2015 WL 3439220, *6 (S.D.N.Y. Feb. 5, 2015) (denying §1782 application for pre-filing discovery because “the statute is not designed to provide potential litigants with information that will help them decide whether and where to commence proceedings”).

28 U.S.C. § 1782 Discovery

Statutory Requirement No. 3

The evidence sought must be “for use in a proceeding in a **foreign or international tribunal.**”

Which “foreign or international tribunals” qualify?

- ❖ Non-U.S. civil and criminal judiciary proceedings
- ❖ Administrative and quasi-judicial proceedings
- ❖ First instance decision maker subject to judicial review

Intel, 242 U.S. at 258.

Do arbitrations arising from investment treaties qualify?

- ❖ Court’s generally permit Section 1782 discovery in investor-state arbitration matters

Chevron Corp. v. Shefftz, 754 F. Supp. 2d 254, 260 (D. Mass. 2010) ("international arbitral bodies operating under UNCITRAL rules constitute 'foreign tribunals' for purposes of § 1782.")

In re Oxus Gold PLC, 2007 U.S. Dist. LEXIS 24061, at *5 (D.N.J. Apr. 2, 2007) (holding that a bilateral investment treaty governed by UNCITRAL rules constituted a "foreign tribunal" under § 1782).

28 U.S.C. § 1782 Discovery

Statutory Requirement No. 3

The evidence sought must be “for use in a proceeding in a **foreign or international tribunal.**”

- ❖ U.S. courts are divided as to whether private commercial arbitration proceedings qualify as tribunal
- ❖ Some District Courts have allowed Section 1782 discovery for private commercial arbitration

OJSC Ukrnafta v. Carpaty Petroleum Corp., 2009 U.S. Dist. LEXIS 109492, at *10-13 (D. Conn. Aug. 27, 2009) (“In this case, there is sufficient judicial reviewability, as there is a coinciding jurisdictional challenge pending before the Swedish Court for which Urknafta could seek discovery under Section 1782, and either or both parties can seek review of the decision of the arbitral tribunal. ... Thus, [Arbitration Institute of the Stockholm Chamber of Commerce] AISCC is acting as a "first-instance decision maker," whose decision may be subject to review, and thus falls within the purview of Section 1782.”)

In re Babcock Borsig AG, 583 F. Supp. 2d 233, 240 (D. Mass. 2008) (“the ICC is a "tribunal" within the meaning of § 1782(a)”).

Comisión Ejecutiva, Hidroeléctrica Del Río Lempa v. Nejapa Power Company, LLC, 2008 U.S. Dist. LEXIS 90291 (D. Del. October 14, 2008) (Section 1782 applies to “private foreign arbitrations”).

In re: Application of Hallmark Capital Corp., 534 F. Supp. 2d 951, 957 (D. Minn. 2007) (private Israeli arbitral body was a "tribunal" for purposes of the statute.)



In re Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (the court ordered discovery in aid of a private arbitral panel convened under the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna. The court noted “[w]here a body makes adjudicative decisions responsive to a complaint and reviewable in court, it falls within the widely accepted definition of 'tribunal,' the reasoning of *Intel*, and the scope of § 1782(a), regardless of whether the body is governmental or private.”) *Id.* at 1228.

❖ Some District Courts have not allowed Section 1782 discovery for private commercial arbitration

In re Arbitration in London, 626 F. Supp. 2d 882 (N.D. Ill. 2009) (private arbitrations do not have the "ultimate reviewability," or "judicial review of the merits of the parties' dispute," the importance of which review was emphasized by the Supreme Court; thus, private arbitral tribunals do not fall within the scope of Section 1782(a).)

La Comision Ejecutiva, Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 487 (S.D. Tex. 2008) (because the Swiss arbitral tribunal "prohibited almost all discovery," the district court should not exercise its discretionary authority to order discovery, "out of respect for the efficient administration of the Swiss arbitration.")

In re Operadora DB Mexico, S.A. DE C.V., 2009 U.S. Dist. LEXIS 68091, at *9 (M.D. Fla. Aug. 4, 2009) ("Congress did not clearly intend to include private arbitral proceedings within the ambit of foreign or international tribunals.")

❖ No clear guidance from the appellate courts



28 U.S.C. § 1782 Discovery

PRIVILEGE

“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.S. § 1782.

Numerous privileges may apply:

- ❖ Attorney-client privilege
- ❖ Attorney work product privilege
- ❖ Foreign privilege
- ❖ Constitutional privilege against self-incrimination
- ❖ The proponent bears the burden of demonstrating the applicability of any asserted privilege with "reasonably certainty." That showing must extend to "each of the essential elements necessary to support a claim of privilege." *Alexander v. Fed. Bureau of Investigation*, 192 F.R.D. 42, 45 (D.D.C. 2000).
- ❖ No blanket or categorical claims of privilege. The law "requires a showing that the privilege applies to each communication for which it is asserted." *United States v. Legal Servs. for N. Y. C.*, 249 F.3d 1077, 1082, (D.C. Cir. 2001).

28 U.S.C. § 1782 Discovery

The Discretionary Factors

- 1) Whether the person from whom discovery is sought is not a participant in the foreign proceeding and thus outside of the foreign court's reach;
- 2) Nature of the foreign tribunal and its receptivity to U.S. judicial assistance;
- 3) Whether the request conceals an attempt to circumvent foreign evidence gathering rules; and
- 4) Whether the request is unduly intrusive or burdensome.

Intel, 542 U.S. 264-265.

- ❖ "Once the statutory requirements are met, a district court is free to grant discovery in its discretion." *Metallgesellschaft v. Hodapp*, 121 F.3d 77, 78 (2d Cir. N.Y. 1997) (reversing refusal to grant § 1782 discovery.)
- ❖ Courts consider discretionary grounds "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." *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004).

Discretionary Factor No. 1

Whether the person from whom discovery is sought is not a participant in the foreign proceeding and thus outside of the foreign court's reach.

- ❖ “[W]hen the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence.” *Intel*, 542 U.S. at 264.
- ❖ “Nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.” *Id.*

Significant cases:

In re OOO Promnefstroy, 2009 WL 3335608, at *5 (S.D.N.Y. Oct. 15, 2009) (“[T]he foreign tribunal’s ability to control the evidence and order production, not the nominal target of the § 1782 application, [is] on which the district court should focus.”)

In re Microsoft Corp., 428 F. Supp. 2d 188, 194 (S.D.N.Y. 2006) (“The relevant inquiry is whether the evidence is available to the foreign tribunal. In this case, it is. Thus, § 1782 aid is both unnecessary and improper.”)

In re Application Pursuant to 28 U.S.C. § 1782, 2014 WL 4181618 at *4 (S.D. Ohio, Aug. 21, 2014) (holding that discretionary requirements not met because subjects would be participants in the foreign proceedings).

In re Kreke Immobilien, 2013 WL 5966916, at *6 (S.D.N.Y. Nov. 8, 2013) (If discovery is available through the foreign parties, this “discretionary factor weighs strongly in favor of denying the application.”).

Discretionary Factor No. 2

The nature of the foreign tribunal and its receptivity to U.S. judicial assistance.

- ❖ §1782 does not require the applicant to establish that the sought evidence is admissible in the foreign action. *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 82 (2nd Cir. 2012).
- ❖ "Federal courts, in responding to [§ 1782] requests, should not feel obliged to involve themselves in technical questions of foreign law relating to . . . the admissibility before such tribunals of the testimony or material sought". *In re Request for Judicial Assistance from the Seoul Dist. Criminal Court*, 555 F.2d 720, 723 (9th Cir. 1977).
- ❖ "Parties that apply for discovery under § 1782 enjoy a presumption in favor of foreign tribunal receptivity that can be offset by reliable evidence that the tribunal would reject the evidence." *Government of Ghana v. ProEnergy Servs., LLC*, 2011 U.S. Dist. LEXIS 75029, at *4 (W.D. Mo. June 6, 2011).
- ❖ A "district court's inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782"). *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099-100 (2d. Cir.1995).

Significant cases:

In re Matter of Application of Schmitz, Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 1984)(the §1782 request was denied in part because the German authorities specifically stated that the requested discovery would undermine an ongoing investigation.)

Metallgesellschaft v. Hodapp 121 F.d 77, 80 (2nd Cir. 1997)("no such 'authoritative proof' was forthcoming".)

In re Request for Judicial Assistance from the Seoul Dist. Criminal Court, 555 F.2d 720, 723 (9th Cir. 1977) ("[F]ederal courts, in responding to [§ 1782] requests, should not feel obliged to involve themselves in technical questions of foreign law relating to . . . the admissibility before such tribunals of the testimony or material sought.")

Grupo Qumma, 2005 U.S. Dist. LEXIS 6898 (S.D.N.Y. April 25, 2005) (granting § 1782 discovery application where the foreign court's receptiveness of the discovery was disputed).

❖ Arguments in opposition to a §1782 request resting upon interpretations of foreign policy or law are generally insufficient

Significant cases:

Euromepa, S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 11099-1100 (2d Cir. 1995) (The Court of Appeals stated "we do not think that the district court's concern for trespassing upon the prerogatives of French sovereignty should have weighed so heavily in its decision".)

In re Imanagement Services, Ltd., 2006 U.S. Dist. LEXIS 8876, *16 (S.D.N.Y. February 28, 2006) (the court declined to undertake a "speculative foray" into unfamiliar legal territory and attempt to determine the extent to which a Russian court would be receptive to documentary or testimonial evidence gathered pursuant to outside discovery assistance under §1782.)



Discretionary Factor 3

Whether the request conceals an attempt to circumvent foreign evidence gathering rules.

- ❖ “To decline a § 1782(a) request based on foreign non-discoverability, a district court must conclude that the request would undermine a specific policy of a foreign country or the United States”. *In re The Procter & Gamble Co.*, 334 F. Supp.2d 1112, 1116 (E.D. Wis. 2004).
- ❖ Section 1782 allows for discovery broader than allowed in the foreign proceeding.
- ❖ No requirement for the discovery to be permitted under the laws of the foreign forum.
- ❖ No requirement to first seek discovery in the foreign forum.

Case study:

Imanagement Services brought an action in Russia against The Bank of New York and in New York, requested Section 1782 discovery against The Bank of New York. The Bank of New York opposed discovery taking the position that because written testimony from witnesses outside Russia is inadmissible in a Russian action absent a Russian court order, and that because the §1782 applicant sought the *ex parte* order without first requesting permission from the Russian court, the request for discovery under §1782 demonstrated an attempt to circumvent the procedural rules of the Russian court.

The U.S. court rejected this argument stating the fact that the §1782 applicant requested relief without first seeking an order from the Russian court did not suggest that the applicant was attempting to circumvent the rules of the foreign tribunal. In addition, the Bank of New York failed to submit any "authoritative proof" that Russian law prohibited either the gathering of evidence pursuant to §1782 or its subsequent use or admission in the Russian proceeding.

In re Imanagement Services, Ltd., 2005 U.S. Dist. LEXIS 17025 (E.D.N.Y. August 16, 2005).

Significant cases:

Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 82 (2d Cir. 2012) (“a district court should not consider the *discoverability* of the evidence in the foreign proceeding”).

Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1098 (2d Cir. 1995) (rejecting "any implicit requirement that any evidence sought in the United States be discoverable under the laws of the foreign country").



Discretionary Factor 4

THE REQUESTS ARE DELIBERATELY UNDULY BURDENSOME AND INTRUSIVE WEIGHING AGAINST DISCOVERY

- ❖ Courts will exercise their normal gate keeping function to protect against abusive or harassing discovery requests and to protect confidential information.
- ❖ Unduly intrusive or burdensome requests made under section 1782 may be rejected or trimmed.
Intel, 542 U.S. at 265.



Extra-Territorial Reach of Section 1782

- ❖ Section 1782 empowers U.S. Courts to allow discovery to be taken and produced "in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a).
- ❖ The Federal Rules governing subpoenas and the production of documents contain no geographical limitations with respect to where discoverable information can be located, requiring simply that a respondent produce any relevant documents, electronically-stored information, or tangible items in their **“possession, custody, or control”**. *See* Fed. R. Civ. P. 34(a)(1), 45(a)(1)(A)(iii), 45(c)(2)(A).

Significant cases:

Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016) (holding that § 1782 reaches "responsive documents and information located outside the United States" in the "possession, custody, or control of" the compelled party).

In re Barnwell Enters., 2017 U.S. Dist. LEXIS 108337, *28 (D.D.C. July 13, 2017) (allowing discovery of documentary evidence directly from company employees, some of whom happen to be located abroad).

In re Application of RSM Production Corp. 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 Israeli proceedings].")

In re Application of Gemeinshcaftspraxis D. Med. Schottdorf, 2006 U.S. Dist. LEXIS 94161 (S.D.N.Y. January 4, 2007)(granted §1782 application to serve a subpoena upon a U.S. company headquartered in New York and required it to produce documents within its control that were physically located in Germany.)





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Tom's practice includes representation of Western, Russian and Ukrainian clients in complex international commercial disputes and discovery matters. He has successfully brought and defended numerous Section 1782 matters throughout the United States, including in New York, Florida, California, Alabama, Delaware, Ohio, Oklahoma and Oregon.

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