IAFL US & CANADIAN CHAPTERS MEETING
EDUCATION PROGRAM

Education Program Committee:
Chair: Melissa A. Kucinski (Washington, D.C., USA)
Jonathan Lounsberry (South Carolina, USA)
Jessica Kirk Drennan (Alabama, USA)

Chapter Presidents:
Wendy Brooks Crew (Alabama, USA) and Oren Weinberg (Ontario, Canada)

Welcome to Charleston, South Carolina. Our Education Programs are based on a hypothetical family who is experiencing some significantly complicated legal issues. With guidance from our expert legal teams on each panel, we will debate the merits of our family's legal problems and propose solutions to solve their family law woes.

Thursday, February 6, 2025

8:30 to 8:40 AM **Introduction and Welcome from the Chapter Presidents**

Wendy Brooks Crew (Alabama, USA) & Oren Weinberg (Ontario, Canada)

8:40 to 9:10 AM **Welcome to Charleston**

Our Opening Speaker will welcome all fellows with a fascinating tale of the history of this great city.

Katherine Pemberton, Museum Director of the Powder Magazine Museum and Director of Programming for the National Society of Colonial Dames in America in the State of South Carolina

9:10 to 9:20 AM **Mobile Families and Conflicts in Laws**

You will be introduced to a highly mobile family. For each panel, a team of international lawyers will advise and guide our family through a complex maze of international family law problems, which will highlight the complex conflict of laws problems that may exacerbate litigation, and, hopefully, propel settlement.

Peter and Kay are a highly mobile, international couple, that are finding themselves in a lot of legal trouble as they navigate starting a family, marrying, divorcing, and addressing their finances. We have assembled some of the most sophisticated global legal teams to provide advice to Peter and/or Kay.

Introduction by Melissa Kucinski, Managing Partner of the "IAFL International Law Firm"

9:20 to 10:20 AM **Valuing an international business**

Kay is the part-owner of an international lumber and shipping company. The company is headquartered in Wilmington, Delaware, United States, but has its warehouse and shipping facility in Canada. Peter is the owner of an import/export company that has done significant business throughout the Asia-Pacific region, including in Singapore. Its headquarters is in London, and it has a satellite office in Melbourne, Australia.

Both Kay and Peter need to value these international companies, and they agree to hire Mr. Brian Burns to conduct a neutral business valuation of each.

Speakers: Brian Burns or Alex Rey (Richmond, Virginia), Ian Kennedy, AM (Melbourne, Australia), Mélissa Chevalier (Montreal, QC, Canada)

10:20 to 10:30 AM **DivorceLawyer.com speaking**
10:30 to 10:50 **Break**

10:50 to 12:00 PM **International Parentage and Surrogacy**

Peter and Kay are madly in love, but Kay is having difficulty conceiving a child, something she desperately wants. The couple is not yet married. Kay is living in Paris, France in a home owned by Peter, but travels frequently to Canada, where she oversees operations for her family's business. Peter is spending time between England and France. He periodically travels to the Asia-Pacific region to engage in business as part of his international import/export company. Kay travels to the United States where she reconnects with her good friend, Rachael, who is willing to be the surrogate that carries Kay's child.

Speakers: Colin Rogerson (London, England), Bruce Hale (Boston, Massachusetts), Shirley Eve Levitan (Toronto, Canada)

Friday, February 7, 2025

8:30 to 10:00 AM **The International Movement of Children**

Kay's child, Marlene, is born through Rachael. Kay and Marlene will spend approximately four months each year in France, Canada, and the United States with the child, although she may periodically visit Peter while he is on job assignment elsewhere. During one visit with Peter in Singapore, where he was negotiating a new contract for his company, Peter proposes that they temporarily relocate to Singapore for one year. Kay agrees to the temporary relocation, but, concerned about packing the family's households with a now 2-year-old toddler, Kay travels to the United States and leaves Marlene with Rachael, who is also the child's godmother. Rachael has a close connection to Marlene and is very concerned about the family's plans to relocate to Singapore. Rachael refuses to return Marlene to Peter and Kay when it comes time for the move. Peter and Kay file a lawsuit in New York, where Rachael is living, seeking Marlene's return.

Speakers: Richard Min (New York, New York), Isabelle Rein-Lescasteryres (Paris, France), Alexandra Carr (Toronto, Canada)

10:00 to 10:10 AM **CBIZ Speaking**
10:10 to 10:30AM **Break**

10:30 to 12:00 PM **The role of fault in dividing international assets, the transfer of assets between countries and other considerations**

Fast forward. Peter and Kay manage to resume care and custody of Marlene from Rachael. Rachael is in jail in the United States for having kidnapped Marlene. Peter and Kay have reconciled and remained in Singapore beyond the one year originally contemplated. They marry in a small private ceremony at home in Singapore. Marlene is now age 5, It's finally time for Peter and Kay to enroll Marlene in school, and Kay would like the child to attend an elite private boarding school in Canada. Peter and Kay get into a fight. Kay moves out with Marlene and goes to her family home in Canada. She rekindles a relationship with Jason, an old boyfriend from university, who now plays for the National Hockey League (NHL). Jason lives most of the year in New York and is spending substantial time with Kay in Peter and Kay's two-bedroom apartment on the Upper East Side, which Peter and Kay had utilized as a pied a terre. When Peter finds out, he decides to divorce Kay.

The couple has the following key assets:

For Kay: Bank and Brokerage accounts in Canada, the United States, Singapore, and France; retirement assets in New York; a share in the family

business in Canada, which is held in a trust; a small condo in Paris; an inheritance right in the real estate where she resides while in Canada; among other things.

For Peter: Bank and Brokerage accounts in England, France, Singapore, and Australia; retirement assets in England; his import/export company that is headquartered in London; a house in Paris, France; an apartment in New York, among other things.

Speakers: Karon Bales (Toronto, Canada), Gretchen Beall Schumann (New York, NY), Tim Amos, KC (London, England), Kai Yun Wong (Singapore)

Saturday, February 8, 2025

8:15 to 9:15 AM **US Chapter and Canadian Chapter Business Meetings**

9:15 to 9:35 AM **Break**
9:35 to 9:40 AM **Wilmington speaking**
9:45 to 11:15 AM **International Discovery**

Peter and Kay are in the thick of litigation in France (for child custody), Singapore (for divorce), and Canada (for the division of certain assets). They realize that for all aspects of their case, they are going to need information from within and without each country. They each independently consult their legal teams about how to obtain the necessary disclosures.

As a reminder, the parties have the following assets:

For Kay: Bank and Brokerage accounts in Canada, the United States, Singapore, and France; a share in the family business in Canada; a small condo in Paris; her relative having passed, real estate where she resides while in Canada as well as real estate in Alabama where she stays while visiting Rachael; among some other assets. Peter also suspects that Kay owns 40% of a subsidiary of her family's business that has multiple sites in the Alabama Gulf shores.

For Peter: Bank and Brokerage accounts in England, France, Singapore, and Australia; his import/export company that is headquartered in London; a house in Paris, France; among some other assets. Peter also owns real estate in London which he inherited from a wealthy aunt. He and Kay stayed in one of the properties from time to time when on vacation and/or passing through London *en route* to Singapore.

Both are also very wary of the other hiding additional assets and consult their respective teams on how to obtain as much financial information about the other as possible and the most efficiently.

Speakers: Frances Auchincloss Goldsmith (Paris, France), Jane Keir (London, England), Kenneth Fishman (Toronto, Canada), Jessica Kirk Drennan (Birmingham, Alabama)

Thursday Materials

9:20 to 10:20 AM

Valuing an International Business

IAFL US & CANADIAN CHAPTERS MEETING
EDUCATION PROGRAM

Valuing an international business[1]

Peter and Kay are a highly mobile and rather wealthy international couple. Their marriage has broken down and they are separated. Kay is a Canadian citizen who lives six months each year in Canada and six months in France. Peter is a UK citizen who has a US green card and now lives primarily in London.

During their marriage, both were highly successful businesspeople.

On the advice of their very competent IAFL lawyers they want to explore resolving financial issues between them amicably and confidentially and to avoid any court proceedings. However as time has gone on since they separated and they have learned or come to suspect more about the financial activities of the other than they had previously bothered paying attention to, they have become increasingly suspicious that the other may not be entirely frank about disclosing their assets, resources and business and financial affairs to enable a fair settlement of property between them.

Their lawyers have accordingly instructed me to act as a neutral evaluator and provide advice as to what would be a proper settlement range so that they have some guidance and structure in negotiating that.

In order to undertake that exercise, the first and most basic step is for me to have a full understanding of the nature of their respective financial interests – and, most importantly, their value.

From my preliminary investigations – based on discussions with Kay, Peter and their respective legal representatives (plus a bit of digging triggered by issues touched on arising from the mutual suspicion) – I have recorded my present understanding of the financial position of each party and the issues which seem to require further investigation. However I have no idea how to go about fully identifying the various interests – and in particular, placing a value on them.

I have accordingly sought and obtained approval to commission a neutral valuation of the business and personal interests of each party, and have turned to Brian Burns (Forvis Mazars,

[1] Brian Burns (Forvis Mazars, Virginia, USA); Mélissa Chevalier (Forvis Mazars, Montreal, Canada); Ian Kennedy AM (Kennedy Partners, Melbourne, Australia)

USA) and Mélissa Chevalier (Forvis Mazars, Canada) for expert help and have provided them with the following information:

KAY

Kay is part-owner of a family-owned international shipping and lumber business commenced by her grandfather. Her 84-year-old father is Chairman and Managing Director of the holding company Shivama Timbers, which is registered and headquartered in Wilmington, Delaware with the shares being held in a Cayman Islands trust.

The business operates through a complex web of companies managing different aspects of its operations. It has extensive interests including a mixture of freehold and leasehold/licensed forestry holdings throughout Canada and northern USA; milling facilities in various locations; shipping facilities and wharfage rights in Montréal and Vancouver; a haulage company for transporting timber from mill to port; equipment relating to the forestry and shipping activities including helicopters and aeroplanes; and charter agreements with shipping companies.

The forestry holdings are held in various subsidiaries and leased to Shivama, which also holds rights and licenses over large tracts of undeveloped land suitable for expanding the forestry business. Although it has not yet been fully explored, surveys have indicated that some of its property interests hold previously-unknown deposits of the rare earth mineral terbium (essential for electric car motors) the known reserves of which are dominated by China – but exploitation of which would require significant capital investment and give rise to environmental and regulatory concerns and traditional owner concerns.

Shivama sells its timber for the Asia-Pacific region to a Singapore company, which then onsells to purchasers. A similar arrangement applies to the USA/European markets through a Cayman Islands entity (arrangements which seem to mean the income of the export activities is taxed in tax-friendly environments).

It appears that each family member has stock options in Shivama which mature over time, and put options for their existing stock.

The financial media reports rumours that Shivama may be a target for a major US private equity firm in partnership with the Canadian Pension Fund, attracted by the possibility of exploiting the terbium deposits, which Shivama does not have the capacity or expertise to do.

Kay's personal assets include: –

a. a condominium in Paris

b. brokerage accounts in Canada, USA, Hong Kong and France

c. a remainder interest in real estate in Canada under her late grandfather's will, subject to a life interest to her 84 year old father.

Her personal tax returns disclose minimal income, but she seems to live an extremely comfortable life between Canada and Europe, with most of her expenses appearing to be met on her behalf from Shivama or various entities within the family group.

PETER

Peter has sole control of an import/export business which conducts significant business operations throughout the Asia-Pacific region, including Hong Kong, importing into the USA, Canada, Europe and Australia. Its headquarters are in London (where Peter lives in a £20 million house near Buckingham Palace), with a satellite office in Melbourne, Australia from where the Asia-Pacific operations are conducted and where he spends substantial periods all each year, particularly around the Australian Tennis Open and the Melbourne F1 Grand Prix. It also has business interests in the Caribbean and South America operated through entities within the group.

The structure of Peter's business interests is really quite opaque. However, like Kay, he appears to live at a very high level while showing not much income.

In addition to the business and the London home, Peter has disclosed bank and brokerage accounts in England, Singapore and Australia and a home in France. Kay believes that he also has a very large part of his wealth invested in digital currency (which has not been disclosed).

Forvis Mazars will help us identify and navigate the valuation issues which the financial affairs of this couple throw up.

Friday Materials

10:30 to 12:00 PM

The role of fault in dividing international assets, the transfer of assets between countries and other considerations

IAFL Charleston: CLE Finance Panel: "**The role of fault in dividing international assets, the transfer of assets between countries and other considerations**."

Show of hands – yes!: who *does* fault (still)? And anyone want to illustrate (5 mins)?

Issues (thru lens of 4 common law jurisdictions) Ontario, Singapore, New York, England & Wales: ≅ "things to think about as pointers for most cases you'll ever have!" 😊

0. *Cultural norms/non-assumptions: eg. school age 5?*

1. **Core**: Jurisdiction: residence/"domicile"/citizenship
    a. Applicable law – 2nd show of hands: how many jurisdictions in audience *do* this?
    b. Validity of marriage - at home in Singapore/"*lex loci celebrationis"/*officiant
2. **Collateral**: not child issues, except Marlene, as surrogate child, a "child" for Trust?
3. **Financial**:

a. ?Fault – with 3rd show in relation to Domestic Violence initiatives/prognosis?

b. b/f Jason: relevant to H/W maintenance-alimony/?add-back/child welfare?

c. Matrimonial Property Regime/marital vs. non-marital/asset-categorisation/NEEDS?

d. Resources/Trust/inheritance-right/externality/future distance + control

e. Companies (Thurs) + liquidity/internal finance + value-adjusting/quasi-partnership?

f. Retirement assets/pensions: pension-sharing orders/jurisdiction limits/QDRO

g. The "inheritance right" in Canadian real estate?

h. Retrospective recovery of dispositions pre-separation so as to increase assets now

i. Maintenance-alimony/capitalisation/"clean-break" – budgets/formulae/guidelines

4. **Procedural**:
    a. Forum race/stay/anti-suit injunction/(interlocutory) Hemain – informal soundings
    b. Disclosure/duties/questions + consequences of non-disclosure/set-aside
    c. What can the parties do if they don't like SJE Mr. Burns' valuation report?
    d. Publicity/reporting restrictions/commercial sensitivity: 4/5/6th show of hands

5. "After-party":

a. "Pt III" (3), Matrimonial & Family Proceedings Act 1984 after "overseas" divorce…

b. In any (and every) case, ENFORCEMENT of the result(s)?

c. Expert evidence of (foreign) law

Saturday Materials

9:45 to 11:15 AM

International Discovery

IAFL: US AND CANADIAN CHAPTERS MEETING

Charleston, USA

5-9 February 2025

International Discovery

Saturday 8 February 2025

Outline details: **Jane Keir (London)**

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Kingsley Napley - When it Matters Most | Lawyers, Solicitors London

1. What information can both parties obtain without litigation?

(a) Companies House

Companies House is the UK's register of companies. It falls under the remit of the Department of Business and Trade. All forms of companies (as permitted by the UK Companies Acts) are incorporated and registered with Companies House. All registered Limited Companies, including subsidiary, small and inactive companies, must file annual financial statements, in addition to annual company returns which are all public records. www.gov.uk/government/organisations/companies-house - where the following detail is available for free:-

(i) Registered address and date of incorporation;
(ii) Current and registered officers;
(iii) Document images – including accounts and returns;
(iv) Mortgage charge data;
(v) Previous company names;
(vi) Insolvency information

It is possible to set up an email alert so that as and when entries are made in relation to a particular company an email is sent to the enquirer.

Searches can be made against the name of the individual which will bring up current Directorships, previous Directorships, offices held and dates of birth.

It is also possible to make a search against the register of disqualified directors.

(b) HM Land Registry – www.gov.uk/government/organisations/land-registry

Part of the Ministry of Housing, Communities and Local Government in England and Wales – Scotland and Northern Ireland are separate jurisdictions. For the payment of a fee it is possible to find out information about a property in England and Wales as to its owner, how far its boundaries extend, whether it is at risk of flooding etc. If the address and postcode of the property are known, it is possible to find out:

(i) The registered owner(s);
(ii) The purchase price paid/value stated;
(iii) Any rights of way or restrictions against the property;
(iv) Whether it is subject to a mortgage;
(v) A title plan

Note that under the provisions of the Family Law Act 1996 (as amended by the Civil Partnership Act 2004), where the property in which the parties last lived as their matrimonial home is held in the name of one spouse only it is possible for the other to apply to register a Notice of Home Rights in Form HR1 on payment of a fee. Should prevent any sale, or re-mortgage, or other dealing with the title to the property.

2. Can the parties introduce pre-litigation discovery?

Unless a financial application has been made, within divorce proceedings, then no financial disclosure can be compelled by one spouse against the other. Is it too late to look at jurisdiction? Much turns on the choice of jurisdiction. Where either or both parties have connections with England and another jurisdiction, then consider which is the better jurisdiction for the client? England is a discretionary and quasi-inquisitorial jurisdiction. The law requires the full extent of all matrimonial and non-matrimonial resources to be established, which includes any overseas/foreign assets. London still

regards itself as the divorce capital of the world and once jurisdiction is invoked, it has wide powers of discovery and to make orders against overseas assets. Jurisdiction depends upon the domicile of the parties and/or their habitual. Note however that an English Court can decline to exercise jurisdiction on the basis that the foreign court is considered to be the more appropriate forum when applying the *forum non-conveniens* test. Also check any pre or post-nuptial agreement for a jurisdiction clause. If England does not have and cannot exercise jurisdiction then the pre-litigation options are extremely limited.

Consider if there is any prospect of applying under non-matrimonial proceedings, for example in relation to a dispute concerning the ownership of a property – Trusts of Land and Appointment of Trustees Act 1996 and possible remedies under the Companies Acts.

3. How to obtain evidence in support of overseas litigation

Governed by:-

(i) The Hague Convention on the Taking of Evidence for Abroad in Civil or Commercial Matters (Hague Evidence Convention);
(ii) The Evidence (Proceedings in Other Jurisdictions) Act 1975.
(iii) The Requesting Court can seek assistance from the authorities in England through a Letter of Request made to the Foreign Process Section of the Kings Bench Division or other designated Civil Judge. The Letter of Request should outline the case and may be accompanied by Pleadings from the requesting court. If the witness is required to produce a document then it must be clearly identified. Part 34 of the Civil Procedure Rules (CPR) provides for:

- informing the requesting court as to the date, time and place of the examination;
- the timescales – ordinarily 6 weeks from the transmission of the information by the Foreign Process Section;
- the names of the solicitors representing the parties and that they should be allowed to attend the examination;
- whether the evidence is to be taken on oath;
- the names and address of the witnesses;
- the list of questions to be answered;
- the substance of the matter upon which the evidence is required.

The evidence is taken by an examiner and is conducted in accordance with English law and procedure. Representatives for each party can attend and witnesses can be cross examined and re-examined. Note that a witness cannot be compelled to give evidence which he or she could not be compelled to give in either civil proceedings before an English Court or in civil proceedings before the requesting court. Upon completion the examiner returns the original order, along with a Letter of Request and the signed deposition to the Senior Master for onward transmission to the requesting court.

The requesting court can also apply to the English court for the production of documents. The Letter of Request will set out brief details of the overseas proceedings, state the documents required, by whom they are held and request the production of documents. An Order will be drawn up by the Foreign Process Section and served on the parties plus the individual or organisation requested to produce the document. The parties will have an opportunity to submit any objections within 7 days of the Order being served upon them. If no such objections are received or are not

upheld, the addressee must comply through the production of the documents which are returned to the foreign process section for onward transmission to the requesting court.

4. Is there a blocking statute?

Not as such but note the provisions of paragraph 3(3) of the Evidence (Proceedings in Other Jurisdictions) Act 1975 *a person shall not be compelled by virtue of an order under section 2 above to give any evidence if his doing so would be prejudicial to the security of the United Kingdom; and a certificate signed by or on behalf of the Secretary of State to the effect that it would be so prejudicial for that person to do so shall be conclusive evidence of that fact*.

5. Enforcement Provisions

Enforcement of foreign orders in England

In relation to maintenance (alimony) much depends upon when the order was made. Position complicated by the UK withdrawal from the European Union and whether, for example, orders for the payment of maintenance are recognised and enforced automatically or not. If the EU Maintenance Regulation does not apply, it may be possible to use the provisions of the 2007 Hague Convention on the International Recovery of Child Support and other forms of family maintenance.

In relation to the enforcement of a property transfer order, application is made to the High Court in London by lodging a copy of the Order to be enforced (with any translation) and paying a fee. The Order is served on the relevant parties and if no objection is received it can be enforced as if it were a domestic order.

Note also the provisions of **Part III of the Matrimonial Family Proceedings Act 1984**: Even though a divorce has been pronounced overseas, in certain circumstances the ex-spouse may be able to bring a financial application in England. The Court can only make orders if the applicant can satisfy certain jurisdictional requirements as to domicile/habitual residence/the situation of the matrimonial home in England and Wales. The application is made in two stages, the first being an application for permission and the second stage being the consideration of the substantive application. The application for permission may be subject to an application to set aside but if successful and permission is granted the application follows the form of a domestic application for a financial order. NB may be of considerable assistance in relation to pension sharing provisions in relation to UK pension schemes.

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Blocking Statutes Chart: Overview

by Practical Law Data Privacy & Cybersecurity

Practice note: overview | Law stated as of 19-Jun-2023 | Australia, Canada, Cayman Islands, China, France, Panama, Singapore, South Africa, United Kingdom

An "at-a-glance" Chart that shows countries with blocking statutes which may prohibit cross-border transfers of discovery and the giving of evidence for use in civil litigation and regulatory proceedings. This Chart may not cover every blocking statute currently in effect.

In today's globalized economy, organizations increasingly face cross-border litigation with customers, competitors, and suppliers. Organizations also may receive inquiries and document requests from regulators throughout the world. These organizations must identify and understand any laws that restrict or prevent cross-border data transfers.

Blocking statutes limit or bar the giving of evidence in foreign litigation or regulatory proceedings. Blocking statues differ in how they apply:

- Some blocking statutes, such as France's, prohibit the cross-border transfer of broad categories of data to foreign public authorities and providing evidence in foreign proceedings.
- Certain blocking statutes prevent or restrict the transfer of only certain data, such as business or commercial information.
- Other blocking statutes only prevent cross-border document productions and giving evidence in a foreign proceeding when an in-country government official bars the transfer.

This Chart provides an "at-a-glance" view of a selection of blocking statutes from different countries that are applicable to civil proceedings and includes data transfer restrictions, exceptions, and penalties under the laws. This Chart does not cover every blocking statute currently in effect so organizations should work with local counsel to determine whether blocking statutes exist in a jurisdiction not listed here.

Data protection laws, bank secrecy laws, data localization laws, professional secrecy laws, and laws governing the disclosure of confidential information may also prohibit or restrict cross-border data transfers in litigation and regulatory proceedings. However, this Chart does not address these laws or cover laws barring document transfers and the giving of evidence in criminal proceeedings.

For more information on data localization laws, bank secrecy laws, and addressing data protection laws, see:

- Practice Note, Conflicts between US Discovery and Non-US Data Protection Laws.
- Global Data Localization Laws Toolkit.
- Global Bank Secrecy Toolkit.

- Cross-Border Personal Data Transfers Toolkit.

Country	Statutes	Transfer Restrictions	Exceptions	Penalties
Australia	Foreign Evidence Act, 1994	When a party applies to an Australian court to take evidence for use in foreign court proceedings, the attorney general may issue a written order preventing: • The production of documents or specific items. • Giving any evidence or information, including testimony. (Article 42, Foreign Evidence Act.) The attorney general must not exercise this power unless to prevent prejudice to Australia's security (Article 41, Foreign Evidence Act).	The statute does not list any exceptions if the attorney general exercises its power to prevent disclosure of evidence to a foreign tribunal.	The statute does not set out the penalties for violating an attorney general order prohibiting document or evidence production or the giving of evidence in a foreign proceeding.
Canada	Foreign Extraterritorial Measures Act, R.S.C. 1985, c. F-29	If the attorney general determines that a foreign tribunal has exercised powers that adversely affect significant Canadian interests in international trade or commerce, it may issue an order prohibiting: • The production or disclosure of records located in Canada or in the possession or control of a Canadian citizen or resident. • Any act resulting in the disclosure of Canadian records or information to a foreign	The statute does not list any exceptions if the attorney general exercises its power to prevent disclosure of evidence to a foreign tribunal (Section 5(1), Foreign Extraterritorial Measures Act).	Individuals who violate an attorney general order face either or both: • A fine up to CAD150,000. • Up to five years imprisonment. (Section 7(1), Foreign Extraterritorial Measures Act.) Organizations that violate an order issued by the attorney general are subject to: • A fine up to CAD150,000,

		tribunal, including information relating to the contents or identification of Canadian records. (Section 3(1), Foreign Extraterritorial Measures Act.)		on summary conviction. • A fine up to CAD1.5 million, on conviction on indictment. (Section 7(1), Foreign Extraterritorial Measures Act.)

Ontario, Canada	Ontario Business Records Protection Act, R.S.O. 1990, c. B.19	Individuals may not transfer outside of Ontario any account, balance sheet, profit and loss statement, inventory, resume, or digest relating to any business conducted in Ontario unless the transfer is:
		• Provided as part of a regular practice to:
		  • a head office or parent company; or
		  • an organization outside Ontario relating to a branch or subsidiary organization carrying on business in Ontario.
		• Made by a company or person as defined in the Securities Act conducting business in Ontario where their securities are qualified for sale with the consent
			The statute's exceptions do not allow for the disclosure of information in foreign proceedings (Section 1, Business Records Protection Act).
			
			However, the attorney general or any person having an interest in a business may apply to the Superior Court of Justice for an order allowing the disclosure if the disclosing person provides an undertaking (Section 2, Business Records Protection Act).
				Individuals are held in contempt of court and subject to one-year imprisonment if they violate the Act's requirements (Sections 2(2), (3), Business Records Protection Act).

		of the company or person. • Made by a dealer or salesperson as defined in the Securities Act where the dealer or salesperson is registered or qualified to conduct business as a dealer or salesperson. • Permitted by an Ontario law or the Parliament of Canada. (Sections 1 and 2, Business Records Protection Act.)		
Québec, Canada	Business Concerns Records Act, C.Q.L.R. c. D-12	No person, acting on orders from any authority outside of Québec, may remove, send, or cause to be removed or sent, any business document from any place in Québec to a place outside Québec (Sections 2 and 3, Business Concerns Records Act). "Business documents" include any account, balance sheet, statement of receipts and expenditure, profit and loss statement, statement of assets and liabilities, inventory, report, and any other writing or material forming part of the records or archives of a business concern (Section 1(a), Business Concerns Records Act).	The statute's exceptions do not allow for the disclosure of information in foreign proceedings (Section 3, Business Concerns Records Act). If there is reason to believe that a foreign authority is likely to seek the removal of a business document from Québec, the attorney general may apply to a local judge of the Court of Québec for an order requiring any person, whether or not directly involved in the matter, to furnish an undertaking or security to ensure that the person does not remove or send the document in question out of Québec (Section 4, Business Concerns Records Act).	Individuals who violate the statute are held in contempt of court (Section 5, Business Concerns Records Act).
Cayman Islands	Confidential Information Disclosure Law,	A person intending to give evidence containing confidential information (as defined in the CIDL)	A person who owes a duty of confidence may disclose confidential	The statute does not set out penalties for violations, which likely means the court will

	2016 (Law 23 of 2016) (CIDL).	in any proceeding within or outside the Cayman Islands must first apply for directions from a Judge of the Grand Court, unless the person receives express consent from person to whom the duty of confidence is owed (Sections 2, 4, CIDL).	information without applying for directions:
			• When in compliance with:
			  • a court order under CIPL Section 4;
			  • the normal course of business or with the consent of the person owed the duty of confidence; or
			  • a specified Central Authority order or search warrant.
			• To any of the following entities:
			  • a constable ranked inspector or above investigating a criminal offense alleged to have been committed within the Islands;
			  • the Monetary Authority;
			  • the Financial Reporting Authority; or
			  • the Anti-Corruption Commission.
				apply common law and rules of equity in the event of a breach.

			• Under a right or duty created by any other law or regulation. (Section 3(1), CIPL.)	
China	Civil Procedure Law of the People's Republic of China 2021 (2021 CPL) (in Chinese).	No foreign authority or individual may serve process, investigate, or collect evidence in China without permission from the competent authority. Foreign courts may, in accordance with the international treaties concluded or acceded to by China or with the principle of reciprocity, request judicial assistance in serving legal documents, investigations, collecting evidence, and other acts in connection with litigation. However, Chinese courts may refuse to comply with the request if the assistance would harm China's sovereignty, security, or public interest. (Articles 283, 284, 2021 CPL.)	Foreign embassies and consulates in China may serve process on, investigate, and collect evidence from their own citizens in China, but must not take compulsory measures or violate Chinese law (Article 284, 2021 CPL).	No provision of the 2021 CPL links a violation of Articles 283 and 284 with an express penalty or sanction.
France	Law No. 68-678 of 26 July 1968 relating to the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons, as amended by Law No. 80-538 of July 16, 1980 (in French) (Law No. 68-678).	No French citizen, resident, or organization may communicate, disclose, or provide to a foreign public authority any economic, commercial, industrial, financial, or technical information or documents which are liable to infringe on the sovereignty, security, or essential economic interests of France (Article 1, Law No. 68-678). Subject to international treaties or agreements and laws and regulations, no person may request, search	Based on Decree No. 2022-207, Law No. 68-678 applies to only certain categories of sensitive data (see Guidance for Companies for Identifying Sensitive Personal Data) (in French). The SISSE will issue an opinion on the applicability of Law No. 68-678 Articles 1 and 1bis within one month from the submission of the application (Articles 3 and 4, Decree No. 2022-207).	Individuals who violate Law No. 68-678 are subject to either or both: • Six months imprisonment. • A fine of up to EUR18,000. (Article 3, Law No. 68-678.) Legal entities may be subject to a fine of up to EUR90,000 (Article 131-38, Penal Code (in French)).

	Decree No. 2022-207 of 18 February 2022 relating to the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons (in French) (Decree No. 2022-207).	for, or communicate, in any form, economic, commercial, industrial, financial or technical documents or information for the purposes of establishing evidence in foreign judicial or administrative procedures (Article 1bis, Law No. 68-678). Organizations that receive a transfer request arising out of a foreign litigation must inform the Service de l'information stratégique et de la sécurité économique (SISSE) of the request and provide the information set out in Ministerial Order of 7 March 2022 (in French).		
Panama	Código de Comercio (in Spanish).	No authority may compel merchants to supply copies or reproductions of books, correspondence, or other documents in their possession (Article 89, Código de Comercio).	None.	A merchant who supplies these documents for use in foreign litigation based on an order from an authority other than the Republic of Panama will be punished by a fine of not more than PAB100,000 (Article 89, Código de Comercio).
Singapore	Evidence (Civil Proceedings in Other Jurisdictions) Act (Evidence Act).	An individual may not give any evidence if it prejudices Singapore's security and the Minister for Law signs a certificate barring the disclosure (Section 5(3), Evidence Act).	None.	The statute does not set out penalties.
South Africa	Protection of Businesses Act 99 of 1978 (Protection of Businesses Act).	No individual may produce any business information in response to any order or other request for documents or evidence in a foreign civil proceeding (Section 1(1)(b), Protection of Businesses Act).	Permission to comply with a foreign civil proceeding may be granted by: • Notice in the Gazette or written authority addressed to a particular person.	Individuals who violate the statute are considered guilty of an offense and subject to either or both of the following sanctions: • A ZAR2,000 fine.

			• The Minister of Economic Affairs, subject to any stated conditions. (Section 1(2)(a), (b), Protection of Businesses Act.)	• Two years imprisonment. (Section 2, Protection of Businesses Act.)
United Kingdom	Protection of Trading Interests Act 1980, Chapter 11	For documents and information required by overseas courts and authorities, the Secretary of State may prohibit compliance if it appears that: • A foreign court or tribunal has imposed a requirement on a person in the UK to produce any commercial document that is not within the territorial jurisdiction of the UK. • Any foreign authority has a required a person in the UK to publish any commercial document or information. (Section 2(1), Protection of Trading Interests Act.) "Commercial document" and "commercial information" means a document or information relating to a business. "Document" includes any record or device by means of which material is recorded or stored. (Section 2(6), Protection of Trading Interests Act.)	None.	Individuals who fail to comply with the Act's requirements are subject to: • A fine, on conviction on indictment. • A fine not to exceed the statutory maximum, on summary conviction. (Section 3(1), Protection of Trading Interests Act.) Non-UK citizens and non-UK organizations are not guilty of an offense for anything done or omitted outside the UK in contravention of the Secretary of State's direction (Section 3(2), Protection of Trading Interests Act).

END OF DOCUMENT

20. CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS[1]

(Concluded 18 March 1970)

The States signatory to the present Convention,
Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,
Desiring to improve mutual judicial co-operation in civil or commercial matters,
Have resolved to conclude a Convention to this effect and have agreed upon the following provisions –

CHAPTER I – LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.
The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.
Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify –
a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;
c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained or other judicial act to be performed.

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[1] This Convention, including related materials, is accessible on the website of the Hague Conference on Private International Law (www.hcch.net), under “Conventions” or under the “Evidence Section”. For the full history of the Convention, see Hague Conference on Private International Law, *Actes et documents de la Onzième session (1968)*, Tome IV, *Obtention des preuves* (219 pp.).

Where appropriate, the Letter shall specify, *inter alia* –

e) the names and addresses of the persons to be examined;

f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

g) the documents or other property, real or personal, to be inspected;

h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;

i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.
No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.
Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.
A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.
A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.
Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.
A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence –

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that –

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.
In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.
Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.
The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.
A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if –

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if –

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.
If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence –

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III – GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.
Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of

Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.
Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from –

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from –

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

b) the provisions of Article 4 with respect to the languages which may be used;

c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

f) the provisions of Article 14 with respect to fees and costs;

g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.
Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.
When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.
A Contracting State shall likewise inform the Ministry, where appropriate, of the following –

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;
b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;
c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;
d) any withdrawal or modification of the above designations and declarations;
e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.
It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.
The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.
The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.
The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.
At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.
The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.
If there has been no denunciation, it shall be renewed tacitly every five years.
Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.
It may be limited to certain of the territories to which the Convention applies.
The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following –

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

The French Blocking Statute – Avoiding a judicial crossfire

The French Blocking Statute (Law No. 80-538 of 16 July 1980) can create utter bafflement for parties to a litigation outside of France, but who need information held on French territory or by persons located in France. In application of its provisions, they can be caught in a judicial cross-fire where they risk a fine before the US courts (for example) if they do not produce the requested information and criminal penalties in France if they even seek out this information.

Three of the major French cases applying the Blocking Statute concern companies who invoked its provisions against injunctions from US courts to produce documents in the context of discovery proceedings.[1] In all three cases, French judges found that for these companies to communicate documents to foreign jurisdictions in the context of ongoing or future proceedings would be contrary to Article 1 *bis* of the Blocking Statute. A more recent decision rendered by the Criminal Chamber of the *Cour de cassation* of 12 December 2007 (the « MAAF Decision »), fined a French lawyer for having sought information on the circumstances in which the board of directors of the insurance company MAAF had bought shares of an insurance company called "Executive Life".[2] The Court found the attorney guilty for having merely seeking information covered by Article 1 *bis* of the Blocking Statute (information of an economic, financial or commercial nature and aimed towards building evidence in the context of a foreign judicial procedure).

This decision demonstrates the general nature of the content covered by the Blocking Statute, whose main objective is not only to protect French interests from American style discovery[3], but to promote the use of international judicial assistance established through international treaties and agreements, such as the Hague Convention of 18 March 1970. In order to promote this international cooperation, Article 1 and Article 1 *bis* of the Blocking Statute list different incriminations concerning the exportation of information out of France.

Article 1 of the Blocking Statute prohibits communicating (in writing, orally or in any other form) to foreign public officials:

- "documents or information of an economic, commercial, industrial, financial or technical nature and the communication of which is against the sovereignty, security, or essential economic interest of France or its public policy."
- The scope of Article 1 *bis* of the Blocking Statute is different than that of Article 1 as it prohibits requesting, seeking, or communicating (in writing, orally, or in any other form), to obtain proof in the context of ongoing or future foreign judicial or administrative proceedings:
- "documents or information of an economic, commercial, industrial, financial or technical nature."

Consequently, when the information requested or provided is meant to be used in the context of foreign judicial or administrative proceedings, the scope of the Blocking Statute is significantly wider than when the information is to be simply communicated to foreign public officials. Article 1 *bis* does not necessitate the information requested or communicated to be against the sovereignty, security, or essential economic interest of France or its public policy, which widens even further its scope.

Moreover, Article 1 *bis* does not state that the information obtained must be adduced as proof in foreign proceedings, but that it is simply obtained in the context of said foreign proceedings.

In the facts leading to the MAAF decision, no actual information was received. The MAAF executive contacted by the attorney had allegedly responded vaguely and then contacted French prosecutors. In light of this decision, the only criterion needed to prosecute is for the accused to have sought information. In addition, the *Cour de cassation* in the MAAF Decision specifically criticized the attorney for not having received a special power in accordance with the provisions of the Hague Convention of 18 March 1970.[4]

Article 3 of the Statute penalizes such infractions by a maximum prison sentence of 6 months and a fine of up to 18,000 euros.

However, the Blocking Statute is not meant to hinder relations between attorneys and their clients.[5] The French Minister of Justice confirmed that the Blocking Statute should not apply in the absence of foreign judiciary or administrative proceedings, especially as regards business relations with foreign countries, nor limit or control relations between international attorneys and their clients.

The *Cour de cassation* in the MAAF decision also specified that the Blocking Statute should not be seen as a disproportionate obstacle to a defendant's rights to a proper defense, as this is guaranteed by the procedures set out under the Hague Convention of 18 March 1970.[6]

Given the lack of regard many US courts have for the Blocking Statute and its enforcement by the French courts as demonstrated by the Maaf decision, great care must be taken in trying to obtain proof in France. Coordination between the US proceedings and any measures that could be taken in France to obtain proof is not only necessary for the proper execution of such measures, but also to avoid fines or penalties whether it be in the US or France.

Frances Auchincloss Goldsmith

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[1] Court of first instance of Nanterre, 22 December 1993, JurisData No. 1993-050136; *Cour de cassation*, 2nd civil chamber,20 November 2003, No. 01-15.633; Commercial Court of Paris, 20 July 2005, JurisData No. 2005-288978.

[2] *Cour de cassation*, Criminal Chamber, 12 December 2007, No. 07-83.228, JurisData No. 2007-042157.

[3] The discovery proceedings took place accordingly in France according to the rules set out by the Hague Convention (Chapter 1) and under the control of the French judge ; in reality the attorney designated by the insurance commissioner undertook and investigation to find witnesses to whom he offered monetary compensation.

[4] It is necessary to specify that the US courts in the MAAF Decision had already formulated a request for judicial assistance, which may have possibly exacerbated the decision rendered against the attorney.
[5] Response from the Minister of Justice to the French Parliament, JOAN Q,26 January 1981, No. 373.
[6] Convention of18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters: The use of this Convention would allow theUS courts to initiate a procedure of judicial assistance under which the desired information could be obtained, if it is sufficiently enumerated.

RÉSUMÉ :

Constituent, au sens de l'article 1 bis de la loi du 26 juillet 1968, modifiée, la recherche de renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue d'une procédure étrangère, les démarches effectuées par une personne, correspondante en France de l'avocat d'une des parties à ladite procédure, dans le but de connaître les circonstances dans lesquelles le conseil d'administration d'une société française a pris la décision d'acquérir une société étrangère. Dès lors, commet le délit réprimé par l'article 3 de la loi susvisée, la personne qui se livre à de telles démarches, sans disposer d'un mandat autorisé prévu par la Convention de La Haye du 18 mars 1970

Texte intégral

Rejet
numéros de diffusion : 7168

RÉPUBLIQUE FRANÇAISE

AU NOM DU PEUPLE FRANÇAIS

LA COUR DE CASSATION, CHAMBRE CRIMINELLE, a rendu l'arrêt suivant :

Statuant sur le pourvoi formé par :

-X... Christopher,

contre l'arrêt de la cour d'appel de PARIS, 9e chambre, en date du 28 mars 2007, qui, pour recherche de renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves dans une procédure étrangère, l'a condamné à 10 000 euros d'amende ;

Vu le mémoire produit ;

Sur le premier moyen de cassation, pris de la violation et fausse application du chapitre 2 de la Convention de La Haye du 18 mars 1970 sur l'obtention des preuves à l'étranger en matière civile ou commerciale et des articles 1134 du code civil,111-4 du code pénal,1 bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi n° 80-538 du 16 juillet 1980,591 et 593 du code de procédure pénale, défaut et contradiction de motifs, manque de base légale ;

" en ce que l'arrêt infirmatif attaqué a déclaré Christopher X... coupable du délit défini à l'article 1 bis de la loi du 26 juillet 1968 modifiée par la loi du 16 juillet 1980 ;

" aux motifs qu'il résulte du courrier adressé le 21 décembre 2000 par Jean-Claude Y... à Christopher X..., en réaction à un entretien antérieur, que cet avocat a sollicité son interlocuteur de lui fournir des indications sur la manière dont les décisions du conseil d'administration de la MAAF avaient été prises à l'époque du rachat d'Executive Life, alléguant que les membres du conseil d'administration n'avaient pas été bien informés ... qu'il n'avait pas été débattu de la question et que les décisions auraient été prises dans les couloirs » ; qu'ayant ainsi prêché le faux pour savoir le vrai », Christopher X... s'est vu répondre par Jean-Claude Y... que celui-ci n'avait jamais pris de décision dans les couloirs dans tous les conseils d'administration auxquels il avai t participé » ; qu'il a, de cette manière, obtenu, ou en tout cas tenté d'obtenir, la preuve que les administrateurs de la MAAF avaient pris leurs décisions en pleine connaissance de cause ; que, contrairement à ce qu'il soutient, Christopher X... ne s'est donc pas contenté d'approcher, de manière neutre, des personnes dont le témoignage aurait pu être ultérieurement sollicité dans le cadre d'une procédure conforme aux dispositions du chapitre 2 de la Convention de La Haye, qui autorise la recherche de preuves par un agent diplomatique ou un commissaire indépendant mandaté par la juridiction étrangère, sous réserve de l'accord de l'autorité compétente désignée par l'Etat de l'exécution

; qu'il a recherché, alors qu'il était dépourvu de tout mandat autorisé au sens de cette convention, des informations dont le caractère économique, commercial ou financier est avéré, et qui tendaient à la constitution de preuves, dès lors qu'elles étaient susceptibles de justifier la désignation de Jean-Claude Y... comme témoin à charge dans la procédure pendante devant la juridiction californienne et d'orienter son interrogatoire ultérieur ; que l'infraction à l'article 1er bis de la loi n° 68-678 du 26 juillet 1968, modifiée par la loi n° 80-538 du 16 juillet 1980 est établie ;

" 1°) alors que les dispositions de l'article 1er bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi du 16 juillet 1980 sont édictées sous réserve des traités ou accords internationaux parmi lesquels figure la Convention de La Haye du 18 mars 1970, qui prévoit, en son chapitre 2, l'obtention de preuves par un agent diplomatique ou un commissaire indépendant mandaté par la juridiction étrangère ; que, comme le faisait Christopher X... dans ses conclusions régulièrement déposées et de ce chef délaissées, l'obtention de preuves en application des dispositions de ce chapitre nécessite l'accord préalable des éventuels témoins dès lors qu'aux termes de l'article 17 de la convention, le commissaire ne dispose d'aucun pouvoir de contrainte pour procéder à des actes d'instruction et que c'est un tel accord préalable qu'il avait donc cherché à recueillir auprès de son interlocuteur, Jean-Claude Y... ;

" 2°) alors que la lettre du 21 décembre 2000 adressée par Jean-Claude Y... à Christopher X... étant au dossier de la procédure, la Cour de cassation est en mesure de s'assurer qu'il ne résulte pas de ses termes que Christopher X... ait commis, selon l'expression de la cour d'appel, un abus dans la recherche des preuves » susceptible de caractériser l'infraction à l'article 1er bis de la loi du 26 juillet 1968 mais s'est, étant chargé des intérêts de l'Etat de Californie dans le dossier Executive Life, borné à approcher des personnes dont le témoignage pourrait être ultérieurement sollicité dans le cadre d'une procédure conforme aux dispositions du chapitre 2 de la Convention de La Haye et qu'en dénaturant les termes clairs de la lettre qui lui était soumise, la cour d'appel a de surcroît statué par une décision empreinte de contradiction de motifs, laquelle doit être censurée ;

" 3°) alors que l'obtention de preuves en-dehors de toute sollicitation n'est pas incriminée par l'article 1er bis de la loi du 26 juillet 1968 ; que les termes de la même lettre mettent en évidence que le renseignement » selon lequel Jean-Claude Y... n'aurait jamais pris la décision dans les couloirs de tous les conseils d'administration auxquels il a participé » ne résulte pas d'une sollicitation de Christopher X... mais d'une déclaration spontanée de son interlocuteur, en tant que telle, non punissable ;

" 4°) alors qu'il résulte enfin des énonciations de la lettre adressée le 21 décembre 2000 par Jean-Claude Y... à Christopher X... que la démarche » de Christopher X... était fondée sur la recherche de la vérité » excluant par conséquent que ce dernier ait cherché à orienter l'éventuel témoignage ultérieur » de son interlocuteur comme l'a énoncé la cour d'appel dans ses motifs une fois encore empreints de contradiction " ;

Sur le deuxième moyen de cassation, pris de la violation et fausse application des articles 1 bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi n° 80-538 du 16 juillet 1980,591 et 593 du code de procédure pénale, défaut de motifs, manque de base légale ;

" en ce que l'arrêt infirmatif attaqué a déclaré Christopher X... coupable du défini à l'article 1 bis de la loi du 26 juillet 1968 modifiée par la loi du 16 juillet 1980 ;

" aux motifs qu'il résulte du courrier adressé le 21 décembre 2000 par Jean-Claude Y... à Christopher X..., en réaction à un entretien antérieur, que cet avocat a sollicité son interlocuteur de lui fournir des indications sur la manière dont les décisions du conseil d'administration de la MAAF avaient été prises à l'époque du rachat d'Executive Life, alléguant que les membres du conseil d'administration n'avaient pas été bien informés ... qu'il n'avait pas été débattu de la question et que les décisions auraient été prises dans les couloirs » ; qu'ayant ainsi prêché le faux pour avoir le vrai », Christopher X... s'est vu répondre par Jean-Claude Y... que celui-ci n'avait jamais pris de décisions dans les couloirs dans tous les conseils d'administration auxquels il avait participé » ; qu'il a, de cette manière, obtenu, ou en tout cas tenté d'obtenir, la preuve que les administrateurs de la MAAF avaient pris leurs décisions en pleine connaissance de cause ;

" alors que, ainsi que l'avaient pertinemment énoncé les premiers juges, la simple allusion au fait que les décisions d'un conseil d'administration seraient ou non prises dans les couloirs » ne constitue pas un renseignement d'ordre économique, commercial, industriel, financier ou technique tombant sous le coup de l'article 1 bis de la loi du 26 juillet 1968 " ;

Sur le troisième moyen de cassation, pris de la violation des articles 6 et 7 de la Convention européenne des droits de l'homme,1 bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi n° 80-538 du 16 juillet 1980,591 et 593 du code de procédure pénale, défaut de motifs, manque de base légale ;

" en ce que l'arrêt infirmatif attaqué a déclaré Christopher X... coupable du délit défini à l'article 1bis de la loi du 26 juillet 1968 modifiée par la loi du 16 juillet 1980 ;

" aux motifs que contrairement à ce que soutient Christopher X..., cette incrimination qui vise à limiter les abus pouvant être commis dans la recherche de la preuve, ne constitue pas une entrave disproportionnée aux droits de la défense » ; que l'exercice de ces droits est assuré par les garanties attachées aux procédures instaurées par la Convention de La Haye ;

" 1°) alors que ne saurait être considérée comme un abus dans la recherche des preuves », la sollicitation, à la supposer avérée, d'un renseignement d'ordre économique, commercial, industriel, financier ou technique opéré comme en l'espèce sans contrainte ;

" 2°) alors que le droit au procès équitable auquel les Etats ne sont autorisés à n'apporter aucune restriction (si ce n'est en ce qui concerne la publicité de l'audience) implique une recherche libre et sans entrave de la preuve et que l'article 1bis de la loi du 26 juillet 1968, en tant qu'il est interprété comme faisant obstacle à l'exercice de ce droit, est incompatible avec les dispositions des articles 6 et 7 de la Convention européenne des droits de l'homme " ;

Sur le quatrième moyen de cassation, pris de la violation des articles 10 de la Convention européenne des droits de l'homme,1 bis de la loi n° 68-678 du 26 juillet 1968 modifiée par la loi n° 80-538 du 16 juillet 1980,591 et 593 du code de procédure pénale, défaut de motifs, manque de base légale ;

" en ce que l'arrêt infirmatif attaqué a déclaré Christopher X... coupable du délit défini à l'article 1bis de la loi du 26 juillet 1968 modifiée par la loi du 16 juillet 1980 ;

" 1°) alors que les dispositions de l'article 1er bis de la loi n° 68-678 du 26 juillet 1968 sont édictées sous réserve des traités ou accords internationaux parmi lesquels figure la Convention européenne des droits de l'homme ; que cette convention précise en son article 10 que le droit de toute personne à la liberté d'expression comprend notamment la liberté de recevoir ou de communiquer des informations sans qu'il puisse y avoir ingérence d'autorités publiques et sans considération de frontière et que sanctionner pénalement les propos d'un avocat qui s'est borné à faire état au cours d'une conversation téléphonique adressée à l'ancien dirigeant d'une mutuelle de ce que les membres du conseil d'administration (de cette mutuelle) n'avaient pas été bien informés, qu'il n'avait pas été débattu de la question et que les décisions auraient été prises dans les couloirs » constitue une entrave à la liberté d'expression et par conséquent une violation de l'article 10 susvisé ;

" 2°) alors que cette entrave à la liberté d'expression n'est pas justifiée au sens de l'article 10-2 de la convention dès lors que l'interdiction générale et absolue de communiquer tout renseignement »-si anodin soit-il – d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci », constitue une mesure non nécessaire et par conséquent disproportionnée dans une société démocratique y compris pour protéger les droits et la réputation d'autrui et pour garantir l'autorité et l'impartialité du pouvoir judiciaire " ;

Les moyens étant réunis ;

Attendu qu'il résulte de l'arrêt attaqué et des pièces de procédure que le tribunal fédéral de Californie, saisi d'un litige portant sur les conditions de la reprise de la société d'assurance vie nord-américaine Executive Life et opposant le commissaire aux assurances de cet Etat à la société Mutuelle d'assurance artisanale de France (MAAF), a délivré, notamment en avril et décembre 2000, des commissions rogatoires civiles internationales tendant à la communication, par cette dernière société, de documents se

rapportant au litige, selon les modalités définies par la Convention de La Haye du 18 mars 1970 ; que Chritopher X..., avocat correspondant en France de l'avocat nord-américain du commissaire aux assurances, a, à la fin de l'année 2000, contacté Jean-Claude Y..., ancien administrateur de la MAAF, pour obtenir desrenseignements sur les conditions dans lesquelles avaient été prises les décisions du conseil d'administration de cette société à l'époque du rachat d'Executive Life, alléguant que " les membres du conseil d'administration n'avaient pas été bien informés... qu'il n'avait pas été débattu de la question et que les décisions auraient été prises dans les couloirs " ; qu'au terme d'une information judiciaire, ouverte sur plainte avec constitution de partie civile de la MAAF, Christopher X... a été renvoyé devant le tribunal pour avoir demandé ou recherché des renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères, faits prévus et réprimés par les articles 1 bis et 3 de la loi du 26 juillet 1968, modifiée ;

Attendu que, pour déclarer le prévenu coupable de cette infraction, l'arrêt énonce que celui-ci ne s'est pas contenté d'approcher, de manière neutre, des personnes dont le témoignage aurait pu être ultérieurement sollicité conformément aux dispositions de la Convention de la Haye, mais a obtenu, ou, en tout cas tenté d'obtenir, la preuve que les administrateurs de la MAAF avaient pris leur décision en pleine connaissance de cause ; que les juges ajoutent qu'en agissant ainsi, Christopher X... a recherché, alors qu'il était dépourvu de tout mandat autorisé au sens de la convention précitée, des informations à caractère économique, commercial ou financier tendant à la constitution de preuves, susceptibles de justifier la désignation de la personne approchée comme témoin à charge dans la procédure suivie devant la juridiction californienne et d'orienter son interrogatoire ultérieur ; qu'ils relèvent, enfin, que, contrairement à ce que soutient le prévenu, l'incrimination, qui vise à limiter les abus pouvant être commis dans la recherche de la preuve, ne constitue pas une entrave disproportionnée aux droits de la défense, dont l'exercice est assuré par les garanties attachées aux procédures instaurées par la Convention de La Haye ;

Attendu qu'en l'état de ces énonciations, d'où il résulte que les renseignements recherchés sur les circonstances dans lesquelles le conseil d'administration de la MAAF a pris ses décisions sur le rachat de la société Executive Life sont d'ordre économique, financier ou commercial et tendent à la constitution de preuves dans une procédure judiciaire étrangère, la cour d'appel, qui a répondu aux arguments péremptoires des conclusions, a justifié sa décision, sans méconnaître les textes conventionnels invoqués ;

D'où il suit que les moyens doivent être écartés ;

Et attendu que l'arrêt est régulier en la forme ;

REJETTE le pourvoi ;

Ainsi jugé et prononcé par la Cour de cassation, chambre criminelle, en son audience publique, les jour, mois et an que dessus ;

Etaient présents aux débats et au délibéré : M. Cotte président, Mme Nocquet conseiller rapporteur, M. Dulin, Mmes Thin, Desgrange, M. Rognon, Mme Ract-Madoux, M. Bayet conseillers de la chambre, M. Soulard, Mmes Slove, Degorce, Labrousse conseillers référendaires ;

Avocat général : M. Boccon-Gibod ;

Greffier de chambre : Mme Randouin ;

En foi de quoi le présent arrêt a été signé par le président, le rapporteur et le greffier de chambre ;

Composition de la juridiction : M. Cotte, M. Boccon-Gibod, Mme Nocquet, SCP Piwnica et Molinié

Décision attaquée : Cour d'appel Paris 2007-03-28 (Rejet)

United States Code Annotated - 2023

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part V. Procedure
Chapter 117. Evidence; Depositions (Refs & Annos)

28 U.S.C.A. § 1782

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

Currentness

(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.

Credits
(June 25, 1948, c. 646, 62 Stat. 949; May 24, 1949, c. 139, § 93, 63 Stat. 103; Pub.L. 88-619, § 9(a), Oct. 3, 1964, 78 Stat. 997; Pub.L. 104-106, Div. A, Title XIII, § 1342(b), Feb. 10, 1996, 110 Stat. 486.)

HISTORICAL NOTES

Revision Notes and Legislative Reports
1948 Acts. Based on Title 28, U.S.C., 1940 ed., §§ 649-653, 701, 703, 704 (R.S. §§ 871-875, 4071, 4073, 4074; Feb. 27, 1877, c. 69, § 1, 19 Stat. 241; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1936, c. 804, 49 Stat. 1921).

Sections 649-652 of Title 28, U.S.C., 1940 ed., applied only to the District of Columbia and contained detailed provisions for issuing subpoenas, payment of witness fees and procedure for ordering and taking depositions. These matters are all covered by Federal Rules of Civil Procedure, Rules 26-32.

Provisions in sections 649-652 of Title 28, U.S.C., 1940 ed., relating to the taking of testimony in the District of Columbia for use in State and Territorial courts were omitted as covered by section 14-204 of the District of Columbia Code, 1940 ed., and Rules 26 et seq., and 46 of the Federal Rules of Civil Procedure.

Only the last sentence of section 653 of Title 28, U.S.C., 1940 ed., is included in this revised section. The remaining provisions relating to depositions of witnesses in foreign countries form the basis of section 1781 of this title.

Sections 701, 703, and 704 of Title 28, U.S.C., 1940 ed., were limited to "suits for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest."

The revised section omits this limitation in view of the general application of the last sentence of section 653 of Title 28, U.S.C., 1940 ed., consolidated herein. The improvement of communications and the expected growth of foreign commerce will inevitably increase litigation involving witnesses separated by wide distances.

Therefore the revised section is made simple and clear to provide a flexible procedure for the taking of depositions. The ample safeguards of the Federal Rules of Civil Procedure, Rules 26-32, will prevent misuse of this section.

The provisions of section 703 of Title 28, U.S.C., 1940 ed., for punishment of disobedience to subpoena or refusal to answer is covered by Rule 37(b)(1) of [the] Federal Rules of Civil Procedure.

The provisions of section 704 of Title 28, U.S.C., 1940 ed., with respect to fees and mileage of witnesses are covered by Rule 45(c) of [the] Federal Rules of Civil Procedure.

Changes were made in phraseology. 80th Congress House Report No. 308.

1949 Acts. This amendment corrects restrictive language in section 1782 of Title 28, U.S.C., in conformity with original law and permits depositions in any judicial proceeding without regard to whether the deponent is "residing" in the district or only sojourning there.

1964 Acts. Senate Report No. 1580, see 1964 U.S. Code Cong. and Adm. News, p. 3782.

1996 Acts. House Conference Report No. 104-450, see 1996 U.S. Code Cong. and Adm. News, p. 238.

References in Text

The Federal Rules of Civil Procedure, referred to in subsec. (a), are set out in the Appendix to this title, Fed.Rules Civ.Proc.Rule 1 et seq., 28 U.S.C.A.

Amendments

1996 Amendments. Subsec. (a). Pub.L. 104-106, § 1342(b), inserted ", including criminal investigations conducted before formal accusations" after "proceeding in a foreign or international tribunal".

1964 Amendments. Pub.L. 88-619 substituted provisions which empowered district courts to order residents to give testimony or to produce documents for use in a foreign or international tribunal, pursuant to a letter rogatory, or request, of a foreign or international tribunal or upon application of any interested person, and to direct that

the evidence be presented before a person appointed by the court, provided that such person may administer oaths and take testimony, that the evidence be taken in accordance with the Federal Rules of Civil Procedure unless the order prescribes using the procedure of the foreign or international tribunal, that a person may not be compelled to give legally privileged evidence, and that this chapter doesn't preclude a person from voluntarily giving evidence for use in a foreign or international tribunal, for provisions permitting depositions of witnesses within the United States for use in any court in a foreign country with which the United States was at peace to be taken before a person authorized to administer oaths designated by the district court of the district where the witness resides or is found, and directing that the procedure used be that generally used in courts of the United States, in the text, and "Assistance to foreign and international tribunals and to litigants before such tribunals" for "Testimony for use in foreign countries", in the catchline.

1949 Amendments. Act May 24, 1949, struck out the word "residing" following "witness", and substituted "judicial proceeding" for "civil action" following "to be used in any".

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31 Am. Jur. Proof of Facts 3d 495, Invalidity of Foreign Arbitration Agreement or Arbitral Award.
39 Am. Jur. Proof of Facts 3d 1, Proof of Basis For, and Grounds for Lifting, Work Product Protection Against Discovery.
92 Am. Jur. Proof of Facts 3d 1, Arbitrability Disputes: Proving What Facts to Whom.
102 Am. Jur. Proof of Facts 3d 1, Proof of Facts Allowing a Federal Court to Assert Personal Jurisdiction Over a Defendant Not Present in the United States.
3 Am. Jur. Trials 553, Selecting the Forum--Plaintiff's Position.
44 Am. Jur. Trials 507, Alternative Dispute Resolution: Commercial Arbitration.
71 Am. Jur. Trials 1, How to Conduct International Discovery.
76 Am. Jur. Trials 1, Arbitration Evidence: Putting Your Best Case Forward.
81 Am. Jur. Trials 1, Arbitrating International Claims--At Home and Abroad.
82 Am. Jur. Trials 243, Handling Aviation Disaster Cases.
86 Am. Jur. Trials 111, Arbitration Highways to the Courthouse--A Litigator's Roadmap.
97 Am. Jur. Trials 1, Telecommunications and Other Litigation: Call Detail Records and Fraud.
23 Am. Jur. 2d Depositions and Discovery § 5, Discretion of Court.
23 Am. Jur. 2d Depositions and Discovery § 14, Generally.
23 Am. Jur. 2d Depositions and Discovery § 15, Issuance and Enforcement of Letter Rogatory or Request.
23 Am. Jur. 2d Depositions and Discovery § 44, Generally.
23 Am. Jur. 2d Depositions and Discovery § 153, Nonparties Subject to Production and Inspection.
24 Am. Jur. 2d Divorce and Separation § 286, Discovery in Divorce Action.

Forms
8B Am. Jur. Pl. & Pr. Forms Descent and Distribution § 47.10, Petition or Application--To Take Testimony for Use in Foreign Action to Determine Rights of Heirs.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 908, Introductory Comments.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 909, Application--By Interested Person--To Take Deposition for Use in Foreign Action.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 911, Motion--By Subpoenaed Witness--To Vacate Order for Execution of Letter Rogatory from Foreign Agency--Issuing Agency Not “Tribunal”.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 913, Order--Appointing Officer to Take Deposition for Use in Foreign Country--Specifying Procedures--On Application by Interested Person.

11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 914, Order--Appointing Officer to Take Deposition for Use in Foreign Action--On Request by Foreign Court.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 915, Order--For Execution of Letters Rogatory from Foreign Tribunal--Appointing Special Examiner to Take Deposition--Directing Issuance of Subpoena to Witness.
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 916, Order--Vacating Ex Parte Order for Execution of Letter Rogatory and Quashing Subpoena--Foreign Agency Not "Tribunal".
11B Am. Jur. Pl. & Pr. Forms Federal Practice and Procedure § 917, Order--Denying Motion to Vacate Order for Execution of Letters Rogatory Issued by Foreign Tribunal and to Quash Subpoena.
8 Federal Procedural Forms § 23:280, Transmittal of Letter of Request; Court Order for Discovery.
8 Federal Procedural Forms § 23:281, What Foreign or International Tribunals May Obtain Discovery.
8 Federal Procedural Forms § 23:282, Privileges; Voluntary Disclosure.
8 Federal Procedural Forms § 23:283, Granting of Request as Exercise of Discretion.
8 Federal Procedural Forms § 23:288, Petition--For Order to Conduct Discovery for Use in Foreign Proceedings [28 U.S.C.A. § 1782; Fed. R. Civ. P. 26, 45].
8 Federal Procedural Forms § 23:290, Order--Appointing Officer to Take Deposition for Use in Foreign Action--On Request by Foreign Court [28 U.S.C.A. § 1782; Fed. R. Civ. P. 28(A)].
8 Federal Procedural Forms § 23:291, Order--For Execution of Letter Rogatory--Appointing Examiner and Directing Issuance of Subpoena [28 U.S.C.A. § 1782(A)].
8 Federal Procedural Forms § 23:292, Motion--By Subpoenaed Witness--To Vacate Order for Execution of Letter Rogatory from Foreign Agency; Issuing Agency Not "Tribunal" [28 U.S.C.A. § 1782(A)].
8 Federal Procedural Forms § 23:293, Order--Vacating Ex Parte Order for Execution of Letter Rogatory and Quashing Subpoena--Foreign Agency Not "Tribunal" [28 U.S.C.A. § 1782(A)].
8 Federal Procedural Forms § 23:294, Order--Denying Motion to Vacate Order for Execution of Letters Rogatory Issued by Foreign Tribunal and to Quash Subpoena [28 U.S.C.A. § 1782(A)].
3B West's Federal Forms § 31:5, Service of Subpoena.
5A West's Federal Forms § 87:63, Assistance to Foreign Tribunals--Application for Order Appointing Commissioners to Obtain Evidence for Foreign Prosecution.
5A West's Federal Forms § 87:64, Assistance to Foreign Tribunals--Application for Order Appointing Commissioners to Obtain Evidence for Foreign Prosecution--Supporting Memorandum.
5A West's Federal Forms § 87:65, Assistance to Foreign Tribunals--Application for Order Appointing Commissioners to Obtain Evidence for Foreign Prosecution--Commissioner's Subpoena.
7A West's Federal Forms § 11761, Special Notice of Taking Deposition (Witness Departing from District).
7A West's Federal Forms § 11795, Motion to Quash Subpoena and Vacate Order Appointing Commissioner.

Treatises and Practice Aids
Bankruptcy Procedure Manual § 7028:4, Service of a Subpoena in a Foreign Country.
3 Callmann on Unfair Competition, Trademarks, and Monopolies § 14:30 (4th Ed.), The Requirements for Protection--Secrecy and Publication--Disclosure in Litigation.
10B Federal Procedure, Lawyers Edition § 26:876, Court Order for Discovery in United States for Use in Foreign Country.
10B Federal Procedure, Lawyers Edition § 26:877, Court Order for Discovery in United States for Use in Foreign Country--Procedure for Obtaining Court Order.
10B Federal Procedure, Lawyers Edition § 26:878, What Foreign or International Tribunals May Obtain Discovery in United States.
10B Federal Procedure, Lawyers Edition § 26:879, What Foreign or International Tribunals May Obtain Discovery in United States--Adjudicative Nature of Foreign Proceeding.
10B Federal Procedure, Lawyers Edition § 26:880, Application of Interested Person for Discovery in United States for Use in Foreign Country.

10B Federal Procedure, Lawyers Edition § 26:881, Necessity of Pending Proceeding in Foreign Country for Discovery in United States.
10B Federal Procedure, Lawyers Edition § 26:882, Discovery of Privileged Material in Untied State for Use in Foreign Country; Voluntary Disclosure.
10B Federal Procedure, Lawyers Edition § 26:883, Honoring Request for Discovery in United States for Use in Foreign Country Not Dependent on Reciprocity.
10B Federal Procedure, Lawyers Edition § 26:885, Granting of Request for Discovery in United States for Use in Foreign Country as Exercise of Discretion--Discoverability.
10B Federal Procedure, Lawyers Edition § 26:886, Appeal and Review of District Court Decision on Request for Discovery in United States for Use in Foreign Country.
10B Federal Procedure, Lawyers Edition § 26:902, Appellate Review of Discovery Orders Concerning Letters of Request from Foreign Tribunals.
13A Federal Procedure, Lawyers Edition § 36:209, Introduction.
13A Federal Procedure, Lawyers Edition § 36:210, Determining Proper Procedure for Foreign Deposition.
13A Federal Procedure, Lawyers Edition § 36:211, Assertion of Privilege.
28 Federal Procedure, Lawyers Edition § 65:262, Specificity as to Subpoenaed Materials as Factor in Undue Burden Determination.
8 Norton Bankruptcy Law and Practice 3d § 154:2, Applicability of Other Bankruptcy Code Sections and the Bankruptcy Rules to Chapter 15 Cases (Code § 103).
1 Patent Law Fundamentals § 4:6 (2d ed.), Trade Secret Misappropriation--Elements of a Cause of Action for Trade Secret Misappropriation.
6 Patent Law Fundamentals § 20:79 (2d ed.), Discovery--Matters Discoverable.
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Restatement of the Law Third - The U.S. Law of International Commercial Arbitration App d TD, Appendix D TD (2018).
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Restatement of the Law Third - The U.S. Law of International Commercial Arbitration § 1.1 TD 2, Definitions.
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Restatement of the Law Third - The U.S. Law of International Commercial Arbitration § 3.5 TD, Court-Ordered Production of Evidence in Aid of Arbitration.
Restatement of the Law Third - The U.S. Law of International Commercial Arbitration § 5.4 PFD, The Judicial Role in Investor-State Arbitral Proceedings.
Restatement of the Law Third - The U.S. Law of International Commercial Arbitration § 5.4 TD 5, The Judicial Role in Investor-State Arbitral Proceedings.
21 Securities Crimes § 5:37, Early Case Law on Letters Rogatory.
21 Securities Crimes § 5:38, Current Use of Letters Rogatory in Criminal Cases.
21 Securities Crimes § 5:46, Generally.
1 Trade Secrets Law § 5:42.50, U.S. Discovery for Use in Foreign Suits.
Wright & Miller Federal Practice and Procedure § 2005.1, Exclusiveness of Procedures--Foreign Discovery.

Wright & Miller Federal Practice and Procedure § 2006, Appellate Review of Discovery Orders.
Wright & Miller Federal Practice and Procedure § 2016.4, Privileged Matter--Disclosure of Privileged Material Outside Discovery.
Wright & Miller Federal Practice and Procedure § 2031.1, Expert Witnesses--1993 Requirement for Detailed Report and Routine Depositions Regarding Retained Expert Witnesses.
Wright & Miller Federal Practice and Procedure § 2072, Depositions Before Action--Petition.
Wright & Miller Federal Practice and Procedure § 2203, Actions in Which Production Available.
Wright & Miller Federal Practice and Procedure § 2444, Proof of Foreign Law.
Wright & Miller Federal Practice and Procedure § 2463.1, Quashing or Modifying a Subpoena.
Wright & Miller Federal Practice and Procedure § 3068.2, Magistrate Judge Handling of Matters Other Than Trial--Dispositive and Nondispositive Matters.
Wright & Miller Federal Practice and Procedure § 3071.2, Consensual Civil Proceedings Before Magistrate Judges--Consent to the Magistrate Judge's Jurisdiction.
Wright & Miller Federal Practice and Procedure § 3569, Arbitration.
Wright & Miller Federal Practice and Procedure § 3691, Miscellaneous Bases of Federal Jurisdiction--Federal Statutes; Indians and Indian Tribes.
Wright & Miller Federal Practice and Procedure § 3901.1, Magistrate Judge Appeals.
Wright & Miller Federal Practice and Procedure § 3914.24, Finality--Orders Prior to Trial--Discovery Orders--Ancillary Discovery Proceedings.
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Wright & Miller Federal Practice and Procedure § 3935.3, Mandamus Use in Civil Action--Discovery Orders.
Wright & Miller Federal Practice and Procedure § 3949.4, Contents of the Notice of Appeal.
Wright & Miller Federal Practice and Procedure § 4477.3, Preclusion of Inconsistent Positions--Inconsistency.
Wright & Miller Federal Practice and Procedure § 4516, Areas of Competence for the Formulation of Federal Common Law--Filling the Interstices Within a Pervasive Federal Framework.
Wright & Miller Federal Practice and Procedure § 5426, General Rule--Journalist Privilege.
Wright & Miller Federal Practice and Procedure § 5437, Exceptions--Act of Congress.
Wright & Miller Federal Practice and Procedure § 5665, Secrets of State--“Secret”.
NOTES OF DECISIONS

1 Generally

In determining whether an adjudicative body is an "international tribunal" within the meaning of the federal statute permitting domestic discovery for use in a foreign or international tribunal proceeding, it is not dispositive whether an adjudicative body shares some features of other bodies that look governmental; instead, the inquiry is whether those features and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Federal Civil Procedure 1312

Letters rogatory in aid of foreign criminal proceedings are authorized. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

Letters rogatory may be executed by district court when testimony sought is for use in proceeding in foreign or international tribunal. In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.2 (N.Y.) 1967, 385 F.2d 1017. Federal Civil Procedure 1312

2 Construction

Amendment to this section must be interpreted in terms of mischief it was intended to rectify. In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.2 (N.Y.) 1967, 385 F.2d 1017. Statutes 1455

3 Construction with other laws

The manner in which discovery proceeds under statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals is determined by normal discovery rules. Government of Ghana v. ProEnergy Services, LLC, C.A.8 (Mo.) 2012, 677 F.3d 340. Federal Civil Procedure 1312

Whether six anonymous scathing reviews of New Zealand employer on American workplace review website could be classified as statements of "honest opinion," which was affirmative defense to defamation liability under New Zealand law, could not be determined at motion to quash subpoena stage of action in which employer applied under statute permitting domestic discovery for use in foreign proceedings, seeking to subpoena website to determine identities of reviewers; reviewers had not even been identified, much less appeared in court and offered evidence on genuineness of their opinions, and statements of opinion other than "honest" ones were not categorically protected in New Zealand, unlike under the United States's First Amendment. Zuru, Inc. v. Glassdoor, Inc., N.D.Cal.2022, 2022 WL 2712549. Federal Civil Procedure 1312

Limited liability company's (LLC) motion to, one, vacate order authorizing investors in Mauritius private-equity funds formed to invest in real estate in India to take discovery from LLC and individual for use in connection with proceedings in Mauritius, India, and United Kingdom regarding alleged fraud and, two, to quash resulting subpoenas, and individual's motion to quash subpoenas were brought pursuant to statute authorizing such discovery orders, not only under rules on discovery, and thus Southern District of New York local rules on motions under discovery rules did not apply, where application for order had been ex parte, such that LLC and individual, who had lacked opportunity to challenge application, were challenging not just contours of discovery, but also validity of order. In re Children's Investment Fund Foundation (UK), S.D.N.Y.2019, 363 F.Supp.3d 361. Federal Civil Procedure 1312

Stored Communications Act precluded disclosure to applicant for discovery under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals, of the identities of people who "liked" Cambodian prime minister's social networking website page. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312; Searches And Seizures 276

Internationally known individual was not entitled to order directing United States National Security Agency (NSA) to produce classified documents relating to the death of individual's son and his companion in a highly publicized automobile crash, even for purposes of use in foreign tribunal's inquiry into such deaths, where another party's request for same documents was previously denied under Freedom of Information Act (FOIA). In re Al Fayed, D.Md.1999, 36 F.Supp.2d 694, affirmed 210 F.3d 421. Federal Civil Procedure 1312

Right to Financial Privacy Act did not apply to proceeding seeking to enforce subpoena duces tecum under letters rogatory issued by Brazilian court. In re Request for Intern. Judicial Assistance (Letter Rogatory) from the Federative Republic of Brazil, S.D.N.Y.1990, 130 F.R.D. 283. Federal Civil Procedure 1312

4 Construction with federal rules of civil procedure

Private adjudicatory bodies do not fall within the scope of the federal statute permitting domestic discovery for use in a foreign or international tribunal proceeding; abrogating *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209,

and *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Alternative Dispute Resolution 514

On applicants' petition for judicial assistance to obtain documentary and testimonial evidence from nonparty discovery targets for use in foreign proceedings, applicant's service on one target, a company incorporated in Maryland, by leaving subpoena and deposition notice with company employee who was not an officer and who explicitly disclaimed his authorization to accept service, would not be stricken as improper; the court declined to impose a requirement of personal in-hand service where applicants' mode of service reasonably ensured company's actual receipt of the subpoena, especially given that such service was made on the process server's third attempt, and it was undisputed that company had actual notice of the petition. In re Newbrook Shipping Corp., D.Md.2020, 498 F.Supp.3d 807, vacated and remanded 31 F.4th 889, on remand 2022 WL 3273534. Federal Civil Procedure 1312

Amended version of Federal Rule of Civil Procedure governing discovery disclosure applied to request of Republic of Ecuador and its Attorney General seeking production of documents from witness and his former employer for use in foreign proceeding, a Bilateral Investment Treaty Arbitration; Republic's application for documents was filed nearly two years after Arbitration was initiated, and after enactment of amended version of Rule. In re Application of Republic of Ecuador, N.D.Cal.2012, 280 F.R.D. 506, stay granted in part 2012 WL 13187177, extension of stay denied 2012 WL 13187178, affirmed 742 F.3d 860. Federal Civil Procedure 44

5 Purpose

Twin aims of statute which permits a district court to provide assistance to foreign and international tribunals, and litigants before such tribunals, are to provide efficient means of assistance to participants in international litigation in federal courts, and to encourage foreign countries by example to provide similar means of assistance to United States courts. In re Ishihara Chemical Co., C.A.2 (N.Y.) 2001, 251 F.3d 120, 58 U.S.P.Q.2d 1907. Federal Civil Procedure 1312

Goals of statute permitting federal district court to allow interested persons to obtain discovery for use before foreign tribunals are to provide equitable and efficacious discovery procedures in United States courts for the benefit of tribunals and litigants involved in litigation with international aspects, and to encourage foreign countries by example to provide similar means of assistance to American courts. Lancaster Factoring Co. Ltd. v. Mangone, C.A.2 (N.Y.) 1996, 90 F.3d 38, on remand 1996 WL 706925. Federal Civil Procedure 1312

Purpose of 1964 amendment to this section providing for assistance to foreign or international tribunals was to broaden prior law and permit extension of international assistance to bodies of a quasi-judicial or administrative nature, including foreign investigating magistrates. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. International Law 541

Primary purpose of statute authorizing district court to order individual within its district to give his testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal is to provide federal-court judicial assistance in gathering evidence for use in a proceeding in a foreign or international tribunal. In re Dubey, C.D.Cal.2013, 949 F.Supp.2d 990, appeal dismissed. Federal Civil Procedure 1312

The statute under which a district court may order a person to produce a document for use in a proceeding in a foreign or international tribunal is the product of congressional efforts to provide federal-court assistance in gathering evidence for use in foreign tribunals. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312

By enacting 1964 amendments to this section pertaining to assistance to foreign and international tribunals, Congress intended to enable the United States to take the initiative in rendering such assistance, with the hope that this would stimulate reciprocal aid. In re Request For Judicial Assistance From Seoul Dist. Criminal Court, Seoul, Korea, N.D.Cal.1977, 428 F.Supp. 109, affirmed 555 F.2d 720. Federal Civil Procedure 1312

6 Law governing

Subpoena for bank records located in United States, whose enforcement was sought by government of Haiti for use in criminal investigation was issued pursuant to federal statute, and governed by federal law, and Florida law was preempted, for purposes of claim that subpoena violated Florida's constitutional guarantee of privacy. In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic of Haiti, S.D.Fla.1987, 669 F.Supp. 403. States 18.15

7 Treaties

Treaty with foreign government for mutual assistance in criminal matters was self-executing and superseded any inconsistent preexisting statutory domestic law, which relieved domestic court of need to determine whether foreign judicial proceeding was pending or whether evidence requested under treaty could be used in the foreign proceeding. In re Erato, C.A.2 (N.Y.) 1993, 2 F.3d 11. International Law 308

8 Discretion of court

District Court did not abuse its discretion in determining that discretionary factors relevant in applications for discovery for use in foreign proceedings weighed in favor of denying pharmaceutical company's expansive discovery request for use in patent dispute with competitor being litigated in various European countries; court had concluded that the discovery requested by company was unduly burdensome because company gave no indication that the materials it sought were located in the district or even in the United States, rather, application was an attempt to circumvent foreign discovery procedures in the parties' pending European suits, and an Irish court had issued a judgment adjudicating four discovery motions with categories of documents that appeared to overlap significantly with those requested in application by company. In re Eli Lilly and Company, C.A.4 (Va.) 2022, 37 F.4th 160. Federal Civil Procedure 1312

District court abused its discretion in determining whether discovery request weighed against application under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal to extent district court's evaluation relied on possibility that Nigeria would use materials it obtained in English proceeding where Nigeria challenged arbitration award in favor of minority shareholder of entity under criminal investigation. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 2022, 25 F.4th 99. Federal Civil Procedure 1312

District court did not abuse its discretion in finding that granting application for domestic discovery assistance for use in foreign arbitration proceeding conducted pursuant to bilateral investment treaty between Russia and Lithuania challenging Lithuania's expropriation of shares in bankrupt nationalized private bank was consistent with twin aims of statute permitting domestic discovery for use in foreign proceedings; discovery assistance would have aided and enforced efficacy of treaty itself, and if United States or its citizens were involved in such an arbitration, Congressional policy of providing discovery assistance in cases such as this would have encouraged other countries to provide similar means of assistance. Fund for Protection of Investor Rights in Foreign States Pursuant to 28 U.S.C. § 1782 for Order Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, C.A.2 (N.Y.) 2021, 5 F.4th 216. Alternative Dispute Resolution 514

District Court was within its discretion in denying investment advisors' motion to quash in connection with German holding company's application for court-ordered discovery for use in foreign proceeding, seeking order compelling discovery from nonparty investment advisors for use in shareholders' foreign securities fraud actions against company, where District Court applied correct legal standard in determining that company met statutory requirements for obtaining discovery for use in foreign proceeding, and it properly weighed factors for determining whether granting company's discovery request was warranted. In re Porsche Automobil Holding SE, C.A.1 (Mass.) 2021, 985 F.3d 115. Federal Civil Procedure 1312

District Court acted within its discretion when permitting discovery from Spanish bank purchaser's New York affiliate pertaining to bank's financial status for use in foreign proceedings arising from government-forced sale of bank; affiliate was not party to any of the foreign proceedings, no argument was made that bank investors were attempting to procure the discovery in contravention of restrictions in place in foreign proceedings, and neither purchaser nor affiliate showed that production of the documents would be unduly intrusive or burdensome. In re del Valle Ruiz, C.A.2 (N.Y.) 2019, 939 F.3d 520. Federal Civil Procedure 1312

District court abused its discretion by granting petition under statute that permitted domestic discovery for use in foreign proceedings to subpoena documents from law firm in aid of related lawsuit against corporation in Netherlands, as former client, over documents law firm had obtained from prior litigation against same corporation, since corporation had disclosed those documents under confidentiality order that expressly barred petitioner from using documents in any other litigation, and granting petition would have undermined confidence in protective orders and inhibited foreign companies from producing documents to United States law firms even under confidentiality order, which likely would result in bad legal advice to client and harm to United States system of litigation. Kiobel by Samkalden v. Cravath, Swaine & Moore LLP, C.A.2 2018, 895 F.3d 238, certiorari denied 139 S.Ct. 852, 202 L.Ed.2d 582. Federal Civil Procedure 1312

Whether, and to what extent, to honor a request for assistance, pursuant to statute giving district courts power to provide assistance to foreign courts, has been committed by Congress to the sound discretion of the district court. United Kingdom v. U.S., C.A.11 (Fla.) 2001, 238 F.3d 1312, rehearing and rehearing en banc denied 253 F.3d 713, certiorari denied 122 S.Ct. 206, 534 U.S. 891, 151 L.Ed.2d 146. Criminal Law 627.2

Federal statute dealing with discovery for use in foreign or international tribunal gives district court discretion to decide whether to honor requests for assistance. Lo Ka Chun v. Lo To, C.A.11 (Fla.) 1988, 858 F.2d 1564. Federal Civil Procedure 1261

A request by a foreign tribunal for assistance in securing testimony or document is addressed to the district court's discretion. In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, C.A.9 (Cal.) 1977, 555 F.2d 720. Federal Civil Procedure 1312

District court has discretion in determining whether letters rogatory from foreign or international tribunals should be honored. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

District Court would conduct discretionary review of merits of New Zealand employer's New Zealand law defamation claim against American workplace review website, arising from six anonymous scathing reviews of employer on website, in assessing employer's application under statute permitting domestic discovery for use in foreign proceedings; employer, seeking to protect its reputation, wanted to subpoena website to reveal who wrote reviews and to identify how many people had seen reviews, whereas website wanted to safeguard anonymous speech on its website, both of those interests could not simultaneously be accommodated, and assessments of

merits of employer's New Zealand defamation claim would ensure that it had legitimate reasons for outing anonymous reviewers. Zuru, Inc. v. Glassdoor, Inc., N.D.Cal.2022, 2022 WL 2712549. Federal Civil Procedure 1312

Magistrate judge did not abuse discretion in refusing to stay proceedings, as requested by seller of two business units following court's grant of business units' buyer's application for order to conduct discovery for use in foreign proceedings, namely German arbitration that buyer planned to initiate against seller; magistrate gave thoughtful consideration to the issue, explaining that given potential length of time before Supreme Court issued an anticipated decision that could affect governing precedent on the matter, the fact that there was binding precedent in the circuit, and need for swifter action and greater certainty within timeframe for filing and pursuit of what would be expedited arbitration proceedings in Germany, magistrate would not stay case pending Supreme Court decision. Luxshare, LTD. v. ZF Automotive US, Inc., E.D.Mich.2021, 2021 WL 2705477. United States Magistrate Judges 146

Even if son of deceased wealthy Colombian citizen met statutory threshold for taking discovery from his sister and brother-in-law in Southern District of New York for use in proceedings in Colombia over assets of Colombian citizen's estate, district court would deny requested discovery as matter of discretion; any necessary fact finding could be done by Colombian courts, as sister and brother-in-law were under jurisdiction of Colombian courts and had been active participants in proceedings there, requested discovery was apparent attempt to circumvent proof-gathering procedures of Colombian tribunal, such as by taking second depositions that were not allowed in Colombia, and requested discovery was unduly intrusive and burdensome, as son did not show sister had documents he sought. In re Escallon, S.D.N.Y.2018, 323 F.Supp.3d 552. Federal Civil Procedure 1312

Even if district court had statutory authority to grant vehicle purchasers' application to seek discovery from alleged inventor of technology for purposes of litigation in Germany and Ireland against vehicle manufacturer that allegedly used technology to doctor emissions readings, court would, in its discretion, decline to grant application; although alleged inventor was not party to foreign litigation and therefore foreign courts might not be able to obtain the evidence on their own, both Irish and German courts had previously rejected purchasers' claims, German government had exhibited “skepticism” toward United States pre-trial discovery, it was possible that application was filed to circumvent foreign discovery restrictions, and purchasers made no effort to narrowly tailor their document requests. financialright GmbH v. Robert Bosch LLC, E.D.Mich.2018, 294 F.Supp.3d 721. Federal Civil Procedure 1312

District court would refuse to exercise its discretion under statute permitting domestic discovery for use in foreign proceedings to grant request for enforcement of United Kingdom discovery order in foreign defamation action requiring cable provider to disclose name and address of cable subscriber who used particular internet protocol address on specified dates, where subscriber objected to release of his information, and the United Kingdom order specified dates that were subsequent to last date of alleged defamation and harassment in the defamation complaint. Comcast Cable Communications, LLC v. Hourani, D.D.C.2016, 190 F.Supp.3d 29. Federal Civil Procedure 1312

District Court for the District of Maryland had authority to grant Italian limited liability company's (LLC) amended motion to compel consultant's compliance with subpoena, issued to secure consultant's deposition pursuant to statute governing LLC's ex parte application for order to conduct discovery for use in its Italian suit against consultant, where consultant resided in court's district, discovery sought was for use in proceeding before foreign tribunal, and application was made by interested party. HT S.R.L. v. Velasco, D.D.C.2015, 125 F.Supp.3d 211, vacated 2015 WL 13759884. Federal Civil Procedure 1451

If the four requirements are met for an application for judicial assistance to litigant in foreign tribunal, the court has discretion to grant the application. Pott v. Icicle Seafoods, Inc., W.D.Wash.2013, 945 F.Supp.2d 1197. Federal Civil Procedure 1312

If the requirements of the statute under which a district court may order a person to produce a document for use in a proceeding in a foreign or international tribunal are met, the district court is authorized, but not required, to provide assistance. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312

District courts have broad discretion to grant judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Federal Civil Procedure 1312

Even where threshold requirements of statute permitting domestic discovery for use in foreign proceedings are met, a district court is not required to grant a discovery application simply because it has the authority to do so. In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., D.D.C.2011, 821 F.Supp.2d 289. Federal Civil Procedure 1312

Whether to permit requested discovery for use in foreign proceeding is within discretion of court, even if all statutory requirements are met. Republic of Ecuador v. Bjorkman, D.Colo.2011, 801 F.Supp.2d 1121, stay denied, affirmed 2011 WL 5439681. Federal Civil Procedure 1312

District Court is not required to grant a discovery application made by a foreign tribunal simply because it has authority to do so; rather, it has discretion to decide whether to exercise its authority to grant the request for judicial assistance. In re Request for Judicial Assistance from the Dist. Court in Svitavy, Czech Republic, E.D.Va.2010, 748 F.Supp.2d 522. Federal Civil Procedure 1312

Even where threshold requirements of statute authorizing discovery for use in a proceeding in a foreign or international tribunal are met, a district court is not required to grant discovery application simply because it has the authority to do so. In re Application of Caratube Int'l Oil Co., LLP, D.D.C.2010, 730 F.Supp.2d 101. Federal Civil Procedure 1312

It is within the court's discretion to grant or deny an application under federal statute permitting domestic discovery for use in foreign proceedings. In re Roz Trading Ltd., N.D.Ga.2006, 469 F.Supp.2d 1221, stay pending appeal denied 2007 WL 120844. Federal Civil Procedure 1312

District court is not required to grant discovery application for assisting foreign or international tribunal simply because it has authority to do so; rather, once statutory requirements are met, district court is free to grant discovery in its discretion. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Federal Civil Procedure 1312

United States magistrate judge, acting as commissioner pursuant to Convention on Taking of Evidence Abroad, has discretion to grant or deny foreign court's letter rogatory for assistance in obtaining evidence. In re Letter Rogatory from Local Court of Ludwigsburg, Federal Republic of Germany in Matter of Smith, N.D.Ill.1994, 154 F.R.D. 196. International Law 291; United States Magistrate Judges 151

Compliance with statute governing requests by foreign courts for discovery assistance and with Hague Convention does not necessarily end inquiry as to whether to provide assistance as district court must determine whether it is appropriate to exercise wide discretion conferred by statute. In re Letter of Request From Boras Dist. Court, E.D.N.Y.1994, 153 F.R.D. 31. Federal Civil Procedure 1312

9 Mandamus

Statute governing assistance to foreign and international tribunals and to litigants before such tribunals provided no clear duty to government to produce documents for foreign prisoner's use in foreign tribunal, and thus prisoner was not entitled to writ of mandamus ordering production of documents; issuance of discovery orders pursuant to statute was matter of discretion for district court. McKevitt v. Mueller, S.D.N.Y.2010, 689 F.Supp.2d 661. Mandamus 32

10 Persons within section

United States is not "person" within meaning of statute giving district court power to order person to give his testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal. Al Fayed v. C.I.A., C.A.D.C.2000, 229 F.3d 272, 343 U.S.App.D.C. 308. Federal Civil Procedure 1312

District Court did not have specific personal jurisdiction over foreign corporation with respect to motion by member of class in underlying securities fraud action for order permitting domestic discovery for use in foreign proceeding, and, thus, corporation was not "found in" judicial district within meaning of statutory prerequisite for such order on such basis, even if District Court had specific personal jurisdiction over corporation in underlying class action, since class member's motion arose out of foreign arbitration proceeding, in which class member alleged fraud against corporation in connection with securities sold in Brazil, and corporation's activities relevant to foreign arbitration were not purposefully directed at forum, rather they all occurred outside United States. In re Petrobras Securities Litigation, S.D.N.Y.2019, 393 F.Supp.3d 376. Federal Civil Procedure 1312; Federal Courts 2760(1)

Sister and brother-in-law of son of deceased wealthy Colombian citizen did not have permanent, established abode in Southern District of New York, and thus they did not "reside" there as would permit son to take discovery of them there in connection with proceedings in Colombia over assets of Colombian citizen's estate; sister and brother-in-law had for some time maintained an apartment in New York where they stayed when they came to New York for business or otherwise, but mere ownership and control of, and occasional presence in, apartment did not raise inference that apartment was sister's and brother-in-law's established abode or residence. In re Escallon, S.D.N.Y.2018, 323 F.Supp.3d 552. Federal Civil Procedure 1312

Government is not "person" under statute governing assistance to foreign and international tribunals and to litigants before such tribunals and therefore cannot be compelled to provide documents for use in foreign litigation. McKevitt v. Mueller, S.D.N.Y.2010, 689 F.Supp.2d 661. Federal Civil Procedure 1312

Central Intelligence Agency (CIA) was not a "person" within meaning of statute giving district court power to order person 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. In re Al Fayed, D.D.C.2000, 91 F.Supp.2d 137, affirmed 229 F.3d 272, 343 U.S.App.D.C. 308. Federal Civil Procedure 1312

11 Interested persons

Complainant before Commission of the European Communities qualifies as "interested person" within compass of federal statute permitting domestic discovery for use in foreign proceedings; statute makes discovery available to complainants who do not have status of private litigants and are not sovereign agents. Intel Corp. v. Advanced

Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

Minority shareholders in Luxembourg corporation who sought discovery into ownership of the company were "interested persons" within meaning of federal statute permitting domestic discovery for use in foreign proceedings; shareholders planned to file a criminal complaint with a claim for civil damages in Luxembourg, as part of that process they had right to submit information for the investigating judge's consideration, and after doing so, they could appeal any decision not to proceed. Application of Furstenberg Finance SAS v. Litai Assets LLC, C.A.11 (Fla.) 2017, 877 F.3d 1031. Federal Civil Procedure 1312

Brother of person who died intestate in foreign country was "interested person" authorized by statute to seek discovery order from district court for use in proceedings before foreign tribunal, in light of fact that brother was party to two separate proceedings in Hong Kong to determine whether he or his sister would become administrator for their brother's estate. Application of Esses, C.A.2 (N.Y.) 1996, 101 F.3d 873. Federal Civil Procedure 1312

Agent for court-appointed trustee of foreign debtor, which was involved in pending Italian bankruptcy litigation, was "interested person" within meaning of statute permitting federal district court to allow interested persons to obtain discovery for use before foreign tribunals. Lancaster Factoring Co. Ltd. v. Mangone, C.A.2 (N.Y.) 1996, 90 F.3d 38, on remand 1996 WL 706925. Federal Civil Procedure 1312

Tokyo district prosecutor's office was "interested person" for purpose of statute authorizing district courts to give assistance to foreign and international tribunals upon application of foreign or international tribunal or "any interested person." In re Letters Rogatory from Tokyo Dist. Prosecutor's Office, Tokyo, Japan, C.A.9 (Cal.) 1994, 16 F.3d 1016. Federal Civil Procedure 1312

Crown Prosecution Service of the United Kingdom was an "interested person" within meaning of federal statute governing foreign applications for judicial assistance. In re Letter of Request from Crown Prosecution Service of United Kingdom, C.A.D.C.1989, 870 F.2d 686, 276 U.S.App.D.C. 272. Federal Civil Procedure 1312

Applicant established that he was an "interested party" in Cambodian litigation, as required to be entitled to obtain third party discovery from social networking website under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals; although in Cambodia, there was no public docket from which to determine the existence of a formal proceeding, applicant's declaration and newspapers articles supported the fact that there were four actions against applicant in Cambodia, applicant lived in exile because he feared for his life in Cambodia, and he often relied on other sources for his information about the cases against him, and social networking website did not provide any evidence to refute the existence of such proceedings. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

Former owner of Isle of Man company was an interested person in Panamanian attachment proceeding, as an element required for court to have the authority to grant his application to issue a subpoena against foreign limited liability corporation (LLC) for the taking of discovery for use in a foreign proceeding; former owner was the plaintiff in the proceeding. In re Sargeant, S.D.N.Y.2017, 278 F.Supp.3d 814. Federal Civil Procedure 1312

Former owner of Isle of Man company failed to establish that he was an interested person in proceeding in the United Kingdom that Isle of Man company initiated against entities with whom it had entered into joint shipping contracts and, thus, court did not have authority to grant his application to issue a subpoena against foreign limited liability corporation (LLC) that was engaged in litigation against another party of the joint shipping contracts for the taking of discovery to use in the proceeding in the United Kingdom, absent a showing that he had a right to direct company's consideration of the evidence he sought or of any recognized relationship between him

and company that would permit him to do so. In re Sargeant, S.D.N.Y.2017, 278 F.Supp.3d 814. Federal Civil Procedure 1312

Republic of Kazakhstan was "interested person" in foreign arbitration proceeding in which it was ordered to pay damages for its illegal seizure of liquefied petroleum gas plant, and thus was not barred from seeking discovery of evidence in United States for use in foreign proceedings due to fact that it was sovereign. In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. sec. 1782, S.D.N.Y.2015, 110 F.Supp.3d 512. Federal Civil Procedure 1312

District court was statutorily authorized to provide judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings on power company's application for such assistance in relation to its arbitration proceeding under North American Free Trade Agreement (NAFTA) with Canadian government; power company was "interested party' in arbitration, application sought evidence in form of document production and deposition testimony, evidence sought would be used in proceeding before foreign or international tribunal, and competitor from which evidence was sought resided within court's district. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Alternative Dispute Resolution 514

In determining whether to grant application for discovery pursuant to statute permitting domestic discovery for use in foreign proceedings, court must determine whether: (1) person from whom discovery is sought resides or is found in district where action has been filed, (2) discovery sought is for use in proceeding before foreign tribunal, and (3) application is made by foreign or international tribunal or any interested person. In re Lazaridis, D.N.J.2011, 865 F.Supp.2d 521. Federal Civil Procedure 1312

Applications filed by American oil company and two employees of its Ecuadorian subsidiary, seeking discovery from an attorney under statute permitting domestic discovery for use in foreign proceedings, satisfied threshold statutory requirements with regard to an environmental lawsuit pending in Ecuador, to extent that lawsuit concerned the company, and Ecuadorian criminal proceedings against the two employees; attorney resided in the United States, the requested discovery was for use in proceedings before foreign tribunals, and, as civil and criminal defendants in the Ecuadorian proceedings, the applicants were "interested persons" within the meaning of the statute. In re Application of Chevron Corp., D.Mass.2010, 762 F.Supp.2d 242. Federal Civil Procedure 1312

An "interested person" within meaning of statute authorizing an interested person to apply for an order for discovery in aid of foreign proceeding includes a party to the foreign litigation, whether directly or indirectly involved. In re Merck & Co., Inc., M.D.N.C.2000, 197 F.R.D. 267. Federal Civil Procedure 1312

12 Found within district

If a person is served with a subpoena while physically present in the district of the court that issued the discovery order, he is "found" in that district for purposes of statute authorizing discovery in United States for use in foreign tribunal; thus, a person who lives and works in a foreign country is not necessarily beyond the statute's reach simply because the district judge signed the discovery order at a time when that prospective deponent was not physically present in the district. In re Edelman, C.A.2 (N.Y.) 2002, 295 F.3d 171. Federal Civil Procedure 1312

District Court did not have general personal jurisdiction over foreign corporation, and, thus, foreign corporation was not "found in" judicial district within meaning of statutory prerequisite for order permitting domestic discovery for use in foreign proceeding on such basis; foreign corporation was incorporated and maintained its principal place of business in Brazil, and while it maintained office within judicial district when motion was filed and sold American Depository Receipts (ADRs) on New York Stock Exchange, such business contacts were far

from sufficient to subject it to general personal jurisdiction of courts in New York. In re Petrobras Securities Litigation, S.D.N.Y.2019, 393 F.Supp.3d 376. Federal Civil Procedure 1312; Federal Courts 2760(1)

Foreign corporation, which maintained its principal place of business within district, satisfied both due process and statutory "resides or is found" within district requirement for district court to issue discovery order against corporation for use in foreign proceedings, brought by investors in failing Spanish bank arising from the purchase of the bank. In re Del Valle Ruiz, S.D.N.Y.2018, 342 F.Supp.3d 448, affirmed 939 F.3d 520. Constitutional Law 3964; Federal Courts 2724(3); Federal Courts 2726(3)

Son of deceased wealthy Colombian citizen failed to adequately allege that his sister and brother-in-law were "found" in Southern District of New York, that is, physically present there when served with process, as would permit discovery of them there in connection with proceedings in Colombia over assets of Colombian citizen's estate; affidavits of service indicated only that copies of service papers were left with doorman at building where sister and brother-in-law had an apartment. In re Escallon, S.D.N.Y.2018, 323 F.Supp.3d 552. Statutes 1205

Banks were not "found" in District of Columbia, and thus, litigant in foreign tribunal could not obtain order permitting him to conduct discovery to obtain bank records, which allegedly would prove the rightful owner of foreign land, for use in litigant's foreign land dispute, although banks had branches located within the District, bank had automated teller machines (ATM) located within the District, and bank sponsored local football team. In re Application of Masters for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding, D.D.C.2018, 315 F.Supp.3d 269. Federal Civil Procedure 1312

Evidence failed to establish that foreign limited liability corporation (LLC), engaged in pending litigation with person with whom Isle of Man company entered into joint shipping contracts, resided or was found in the Southern District of New York and, thus, district court did not have authority to grant application to issue subpoena against LLC filed by former owner of Isle of Man company for the taking of discovery for use in Panamanian attachment proceeding against defendants including person with whom Isle of Man company entered into contracts, though former owner argued LLC had one of its primary business offices in New York City, absent allegations that LLC conducted business in New York sufficient to establish that its operations in that office were so substantial and of such a nature as to render LLC at home in New York. In re Sargeant, S.D.N.Y.2017, 278 F.Supp.3d 814. Federal Civil Procedure 1312

Allegation that, upon information and belief, entity had "systematic and continuous contacts" with the District of Columbia that would be sufficient to justify the exercise by the district court of in personam jurisdiction over the entity, was not sufficient to establish that entity was found in the District of Columbia, under statute permitting domestic discovery for use in foreign proceedings, absent any explanation as to what such "systematic and continuous contacts" might have been. In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., D.D.C.2011, 821 F.Supp.2d 289. Federal Civil Procedure 1312

Foreign corporations and their executives did not reside and were not found in the Southern District of New York, as required to conduct discovery for use in a foreign proceeding, although they were served with subpoenas there, where corporations were neither incorporated nor headquartered there, and neither corporations nor their executives engaged in systematic and continuous activities there. In re Godfrey, S.D.N.Y.2007, 526 F.Supp.2d 417. Federal Civil Procedure 1312

Software corporation lacked statutory authority to serve subpoenas duces tecum upon partner in European office of American law firm, with respect to ongoing antitrust proceeding before European Commission; although partner was member of New York bar, he was Dutch national who resided and worked in Belgium, and had not been present

in district since subpoenas were issued. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Witnesses 572

Law firm which possessed documents sought by litigants in German securities action was located in the district where the discovery petition was filed, satisfying the assistance to foreign tribunals statute requirement that the person from whom discovery was sought be found in the district court where application was made, although law firm allegedly only had temporary possession of the documents solely for the purposes of the litigation in the United States. In re Application of Schmitz, S.D.N.Y.2003, 259 F.Supp.2d 294, affirmed 376 F.3d 79. Federal Civil Procedure 1312

13 Discovery generally

District court had jurisdiction over petition under statute that permitted domestic discovery for use in foreign proceedings that was filed to subpoena documents from law firm in aid of lawsuit against corporation in Netherlands that law firm had formerly represented in related action. Kiobel by Samkalden v. Cravath, Swaine & Moore LLP, C.A.2 2018, 895 F.3d 238, certiorari denied 139 S.Ct. 852, 202 L.Ed.2d 582. Federal Civil Procedure 1312

Statute that authorized federal courts to order document production for use in certain foreign proceedings permitted discovery for use in foreign criminal investigation conducted by foreign investigating magistrate. In re Application for an Order Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in Foreign Proceedings, C.A.2 (N.Y.) 2014, 773 F.3d 456, rehearing and rehearing en banc denied. Federal Civil Procedure 1312

Statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals does not establish a standard for discovery; instead, it provides for a threshold determination of whether to allow foreign litigants to enjoy discovery in United States courts in accordance with federal rules. Government of Ghana v. ProEnergy Services, LLC, C.A.8 (Mo.) 2012, 677 F.3d 340. Federal Civil Procedure 1312

District court had authority to grant petitioners' request for domestic discovery from physician for use in foreign proceeding in Canada seeking to challenge the validity of petitioners' grandmother's will; physician's status as a District of Columbia resident brought him within the authority of the District Court for the District of Columbia, petitioners clearly contemplated filing a matter in the foreign tribunal at the time the request was filed and petitioners subsequently initiated the action in Canada, and petitioners were "interested persons" in the foreign proceeding since they initiated it to contest the validity of their grandmother's will and would have benefited if that will was declared invalid. In re DiGiulian, D.D.C.2018, 314 F.Supp.3d 1. Federal Civil Procedure 1312

Applicant's discovery requests seeking information about "likes" on Cambodian prime minister's social networking website page and any investigation by website into the "likes" on page, and request to depose a website representative about prime minister's use of website to disseminate false information regarding "likes" and policies and procedures regarding false use of "likes," were relevant to defamation case against applicant in Cambodian court, claiming that applicant made a false statement on website that millions of prime minister's "likes" were generated by "click farms," as required for applicant to be entitled to obtain ex parte third-party discovery from website under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

Contemplated collateral pre-judgment and post-judgment attachment proceedings against trading company were purely speculative, even if they were "proceedings in a foreign tribunal" within meaning of statute permitting domestic discovery for use in foreign proceedings, and thus petition for discovery had to be denied, where

petitioner was unable to locate assets of trading company through other means prior to making application. In re Asia Maritime Pacific Ltd., S.D.N.Y.2015, 253 F.Supp.3d 701. Federal Civil Procedure 1312

United States corporation seeking discovery from non-party, pursuant to federal statute permitting domestic discovery for use in foreign proceedings, was not required to first attempt discovery measures in the foreign jurisdiction, itself, where it was clear that non-party likely had information relevant to the foreign proceeding. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

After issuing order granting application for discovery of evidence to be used in Canadian legal action, District Court would not issue supplemental order in effect declaring nunc pro tunc that nothing in the prior order, or in the laws or rules governing its issuance, would prohibit the applicant from attempting to use the evidence in other legal proceedings in Canada, since, among other things, Court likely did not have subject matter jurisdiction over motion seeking the supplemental order, applicant had represented that the evidence would not be used in other proceedings, and governing statute seemed to limit discovery to specific proceeding. In re Kegel, D.N.D.2014, 67 F.Supp.3d 1054. Federal Civil Procedure 1312

Secondary estate distribution proceeding in Brazil probate court, for which decedent's heirs from a previous marriage sought an order compelling discovery from decedent's Florida banks in which assets were purportedly concealed and from his accountant to contest decedent's will, was a proceeding in a foreign tribunal within reasonable contemplation, a required statutory element to authorize the district court to order the discovery; settlement agreement between will contestants and decedent's widow specifically contemplated a second proceeding for concealed inheritance property, and will contestants reactivated the case file with the Brazilian probate court. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312

Statute providing for judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings directs judges to provide discovery assistance pursuant to the Federal Rules of Civil Procedure, so long as the order does not prescribe the practice and procedure of the foreign country or the international tribunal. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Federal Civil Procedure 1312

The assistance to foreign tribunals statute affords access to discovery of evidence in the United States for use in foreign proceedings. In re Application of Schmitz, S.D.N.Y.2003, 259 F.Supp.2d 294, affirmed 376 F.3d 79. Federal Civil Procedure 1312

Subpoena issued pursuant to Federal Rule of Civil Procedure to compel compliance with discovery sought in Chapter 15 proceedings involving a foreign debtor was immediately appealable, without the attorney against whom subpoena was issued first having to disobey and be held in contempt; Chapter 15 proceedings, like proceedings pursuant to federal statute providing for discovery for use in a foreign or international proceeding, were ancillary to proceedings in another tribunal, such that there would never be a final resolution on the merits beyond the discovery order itself. Markus v. Rozhkov, S.D.N.Y.2020, 615 B.R. 679, on remand 619 B.R. 552. Bankruptcy 3766.1

14 Requests within section

Agreement on Procedures for Mutual Legal Assistance outlining procedures for Department of Justice and Philippine Presidential Commission on Good Government to assist each other in legal investigation of former president of Philippines and his wife upon request of either government did not make applicable to former president and his wife statute providing that person before foreign and international tribunals may not be compelled to give testimony or statements or produce document or other thing in violation of any legally applicable privilege;

existence of agreement was not a "request" which triggered application of statute. In re Doe, C.A.2 (N.Y.) 1988, 860 F.2d 40. Grand Jury 36.3(2)

Bank, which filed application for order authorizing bank to issue and serve subpoenas on 17 banks in connection with civil proceeding in Abu Dhabi Court (Commercial) of the United Arab Emirates (UAE) for repayment of debt, satisfied requirements for application under federal statute permitting domestic discovery for use in foreign proceedings; each respondent bank maintained an office and did business in the Southern District of New York, requested discovery was for use in a civil proceeding in a foreign tribunal, and bank was a party interested in that proceeding. In re Invest Bank PSC, S.D.N.Y.2021, 2021 WL 4804585. Federal Civil Procedure 1312

Application by petitioners, former shareholders of Russian oil and gas company, for leave to serve subpoenas on firm that provided legal services to company, seeking evidence in connection with litigation currently pending in Dutch appellate court was not a "dispositive motion" that had to be decided by means of a report and recommendation, and thus, district court had authority to decide petitioners' request for discovery under statute permitting domestic discovery for use in foreign proceedings by means of an opinion and order. In re Hulley Enterprises, Ltd., S.D.N.Y.2019, 358 F.Supp.3d 331, affirmed 400 F.Supp.3d 62. Federal Civil Procedure 1312

Applicant's request for discovery about communications between Cambodian prime minister and his affiliates through social networking website did not implicate comity, as factor for consideration under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals; website was a private company, and website offered no evidence or commentary that prime minister used website for official, governmental purposes. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

Party requesting relief under statute providing for judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings does not have to prove receptivity to show that they are not attempting to circumvent foreign proof-gathering mechanisms. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Federal Civil Procedure 1312

District court had jurisdiction over a request for deposition and document production ordered pursuant to a letter rogatory issued by an Argentine court in light of evidence in record demonstrating that evidence was sought for use in a pending judicial proceeding and demonstrating the adjudicative function of the Argentine court with sufficient clarity. Application of Sumar, S.D.N.Y.1988, 123 F.R.D. 467. Federal Civil Procedure 1312; Federal Civil Procedure 1551

15 Proceedings generally

Investors in Luxembourg corporation who sought discovery from New York banks for use in contemplated criminal proceeding in Luxembourg against director of company, who allegedly failed to disclose properly his ownership interest in another company that conducted business with Luxembourg company, established that the foreign proceeding was "within reasonable contemplation," as required to obtain relief under federal statute permitting domestic discovery for use in foreign proceedings; although investors had delayed initiation of the foreign proceedings, that delay was caused in part by obstruction the investors faced in related Florida proceedings, which resulted in investors filing three motions to compel production, as well as a motion for sanctions. In re Application of Furstenberg Finance SAS, S.D.N.Y.2018, 334 F.Supp.3d 616, affirmed 785 Fed.Appx. 882, 2019 WL 4127332. Federal Civil Procedure 1312

Potential pre-judgment and post-judgment attachment proceedings that were collateral to private foreign arbitration proceeding were not "proceedings in a foreign tribunal" within meaning of statute permitting domestic

discovery for use in foreign proceedings; even if that arbitration was "proceeding in a foreign tribunal," discovery sought was not for use in that proceeding because defendant had defaulted. In re Asia Maritime Pacific Ltd., S.D.N.Y.2015, 253 F.Supp.3d 701. Federal Civil Procedure 1312

Discretionary factors to be considered by district court in determining whether it should exercise its discretion and grant discovery application pursuant to statute authorizing domestic discovery for use in foreign proceeding include (1) whether the person from whom discovery is sought is a participant in the foreign proceeding so that the foreign tribunal can order the participant to produce evidence, (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or court or agency abroad to judicial assistance from United States federal court, and (3) unduly intrusive or burdensome requests. In re Dubey, C.D.Cal.2013, 949 F.Supp.2d 990, appeal dismissed. Federal Civil Procedure 1312

A "proceeding" within meaning of statute authorizing discovery in aid of a foreign proceeding includes any proceeding in which an adjudicated function is being exercised or is imminent. In re Merck & Co., Inc., M.D.N.C.2000, 197 F.R.D. 267. Federal Civil Procedure 1312

16 Criminal proceedings

District court had jurisdiction to issue a subpoena duces tecum in response to letters rogatory issued by Canadian prosecutor in attempt to obtain records from Detroit bank relative to defendant in Canadian prosecution. In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada, C.A.6 (Mich.) 1975, 523 F.2d 562. Federal Civil Procedure 1354

Israel's compliance with subpoena issued in connection with claimants' criminal complaint against their grandfather in Argentina for misappropriating Israeli bonds did not constitute implied waiver of Israel's sovereign immunity from suit in United States in claimants' action based on internationally-sold bonds. Jacubovich v. Israel, S.D.N.Y.2019, 397 F.Supp.3d 388. International Law 464

This section providing that district court of district in which person resides or is found may order him to produce a document for use in proceeding in foreign or international tribunal permits use of letters rogatory in criminal proceedings, as well as in civil cases. In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada, E.D.Mich.1974, 383 F.Supp. 857, affirmed 523 F.2d 562. Criminal Law 627.2

17 Investigations

Subpoena duces tecum directed at New York bank as result of letters rogatory issued by Brazilian judge could not be enforced consistent with United States letter rogatory statute where there was nothing in record to show that adjudicative proceedings were likely or very soon to be brought against perpetrators of "probable illicit acts" under Brazilian law; letter from Brazilian prosecutor identified four individuals as targets of tax evasion investigation but referred only "possible" violations by those persons and "possible prosecution" of them and gave no assessment of likelihood or timing of formal proceedings, and thus it could not be said that proceedings were imminent, so as to statutorily authorize rendering of judicial assistance. In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, C.A.2 (N.Y.) 1991, 936 F.2d 702. Federal Civil Procedure 1312

Bank documents requested by foreign official were for use in a "proceeding in a foreign tribunal" within meaning of statute authorizing district court to provide assistance to such tribunals, though no proceeding was currently pending, where the documents were sought in admissible form, in an ongoing criminal investigation, for use at trial. In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, S.D.Fla.1986, 648

F.Supp. 464, affirmed 848 F.2d 1151, certiorari denied 109 S.Ct. 784, 488 U.S. 1005, 102 L.Ed.2d 776. Federal Civil Procedure 1312

This section providing that district court of 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 was not intended to and does not authorize United States courts to compel testimony on behalf of foreign governmental bodies whose purpose is to conduct investigations unrelated to judicial or quasi-judicial controversies. In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada, N.D.Cal.1973, 59 F.R.D. 625, affirmed 488 F.2d 511. Federal Civil Procedure 1312

18 Pending proceedings

Investment funds' planned litigation involving foreign companies that the funds had invested in and which had allegedly been defrauded by the companies' owner was not within reasonable contemplation at the time the funds applied for assistance from a district court for aid in a foreign or international proceedings, thus warranting denial of the application, even though the funds had retained counsel, where the funds had only discussed the possibility of initiating litigation. Certain Funds, Accounts and/or Investment Vehicles v. KPMG, L.L.P., C.A.2 (N.Y.) 2015, 798 F.3d 113. Federal Civil Procedure 1312

British criminal proceedings were not required to be pending in order for Crown Prosecution Service of United Kingdom to be entitled to request assistance in criminal investigation, but rather it was sufficient that judicial proceedings be within reasonable contemplation. In re Letter of Request from Crown Prosecution Service of United Kingdom, C.A.D.C.1989, 870 F.2d 686, 276 U.S.App.D.C. 272. Federal Civil Procedure 1312

Statute authorizing federal court to order person residing within district to give testimony or produce document for use in proceeding in foreign or international tribunal did not require that proceeding be pending before judicial assistance could be granted. In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, C.A.11 (Fla.) 1988, 848 F.2d 1151, certiorari denied 109 S.Ct. 784, 488 U.S. 1005, 102 L.Ed.2d 776. Federal Civil Procedure 1312

Evidence confirming existence of foreign proceeding was sufficient for materials requested to be "for use in a foreign proceeding," on petition for judicial assistance seeking permission to obtain testimony from particular persons and entities for use in ongoing Madagascar criminal prosecution; although indictment giving rise to original proceeding was dismissed, attorney in Madagascar provided declaration stating that charges against persons specified would be heard at upcoming scheduled hearing and Madagascar court had since referred new indictment against one of those persons on similar charges. In re Bouka, S.D.N.Y.2023, 2023 WL 1490378. Federal Civil Procedure 1312

Applicants seeking judicial assistance to obtain documentary and testimonial evidence from nonparty discovery targets, a company incorporated in Maryland and a Maryland resident, for use in two foreign proceedings, one a pending proceeding in South Africa and the other a contemplated proceeding in Nevis, pursuant to statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals, satisfied statutory requirements for such application with respect to South African action, but not Nevis action; applicants, who were claimants in South African action and planned to initiate contemplated action in Nevis, were interested persons, applicants sought depositions and documents from discovery targets found in District of Maryland, and, while Nevis action was no more than speculative and discovery related thereto apparently would be used to investigate whether litigation was possible in the first place, South African action was currently pending. In re Newbrook Shipping Corp., D.Md.2020, 2020 WL 6451939. Federal Civil Procedure 1312

Social networking website failed to establish that applicant's discovery requests under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals, were an attempt to circumvent any discovery restrictions in place in Cambodia, as factor for consideration under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals; Cambodian proceedings against applicant occurred in applicant's absence because he was concerned about his personal safety, and there was no evidence that applicant sought such information in Cambodia but failed to obtain it because of restrictions on discovery in Cambodia. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

Discovery that former owner of Isle of Man company sought from limited liability corporation (LLC) that was engaged in pending litigation with person with whom Isle of Man company had entered into joint shipping contracts was for use in a foreign proceeding before a foreign tribunal, as an element required for district court to have authority to grant former owner's application to issue a subpoena against LLC for the taking of discovery for use in a foreign proceeding; former owner intended to use the discovery he sought in Panamanian attachment proceeding against person with whom Isle of Man company entered into contracts to piece together the sequence of his alleged frauds and to trace his assets to aid in the attachment proceeding. In re Sargeant, S.D.N.Y.2017, 278 F.Supp.3d 814. Constitutional Law 3963; Federal Courts 2704; Process 48

The statute under which a district court may order a person to produce a document for use in a proceeding in a foreign or international tribunal is not limited to proceedings that are pending or imminent; rather, the proceeding for which discovery is sought need only be within reasonable contemplation. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312

Statute providing for judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings is not limited to proceedings that are pending; to warrant such assistance, the proceedings need only be within reasonable contemplation. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Federal Civil Procedure 1312

Submissions of Dutch authorities, in support of request by the government of the Netherlands for U.S. assistance in aid of ongoing criminal investigation, sufficiently established that an adjudicative proceeding lay within reasonable contemplation, as required by statute allowing formal assistance to foreign criminal investigations. In re Wilhelm, S.D.N.Y.2007, 470 F.Supp.2d 409. International Law 365

Lack of pending judicial proceeding did not prohibit district court under § 1782 from ordering United States citizen to give deposition testimony and to provide documents to assist United Kingdom authorities during criminal perversion of justice investigation upon application via letter rogatory. In re Letter of Request From Crown Prosecution Service of United Kingdom, D.D.C.1988, 683 F.Supp. 841, affirmed and remanded 870 F.2d 686, 276 U.S.App.D.C. 272. Criminal Law 627.2

19 Foreign or international tribunals

Term “foreign tribunal,” within meaning of federal statute permitting domestic discovery for use in a foreign or international tribunal proceeding, meant tribunal imbued with governmental authority by one nation; word “foreign” modified word “tribunal,” which had potential governmental or sovereign connotations, such that “foreign tribunal” more naturally referred to a tribunal belonging to a foreign nation rather than to a tribunal that was simply located in a foreign nation, and statute's presumption that a foreign tribunal followed practice and procedure of the foreign country was unremarkable if such practice and procedure was prescribed by government that conferred authority to tribunal, as opposed to foreign private adjudicatory bodies which prescribed their own

rules. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Federal Civil Procedure 1312

Discretionary factor for determining whether to order discovery in aid of foreign litigation that focuses on nature of the foreign tribunal, character of the proceedings underway abroad, and receptivity of the foreign government or the court or agency abroad to United States federal-court judicial assistance, weighed against granting patent attorney's request to obtain discovery from non-profit medical research organization in relation to opposition proceedings before European Patent Office (EPO) in which the attorney, representing genome editing company, challenged validity of organization's patents involving technology used in the programmable genome editing of mammalian cells; information sought was irrelevant to the proceeding in that attorney sought information relevant to inventorship and entitlement and EPO had no authority or jurisdiction to resolve issues of entitlement. In re Schlich, C.A.1 (Mass.) 2018, 893 F.3d 40. Federal Civil Procedure 1312

Discovery sought by minority shareholders in Luxembourg corporation, relating to actual ownership of the company, was for use in a "proceeding in a foreign or international tribunal," as required to obtain relief under federal statute permitting domestic discovery for use in foreign proceedings; shareholders intended to file a criminal complaint with a claim for damages in Luxembourg, and complaint would trigger a criminal investigation by a Luxembourg judge. Application of Furstenberg Finance SAS v. Litai Assets LLC, C.A.11 (Fla.) 2017, 877 F.3d 1031. Federal Courts 3567

Taiwan was adequate alternative forum to hear Taiwanese executors' suit against District of Columbia trust, trustee, and trust beneficiary, asserting claims under Taiwan law and District of Columbia common law, concerning distribution of Taiwanese decedent's estate, in support of forum non conveniens dismissal; alternative forum in Taiwan was available as executors waived statute of limitations defense in Taiwan, and alternative forum was adequate as relitigation of unwaived issues did not render Taiwan forum inadequate alternative, Taiwan's legal system was not so fraught with corruption and bias as to provide no remedy at all, executors could request discovery of evidence located in United States despite Taiwan's restrictive discovery rules, and Taiwan courts could order adequate remedy. Chin-Ten Hsu v. New Mighty U.S. Trust, D.D.C.2018, 288 F.Supp.3d 272, subsequent determination 308 F.Supp.3d 178, reversed and remanded 918 F.3d 944, 440 U.S.App.D.C. 105, rehearing en banc denied, certiorari denied 140 S.Ct. 435, 205 L.Ed.2d 263, on remand 2020 WL 588322. Federal Courts 2982

Maritime arbitration association headquartered in England, which sought subpoena duces tecum upon company residing in United States in connection with a series of arbitrations, was a "foreign tribunal" within the meaning of statute authorizing subpoenas to be issued in connection with a proceeding in a foreign or international tribunal. In re Ex Parte Application of Kleimar N.V., S.D.N.Y.2016, 220 F.Supp.3d 517. Alternative Dispute Resolution 514

Court had authority to grant request for order directing individual who resided within court's district to submit to deposition and to produce documents for use in foreign proceedings that were pending in Venezuela, which was made by parties to those proceedings pursuant to federal statute. In Matter of Application of Leret, D.D.C.2014, 51 F.Supp.3d 66. Federal Civil Procedure 1312

Court had authority to grant request for order directing individual who resided within court's district to submit to deposition and to produce documents for use in foreign proceedings that were pending in Venezuela, which was made by parties to those proceedings. Matter of Leret, D.D.C.2013, 981 F.Supp.2d 66, amended 51 F.Supp.3d 66. Federal Civil Procedure 1312

Discovery rules in foreign tribunals bear no impact on the provision of assistance under statute governing discovery of matters for use in proceeding in foreign or international tribunal, and foreign tribunal can place conditions

on its acceptance of information to maintain whatever measure of parity it concludes is appropriate. Republic of Ecuador v. Bjorkman, D.Colo.2011, 801 F.Supp.2d 1121, stay denied, affirmed 2011 WL 5439681. Federal Civil Procedure 1312

Discretionary factors weighed in favor of granting petition of Republic of Ecuador and its Attorney General for issuance of subpoena to environmental expert, who authored reports for oil company for use in bilateral investment treaty arbitration before United Nations Commission on International Trade Law (UNCITRAL) arbitral body, for taking of deposition and production of documents for use in foreign proceeding; expert was not participant in foreign proceeding, nor was there any indication he would be subject to jurisdiction of UNCITRAL arbitration, request was not attempt to circumvent foreign discovery restrictions, permitting discovery had no bearing on whether evidence would be accepted by UNCITRAL panel, and limitation of discovery, pursuant to Federal Rule of Civil Procedure governing discovery of individuals considered testifying experts, was not appropriate absent existence of any privilege. Republic of Ecuador v. Bjorkman, D.Colo.2011, 801 F.Supp.2d 1121, stay denied, affirmed 2011 WL 5439681. Alternative Dispute Resolution 514

Fact that letters rogatory were signed by a Brazilian judge was not dispositive of whether subpoenaed documents were sought for use in a proceeding in a foreign or international tribunal, as required for execution of the letters. In re Request for Intern. Judicial Assistance (Letter Rogatory) from the Federative Republic of Brazil, S.D.N.Y.1988, 687 F.Supp. 880, stay lifted 700 F.Supp. 723, on reargument 130 F.R.D. 283, reversed on other grounds 936 F.2d 702. Federal Civil Procedure 1312

20 Tribunals within section--Generally

Second Circuit's decision in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.,* 165 F.3d 184, in which the Court of Appeals held that the phrase "foreign or international tribunal" in the statute authorizing district courts to assist discovery efforts of litigants before "foreign or international tribunals" does not encompass private arbitral panels, remains good law in light of the Supreme Court's subsequent decision in *Intel Corp. v. Advanced Micro Devices, Inc.,* 124 S.Ct. 2466, and so private international commercial arbitrations are not proceedings for which the statute may be invoked; abrogating *In re Children's Investment Fund Foundation (UK),* 363 F.Supp.3d 361. In Re Guo, C.A.2 (N.Y.) 2020, 965 F.3d 96, as amended. Alternative Dispute Resolution 514

Second Circuit's decision in *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, in which the Court of Appeals held that the phrase "foreign or international tribunal" in the statute authorizing district courts to assist discovery efforts of litigants before "foreign or international tribunals" does not encompass private arbitral panels, remains good law in light of the Supreme Court's subsequent decision in *Intel Corp. v. Advanced Micro Devices, Inc*., 124 S.Ct. 2466, and so private international commercial arbitrations are not proceedings for which the statute may be invoked; abrogating *In re Children's Investment Fund Foundation (UK)*, 363 F.Supp.3d 361. In Re Guo, C.A.2 (N.Y.) 2020, 965 F.3d 96, as amended. Alternative Dispute Resolution 514

Within this section providing that district courts may order persons residing or found in district to give testimony or to produce document or thing for use in proceeding in foreign or international tribunal and order may be made pursuant to letter rogatory issued, or request made, by foreign or international tribunal, "tribunal" has an adjudicatory connotation. Fonseca v. Blumenthal, C.A.2 (N.Y.) 1980, 620 F.2d 322. Federal Civil Procedure 1312

This section providing that district court of district in which person resides or is found may order person to give testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal did not authorize United States court to compel testimony on behalf of foreign governmental body whose purpose was to conduct investigation unrelated to judicial or quasi-judicial controversy. In re Letters of Request to

Examine Witnesses from Court of Queen's Bench for Manitoba, Canada, C.A.9 (Cal.) 1973, 488 F.2d 511. Federal Civil Procedure 1312

This section permitting district court to execute foreign letters rogatory is not so broad as to include all the plethora of administrators whose decisions affect private parties and who are not entitled to act arbitrarily. In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.2 (N.Y.) 1967, 385 F.2d 1017. Federal Civil Procedure 1312

In order for United States district court to grant foreign court's request for judicial assistance in obtaining information, it is sufficient that information sought is intended for use in a judicial or quasi-judicial controversy and that procedures followed comport with our notions of due process of law. In re Request For Judicial Assistance From Seoul Dist. Criminal Court, Seoul, Korea, N.D.Cal.1977, 428 F.Supp. 109, affirmed 555 F.2d 720. Federal Civil Procedure 1312

Word "tribunal," in this section providing that district court of 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, was not intended to include institutions whose purpose is to investigate and report to executive or legislative branches of government; rather, the crucial requirement is that the foreign body exercise adjudicative powers, and have an adjudicative purpose. In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada, N.D.Cal.1973, 59 F.R.D. 625, affirmed 488 F.2d 511. Federal Civil Procedure 1312

21 ---- Arbitration, tribunals within section

Foreign arbitral panel involved in dispute between buyer and seller of two business units did not qualify as governmental body, and thus, was not "foreign tribunal" within meaning of federal statute permitting domestic discovery for use in foreign or international tribunal proceeding, even if arbitral panel was a commercial arbitral panel subject to German law and courts could play role in enforcing any arbitration agreement, since no government was involved in creating panel or prescribing its procedures, but instead buyer and seller, who were private parties, agreed in private contract that private dispute-resolution organization would arbitrate any disputes between them, with each party selecting one arbitrator and those two arbitrators choosing third arbitrator. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Alternative Dispute Resolution 514

In seeking stay pending appeal, seller of business units and seller's senior officers failed to establish likelihood of success on appeal of district court's order granting buyer, which sought to bring foreign arbitration proceeding, limited discovery under statute governing assistance to litigants before foreign and international tribunals, although Supreme Court had granted certiorari in separate case that could have reached different result from Court of Appeals about whether statute applied to private arbitration, where Supreme Court dismissed separate case after granting certiorari. Luxshare, Ltd. v. ZF Automotive US, Inc., C.A.6 (Mich.) 2021, 15 F.4th 780. Federal Courts 3463

District court did not abuse its discretion in considering factors for determining whether to order domestic discovery assistance to compel discovery from non-participant for use in a foreign arbitration challenging Lithuania's expropriation of shares in bankrupt nationalized private bank; responsive documents and communications were beyond those accessible through Lithuania, arbitral panel would have been receptive to such discovery if obtained, Lithuania would have opportunity to object to admissibility of any such evidence at issue as discovery proceeded, discovery request was not unduly intrusive or burdensome as requests went to heart of case in arbitration and appeared to be proportionate to needs. Fund for Protection of Investor Rights in Foreign

States Pursuant to 28 U.S.C. § 1782 for Order Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, C.A.2 (N.Y.) 2021, 5 F.4th 216. Alternative Dispute Resolution 514

Private arbitral panel in United Kingdom charged with resolving dispute between valve supplier and engine manufacturer was "foreign or international tribunal," and thus district court had authority to permit supplier to obtain testimony from residents of South Carolina for use in arbitration, despite manufacturer's contentions that term referred only to entities that exercised government-conferred authority, and that permitting such discovery would inject delay and costs into arbitrations; both United States and United Kingdom sanctioned, regulated, and oversaw private arbitration, and any discovery was subject to any limitations that district court saw fit to impose. Servotronics, Inc. v. Boeing Company, C.A.4 (S.C.) 2020, 954 F.3d 209. Alternative Dispute Resolution 514

Arbitration panel operating under the rules of the Dubai International Financial Centre-London Court of International Arbitration (DIFC-LCIA) qualified as "foreign or international tribunal," and thus, District Court could order discovery for use in private commercial arbitration pending before that panel in Dubai; several dictionaries contained definitions of "tribunal" broad enough to include private arbitration, lawyers and judges had long understood the word "tribunal" to encompass privately contracted-for arbitral bodies with power to bind contracting parties, and congressional usage did not compel narrower definition. In re Application to Obtain Discovery for Use in Foreign Proceedings, C.A.6 (Tenn.) 2019, 939 F.3d 710. Federal Courts 3574

Term "foreign and international tribunals," as used in statute authorizing district courts to assist discovery efforts of litigants before foreign and international tribunals, did not include private international arbitration. Republic of Kazakhstan v. Biedermann Intern., C.A.5 (Tex.) 1999, 168 F.3d 880. Federal Civil Procedure 1312

Statute authorizing district courts to assist discovery efforts of litigants before "foreign or international tribunals" does not apply to proceedings before private arbitral panels. National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., C.A.2 (N.Y.) 1999, 165 F.3d 184. Alternative Dispute Resolution 252

Assuming that statutory requirements for obtaining domestic discovery for use in foreign proceeding were satisfied in parties' private, contractually agreed-upon arbitration, uncertainty as to arbitrators' position regarding parties' need for documents, as well as absence of evidence regarding receptivity to requested documents of arbitration panel, which had not yet been fully assembled, warranted district court's refusal to exercise its discretion to grant discovery. In re Dubey, C.D.Cal.2013, 949 F.Supp.2d 990, appeal dismissed. Alternative Dispute Resolution 252

Private arbitrations do not fall within meaning of "foreign or international tribunal" under statute authorizing district court to order individual within its district to give his testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal. In re Dubey, C.D.Cal.2013, 949 F.Supp.2d 990, appeal dismissed. Alternative Dispute Resolution 252

Arbitral tribunal established by an international treaty, which operated under United Nations Commission on International Trade Law (UNCITRAL) rules was "foreign tribunal" for purposes of statute authorizing discovery of material for use in proceeding before foreign tribunal. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Alternative Dispute Resolution 514

Arbitral tribunal established by an international treaty, which operated under United Nations Commission on International Trade Law (UNCITRAL) rules was a "foreign tribunal" for purposes of statute authorizing discovery of material for use in a proceeding before a foreign tribunal. In re Application of Chevron Corp., S.D.N.Y.2010, 709 F.Supp.2d 283, corrected, for additional opinion, see 2010 WL 5621332, stay denied, affirmed 629 F.3d 297. Alternative Dispute Resolution 512; International Law 292

Statute that permitted federal district court to compel person in its district to provide testimony for proceeding in foreign or international tribunal did not apply to compel witness to testify at deposition in Chicago in connection with private arbitration in London, England; statute applied to state-sponsored arbitral bodies that were subject to reviewability, and private arbitration was alternative to formal litigation that was final and binding on parties. In re Arbitration between Norfolk Southern Corp., Norfolk Southern Ry. Co., and General Sec. Ins. Co. and Ace Bermuda Ltd., N.D.Ill.2009, 626 F.Supp.2d 882. Alternative Dispute Resolution 514

International commercial arbitral body located in Austria was a "tribunal" within the meaning of federal statute permitting domestic discovery for use in foreign proceedings. In re Roz Trading Ltd., N.D.Ga.2006, 469 F.Supp.2d 1221, stay pending appeal denied 2007 WL 120844. Federal Civil Procedure 1312

Unofficial, private arbitration is not "tribunal" within meaning of statute permitting district court to order person in district to give testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal; rather, term "tribunal" refers to public, official adjudicatory proceedings. Application of Medway Power Ltd., S.D.N.Y.1997, 985 F.Supp. 402. Alternative Dispute Resolution 252

Arbitrator or arbitration panel is "tribunal" within meaning of statute authorizing district court to order discovery for use in foreign tribunal. Application of Technostroyexport, S.D.N.Y.1994, 853 F.Supp. 695. Alternative Dispute Resolution 252

21a ---- Domestic discovery, tribunals within section

Term "international tribunal," within meaning of federal statute permitting domestic discovery for use in a foreign or international tribunal proceeding, meant tribunal imbued with governmental authority by multiple nations, even though word "international" could mean either involving two or more nations or involving two or more nationalities, since it would be strange for availability of discovery to turn on whether adjudicative body had adjudicators of different nationalities, as opposed to whether adjudicative body had been imbued by multiple nations with official power to adjudicate disputes. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Federal Civil Procedure 1312

21b ---- Foreign ad hoc arbitral panels, tribunals within section

Foreign ad hoc arbitral panel involved in dispute between Russian corporation that was assignee of shareholder in bankrupt nationalized private Lithuanian bank and Lithuania was not intergovernmental body, and thus, was not "international tribunal" within meaning of federal statute permitting domestic discovery for use in foreign or international tribunal proceeding, even though a sovereign was on one side of dispute and option to arbitrate was contained in bilateral investment treaty between Lithuania and Russia rather than private contract, since inclusion of ad hoc panel in treaty's list of arbitral forums contrasted with inclusion of forums that were clearly governmental, and nothing in treaty reflected any intent that ad hoc panel exercise governmental authority. ZF Automotive US, Inc. v. Luxshare, Ltd., U.S.2022, 142 S.Ct. 2078, 213 L.Ed.2d 163. Alternative Dispute Resolution 514

22 ---- Commission of the European Communities, tribunals within section

Commission of the European Communities is "tribunal" under federal statute permitting domestic discovery for use in foreign proceedings when it acts as first-instance decisionmaker. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

Under statute permitting domestic discovery for use in foreign proceedings, district court had authority to entertain discovery request by antitrust complainant before Commission of the European Communities. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

23 ---- Indian income tax officer, tribunals within section

Indian income-tax officer was not such a "tribunal" as was entitled to execution of its letters rogatory. In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.2 (N.Y.) 1967, 385 F.2d 1017. Federal Civil Procedure 1312

24 ---- Manitoba Commission of Inquiry, tribunals within section

Manitoba Commission of Inquiry is not a "tribunal" within this section providing that district court of 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. In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada, N.D.Cal.1973, 59 F.R.D. 625, affirmed 488 F.2d 511. Federal Civil Procedure 1312

25 ---- Tokyo district court, tribunals within section

District court properly exercised its discretion in honoring letters rogatory from Tokyo district court, which were issued pursuant to request by Tokyo district public prosecutor's office which was investigating improper payments of money to Japanese citizens by an American corporation and its officers and agents, where letters were issued in aid of ongoing investigation of alleged violations of Japanese law, information sought from witnesses, who were not subjects of the investigation, was for use in completion of investigation and in future trials, and letters were issued pursuant to a mutual assistance agreement between Japan and the United States, despite contention that the Tokyo district court, while not acting as an adjudicatory body, was not a "tribunal" as used in this section. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

26 ---- Miscellaneous tribunals, tribunals within section

Arbitration before the China International Economic and Trade Arbitration Commission (CIETAC) was private international commercial arbitration outside the scope of the statute authorizing district courts to assist discovery efforts of litigants before "foreign or international tribunals"; although CIETAC was originally founded by the Chinese government, it now functioned essentially independently of the government, maintaining confidentiality from all non-participants so as to limit opportunities for ex parte intervention by state officials and offering a pool of arbitrators who did not purport to act on government's behalf, the dispute was between two private parties, the parties had the ability to select their arbitrators, CIETAC's jurisdiction flowed exclusively from the parties, not the government, CIETAC arbitrations were provided limited review in Chinese courts, and the government's role in enforcing CIETAC awards did not convert CIETAC panels into public entities. In Re Guo, C.A.2 (N.Y.) 2020, 965 F.3d 96, as amended. Alternative Dispute Resolution 514

Opposition proceedings initiated by biotechnology company in European Patent Office and Japanese Patent Office disputing validity of competitor's European and Japanese patents were "proceedings in foreign or international

tribunal," within meaning of statute permitting discovery in aid of foreign proceedings, even though they were not court proceedings, where both foreign patent offices conducted quasi-judicial proceedings that carried hallmarks of traditional judicial proceedings. Akebia Therapeutics, Inc. v. FibroGen, Inc., C.A.9 (Cal.) 2015, 793 F.3d 1108, 115 U.S.P.Q.2d 1864, mandate stayed 136 S.Ct. 1, 192 L.Ed.2d 994, stay denied 136 S.Ct. 24, 576 U.S. 1092, 192 L.Ed.2d 995. Federal Civil Procedure 1312

Although preliminary, proceeding before the Directorate General-Competition of the European Commission, in which microprocessor company alleged that competitor's actions violated treaty establishing Commission, qualified as "foreign or international tribunal" under statute permitting domestic discovery for use in foreign proceeding, in that proceeding was, at a minimum, one leading to quasi-judicial proceedings. Advanced Micro Devices, Inc. v. Intel Corp., C.A.9 (Cal.) 2002, 292 F.3d 664, 63 U.S.P.Q.2d 1156, certiorari granted 124 S.Ct. 531, 540 U.S. 1003, 157 L.Ed.2d 408, affirmed 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001, on remand 2004 WL 2282320. Federal Civil Procedure 1312

Term "tribunal" in statute governing application to compel discovery for use in a foreign tribunal, meant foreign government, court, or agency, and not a private arbitral body, and thus petitioner could not obtain discovery from company for use in a private arbitration in Germany under statute. In re Storag Etzel GmbH, D.Del.2020, 613 F.Supp.3d 813. Alternative Dispute Resolution 252; Federal Civil Procedure 1312

Liquidation proceeding in Mauritius relating to Mauritius private-equity fund formed to invest in real estate in India satisfied "for use" requirement of statute authorizing district courts to order persons to give their testimony or statements or to produce documents or other things for use in proceedings in foreign or international tribunals, where decision of liquidator, who exercised powers of administrative, investigative, or quasi-judicial capacity in nature, was subject to judicial review. In re Children's Investment Fund Foundation (UK), S.D.N.Y.2019, 363 F.Supp.3d 361. Federal Civil Procedure 1312

Evidence sought by United States corporation from non-party Ecuadorian national residing in Colorado was "for use in a foreign tribunal," as required for discovery to take place under federal statute permitting domestic discovery for use in foreign proceedings; corporation sought information from Colorado resident about funding for both a class action brought against corporation in Ecuador and post-judgment proceedings there, regarding whether a significant financier of an alleged conspiracy had knowledge about illegal and fraudulent activities that a United States judge had found had taken place during the Ecuadorian proceedings. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

Arbitral body falls within the scope of a foreign or international tribunal under statute providing for judicial assistance to foreign tribunals to obtain evidence for use in foreign proceedings, if (1) it is a first-instance adjudicative decisionmaker, (2) it permits the gathering and submission of evidence, (3) it has authority to determine liability and impose penalties, and (4) its decision is subject to judicial review. In re Application of Mesa Power Group, LLC, S.D.Fla.2012, 878 F.Supp.2d 1296. Alternative Dispute Resolution 514

Commissioner appointed by district court was authorized to assist Haitian tribunal and juge d'instruction in conducting discovery of bank records located in United States, since tribunal was a quasi-judicial entity and there was no applicable extranational limitation on its authority to request assistance. In re Letter of Request for Judicial Assistance from Tribunal Civil de Port-au-Prince, Republic of Haiti, S.D.Fla.1987, 669 F.Supp. 403. Federal Civil Procedure 1611

27 Considerations governing--Generally

Among factors that district courts may consider in deciding whether to grant request for formal assistance to foreign criminal investigation are: nature and attitudes of government of country from which request emanates and character of proceedings in that country. U.S. v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation, C.A.9 (Wash.) 2000, 235 F.3d 1200. Federal Civil Procedure 1312; International Law 365

Federal courts, in responding for requests for assistance from foreign tribunals to secure testimony or documents, should not feel obligated to involve themselves in technical questions of foreign law relating to subject matter jurisdiction of foreign or international tribunals or admissibility before such tribunals of the testimony or material sought; however, this is not to say that jurisdiction of the requesting court is never an appropriate inquiry for if departures from our concepts of fundamental due process and fairness are involved, a different question is presented. In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, C.A.9 (Cal.) 1977, 555 F.2d 720. Federal Civil Procedure 1312

Applicant established the required concrete basis for contemplated civil proceedings, to obtain discovery under statute providing for discovery for use in a foreign proceeding; applicant retained counsel to pursue civil claims in the United Kingdom and counsel articulated the civil claims that would be brought, and it was not incumbent on the district court to determine whether or not applicant had a timely claim for relief on his libel and/or slander claims, nor was it incumbent on the district court to determine whether or not applicant's claim for negligent misstatement was viable or not. In re Application of Shervin Pishevar for an Order to take Discovery for use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782, S.D.N.Y.2020, 439 F.Supp.3d 290, adhered to on reconsideration 2020 WL 1862586. Federal Civil Procedure 1312

Company resided or was found in New York, as required for federal court in New York to issue subpoena duces tecum upon company, pursuant to statute authorizing subpoenas to be issued in connection with a proceeding in a foreign or international tribunal, in connection with a series of arbitrations before maritime arbitration association headquartered in England; company traded American Depository Receipts on the New York Stock Exchange and regularly filed forms with Securities and Exchange Commission (SEC) which listed an agent for service and authorized representative registered to do business in New York, and this agent was a wholly owned subsidiary of a third entity, which, in turn, was a wholly owned subsidiary of the company. In re Ex Parte Application of Kleimar N.V., S.D.N.Y.2016, 220 F.Supp.3d 517. Alternative Dispute Resolution 514

Pursuant to statute authorizing district court to order individual within its district to give his testimony or statement or to produce document or other thing for use in proceeding in foreign or international tribunal, district court may order person to produce discovery if three requirements are satisfied: (1) the application is made by a foreign or international tribunal or any interested person, (2) the discovery is for use in a proceeding in a foreign or international tribunal, and (3) the person or entity from whom the discovery is sought is a resident of or found in the district in which the application is filed. In re Dubey, C.D.Cal.2013, 949 F.Supp.2d 990, appeal dismissed. Federal Civil Procedure 1312

Discretionary factors court may consider in deciding whether to grant application for discovery pursuant to statute permitting domestic discovery for use in foreign proceedings include: (1) whether person from whom discovery is sought is participant in foreign proceeding, such that discovery is accessible without statute's aid; (2) nature of foreign tribunal, character of foreign proceedings, and receptivity of foreign government or court to accept court's assistance; (3) whether request conceals attempt to circumvent foreign proof gathering restrictions; and (4) whether subpoena is unduly burdensome. In re Lazaridis, D.N.J.2011, 865 F.Supp.2d 521. Federal Civil Procedure 1312

In determining whether to grant discovery for use in a foreign proceeding, a court can weigh whether the person from whom discovery is sought is a participant in the foreign proceeding, take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign court to United States federal-court judicial assistance, and consider whether the discovery request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; in examining these factors, district courts should consider the twin aims of statute permitting domestic discovery for use in foreign proceedings: providing efficient means of assistance to participants in international litigation in United States federal courts and encouraging foreign countries by example to provide similar means of assistance to United States courts. In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., D.D.C.2011, 821 F.Supp.2d 289. Federal Civil Procedure 1312

A district court considers the following discretionary factors in determining whether to permit discovery for use in foreign litigation: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding, (2) the receptivity of the foreign tribunal to United States court assistance, (3) whether the discovery application is an attempt to circumvent foreign proof-gathering restrictions, and (4) whether the documents and testimony sought are unduly intrusive or burdensome. Chevron Corp. v. Shefftz, D.Mass.2010, 754 F.Supp.2d 254. Federal Civil Procedure 1312

Factors considered in determining whether to grant discovery for use in a proceeding in a foreign or international tribunal include: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding, (2) nature of the foreign tribunal, character of the proceedings, and receptivity of tribunal to U.S. judicial assistance, and (3) attempts to circumvent foreign proof-gathering restrictions. In re Application of Caratube Int'l Oil Co., LLP, D.D.C.2010, 730 F.Supp.2d 101. Federal Civil Procedure 1312

In determining whether to grant application for discovery for use in a foreign proceeding, courts should consider: (1) whether the documents or testimony sought are within the foreign tribunal's jurisdictional reach; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to federal court judicial assistance; (3) whether the request for discovery conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the subpoena contains unduly intrusive or burdensome requests. In re Godfrey, S.D.N.Y.2007, 526 F.Supp.2d 417. Federal Civil Procedure 1312

Court presented with request for domestic discovery for use in foreign proceeding may take into account nature of foreign tribunal, character of proceedings underway abroad, and receptivity of foreign government or court or agency abroad to U.S. federal-court judicial assistance; furthermore, court will, in addition to those factors, consider the scope of the information requested and its relation to the proceedings abroad. In re Roz Trading Ltd., N.D.Ga.2006, 469 F.Supp.2d 1221, stay pending appeal denied 2007 WL 120844. Federal Civil Procedure 1312

District court is authorized to assist foreign or international tribunal or litigant before such tribunal by ordering discovery where: (1) person from whom discovery is sought resides or is found in district; (2) discovery is for use in proceeding before foreign tribunal; and (3) application is made by foreign or international tribunal or any interested person. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Federal Civil Procedure 1312

There are three requirements in the assistance to foreign tribunals statute: (1) that the person from whom discovery is sought reside or be found in the district of the district court to which the application is made, (2) that the discovery be for use in a proceeding before a foreign tribunal, and (3) that the application be made by a foreign or international tribunal or any interested person. In re Application of Schmitz, S.D.N.Y.2003, 259 F.Supp.2d 294, affirmed 376 F.3d 79. Federal Civil Procedure 1312

28 ---- Constitutional rights and privileges, considerations governing

It was premature, on motion to terminate stay of taking of testimony under subpoenas issued pursuant to letters rogatory received from a foreign court, to examine whether the witnesses might have been granted immunity from prosecution in the foreign country and the effects of any such grants, and to consider the possibility that they might claim U.S.C.A. Const. Amend. 5 privilege against testifying, as no witness had yet made any claim of privilege. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

Third party, a federal prisoner, German citizen, and former manager of foreign automobile manufacturer, established fear of prosecution so as to validly invoke Fifth Amendment privilege against self-incrimination, with regard to deposition questions for use in foreign proceedings against manufacturer submitted by German citizens, who owned vehicles affected by diesel emissions fraud, and German legal services provider, regarding whether third party was withdrawing statements made during his plea and sentencing proceedings or whether those statements were truthful, and thus third party could refuse to answer questions; many of the questions were not innocent on their face, but boldly asked third party whether he lied in the plea and sentencing proceedings in his criminal case. Baumer v. Schmidt, E.D.Mich.2019, 423 F.Supp.3d 393. Self-incrimination 57

Court would not exercise its discretion to quash subpoena issued in attempt by Canadian prosecutor to obtain records from Detroit bank relative to defendant in Canadian prosecution, even though defendant alleged that there was potential denial of rights under U.S.C.A. Const. Amend. 6, where government assured court that defendant would have opportunity to cross-examine deponent at hearing to be held by the rogatory commission and it could not be assumed that defendant's constitutional rights would receive no protection under Canadian procedures. In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada, E.D.Mich.1974, 383 F.Supp. 857, affirmed 523 F.2d 562. Criminal Law 662.30

29 ---- Admissibility in foreign jurisdiction, considerations governing

District court could not consider admissibility of evidence in foreign proceeding when ruling on application under statute permitting domestic discovery for use in foreign proceedings. Brandi-Dohrn v. IKB Deutsche Industriebank AG, C.A.2 (N.Y.) 2012, 673 F.3d 76. Federal Civil Procedure 1312

In determining whether litigant requesting assistance from district court in obtaining discovery in United States for use in foreign proceeding has made adequate showing that information sought would be discoverable in the foreign jurisdiction, district court need not explore whether information applicant seeks would be admissible in foreign jurisdiction, or any other issue of foreign law. Application of Asta Medica, S.A., C.A.1 (Me.) 1992, 981 F.2d 1, 25 U.S.P.Q.2d 1861. Federal Civil Procedure 1271

Witnesses could not object to district court's action in issuing subpoenas in response to letters rogatory from a foreign court on the grounds that the testimony to be taken might not be admissible in trial in the foreign country. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

United States corporation did not present authoritative proof that Ugandan and Mauritian tribunals presiding over civil actions by applicants against corporation's Mauritian affiliate would have rejected evidence sought from corporation by applicants, under statute permitting domestic discovery for use in foreign proceedings, which weighed in favor of granting application; while corporation asserted that foreign tribunals would not have accepted

evidence applicants sought, these representations were insufficient to warrant denial of application, since there was no reason to believe that foreign proceedings were of the type that would have otherwise barred applicants from presenting evidence and engaging in discovery. In re Barnwell Enterprises Ltd, D.D.C.2017, 265 F.Supp.3d 1. Federal Civil Procedure 1312

30 ---- Burdensomeness or oppressiveness of order, considerations governing

A district court may deny an application under the statute permitting domestic discovery for use in foreign proceedings where it suspects that the discovery is being sought for the purposes of harassment. Brandi-Dohrn v. IKB Deutsche Industriebank AG, C.A.2 (N.Y.) 2012, 673 F.3d 76. Federal Civil Procedure 1312

Alleged members of a group of company's shareholders that advocated for the merger and privatization of company, which were non-parties to proceeding brought in the Cayman Islands by shareholder that opposed company's merger and privatization, failed to establish that they would incur significant expenses if ordered to comply with subpoenas requesting information for use in Cayman proceeding, as would support shifting the cost of discovery to opposing shareholder; members merely asserted that search and review of documents responsive to the subpoenas would significantly affect a member's business operations, and cause member to incur vendor costs and attorneys' fees of tens of thousands of dollars, and that compliance with a deposition would likely cause member to incur substantial fees. In re Alpine Partners, (BVI) L.P., N.D.Cal.2022, 2022 WL 18956960. Federal Civil Procedure 1312

Discovery sought was not unduly intrusive or burdensome, favoring allowing applicant to obtain domestic discovery for use in international arbitration before the Dubai International Finance Centre-London Court of International Arbitration (DIFC-LCIA) under federal statute permitting domestic discovery for use in foreign proceedings; although some of the documents sought may be privileged, law firm from which the information was sought did not suggest that the creation of a privilege log would be unduly burdensome, and given that applicant had narrowed its request, it appeared that only a handful of search terms would be necessary to search for responsive documents. Food Delivery Holding 12 S.a.r.l. v. DeWitty and Associates CHTD, D.D.C.2021, 2021 WL 1854343. Alternative Dispute Resolution 252

Pursuant to ex parte request by alleged victims of fraudulent foreign investment scheme to obtain discovery from founder and former CEO of brokerage company for use in expected proceeding before High Court of England and Wales against brokerage company, intrusiveness or burden of discovery request did not weigh against granting request; alleged victims' requests were narrowly tailored to obtain information regarding brokerage company's actions in connection with its alleged facilitation and concealment of investment scheme, and founder would have been able to avail himself of protection of rules governing discovery. In re Tovmasyan, D.Puerto Rico 2021, 557 F.Supp.3d 348. Federal Civil Procedure 1312

Magistrate judge's decision to consider delay when ruling on application for discovery assistance in foreign proceeding was not contrary to law; although alleged delay did not fit precisely within any of factors considered by court in exercising its discretion under statute permitting domestic discovery for use in foreign tribunals, it implicated factor regarding whether discovery request was unduly intrusive or burdensome because longer delay in seeking documents imposed greater burden on parties expected to respond to document requests who had to attempt to reconstruct events from distant past. In re Hulley Enterprises Ltd., S.D.N.Y.2019, 400 F.Supp.3d 62. Federal Civil Procedure 1312

Discovery requested from individual, by investors in Mauritius private-equity funds formed to invest in real estate in India, for use in connection with proceedings in Mauritius, India, and United Kingdom regarding alleged fraud was not unduly intrusive or burdensome, as discretionary factor favoring entry of order authorizing investors to

take requested discovery; although individual asserted that discovery requests were duplicative because he was not likely to have any documents that could not be garnered from entities which were parties in foreign proceedings, he did not provide any evidence to support assertion, did not describe with any particularity the documents allegedly in both his possession and that of other entities, and did not identify which particular entities had documents. In re Children's Investment Fund Foundation (UK), S.D.N.Y.2019, 363 F.Supp.3d 361. Federal Civil Procedure 1312

Deposition topics requested by applicant under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals, other than about Cambodian prime minister's use of social networking website to disseminate false information regarding "likes" and policies and procedures regarding false use of "likes," were overly broad and burdensome; for question about communications between website and prime minister, with no limitation as to time or subject, website would have to prepare to talk about every communication between website and prime minister, presumably including any notice sent by website to prime minister, on topics completely unrelated to four cases against applicant in Cambodia, and other deposition topics suffered from same issue. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

Subpoena duces tecum issued upon company, in connection with a series of arbitrations before maritime arbitration association headquartered in England, did not place an undue burden on company, even though it requested documents containing confidential information, such as pricing, and covered contracts that contain confidentiality clauses; company was already able to identify many transactions and documents responsive to the subpoena, indicating that at least partially complying with the subpoena was feasible, and entity that sought and obtained the subpoena had been engaged in discussions with company regarding narrowing the scope of the subpoena to make it less burdensome on company to respond. In re Ex Parte Application of Kleimar N.V., S.D.N.Y.2016, 220 F.Supp.3d 517. Alternative Dispute Resolution 514

Discovery from non-party parent corporation located in United States for use in Israeli proceeding turned on whether requests were overly broad and unduly burdensome, and thus limited discovery was appropriate and would aid in that foreign proceeding; although at least some of requested documents were types of documents needed in Israeli case and Israeli courts generally were receptive to evidence discovered in this manner, parent corporation was not participant in foreign proceeding, requested materials likely were not discoverable in Israel, and expenses for extensive discovery were unduly burdensome and disproportionate to needs of case. In re Application of RSM Production Corporation v. Noble Energy, Inc., S.D.Tex.2016, 195 F.Supp.3d 899. Federal Civil Procedure 1312

Fourth *Intel* factor, 124 S.Ct. 2466, for determining whether to grant discovery for use in a foreign proceeding, whether the subpoena contains unduly intrusive or burdensome requests, favored denying patentee's application for domestic discovery for aid in a Korean Fair Trade Commission (KFTC) proceeding, where patentee's requested discovery was not tailored temporally, geographically or in its subject matter, the requested discovery was not limited to documents or information connected to the KFTC proceedings at issue or to activity in or affecting Korea, and the requested discovery sought information already designated as confidential and subject to protective orders. In re Ex Parte Application of Qualcomm Incorporated, N.D.Cal.2016, 162 F.Supp.3d 1029. Federal Civil Procedure 1312

Discovery request from United States corporation to non-party Ecuadorian national residing in Colorado, pursuant to federal statute permitting domestic discovery for use in foreign proceedings, which sought documents related to any payment non-party had been promised or had received from litigants in Ecuadorian environmental action against corporation, was not "for use in a foreign tribunal," as required to be discoverable, but instead was propounded to harass and intimidate non-party; corporation claimed that information was necessary to determine whether Ecuadorian litigants should be able to proceed in forma pauperis in collection suits filed in foreign

countries, but there were many more convenient, less burdensome, and less expensive ways to obtain information on the litigants' solvency, and request could be seen as a fishing expedition designed to set up future claims against the non-party. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

Discovery sought for aid in a foreign proceeding would be unduly intrusive and burdensome, and thus the District Court would deny a litigant's application for discovery and quash the litigant's subpoenas for the production of documents of a nonparty law firm, even though the other *Intel* discretionary factors supported granting the application for discovery, where compelling discovery might subject the law firm to potential sanctions for breaching foreign laws preventing disclosure, the discovery would be costly and require a large time investment by the law firm, and the probative value of the materials sought was conjectural at best. In re Application Pursuant to 28 U.S.C. Section 1782 of Okean B.V. and Logistic Solution Intern. to Take Discovery of Chadbourne & Parke LLP, S.D.N.Y.2014, 60 F.Supp.3d 419. Federal Civil Procedure 1312

To determine whether it should exercise its discretion to grant an application for judicial assistance to litigant in foreign tribunal, the court considers the following four non-exclusive factors: (1) whether the application seeks discovery from a party that is a participant in the foreign proceeding, (2) the nature of the proceeding and that tribunal's receptivity to the requested discovery, (3) whether the request attempts to circumvent foreign discovery restrictions or policies, and (4) whether the request is unduly burdensome or intrusive. Pott v. Icicle Seafoods, Inc., W.D.Wash.2013, 945 F.Supp.2d 1197. Federal Civil Procedure 1312

Unduly intrusive or burdensome requests for judicial assistance in gathering evidence for use in foreign tribunals may be rejected or trimmed by the district court. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312

Subpoena requiring non-profit organization that provided assistance to victims of international child abduction to provide information regarding organization's website for use in Greek criminal prosecution was unreasonable and burdensome, and thus would be quashed, where applicant was private complainant in prosecution, applicant offered essentially no factual information regarding nature and importance of Greek prosecution or how information sought was relevant to prosecution, court and prosecutor had not requested information sought, breadth of request was great and intrusive, requiring organization to make such production would place great burden on it, applicant failed to establish that he could not obtain information from other sources, and release of information would violate organization's privacy policy. In re Lazaridis, D.N.J.2011, 865 F.Supp.2d 521. Federal Civil Procedure 1312

Unduly intrusive or burdensome requests for discovery under statute permitting domestic discovery for use in foreign proceedings may be rejected or trimmed. In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., D.D.C.2011, 821 F.Supp.2d 289. Federal Civil Procedure 1312

When determining whether to grant a petitioner's request for aid under federal statute permitting domestic discovery for use in foreign proceedings, the court should consider whether the petitioner's request is unduly intrusive or burdensome. Ahmad Hamad Algosaibi & Bros. Co. v. Standard Chartered Intern. (USA) Ltd., S.D.N.Y.2011, 785 F.Supp.2d 434. Federal Civil Procedure 1312

When ruling on request for domestic discovery to be used in foreign proceeding, district court can consider whether statutory request conceals attempt to circumvent foreign proof-gathering restrictions or other policies of foreign country or United States; also, unduly intrusive or burdensome requests may be rejected or trimmed. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1312

Discovery sought by litigant in Israeli arbitration proceeding from non-party was not unduly broad or burdensome, even though non-party did not assume his current position within corporation until after events in question, and discovery was more limited under Israeli law than under United States law, where requested discovery consisted of nine document requests and nine interrogatories, Israeli arbitrator expressly indicated his willingness to consider any evidence that resulted from requested discovery, and documents requested were predominantly e-mails that non-party received in Minnesota by virtue of his prior employment. In re Hallmark Capital Corp., D.Minn.2007, 534 F.Supp.2d 951, reconsideration denied. Federal Civil Procedure 1312

In view of California's policy to permit discovery whenever information is reasonably calculated to reveal admissible evidence and because charges brought by Korean government against Korean citizen were such that any bank deposits which the Korean citizen made abroad might be relevant, subpoena requiring California bank to produce financial records relating to the Korean citizen was not burdensome or oppressive because it concerned a bank account which Korean citizen maintained as president of a corporation. In re Request For Judicial Assistance From Seoul Dist. Criminal Court, Seoul, Korea, N.D.Cal.1977, 428 F.Supp. 109, affirmed 555 F.2d 720. Federal Civil Procedure 1312

Putative father could be ordered to give blood sample pursuant to letter rogatory issued by foreign court in paternity proceeding; order was not oppressive or unduly burdensome and did not violate any substantive or due process right, and putative father had in fact previously expressed willingness to give sample. In re Letter of Request From Local Court of Pforzheim, Div. AV, Federal Republic of Germany (No. 5 C 34183), W.D.Mich.1989, 130 F.R.D. 363. Federal Civil Procedure 1312

Subpoena request for documents created after April 20, 1980, which stated with reasonable particularity subjects to which the documents related, was not unreasonable or oppressive, absent any contention that documents requested were either voluminous and expensive to produce or that request required the creation of new documents. Application of Sumar, S.D.N.Y.1988, 123 F.R.D. 467. Federal Civil Procedure 1558.1

31 ---- Control of documents, considerations governing

American company had control over responsive documents in physical possession or custody of its Bahamian trust companies, as required to merit relief, under statute permitting domestic discovery for use in foreign proceedings, on petition for such discovery by ex-wife, during Russian proceeding to divide marital assets, seeking information with respect to those Bahamian companies, which ex-husband purportedly owned, where company's client liaison members could not possibly perform their intended functions absent ability to obtain information and documents from production company members. Sergeeva v. Tripleton International Limited, C.A.11 (Ga.) 2016, 834 F.3d 1194. Federal Civil Procedure 1312

Magistrate judge acted well within his broad discretion in finding that lack of clarity in Russian privilege and confidentiality law counseled against granting application by former shareholders of Russian oil and gas company for discovery assistance in foreign proceeding with regard to documents generated during law firm's previous representation of company and that remained in law firm's continual custody on basis that “twin aims” of statute of providing efficient means of assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to U.S. courts would not have been furthered by granting application. In re Hulley Enterprises Ltd., S.D.N.Y.2019, 400 F.Supp.3d 62. Federal Civil Procedure 1312

Oil company would be permitted to subpoena producer to turn over the “outtakes” of a documentary film which depicted events relating to a multi-billion dollar Ecuadorian litigation against company, the threatened criminal prosecution in Ecuador of two of its attorneys, and an international arbitration; neither the Ecuadorian court nor

the arbitral tribunal could compel producer, who was in sole possession of the raw footage and was located in the district, to produce the outtakes because he was not a party to the foreign proceedings or subject to their writs, and discovery of the outtakes would not compromise the ability of producer or any other film maker to obtain material from individuals interested in confidential treatment. In re Application of Chevron Corp., S.D.N.Y.2010, 709 F.Supp.2d 283, corrected, for additional opinion, see 2010 WL 5621332, stay denied, affirmed 629 F.3d 297. Federal Civil Procedure 1312

Documents sought by claimant in Israeli arbitration were within control of holding company's chairman, for purposes of claimant's motion to compel production in action alleging that claimant was owed finder's fees concerning investments by subsidiary partnership; with respect to arbitration, subsidiary had voluntarily provided company with copies of its internal correspondence and access to all of its files from relevant period. In re Hallmark Capital Corp., D.Minn.2008, 534 F.Supp.2d 981. Federal Civil Procedure 1574

32 ---- Location of documents, considerations governing

Magistrate judge did not abuse his discretion or commit clear error under statute permitting domestic discovery for use in foreign tribunals by denying request by former shareholders of Russian oil and gas company for documents that were in possession of United States law firm solely because of its representation of Russian Federation in foreign proceeding; even if only documents shareholders were seeking were those that were originally created during firm's representation of company and were then returned to firm during its representation of Russian Federation, those documents currently were in firm's possession because Russian Federation gave them to firm in connection with foreign proceeding, and therefore "real" party from whom shareholders were seeking those documents was Russian Federation. In re Hulley Enterprises Ltd., S.D.N.Y.2019, 400 F.Supp.3d 62. Federal Civil Procedure 1312

Location of most, if not all, of the relevant documents sought from French company, pursuant to petition for discovery in aid of a proceeding before a foreign tribunal, outside the United States, militated against granting the petition; French company was headquartered in France, and petitioners sought information about French assets in order to satisfy what was essentially a French judgment confirming an arbitral award. In re Application of Thai-Lao Lignite (Thailand) Co., Ltd., D.D.C.2011, 821 F.Supp.2d 289. Federal Civil Procedure 1312

33 ---- Discoverability in domestic jurisdiction, considerations governing

Applicant under federal statute permitting domestic discovery for use in foreign proceedings need not show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

Appropriate remedy for district court's abuse of discretion was to vacate its order quashing subpoenas under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal, and remand for further consideration consistent with ruling that Nigeria's application could not be considered attempt to "circumvent" Mutual Legal Assistance Treaty (MLAT) and Nigeria was within its rights to use any evidence it might uncover pursuant to application in English proceeding where Nigeria challenged arbitration award in favor of minority shareholder of entity under criminal investigation, rather than reversal, since court still could conclude that Nigeria's discovery requests were sufficiently burdensome to warrant denial, or more likely limitation, of application. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 2022, 25 F.4th 99. Federal Courts 3785

Spanish bank purchaser's use of New York firms to conduct due diligence on bank for private sale that fell through before bank was forced into resolution and acquired by purchaser was not proximate reason that documents, relating to bank's liquidity position and bank resolution, were available, and thus, District Court lacked personal jurisdiction over purchaser for ordering production of the documents for use in foreign proceedings; purchaser's use of the firms related only to bank's preresolution effort to seek buyer, but bulk of discovery sought by investors in bank arose from forced sale of the bank, which was separate financial transaction. In re del Valle Ruiz, C.A.2 (N.Y.) 2019, 939 F.3d 520. Federal Courts 2738

In evaluating application for domestic discovery for use in foreign proceeding, court should consider (1) whether person from whom discovery is sought is participant in foreign proceeding; (2) nature of foreign tribunal, character of proceedings underway abroad, and receptivity of foreign government to United States federal-court assistance; (3) whether discovery request is attempt to circumvent foreign proof-gathering restrictions or other policies of foreign country or United States; and (4) whether discovery request is unduly intrusive or burdensome. Husayn v. Mitchell, C.A.9 (Wash.) 2019, 938 F.3d 1123, rehearing en banc denied 965 F.3d 775, reversed and remanded 142 S.Ct. 959, 212 L.Ed.2d 65, on remand 31 F.4th 1274. Federal Civil Procedure 1312

Plain language of statute providing for assistance to foreign and international tribunals and to litigants before such tribunals created procedure by which person could obtain discovery, without placing limit on use of evidence obtained, and thus statute did not bar use of evidence obtained under this statute in other United States suits; Congress could have expressed such limitation, but did not do so, nothing in statutory language or in legislative history suggested that Congress specifically contemplated whether evidence obtained could later be used in United States proceedings, and allowing parties to use all documents they have lawfully obtained, regardless of whether they could have obtained them through discovery in case in which they sought to use them, furthered goals of securing just, speedy, and inexpensive determination of proceedings. Glock v. Glock, Inc., C.A.11 (Ga.) 2015, 797 F.3d 1002. Federal Civil Procedure 1312

Victims of terrorist attacks in Israel could not obtain through subpoena all documents that came into non-party counsel's possession, as result of its representation of Jordanian citizen in separate case in United States, from counsel that were not discoverable directly from Jordanian citizen, in action brought by victims of terrorist attacks that named Jordanian citizen as stakeholder in bank that allegedly funded terrorist organization, although victims might have been able to obtain documents through Hague Evidence Convention, where documents were in United States solely for purpose of seeking legal advice. Lelchook v. Lebanese Canadian Bank, SAL, S.D.N.Y.2023, 2023 WL 3033694. Witnesses 539

New Zealand employer plausibly alleged a defamation claim under New Zealand law against American workplace review website arising from six anonymous reviews of employer on website, for purposes of considering merits of employer's New Zealand defamation claim in assessing employer's application under statute permitting domestic discovery for use in foreign proceedings; employer alleged that written reviews constituted “statements,” reviews made employer “sound like a horrible place to work,” statements were “published” by anonymous reviewers who posted reviews, and statements caused monetary loss via employer's expenditure of money, time, and resources in combatting the negative publicity, including by spending more money and resources to recruit additional candidates for open position. Zuru, Inc. v. Glassdoor, Inc., N.D.Cal.2022, 2022 WL 2712549. Federal Civil Procedure 1312; Libel and Slander 1

Operator of Japanese orthodontics clinic demonstrated a need for assistance with regard to identities of users of online map service who posted one-star reviews and allegedly offensive comments about operator on its map listing, supporting grant of operator's request for discovery regarding users' account information for use in planned defamation proceeding against them in Japan; documents which operator sought were located in United States,

and operator contended that evidence was outside reach of a Japanese court's jurisdiction. Medical Incorporated Association Smile Create, N.D.Cal.2021, 2021 WL 2877406. Federal Civil Procedure 1312

Petitioner's motion to compel discovery authorized in district court's prior order, under federal statute permitting domestic discovery for use in a foreign proceeding, allowing discovery for use in an arbitration proceeding petitioner intended to initiate against respondent in Germany would be granted, with discovery required to be produced within 14 days of dismissal or denial of respondent's then-pending appeal of discovery order, where court had rejected respondent's motion for stay of discovery order pending appeal, and petitioner was entitled to discovery under that order. Luxshare, LTD. v. ZF Automotive US, Inc., E.D.Mich.2021, 555 F.Supp.3d 510, stay granted 142 S.Ct. 416, 211 L.Ed.2d 242, certiorari granted before judgment 142 S.Ct. 637, 211 L.Ed.2d 397, reversed 142 S.Ct. 2078, 213 L.Ed.2d 163. Alternative Dispute Resolution 252

Documents sought from Nigerian natural gas processing plant's affiliates under statute permitting domestic discovery for use in foreign proceedings, which involved financial circumstances of the plant at time it contracted with the government, were largely available from the plant itself, counseling against court's use of discretion to issue discovery for use in criminal bribery suit brought against plant by Nigeria and its Attorney General; affiliates, who were partial owners of the plant, and who were not involved in the Nigerian suit, had purchased the facility only after the alleged bribery scandal had occurred so were not likely to have in their possession documents related to operator's alleged fraudulent contract. Federal Republic of Nigeria v. VR Advisory Services, Ltd., S.D.N.Y.2020, 499 F.Supp.3d 3, vacated and remanded 25 F.4th 99, amended and superseded 27 F.4th 136, on remand 2022 WL 17593181. Federal Civil Procedure 1312

Discovery sought by Brazilian applicant was for use before a foreign tribunal, as required under statute providing for domestic discovery for use in a foreign or international tribunal, even though the applicant was involved in both a Brazilian court proceeding and an international arbitration proceeding concerning hostile takeover of applicant, and the international arbitration proceeding was not a foreign or international tribunal under the relevant statute, where the Brazilian action was still pending, and the discovery sought could be relevant to applicant's defenses in that action. In re Atvos Agroindustrial Investimentos S.A., S.D.N.Y.2020, 481 F.Supp.3d 166. Federal Civil Procedure 1312

Defendant failed to establish that Cyprus limited liability company, which sought asset discovery from defendant's daughters, mother, and trustee of daughters' trusts in furtherance of its civil action against defendant in Cypriot court, made its application under statute permitting district court to order discovery for use in foreign tribunal in bad faith, where defendant failed to provide adequate support for allegations of company's bad-faith conduct, and, further, courts had previously determined that allegations were not well suited for review in federal court, given that defendant's prior action against company, which raised same allegations of bad faith, was dismissed on forum nonconveniens grounds. In re Gorsoan Limited, S.D.N.Y.2020, 435 F.Supp.3d 589, reversed and remanded 843 Fed.Appx. 352, 2021 WL 299286. Federal Civil Procedure 1312

Factors weighed in favor of granting application for discovery order under statute permitting domestic discovery for use in foreign proceedings in German action brought by trade secret owner regarding cybersecurity and healthcare patent applications filed by investor in Germany; investor had been served with complaint in German proceeding and thus was a party to that proceeding, German proceedings were patent disputes that could be resolved irrespective of result of California trade secret litigation, there was no basis to conclude that German court would be unreceptive to information requested, there was no evidence that request concealed attempt to circumvent foreign proof-gathering restrictions, and request was not unduly intrusive or burdensome. Palantir Technologies, Inc. v. Abramowitz, N.D.Cal.2019, 415 F.Supp.3d 907. Federal Civil Procedure 1312

Petition for discovery in foreign proceedings, seeking issuance and service of subpoenas ad testificandum and duces tecum on company and its owner in furtherance of discovery in aid of and for use in a pending proceeding before the Polish Head of Tax & Customs Office, met jurisdictional requirements under statute permitting domestic discovery for use in foreign proceedings; company's owner resided, and company was situated, in Suffolk County, under the purview of the district court, discovery sought would have informed a foreign investigation conducted by the Polish Authority, and petitioner was an interested person because it was personally involved as a litigant in the proceeding for which discovery was sought. In re G2A.com SP. Z.O.O. (LTD.), E.D.N.Y.2019, 412 F.Supp.3d 145. Federal Civil Procedure 1312

Former owner of Isle of Man company failed to establish that the discovery he requested against foreign limited liability corporation (LLC), which was involved in litigation against person with whom Isle of Man company had entered into joint shipping contracts, would be used in the proceeding in the United Kingdom initiated by Isle of Man company and, thus, court did not have authority to grant former owner's application to issue a subpoena against LLC for the taking of discovery, absent showing that he had any procedural right or mechanism to inject the requested evidence in United Kingdom proceeding. In re Sargeant, S.D.N.Y.2017, 278 F.Supp.3d 814. Federal Civil Procedure 1312

Oil-and-gas prospector and his corporate entities were not entitled to conduct domestic discovery for use in civil proceedings in Switzerland to recover stake in major oil field located in Caspian Sea near Kazakhstan, where prospector and his corporate entitles had been plaintiffs in more than 200 federal lawsuits over prior 15 years concerning same subject matter undergirding Swiss proceedings, which federal courts had repeatedly dismissed on merits, and current claims were plainly brought in attempt to avoid res judicata effects of prior lawsuits in United States. In re Grynberg, S.D.N.Y.2017, 223 F.Supp.3d 197. Federal Civil Procedure 1312

Foreign company conducted systematic and continuous local activities in the Central District of California, as required to be subject to an application for domestic discovery for use in a foreign proceeding filed in the District Court for the Central District of California, where company had availed themselves of the jurisdiction of the District Court in many protracted lawsuits, company was registered and authorized to do business in California, a wholly-owned subsidiary was headquartered in the Central District of California, and the discovery sought was related to company's position in lawsuits filed in Central District of California. In re Ex Parte Application of Qualcomm Incorporated, N.D.Cal.2016, 162 F.Supp.3d 1029. Federal Civil Procedure 1312

Discretionary factors favored issuing order under statute permitting domestic discovery for use in foreign tribunals, authorizing deposition of non-party who resided in district who allegedly had unique and direct personal knowledge of circumstances and agreements surrounding contested matter, since information about matter resided with that non-party and means did not exist in foreign tribunal to take or compel non-party's testimony, authoritative proof was lacking that foreign tribunal would reject evidence obtained under statute, foreign proof-gathering restrictions would not be circumvented, and single deposition for limited purposes would not be unduly burdensome. In re Application of 000 Promneftstroy for an Order to Conduct Discovery for use in a Foreign Proceeding, S.D.N.Y.2015, 134 F.Supp.3d 789. Federal Civil Procedure 1312

Ex parte subpoena requested by owner of European patent and German patent, seeking disclosure of competitor's license agreements for use in German litigation alleging competitor's infringement of those patents, satisfied timeliness requirements under statute permitting domestic discovery for use in foreign proceeding; while competitor was correct that German trial had concluded, suit remained pending before appellate court. IPCom GMBH & Co. KG v. Apple Inc., N.D.Cal.2014, 61 F.Supp.3d 919. Witnesses 9

District Court was authorized under statute to afford judicial assistance to Argentinean financial services organization in obtaining evidence for use in a securities action in Curacao's Court of First Instance, where the

organization was the plaintiff in the foreign proceeding, organization sought evidence in the form of testimony and the production of documents and sought authority to issue subpoenas ad testificandum and duces tecum to nine different entities, and each of the discovery targets resided or conducted business in the Northern District of Georgia. In re Sociedad Militar Seguro de Vida, N.D.Ga.2013, 985 F.Supp.2d 1375. Federal Civil Procedure 1312

District Court for the District of Massachusetts was authorized by statute to issue order permitting discovery and deposition of expert witness for use in environmental litigation and arbitration proceedings in Ecuador; the expert resided in Massachusetts, the application for the order was made by domestic corporation which was defendant in the foreign proceedings, and the discovery was for use in a foreign or international tribunal. Chevron Corp. v. Shefftz, D.Mass.2010, 754 F.Supp.2d 254. Alternative Dispute Resolution 514; Federal Civil Procedure 1312

Pursuant to statute, District Court had authority to grant request for assistance, made by a court in the Czech Republic, in obtaining discovery in a paternity action initiated in the Czech court; putative father was subject to District Court's jurisdiction, the discovery being sought was to be used in a proceeding before a foreign tribunal, and the application was made by the foreign tribunal. In re Request for Judicial Assistance from the Dist. Court in Svitavy, Czech Republic, E.D.Va.2010, 748 F.Supp.2d 522. Federal Civil Procedure 1312

34 ---- Discoverability in foreign jurisdiction, considerations governing

Federal statute permitting domestic discovery for use in foreign proceedings does not impose blanket "foreign discoverability" requirement that evidence sought from district court be discoverable under law governing foreign proceeding; abrogating *In re Application of Asta Medica, S.A.*, 981 F.2d 1, *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

In exercising their discretion to grant discovery for use in foreign proceeding, courts consider: (1) whether the discovery is sought from a participant in a foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to assistance from federal courts of the United States; (3) whether the request for discovery conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States; and (4) whether the discovery request is unduly intrusive or burdensome. In re Porsche Automobil Holding SE, C.A.1 (Mass.) 2021, 985 F.3d 115. Federal Civil Procedure 1312

Unitary disposition was not required for a joint application to obtain discovery for use in a foreign proceeding, and thus district court was entitled to grant application as to two of four Columbian Departments, rather than deny applications of all four Departments, despite two losing Departments' failure to satisfy the statutory factors for granting an application, and even though prevailing Departments would presumably share information obtained in discovery with losing Departments, since prevailing Departments could have otherwise refiled, prevailed on refiled applications, proceeded to take requested discovery, and then presumably shared discovery with losing Departments. Department of Caldas v. Diageo PLC, C.A.11 (Fla.) 2019, 925 F.3d 1218. Federal Civil Procedure 1312

Under plain reading, statute permitting domestic discovery for use in foreign proceedings authorized district court to require that American company produce documents in its possession, custody, and control, even if such documents were in possession of one of its Bahamian trust companies, on petition for such discovery by ex-wife, during Russian proceeding to divide marital assets, seeking information with respect to those Bahamian companies, which ex-husband purportedly owned; under civil procedure rules, discovery must be produced unless

otherwise limited by court order, and those rules authorized extraterritorial document productions. Sergeeva v. Tripleton International Limited, C.A.11 (Ga.) 2016, 834 F.3d 1194. Federal Civil Procedure 1312

District court acted within its discretion in denying patentee's petition for discovery to be used in its patent-infringement suit against competitor in Germany; German court indicated it would grant the requested discovery if the information was needed to resolve the case, and given the highly sensitive nature of the requested discovery, and the lack of certainty that its confidentiality could be maintained in Germany, the German court was best positioned to assess whether any disclosure could be accomplished without jeopardizing the sensitive trade secrets of competitor that were involved. Andover Healthcare, Inc. v. 3M Co., C.A.8 (Minn.) 2016, 817 F.3d 621, 118 U.S.P.Q.2d 1260. Patents 1760(2)

Even assuming that investment funds which invested in foreign companies which had allegedly been defrauded by the companies' owner were interested persons with respect to proceedings involving the companies before a Saudi Arabian quasi-judicial committee with jurisdiction over bank debt, and foreign liquidation proceedings involving affiliates of the foreign companies, the funds failed to identify any way in which the information sought from accounting firms in an application for discovery in aid of proceedings before foreign and international tribunals would be used in the foreign proceedings, thus warranting denial of the application, even if the information was highly relevant to the proceedings, where the funds had no ability to direct the proceedings or to submit evidence. Certain Funds, Accounts and/or Investment Vehicles v. KPMG, L.L.P., C.A.2 (N.Y.) 2015, 798 F.3d 113. Federal Civil Procedure 1312

Provision of Leahy-Smith America Invents Act revising existing inter partes review proceedings in patent cases and creating new administrative post-grant review proceeding did not limit availability of discovery in aid of foreign proceedings, even though it limited discovery with respect to inter partes review proceedings, where it permitted discovery of any evidence directly related to factual assertions advanced by either party in post-grant review proceeding, and did not purport to limit discovery in foreign proceedings. Akebia Therapeutics, Inc. v. FibroGen, Inc., C.A.9 (Cal.) 2015, 793 F.3d 1108, 115 U.S.P.Q.2d 1864, mandate stayed 136 S.Ct. 1, 192 L.Ed.2d 994, stay denied 136 S.Ct. 24, 576 U.S. 1092, 192 L.Ed.2d 995. Federal Civil Procedure 1312; Patents 1262

Court of Appeals had subject matter jurisdiction to hear immediate appeal from district court's order granting discovery under federal statute permitting domestic discovery for use in foreign proceedings, since order was sufficiently final due to lack of underlying merits proceeding in the United States. In re Naranjo, C.A.4 (Md.) 2014, 768 F.3d 332. Federal Courts 3305

District court abused its discretion in ordering American parent of Australian seller to retrieve documents in Australia and United Kingdom, ship them to United States, and provide them to Australia buyer for use in buyer's breach of contract suit against seller in Australia, where Australian procedure did not require disclosure of documents, requirements for piercing corporate veil had not been met, and documents were not necessary for buyer to establish its claim. Kestrel Coal Pty. Ltd. v. Joy Global, Inc., C.A.7 (Wis.) 2004, 362 F.3d 401. Federal Civil Procedure 1312

Statute permitting domestic discovery for use in foreign proceedings does not impose threshold requirement that material sought be discoverable in foreign proceeding, regardless of whether request comes from private party or foreign tribunal; overruling *Application for Assistance in a Foreign Proceeding*, 147 F.R.D. 223. Advanced Micro Devices, Inc. v. Intel Corp., C.A.9 (Cal.) 2002, 292 F.3d 664, 63 U.S.P.Q.2d 1156, certiorari granted 124 S.Ct. 531, 540 U.S. 1003, 157 L.Ed.2d 408, affirmed 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001, on remand 2004 WL 2282320. Federal Civil Procedure 1312

District court abused its discretion in denying discovery under statute governing discovery for use in foreign and international tribunals by denying German company discovery for use in German employment dispute on ground information sought was not discoverable under German law. In re Application for an Order Permitting Metallgesellschaft AG to take Discovery, C.A.2 (N.Y.) 1997, 121 F.3d 77. Federal Civil Procedure 1312

District court did not have to consider foreign court's discovery rules before modifying protective order to permit party to introduce confidential deposition excerpts in related action in the foreign court, as the excerpts at issue were already discovered; district court was simply enabling foreign court to have the excerpts before it so that it could apply its own rules. In re Jenoptik AG, C.A.Fed. (Cal.) 1997, 109 F.3d 721, 41 U.S.P.Q.2d 1950. Federal Civil Procedure 1312

District court was not required to determine that blood test was discoverable as matter of German law before ordering resident to comply with foreign court's letter rogatory requesting blood test from resident putative father for use in foreign paternity action, pursuant to Convention on the Taking of Evidence Abroad in Civil or Commercial Matters; United States courts were not in business of second-guessing evidentiary requests of foreign courts based on foreign jurisdiction's own rules of discovery. In re Letter of Request from Amtsgericht Ingolstadt, Federal Republic of Germany, C.A.4 (W.Va.) 1996, 82 F.3d 590. Federal Civil Procedure 1312; International Law 311

In deciding whether to order discovery in aid of foreign litigation, extensive examination of foreign law regarding existence and extent of discovery in the forum country is not desirable to ascertain the attitudes of foreign nations to outside discovery assistance, and though grant of discovery that trenches on clearly established procedures of foreign tribunal would not be within the discovery statute, inquiry into discoverability of the requested materials should consider only authoritative proof that foreign tribunal would reject evidence obtained with the aid of discovery under the United States statute, as embodied in the forum country's judicial, executive or legislative declaration specifically addressing the use of evidence gathered under foreign procedures. Euromepa S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1995, 51 F.3d 1095. Federal Civil Procedure 1312

District court did not abuse its discretion in granting provisional general guardians of Chilean incompetent discovery from American residents concerning incompetent's assets in the United States, under statute governing assistance to foreign and international tribunals and to litigants before tribunal; although court did not make finding as to party's ability to obtain pretrial discovery under Chilean law, it inquired into whether its grant of discovery would circumvent Chilean restrictions on discovery or would be an affront to Chilean court or Chilean sovereignty, and found that discovery would be permissible. Application of Gianoli Aldunate, C.A.2 (Conn.) 1993, 3 F.3d 54, certiorari denied 114 S.Ct. 443, 510 U.S. 965, 126 L.Ed.2d 376. Federal Civil Procedure 1312

Litigant requesting assistance from district court in obtaining discovery in United States for use in foreign proceedings must show that information sought would be discoverable in foreign jurisdiction; in rare case where such determination would be unduly difficult, district court has various options, among them, to ask foreign court to help it decide whether information is available in foreign jurisdiction, or to request assistance of foreign law expert. Application of Asta Medica, S.A., C.A.1 (Me.) 1992, 981 F.2d 1, 25 U.S.P.Q.2d 1861. Federal Civil Procedure 1271

Discretionary factors weighed in favor of granting bank's application under federal statute permitting domestic discovery for use in foreign proceedings for order authorizing bank to issue and serve subpoenas on 17 banks in connection with civil proceeding in Abu Dhabi Court (Commercial) of the United Arab Emirates (UAE) for repayment of debt; none of respondent banks was a party to the underlying proceedings, Abu Dhabi Court would be receptive to materials produced, bank did not appear to be circumventing foreign evidentiary restrictions, and bank appeared to be attempting to obtain relevant information that foreign tribunal would find useful but, for

reasons having no bearing on international comity, could not obtain under its own laws. In re Invest Bank PSC, S.D.N.Y.2021, 2021 WL 4804585. Federal Civil Procedure 1312

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Pursuant to ex parte request by alleged victims of fraudulent foreign investment scheme to obtain discovery from founder and former CEO of brokerage company for use in expected proceeding before High Court of England and Wales against brokerage company, founder's role in foreign proceeding favored granting discovery request; founder was not expected to be a party in the foreign proceeding, and it seemed founder, who resided in Puerto Rico, would have been outside the reach of the High Court of England and Wales and the evidence he may have provided may have been unobtainable if alleged victims' request was not granted. In re Tovmasyan, D.Puerto Rico 2021, 557 F.Supp.3d 348. Federal Civil Procedure 1312

Defendant failed to establish that Cyprus limited liability company's application under statute permitting district court to order discovery for use in foreign tribunal, which application sought asset discovery from defendant's daughters, mother, and trustee of daughters' trusts in furtherance of its civil action against defendant in Cypriot court, was attempt to circumvent supervision and procedures of Cypriot court; defendant's contention that Cypriot court did not permit third-party discovery or use of depositions was not viable, given that statute permitted district court to order broader discovery than discovery permitted in foreign tribunal, Cypriot court had made no indication that it would reject discovery, and defendant's argument had been rejected in prior case. In re Gorsoan Limited, S.D.N.Y.2020, 435 F.Supp.3d 589. Federal Civil Procedure 1312

For purposes of the statutory requirement, for a district court to order a person 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, that the discovery be for use in a foreign proceeding before a foreign or international tribunal, the applicant for discovery need only make a de minimis showing that the requested discovery is for use in the proceeding, so long as the proceeding falls within the scope of the statute authorizing such discovery orders. In re Children's Investment Fund Foundation (UK), S.D.N.Y.2019, 363 F.Supp.3d 361. Federal Civil Procedure 1312

First *Intel* factor, 124 S.Ct. 2466, for determining whether to grant discovery for use in a foreign proceeding, whether the material sought was within the foreign tribunal's jurisdiction reach and thus accessible absent the grant of domestic discovery, was neutral, in patentee's application for domestic discovery for aid in a Korean Fair Trade Commission (KFTC) proceeding, where the targets of the discovery were participants in the KFTC proceedings, but it was unclear whether KFTC could compel the parties that held the requested evidence to produce it. In re Ex Parte Application of Qualcomm Incorporated, N.D.Cal.2016, 162 F.Supp.3d 1029. Federal Civil Procedure 1312

Limiting scope of Italian limited liability company's (LLC) discovery requests to time period in which consultant was barred by parties' agreement from competing with LLC, and further permitting redaction of any proprietary and confidential information not pertaining to LLC, was appropriate in granting relief on LLC's motion to enforce subpoena issued to consultant pursuant to statute governing LLC's ex parte application for order to conduct

discovery for use in its Italian suit against consultant. HT S.R.L. v. Velasco, D.D.C.2015, 125 F.Supp.3d 211, vacated 2015 WL 13759884. Federal Civil Procedure 1312

London-based law firm, from which Republic of Kazakhstan sought discovery pursuant to statute governing conditions under which United States courts might provide assistance to foreign and international tribunals, and such firm's United States office, upon which Kazakhstan's subpoena was served, constituted single entity, thus satisfying statute's requirement that person from whom discovery was sought had to reside in district of district court to which application was made, even though the offices were set up as separate entities, where entities operated as single firm, and all partners in United States entity were also partners in London entity. In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. sec. 1782, S.D.N.Y.2015, 110 F.Supp.3d 512. Federal Civil Procedure 1312

Documents sought by United States corporation from non-party Ecuadorian national residing in Colorado, pursuant to federal statute permitting domestic discovery for use in foreign proceedings, were not unnecessarily cumulative of other evidence already obtained, as would allow non-party to quash subpoena for deposition and production of documents; although discovery requested was broad, it had not been ordered produced in any previous case, despite non-party's apparent involvement in a conspiracy to enforce fraudulently entered Ecuadorian judgments for billions of dollars, and documents sought were crucial to determine the knowledge held by funders of the foreign lawsuits regarding the racketeering activity. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

Exercise of district court's discretionary authority under federal statute to order individual residing within its district to submit to deposition and to produce documents for use in foreign proceedings pending in Venezuela was not warranted in light of individual's agreement to submit to movants' discovery requests in Venezuela. In Matter of Application of Leret, D.D.C.2014, 51 F.Supp.3d 66. Federal Civil Procedure 1312

Request for judicial assistance in obtaining discovery in paternity dispute involving a United States citizen, made by a court in the Czech Republic, was not an attempt to circumvent foreign proof-gathering restrictions or any other foreign or U.S. policy, weighing in favor of granting the request; putative father would be able to challenge the personal jurisdiction of any order issued by the Czech court, once presented to a U.S. court of his employer. In re Request for Judicial Assistance from the Dist. Court in Svitavy, Czech Republic, E.D.Va.2010, 748 F.Supp.2d 522. Federal Civil Procedure 1312

A foreign tribunal's willingness to accept evidence obtained through the discovery in federal court generally weighs in favor of granting such petitions; in evaluating a tribunal's willingness, courts do not believe that an extensive examination of foreign law regarding the existence and extent of discovery in the forum country is desirable in order to ascertain the attitudes of foreign nations to outside discovery assistance. In re Application of Caratube Int'l Oil Co., LLP, D.D.C.2010, 730 F.Supp.2d 101. Federal Civil Procedure 1312

Non-party was required to respond to litigant's requests for discovery for use in Israeli arbitration proceeding, where non-party resided in district, non-party appeared to have information relevant to proceeding, and litigant was claimant in proceeding. In re Hallmark Capital Corp., D.Minn.2007, 534 F.Supp.2d 951, reconsideration denied. Federal Civil Procedure 1312

For purposes of statute governing discovery applications for assisting foreign or international tribunals, a witness cannot be compelled to produce documents located outside of the United States. In re Godfrey, S.D.N.Y.2007, 526 F.Supp.2d 417. Federal Civil Procedure 1312

In light of petitioner's allegations that respondent was involved to some degree in the underlying dispute giving rise to arbitration of petitioner's contract claim against government of Uzbekistan in a foreign tribunal, and in view of the likelihood that respondent had unique access to relevant documents, court would exercise its discretion under federal statute permitting domestic discovery for use in foreign proceedings to compel respondent to produce documents seized or made unavailable to petitioner by the Uzbek government; foreign tribunal could not itself order respondent to produce evidence, and was receptive to aid from courts. In re Roz Trading Ltd., N.D.Ga.2006, 469 F.Supp.2d 1221, stay pending appeal denied 2007 WL 120844. Federal Civil Procedure 1312

Bank asserting claim in Venezuela against Venezuelan security firm to recover funds stolen by firm employee would be required to produce documents concerning any insurance claim made, and any insurance payment received, by bank for loss at issue in Venezuelan proceeding, despite bank's contention that firm should be required to wait until evidentiary stage of Venezuelan proceeding, and to seek discovery from Venezuelan court in first instance, where, under Venezuelan law, partial or complete reimbursement by insurer would deprive bank of standing to bring suit, and documents were unobtainable under Venezuelan discovery rules for purely technical reasons. In re Servicio Pan Americano de Proteccion, S.D.N.Y.2004, 354 F.Supp.2d 269. Federal Civil Procedure 1312

One of the factors a district court may consider in determining how to exercise its discretion pursuant to assistance to foreign tribunals statute is whether the documents would be discoverable under the relevant foreign law; however, that inquiry should serve at most as a "useful tool" and one among many factors utilized to inform discretion, but can serve no greater purpose given that assistance to foreign tribunal statute makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. In re Application of Schmitz, S.D.N.Y.2003, 259 F.Supp.2d 294, affirmed 376 F.3d 79. Federal Civil Procedure 1312

Private litigant in proceeding pending in foreign jurisdiction may not obtain district court order requiring non-party resident of district to give pretrial discovery for use in the foreign proceeding unless the foreign jurisdiction allows pretrial discovery. In re Trygg-Hansa Ins. Co., Ltd., E.D.La.1995, 896 F.Supp. 624. Federal Civil Procedure 1312

In deciding whether to order discovery of evidence in United States for use in foreign paternity proceedings, District Court would not undertake inquiry into whether Norwegian laws would permit ordering of blood samples. In re Letter Rogatory from Nedenes Dist. Court, Norway, S.D.N.Y.2003, 216 F.R.D. 277. Federal Civil Procedure 1312

English litigants who requested assistance of federal courts in obtaining discovery in United States were not entitled to discovery beyond that available in English court in which action was proceeding. Application for an Order for Judicial Assistance in a Foreign Proceeding in High Court of Justice, Chancery Div., England, C.D.Cal.1993, 147 F.R.D. 223. Federal Civil Procedure 1271

It was not necessary for district court to decide whether domestic laws of Trinidad and Tobago would permit production of bank records in order to rule on request by government of Trinidad and Tobago for production of bank records pursuant to statute providing that district court may order person to give testimony or his statement or provide document for use in proceeding in foreign or international tribunal. In re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago, S.D.Fla.1987, 117 F.R.D. 177. Federal Civil Procedure 1551

Absent indication that documents and testimony for which opponents requested discovery order were discoverable under South African law and in view of information which would lead court to suspect that materials were not available through South African procedures, opponent in pending litigation regarding issuance of South African

patent was not entitled, under statute governing assistance to foreign and international tribunals to litigants before such tribunals, to order directing applicant to give testimony and produce documents relating to patent case pending in South Africa. In re Court of Com'r of Patents for Republic of South Africa, E.D.Pa.1980, 88 F.R.D. 75. Federal Civil Procedure 1312

35 ---- Imminence, considerations governing

Federal statute permitting domestic discovery for use in foreign proceedings does not come into play only when adjudicative proceedings are "pending" or "imminent" and instead requires only that dispositive ruling by European Commission, reviewable by the European courts, be within reasonable contemplation; abrogating *In re Ishihara Chemical Co.*, 251 F.3d 120. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

Foreign proceeding reasonably was contemplated, as required for court to grant application for judicial assistance under federal statute permitting domestic discovery for use in foreign proceedings, where petitioner after extensive internal audit provided facially legitimate and detailed explanation of its ongoing investigation and its intent to commence civil action and continue its pending arbitration against its former employees for collusion, and it had valid reasons to obtain requested discovery; under Ecuadorian law, petitioner had to submit its evidence with pleading at time that it commenced civil action and instant discovery application was to produce that evidence. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., C.A.11 (Fla.) 2014, 747 F.3d 1262. Federal Civil Procedure 1312

Statute governing formal assistance to foreign criminal investigations does not contain "imminence" requirement; had Congress meant to authorize assistance to foreign investigations only where foreign proceedings are imminent, it could have said so. U.S. v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation, C.A.9 (Wash.) 2000, 235 F.3d 1200. Federal Civil Procedure 1312; International Law 365

Imminent-proceeding requirement of statute permitting federal district court to allow interested persons to obtain discovery for use before foreign tribunals was met where party seeking discovery was agent for court-appointed trustee of foreign debtor and Italian bankruptcy proceeding was pending; bankruptcy proceeding was, by its nature, one in which value of debtor's estate was adjudicated, and thus such proceeding was within statute's scope. Lancaster Factoring Co. Ltd. v. Mangone, C.A.2 (N.Y.) 1996, 90 F.3d 38, on remand 1996 WL 706925. Federal Civil Procedure 1312

District court may order production of evidence pursuant to foreign government's letter rogatory in absence of pending adjudicative proceeding, but only if such proceeding is imminent, that is, very likely to occur within brief interval from request; it is not sufficient that adjudicative proceedings are merely "probable." In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, C.A.2 (N.Y.) 1991, 936 F.2d 702. Federal Civil Procedure 1312

"Contemplated" indemnity actions against sub-charter and sub-sub-charterer were speculative, and thus petition for discovery under statute permitting domestic discovery for use in foreign proceedings had to be denied, where petitioning party to time charter was merely contemplating possibility of initiating litigation, and there was no indication where petitioner would bring such claims or that the forum would be "a foreign or international tribunal." In re Asia Maritime Pacific Ltd., S.D.N.Y.2015, 253 F.Supp.3d 701. Federal Civil Procedure 1312

Proceeding before and on behalf of French juge d'instruction was adjudicatory in nature, and not police matter, and thus, district court properly appointed Assistant United States Attorney as commissioner to act on behalf of

government of France in accordance with formal request of France for discovery including issuance of subpoenas, even though imminence of filing of charge could not be assessed in advance. In re Letter of Request From Government of France, S.D.N.Y.1991, 139 F.R.D. 588. Federal Civil Procedure 1312

36 ---- Limitations, considerations governing

German medical device manufacturer knew or had reason to know of alleged misappropriation of its trade secrets by competitor no later than date it filed action seeking discovery for use in German lawsuit that alleged misappropriation of trade secrets, triggering applicable three-year limitations period on manufacturer's claim of misappropriation of trade secrets under the Pennsylvania Uniform Trade Secrets Act (PUTSA); while manufacturer asserted that it needed to receive discovery it sought for use in foreign lawsuit before it was able to bring its PUTSA claim, such a standard would have allowed tolling of limitations period until party received all evidence it needed to prove its claims. Heraeus Medical GmbH v. Esschem, Inc., E.D.Pa.2018, 285 F.Supp.3d 855, affirmed in part, reversed in part and remanded 927 F.3d 727. Limitation of Actions 95(7)

Neither fact that prosecution in United States would be barred by expiration of statute of limitations, nor allegation that defense had become impossible due to passage of time precluded enforcement of Swiss request for assistance in obtaining testimony for criminal investigation in Switzerland; Swiss statute of limitations had not expired and witnesses, if charges were brought against them, would have opportunity to argue prejudicial prosecutorial delay in Swiss court. In re Kasper-Ansermet, D.N.J.1990, 132 F.R.D. 622. International Law 296

37 ---- Need for information, considerations governing

Additional fact-finding about nature of English proceeding stemming from applicant's alleged role in misappropriation of funds from bank in Kazakhstan was necessary in determining whether to grant applicant order to conduct discovery for use in that proceeding, where, while application was pending in district court and on appeal, applicant's attempts to discharge two court orders against him were denied by English courts, and he was not given permission to appeal those denials, but he arguably retained ability to reopen those proceedings if he discovered new evidence--such as information he sought in his application. Khrapunov v. Prosyankin, C.A.9 (Cal.) 2019, 931 F.3d 922. Federal Courts 3784

Individuals charged with fraud conspiracy in United Kingdom were not entitled to discovery of secret grand jury materials related to American prosecution of alleged coconspirators, under statute permitting district courts to provide assistance to foreign courts, as individuals made blanket request for such materials, without showing particularized need for any individual items; mere fact these items were being sought for use in defending against criminal charges was insufficient. United Kingdom v. U.S., C.A.11 (Fla.) 2001, 238 F.3d 1312, rehearing and rehearing en banc denied 253 F.3d 713, certiorari denied 122 S.Ct. 206, 534 U.S. 891, 151 L.Ed.2d 146. Grand Jury 41.50(5)

Statute authorizing discovery for use in foreign tribunal did not entitle applicant to order directing United States National Security Agency (NSA) to produce documents relating to the death of applicant's son and son's companion in highly publicized automobile crash, where applicant did not demonstrate how the information he sought would assist his participation in French investigative proceedings, he only summarily explained purpose and function the requested documents would serve in the foreign proceeding, and disclosure of the documents sought had already been identified by NSA as potentially causing exceptionally grave damage to national security. Al Fayed v. U.S., C.A.4 (Md.) 2000, 210 F.3d 421. Federal Civil Procedure 1312

American workplace review website's concern as to commercial sensitivity of revealing number of people who saw six anonymous scathing reviews of New Zealand employer on website could be adequately ameliorated, and thus did not outweigh employer's interest in obtaining that information, as website asserted in seeking to quash subpoena seeking identities of reviewers and number of people who saw reviews, in action wherein employer filed application under statute permitting domestic discovery for use in foreign proceedings; website's user statistics were confidential, but interest in protecting that information from widespread disclosure could be safeguarded by protective order, to which parties could stipulate and which would prevent employer from using that data outside of litigation. Zuru, Inc. v. Glassdoor, Inc., N.D.Cal.2022, 2022 WL 2712549. Federal Civil Procedure 1312

After Swedish arbitral tribunal determined that it had illegally seized liquefied petroleum gas plant and awarded damages, Republic of Kazakhstan was entitled to production of documents from law firm representing parties in other foreign arbitration proceedings in which valuation of plant was at issue, even though Kazakhstan had not requested discovery from Swedish court, where firm's clients were not parties to foreign action at issue, Kazakhstan claimed that documents at issue might reveal that arbitral committee relied on falsified evidence and award could be therefore invalidated as manifestly incompatible with Swedish public policy, and there was no authoritative proof that Swedish tribunal would reject evidence. In re Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP Pursuant to 28 U.S.C. sec. 1782, S.D.N.Y.2015, 110 F.Supp.3d 512. Federal Civil Procedure 1312

Discovery request from United States corporation to non-party Ecuadorian national residing in Colorado, pursuant to federal statute permitting domestic discovery for use in foreign proceedings, which sought Ecuadorian appellate court documents in non-party's possession stemming from a review of an Ecuadorian judgment entered against the corporation, sought information relevant to the corporation's defense of a collection action on the judgment, filed in Gibraltar court, and therefore, was discoverable; collection action involved claims that any misconduct during Ecuadorian trial had been “cleansed” on appeal, rendering the appellate order enforceable in spite of fraud found by United States court. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

Quashing ex parte subpoena requested by owner of European patent and German patent, seeking disclosure of competitor's license agreements for use in German litigation alleging competitor's infringement of those patents, was unwarranted on grounds of lacking current need for such discovery, since owner's entire case, including question of damages amount, was before German appellate court and owner stated that competitor's license agreements were directly relevant to damages calculation. IPCom GMBH & Co. KG v. Apple Inc., N.D.Cal.2014, 61 F.Supp.3d 919. Federal Civil Procedure 1312

Factor of the nature of the underlying proceedings and the need for discovery assistance weighed in favor of allowing applicants, an American oil company and two employees of its Ecuadorian subsidiary, to obtain domestic discovery from an attorney for use in Ecuadorean civil and criminal proceedings, pursuant to statute permitting domestic discovery for use in foreign proceedings, even though it was not entirely clear that the Ecuadorian criminal court was receptive to such discovery assistance; the two employees faced serious criminal charges, and it appeared that the attorney possessed at least some information with regard thereto. In re Application of Chevron Corp., D.Mass.2010, 762 F.Supp.2d 242. Federal Civil Procedure 1312

Statute governing court discovery assistance in aid of foreign proceedings did not authorize order compelling United States nonparty subsidiary to produce documents held by European parent corporation, for use in Canadian litigation; there was no showing that Canadian courts needed or wanted American court assistance, and there was no basis for piercing of corporate veil to secure possession of documents held by parent. Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada, D.D.C.2005, 384 F.Supp.2d 45. Corporations And Business Organizations 1078(1); Federal Civil Procedure 1312

In view of fact that Korean prosecutor might contemplate bringing additional charges against Korean citizen, who had been convicted for violations of Korean law, and that prosecutor had reiterated need for records of California bank relating to the Korean citizen, fact that Korean citizen had been convicted in Korea subsequent to prosecutor's initial request for judicial assistance in obtaining bank records did not warrant conclusion that information sought was no longer needed by Korean authorities. In re Request For Judicial Assistance From Seoul Dist. Criminal Court, Seoul, Korea, N.D.Cal.1977, 428 F.Supp. 109, affirmed 555 F.2d 720. Federal Civil Procedure 1312

38 ---- Reception of assistance, considerations governing

District court did not abuse its discretion by denying application for discovery assistance in a foreign proceeding by shareholders in German corporation who had brought suit in Germany against corporation, through which shareholders sought discovery from law firms which represented opposing sides in action brought against corporation in American court by purchasers of corporation's American depository shares, where German government had made clear that it was unreceptive to judicial assistance of an American court in instant case. Schmitz v. Bernstein Liebhard & Lifshitz, LLP., C.A.2 (N.Y.) 2004, 376 F.3d 79. Federal Civil Procedure 1312

Operator of Japanese orthodontics clinic which requested discovery as to account information of users of online map service who had posted one-star reviews and allegedly offensive comments about operator on its map listing demonstrated that Japanese courts would be receptive to assistance in discovery from United States, supporting grant of requested discovery for use in operator's Japanese litigation; operator represented that Japanese courts had been receptive to such assistance in other matters, and there was no evidence that Japanese courts would object to operator's discovery or objected more generally to United States' judicial assistance. Medical Incorporated Association Smile Create, N.D.Cal.2021, 2021 WL 2877406. Federal Civil Procedure 1312

Brazilian government was receptive towards United States federal-court judicial assistance, and thus factor considering government receptivity weighed towards granting application for domestic discovery for use in Brazil, as under Brazilian law, the parties to a judicial proceeding were entitled to submit any kind of evidence to the court, as long as that evidence was not improperly obtained. In re Atvos Agroindustrial Investimentos S.A., S.D.N.Y.2020, 2020 WL 4937084. Federal Civil Procedure 1312

For purposes of application for judicial assistance in obtaining evidence regarding foreign marital assets that applicant claimed her ex-husband concealed in foreign proceeding, factor addressing receptivity of foreign court to assistance from district court weighed in favor of granting the discovery requests; Ecuadorian law would require Ecuador Family Court to conduct an inventory if new assets were found that were not known while original inventory was ongoing, applicant sought to discover assets that ex-husband did not disclose in original inventory, and although respondent argued that applicant knew about offshore companies during pendency of inventory proceedings, it did not assert that applicant knew of ex-husband's ownership interests in companies or of assets owned by companies. In re Pons, S.D.Fla.2020, 614 F.Supp.3d 1134, affirmed 835 Fed.Appx. 465, 2020 WL 6611454. Federal Civil Procedure 1312

Pursuant to ex parte request by alleged victims of fraudulent foreign investment scheme to obtain discovery from founder and former CEO of brokerage company for use in expected proceeding before High Court of England and Wales against brokerage company, receptivity of foreign court to United States federal-court judicial assistance favored granting discovery request; alleged victims expected documents and testimony elicited from founder would be admissible in English proceeding, and English courts were generally receptive to discovery granted by United States federal courts for use in English proceedings. In re Tovmasyan, D.Puerto Rico 2021, 557 F.Supp.3d 348. Federal Civil Procedure 1312

Factor asking about the receptivity of foreign government to United States federal court judicial assistance weighed in favor of applicant, who sought to obtain discovery from news editor, to use in civil and criminal proceedings in the United Kingdom against confidential source who provided information about applicant to editor; editor submitted a declaration from a dual-qualified English barrister and New York licensed attorney arguing that an English court would uphold editor's privilege against disclosure of his confidential source, but even that declaration noted that disclosure of a journalist's source of information in an English court proceeding could be compelled if it was established to the satisfaction of the court that disclosure was necessary in the interests of justice. In re Application of Shervin Pishevar for an Order to take Discovery for use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782, S.D.N.Y.2020, 439 F.Supp.3d 290, adhered to on reconsideration 2020 WL 1862586. Federal Civil Procedure 1312

Second *Intel* factor, 124 S.Ct. 2466, for determining whether to grant discovery for use in a foreign proceeding, whether the material sought was within the foreign tribunal's jurisdiction reach and thus accessible absent the grant of domestic discovery, 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, strongly weighed in favor of denying patentee's application for domestic discovery for aid in a Korean Fair Trade Commission (KFTC) proceeding, where the KFTC, in an amicus brief, had requested the District Court deny the application in its entirety as a matter of comity. In re Ex Parte Application of Qualcomm Incorporated, N.D.Cal.2016, 162 F.Supp.3d 1029. Federal Civil Procedure 1312

District court presented with discovery request for assisting foreign or international tribunal should consider receptivity of foreign government or court or agency abroad to federal-court judicial assistance. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Federal Civil Procedure 1312

39 ---- Reciprocity or reciprocal treaties, considerations governing

Statute authorizing district court to provide assistance to foreign tribunals and litigants before those tribunals did not require that reciprocal arrangements exist in order for private foreign litigant's discovery request to be granted. Application of Malev Hungarian Airlines, C.A.2 (Conn.) 1992, 964 F.2d 97, certiorari denied 113 S.Ct. 179, 506 U.S. 861, 121 L.Ed.2d 125. Federal Civil Procedure 1312

To extent district court rested its decision to deny discovery to litigant before foreign tribunal upon lack of reciprocity in issuance of letters rogatory and upon prediction that discovered evidence would not be admissible in foreign tribunal, district court abused its discretion, since statute governing judicial assistance rendered to foreign and international tribunals and to litigants before such tribunals does not depend upon reciprocal agreements, and testimony sought would generally be subject to discovery were all parties in foreign tribunal's jurisdiction. John Deere Ltd. v. Sperry Corp., C.A.3 (Pa.) 1985, 754 F.2d 132. Federal Civil Procedure 1269.1

Existence of tax treaty between United States and Korea was not prerequisite to district court's honoring request of Korean district court for assistance in procuring from California bank certain financial records relating to a Korean citizen under investigation in Korea for violating Korean currency laws. In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, C.A.9 (Cal.) 1977, 555 F.2d 720. Federal Civil Procedure 1312

In absence of evidence that Korea had refused to provide similar assistance to United States courts when requested, district court would disregard the lack of a reciprocal treaty in determining whether to grant request of Korean District Criminal Court for judicial assistance in procuring certain financial records from a California bank. In re Request For Judicial Assistance From Seoul Dist. Criminal Court, Seoul, Korea, N.D.Cal.1977, 428 F.Supp. 109, affirmed 555 F.2d 720. Federal Civil Procedure 1312

40 ---- Use of evidence, considerations governing

Nigeria's potential use of discovery materials sought in related proceeding challenging arbitration award before English court was not improper, and therefore potential use could not be negative factor in addressing Nigeria's application under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal; although award resembled already extant judgment and Nigeria was attempting to keep that award from being "enforced" in English proceeding, Nigeria was expressly asking English court to probe merits of, and set aside, arbitration award, and English court had authority to do so. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 (N.Y.) 2022, 27 F.4th 136, on remand 2022 WL 17593181. Federal Civil Procedure 1312

Nigeria's potential use of discovery materials sought in related proceeding challenging arbitration award before English court was not improper, and therefore potential use could not be negative factor in addressing Nigeria's application under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal; although award resembled already extant judgment and Nigeria was attempting to keep that award from being "enforced" in English proceeding, Nigeria was expressly asking English court to probe merits of, and set aside, arbitration award, and English court had authority to do so. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 2022, 25 F.4th 99. Federal Civil Procedure 1312

Foreign sovereign did not have to resort to process under United States-Nigeria Mutual Legal Assistance Treaty (MLAT) before filing application in district court under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal; although parts of MLAT imposed limits on assistance that Department of Justice or Nigerian Attorney General would provide in response to MLAT request, MLAT was intended to expand, not contract, each signatory's access to criminal evidence in other's jurisdiction. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 2022, 25 F.4th 99. Federal Civil Procedure 1312; International Law 291

Applicant, who sought to compel discovery for use in defamation proceeding in the Netherlands, based on allegations that an economist made allegations against her, to law enforcement, causing her to be arrested and charged in state court with misdemeanor counts of stalking, menacing, and harassment, satisfied "for use" requirement of statute permitting domestic discovery for use in foreign proceedings even if applicant already possessed materials to support her allegations and the materials she sought to discover were thus not necessary to draft an adequate complaint in the foreign court, where applicant showed that materials she sought would be used at some stage of the foreign proceeding that was within reasonable contemplation at the time of the proceeding. Mees v. Buiter, C.A.2 (N.Y.) 2015, 793 F.3d 291. Federal Civil Procedure 1312

Statute permitting domestic discovery for use in foreign proceeding did not preclude possibility that evidence sought could be utilized to cast doubts on impartiality of foreign court. In re Chevron Corp., C.A.3 (N.J.) 2011, 633 F.3d 153. Federal Civil Procedure 1312

Use to which depositions to be obtained pursuant to subpoenas issued in response to letters rogatory from a foreign court were to be put in the foreign country did not merit concern of court of appeals where witnesses were neither defendants nor subjects of investigation in the foreign country. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

Cyprus limited liability company, which filed civil action against defendant in Cypriot court, sufficiently established that asset discovery from defendant's daughters, mother, and trustee of daughters' trusts would offer it some advantage in Cypriot court, and thus satisfied "for use" requirement of statute permitting district court to order discovery for use in foreign tribunal, where Cyprus action remained ongoing and its merits were unresolved,

and requested discovery would assist in determining extent to which defendant had complied with asset freeze and disclosure order issued by Cypriot court, thus permitting company to move for contempt against defendant in Cypriot court and potentially limiting defendant's ability to present defense or even precluding presentation of any defense. In re Gorsoan Limited, S.D.N.Y.2020, 435 F.Supp.3d 589, reversed and remanded 843 Fed.Appx. 352, 2021 WL 299286. Federal Civil Procedure 1312

Investors in Mauritius private-equity funds formed to invest in real estate in India had practical ability to submit evidence to authorities and courts involved in criminal proceedings in India regarding alleged fraud, and thus satisfied "for use" requirement of statute authorizing district courts to order persons to give their testimony or statements or to produce documents or other things for use in proceedings in foreign or international tribunals; investors alleged that under Indian law they, as the criminal complainants, had right to require that their allegations and evidence be considered by magistrate and reviewing court. In re Children's Investment Fund Foundation (UK), S.D.N.Y.2019, 363 F.Supp.3d 361. Federal Civil Procedure 1312

Son of deceased wealthy Colombian citizen failed to demonstrate that discovery he sought from his sister and brother-in-law was "for use" in proceedings in Colombia over family's assets, as required for son to be permitted to take discovery from sister and brother-in-law in Southern District of New York; son principally argued that requested discovery would be used in defending criminal charges pending against him in Colombia for abuse of trust for transferring family assets to trust vehicle over which he had sole control, but his request appeared to be little more than fishing expedition for documents of, at best, limited relevance. In re Escallon, S.D.N.Y.2018, 323 F.Supp.3d 552. Federal Civil Procedure 1312

Vehicle purchasers, who sought to pursue litigation in Germany and Ireland based on vehicle manufacturer's installation of technology that would yield doctored emissions readings, failed to establish that evidence sought from alleged inventor of technology was "for use" in foreign tribunal, and thus district court lacked statutory authority to order alleged inventor to produce such evidence; purchasers' case in Germany was already rejected on the merits, there was no indication that newly-filed case in Germany would have different outcome, and Irish litigation had been stayed pending judicial review of trial court's jurisdiction to hear the case. financialright GmbH v. Robert Bosch LLC, E.D.Mich.2018, 294 F.Supp.3d 721. Federal Civil Procedure 1312

Insurance company was entitled to obtain communications between policyholders' former counsel and insurance broker for use in proceeding insurer brought in United Kingdom to enforce its default judgment against broker in insurer's third party action filed in conjunction with policyholders' action against insurer, where attorney was not participant in United Kingdom proceeding, insurer's attorney stated that information sought would be highly relevant to disposition of proceeding, United Kingdom courts were permitted to use foreign discovery devices to gather evidence, and there was nothing burdensome about request. La Suisse, Societe d'Assurances Sur La Vie v. Kraus, S.D.N.Y.2014, 62 F.Supp.3d 358. Federal Civil Procedure 1312

Quashing ex parte subpoena requested by owner of European patent and German patent, seeking disclosure of competitor's license agreements for use in German litigation alleging competitor's infringement of those patents, was unwarranted on grounds of improper purpose, since owner represented that it did not intend to use requested discovery for any improper purpose, and competitor did not provide any information to discredit that representation. IPCom GMBH & Co. KG v. Apple Inc., N.D.Cal.2014, 61 F.Supp.3d 919. Federal Civil Procedure 1312

Discovery of financial records related to allegedly fraudulent monetary transfers that Saudi Arabian corporation sought from New York banks was for use in proceedings in Cayman Islands and Saudi Arabia involving corporation such that corporation met requirements under federal statute permitting domestic discovery for use in foreign proceedings; foreign courts could not order banks as nonparties to produce requested discovery, discovery

was relevant to corporation's allegations that fraud was accomplished through channeling billions of dollars in loans and repayments through various bank accounts including accounts in New York, some documents requested in discovery likely were necessary to prove fraud claims, and fact that information corporation obtained in discovery also could be used in future litigation against banks was immaterial. Ahmad Hamad Algosaibi & Bros. Co. v. Standard Chartered Intern. (USA) Ltd., S.D.N.Y.2011, 785 F.Supp.2d 434. Federal Civil Procedure 1312

Documents and information concerning preparation of expert reports generally in litigation in Republic of Ecuador was "for use" in that proceeding, and thus district court was authorized to grant request for domestic discovery under federal statute permitting domestic discovery for use in foreign proceedings, since veracity of expert reports actually submitted to court in that litigation for its consideration was relevant issue in that litigation. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1312

Communications concerning activities of laboratory known as "Selva Viva," which referred to technical team and their allegedly makeshift testing facilities in hotel room in Ecuador, was "for use" in civil litigation in Republic of Ecuador relating to results from that laboratory, and thus district court was authorized to grant request for domestic discovery under federal statute permitting domestic discovery for use in foreign proceedings, since it raised some concern as to whether experts at Selva Viva conducted their work pursuant to sound scientific practices. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1312

41 ---- Relationship to issues, considerations governing

Applicant's discovery requests directed to documents about communications between Cambodian prime minister and his affiliates about application, payments by individuals for advertising with social networking website, and website's historical processes for preventing false or deceptive news and threatening or harassing statements, and request to depose website on a number of topics including enforcement of policies against prime minister's page and any communications between website and prime minister, were not related to the issues in any of the cases against applicant in Cambodian courts, as required for applicant to be entitled to obtain ex parte discovery from website under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals. Rainsy v. Facebook, Inc., N.D.Cal.2018, 311 F.Supp.3d 1101. Federal Civil Procedure 1312

42 ---- Infringement on foreign procedure, considerations governing

District court did not abuse its discretion by denying German corporation's request for certain unredacted documents from American corporation, for use in foreign litigation against Spanish corporations, on ground that unredacted versions of documents desired would be cumulative, since district court did not thereby improperly intrude into the substantive role of the foreign forum court, and decision was not a prediction of the actions of the foreign tribunal. Bayer AG v. Betachem, Inc., C.A.3 (N.J.) 1999, 173 F.3d 188, 50 U.S.P.Q.2d 1380. Federal Civil Procedure 1312

It was improper to deny discovery in aid of litigation in France on ground that French policy requires that pretrial discovery and use of evidence be controlled by courts and not by parties and that granting petition would infringe on power that French legislature has bestowed on the courts, where no authoritative declarations by French judicial, executive or legislative bodies objecting to foreign discovery assistance appeared in the record, and since French court could enjoin party from pursuing discovery in manner that violates judicial policies of France or refuse to

consider evidence gathered by such practice. Euromepa S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1995, 51 F.3d 1095. Federal Civil Procedure 1312

Operator of Japanese orthodontics clinic demonstrated that its discovery request for account information of users of online map service who had posted one-star reviews and allegedly offensive comments about operator on its map listing did not conceal an attempt to circumvent proof-gathering restrictions in Japanese courts, supporting grant of requested discovery for use in operator's Japanese litigation; operator submitted declaration of Japanese attorney who was licensed to practice in Japan stating that he was aware of no restrictions or policies under Japanese law that would limit gathering of the evidence which operator sought. Medical Incorporated Association Smile Create, N.D.Cal.2021, 2021 WL 2877406. Federal Civil Procedure 1312

Factor asking whether an application for discovery for use in a foreign tribunal would circumvent foreign proof-gathering restrictions or United States or United Kingdom policies weighed against granting application for discovery from news editor, for use in applicant's planned civil and criminal proceedings against a confidential source who provided information about applicant to editor; although no authoritative proof was submitted regarding editor's reporter's privilege under United Kingdom law, and regardless of whether applicant would be able to obtain discovery in a United Kingdom-based legal proceeding from editor, who was located in New York, applicant did not overcome the United States public policy undergirding the reporter's privilege. In re Application of Shervin Pishevar for an Order to take Discovery for use in Foreign Proceedings Pursuant to 28 U.S.C. § 1782, S.D.N.Y.2020, 2020 WL 769445. Federal Civil Procedure 1312

For purposes of application for judicial assistance in obtaining evidence regarding foreign marital assets that applicant claimed her ex-husband concealed in foreign proceeding, magistrate judge's finding that factor addressing whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States weighed in favor of granting the discovery requests was not clearly erroneous or contrary to law; although the Ecuador Family Court denied applicant's requests to reopen discovery, it would be required to conduct an inventory if new assets were found, applicant sought to discover assets that ex-husband did not disclose in original inventory, and Ecuadorian law provided for a penalty for willfully concealed assets. In re Pons, S.D.Fla.2020, 614 F.Supp.3d 1134, affirmed 835 Fed.Appx. 465, 2020 WL 6611454. Federal Civil Procedure 1312

Discovery sought by alleged victims of fraudulent foreign investment scheme from founder and former CEO of brokerage company for use in expected action against brokerage company before High Court of England and Wales was not protected by any legally applicable privilege, as required for the district court to grant ex parte request for discovery for use in foreign proceeding; founder would have remained able to avail himself of discovery rules, including those protecting proprietary or privileged information, and alleged victims expected that documents and testimony elicited from founder would not be barred by any applicable or local rules. In re Tovmasyan, D.Puerto Rico 2021, 557 F.Supp.3d 348. Federal Civil Procedure 1312

Third *Intel* factor, 124 S.Ct. 2466, for determining whether to grant discovery for use in a foreign proceeding, whether an applicant seeks to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States, favored denying patentee's application for domestic discovery for aid in a Korean Fair Trade Commission (KFTC) proceeding, where the KFTC had a process which allowed for some discovery, even if not as broad as that sought by patentee, and permitting domestic discovery would allow patentee to do an end run around Korean procedures, which would discourage parties from voluntarily cooperating with KFTC investigations. In re Ex Parte Application of Qualcomm Incorporated, N.D.Cal.2016, 162 F.Supp.3d 1029. Federal Civil Procedure 1312

Judicial efficiency considerations for determining whether to stay discovery pending resolution of foreign proceedings weighed in favor of granting a limited stay in Brazilian bankruptcy trustee's proceeding for judicial assistance to allow discovery for use in a large-scale Brazilian bankruptcy, where foreign interests in the matter outweighed any United States' interests, and a ruling in the Brazilian appeal would resolve the question of whether trustee had the right to the discovery requested. In re Application of Alves Braga, S.D.Fla.2011, 789 F.Supp.2d 1294. Action 69(5)

District court would, as a matter of discretion, deny without prejudice American oil company's request, pursuant to statute permitting domestic discovery for use in foreign proceedings, for discovery from an attorney for use in an arbitration proceeding under a United States-Ecuador treaty, even though company's application satisfied statutory criteria; it was unclear whether the requested discovery was appropriate, rather than an attempt to circumvent proof-gathering mechanisms that might be available in the arbitration, and the discovery sought was not relevant to the tribunal's jurisdiction, which was the only matter before it. In re Application of Chevron Corp., D.Mass.2010, 762 F.Supp.2d 242. Alternative Dispute Resolution 252

Oil company was not entitled to discovery for use in an international arbitration of a contract dispute against the Republic of Kazakhstan; none of the respondents were parties to the underlying arbitration, arbitration was already "late in the procedure," and company appeared to be circumventing the tribunal's control over its own discovery process. In re Application of Caratube Int'l Oil Co., LLP, D.D.C.2010, 730 F.Supp.2d 101. Alternative Dispute Resolution 514

43 ---- Relevance, considerations governing

Finding of English court that materials sought by individuals charged with fraud conspiracy in United Kingdom, which related to American prosecution of alleged coconspirators, were relevant or possibly relevant and thus discoverable under English law did not require district court judge to grant individuals' request for discovery of such materials, under statute permitting district courts to provide assistance to foreign courts, as English court made no particularized finding of relevance, but stated that its ruling was subject to any possible claims of privilege or immunity. United Kingdom v. U.S., C.A.11 (Fla.) 2001, 238 F.3d 1312, rehearing and rehearing en banc denied 253 F.3d 713, certiorari denied 122 S.Ct. 206, 534 U.S. 891, 151 L.Ed.2d 146. Criminal Law 627.2

Operator of Japanese orthodontics clinic which requested discovery as to account information of online map service users who had posted allegedly offensive comments about operator on its map listing was entitled to information for use in Japanese litigation only for period covering time of and just before review posting, assuming that information sought by clinic was confidential; operator sought all documents showing users' names, addresses, e-mail addresses, and telephone numbers, all documents showing names and addresses of credit card holders registered on accounts, and all documents showing access logs, including date, times, IP addresses, and access type, information beyond this period was overly broad, and operator failed to adequately demonstrate need beyond this period. Medical Incorporated Association Smile Create, N.D.Cal.2021, 2021 WL 2877406. Federal Civil Procedure 1312

Discovery request from United States corporation to non-party Ecuadorian national residing in Colorado, pursuant to federal statute permitting domestic discovery for use in foreign proceedings, which sought information possessed by non-party about an entity suspected of distributing proceeds of fraudulently obtained Ecuadorian judgment against the corporation was relevant to corporation's defense of a collection action on the judgment, filed in Gibraltar court, and therefore, discoverable; entity in question had been created by the non-party, and two other litigants in the Gibraltar suit were allegedly involved with the entity. Chevron Corporation v. Snaider, D.Colo.2015, 78 F.Supp.3d 1327. Federal Civil Procedure 1312

Under the federal statute permitting domestic discovery for use in foreign proceedings, relevancy is broadly construed and encompasses any material that bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the case; when relevance is in doubt, the district court should be permissive. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1272.1

44 ---- Rulings, considerations governing

Statute permitting domestic discovery for use in foreign proceedings authorizes, but does not require, federal district court to provide assistance to complainant in European Commission proceeding that leads to dispositive ruling, i.e., final administrative action both responsive to complaint and reviewable in court. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Civil Procedure 1312

45 ---- Reopening of proceedings, considerations governing

Newly discovered evidence of former employee's filing of retaliatory suit for slander that had been proffered in motion for reconsideration was not material evidence or evidence that probably would have changed outcome of district court's decision that granted employer's petition under federal statute permitting domestic discovery for use in foreign proceedings, and thus motion was due to be denied, since court could not simply assume that allegations in employee's lawsuit were true and allegations in employer's petition were false, and bulk of motion just reiterated already-rejected arguments. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., C.A.11 (Fla.) 2014, 747 F.3d 1262. Federal Civil Procedure 1312

Potential motion to reopen French Court of Appeal action, after French Supreme Court had affirmed judgment, based on newly discovered evidence did not suffice as predicate proceeding for insurer's petition for discovery to aid foreign litigation; statute governing discovery in aid of foreign litigation was not designed to provide discovery to justify reopening of already-completed litigation. Euromepa, S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1998, 154 F.3d 24. Federal Civil Procedure 1312

Magistrate judge's implicit finding that applicant's alleged lack of candor did not warrant vacatur of the district court's ex parte order granting application for judicial assistance in obtaining evidence regarding foreign marital assets that applicant claimed her ex-husband concealed and did not disclose in foreign proceeding was not clearly erroneous or contrary to law; fact that the Ecuador Family Court previously denied applicant's requests to reopen discovery was inconsequential to the current proceedings, as Ecuadorian law required the Ecuador Family Court to carry out an inventory of any newly found assets, and the evidence applicant sought to discover could qualify as assets found that were not known while the inventory was ongoing. In re Pons, S.D.Fla.2020, 614 F.Supp.3d 1134, affirmed 835 Fed.Appx. 465, 2020 WL 6611454. Federal Civil Procedure 1312

Reopening was warranted for administratively closed case for a limited amount of time for non-party parent corporation located in United States to review and produce relevant and unprivileged documents related to foreign proceeding concerning licenses and permits to explore natural gas deposits. RSM Production Corporation v. Noble Energy, Inc., S.D.Tex.2019, 357 F.Supp.3d 592. Federal Civil Procedure 1312

46 ---- Miscellaneous cases, considerations governing

State secrets privilege applied to detainee's domestic discovery requests seeking information that would tend to confirm Poland as location for Central Intelligence Agency (CIA) site at which detainee, who was a foreign

national, allegedly had been tortured during interrogation following terrorist attacks of September 11, 2001, which information was sought pursuant to subpoenas, on two former CIA contractors, for deposition testimony and documents for use in ongoing criminal investigation in Poland; former CIA insiders' confirmation of confidential cooperation between CIA and foreign intelligence service could damage CIA's clandestine relationships with foreign authorities, and detainee's need for information was not great, since he suggested that he did not seek confirmation of interrogation site's Polish location so much as he sought information about what had happened there. United States v. Husayn, U.S.2022, 142 S.Ct. 959, 212 L.Ed.2d 65. Privileged Communications and Confidentiality 360

Investor in Cayman Island oil company who sought foreign discovery to support a planned double-derivative suit failed to demonstrate the likelihood that the proceedings would be instituted within a reasonable time, as required to obtain discovery under federal statute permitting discovery for use in foreign proceedings; investor would be required to clear a series of procedural hurdles under Cayman law before it could present any evidence to a Cayman court in a suit against the company's chief executive officer (CEO) and directors on behalf of the company, and there was no indication that investor would be able to accomplish this. IJK Palm LLC v. Anholt Services USA, Inc., C.A.2 (Conn.) 2022, 33 F.4th 669. Federal Civil Procedure 1312

Captain of oil tanker that sank off coast of Spain failed to provide sufficient objective indicia that foreign criminal proceedings were more than merely speculative, and thus did not support application for discovery for use in foreign proceeding; even though captain stated that he intended to use discovery to draft criminal complaint based on three witnesses in prior action regarding sunk ship providing false testimony, captain's submissions did not provide legal theory supporting such a proceeding, nor did captain clearly lay out either content of claims or sufficiently concrete basis for belief that witnesses gave false testimony. Mangouras v. Squire Patton Boggs, C.A.2 (N.Y.) 2020, 980 F.3d 88. Federal Civil Procedure 1312

District court did not abuse its discretion in finding narrowly tailored, and granting, Ecuadorian shipper's requested discovery of pricing information from American affiliate of Ecuadorian carrier for use in shipper's contemplated civil and criminal proceedings in Ecuador against former employees who may have violated Ecuador's collusion laws in connection with processing and approving carrier's allegedly inflated invoices; application did not seek confidential or general pricing information, but rather related directly to parties' shipping contract. Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., C.A.11 (Fla.) 2014, 747 F.3d 1262. Federal Civil Procedure 1312

District court did not abuse its discretion by denying discovery, rather than merely limiting discovery, in connection with application for discovery assistance in a foreign proceeding by shareholders in German corporation who had brought suit in Germany against corporation, through which shareholders sought discovery from law firms which represented opposing sides in action brought against corporation in American court by purchasers of corporation's American depository shares, where German authorities objected to any disclosure of documents to German shareholders, who were not in same position as purchasers of depositary shares. Schmitz v. Bernstein Liebhard & Lifshitz, LLP., C.A.2 (N.Y.) 2004, 376 F.3d 79. Federal Civil Procedure 1312

Journalists had no conceivable interest in maintaining confidentiality of source which would have precluded production of tape recordings of their interviews with key prosecution witness to defendant facing prosecution in foreign country for membership in banned organization and directing terrorism; not only was identity of source, the witness, known, but he indicated that he had no objection to disclosure of recordings. McKevitt v. Pallasch, C.A.7 (Ill.) 2003, 339 F.3d 530, rehearing and rehearing en banc denied. Privileged Communications And Confidentiality 404

Requiring alleged member of a group of company's shareholders that advocated the merger and privatization of company to produce its co-chief executive officer (CEO), who had also served as one of company's directors prior to, during, and after the merger, as a witness for a deposition would not be unduly burdensome, as factor that weighed in favor of granting application brought by shareholder that dissented from company's decision to merge and privatize to order alleged members to produce discovery for use in dissenting shareholder's action in the Cayman Islands; member was headquartered in the district, and co-CEO possessed unique information about the company's value in light of his position prior to, during, and after the merger. In re Alpine Partners, (BVI) L.P., N.D.Cal.2022, 2022 WL 18956960. Federal Civil Procedure 1312

District court would consider whether combined civil-criminal proceeding in Madagascar, involving the alleged misappropriation of funds from Malagasy energy company by its chief executive officer (CEO), comported with notions of due process, in light of alleged corruption in Madagascar's judicial system, when analyzing discretionary factors, relevant to whether it should grant minority shareholder's application for domestic discovery in aid of the Madagascar proceeding, since the underlying fairness of the foreign proceeding was not a statutory requirement for granting or denying application for discovery. In re Zouzar Bouka; Vision Indian Ocean S.A., S.D.N.Y.2022, 2022 WL 15527657, modified on reconsideration 2023 WL 1490378. Constitutional Law 3986; Federal Civil Procedure 1312

Pursuant to ex parte request by alleged victims of fraudulent foreign investment scheme to obtain discovery from founder and former CEO of brokerage company for use in expected proceeding before High Court of England and Wales against brokerage company, request was not an attempt to circumvent policies of England or United States, as favored granting discovery request; alleged victims posited that evidence elicited from founder was not barred by laws or local rules and that English rules contemplated that parties to proceedings would engage in discovery and submit documentary evidence, and there was no clear indication that discovery sought would have undermined specific policy of England or United States or that discovery was sought in bad faith. In re Tovmasyan, D.Puerto Rico 2021, 2021 WL 3737184. Federal Civil Procedure 1312

Applicants seeking judicial assistance to obtain documentary and testimonial evidence from nonparty discovery targets, a company incorporated in Maryland and a Maryland resident, for use in, inter alia, a foreign proceeding pending in South Africa, pursuant to statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals, satisfied the discretionary factors for judicial assistance set forth in *Intel*, 124 S.Ct. 2466; neither discovery target was a party to the South African action, there was no indication that South African court would reject United States court's assistance with respect to issues pending in the South African action or that applicant petitioned the U.S. court to supplant South African proof-gathering rules, and discovery targets did not explain why applicants' requests were unduly intrusive or burdensome. In re Newbrook Shipping Corp., D.Md.2020, 2020 WL 6451939. Federal Civil Procedure 1312

Nigeria's discovery request under statute permitting domestic discovery for use in foreign proceedings, which sought information from affiliates of natural gas processing plant, concealed an attempt to circumvent policies of the United States, as would strongly counsel against court's use of discretion to issue discovery in criminal bribery suit brought in Nigeria against the plant; United States and Government of the Federal Republic of Nigeria had established procedures under Mutual Legal Assistance in Criminal Matters Treaty (MLAT) to facilitate precisely this type of request and Nigeria failed to provide a good reason for bypassing the MLAT process or identify any special urgency to its request as would justify forgoing the procedures. Federal Republic of Nigeria v. VR Advisory Services, Ltd., S.D.N.Y.2020, 499 F.Supp.3d 3, vacated and remanded 25 F.4th 99, amended and superseded 27 F.4th 136, on remand 2022 WL 17593181. Federal Civil Procedure 1312

Magistrate judge's decision to deny application by former shareholders of Russian oil and gas company for discovery assistance in foreign proceeding on basis of delay was not clearly erroneous; unclean hands argument

about which shareholders sought evidence had been raised by Russian Federation in that proceeding more than decade previously, although precise legal argument or context in which those allegations were being raised might have been different than that in which they were raised during prior arbitrations and new evidence was offered. In re Hulley Enterprises Ltd., S.D.N.Y.2019, 400 F.Supp.3d 62. Federal Civil Procedure 1312

Petitioners, former shareholders of Russian oil and gas company, would not be permitted relief under statute permitting domestic discovery for use in foreign proceedings to serve subpoenas on firm that provided legal services to company, seeking evidence in connection with litigation currently pending in Dutch appellate court, given that firm was not a participant in the proceedings before the Dutch appellate court and petitioners had delayed taking action to obtain the evidence for many years. In re Hulley Enterprises, Ltd., S.D.N.Y.2019, 358 F.Supp.3d 331, affirmed 400 F.Supp.3d 62. Federal Civil Procedure 1574

Granting Swedish court's request for assistance in obtaining DNA evidence from a non-party United States citizen was appropriate under statute permitting domestic discovery for use in foreign proceedings; Swedish court could not itself order the U.S. citizen to produce the evidence, there was no indication that the Swedish court's request concealed an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States, and the request was not unduly intrusive or burdensome. In re Request for International Judicial Assistance from the Norrköping District Court, Sweden, D.Colo.2015, 219 F.Supp.3d 1061. Federal Civil Procedure 1312

Judicial assistance in obtaining evidence by Argentinean financial services organization for use in a securities action in Curacao's Court of First Instance was warranted, where six of the nine discovery targets were not parties to the Curacao action and Court of First Instance would not have jurisdiction over those entities and therefore would be unable to compel them to produce the testimony and documents requested by organization, District Court was aware of nothing to suggest that the Court of First Instance would not be receptive to judicial assistance from District Court, there was nothing to suggest organization was concealing an attempt to circumvent foreign proof-gathering restrictions, organization's proposed subpoenas requested information and documents that related to the fund at issue in the Curacao lawsuit and appeared to be sufficiently limited in scope and narrowly tailored, and any of the persons from whom discovery was sought could file a motion to quash if that person objected to any part of the subpoena. In re Sociedad Militar Seguro de Vida, N.D.Ga.2013, 985 F.Supp.2d 1375. Federal Civil Procedure 1312

Even if arbitration taking place in Virginia before a panel of American arbitrators applying American law, but under the auspices of the International Chamber of Commerce, was considered to be before a foreign or international tribunal, as would grant the District Court discretion to order discovery, the Court would decline to exercise such discretion, where the arbitration proceeding itself offered the possibility of discovery, under the supervision of the arbitrators, and the District Court's grant of a discovery order would threaten unfairness and virtually ensure unnecessary complication and expense. In re Hanwha Azdel, Inc., D.Mass.2013, 979 F.Supp.2d 178. Alternative Dispute Resolution 514

Fairness considerations for determining whether to stay discovery pending resolution of foreign proceedings weighed in favor of granting a stay in Brazilian bankruptcy trustee's proceeding for judicial assistance to allow discovery for use in a large-scale Brazilian bankruptcy, where foreign interests in the matter outweighed any United States' interests, the foreign forum was therefore also more convenient, and, given that trustee initiated the litigation in Brazil, it was likely that he would receive fair and impartial appellate consideration there on the threshold issue of a company's inclusion in the bankruptcy estate, on which the relevance of the requested discovery turned. In re Application of Alves Braga, S.D.Fla.2011, 789 F.Supp.2d 1294. Action 69(5)

Applicants for domestic discovery did not attempt to circumvent foreign proof-gathering restrictions and policies by attempting to obtain domestic discovery for use in civil and criminal proceedings in Republic of Ecuador under federal statute permitting domestic discovery for use in foreign proceedings, by not first seeking discovery from foreign tribunal, since statute did not incorporate exhaustion requirement. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1312

Discretionary factors weighed against granting of discovery request made by software corporation that served competitor and counsel in European antitrust matters with subpoenas duces tecum in connection with ongoing antitrust proceeding before European Commission; commission was or would be in possession of documents sought, commission opposed federal-court judicial assistance, corporation sought to circumvent commission's access to file rules, and subpoenas were unduly intrusive and burdensome. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Federal Civil Procedure 1312

Defendant in multiple foreign patent infringement suits would be allowed to obtain discovery from plaintiff; alternative discovery channels were inefficient and possibly ineffective, request did not undermine any specific policies of foreign countries or United States, request was not unduly burdensome, and confidentiality of requested material could be maintained. In re Application of Procter & Gamble Co., E.D.Wis.2004, 334 F.Supp.2d 1112. Patents 1751

It was legitimate to take Germany's explicitly stated sovereignty concerns into account in determining whether German litigants could have access to discovery materials in a securities regulation lawsuit in the United States; failure to acknowledge those concerns would undermine the assistance to foreign tribunal statute's purposes by discouraging foreign countries from heeding similar sovereignty concerns posited by our governmental authorities to foreign courts. In re Application of Schmitz, S.D.N.Y.2003, 259 F.Supp.2d 294, affirmed 376 F.3d 79. Federal Civil Procedure 1312

District court would grant timepiece producer's request for discovery under statute governing assistance to foreign and international tribunals and to litigants before such tribunals from prospective licensee of trademark holder which licensed its trademark to producer, as to information for which request was clearly set forth and which was relevant for foreign proceeding between producer and trademark holder, absent evidence that foreign tribunal prohibited any discovery or that foreign law prohibited use of discovery sought; purpose of statute would be served since discovery would provide assistance to foreign litigants and discovery would not significantly upset balance between litigants. Eco Swiss China Time Ltd. v. Timex Corp., D.Conn.1996, 944 F.Supp. 134. Federal Civil Procedure 1312

District Court would exercise its discretion to compel putative father to provide blood sample in connection with paternity proceeding in Norway, where Norwegian court had specifically requested assistance of District Court, such that no Norwegian sovereignty concerns could hinder District Court's efforts, and where compelling blood sample would efficiently assist request made by Norwegian court and encourage Norway to provide similar assistance to United States courts. In re Letter Rogatory from Nedenes Dist. Court, Norway, S.D.N.Y.2003, 216 F.R.D. 277. Federal Civil Procedure 1312

Ordering putative father to provide blood sample in connection with paternity proceeding in Norway was permissible under rule allowing district court to order party to submit to physical examination, where putative father denied he was father, neither party claimed that designated medical provider was not certified to take blood sample, and blood sample was relevant to determination of paternity. In re Letter Rogatory from Nedenes Dist. Court, Norway, S.D.N.Y.2003, 216 F.R.D. 277. Federal Civil Procedure 1653

In determining whether to provide discovery assistance to Swedish court in connection with paternity action by ordering alleged father to provide blood sample, district court was not required to determine whether prima facie case of paternity under state law had been established in Swedish court, in absence of express statutory requirement; that Swedish court found sufficient grounds to order blood test ended district court's inquiry in that regard. In re Letter of Request From Boras Dist. Court, E.D.N.Y.1994, 153 F.R.D. 31. Federal Civil Procedure 1312

Extensive factual recitations concerning parties' prior litigation were irrelevant to request for documents and deposition order pursuant to letter rogatory issued by Argentine court. Application of Sumar, S.D.N.Y.1988, 123 F.R.D. 467. Federal Civil Procedure 1312; Federal Civil Procedure 1551

47 Privileges--Generally

Government, in asserting state secrets privilege, established reasonable danger of harm to national security from confirmation of Poland as location for Central Intelligence Agency (CIA) site at which detainee, who was a foreign national, allegedly had been tortured during interrogation following terrorist attacks of September 11, 2001, which confirmation would tend to occur if two former CIA contractors responded to subpoenas, sought by detainee, for deposition testimony and documents for use in ongoing criminal investigation in Poland; while interrogation site's location had already been made public through unofficial sources, former CIA insiders' confirmation of confidential cooperation between CIA and foreign intelligence service could damage CIA's clandestine relationships with foreign authorities. United States v. Husayn, U.S.2022, 142 S.Ct. 959, 212 L.Ed.2d 65. Privileged Communications and Confidentiality 360

District courts may order production of evidentiary materials for use in foreign legal proceedings, provided materials are not privileged. McKevitt v. Pallasch, C.A.7 (Ill.) 2003, 339 F.3d 530, rehearing and rehearing en banc denied. Federal Civil Procedure 1312

Treaty with foreign government for mutual assistance in criminal matters prevented assertion of foreign parent-child privilege in proceeding to compel testimony for use in foreign criminal prosecution, despite treaty's general incorporation of domestic law including statute for recognition of privileges to which witness might be entitled; treaty intended any foreign privilege to be asserted before introduction of evidence into foreign prosecution, which allowed domestic courts to avoid burdensome inquiries into foreign law. In re Erato, C.A.2 (N.Y.) 1993, 2 F.3d 11. International Law 296

Federal grand jury could take testimony of former President of the Philippines and his wife in violation of the Philippine privilege against self-incrimination; the federal grand jury issued subpoenas to the former President and his wife on its own initiative, rather than as result of any type of request from Philippine tribunal, as part of the grand jury's ongoing investigation into corruption in the dealings of American corporations with the former President's regime. In re Grand Jury Proceedings, Doe No. 700, C.A.4 (Va.) 1987, 817 F.2d 1108, certiorari denied 108 S.Ct. 212, 484 U.S. 890, 98 L.Ed.2d 176. Self-incrimination 15

District Court would not compel discovery of communications among attorneys of United States law firm and communications between same firm and its client, oil company majority-owned by Russian Federation, pertaining to legal proceedings in Armenia and Netherlands, for purposes of expropriation action brought by majority shareholders of other, defunct oil company in Dutch court; although shareholders alleged that discovery of such communications would yield evidence that Russian Federation manipulated judges and case outcomes, same communications plainly implicated attorney-client privilege and work-product privilege, and evidence of foul play was minimal, failing to establish prima facie showing that crime-fraud exception would apply. In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for use in a Foreign Proceeding, D.D.C.2017,

286 F.Supp.3d 1. Federal Civil Procedure 1604(1); Privileged Communications and Confidentiality 132; Privileged Communications and Confidentiality 133; Privileged Communications and Confidentiality 154

Facts and data considered by petroleum company's expert witness in producing reports for Republic of Ecuador's environmental litigation against it were not protected by work product doctrine, and thus were subject to discovery for use in company's arbitration proceeding under United Nations Commission on International Trade Law (UNCITRAL) challenging Ecuador court's decision against it, even if expert was involved in attorneys' litigation strategy, where reports were relied upon in Ecuador litigation, discussed in expert's testimony, and provided directly to tribunal, and arbitration required reevaluation of Ecuador decision on merits, in order to determine what would have happened in absence of alleged corruption. In re Application of Republic of Ecuador v. Douglas, D.Mass.2015, 153 F.Supp.3d 484. Alternative Dispute Resolution 252

The existence of privilege cannot be determined from a blanket assertion of privilege over a large amount of material, as is the assertion of privilege to any bit of information that relates to a bank account. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Privileged Communications and Confidentiality 21

Attorney-client privilege and attorney work product doctrine did not protect documents listed on privilege log, in action seeking discovery under federal statute permitting domestic discovery for use in foreign proceedings in connection with lawsuit pending in Republic of Ecuador against United States corporation, criminal proceedings commenced against lawyers for corporation in Ecuador, and arbitration commenced by corporation against Republic; privilege log contained numerous defects including document descriptions that were too general and brief to give the court a basis for determining whether the privilege was properly invoked, failure to correlate assertions of privilege with specific communications, and failure to identify role of attorney at any particular moment in time, who was representing different parties in related litigations, and which of attorney's communications related to which litigation. In re Veiga, D.D.C.2010, 746 F.Supp.2d 27, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1558.1; Privileged Communications And Confidentiality 22

Statute governing discovery applications for assisting foreign or international tribunals expressly shields privileged material. In re Microsoft Corp., S.D.N.Y.2006, 428 F.Supp.2d 188. Federal Civil Procedure 1312; Privileged Communications And Confidentiality 9

48 ---- Persons entitled to assert, privileges

While former contractors for Central Intelligence Agency (CIA) were private parties, their disclosures would be tantamount to disclosure from CIA itself, for purposes of Government's assertion of state secrets privilege with respect to confirmation of Poland as location for CIA site at which detainee, who was a foreign national, allegedly had been tortured during interrogation following terrorist attacks of September 11, 2001, which confirmation would tend to occur if former contractors responded to subpoenas, sought by detainee, for deposition testimony and documents for use in ongoing criminal investigation in Poland; former contractors played central role in relevant events, e.g., they devised and implemented CIA's enhanced-interrogation program and they personally interrogated detainee. United States v. Husayn, U.S.2022, 142 S.Ct. 959, 212 L.Ed.2d 65. Privileged Communications and Confidentiality 360

Creator of documentary film was not independent as to what he published in film regarding litigation being conducted in Ecuador over allegations of environmental damage in Ecuador from petroleum operations conducted by affiliate of oil corporation, and thus, for purposes of oil corporation's motion seeking disclosure of footage shot

in making of documentary for use in proceedings in foreign tribunals, creator was not entitled to withhold footage under qualified evidentiary privilege for information gathered in journalistic investigation, notwithstanding creator's contention that some of footage was either irrelevant to proceedings or could have been obtained from other sources, where attorney for plaintiffs in litigation in Ecuador solicited creator to make documentary of litigation from perspective of plaintiffs, and creator removed at least one scene from final version of documentary at direction of plaintiffs in Ecuadoran litigation. Chevron Corp. v. Berlinger, C.A.2 (N.Y.) 2011, 629 F.3d 297. Privileged Communications And Confidentiality 404

Statute providing that person before foreign and international tribunals may not be compelled to give testimony or statement or produce document or other thing in violation of any legally applicable privilege has no application to witness in United States who is subpoenaed for investigation being conducted in the United States. In re Doe, C.A.2 (N.Y.) 1988, 860 F.2d 40. Grand Jury 36.3(2)

Professional basketball league was required to produce records regarding expulsion of player for violation of drug usage policy, in response to subpoena issued in connection with player's suit in German court against international basketball association, which had declared him ineligible based upon league's drug violation finding, despite league's claim that collective bargaining agreement with players' association required that information be kept confidential; real privacy interest was that of player, who waived confidentiality by challenging league's determination in German court. In re Federation Internationale de Basketball, for a Subpoena Pursuant to 28 U.S.C. § 1782, S.D.N.Y.2000, 117 F.Supp.2d 403. Privileged Communications And Confidentiality 423

49 ---- Waiver, privileges

Issue of whether claimed privileges had been waived was ripe for consideration by trial court, in proceeding under federal statute permitting domestic discovery for use in foreign proceedings, since issues presented were largely legal ones that did not depend on future uncertainties and petitioner demonstrated need for discovery in relation to ongoing proceedings in Ecuador and at The Hague; although judge did not wait for opponent to produce privilege log before deciding privileges issues, issues were adequately concrete and fully briefed. In re Naranjo, C.A.4 (Md.) 2014, 768 F.3d 332. Federal Courts 2133

Bank's failure to assert, on appeal, attorney-client privilege as basis for protection from disclosure of documents which were sought by foreign company under statute authorizing district court to order production of documents for use in proceeding in foreign tribunal constituted waiver of privilege, which bank had asserted before district court, and warranted remand to determine whether company was entitled to require production of documents. Application of Sarrio, S.A., C.A.2 (N.Y.) 1997, 119 F.3d 143. Federal Courts 3785

50 Property rights

Disclosure to defendant facing prosecution in foreign country for membership in banned organization and for directing terrorism of tape recordings of journalists' interviews with key prosecution witness, made in course of research for biography of witness, pursuant to statute authorizing district court to order production of evidentiary materials for use in foreign legal proceedings, did not constitute appropriation of intellectual property; no showing was made, nor was it plausible, that journalists would have abandoned biography if information contained in recordings was made public. McKevitt v. Pallasch, C.A.7 (Ill.) 2003, 339 F.3d 530, rehearing and rehearing en banc denied. Copyrights And Intellectual Property 534

51 Scope of assistance--Generally

Supreme Court would not exercise its supervisory authority to adopt rules barring domestic discovery by foreign antitrust complainant for use in proceedings before European Commission; instead, Court would allow lower courts to determine on remand, using relevant factors it had outlined, what, if any, discovery assistance was appropriate. Intel Corp. v. Advanced Micro Devices, Inc., U.S.2004, 124 S.Ct. 2466, 542 U.S. 241, 159 L.Ed.2d 355, 71 U.S.P.Q.2d 1001. Federal Courts 3126; Federal Courts 3218

Scope of congressional authorization necessarily limits and defines judicial power to render and seek assistance in response to letters rogatory issued by foreign and international tribunals. In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada, C.A.6 (Mich.) 1975, 523 F.2d 562. Courts 513

Cyprus limited liability company's subpoena requests under statute permitting district court to order discovery for use in foreign tribunal, which requests sought asset discovery from defendant's daughters, mother, and trustee of daughters' trusts in furtherance of its civil action against defendant in Cypriot court, were overly broad, and thus matter would be referred to magistrate judge to determine permissible scope of document production, where subpoenas pursued material with little apparent or likely relevance to subject matter, and although disclosure of some financial information was relevant to asset freeze and disclosure order issued by Cypriot court, subpoenas required more than what appeared necessary, including tax returns. In re Gorsoan Limited, S.D.N.Y.2020, 435 F.Supp.3d 589. Federal Civil Procedure 1312; United States Magistrate Judges 145

Scope of discovery requests by applicants, who sought discovery from United States corporation for use in civil actions in Mauritius and Uganda against corporation's Mauritian affiliate, under statute permitting domestic discovery for use in foreign proceedings was sufficiently limited so as not to be unduly burdensome, weighing in favor of granting applicants' request; applicants sought discovery specifically related to four of corporation's employees, identified a particular starting date for information sought, and corporation's servers containing employees' e-mail information were accessible from its office in the United States. In re Barnwell Enterprises Ltd, D.D.C.2017, 265 F.Supp.3d 1. Federal Civil Procedure 1312

Court's involvement on letter rogatory is narrow, so that, where subpoenas were issued pursuant to letters rogatory, proceeding is limited by act of Congress to question of enforceability of subpoenas by compulsion. In re Letters Rogatory from Supreme Court of Ontario, Canada, E.D.Mich.1987, 661 F.Supp. 1168. Federal Civil Procedure 1353.1

52 ---- Enforcement of judgments

Prior determination by New York district court, that lead counsel representing Ecuadorian Amazon residents had waived any claimed attorney-client privileges in action alleging that multi-billion-dollar judgment in Ecuador against United States corporation was fraudulent, was entitled to comity in corporation's subsequent proceeding in Maryland under federal statute permitting domestic discovery for use in foreign proceeding requesting that attorneys assisting lead counsel produce documents in their possession that had been subpoenaed by corporation; not applying waiver in subsequent proceeding would have significantly undermined New York court's decision and potentially spawned conflicting judgments as to very same subject matter. In re Naranjo, C.A.4 (Md.) 2014, 768 F.3d 332. Federal Courts 3864

Enforcement of Mexican judgment against Mexican national allegedly residing in Texas was beyond scope of assistance which district court could give pursuant to request for judicial assistance by letters rogatory. In re Civil Rogatory Letters Filed by Consulate of the U.S. of Mexico, S.D.Tex.1986, 640 F.Supp. 243. See, also, Tacul, S.A. v. Hartford Nat. Bank & Trust Co., D.Conn.1988, 693 F.Supp. 1399. Judgment 830.1

53 Exhaustion of other means or procedures

Discovery in aid of foreign litigation could not properly be denied for having failed to exhaust discovery options in the foreign country before seeking assistance in the United States, even on the basis of considering it factor in addition to the nature and attitudes of the foreign country tort discovery and whether information sought was ultimately discoverable under foreign law. Euromepa S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1995, 51 F.3d 1095. Federal Civil Procedure 1312

Private foreign litigant's request for discovery from American aircraft manufacturer was improperly denied as "premature and unnecessary" on the theory that the foreign litigant had never made a formal discovery request on the American company through the foreign tribunal. Application of Malev Hungarian Airlines, C.A.2 (Conn.) 1992, 964 F.2d 97, certiorari denied 113 S.Ct. 179, 506 U.S. 861, 121 L.Ed.2d 125. Federal Civil Procedure 1312

54 Intervention

Assuming that a proposed intervenor was required to show independent Article III standing, successor to winning bidder for government telecommunications contract in Mexico had Article III standing to intervene after grant of unsuccessful bidder's ex parte application for permission to serve deposition and document subpoenas on a witness, to obtain evidence for use in foreign tribunal; successor had risk of injury from unsuccessful bidder using testimony from on-going deposition in both a constitutional appeal in Mexico and a potential civil lawsuit in Mexico against successor, that injury was traceable to unsuccessful bidder's conduct, and favorable judicial decision would likely redress the injury by granting successor an opportunity to cross-examine witness at on-going deposition. In re Rivada Networks, E.D.Va.2017, 230 F.Supp.3d 467. Federal Courts 2110; Federal Courts 2113

Rule governing permissive intervention, rather than statute providing for assistance to foreign and international tribunals and to litigants before such tribunals, was proper vehicle for Canadian linerboard purchaser, who was a plaintiff in similar action in Canadian court, to seek modification of confidentiality order in antitrust class action involving allegations that manufacturers of linerboard fixed prices in violation of the Sherman Act, although Canadian rules of civil procedure would not permit a plaintiff to seek discovery from a defendant until after class certification, where defendants would suffer no prejudice from granting movant access to materials that had already been produced to plaintiffs in District Court. In re Linerboard Antitrust Litigation, E.D.Pa.2004, 333 F.Supp.2d 333. Federal Civil Procedure 1312

55 Jurisdiction

District court's initial granting of bank's application for assistance in obtaining discovery from three Texas-based entities for use in Portuguese proceedings, and denial of entities' first motion to quash, did not conclusively determine whether, and to what extent, discovery might be required, and thus, Court of Appeals lacked jurisdiction to review such orders under the collateral order doctrine; after filing appeal, entities filed second motion to quash subpoenas in the district court, and magistrate judge entered a 52-page ruling, granting in part and denying in part that motion, which generated additional motions practice in the district court, and all the issues raised would be reviewable in an appeal after district court's conclusive determination of the scope of any discovery. Banca Pueyo SA v. Lone Star Fund IX (US), L.P., C.A.5 (Tex.) 2020, 978 F.3d 968. Federal Courts 3305

Foreign corporation is not "found" in a district, so that court has jurisdiction to issue discovery order against corporation for use in foreign proceedings, merely because corporation maintains offices or conducts business in

the district; threshold inquiry to establish jurisdiction is not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, but, rather, is whether that corporation's affiliations with the State are so continuous and systematic as to render it essentially at home in the forum State. In re Del Valle Ruiz, S.D.N.Y.2018, 342 F.Supp.3d 448, affirmed 939 F.3d 520. Federal Courts 2748; Federal Courts 2762

District court had subject matter jurisdiction over request by foreign tribunal to order blood test of putative father residing within district in which court sat; matter required interpretation of treaty of United States, Congress had expressly authorized federal district courts to consider foreign letter rogatory requests and court had personal jurisdiction over the subject of the requests under Convention on Taking of Evidence Abroad in Civil or Commercial Matters. In re Letter Rogatory from Local Court of Ludwigsburg, Federal Republic of Germany in Matter of Smith, N.D.Ill.1994, 154 F.R.D. 196. Federal Courts 2333; International Law 291

56 Abstention

The assumption of jurisdiction over a res factor for *Colorado River* abstention favored abstention on application by attorney who was appointed to inventory assets of estate to compel two New York attorneys to produce certain documents in connection with foreign probate proceeding, where there was chance a New York surrogate's court could appoint a temporary administrator to assume temporary control over assets of the estate, and there were restraining orders in effect with respect to certain entities allegedly controlled by the deceased. Application of Horler, S.D.N.Y.1992, 799 F.Supp. 1457. Federal Courts 2603

57 Procedure for taking evidence--Generally

Discovery sought by investor in Cayman Island oil company to support a planned derivative suit on behalf of the company was not "for use in a foreign proceeding," as required for court to exercise its discretion to order discovery under federal statute permitting discovery for use in foreign proceedings; oil company had been placed in liquidation, which meant that under Cayman Island law, only the liquidators could bring suit on behalf of the company in the first instance, and since there was no indication that they had plans to do so, the discovery material sought would merely be used to persuade this third party to initiate the proceedings. IJK Palm LLC v. Anholt Services USA, Inc., C.A.2 (Conn.) 2022, 33 F.4th 669. Federal Civil Procedure 1312

Evidence taken from American citizen and supplied to Crown Prosecution Service of United Kingdom for use in British criminal investigation pursuant to federal statute allowing foreign states to request such evidence was to be supplied in a form appropriate for use in British court. In re Letter of Request from Crown Prosecution Service of United Kingdom, C.A.D.C.1989, 870 F.2d 686, 276 U.S.App.D.C. 272. Federal Civil Procedure 1312

58 ---- Ex parte proceedings, procedure for taking evidence

Letters rogatory may properly be received and appropriate action taken with respect thereto ex parte, as witnesses can raise objections in exercise of their due process rights by motion to quash subpoenas. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

Ex parte application to depose and conduct discovery on expert witness in Massachusetts for use in environmental litigation in Ecuador would be granted; the expert witness resided outside of the jurisdiction of the foreign tribunal, the Ecuadorian tribunal was still accepting documents, there was no showing that the discovery was sought in bad faith or in an attempt to circumvent foreign proof-gathering restrictions, and the discovery request was not unduly intrusive or burdensome. Chevron Corp. v. Shefftz, D.Mass.2010, 754 F.Supp.2d 254. Federal Civil Procedure 1312

59 ---- Notice, procedure for taking evidence

Statements taken, pursuant to court order issued under statute regarding assistance to foreign and international tribunals and to litigants before such tribunals, in Tokyo district prosecutor's office's investigation of murder of Japanese citizen while she was in Los Angeles, were far more analogous to depositions than Jencks Act statements, and thus notice of taking deposition should have been provided in accordance with Federal Rules of Civil Procedure. In re Letters Rogatory from Tokyo Dist. Prosecutor's Office, Tokyo, Japan, C.A.9 (Cal.) 1994, 16 F.3d 1016. Federal Civil Procedure 1312

Art buyers' letter on court's electronic docket in action against auction house and its parent company requesting permission to use domestic discovery "in new foreign proceedings soon to be commenced in the United Kingdom" against auction house and art dealer, did not qualify as "notice of suit" within meaning of parties' tolling agreement, requiring parties to give 14 days notice before filing related litigation, the fulfillment of which would terminate the agreement, for purposes of art buyers' claim that auction house and its parent breached the agreement by filing suit in Swiss court without giving them the required 14 days notice, where terms of the agreement provided that notice had to be sent by reputable overnight courier service. Accent Delight International Ltd. v. Sotheby's, S.D.N.Y.2019, 394 F.Supp.3d 399. Federal Courts 2662

Successor to winning bidder for government telecommunications contract in Mexico was entitled to notice of subpoenas for deposition testimony and documents for use in foreign tribunal and to notice of deposition, after grant of ex parte application by unsuccessful bidder for permission to serve deposition and document subpoenas on a witness, for use in both a constitutional appeal in Mexico and a potential civil lawsuit in Mexico against successor; successor, which at latest was formed two days after filing of application, was an expected adverse party, and order granting application, consistent with statute under which subpoenas were issued, required discovery to be consistent with Federal Rules of Civil Procedure. In re Rivada Networks, E.D.Va.2017, 230 F.Supp.3d 467. Federal Civil Procedure 320; Federal Civil Procedure 331

Defendant in criminal proceedings begun in Hong Kong, alleging fraud and corruption in conducting bank's affairs, was entitled to notice of proceedings against him, and, thus, where defendant was denied opportunity to participate in depositions of bank representatives, United States Attorney and Attorney General of Hong Kong had to return deposition transcripts; Hong Kong Attorney General subjected himself to district court's jurisdiction by applying for orders to carry out discovery pursuant to letters of request. In re Letter of Request from Supreme Court of Hong Kong, S.D.N.Y.1991, 138 F.R.D. 27. Federal Civil Procedure 1312

60 ---- Presence of parties at proceedings, procedure for taking evidence

Target of French criminal investigation had no right to disclosure of documents submitted by juge d'instruction in seeking appointment of commissioner to aid in discovery, nor to be present at examinations of subpoenaed witnesses or to cross examine those witnesses. In re Letter of Request From Government of France, S.D.N.Y.1991, 139 F.R.D. 588. Federal Civil Procedure 1312

61 Protective orders

Protective order barring wife's use in separate United States suit under Racketeer Influenced and Corrupt Organizations Act (RICO) of evidence obtained in her miscellaneous proceeding under statute providing for assistance to foreign and international tribunals and to litigants before such tribunals, seeking to discover evidence in U.S. for use in Austrian divorce proceedings, was improper because order was required to be coextensively

limited with bounds of statute, and statute placed no such limits on use of evidence obtained in separate U.S. proceedings. Glock v. Glock, Inc., C.A.11 (Ga.) 2015, 797 F.3d 1002. Federal Civil Procedure 1312

Documents that were sent by Dutch client to law firm, even if sent to secure firm's legal advice, were not entitled to protection from disclosure by subpoena in action by third party against company which client had audited, to extent that client voluntarily authorized firm to send documents to Securities and Exchange Commission (SEC) during investigation into such audits. Ratliff v. Davis Polk & Wardwell, C.A.2 (N.Y.) 2003, 354 F.3d 165. Privileged Communications And Confidentiality 168

United States citizen from whom evidence was to be taken for possible use in British criminal proceedings pursuant to request of Crown Prosecution Service of United Kingdom was not entitled to protective order to guard against improper use of evidence in auxiliary or unrelated proceedings in the United States or abroad, but rather citizen was entitled to assert precise objection in the event that improper use of evidence threatened injury to him. In re Letter of Request from Crown Prosecution Service of United Kingdom, C.A.D.C.1989, 870 F.2d 686, 276 U.S.App.D.C. 272. Federal Civil Procedure 1312

Appointment of United States branch of specific accounting firm to perform valuation of husband's shares in Delaware corporation, in proceeding that wife initiated seeking domestic discovery in furtherance of Israeli divorce action, would not allow wife to circumvent protective orders previously entered by district court and Israeli court, even though Israeli court subsequently appointed all branches of firm worldwide to act as valuation expert in divorce action; firm's branch in United States, which Israeli court appointed solely to provide single-number valuation of corporation absent context or analysis, operated independently of other branches, and district court's protective order prohibited wife from accessing confidential documents corporation would supply to firm for valuation. In re Discovery From Glasstech Inc., D.Del.2021, 539 F.Supp.3d 330. Federal Civil Procedure 1312

A protective order, prohibiting unsuccessful bidder for government telecommunications contract in Mexico from using in Mexico courts, or publicly discussing, testimony from on-going deposition was not appropriate remedy for failure of unsuccessful bidder to provide winning bidder's successor with notice of subpoenas issued pursuant to unsuccessful bidder's ex parte application for assistance in obtaining evidence for use in foreign tribunal, and failure to provide notice of deposition; Mexican media entities were already aware of deposition testimony, and it would be inappropriate for District Court to dictate what Mexican federal court should do with a deposition transcript it already had. In re Rivada Networks, E.D.Va.2017, 230 F.Supp.3d 467. Federal Civil Procedure 1312

Although subpoena duces tecum issued upon company, in connection with a series of arbitrations before maritime arbitration association headquartered in England, requested documents containing confidential information, such as pricing, and covered contracts that contain confidentiality clauses, company's confidentiality concerns could be addressed by a protective order, and thus, these concerns were not severe enough to warrant quashing the subpoena, given that entity that sought and obtained the subpoena offered to narrow the scope of the subpoena and agree to a confidentiality stipulation or a protective order. In re Ex Parte Application of Kleimar N.V., S.D.N.Y.2016, 220 F.Supp.3d 517. Alternative Dispute Resolution 514

Subpoena compelling nonparty corporation to produce documents requested by Argentine court pursuant to letters rogatory would not be quashed on ground that compliance would force corporation to breach contract with Argentine Air Force and was threat to Argentine national security; Argentine court was capable of making such decisions and had done so, and appropriate response to corporation's concerns was protective order requiring that party seeking documents neither disclose nor publish them. In re Letters Rogatory Issued by Nat. Court of First Instance in Commercial Matters N. 23 of Federal Capital of Argentinean Republic, E.D.Pa.1992, 144 F.R.D. 272. Federal Civil Procedure 1353.1

62 Disclosure orders

Japanese murder suspects' remedy for fact that evidence against them was taken in violation of notice provisions of Federal Rules of Civil Procedure was district court order directing commissioners appointed pursuant to statute providing district court with authority to provide assistance to foreign and international tribunals and to litigants before such tribunals to provide copies of all witness statements, including affidavits, interviews, and depositions, and all documentary and physical evidence collected and still in commissioners' possession, to suspects. In re Letters Rogatory from Tokyo Dist. Prosecutor's Office, Tokyo, Japan, C.A.9 (Cal.) 1994, 16 F.3d 1016. Federal Civil Procedure 1312

Non-party parent corporation located in the United States was required to disclose non-privileged e-mails which were collected and stored pursuant to originally proposed search terms regarding related foreign proceeding concerning licenses and permits to explore natural gas deposits, even though it was more burdensome to produce e-mails following two-year delay and failure of party seeking e-mails to comply with court's discovery order, and absent evidence about how change in non-party's status in foreign case as a member of consortium allegedly accused of paying bribes impacted discovery rules in foreign country; non-party had not been served in foreign proceeding, and cost of reactivating data and reviewing e-mails would be paid by company seeking disclosure. RSM Production Corporation v. Noble Energy, Inc., S.D.Tex.2019, 357 F.Supp.3d 592. Federal Civil Procedure 1312

63 Reciprocal discovery

District court did not abuse its discretion in declining to order reciprocal discovery in former corporate officer's proceeding against shareholders and directors requesting discovery for use in Spanish litigation seeking to annul board of directors' decision terminating his and his brother's at-will employment agreements, even though information sought was relevant to parties' pending arbitration, where there was no evidence that request for discovery for Spanish litigation was merely ruse for obtaining evidence to use in arbitration. Sampedro v. Silver Point Capital, L.P., C.A.2 (Conn.) 2020, 958 F.3d 140. Federal Civil Procedure 1312

District court acted well within its statutory discretion in ordering reciprocal discovery between brother and sister for use in foreign proceedings to determine administrator of their brother's estate, absent any indication that district court's decision was at variance with purposes of statute, that it lacked reasonable basis, that order was overly burdensome or duplicative, or that foreign court had issued any pronouncement suggesting discovery order would trench upon foreign law or otherwise interfere with foreign proceedings. Application of Esses, C.A.2 (N.Y.) 1996, 101 F.3d 873. Federal Civil Procedure 1312

To extent that district court presented with petition to order discovery in aid of litigation in France was concerned that permitting requested discovery would allow requesting party to examine documents that it might not wish to use in court, which might be barred by French discovery rule, court was free to insist that requesting party submit any evidence it obtained in the United States to the French court regardless of whether the evidence helped or hindered it, and if district court wished to ensure procedural parity between requesting party and party from whom discovery was sought in the United States, which would be unable to gain access to analogous documents of the requesting party in Europe, district court could have conditioned relief on parties' reciprocal exchange of information. Euromepa S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1995, 51 F.3d 1095. Federal Civil Procedure 1312

District court did not err in denying application for reciprocal discovery, as it was a cursory, single-sentence request without any detailed description of the specific information sought. In re Application of Furstenberg Finance SAS, S.D.N.Y.2018, 334 F.Supp.3d 616, affirmed 785 Fed.Appx. 882, 2019 WL 4127332. Federal Civil Procedure 1271

64 Persons entitled to challenge order

District court's ex parte approval of application authorizing discovery by interested parties for use in foreign litigation was not immune from adversarial testing by reconsideration sought by opponents, and their only permissible response was not a motion to quash subpoenas for documents and testimony for use in Portuguese litigation arising out of bank insolvency; forbidding request for reconsideration of the merits after the ex parte discovery orders, while affording a respondent duly noticed about the same application a full arsenal of legal arguments, was an unfair and arbitrary result, and district court's refusal to reconsider invited gamesmanship and even more ex parte applications for discovery. Banca Pueyo SA v. Lone Star Fund IX (US), L.P., C.A.5 (Tex.) 2022, 55 F.4th 469. Federal Civil Procedure 1312

Biotechnology company that initiated opposition proceedings in European Patent Office and Japanese Patent Office disputing validity of competitor's European and Japanese patents had reasonable interest in obtaining judicial assistance in connection with those proceedings, and thus qualified as "interested person" eligible to apply for discovery in aid of foreign proceedings. Akebia Therapeutics, Inc. v. FibroGen, Inc., C.A.9 (Cal.) 2015, 793 F.3d 1108, 115 U.S.P.Q.2d 1864, mandate stayed 136 S.Ct. 1, 192 L.Ed.2d 994, stay denied 136 S.Ct. 24, 576 U.S. 1092, 192 L.Ed.2d 995. Federal Civil Procedure 1312

Plaintiffs in Ecuadorian class action against oil company had standing to bring appeal challenging district court's ruling that plaintiffs waived attorney-client privilege with respect to their attorney's communications regarding Ecuadorian class action, in oil company's action seeking discovery of communications for use in Ecuadorian class action, because plaintiffs were the clients to whom attorney-client privilege belonged. In re Chevron Corp., C.A.3 (Pa.) 2011, 650 F.3d 276. Federal Courts 3255

United States citizen, potential target in British criminal investigation, had standing to challenge district court order for the taking of evidence in aid of that criminal investigation pursuant to a letter rogatory from the Crown Prosecution Service of the United Kingdom, even though no evidence was sought from citizen. In re Letter of Request from Crown Prosecution Service of United Kingdom, C.A.D.C.1989, 870 F.2d 686, 276 U.S.App.D.C. 272. Federal Civil Procedure 1312

While Korean citizen, who was under investigation in Korea for violation of Korean currency laws, may no have had standing to challenge disclosure of records of his account with California bank on the basis of U.S.C.A. Const. Amends. 4 or 5, he had standing to challenge order granting request of Korean court for assistance in procuring the records; question was whether judicial assistance should have been granted under this section and request warrant stating that the records were sought in connection with pending criminal charges. In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, C.A.9 (Cal.) 1977, 555 F.2d 720. Federal Civil Procedure 1312

Defendant, who was subject of letters rogatory issued by Canadian prosecutor in attempt to obtain records from Detroit bank relative to defendant in Canadian prosecution, had standing to challenge district court's power to issue a subpoena duces tecum in response thereto on theory that court had acted in excess of terms of this section. In re Letter Rogatory from Justice Court, Dist. of Montreal, Canada, C.A.6 (Mich.) 1975, 523 F.2d 562. Federal Civil Procedure 1332

A foreign citizen aggrieved by an order under a provision allowing a district court to exercise authority to compel discovery pursuant to a letter rogatory issued by a foreign court had standing to oppose judicial assistance to foreign authorities under that provision. Application of Sumar, S.D.N.Y.1988, 123 F.R.D. 467. Federal Civil Procedure 1312

65 Participant in foreign proceeding

There was no fundamental unfairness caused by district court declining to compel production, pursuant to Government of Ghana's application for discovery pursuant to statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals, of settlement documents between Missouri companies and a contractor that Government of Ghana was suing in a foreign proceeding, and therefore any error in the district court's decision declining to compel production did not constitute reversible error; Missouri companies had already produced most of the documents, depositions, and interrogatory answers from its lawsuit with the Government of Ghana's contractor, and Missouri companies were not party to the foreign litigation. Government of Ghana v. ProEnergy Services, LLC, C.A.8 (Mo.) 2012, 677 F.3d 340. Federal Civil Procedure 1312; Federal Courts 3695

District court did not abuse its discretion in requiring plaintiffs in environmental damages action in Ecuador to turn over to oil company documents created by non-testifying environmental consultant and submitted to court-appointed damages expert, where consultant was not subject to Ecuadorian court's jurisdiction, expert apparently denied that he was in receipt of documents from consultant, arbitration panel hearing dispute did not have authority to order production, and Ecuadorian court had not definitively ruled on company's request. In re Chevron Corp., C.A.3 (N.J.) 2011, 633 F.3d 153. Federal Civil Procedure 1312

Law firm from which discovery was sought was not participant in foreign proceeding, favoring allowing applicant to obtain domestic discovery for use in international arbitration before the Dubai International Finance Centre-London Court of International Arbitration (DIFC-LCIA) under federal statute permitting domestic discovery for use in foreign proceedings; since law firm was not party in the foreign proceedings, there was no reason to be believe that it was within the jurisdictional reach of the DIFC-LCIA or even courts in the United Arab Emirates (UAE) that were empowered to assist the DIFC-LCIA when parties were defiant, which made the evidence, available in the United States, unobtainable absent grant of the application. Food Delivery Holding 12 S.a.r.l. v. DeWitty and Associates CHTD, D.D.C.2021, 2021 WL 1854343. Alternative Dispute Resolution 252

United States corporation was not involved in applicants' litigation in Uganda and Mauritius against corporation's Mauritian affiliate, which weighed in favor of granting applicants' request for discovery under statute permitting domestic discovery for use in foreign proceedings; while corporation asserted that seeking discovery from it was effectively equivalent to seeking discovery from affiliate, corporation and affiliate were distinct legal entities, nor was there any indication applicants were seeking to pierce corporate veil between corporation and affiliate. In re Barnwell Enterprises Ltd, D.D.C.2017, 265 F.Supp.3d 1. Federal Civil Procedure 1312

District court would not quash subpoena issued in response to former business owner's application for judicial assistance to litigant in foreign tribunal, seeking subpoena against interested party in sale of business assets; although interested party was not party to foreign action, business owner's ongoing criminal proceeding against buyer of assets qualified as foreign proceeding, business owner sought information regarding value of business that might contradict evidence produced by buyer in Argentina, and business owner argued that he and interested party worked collectively to limit breadth of discovery and that there was no expense to buyer associated with document production. Pott v. Icicle Seafoods, Inc., W.D.Wash.2013, 945 F.Supp.2d 1197. Federal Civil Procedure 1312

Statutory requirements were satisfied in connection with petition of Republic of Ecuador and its Attorney General for issuance of subpoena to environmental expert, who authored reports for oil company for use in bilateral investment treaty arbitration before United Nations Commission on International Trade Law (UNCITRAL) arbitral body, for taking of deposition and production of documents for use in foreign proceeding; expert was resident of district, discovery sought would be used before treaty arbitration pending at UNCITRAL tribunal, and petition was made by interested person as party to UNCITRAL proceeding. Republic of Ecuador v. Bjorkman, D.Colo.2011, 801 F.Supp.2d 1121, stay denied, affirmed 2011 WL 5439681. Alternative Dispute Resolution 514

Attorney from whom discovery was sought was not a party to, nor an attorney presently connected with, the underlying Ecuadorian civil and criminal proceedings, weighing in favor of allowing applicants, an American oil company and two employees of its Ecuadorian subsidiary, to obtain domestic discovery from the attorney for use in the Ecuadorian proceedings, pursuant to statute permitting domestic discovery for use in foreign proceedings. In re Application of Chevron Corp., D.Mass.2010, 762 F.Supp.2d 242. Federal Civil Procedure 1312

Putative father was a "participant," within meaning of statute governing requests for judicial assistance to foreign tribunals, in paternity action filed in a court in the Czech Republic, weighing in favor of granting that court's request for such assistance; since putative father had no connection to the Czech Republic other than the underlying paternity dispute, the foreign court would be unable to compel him to respond to its discovery requests without the District Court's assistance. In re Request for Judicial Assistance from the Dist. Court in Svitavy, Czech Republic, E.D.Va.2010, 748 F.Supp.2d 522. Federal Civil Procedure 1312

Person who had not had active role in subject proceeding in Republic of Ecuador for years, and even then only as counsel, was not participant in foreign proceeding, favoring allowing applicants to obtain domestic discovery for use in civil and criminal proceedings in Republic of Ecuador under federal statute permitting domestic discovery for use in foreign proceedings; although such person had represented that he would subject himself to jurisdiction of Ecuadorian courts upon properly lodged application for discovery in those courts, he had not done so. In re Veiga, D.D.C.2010, 746 F.Supp.2d 8, appeal dismissed 2010 WL 5140467, appeal dismissed 2011 WL 1765213. Federal Civil Procedure 1312

66 Final and appealable orders

District court's order, affirming magistrate judge's denial of patent owner's motion to compel accused infringer of patents related to biometric security to turn over documents for owner to use in potential infringement lawsuit in Germany against accused infringer's affiliate, was "final decision," as required for exercise of appellate jurisdiction to review district court's order; unlike ordinary discovery order that was only one step in ongoing federal case, once district court ruled on motion to compel discovery assistance to foreign tribunal, there was no further case or controversy for district court to resolve, as only relief sought by owner was court-ordered discovery. CPC Patent Technologies Pty Ltd. v. Apple, Inc., C.A.9 (Cal.) 2022, 34 F.4th 801. Patents 1955(1)

An order denying a motion to quash a subpoena is a "final," appealable order in proceedings brought under federal statute permitting domestic discovery for use in foreign proceedings, since once the district court has ruled on the parties' motions concerning the request, there is no further case or controversy before the district court, in that underlying case will necessarily be conducted in a foreign tribunal. Application of Furstenberg Finance SAS v. Litai Assets LLC, C.A.11 (Fla.) 2017, 877 F.3d 1031. Federal Courts 3305

In action where Mexican mining corporation sought discovery from Cayman Islands chartered company that had office in Dallas, Texas, for litigation pending in Mexico, company waived argument on appeal that District Court lacked subject matter jurisdiction to issue subpoena for service on company or to enforce subpoena after company

failed to respond; District Court had authority to rule on application for document production order and motion to compel, and company failed to timely file objections after service of subpoena. Grupo Mexico SAB de CV v. SAS Asset Recovery, Ltd., C.A.5 (Tex.) 2016, 821 F.3d 573. Federal Courts 3409; Federal Courts 3413

District court order partially granting foreign sovereign's motion to compel production of documents pursuant to statute authorizing district courts to compel production of documents for use in proceeding being conducted before foreign tribunal was final appealable order, even though magistrate judge had subsequently issued additional orders concerning same application, where district court never adopted magistrate judge's orders as its own. Republic of Ecuador v. For Issuance of a Subpoena Under 28 U.S.C. Sec. 1782(a), C.A.10 (Colo.) 2013, 735 F.3d 1179. Federal Courts 3305

District court's discovery order, directing creator of documentary film to produce all footage shot in making of documentary for use by oil corporation in civil litigation in Ecuador, and for use by oil corporation's attorneys in criminal prosecutions brought against them in Ecuador, was final adjudication of corporation's petition to take discovery in aid of foreign proceeding, and, thus, Court of Appeals had jurisdiction to review order, notwithstanding that suits in Ecuador remained unadjudicated. Chevron Corp. v. Berlinger, C.A.2 (N.Y.) 2011, 629 F.3d 297. Federal Courts 3305

District court's orders made pursuant to statute governing formal assistance to foreign criminal investigations are final and appealable. U.S. v. Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor General of the Russian Federation, C.A.9 (Wash.) 2000, 235 F.3d 1200. Federal Courts 3291

District court order granting request of Korean court for assistance in procuring from a California bank certain financial records relating to a Korean citizen under investigation in Korea for violating Korean currency laws was appealable; subpoena was directed against the bank, and not the subject of the investigation and bank was unlikely to suffer finding of contempt to protect the subject's rights. In re Request For Judicial Assistance from Seoul Dist. Criminal Court, Seoul, Korea, C.A.9 (Cal.) 1977, 555 F.2d 720. Federal Courts 3305

Although issue is more difficult than in case of order granting motion to vacate and quash subpoena issued pursuant to letters rogatory would be, order in aid of foreign letters rogatory is also appealable. In re Letters Rogatory Issued by Director of Inspection of Government of India, C.A.2 (N.Y.) 1967, 385 F.2d 1017. Federal Courts 3305

67 Stay pending appeal

In seeking stay pending appeal, seller of business units and seller's senior officers failed to establish likelihood that they would be irreparably injured absent stay of district court's order granting buyer, which sought to bring foreign arbitration proceeding, limited discovery under statute governing assistance to litigants before foreign and international tribunals, despite contention that should seller and officers prevail on appeal, arbitration proceeding would likely be complete and they would have no remedy for harm, where discovery that was granted was minimal and nonconfidential. Luxshare, Ltd. v. ZF Automotive US, Inc., C.A.6 (Mich.) 2021, 15 F.4th 780. Federal Courts 3463

Witnesses were not entitled to a stay pending appeal from denial of motion to quash subpoenas which were issued in response to letters rogatory from a Japanese court, where it appeared that the substantial likelihood of success on the merits was in favor of commissioner appointed by the district court, rather than the witnesses, imposition on witnesses in attending depositions was outweighed by Japanese government's request for expeditious treatment, and public policy, as reflected by a mutual assistance agreement entered into by the United States government, strongly favored denial of stay. In re Letters Rogatory from Tokyo Dist., Tokyo, Japan, C.A.9 (Cal.) 1976, 539 F.2d 1216. Federal Civil Procedure 1312

There was no good cause to justify stay of order granting Ecuador's application for subpoena to environmental expert, who authored reports for oil company for use in bilateral investment treaty arbitration before United Nations Commission on International Trade Law (UNCITRAL) arbitral body, for taking of deposition and production of documents for use in foreign proceeding; any "risk of conflict" with Treaty Arbitration Tribunal's supposed discovery order or proceedings was speculative since Tribunal had not yet ordered discovery, and movants failed to show how they would be harmed absent stay. Republic of Ecuador v. Bjorkman, D.Colo.2011, 801 F.Supp.2d 1121, stay denied, affirmed 2011 WL 5439681. Alternative Dispute Resolution 514

Documentary filmmaker was not entitled to a stay pending appeal of order issuing a subpoena requiring him to turn over the "outtakes" of his documentary film, which depicted events relating to a multi-billion dollar Ecuadorian litigation against oil company, the threatened criminal prosecution in Ecuador of two of its attorneys, and an international arbitration; there was reason to doubt the finality of the order appealed from and hence its appealability, even if there was appellate jurisdiction, filmmaker would not be likely to prevail on the merits, and the equitable factors on balance strongly favored the oil company. In re Application of Chevron Corp., S.D.N.Y.2010, 709 F.Supp.2d 283, corrected, for additional opinion, see 2010 WL 5621332, stay denied, affirmed 629 F.3d 297. Federal Courts 3463

Order granting foreign suit defendant's request for discovery would not be stayed pending appeal; need for discovery was immediate, and it was unlikely that subject of discovery order would succeed on appeal. In re Application of Procter & Gamble Co., E.D.Wis.2004, 334 F.Supp.2d 1112. Federal Courts 3463

68 Stay pending foreign proceedings

International comity factor for determining whether to stay discovery pending resolution of foreign proceedings weighed in favor of granting a stay in Brazilian bankruptcy trustee's proceeding for judicial assistance to allow discovery for use in a large-scale Brazilian bankruptcy, where Cayman Islands' interests in the action were subsumed within the Brazilian interests, and those Brazilian interests far outweighed the nebulous risk of harm to future United States requests for judicial assistance from Brazil. In re Application of Alves Braga, S.D.Fla.2011, 789 F.Supp.2d 1294. Action 69(5)

69 Preservation of issues

Patent attorney preserved for appellate review his arguments that, as party opposing discovery in aid of foreign litigation, non-profit medical research organization bore burden of establishing that foreign tribunal would not be receptive to discovery sought, and that district court erroneously inverted burden of proof and required the attorney to provide proof that the foreign tribunal would be receptive to the assistance of the court in obtaining discovery; attorney raised burden of proof argument in district court, both in his writings prior to hearing on his petition to obtain discovery for use in foreign proceeding, and at the hearing, and he sufficiently developed his legal standard argument by referencing other courts applying that same standard and by further characterizing his evidence as meeting that standard. In re Schlich, C.A.1 (Mass.) 2018, 893 F.3d 40. Federal Civil Procedure 1312

70 Standard of review

Appellate courts review a district court's decision on an application for discovery pursuant to statute allowing federal courts to provide assistance in gathering evidence for use in foreign tribunals for abuse of discretion. Government of Ghana v. ProEnergy Services, LLC, C.A.8 (Mo.) 2012, 677 F.3d 340. Federal Courts 3591

Court of Appeals reviews for abuse of discretion a district court's decision on a request for discovery for use in a foreign proceeding, however, if the district court misinterpreted or misapplied the law, or if the district court relied on inappropriate factors in the exercise of its discretion, the Court of Appeals' review is plenary. In re Chevron Corp., C.A.3 (Pa.) 2011, 650 F.3d 276. Federal Courts 3591

Review by Court of Appeals of district court's decision in case involving request for assistance made pursuant to statute giving district courts power to provide assistance to foreign courts is extremely limited and highly deferential; because Congress has given district courts broad discretion in granting judicial assistance to foreign countries, Court of Appeals may overturn district court's decision only for abuse of discretion, although review is de novo to the extent the district court's decision is based on an interpretation of law. United Kingdom v. U.S., C.A.11 (Fla.) 2001, 238 F.3d 1312, rehearing and rehearing en banc denied 253 F.3d 713, certiorari denied 122 S.Ct. 206, 534 U.S. 891, 151 L.Ed.2d 146. Criminal Law 1139; Criminal Law 1148

Order directing resident to comply with foreign or international tribunal's request for evidence made pursuant to Convention on the Taking of Evidence Abroad in Civil or Commercial Matters is reviewed for abuse of discretion. In re Letter of Request from Amtsgericht Ingolstadt, Federal Republic of Germany, C.A.4 (W.Va.) 1996, 82 F.3d 590. Federal Courts 3591

Decision as to whether to order discovery in aid of foreign litigation is reviewed for abuse of discretion, but fact that district court may or may not, in its discretion, order discovery does not mean that it is free to do so on inappropriate grounds. Euromepa S.A. v. R. Esmerian, Inc., C.A.2 (N.Y.) 1995, 51 F.3d 1095. Federal Courts 3591

Abuse of discretion is standard of review for determining whether district court can exercise its authority under statute allowing district court to order one before foreign and international tribunals to give testimony or statement or produce document for use in proceeding in foreign or international tribunal. In re Doe, C.A.2 (N.Y.) 1988, 860 F.2d 40. Federal Courts 3591

Application for discovery assistance in foreign proceeding was non-dispositive matter that properly was decided by magistrate in an order, rather than in report and recommendation, and therefore it was subject to review for clear error; application was ancillary by nature, ruling on such application was procedural and failed to address any substantive issues, and it did not dispose of underlying claims or defenses pending in foreign or international tribunal although ruling on such application might terminate matter before U.S. court. In re Hulley Enterprises Ltd., S.D.N.Y.2019, 400 F.Supp.3d 62. United States Magistrate Judges 145; United States Magistrate Judges 237(11)

District courts have broad discretion in granting judicial assistance in gathering evidence for use in foreign tribunals, and any review of the court's determination is extremely limited and highly deferential. In re Pimenta, S.D.Fla.2013, 942 F.Supp.2d 1282, adhered to 2013 WL 12157798. Federal Civil Procedure 1312; Federal Courts 3591

71 Moot issues

Appeal from district court's grant of application for discovery for use in foreign proceedings, in which attorney and naval architects sought return or destruction of documents, was not moot, and therefore appeal still presented case or controversy; even though foreign proceedings that formed basis for application became defunct, appeal challenged validity of grant, outcome of appeal implicated parties' respective rights to possess documents, and thus parties plainly retained legally cognizable interest in outcome of case. Mangouras v. Squire Patton Boggs, C.A.2 (N.Y.) 2020, 980 F.3d 88. Federal Courts 3515

Petition in which Japanese patent holder sought discovery from its American competitor for use in invalidity proceeding before Japanese Patent Office (JPO) did not relate to discovery for use in a proceeding before a foreign tribunal, and thus, appeals from order granting petition in part were moot, where JPO had conducted evidentiary hearing on merits during pendency of appeals; requested discovery could not be introduced in JPO proceeding, and possibility that a new invalidity proceeding would be brought would not be considered, since petition had not been based on need for discovery in any such proceeding. In re Ishihara Chemical Co., C.A.2 (N.Y.) 2001, 251 F.3d 120, 58 U.S.P.Q.2d 1907. Federal Courts 3515

72 Costs

Civil contempt order based on American company's bad faith was warranted with respect to its actions in response to application, under statute permitting domestic discovery for use in foreign proceedings, in which ex-wife, during Russian proceeding to divide marital assets, sought information with respect to related Bahamian trust companies that ex-husband purportedly owned, where American company was afforded ample opportunity to show cause why it should not be held in contempt and sanctioned in face of clear and convincing evidence of violations of court's many orders, which violations complemented discovery-avoidance efforts in other jurisdictions, and American company failed to demonstrate that it made all reasonable efforts to comply in good faith with court's orders. Sergeeva v. Tripleton International Limited, C.A.11 (Ga.) 2016, 834 F.3d 1194. Federal Civil Procedure 1312

Petitioner was not entitled to attorney fees incurred in bringing motion to compel discovery authorized in district court's prior order, under federal statute permitting domestic discovery for use in a foreign proceeding, allowing discovery for use in an arbitration proceeding petitioner intended to initiate against respondent in Germany, even though respondent did not comply with order, where respondent had informed petitioner soon after order's issuance that it intended to appeal and seek stay, and there was some legal basis for doing so given that the Supreme Court had granted certiorari in a case raising the issue of whether the statute could be used to seek discovery for use in private foreign arbitration, the very purpose for which petitioner sought discovery. Luxshare, LTD. v. ZF Automotive US, Inc., E.D.Mich.2021, 555 F.Supp.3d 510, stay granted 142 S.Ct. 416, 211 L.Ed.2d 242, certiorari granted before judgment 142 S.Ct. 637, 211 L.Ed.2d 397, reversed 142 S.Ct. 2078, 213 L.Ed.2d 163. Alternative Dispute Resolution 252

Saudi Arabian corporation was required to pay 100% of costs related to discovery of financial records related to allegedly fraudulent monetary transfers from New York banks under federal statute permitting domestic discovery for use in foreign proceedings based on substantial burden discovery request placed on banks; corporation's discovery requests were defined very broadly, corporation requested records over an 11-year time period, and one respondent bank had ceased banking activity and had date responsive to requests only on legacy computer systems that were no longer maintained. Ahmad Hamad Algosaibi & Bros. Co. v. Standard Chartered Intern. (USA) Ltd., S.D.N.Y.2011, 785 F.Supp.2d 434. Federal Civil Procedure 1312

73 Remand

Appropriate remedy for district court's abuse of discretion was to vacate its order quashing subpoenas under statute providing for domestic discovery assistance for use in proceeding in foreign or international tribunal, and remand for further consideration consistent with ruling that Nigeria's application could not be considered attempt to “circumvent” Mutual Legal Assistance Treaty (MLAT) and Nigeria was within its rights to use any evidence it might uncover pursuant to application in English proceeding where Nigeria challenged arbitration award in favor of minority shareholder of entity under criminal investigation, rather than reversal, since court still could conclude that Nigeria's discovery requests were sufficiently burdensome to warrant denial, or more likely limitation, of

application. Federal Republic of Nigeria v. VR Advisory Services, Ltd., C.A.2 (N.Y.) 2022, 27 F.4th 136, on remand 2022 WL 17593181. Federal Courts 3785

28 U.S.C.A. § 1782, 28 USCA § 1782

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28 U.S.C. § 1782 and the Evolution of International Judicial Assistance in United States Courts

By Michael Campion Miller, Alejandro G. Rosenberg, and Michael Stoll

Over the past 65 years, under the auspices of 28 U.S.C. § 1782, American courts have become increasingly willing to allow foreign litigants to seek discovery within the United States for use abroad. This trend represents a marked shift from the earliest days of the republic, when the process for obtaining discovery within the United States was too fraught with procedural and practical hurdles to contemplate.

"Then": International Judicial Assistance Over the Years

1780–1854: International Judicial Assistance Permitted But Not Practiced

Around the time of the American Revolution, English and American courts recognized two means by which foreign litigants could seek to obtain evidence in the United States for use abroad: letters rogatory and commissions. A letter rogatory, or letter of request, was and remains today a letter from one court to another seeking that court's official assistance. If the request was granted, the court appointed a commissioner to obtain the evidence sought by the requester. Although recognized as legitimate means for pursuing evidence for use abroad, letters rogatory and commissions do not appear to have received actual judicial assistance with any regularity. In fact, searches have returned no reported cases in which a U.S. court responded to foreign letters rogatory or otherwise assisted a foreign commissioner.[1] Nevertheless, case law indicates that U.S. courts believed that they could exercise this power "for the purpose of aiding in the administration of justice."[2]

The absence of a clear judicial track record for letters rogatory in these early years does not come as much of a surprise, however. For instance, imagine what a London merchant in 1785 would have to do to depose a former clerk who had moved to Philadelphia. How would the London merchant even find local counsel to assist with the case? Even if the merchant could find local counsel, conducting this process via letter and sailboat would take months, at least, and probably prove far too time-consuming a task to undertake.

1855: A Failed Attempt to Provide Judicial Assistance

In 1855, the attorney general of the United States issued an opinion concluding that U.S. courts lacked statutory authority to execute letters rogatory submitted by foreign government officials.[3] To remedy this, later that year, Congress enacted a statute granting federal courts the authority to execute letters rogatory by appointing commissioners to compel witnesses to testify "in the same manner" as they testify in federal court.[4] But in a comedy of errors that would make today's Congress blush, a series of indexing mishaps resulted in the act literally becoming lost and accordingly disregarded by the federal courts.[5]

1863–1948: The "Lost Years" of U.S. Discovery in Aid of Foreign Cases

In 1863, apparently unaware of the act that it had just passed—and perhaps more focused on pressing domestic matters—Congress enacted another statute governing discovery requests from foreign courts. The act passed in 1863 significantly curtailed the availability of discovery assistance for foreign cases. Perhaps as a thinly veiled message to countries offering support for the Confederacy, the 1863 act allowed federal courts to execute letters rogatory only if the United States and the foreign country for which discovery was sought were "at peace." The 1863 act also provided that the foreign government must be a party to or have an "interest" in the case for which discovery was requested. Assistance in obtaining discovery was also limited to actions for the "recovery of money or property." Over the next 75 years, federal courts generally denied requests for discovery for use abroad, citing the statute's limits. Again, no reported federal case exists in which discovery was permitted.[6]

1948–1958: The Birth of 28 U.S.C ∫ 1782

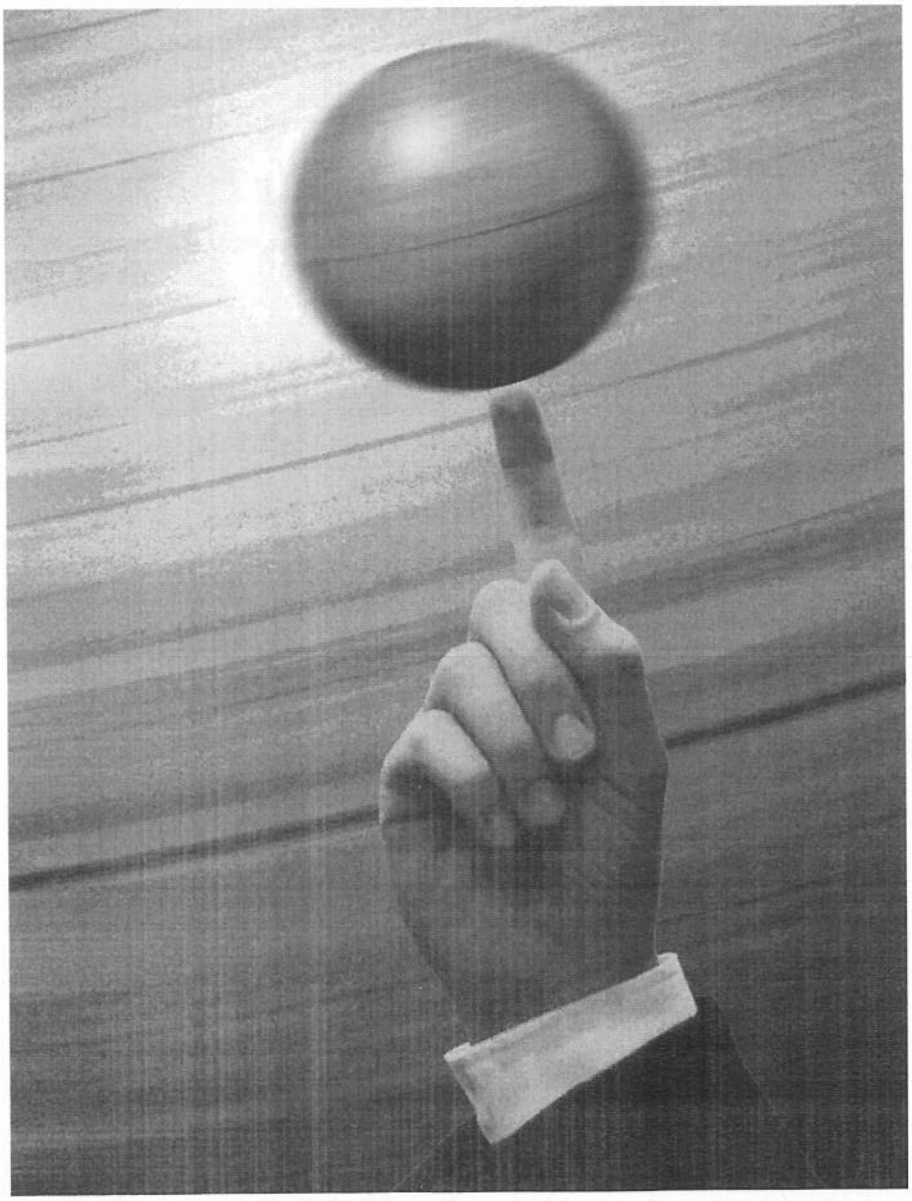
In 1948, while reviewing the federal judicial code, Congress stumbled upon the act that had been passed—and misplaced—in 1855. Perhaps inspired by the spirit of globalization and international cooperation that prevailed after World War II—construction of the United Nations building in Manhattan was scheduled to start the following

year—Congress re-adopted the more generalized approach of the 1855 act and rejected the constraints placed on judicial assistance by the 1863 act.

The re-adoption, codified in 28 U.S.C. § 1782, allowed for the deposition of any witness residing in the United States to be used in any civil action in a foreign country's court, provided that the United States was at peace with the foreign country. Thus, Congress extended federal judicial assistance while removing some previous limitations on the foreign country's relationship to the matter.[7]

Then, in 1949, Congress replaced the term "civil action" with the phrase "judicial proceeding" and removed the word "residing" from the statute. The situation in 1949 thus allowed federal courts to compel witness testimony of any witness located, even temporarily, in the United States to be used in pending foreign judicial proceedings so long as the foreign country was "at peace" with the United States.[8]

In the ensuing 15 years, federal courts began to open their doors and provide discovery assistance, but some viewed § 1782 as too narrow to allow for genuine assistance.[9] In 1958, Congress undertook efforts to restructure the statute in a way that would allow it to better meet modern commercial needs; the result was that the statute took its modern form.



1964: The Emergence of Modern § 1782

After six years of study, a congressional commission proposed a complete revision of the nascent 28 U.S.C. § 1782 in order to promote "[w]ide judicial assistance ... on a wholly unilateral basis" and to provide "equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[10] Congress passed the revised statute in 1964.

As amended, § 1782 provided that, upon request by "a foreign or international tribunal or upon the application of any interested person," federal district courts "may order" the production of documents or testimony "for use in a proceeding in a foreign or international tribunal."[11] The revision deleted language limiting assistance to nations that are at peace with ours and substituted the word "tribunal" for the word "court" to ensure that "assistance is not confined to proceedings before conventional courts" but also extends to "administrative and quasi-judicial proceedings all over the world." This change was the result of an important and prescient recognition by Congress that the staging areas for international litigations were in the process of moving beyond the courthouse.

Section 1782 stood until 1996, when it was modified to allow for its use in criminal investigations conducted before a formal accusation was made in court.

"Now": 28 U.S.C. § 1782 and the Great Leap Forward

One of Congress' primary goals in overhauling 28 U.S.C. § 1782 was to encourage foreign countries to adjust their procedures to match ours. Despite this noble intent, Congress' vision of U.S. litigants getting discovery assistance from foreign tribunals is still closer to an ideal than to a reality.[12] But, increasingly, thanks to a progressive and still-evolving body of federal case law, Congress' goal of employing fair and effective procedures for foreign litigants seeking U.S. discovery has come to fruition—a sharp change from previous laws that were no more than useless appendages to the federal code. Foreign litigants and other "interested persons" are now better positioned than ever before to get U.S. discovery assistance from the federal courts, and, for the first time, U.S. practitioners have the opportunity to lend their international clients meaningful assistance in obtaining discovery.

The Favorable Statutory Language of § 1782

Modern-day applicants for U.S. discovery have two primary advantages over their

predecessors: the plain language language in § 1782 and its liberal construction.

Section 1782, as amended, sets a very modest threshold for obtaining U.S. discovery assistance. In order to qualify, a requesting party need only meet three basic statutory requirements:

- The person or entity from whom discovery is sought must either "reside" or be "found in" the judicial district where the request is directed.
- The discovery must be "for use in a proceeding in a foreign or international tribunal."
- The applicant must either be a "foreign or international tribunal" or qualify as an "interested person."[13]

Provided these conditions are met, a district court is authorized—but not required—to order discovery.[14]

Section 1782, as amended, also allows foreign litigants to avail themselves of a more democratic process for seeking judicial assistance. Foreign or international tribunals may still pursue judicial assistance through conventional diplomatic channels.[15] But in a stark departure from historical precedent, under the current section, "any interested person" has the right to make direct application for discovery to the district court where the evidence is believed to reside without resort to letters rogatory, treaty provisions, or other appeals to a foreign tribunal.

The categories of discovery available under the statute are also quite broad, in keeping with the Federal Rules of Civil Procedure, which serve as the default procedural rules.

Liberal Construction of § 1782

The second edge possessed by the modern-day applicant for U.S. discovery is the emergence of a body of federal jurisprudence that is highly conducive to international requests for judicial assistance. The Supreme Court case of *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241 (2004), is the leading case involving § 1782 and the case that is most singularly responsible for the great leap forward in American responsiveness to international requests for judicial assistance.

Intel centered on a dispute between archrivals in the microprocessor business: Advanced Micro Devices (AMD) and Intel Corp. AMD filed a complaint with the European Commission's Directorate-General for Competition (DG-Competition), the European Union's primary enforcer of antitrust regulations, alleging that Intel monopolized the market in Windows®-capable microprocessors. To prove the violation, AMD asked the DG-Competition to seek discovery of some 600,000 pages of documents produced by Intel in the course of a private antitrust action in Alabama. When the DG-Competition refused to request discovery, AMD made an independent application to the U.S. District Court for the Northern District of California—where both Intel and AMD are headquartered—for its assistance in obtaining the discovery AMD was seeking. The district court initially rejected AMD's request, but the Ninth Circuit reversed, and certiorari was granted.

In a 7-1 majority opinion authored by Justice Ruth Bader Ginsburg, the U.S. Supreme Court remanded the case back to the district court and, in so doing, equipped federal courts with a new set of discretionary factors to guide the application of § 1782.[16] But, more important from the standpoint of foreign litigants seeking U.S. discovery, the Court made several pronouncements that considerably widened the availability of international discovery assistance under § 1782:

- The Court refused the invitation of some circuit judges to graft onto § 1782 a "foreign-discoverability requirement"—a requirement that any discovery pursued by a foreign litigant or other interested person be discoverable under the laws of the foreign jurisdiction. "While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases," the Court explained, "they do not permit our insertion of a generally-applicable foreign-discoverability rule into the text of § 1782."
- The Court interpreted § 1782 so broadly that Advanced Micro Devices—the complainant that instigated the European Commission's investigation of Intel—was deemed to be an "interested person" within the meaning of § 1782, although not yet a "litigant" in any foreign proceeding. And the European Commission was deemed a "tribunal," even though AMD's complaint had yet to progress beyond the investigative stage.
- The Court rejected the view that § 1782 applies only to "pending" or "imminent" proceedings in favor of the more charitable view, previously espoused by Justice Ginsburg on the D.C. Circuit, that adjudicative proceedings need only be "within reasonable contemplation."[17]

Other, lesser known developments in case law have only added to the utility of § 1782 for foreign litigants.[18] Federal courts, including the Supreme Court, have flatly rejected, as contrary to congressional intent, a reciprocity requirement that would condition § 1782 discovery on whether the requesting tribunal would honor a reciprocal request from a U.S. court.[19] Nor does a foreign litigant seeking § 1782 discovery need to exhaust all available remedies in the foreign jurisdiction before seeking relief under § 1782.[20] And, in the wake of the *Intel* decision, some district courts have held that judicial assistance under § 1782 extends to nonjudicial arbitral bodies and their participants.[21] Finally, district courts regularly grant ex parte applications for discovery, dispensing with the notice requirements that have traditionally been a bedrock principle of the Federal Rules of Civil Procedure.[22]

Conclusion

For years, the process of seeking discovery in the United States for use in foreign proceedings was like flinging a message in a bottle into the ocean and hoping it would wash up on American shores. Those days are history. Congress and the federal courts have collaborated to create a useful mechanism for obtaining U.S. discovery for use abroad in the form of 28 U.S.C. § 1782. With a

knowledgeable federal practitioner and a reasonable window of time to allow judicial processes to unfold, foreign litigants can expect more help from U.S. courts than ever before. **TFL**

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Endnotes

[1]*See* Walter B. Stahr, *Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings*, 30 VA. J. INT'L L. 597, 600 (1989).

[2]*McKenzie's Case*, 2 PARSON'S SELECTED EQUITY CASES 227, 228 (Pa. Ct. Com. Pl. 1843).

[3]*See* 7 OP. ATT'Y GEN. 56 (1855); Brief for the United States as Amicus Curiae Supporting Affirmance in *Intel*, 124 S. Ct. 2466 (2004), 2004 WL 214306 at *3.

[4]*See* Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630.

[5]Stahr, *supra* note 1 at 601; Harry L. Jones, *International Judicial Assistance, Procedural Chaos and a Program for Reform*, 62 YALE L.J. 515, 540 (1953).

[6]Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769. *See* Stahr, *supra* note 1 at 602; Jones, *supra* note 5 at 540–541.

[7]Act of June 25, 1948, Pub. L. No. 80-773, ch. 646 § 1782, 62 Stat. 949.

[8]Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103.

[9]*See, e.g.*, Jones, *supra* note 5 at 516.

[10]See Stahr, *supra* note 1 at 604 (citing Commission on International Rules of Judicial Procedure, *Fourth Annual Report to the President for Transmission to Congress*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 19 (1963)).

[11]*See* Act of Oct. 3, 1964, § 9(a), 78 Stat. 997; Senate Report No. 1580, 88th Cong., 2d Sess. 7–8 (1964).

[12]*See, e.g.*, Marat A. Massen, Note, *Discovery for Foreign Proceedings After* Intel v. Advanced Micro Devices: *Critical Analysis of 28 U.S.C. § 1782 Jurisprudence*, 83 S. CAL. L. REV. 875, 885 (2010) ("The perceived intrusiveness of American discovery has led civil law nations to enact blocking statutes or other legal obstacles to American encroachment on their legal systems.").

[13]28 U.S.C. § 1782.

[14]*Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 247 (2004); *see also Esses v. Hanania*, 101 F.3d 873, 876 (2d Cir. 1996).

[15]There is, as practitioners know, another method for obtaining discovery to assist foreign litigation: the Hague Convention on the Taking of Evidence in Civil or Commercial Matters, 23 U.S.T. 2555,T.I.A.S. No. 7444, 847 U.N.T.S. 231. Under the Hague Evidence Convention, the U.S. Department of State and the U.S. Department of Justice receive and transmit letters of request to the courts. MOORE'S FEDERAL PRACTICE § 28.12. But the process is notoriously inefficient and "may take six months to a year, if not longer." MOORE'S FEDERAL PRACTICE § 28.12; *see* Anand S. Patel, *International Judicial Assistance: An Analysis of* Intel v. AMD *and its Affect on § 1782 Discovery Assistance*, 18 FLA. J. INT'L L. 301, 303 (2006) ("Section 1782 generally provides a far less cumbersome procedure for obtaining discovery assistance than other available foreign tools."). It is also only available to litigants in signatory countries.

[16]The *Intel* Court articulated four discretionary factors to guide district courts in their analyses of § 1782 requests: (1) whether the persons from whom discovery is sought are participants in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign entity to judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the requested information is unduly burdensome or intrusive. *See Intel*, 542 U.S. at 264.

[17]*Id.* at 253, 256–263.

[18]Section 1782 discovery may be confined to documents and testimony in the United States. *Compare In re Godfrey*, 526 F. Supp. 2d 417, 423 (S.D.N.Y. 2007) (legislative history supports conclusion that § 1782 was intended to aid in "obtaining oral and documentary evidence in the United States"), with *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, 2006 WL 3844464, at *8 (S.D.N.Y. Dec. 29, 2006) (ordering a U.S. company to turn over documents under its control but physically located in Germany).

[19]*See John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985) ("[T]he unilateral character [of § 1782] does not require reciprocity as a predicate to the grant of a discovery order."); *Societé Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 529–530 (1987).

[20]*See, e.g., Euromepa S.A. v. R. Esmerian Inc.*, 51 F.3d 1095, 1098 (2d Cir. 1995); *In re Malev*, 964 F.2d 97, 100 (2d Cir. 1992).

[21]*See In re Oxus Gold PLC*, 2006 WL 2927615 (D.N.J. Oct. 11, 2006); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

[22]*See, e.g., In re Imanagement Svcs. Ltd.*, 2005 WL 1959702, at *1 (E.D.N.Y. Aug. 16, 2005).

Obtaining International Discovery in Family Law Matters

by
Anne L. Berger and Patricia A. Cooper*

Introduction

This article is intended to provide practical assistance to family lawyers in the various U.S. jurisdictions who either need to obtain discovery from non-U.S. sources for use in pending U.S. jurisdiction cases or who are assisting practitioners in non-U.S. jurisdictions to obtain discovery from U.S. sources for use in foreign cases.

There exists a striking difference between what assistance U.S. courts are able give to foreign litigants and what assistance non-U.S. courts will give to U.S. litigants in furtherance of discovery requests. In both cases, the availability of international treaties, federal statutes, state and interstate statutes, and in some cases available rules of domestic relations procedure will be examined and discussed. Part I of this article addresses discovery requests from foreign jurisdictions. Part II explores the reverse: discovery requests from cases originating in the United States directed to entities in foreign jurisdictions.

I. Incoming Discovery Requests from Non-U.S. Jurisdictions

There are three possible avenues to assist the parties litigating in foreign jurisdictions to obtain discovery from

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persons and entities located in the United States and its Territories and Possessions:

1. Use of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Hague Evidence Convention")[1];
2. Application of 28 U.S.C. § 1782[2]; and
3. Application of various state statutes where they exist.

A. *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*

On March 18, 1970 at the Hague, Netherlands, the Eleventh Session of the Hague Conference on Private International Law adopted a new convention which replaced portions of two earlier Conventions on civil procedure.[3] The "new" convention allows a judicial authority (judge or court or administrative agency) to send a letter of request to the authority of a responding State to facilitate the procurement of evidence or to facilitate the performance of a judicial act for a proceeding taking place in the requesting jurisdiction.[4]

Parties to a judicial action in any of the countries signatory to the Convention may ask the judicial authority (tribunal) handling their case to send the letter of request, specifying what documents or evidence it wants to adjudicate the matter before it. Every signatory has to designate a Central Authority to emit and to receive letters of request and all outgoing and incoming Letters of Request may only go through and between those two Central Authorities.[5]

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1 Hague Conf. on Private Int'l L., Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, ch. 1, art. 1, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, https://www.hcch.net/en/instruments/conventions/full-text/?cid=82

2 28 U.S.C. § 1782 (2022).

3 Hague Conf. on Private Int'l L., Convention on Civil Procedure arts. 8-16, Mar. 1, 1954, 286 U.N.T.S. 265, http:// www.hcch.net/upload/conventions/txt02en.pdf.

4 However, "[a] Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated. The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures." Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, ch. 1, art. 1.

5 *Id.* art 2.

B. *U.S. Federal Statutes*

Under 28 U.S.C § 1782 litigants with a matter pending in a non-U.S. jurisdiction may pursue discovery from a witness located in the United States by petitioning the federal district court where a witness located in the United States resides through a letter of request for issuance of an appointment to take testimony and obtain documents for use in a proceeding in a foreign country.[6]

Section 1782 is the product of congressional efforts, over the span of nearly one hundred and fifty years, to provide federal court assistance to gathering evidence for use in foreign tribunals.[7]

> The goals of the statute, which dates back to 1855, are to provide equitable and efficacious discovery procedures in United States Courts for the benefit of tribunals and litigants involved in litigation with international aspects and to encourage foreign countries by example to provide similar means of assistance to our courts.[8]

The general trend over many years has been to increasingly broaden the application of the statute. A 1996 amendment, for example, added "criminal investigations conducted before formal accusations" to the large range of civil actions and proceedings previously covered.[9]

The determination whether to grant a request under § 1782 requires an examination of four discretionary factors:

1. Whether the material sought is within the foreign tribunal's jurisdictional reach;
2. The nature of the foreign tribunal, the character of the proceedings abroad, and the receptivity of the foreign court to U.S. federal-court jurisdictional assistance;
3. Whether the § 1782 (a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies; and
4. Whether the request is unduly intrusive or burdensome.[10]

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6 28 U.S.C. § 1782 (2023).

7 See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004), and its progeny. *See also In re* Syngenta Crop Protection AG, C.A. No. 21-mc-375 CFC, 2022 WL 1690832, at *1 (D. Del. May 26, 2022).

8 Tony Abdollahi, *The Hague Convention: A Medium for International Discovery*, 40 N.C.J. Int'l L. 771 (2015).

9 28 U.S.C. § 1782.

10 *Intel Corp.*, 542 U.S. at 264-65.

Moreover, a foreign litigant may proceed under § 1782, or the Hague Convention, or both.[11] The decision of how to seek discovery lies with the party seeking the discovery and § 1782 has no exhaustion requirement.[12]

The procedure employed in federal district courts is the filing of an Ex Parte Application for an Order to Conduct Discovery for Use in a Foreign Proceeding Pursuant to U.S.C. § 1782. Once the court enters an order, the applicant may then serve subpoenas and notice depositions as in domestic litigation and the Federal Rules of Civil Procedure apply. If a subpoena is served, either for the production of documents or for testimony at a deposition or hearing, Federal Rule 45(d)(2)(B) requires a party objecting to a subpoena to serve objections "before the earlier of the time specified for compliance or 14 days after the subpoena is served."[13] If no objection is served, any objection is generally deemed waived.

The evidence sought through § 1782 discovery need not necessarily be admissible in the foreign proceeding.[14] And it need not necessarily have to be discoverable under the foreign law of the jurisdiction in which the case is pending.[15] In a Norwegian paternity case, for example, the court determined that it would not inquire into whether Norwegian laws would permit the ordering of blood samples in order to enter a U.S. order for discovery.[16] Moreover, federal discovery rules and precepts will generally preempt individual state rules regarding issues such as the right to privacy set forth in state constitutions.[17]

Since alternative dispute resolution, which takes many forms, has become ubiquitous in family law cases, and is often actively

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11 Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Kozeny, 115 F. Supp. 2d 1243 (D. Colo. 2000).

12 *See In re* Martin & Harris, Civil Action No. 20-17070, 2021 WL 2434069, at *5 (D. N.J. June 14, 2021).

13 Fed. R. Civ. P. 45(d)(2)(B).

14 *In re* Barnwell Enter. Ltd., 265 F. Supp. 3d 1, 10-11(D.D.C. 2017). The burden appears to be on the party resisting discovery to point to authoritative proof that the foreign tribunal would reject the evidence sought. *In re* Veiga, 746 F. Supp. 2d 8, 23-24 (D.D.C. 2010).

15 *Intel Corp*., 542 U.S. at 264.

16 *In re* Letter Rogatory from Nedones Dist. Ct. of Norway, 216 F.R.D. 277 (S.D.N.Y. 2003).

17 *In re* Letter of Request for Judicial Assistance from Tribunal Civil de Port au Prince, Republic of Haiti, 669 F. Supp. 403 (S.D. Fla. 1987).

encouraged by family law courts, two recent consolidated Supreme Court cases should be noted as a caution: *ZF Automotive US, Inc. v. Luxshare Ltd.*, and *Alixpartners, LLP v. Fund for the Protection of Investors' Rights in Foreign States*.[18] In these two consolidated cases decided in 2022, a unanimous Supreme Court held that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782.[19] Both cases involved forms of arbitration and the petitioners argued that the language of § 1782 permitting a district court to order discovery "for use in a proceeding in a foreign or international tribunal" allowed a definition of "tribunal" to include administrative and quasi-judicial proceedings.[20] The court disagreed and adopted a firm definition of tribunal to mean only "an adjudicative body that exercises governmental authority."[21] So § 1782 may only be used if there is an actual proceeding in a court or in a governmental administrative proceeding.

Older cases had permitted the inclusion of arbitration proceedings, such as one involving the Canadian Government under NAFTA (the North Atlantic Treaty Organization)[22] and one involving the Republic of Kazakhstan.[23] However, those discovery requests were upheld on the bases that Canada is a governmental entity and Kazakhstan is a sovereign nation and thus these cases involved non-private (governmental) applicants exercising governmental authority. It should be noted that notwithstanding *ZF Automotive,*[24] where a court proceeding is actually pending and the parties also agree to private arbitration while the action in court is still pending, the statute can be employed.[25]

There are limitations on the use of § 1782, and district courts have discretion to permit or deny requests for judicial assistance

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18 142 S. Ct. 2078 (2022).

19 *Id.* at 2089.

20 *Id.* at 2083.

21 *Id.* at 2086.

22 *In re* Application of Mesa Power Group, LLC, 878 F. Supp. 2d 1296 (S.D. Fla. 2012).

23 *In re* Republic of Kazakhstan for an Order Directing Discovery from Clyde & Co. LLP, 110 F. Supp. 3d 512 (S.D.N.Y. 2015).

24 142 S. Ct. 2078.

25 *In re* Atvo Agroindustrial Investimentos S.A., 481 F. Supp. 3d 166 (S.D.N.Y. 2020).

even if the statutory requirements have been met.[26] The Second Circuit Court of Appeals determined it was an abuse of discretion to grant a subpoena for documents from a law firm that the firm had obtained under a confidentiality order, because allowing such discovery would undermine confidence in protective orders generally. [27] And a U.S. court also refused to allow discovery that would have circumvented protective orders to access confidential corporate documents in an Israeli case.[28]

In a case where both German and Irish courts had previously rejected the petitioner's claims, the court determined that the petitioner was trying to circumvent foreign proof-gathering restrictions and denied relief.[29] In a French case, the court, although concerned that the documents produced might not be used in a court in France and might be barred by French evidence rules, held that the trial court could order as a condition that the applicant turn over all of the documents obtained to the French court, whether or not they were helpful or harmful to the applicant's case, and could also order reciprocal discovery for the respondent.[30]

A court proceeding does not actually have to be pending for discovery to be requested; however the contemplated court action has to be more than speculative to satisfy the statutory language "for use in a foreign proceeding or tribunal."[31] In other words, there must be a concrete basis for a contemplated civil proceeding.[32] And the filing itself must be "within reasonable contemplation."[33]

Where a litigant has deliberately failed, refused, or neglected to disclose assets or has concealed assets, the court can order relief even though a foreign court has denied a request to re-open discovery. In *Pons v. AMKE Registered Agents, LLC*, the Eleventh Circuit Court of Appeals granted an ex-wife's application for the discovery of foreign marital assets that she claimed her ex-husband

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26 Republic of Ecuador v. Bjorkman, 801 F. Supp. 2d 1121 (D. Colo. 2011); *In re* Application of Thai-Lao Lignite Co. Ltd., 821 F. Supp. 2d 289 (D.D.C. 2011).

27 Kiobel v. Cravath, Swaine & Moore LLP, 895 F. 3d 238 (2d Cir. 2018).

28 *In re* Discovery from Glasstech, Inc., 539 F. Supp. 3d 330 (D. Del. 2021).

29 Financialright GmbH v. Robert Bosch LLC, 294 F. Supp. 3d 721 (E.D. Mich. 2018).

30 Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).

31 *In re* Newbrook Shipping Corp., 498 F. Supp. 3d 807, 808 (D. Md. 2020).

32 *In re* Application of Shervin Pishevar, 439 F. Supp. 3d 290, 302 (S.D.N.Y. 2020).

33 *Mesa Power Group*, 878 F. Supp. 2d at 1303.

had concealed on the grounds that those U.S. assets were previously not known to her.[34]

The definition of "participant" in a pending proceeding is quite liberal. In the case of *In re Request for Judicial Assistance from the District Court in Svitavy, Czech Republic,* the federal district court for the Eastern District of Virginia held that a putative father was a "participant" in a paternity action even though he had absolutely no connection to the Czech Republic other than the paternity dispute.[35] Thus, the court allowed discovery to proceed.

C. *U.S. State Statutes and Rules*

In 1962 the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Interstate and International Procedure Act.[36] Versions of the uniform act were initially adopted by six jurisdictions: Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the U.S. Virgin Islands. The Massachusetts version of the Act is representative and is still in full force and effect. It was amended to exempt only the discovery of protected health care information. Massachusetts General Laws chapter 223A states, in part:

> A court of this commonwealth may order a person who is domiciled or is found within this commonwealth to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this commonwealth. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this commonwealth, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this commonwealth issuing the order.[37]

Protected health information is excluded from discovery.

But by 1977, the Uniform Interstate and International Procedure Act was withdrawn by the Commissioners as "obsolete."[38]

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34 835 Fed. Appx. 465 (11th Cir. 2020).

35 748 F. Supp. 2d 522 (E.D. Va. 2010).

36 Unif. Interstate & Int'l. Procedure Act (Unif. L. Comm'n 1962).

37 Mass. Gen. L. ch. 223A § 11 (2022).

38 Preamble to the adoption of the Unif. Interstate Depositions & Discovery Act preamble (Unif. L. Comm'n 1977).

The only United States jurisdictions that have not[39] either adopted versions of the Uniform Interstate Depositions and Discovery Act (UIDDA) or do not have legislation pending to adopt it are New Hampshire and Puerto Rico.[40] But that act does not directly address the ability of a state to order discovery for cases in foreign (non-U.S.) jurisdictions. One of the 1997 UIDDA's core requirements is that the "foreign state" issue a subpoena that the U.S. state court is then asked to enforce. And all of that receiving state's rules of practice and procedure then apply.[41] Therefore, optimally, use of either the Hague Convention or 28 U.S.C. § 1782 is safest and provides the broadest remedies in all but the few jurisdictions that have retained the earlier (1962) version.

II. Outgoing Discovery Requests from U.S. Jurisdictions to Non-U.S. Jurisdictions

Conducting discovery abroad in a matrimonial matter can be a complex, time-consuming, and costly proposition. Yet, when

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39 Enactment of versions of the UIDDA are currently pending in the legislatures of Massachusetts (MA H. 4327 and MA S. 939) and Missouri (MO H.B. 1886 and MO S.B. 897). Texas. On May 26, 2023 the Texas legislature enacted H.B. 3929 which took effect on September 1, 2023 allowing the Texas Supreme Court to implement a version of the UIDDA within the next 2 years. Unif. Interstate Depositions & Discovery Act (Unif. L. Comm'n 2007), https://my.uniformlaws.org/committees/community-home?CommunityKey=181202a2-172d-46a1-8dcc-cdb495621d35.

40 *Id*.

41 In the older UIIPA the procedure may be "wholly or in part the practice and procedure of the tribunal outside this commonwealth" at the discretion of the U.S. court. UIIPA Section 3.02(a) of the act provides: [A court][The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath. 1962 UIIPA promulgated by the National Council of Commissioners on Uniform State Laws.

evidence critical to a client's matter lies abroad, practitioners must understand and navigate the labyrinth of treaties and local rules that govern seeking evidence in a foreign country. In a typical domestic relations matter, state and local rules prescribe the form and content of permissible discovery, the required manner of service, and the timing of discovery. When discovery is sought in a foreign country, however, the law governing such discovery depends on the facts and circumstances of the case and involves considerations of international comity.[42] Family law practitioners are challenged with the task of determining whether familiar state discovery procedures or the Hague Evidence Convention apply and the extent to which the law of the foreign jurisdiction will impede or facilitate the discovery process.[43]

As a practical matter, evidence that is readily discoverable within the United States might be impossible or impractical to obtain abroad, and practitioners are advised to weigh the importance of the evidence sought against the time and costs involved. The time necessary to conduct international discovery varies, but generally, practitioners should expect the process to take much longer than the typical timeline for intra-state discovery. The U.S. State Department's foreign affairs manual estimates that processing and service of letters rogatory for obtaining evidence abroad may take six months to a year or more.[44] Family law practitioners must account for this additional time when conducting discovery involving a person or entity in a foreign country and should manage the scheduling of the case accordingly. When the need for foreign discovery becomes known, practitioners should consider promptly filing a motion or other request that discovery deadlines be extended to accommodate the time necessary to prepare, serve, and effectuate gathering evidence abroad. Many states' rules afford the trial court discretion to extend discovery deadlines for "good cause."[45]

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42 Comity is the concept that "the courts of one sovereign state should not, as a matter of sound international relations, require acts or forbearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified." Volkswagenwerk Aktiengesellschaft v. Super. Ct., 176 Cal. Rptr. 874, 884 (Cal. Ct. App. 1981).

43 *See, e.g.,* Abdollahi, *supra* note 8.

44 U.S. Dep't. of State, 7 Foreign Affairs Manual § 931.1c (2021).

45 *E.g.*, Colo. R. Civ. P. 6; Ill. R. S. Ct. r. 183; N.Y. Civ. Prac. Law & R. (McKinney 2023).

Arguably, the inherent and unavoidable delay resulting from the complex procedural requirements for conducting discovery abroad constitutes good cause for an extension of applicable deadlines.[46]

A. *International Discovery and the Hague Evidence Convention*

The Hague Evidence Convention[47] is a bilateral treaty based on the principle of comity. It was designed to reconcile the substantially different discovery procedures in common law countries and civil law countries[48] and to provide a uniform procedure for obtaining evidence located in a foreign country.[49] As discussed above in Part I, the Convention may be used by a civil litigant in a foreign country to obtain evidence located in the United States. Similarly, the Convention is an available method by which a divorce litigant in the United States may conduct discovery in a foreign signatory country.[50] Sixty-six countries are signatories to the Hague Evidence Convention.[51] When discovery is sought in a country that is not a signatory to the Convention, or when discovery under the procedures of the Convention is deemed inappropriate, discovery will normally proceed via letters rogatory, as discussed below in Part II.B.2.

Societe Nationale Industrielle Aerospatiale v. U.S. District Court[52] is the seminal U.S. Supreme Court opinion interpreting

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46 *Cf.* Arison v. Offer et al., 669 So.2d 1128, 1129 (Fla. Dist. Ct. App. 1996) (finding that dismissal was not required because the plaintiff showed good cause for failure to serve the defendant within the standard deadline because the defendant was served in a foreign country under a service treaty).

47 Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1.

48 See Geoffrey C. Hazard, Jr., *Discovery and the Role of the Judge in Civil Law Jurisdictions*, 73 Notre Dame L. Rev. 1017 (1998), for an in-depth discussion of the differences between common law and civil law systems in the conduct of discovery.

49 Philadelphia Gear Corp. v. Am. Pfauter Corp., 100 F.R.D. 58, 59 (E.D. Pa. 1983).

50 See Ved P. Nanda et al., 3 Litigation of International Disputes in U.S. Courts § 17:18 (2d ed. 2023), for a discussion of the mechanics of the Convention.

51 Hague Conference on Private International Law ("HCCH"), Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Nov. 4, 2023). Notably, Canada, Japan, and many countries of Central and South America are not signatories to the Hague Evidence Convention.

52 482 U.S. 522 (1987).

the Hague Evidence Convention and its application in domestic litigation involving international discovery. In *Aerospatiale*, the Supreme Court held that the Hague Evidence Convention is a permissible, but not exclusive or mandatory, mechanism for discovery abroad[53] in domestic litigation and that litigants need not first resort to the Convention before pursuing other methods of discovery.[54] The optional Hague Evidence Convention procedures are available when the foreign country in question is a signatory and use of the Convention "will facilitate the gathering of evidence by means authorized by the Convention."[55]

State and federal appellate courts have repeatedly recognized that the Hague Evidence Convention does not deprive the presiding court of its authority to permit and enforce discovery pursuant to domestic civil procedure rules when such discovery is propounded to a party over whom the court has personal jurisdiction.[56] Thus, when a trial court in a divorce matter has personal jurisdiction over a spouse located in a foreign country, the spouse who wishes

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53 *Id.* at 538.

54 *Id.* at 542.

55 *Id.* at 541.

56 *Id.* at 539-40 (noting that the Convention did not deprive a district court of jurisdiction to order a foreign national party to produce evidence physically located within the signatory nation); Daimler-Benz Aktiengesellschaft v. U.S. Dist. Ct. W. Dist. Okla., 805 F.2d 340, 341 (10th Cir. 1986) (stating that the Convention has no application to the production of evidence in the United States by a party subject to the court's jurisdiction); Belmont Textile Mach. Co. v. Superba, S.A., 48 F. Supp. 2d 521, 524 (W.D.N.C. 1999) (finding that the Convention does not deprive a trial court of jurisdiction to order a foreign party to produce evidence under the federal rules); Lowrance v. Michael Weinig, GmbH & Co., 107 F.R.D. 386, 388-89 (W.D. Tenn. 1985) (providing that the Convention does not apply to discovery directed to a foreign national party over whom the court has personal jurisdiction); *In re* Activision Blizzard, Inc., 86 A.3d 531, 543 (Del. Ch. 2014), citing *Aerospatiale*, 482 U.S. at 543–46 (stating that a state court has power to require foreign litigants to respond to discovery conducted under state court rules); American Home Assurance Co. v. Societe Commerciale Toutelectric, 128 Cal. Rptr. 2d 430, 446-47 (Cal. Ct. App. 2002) (noting that corporate defendants under a court's jurisdiction are subject to the same legal constraints and burdens of American judicial procedures as American competitors); Bank of Tokyo-Mitsubishi Ltd., N.Y. Branch v. Kvaerner, a.s., 671 N.Y.S.2d 902, 904-05 (N.Y. Sup. Ct. 1998) (holding that a party subject to the court's *in personam* jurisdiction is obligated to produce all appropriate discovery documents under control of its agent, wherever located, without resort to Convention procedures); *See also* Restatement (Third) of Foreign Relations Law of the United States § 442(1)(a)(1987).

to conduct discovery of the abroad spouse is generally free to proceed under traditional state discovery rules.[57] However, if the abroad spouse fails to cooperate in discovery, then the discovering party may choose to proceed under the Convention to obtain judicial assistance in the foreign country.[58]

While *Aerospatiale* makes clear that discovery under the Hague Evidence Convention is neither mandatory nor the default method of discovery when a signatory country is involved, trial courts must exercise "special vigilance" to protect foreign litigants from discovery abuses and must also, as comity demands, "demonstrate due respect" for sovereign interests and the special problems that foreign litigants might face in the discovery process because of their nationality.[59] In practice, this means that when a party in a family law matter propounds discovery on a foreign opposing party located in a signatory country using discovery methods provided by state law, and the foreign party objects to discovery by means other than the Convention, the trial court must consider: 1) the particular facts of the case, 2) the sovereign interests involved, and 3) the likelihood that procedures under the

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57 *See, e.g.,* Sandsend Fin. Consultants, Ltd. v. Wood, 743 S.W.2d 364 (Tex. Ct. App. 1988); *But see* Knight v. Ford Motor Co., 615 A.2d 297 (N.J. Super. Ct. Law Div. 1992) (requiring first the use of the Hague Evidence Convention for discovery of the defendant party); *see also* David Westin & Gary Born, *Applying the* Aerospatiale *Decision in State Court Proceedings*, 26 Colum. J. Transnat'l L. 297, 306-11 (1988) (opining that under *Aerospatiale*, states are not prohibited from imposing a first use of the Convention rule for reasons of judicial administration).

58 Article 10 of the Convention provides that: "In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings." Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, ch. 1, art. 10.

59 *Aerospatiale*, 482 U.S. at 545. For a discussion of a particular "special problem" that foreign litigants might face, see Vivian Grosswald Curran, *United States Discovery and Foreign Blocking Statutes*, 76 La. L. Rev. 1141 (2016), and Gary B. Born & Scott Hoin, *Comity and the Lower Courts: Post-*Aerospatiale *Applications of the Hague Evidence Convention*, 24 Int'l Law. 393, 395-96 n.12 (1990). Specifically, some countries have enacted "blocking statutes" which forbid compliance with United States style discovery and subject the foreign resident who complies with such discovery to penal sanctions. *See* M.J. Hoda, *The* Aérospatiale *Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 Cal. L. Rev. 231, 239 (2018).

Convention will be effective[60] to determine the reasonableness of various methods of discovery and whether Convention procedures should be followed.[61] Factors to be considered in the presiding court's analysis include, but are not limited to, the importance of the evidence sought to the litigation, the availability of alternative means of securing the information, and whether compliance with the request would undermine important interests of the United States or the foreign country.[62] The court undertakes the same analysis when determining, in the exercise of its authority to manage discovery, whether a party who wishes to conduct discovery pursuant to the Convention may do so, or if state discovery procedures are superior and should be utilized.[63] The burden of demonstrating the applicability of the Convention is on the party seeking discovery under the Convention or on the party seeking protection under the Convention, as the case may be.[64]

At least one state court has held that a party can waive its right to insist on discovery under the Hague Evidence Convention. In *American Home Assurance Co. v. Societe Commerciale Toutelectic*,[65] the California Court of Appeals held that a French defendant company waived its right to insist on adherence to Convention procedures, finding that its tactics in prior responses to discovery were inconsistent with Hague Convention procedures.[66] A party's neglect of its right to request application of the Convention must be substantial to support a finding of waiver as described in *American Home Assurance*.[67]

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60 When considering the likely effectiveness of the Convention as a discovery tool, practitioners must consider whether the country in question has issued a declaration under Article 23 of the Convention, which provides that: "A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries." Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, *supra* note 1, art. 23.

61 *Aerospatiale*, 482 U.S. at 544-45.

62 *Id.* at 544, n.28 (citing Restatement of Foreign Relations Law of the United States (Revised) § 437(1)(c) (Tent. Draft No. 7, 1986) (approved May 14, 1986)).

63 *See* Abdollahi, *supra* note 8, at 782-83.

64 *Id.* at 782.

65 128 Cal. Rptr. 2d 430 (Cal. Ct. App. 2002).

66 *Id.* at 434-35.

67 *Id.* at 430.

A limited number of state court appellate opinions have addressed the *Aerospatiale* factors and whether discovery may proceed under traditional state discovery rules or must proceed under the Hague Evidence Convention, and they do not involve evidence gathering in domestic relations. Rather, these cases primarily involve commercial litigation and efforts to obtain evidence abroad from a non-party.[68] Subject matter differences aside, these opinions recognize the fundamental distinction between discovery directed to a party in the case over whom the court has personal jurisdiction and discovery directed to a third party over whom the court lacks jurisdiction. Discovery of a party typically need not proceed under the Convention, while use of Convention procedures is "virtually compulsory" when discovery is sought from a foreign third party over whom the court does not have personal jurisdiction.[69]

Several countries have exercised the right, under Article 23 of the Convention, to refuse to execute Letters of Request for pre-trial discovery of documents,[70] which makes obtaining documentary evidence from a non-party witness in a Convention country nearly impossible. A party involved in a family law matter in the United States who resides in a foreign country might hope to benefit unfairly from that country's restrictive policy on pre-trial discovery from third parties such as employers or financial institutions. However, as courts of equity, divorce courts have broad authority to enter orders and grant remedies designed to prevent injustice to the aggrieved spouse.

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68 *See In re* Cote d'Azur Est. Corp., 286 A.3d 504 (Del. Ch. 2022) (discovery sought from a non-party); Matter of Est. of Agusta, 567 N.Y.S.2d 664 (N.Y. App. Div. 1991) (discovery sought from a non-party); Orlich v. Helm Bros., Inc., 560 N.Y.S.2d 10 (N.Y. App. Div. 1990) (discovery sought from a non-party); Ayyash v. Koleilat, 957 N.Y.S.2d 574 (N.Y. Sup. Ct. 2012) (discovery sought from a non-party); Intercontinental Credit Corp., Div. of Pan Am. Trade Dev. Corp. v. Roth, 595 N.Y.S.2d 602 (N.Y. Sup. Ct. 1991) (discovery sought from a non-party); *But see Activision Blizzard, Inc.*, 86 A.3d 531 (discovery sought from a party); Scarminach v. Goldwell GmbH, 531 N.Y.S.2d 188 (N.Y. Sup. Ct. 1988) (discovery sought from a party).

69 *Orlich*, 560 N.Y.S.2d at 14.

70 Convention of the Taking of Evidence Abroad in Civil or Commercial Matters, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

B. *Beyond the Hague Evidence Convention*

1. *State Discovery Rules*

Some domestic relations matters involving discovery of a foreign party or witness do not implicate the Hague Evidence Convention, such as when the foreign country is not a signatory to the Convention or when the court has determined that discovery may proceed outside of the Convention. In that event, when requests for production of documents or interrogatories are sought from a party in a foreign country over whom the court has personal jurisdiction, then state rules govern discovery as they would domestically, and the discovery may be propounded in the customary manner. Similarly, when the Convention does not apply, and a divorcing party wishes to depose the other spouse, state law often provides for taking the deposition on notice, without requiring personal service of a subpoena.[71]

2. *Letters Rogatory*

Many states have specific rules addressing depositions in a foreign country. They are often modeled on the federal rules and commonly provide that a deposition may be conducted on notice before an authorized person, by commission, or pursuant to letters rogatory.[72] Letters rogatory are the usual method for obtaining judicial assistance with discovery abroad when an international treaty does not apply. Letters rogatory are requests from courts in one country to the courts of another country requesting the performance of an act which, if done without the sanction of the foreign court, could constitute a violation of that country's sovereignty.[73] The letters rogatory process is complex and time-consuming, in part because letters

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71 *See, e.g.*, Colo. R. Civ. P. 30.

72 *E.g.*, Ga. Code Ann. § 9-11-28(b) (2023); La. Rev. Stat. Ann. § 13:3823 (2023); Ala. R. Civ. P. 28(b); Cal. C. Civ. P. § 2027.010; Colo. R. Civ. P. 28; Fla. R. Civ. P. 1.300(b); Mass. R. Civ. P. 28(b); Pa. R. Civ. P. 4015(b); Tex. R. Civ. P. 201.1; Vt. R. Civ. P. 28(b).

73 U.S. Dep't of State., Legal Resources, *Obtaining Evidence, Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Sept. 26, 2023).

rogatory must be transmitted through diplomatic channels in most circumstances.[74]

When a party wishes to depose someone over whom the court does not have personal jurisdiction, and the witness is located in a country that is not a signatory to the Hague Evidence Convention, then the deposition must be sought via letters rogatory, unless the witness voluntarily submits to the deposition. Even if a witness seems cooperative, it is prudent to utilize letters rogatory to secure the deposition if there is a chance that the witness might later become uncooperative, necessitating judicial assistance in the foreign country.

The U.S. Department of State offers useful guidance on the preparation and transmission of letters rogatory, including sample letters rogatory and information about fees associated with the letters rogatory process.[75] Importantly, the State Department also maintains country-specific information detailing whether a particular country is party to the Hague Evidence Convention and, if not, whether certain types of discovery are possible in that country via letters rogatory or whether discovery may not be had at all, even via letters rogatory.[76]

When a country is not party to the Hague Evidence Convention, before proceeding with letters rogatory, practitioners should thoroughly research that country and consult with local counsel as necessary to determine whether the anticipated letters rogatory are likely to be honored, and, if not, whether there are any other means by which desired evidence might be discoverable within that country. For example, Chile is not party to the Convention and reportedly will not execute on letters rogatory for a deposition, even if the witness to be deposed is willing to submit

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74 *See, e.g.,* T. Andrew Keating, *Transmitting Rule 4(d)(2)'s Cost-Shifting Provisions Abroad*, 67 Wayne L. Rev. 401, 410 (2022) ("The U.S. State Department also advises against using letters rogatory, describing the procedure as a 'time consuming, cumbersome process' that 'need not be utilized unless there are no other options available.'").

75 *Id.*

76 U.S. Dep't of State, Legal Resources, *Judicial Assistance Country Information*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information.html (last visited Sept. 26, 2023). The State Department cautions that the country information that it provides might not be entirely accurate and encourages counsel to consult with an attorney who practices in the foreign country.

to the deposition voluntarily.[77] In contrast, Canada is not party to the Convention, yet parties in a private civil case in the United States may arrange to depose a willing witness in Canada without prior consultation with or permission from Canadian authorities and may seek assistance from a Canadian court with compelling deposition testimony or the production of documents.[78]

3. *28 U.S.C. § 1783(a)*

In certain circumstances, domestic relations litigants may be able to conduct discovery of a U.S. citizen or permanent resident located in a foreign country utilizing 28 U.S.C. § 1783(a). The statute provides as follows:

> A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.[79]

To pursue issuance of a subpoena under 28 U.S.C. § 1783(a), a state court litigant must commence a miscellaneous action in federal court. [80] This is a costly and daunting proposition, particularly for domestic relations practitioners who do not practice in federal court. Nonetheless, in high stakes divorce litigation, it might be necessary to pursue evidence abroad using all available means. If a state court litigant obtains a subpoena from a federal court, and the country in which the deponent resides is party to a service treaty to which the United States is also a party, then service of the subpoena must be perfected in accordance with that treaty.

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77 U.S. Dep't of State—Bureau of Consular Affairs, *Chile*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Chile.html (last visited Sept. 26, 2023).

78 U.S. Dep't of State—Bureau of Consular Affairs, *Canada*, https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Canada.html (last visited Sept. 26, 2023).

79 28 U.S.C. § 1783(a).

80 Peter M. Lauriat et al., 49A Mass. Prac. Discovery § 8:6 (2023).

A person who fails to comply with a subpoena issued under 28 U.S.C. § 1783(a) is punishable for contempt.[81] Sanctions for non-compliance include financial penalties and levy upon property located in the United States.[82] Nonetheless, these sanctions are unlikely to be effective in forcing compliance with the subpoena unless the person to whom the subpoena was directed has property in the United States.

C. *Service Considerations*

State law often requires that a subpoena to produce documents or to appear for a deposition be personally served. When service is made on a foreign person or entity and an international service treaty to which the United States is party applies, by virtue of the Supremacy Clause of the U.S. Constitution,[83] service must be made as provided by the treaty, state service rules notwithstanding.[84] The two international service treaties to which the United States is a party are the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention")[85] and the Inter-American Convention on Letters Rogatory ("IACLR") and Additional Protocol to the Inter-American Convention on Letters Rogatory ("Additional Protocol").[86]

This does not mean, however, that state methods for service of discovery are never permitted in family law cases involving a foreign party, witness, or entity in possession of critical evidence. For example, when the address of the person or entity to be served is unknown and cannot reasonably be ascertained, the Hague Service Convention is not implicated, and service may

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81 28 U.S.C. § 1784.

82 *Id.*

83 U.S. Const. art. VI, cl. 2.

84 Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 699 (1988).

85 *See* Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 5, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (entered into force Feb. 10, 1969), https://www.hcch.net/en/instruments/conventions/full-text/?cid=17.

86 *See* Inter-American Convention on Letters Rogatory, Jan. 30, 1975, O.A.S.T.S. No. 43, https://www.oas.org/juridico/english/treaties/b-36.html; Additional Protocol to the Inter-American Convention on Letters Rogatory, May 8, 1979, O.A.S.T.S. No. 56, http://www.oas.org/juridico/english/treaties/b-46.html.

proceed as provided by state law.[87] Similarly, when the foreign country is not a party to an international treaty, then service may be accomplished in any manner that comports with state law for service abroad and the law of the country in which service is made.[88] Prudence warrants consulting with local counsel in the country where service is sought to confirm whether a contemplated manner of service is acceptable in the foreign country. If the foreign country where service is sought is not party to a service treaty, and a form of service permissible under state law, such as personal service by a private citizen, is not available because it does not constitute valid service under the laws of the foreign country, then service must be accomplished by issuance of letters rogatory.[89]

III. Conclusion

Family law practitioners in the United States who are accustomed to transparency, voluntary financial disclosure, and broad access to records and information through pre-trial discovery, must accept the limits of international discovery and devise a path forward to an equitable outcome for the client despite these limitations. For outgoing requests, careful, closely tailored, specific requests for discovery to foreign courts are essential to the success of the discovery process. Vague and/or overbroad requests are usually doomed to failure.

As this article demonstrates by contrast, the very liberal discovery philosophy and approach of U.S. courts, even when

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87 Hague Service Convention, art. 1.; *See, e.g.*, People v. Mendocino County Assessor's Parcel No. 056-500-09, 68 Cal. Rptr. 2d 51, 53 (Cal. Ct. App. 1997); *See also* Willhite v. Rodriguez-Cera, 274 P.3d 1233, 1237 (Colo. 2012) (ruling that substituted service within Colorado under Colorado service rules constituted valid service on a Mexico defendant because service did not require the transmittal of documents abroad to effectuate service; thus, the Hague Service Convention was not implicated).

88 U.S. Dep't of State—Bureau of Consular Affairs, *Service of Process*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process.html (last visited Sept. 26, 2023).

89 U.S. Dep't of State—Bureau of Consular Affairs, *Preparation of Letters Rogatory*, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (last visited Sept. 26, 2023).

dealing with non-U.S. discovery requests, is an almost exclusively American concept which does not have foreign counterparts. As a result, we are able to assist our non-U.S. counterparts a great deal more than they are able to assist us.

FULL TEXT

20: Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Entry into force: 7-X-1972

Text of the Convention in PDF

Outline of the Convention

(In the relations between the Contracting States, this Convention replaces Articles 8 to 16 of the Conventions on civil procedure of 1905 and 1954)

CONVENTION ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

(Concluded 18 March 1970)

The States signatory to the present Convention,

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose,

Desiring to improve mutual judicial co-operation in civil or commercial matters,

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions -

CHAPTER I - LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression "other judicial act" does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each State shall organise the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify -

a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;
b) the names and addresses of the parties to the proceedings and their representatives, if any;
c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;
d) the evidence to be obtained or other judicial act to be performed.

Where appropriate, the Letter shall specify, *inter alia* -

e) the names and addresses of the persons to be examined;
f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;
g) the documents or other property, real or personal, to be inspected;
h) any requirement that the evidence is to be given on oath or affirmation, and any special form to be used;
i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legalisation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorised by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to

comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorised in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorisation by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence -

a) under the law of the State of execution; or

b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Article 12

The execution of a Letter of Request may be refused only to the extent that -

a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the latter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II - TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if -

a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if -

a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and
b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence; in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorised under Articles 15, 16 or 17 to take evidence -

a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;
b) a request to a person to appear or to give evidence shall, unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the evidence is taken or be accompanied by a

translation into such language;

c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III - GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provisions of the present Convention shall not prevent a Contracting State from -

a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from -

a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;
b) the provisions of Article 4 with respect to the languages which may be used;
c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;
d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;
e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;
f) the provisions of Article 14 with respect to fees and costs;
g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at The Hague on the 17th of July 1905 and the 1st of March 1954, this Convention shall replace Articles 8-16 of the earlier Conventions.

Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following -

a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 23 and 27;

d) any withdrawal or modification of the above designations and declarations;

e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialised agency of that Organisation, or a Party to the Statute of the International Court of Justice may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following -

a) the signatures and ratifications referred to in Article 37;
b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;
c) the accessions referred to in Article 39 and the dates on which they take effect;
d) the extensions referred to in Article 40 and the dates on which they take effect;
e) the designations, reservations and declarations referred to in Articles 33 and 35;
f) the denunciations referred to in the third paragraph of Article 41.

In witness whereof the undersigned, being duly authorised thereto, have signed the present Convention.

Done at The Hague, on the 18th day of March, 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.

Model for Letters of Request recommended for use in applying the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

Request for International Judicial Assistance pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

N.B. Under the first paragraph of Article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language. However, the provisions of the second and third paragraphs may permit use of English, French or another language.

In order to avoid confusion, please spell out the name of the month in each date.

Please fill out an original and one copy of this form (use additional space if required).

1. Sender — (identity and address)

2. Central Authority of the Requested State — (identity and address)

3. Person to whom the executed request is to be returned — (identity and address)

4. Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request

   Date

   Reason for urgency*

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* Omit if not applicable.

IN CONFORMITY WITH ARTICLE 3 OF THE CONVENTION, THE UNDERSIGNED APPLICANT HAS THE HONOUR TO SUBMIT THE FOLLOWING REQUEST:

5.	*a*	Requesting judicial authority (Article 3,*a)*)	(identity and address)
	b	To the competent authority of (Article 3, *a)*)	(the requested State)
	c	Names of the case and any identifying number	
6.		Names and addresses of the parties and their representatives (including representatives in the requested State*) (Article 3, *b)*)	
	a	Plaintiff	
		Representatives	
	b	Defendant	
		Representatives	
	c	Other parties	
		Representatives	

* Omit if not applicable.

7.	*a*	Nature of the proceedings (divorce, paternity, breach of contract, product liability, etc.) (Article 3, *c)*)	
	b	Summary of complaint	
	c	Summary of defence and counterclaim*	
	d	Other necessary information or documents*	
8.	*a*	Evidence to be obtained or other judicial act to be performed (Article 3, *d)*)	
	b	Purpose of the evidence or judicial act sought	
9.		Identity and address of any person to be examined (Article 3, *e)*)*	
10.		Questions to be put to the persons to be examined or statement of the subject-matter about which they are to be examined (Article 3, *f)*)*	(or see attached list)

* Omit if not applicable.

11. Documents or other property to be inspected (Article 3, *g)*)*	
12. Any requirement that the evidence be given on oath or affirmation and any special form to be used (Article 3, *h)*)*	(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence)
13. Special methods or procedure to be followed (e.g. oral or in writing, verbatim, transcript or summary, cross-examination, etc.) (Articles 3, *i)* and 9)*	(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law)
14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (Article 7)*	
15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of the Letter of Request (Article 8)*	

* Omit if not applicable.

16. Specification of privilege or duty to refuse to give evidence under the law of the State of origin (Article 11, *b*))*	(attach copies of relevant laws or regulations)
17. The fees and costs incurred which are reimbursable under the second paragraph of Article 14 or under Article 26 of the Convention will be borne by*	(identity and address)
DATE OF REQUEST	

SIGNATURE AND SEAL OF THE REQUESTING AUTHORITY ----------

Erase all entries Print

* Omit if not applicable.

How to obtain section 1782 discovery: a step-by-step guide - Litigation Committee newsletter article, April 2020

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United States discovery mechanisms are document requests and depositions of key witnesses or entities, among others, and are powerful tools for proving your case. Discovery requests can cover a broad array of subject matter. So long as the discovery sought is not covered by privilege and is 'relevant' to the party's claim or defence, it is fair game. It is no wonder that lawyers outside of the US, particularly on the plaintiff or claimant-side, often wish they had similar tools at their disposal.

Section 1782 of title 28 of the United States Code grants that wish. It authorises US federal district courts (ie, a federal trial courts) to order a person or entity that 'resides' within the court's jurisdiction '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.' This article provides a guide for foreign lawyers interested in section 1782 discovery.

Use of section 1782 discovery for proceedings around the globe

Section 1782 has been used to obtain discovery for a range of proceedings around the world: from labour cases in Brazil to probate disputes in Hong Kong and maritime law arbitrations in London, as well as many other in between.

re Application for an Order for Judicial Assistance in a Foreign eeding in the Labour Court of Brazil, for example, a federal trial court in orthern District of Illinois (in Chicago) granted a petition seeking n 1782 discovery for use in proceedings in the 68th and 72nd Labour Courts of São Paulo. That case concerned a wrongful termination suit by the former CEO and former Financial Director of McDonald's Comercio de Alimentos Ltda, a Brazilian subsidiary of McDonald's Corporation. The

officers sought very broad discovery: interrogatories, documents, and depositions of McDonald's employees, covering a wide-range of subjects, including personnel files, the decision to dismiss the employees, McDonald's termination policies, franchise issues, tax issues, employee benefits, compliance with US laws, accounting audits, insurance claims, and other topics. The US court granted the discovery, with only a few, specific limitations.

United States courts have also ordered section 1782 discovery for use in probate disputes. For example, in *Application of Esses*, the US Court of Appeals for the Second Circuit, which covers New York among other states, affirmed a trial court's order granting a section 1782 petition that sought discovery for use in judicial proceedings in Hong Kong to determine the administrator of an estate of an individual who died intestate. The case arose from a dispute between the deceased's brother and sister before the Hong Kong courts regarding who should be appointed as administrator of the estate. The brother, who lived in Argentina, filed a section 1782 petition with the United States District Court for the Southern District of New York (in New York City), seeking information he claimed would show he was entitled to be appointed administrator. The application was successful.

Section 1782 discovery has also been granted for use in family law cases. In *In re Solines*, for example, a federal court in Louisiana granted a section 1782 petition seeking documents for use in an Ecuadorian child support dispute. Ms Solines sought documents concerning her ex-husband's compensation: a critical point of contention in the child support dispute. The court granted the petition, allowing the plaintiff to obtain discovery from her ex-husband's employer, a hospital located in the US.

Petitions seeking discovery under section 1782 have also been authorised for maritime law proceedings. In *In re Ex Parte Application of Kleimar NV*, the US District Court for the Southern District of New York granted an ex parte section 1782 application seeking discovery for use in arbitrations before the London Maritime Arbitration Association. The court granted the application, authorising discovery regarding pricing and other information relevant to the London proceedings.

Courts have also granted discovery under section 1782 for use in criminal proceedings. For example, in *Super Vitaminas, SA*, a company filed a section 1782 petition seeking discovery for use in criminal proceedings in Guatemala relating to the company's alleged non-payment of import taxes. The company believed that certain emails to which it no longer had access would prove its innocence. Using section 1782, the company obtained a subpoena requiring Microsoft and Google to turn over the exonerating emails.

How to conduct Discovery under section 1782

A section 1782 petition must show that:

- the target of the discovery either resides or is found in the US jurisdiction where the motion was filed;
- the discovery sought is for use in foreign 'proceeding(s)'; and
- the party seeking discovery is an 'interested person'.

Step one: Identify the US jurisdiction where the party with the discovery es

mining whether a person or entity 'resides or is found' in the US is very ır to determining whether a court has personal jurisdiction over a n individual or entity. For a natural person, residence is usually the n's domicile, ie, where that person lives. For corporations and other es, the inquiry is a little more complicated, but their residence is ally the jurisdiction where they are incorporated or maintain their ipal place of business.

SHARE

Filing the section 1782 application in the jurisdiction where the target resides satisfies that residence requirement. But sometimes it is not that simple.

In *In re Escallón*, for example, the petitioner, Arturo Escallón, sought deposition testimony and document discovery from two individuals, Patricia and Carlos Ardila, for use in contemplated proceedings in Colombia. The court denied the petition, in part because Escallón had not shown that the Ardilas resided in the Southern District of New York, meaning that the district was their permanent residence, merely by showing that they maintained an apartment in New York City. Additionally, the court determined the Ardilas were not 'found in' the district because they were not physically present in the district when served with process.

Similarly, in *In re Application of Fernando Celso De Aquino Chad*, a judicial administrator of a bankruptcy proceeding in Brazil filed a request under section 1782 to compel certain US banks to produce transaction records, which, he argued, would provide proof that the entities had dissipated assets in anticipation of their bankruptcy filing. The court granted the petition, but limited it to banks that were headquartered in New York, where the petition was filed. Jurisdiction could not be exercised over the other banks, the court explained, because, although they operated in New York, none of their alleged conduct in New York was connected to the dissipation of assets that formed the basis for the 1782 petition.

Step two: Establish that the discovery is 'for use in' a foreign or international proceeding

The party seeking discovery must also establish that the documents or testimony sought are 'for use in a proceeding in a foreign or international tribunal'. Note that the statute does not say anything about the proceeding being ongoing or already initiated. The party must only identify objective indicia suggesting that the filing or initiation is being contemplated if the proceeding is not yet underway.

Some courts, including the US Court of Appeals for the Second Circuit, have held that to count as a 'proceeding', there must be some dispute regarding liability that the foreign or international tribunal must resolve, imposing a requirement that the proceedings be 'adjudicative' in nature. Other courts, however, have disagreed. The US Court of Appeals for the Eleventh Circuit, which covers Florida, among other states, has held that section 1782 authorises discovery, for example, for use in post-judgment proceedings where liability has already been established.

Another significant unresolved question regarding the 'proceeding' requirement is whether private foreign arbitrations count as 'proceeding[s] *in a foreign or international tribunal*.' At least the Second and Fifth Circuit Court of Appeals (covering, most significantly, New York and Texas) have held that they do not. Other courts, including the US Court of Appeals for the Sixth Circuit, have disagreed. In *Abdul Latif Jameel Transportation Company Ltd v FedEx Corp*, that court ruled that section 1782 authorises discovery in private commercial arbitrations. The issue is currently pending in *Servotronics, Inc v Rolls-Royce PLC*, before the US Court of Appeals for the Seventh Circuit, which covers Illinois, among other states.

Apart from showing that the proceeding actually counts as a 'proceeding', the party seeking section 1782 discovery must also show that the ments or testimony can actually *be used* in the foreign or international eeding. The party does not have to show that it will in fact use the very. The party must simply show the *ability* to use the discovery. fore, if the documents or testimony are subject to exclusion under a n rule or privilege, the section 1782 motion may not be successful.

SHARE

three: Show that the party seeking discovery is an 'interested on'

A party to a foreign or international proceeding is clearly an 'interested person' under section 1782. But a person or entity with a mere financial or ideological stake in the proceeding is not.

The space between those two extremes, however, is somewhat unclear. Where a non-party is seeking section 1782 discovery, courts typically assess whether the person has a right to provide evidence, whether the person has an established relationship (ie, agent-principal or employee-employer) with a party, or whether the person is a creditor.

Step four: Overcome discretionary factors

Even where a party has met all three statutory requirements, whether to grant the section 1782 application is left to the district court's discretion.

In deciding whether to exercise discretion to grant a section 1782 application courts typically consider whether the foreign or international tribunal could order the discovery itself, the nature of the tribunal, the character of the foreign or international proceedings, whether the tribunal would be receptive to US-court assistance, whether the party seeking discovery is attempting to circumvent proof-gathering restrictions imposed by the foreign country or international body, and whether the request is unduly burdensome. The party opposing discovery bears the burden of showing that any of those discretionary factors (or other factors) warrant denial of the motion.

It is therefore critically important that section 1782 applications not only satisfy the statutory requirements but also provide the court comfort that the discovery sought is appropriate for the proceedings in which it will be used and is not overly broad.

Abstract

Section 1782 discovery requests, if crafted appropriately, can be of enormous assistance to non-US lawyers looking to bolster their discovery efforts and chances of success in their home courts.

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JUSTIA

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004)

Granted:	Argued:	Decided:
November 10, 2003	April 20, 2004	June 21, 2004

Syllabus

SYLLABUS
OCTOBER TERM, 2003
INTEL CORP. V. ADVANCED MICRO DEVICES, INC.

SUPREME COURT OF THE UNITED STATES

INTEL CORP. *v.* ADVANCED MICRO DEVICES, INC.

certiorari to the united states court of appeals for the ninth circuit

No. 02–572. Argued April 20, 2004—Decided June 21, 2004

In 1964, pursuant to a recommendation by the Commission on International Rules of Judicial Procedure (Rules Commission), and as part of an endeavor to improve judicial assistance between the United States and foreign countries, Congress completely revised 28 U. S. C. §1782(a). In its current form, §1782(a) provides that a federal district court "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal … upon the application of any interested person." The 1964 overhaul of §1782(a) deleted the prior law's words, "in any judicial proceeding *pending* in any court in a foreign country." (Emphasis added.)

Respondent Advanced Micro Devices, Inc. (AMD), filed an antitrust complaint against petitioner Intel Corporation (Intel) with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (Commission), alleging that Intel had violated European competition law. After the DG-Competition declined AMD's recommendation to seek documents Intel had produced in a private antitrust suit in an Alabama federal court, AMD petitioned the District Court for the Northern District of California under §1782(a) for an order directing Intel to produce those documents. The District Court concluded that §1782(a) did not authorize such discovery. The Ninth Circuit reversed and remanded with instructions to rule on the application's merits. The appeals court observed that §1782(a) includes matters before bodies of a quasi-judicial or administrative nature, and, since 1964, has contained no limitation to foreign proceedings that are "pending." A proceeding judicial in character, the Ninth Circuit noted, was a likely sequel to the Commission investigation. The Court of Appeals rejected Intel's argument that §1782(a) called for a threshold showing that the documents AMD sought, if located in the European Union, would have been discoverable in the Commission investigation. Nothing in §1782(a)'s language or legislative history, the Ninth Circuit said, required a "foreign-discoverability" rule of that order.

Held: Section 1782(a) authorizes, but does not require, the District Court to provide discovery aid to AMD. Pp. 9–23.

1. To provide context, the Court summarizes how the Commission, acting through the DG-Competition, enforces European competition laws. Upon receiving a complaint, or *sU. S.onte,* the DG-Competition conducts a preliminary investigation into alleged violations of those laws. The DG-Competition may consider information provided by a complainant, and it may seek information from a complaint's target. The DG-Competition's investigation results in a formal written decision whether to pursue the complaint. If the DG-Competition decides not to proceed, its decision may be reviewed by the Court of First Instance and, ultimately, the Court of Justice for the European Communities (European Court of Justice). When the DG-Competition pursues a complaint, it typically serves the investigation's target with a formal "statement of objections" and advises the target of its intention to recommend a decision finding an antitrust violation. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. Once the DG-Competition makes its recommendation, the Commission may dismiss the complaint or issue a decision holding the target liable and imposing penalties. The Commission's final action is subject to review in the Court of First Instance and the European Court of Justice. Lacking formal "litigant" status in Commission proceedings, a complainant nonetheless has significant procedural rights. Important here, a complainant may submit relevant information to the DG-Competition and seek judicial review of the Commission's disposition. Pp. 9–11.

2. Section 1782(a)'s language, confirmed by its context, warrants the conclusion that the provision authorizes, but does not require, a federal district court to provide assistance to a complainant in a Commission proceeding that leads to a dispositive ruling. The Court therefore rejects the categorical limitations Intel would place on the statute's reach. Pp. 11–20.

(a) A complainant before the Commission, such as AMD, qualifies as an "interested person" within §1782(a)'s compass. The Court rejects Intel's contention that "interested person[s]" does not include complainants, but encompasses only litigants, foreign sovereigns, and a sovereign's designated agents. To support its reading, Intel highlights §1782's caption, "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals" (emphasis added). A statute's caption, however, cannot undo or limit its text's plain meaning. *Trainmen* v. *Baltimore & Ohio R. Co.,* 331 U. S. 519, 529. Section 1782(a) plainly reaches beyond the universe of persons designated "litigant." With significant participation rights in Commission proceedings, the complainant qualifies as an "interested person" within any fair construction of that term. Pp. 11–13.

(b) The assistance AMD seeks meets §1782(a)'s specification "for use in a foreign or international tribunal." The Commission qualifies as a "tribunal" when it acts as a first-instance decisionmaker. Both the Court of First Instance and the European Court of Justice are tribunals, but not proof-takers. Their review is limited to the record before the Commission. Hence, AMD could "use" evidence in those reviewing courts only by submitting it to the Commission in the current, investigative stage. In adopting the Rules Commission's recommended replacement of the term "any judicial proceeding" with the words "a proceeding in a foreign or international tribunal," Congress opened the way for judicial assistance in foreign administrative and quasi-judicial proceedings. This Court has no warrant to exclude the Commission, to the extent that it acts as a first-instance decisionmaker, from §1782(a)'s ambit. Pp. 13–14.

(c) The "proceeding" for which discovery is sought under §1782(a) must be within reasonable contemplation, but need not be "pending" or "imminent." The Court rejects Intel's argument that the Commission *investigation* launched by AMD's complaint does not qualify for §1782(a) assistance. Since the 1964 revision, which deleted the prior law's reference to "pending," Congress has not limited judicial assistance under §1782(a) to "pending" adjudicative proceedings. This Court presumes that Congress intends its statutory amendments to have real and substantial effect. *Stone* v. *INS,* 514 U. S. 386, 397. The 1964 revision's legislative history corroborates Congress' recognition that judicial assistance would be available for both foreign proceedings and *investigations*. A 1996 amendment clarifies that §1782(a) covers "criminal investigations conducted before formal accusation." Nothing in that amendment, however, suggests that Congress meant to rein in, rather than to confirm, by way of example, the range of discovery §1782(a) authorizes. Pp. 14–15.

(d) Section 1782(a) does not impose a foreign-discoverability requirement. Although §1782(a) expressly shields from discovery matters protected by legally applicable privileges, nothing in §1782(a)'s text limits a district court's production-order authority to materials discoverable in the foreign jurisdiction if located there. Nor does the legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on §1782(a) assistance. The Court rejects two policy concerns raised by Intel in support of a foreign-discoverability limitation on §1782(a) aid—avoiding offense to foreign governments, and maintaining parity between litigants. While comity and parity concerns may be legitimate touchstones for a district court's exercise of discretion in particular cases,

they do not warrant construction of §1782(a)'s text to include a generally applicable foreign-discoverability rule. Moreover, the Court questions whether foreign governments would be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions; such reasons do not necessarily signal objection to aid from United States federal courts. A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to §1782(a). When the foreign tribunal would readily accept relevant information discovered in the United States, application of a categorical foreign-discoverability rule would be senseless. Concerns about parity among adversaries in litigation likewise provide no sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court can condition relief upon reciprocal information exchange. Moreover, the foreign tribunal can place conditions on its acceptance of information, thereby maintaining whatever measure of parity it deems appropriate. The Court also rejects Intel's suggestion that a §1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger. For example, the United States has no close analogue to the Commission regime, under which AMD lacks party status and can participate only as a complainant. Pp. 15–20.

3. Whether §1782(a) assistance is appropriate in this case is yet unresolved. To guide the District Court on remand, the Court notes factors relevant to that question. First, when the person from whom discovery is sought is a participant in the foreign proceeding, as Intel is here, 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. In contrast, nonparticipants in foreign proceedings may be outside the foreign tribunal's jurisdictional reach; thus, their evidence, available in the United States, may be unobtainable absent §1782(a) aid. Second, a court presented with a §1782(a) request may consider the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance. Further, the grounds Intel urged for categorical limitations on §1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed. The Court declines, at this juncture, Intel's suggestion that it exercise its supervisory authority to adopt rules barring §1782(a) discovery here. Any such endeavor should await further experience with §1782(a) applications in the lower courts. Several facets of this case remain largely unexplored. While Intel and its *amici* are concerned that granting AMD's application in any part may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the Commission's program offering prosecutorial leniency for admissions of wrongdoing, no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that §1782(a)'s preservation of legally applicable privileges and the controls on discovery available under Federal Rule of Civil Procedure 26(b)(2) and (c) would be ineffective to prevent discovery of Intel's confidential information. The Court leaves it to the courts below, applying closer scrutiny, to assure an airing adequate to determine what, if any, assistance is appropriate. Pp. 20–23.

292 F. 3d 664, affirmed.

Ginsburg, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, and Thomas, JJ., joined. Scalia, J., filed an opinion concurring in the judgment. Breyer, J., filed a dissenting opinion. O'Connor, J., took no part in the consideration or decision of the case.

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Opinions

Opinion (Ginsburg) | Concurrence (Scalia) | Dissent (Breyer)

Hear Opinion Announcement - June 21, 2004

OPINION OF THE COURT
INTEL CORP. V. ADVANCED MICRO DEVICES, INC.
542 U. S. _____ (2004)

SUPREME COURT OF THE UNITED STATES
NO. 02-572

INTEL CORPORATION, PETITIONER *v.* ADVANCED MICRO DEVICES, INC.

on writ of certiorari to the united states court of appeals for the ninth circuit

[June 21, 2004]

Justice Ginsburg delivered the opinion of the Court.

This case concerns the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal. In the matter before us, respondent Advanced Micro Devices, Inc. (AMD) filed an antitrust complaint against petitioner Intel Corporation (Intel) with the Directorate-General for Competition of the Commission of the European Communities (European Commission or Commission). In pursuit of that complaint, AMD applied to the United States District Court for the Northern District of California, invoking 28 U. S. C. §1782(a), for an order requiring Intel to produce potentially relevant documents. Section 1782(a) provides that a federal district court "may order" a person "resid[ing]" or "found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal ... upon the application of any interested person."

Concluding that §1782(a) did not authorize the requested discovery, the District Court denied AMD's application. The Court of Appeals for the Ninth Circuit reversed that determination and remanded the case, instructing the District Court to rule on the merits of AMD's application. In accord with the Court of Appeals, we hold that the District Court had authority under §1782(a) to entertain AMD's discovery request. The statute, we rule, does not categorically bar the assistance AMD seeks: (1) A complainant before the European Commission, such as AMD, qualifies as an "interested person" within §1782(a)'s compass; (2) the Commission is a §1782(a) "tribunal" when it acts as a first-instance decisionmaker; (3) the "proceeding" for which discovery is sought under §1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and (4) §1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding. We caution, however, that §1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to "interested person[s]" in proceedings abroad. Whether such assistance is appropriate in this case is a question yet unresolved. To guide the District Court on remand, we suggest considerations relevant to the disposition of that question.

I

A

Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals. Congress first provided for federal-court aid to foreign tribunals in 1855; requests for aid took the form of letters rogatory forwarded through diplomatic channels. See Act of Mar. 2, 1855, ch. 140, §2, 10 Stat. 630 (circuit court may appoint "a United States commissioner designated ... to make the examination of witnesses" on receipt of a letter rogatory from a foreign court); Act of Mar. 3, 1863, ch. 95, §1, 12 Stat. 769 (authorizing district courts to respond to letters rogatory by compelling witnesses here to provide testimony for use abroad in "suit[s] for the recovery of money or property"). [Footnote 1] In 1948, Congress substantially broadened the scope of assistance federal courts could provide for foreign proceedings. That legislation, codified as §1782, eliminated the prior requirement that the government of a foreign country be a party or have an interest in the proceeding. The measure allowed district courts to designate persons to preside at depositions "to be used in *any civil action* pending in any court in a foreign country with which the United States is at peace." Act of June 25, 1948, ch. 646, §1782, 62 Stat. 949 (emphasis added). The next year, Congress deleted "civil action" from §1782's text and inserted "judicial proceeding." Act of May 24, 1949, ch. 139, §93, 63 Stat. 103. See generally, Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515 (1953).

In 1958, prompted by the growth of international commerce, Congress created a Commission on International Rules of Judicial Procedure (Rules Commission) to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Act of Sept. 2, Pub. L. 85–906, §2, 72 Stat. 1743; S. Rep. No. 2392, 85th Cong., 2d Sess., p. 3 (1958); Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015–1016 (1965) (hereinafter Smit, International Litigation). Six years later, in 1964, Congress unanimously adopted legislation recommended by the Rules Commission;[Footnote 2] the legislation included a complete revision of §1782. See Act of Oct. 3, Pub. L. 88–619, §9, 78 Stat. 997; Smit, International Litigation 1026–1035.

As recast in 1964, §1782 provided for assistance in obtaining documentary and other tangible evidence as well as testimony. Notably, Congress deleted the words "in any judicial proceeding *pending* in any court in a foreign country," and replaced them with the phrase "in a proceeding in a foreign or international tribunal." Brief for United States as *Amicus Curiae* 6, 4a–5a (emphasis added). While the accompanying Senate Report does not account discretely for the deletion of the word "pending,"[Footnote 3] it explains that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings." S. Rep. No. 1580, 88th Cong., 2d Sess., p. 7 (1964); see H. R. Rep. No. 1052, 88th Cong., 1st Sess., p. 9 (1963) (same). Congress further amended §1782(a) in 1996 to add, after the reference to "foreign or international tribunal," the words "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104–106, §1342(b), 110 Stat. 486. Section 1782(a)'s current text reads:

"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 … . 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 … [or may be] 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

AMD and Intel are "worldwide competitors in the microprocessor industry." 292 F. 3d 664, 665 (CA9 2002). In October 2000, AMD filed an antitrust complaint with the Directorate-General for Competition (DG-Competition) of the European Commission. *Ibid.;* App. 41. "The European Commission is the executive and administrative organ of the European Communities." Brief for Commission of European Communities as *Amicus Curiae* 1 (hereinafter European Commission *Amicus Curiae*). The Commission exercises responsibility over the wide range of subject areas covered by the European Union treaty; those areas include the treaty provisions, and regulations thereunder, governing competition. See *ibid.;* Consolidated Versions of Treaty on European Union and Treaty Establishing European Community, Arts. 81 and 82, 2002 O. J. (C 325) 33, 64–65, 67 (hereinafter EC Treaty). The DG-Competition, operating under the Commission's aegis, is the European Union's primary antitrust law enforcer. European Commission *Amicus Curiae* 2. Within the DG-Competition's domain are anticompetitive agreements (Art. 81) and abuse of dominant market position (Art. 82). *Ibid.;* EC Treaty 64–65.

AMD's complaint alleged that Intel, in violation of European competition law, had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements with manufacturers and retailers, price discrimination, and standard-setting cartels. App. 40–43; Brief for Petitioner 13. AMD recommended that the DG-Competition seek discovery of documents Intel had produced in a private antitrust suit, titled *Intergraph Corp.* v. *Intel Corp.,* brought in a Federal District Court in Alabama. 3 F. Supp. 2d 1255 (ND Ala. 1998), vacated 195 F. 3d 1346 (CA Fed. 1999), remanded, 88 F. Supp. 2d 1288 (ND Ala. 2000), aff'd 253 F. 3d 695 (CA Fed. 2001); App. 111; App. to Pet. for Cert. 13a–14a.[Footnote 4] After the DG-Competition declined to seek judicial assistance in the United States, AMD, pursuant to §1782(a), petitioned the District Court for the Northern District of California[Footnote 5] for an order directing Intel to produce documents discovered in the *Intergraph* litigation and on file in the federal court in Alabama. App. to Pet. for Cert. 13a–14a. AMD asserted that it sought the materials in connection with the complaint it had filed with the European Commission. *Ibid.* *[Footnote 6]*

The District Court denied the application as "[un]supported by applicable authority." *Id.*, at 15a. Reversing that determination, the Court of Appeals for the Ninth Circuit remanded the case for disposition on the merits. 292 F. 3d, at 669. The Court of Appeals noted two points significant to its decision: §1782(a) includes matters before " 'bodies of a quasi-judicial or administrative nature,' " *id.,* at 667 (quoting *In re Letters Rogatory from Tokyo District,* 539 F. 2d 1216, 1218–1219 (CA9 1976)); and, since 1964, the statute's text has contained "[no] requirement that the proceeding be 'pending,' " *ibid.* (quoting *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of Russian Federation,* 235 F. 3d 1200, 1204 (CA9 2000)); see *supra*, at 4. A proceeding judicial in character, the Ninth Circuit further observed, was a likely sequel to the European Commission's investigation: "[The European Commission is] a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties. [The Commission's] decisions are appealable to the Court of First Instance and then to the [European] Court of Justice. Thus, the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." 292 F. 3d, at 667; see *infra*, at 9–11 (presenting synopsis of Commission proceedings and judicial review of Commission decisions).

The Court of Appeals rejected Intel's argument that §1782(a) called for a threshold showing that the documents AMD sought in the California federal court would have been discoverable by AMD in the European Commission investigation had those documents been located within the Union. 292 F. 3d, at 668. Acknowledging that other Courts of Appeals had construed §1782(a) to include a "foreign-discoverability" rule, the Ninth Circuit found "nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing [by] the party seeking discovery that what is sought be discoverable in the foreign proceeding," *id.*, at 669. A foreign-discoverability threshold, the Court of Appeals added, would disserve §1782(a)'s twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.*

On remand, a Magistrate Judge found AMD's application "overbroad," and recommended an order directing AMD to submit a more specific discovery request confined to documents directly relevant to the European Commission investigation. App. to Brief in Opposition 1a–6a; Brief for Petitioner 15, n. 9. The District Court has stayed further proceedings pending disposition of the questions presented by Intel's petition for certiorari. *Ibid.;* see Order Vacating Hearing Date, No. C 01–7033 MISC JW (ND Cal., Nov. 30, 2003) (stating "Intel may renotice its motion for de novo review of the Magistrate Judge's decision after the Supreme Court issues its ruling").

We granted certiorari, 540 U. S. 1003 (2003), in view of the division among the Circuits on the question whether §1782(a) contains a foreign-discoverability requirement.[Footnote 7] We now hold that §1782(a) does not impose such a requirement. We also granted review on two other questions. First, does §1782(a) make discovery available to complainants, such as AMD, who do not have the status of private "litigants" and are not sovereign agents? See Pet. for Cert. (i). Second, must a "proceeding" before a foreign "tribunal" be "pending" or at least "imminent" for an applicant to invoke §1782(a) successfully? Compare *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F. 2d 686, 691 (CADC 1989) (proceeding must be "within reasonable contemplation"), with *In re Ishihari Chemical Co.*, 251 F. 3d 120, 125 (CA2 2001) (proceeding must be "imminent—very likely to occur and very soon to occur"); *In re International Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F. 2d 702, 706 (CA2 1991) (same). Answering "yes" to the first question and "no" to the second, we affirm the Ninth Circuit's judgment.

II

To place this case in context, we sketch briefly how the European Commission, acting through the DG-Competition, enforces European competition laws and regulations. The DG-Competition's "overriding responsibility" is to conduct investigations into alleged violations of the European Union's competition prescriptions. See European Commission *Amicus Curiae* 6. On receipt of a complaint or *sua sponte*, the DG-Competition conducts a preliminary investigation. *Ibid.* In that investigation, the DG-Competition "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint." *Ibid.* "Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If [the DG-Competition] declines to proceed, that decision is subject to judicial review" by the Court of First Instance and, ultimately, by the court of last resort for European Union matters, the Court of Justice for the European Communities (European Court of Justice). *Id.,* at 7; App. 50; see, *e.g.*, case T–241/97, *Stork Amsterdam BV* v. *Commission*, 2000 E. C. R. II–309, [2000] 5 C. M. L. R. 31 (Ct. 1st Instance 2000) (annulling Commission's rejection of a complaint).[Footnote 8]

If the DG-Competition decides to pursue the complaint, it typically serves the target of the investigation with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated European competition law. European Commission *Amicus Curiae* 7. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. *Ibid.;* App. 18–27. Once the DG-Competition has made its recommendation, the European Commission may "dismis[s] the complaint, or issu[e] a decision finding infringement and imposing penalties." European Commission *Amicus Curiae* 7. The Commission's final action dismissing the complaint or holding the target liable is subject to review in the Court of First Instance and the European Court of Justice. *Ibid.;* App. 52–53, 89–90.

Although lacking formal "party" or "litigant" status in Commission proceedings, the complainant has significant procedural rights. Most prominently, the complainant may submit to the DG-Competition information in support of its allegations, and may seek judicial review of the Commission's disposition of a complaint. See European Commission *Amicus Curiae* 7–8, and n. 5; *Stork Amsterdam*, [2000] E. C. R. II, at 328–329, ¶ ;¶ ; 51–53.

III

As "in all statutory construction cases, we begin [our examination of §1782] with the language of the statute." *Barnhart* v. *Sigmon Coal Co.,* 534 U. S. 438, 450 (2002). The language of §1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion: The statute authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, *i.e.*, a final administrative action both responsive to the complaint and reviewable in court.[Footnote 9] Accordingly, we reject the categorical limitations Intel would place on the statute's reach.

A

We turn first to Intel's contention that the catalog of "interested person[s]" authorized to apply for judicial assistance under §1782(a) includes only "litigants, foreign sovereigns, and the designated agents of those sovereigns," and excludes AMD, a mere complainant before the Commission, accorded only "limited rights." Brief for Petitioner 10–11, 24, 26–27. Highlighting §1782's caption, "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals," Intel urges that the statutory phrase "any interested person" should be read, correspondingly, to reach only "litigants." *Id.*, at 24 (internal quotation marks omitted, emphasis in original).

The caption of a statute, this Court has cautioned, "cannot undo or limit that which the [statute's] text makes plain." *Trainmen* v. *Baltimore & Ohio R. Co.,* 331 U. S. 519, 529 (1947). The text of §1782(a), "upon the application of any interested person," plainly reaches beyond the universe of persons designated "litigant." No doubt litigants are included among, and may be the most common example of, the "interested person[s]" who may invoke §1782; we read §1782's caption to convey no more. See, *e.g.*, *Whitman* v. *American Trucking Assns., Inc.,* 531 U. S. 457, 482–483 (2001) (rejecting narrow reading of 42 U. S. C. §7511(a) based on caption in light of "specifically" broader coverage of provision's text).

The complainant who triggers a European Commission investigation has a significant role in the process. As earlier observed, see *supra*, at 11, in addition to prompting an investigation, the complainant has the right to submit information for the DG-Competition's consideration, and may proceed to court if the Commission discontinues the investigation or dismisses the complaint. App. 52–53. Given these participation rights, a complainant "possess[es] a reasonable interest in obtaining [judicial] assistance," and therefore qualifies as an "interested person" within any fair construction of that term. See Smit, International Litigation 1027 ("any interested person" is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance").[Footnote 10]

B

We next consider whether the assistance in obtaining documents here sought by an "interested person" meets the specification "for use in a foreign or international tribunal." Beyond question the reviewing authorities, both the Court of First Instance and the European Court of Justice, qualify as tribunals. But those courts are not proof-taking instances. Their review is limited to the record before the Commission. See Tr. of Oral Arg. 17. Hence, AMD could "use" evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage.

Moreover, when Congress established the Commission on International Rules of Judicial Procedure in 1958, see *supra*, at 3–4, it instructed the Rules Commission to recommend procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies*." §2, 72 Stat. 1743 (emphasis added). Section 1782 had previously referred to "any judicial proceeding." The Rules Commission's draft, which Congress adopted, replaced that term with "a proceeding in a foreign or international tribunal." See *supra*, at 4. Congress understood that change to "provid[e] the possibility of U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]." S. Rep. No. 1580, at 7–8; see Smit, International Litigation 1026–1027, and nn. 71, 73 ("[t]he term 'tribunal' ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts"; in addition to affording assistance in cases before the European Court of Justice, §1782, as revised in 1964, "permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers"). See also European Commission *Amicus Curiae* 9 ("[W]hen the Commission acts on DG Competition's final recommendation ... the investigative function blur[s] into decisionmaking."). We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from §1782(a)'s ambit. See 292 F. 3d, at 667; *supra*, at 11, n. 9.

C

Intel also urges that AMD's complaint has not progressed beyond the investigative stage; therefore, no adjudicative action is currently or even imminently on the Commission's agenda. Brief for Petitioner 27–29.

Section 1782(a) does not limit the provision of judicial assistance to "pending" adjudicative proceedings. In 1964, when Congress eliminated the requirement that a proceeding be "judicial," Congress also deleted the requirement that a proceeding be "pending." See *supra*, at 4. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *INS,* 514 U. S. 386, 397 (1995). The legislative history of the 1964 revision is in sync; it 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." S. Rep. No. 1580, at 9 (emphasis added).

In 1996, Congress amended §1782(a) to clarify that the statute covers "criminal investigations conducted before formal accusation." See §1342(b), 110 Stat. 486; *supra*, at 4. Nothing suggests that this amendment was an endeavor to rein in, rather than to confirm, by way of example, the broad range of discovery authorized in 1964. See S. Rep. No. 1580, at 7 ("[T]he [district] court[s] have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.").

In short, we reject the view, expressed in *In re Ishihara Chemical Co.,* that §1782 comes into play only when adjudicative proceedings are "pending" or "imminent." See 251 F. 3d, at 125 (proceeding must be "imminent—very likely to occur and very soon to occur" (internal quotation marks omitted)). Instead, we hold that §1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation. See *Crown Prosecution Serv. of United Kingdom*, 870 F. 2d, at 691; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1155, and n. 9 (CA11 1988); Smit, International Litigation 1026 ("It is not necessary ... for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.").

D

We take up next the foreign-discoverability rule on which lower courts have divided: Does §1782(a) categorically bar a district court from ordering production of documents when the foreign tribunal or the "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction? See *supra*, at 8–9, and n. 7.

We note at the outset, and count it significant, that §1782(a) expressly shields privileged material: "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." See S. Rep. No. 1580, at 9 ("[N]o person shall be required under the provisions of [§1782] to produce any evidence in violation of an applicable privilege."). Beyond shielding material safeguarded by an applicable privilege, however, nothing in the text of §1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect."

In re Application of Gianoli Aldunate, 3 F. 3d 54, 59 (CA2 1993); accord *Four Pillars Enterprises Co.* v. *Avery Dennison Corp.*, 308 F. 3d 1075, 1080 (CA9 2002); 292 F. 3d, at 669 (case below); *In re Bayer AG*, 146 F.3d 188, 193–194 (CA3 1998).[Footnote 11]

Nor does §1782(a)'s legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on the provision of assistance under §1782(a). The Senate Report observes in this regard that §1782(a) "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." S. Rep. No. 1580, at 7.

Intel raises two policy concerns in support of a foreign-discoverability limitation on §1782(a) aid—avoiding offense to foreign governments, and maintaining parity between litigants. Brief for Petitioner 23–24; Reply Brief 5, 13–14; see *In re Application of Asta Medica, S. A.*, 981 F. 2d 1, 6 (CA1 1992) ("Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation."). While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of §1782(a).

We question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts. See *Bayer*, 146 F. 3d, at 194 ("[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use."); Smit, Recent Developments in International Litigation, 35 S. Tex. L. Rev. 215, 235–236 (1994) (hereinafter Smit, Recent Developments) (same).[Footnote 12] A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to §1782(a). See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N. V.*, [1987] 1 App. Cas. 24 (House of Lords ruled that nondiscoverability under English law did not stand in the way of a litigant in English proceedings seeking assistance in the United States under §1782).[Footnote 13] When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless. The rule in that situation would serve only to thwart §1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court could condition relief upon that person's reciprocal exchange of information. See *Euromepa, S. A.* v. *R. Esmerian, Inc.,* 51 F. 3d 1095, 1102 (CA2 1995); Smit, Recent Developments 237. Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate. See *Euromepa,* 51 F. 3d, at 1101.[Footnote 14]

We also reject Intel's suggestion that a §1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Brief for Petitioner 19–20 ("[I]f AMD were pursuing this matter in the United States, U. S. law would preclude it from obtaining discovery of Intel's documents."). Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.[Footnote 15] For example, we have in the United States no close analogue to the European Commission regime under which AMD is not free to mount its own case in the Court of First Instance or the European Court of Justice, but can participate only as complainant, an "interested person," in Commission-steered proceedings. See L. Ritter, W. Braun, & F. Rawlinson, European Competition Law: A Practitioner's Guide 824–826 (2d ed. 2000) (describing a complaint as a potentially "more certain (and cheaper) alternative to private enforcement through the [European Union's member states'] courts").[Footnote 16]

IV

As earlier emphasized, see *supra*, at 17, a district court is not required to grant a §1782(a) discovery application simply because it has the authority to do so. See *United Kingdom* v. *United States*, 238 F. 3d 1312, 1319 (CA11 2001) ("a district court's compliance with a §1782 request is not mandatory"). We note below factors that bear consideration in ruling on a §1782(a) request.

First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), 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. App. to Reply Brief 4a ("When th[e] person [who is to produce the evidence] is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence." (quoting Decl. of H. Smit in *In re: Application of Ishihara Chemical Co., Ltd., For order to take discovery of Shipley Company, L.L.C., Pursuant to 28 U. S. C. §1782,* Misc. 99–232 (FB) (EDNY, May 18, 2000)). In contrast, 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. See App. to Reply Brief 4a.

Second, as the 1964 Senate Report suggests, a court presented with a §1782(a) request may take into account 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. See S. Rep. No. 1580, at 7. Further, the grounds Intel urged for categorical limitations on §1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. See Brief for United States as *Amicus Curiae* 23. Specifically, a district court could consider whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. See *id.*, at 27. Also, unduly intrusive or burdensome requests may be rejected or trimmed. See *Bayer*, 146 F. 3d, at 196 (remanding for district-court consideration of "appropriate measures, if needed, to protect the confidentiality of materials"); *In re Application of Esses*, 101 F. 3d 873, 876 (CA2 1996) (affirming limited discovery that is neither "burdensome [n]or duplicative").

Intel maintains that, if we do not accept the categorical limitations it proposes, then, at least, we should exercise our supervisory authority to adopt rules barring §1782(a) discovery here. Brief for Petitioner 34–36; cf. *Thomas* v. *Arn,* 474 U. S. 140, 146–147 (1985) (this Court can establish rules of "sound judicial practice" (internal quotation marks omitted)). We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with §1782(a) applications in the lower courts.[Footnote 17] The European Commission has stated in *amicus curiae* briefs to this Court that it does not need or want the District Court's assistance. See European Commission *Amicus Curiae* 11–16; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 4–8. It is not altogether clear, however, whether the Commission, which may itself invoke §1782(a) aid, means to say "never" or "hardly ever" to judicial assistance from United States courts. Nor do we know whether the European Commission's views on §1782(a)'s utility are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions.

Several facets of this case remain largely unexplored. Intel and its *amici* have expressed concerns that AMD's application, if granted in any part, may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the European Commission's Leniency Program. See Brief for Petitioner 37; European Commission *Amicus Curiae* 11–16.[Footnote 18] Yet no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that §1782(a)'s preservation of legally applicable privileges, see *supra*, at 16, and the controls on discovery available to the District Court, see, *e.g.*, Fed. Rule Civ. Proc. 26(b)(2) and (c), would be ineffective to prevent discovery of Intel's business secrets and other confidential information.

On the merits, this case bears closer scrutiny than it has received to date. Having held that §1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to assure an airing adequate to determine what, if any, assistance is appropriate.[Footnote 19]

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

Justice O'Connor took no part in the consideration or decision of this case.

Footnote 1 "[A] *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness." Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515, 519 (1953). See Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1027 (1965) (hereinafter Smit, International Litigation) (noting foreign courts' use of letters rogatory to request evidence-gathering aid from United States courts).

Footnote 2 The Rules Commission also drafted amendments to the Federal Rules of Civil and Criminal Procedure and a Uniform Interstate and International Procedure Act, recommended for adoption by individual States. See Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H. R. Doc. No. 88, 88th Cong., 1st Sess., 2 (1963).

Footnote 3 See Smit, International Litigation 1026–1027, n. 72 (commenting that Congress eliminated the word "pending" in order "to facilitate the gathering of evidence prior to the institution of litigation abroad").

Footnote 4 The Alabama federal court granted summary judgment in Intel's favor in the *Intergraph* litigation, and the Court of Appeals for the Federal Circuit affirmed. See 253 F. 3d, at 699. A protective order, imposed by the Alabama federal court, governs the confidentiality of all discovery in that case. App. 72–73.

Footnote 5 Both Intel and AMD are headquartered in the Northern District of California. *Id.*, at 113.

Footnote 6 AMD's complaint to the Commission alleges, *inter alia*, "that Intel has monopolized the worldwide market for Windows-capable i.e. x86, microprocessors." *Id.*, at 55–56. The documents from the *Intergraph* litigation relate to: "(a) the market within which Intel x86 microprocessors compete; (b) the power that Intel enjoys within that market; (c) actions taken by Intel to preserve and enhance its position in the market; and (d) the impact of the actions taken by Intel to preserve and enhance its market position." App. 55.

Footnote 7 The First and Eleventh Circuits have construed §1782(a) to contain a foreign-discoverability requirement. See *In re Application of Asta Medica, S. A.*, 981 F. 2d 1, 7 (CA1 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1156 (CA11 1988). The Fourth and Fifth Circuits have held that no such requirement exists if the §1782(a) applicant is a foreign sovereign. See *In re Letter of Request from Amtsgericht Ingolstadt, F. R. G.,* 82 F. 3d 590, 592 (CA4 1996); *In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F. 3d 308, 310–311 (CA5 1995). In alignment with the Ninth Circuit, the Second and Third Circuits have rejected a foreign-discoverability requirement. See *In re Application of Gianoli Aldunate*, 3 F. 3d 54, 59–60 (CA2 1993); *In re Bayer AG*, 146 F.3d 188, 193–194 (CA3 1998).

Footnote 8 The Court of First Instance, which is "attached to the [European] Court of Justice," was established "to improve the judicial protection of individual interests, particularly in cases requiring the examination of complex facts, whilst at the same time reducing the workload of the [European] Court of Justice." C. Kerse, E. C. Antitrust Procedure 37 (3d ed. 1994).

Footnote 9 The dissent suggests that the Commission "more closely resembles a prosecuting authority, say, the Department of Justice's Antitrust Division, than an administrative agency that adjudicates cases, say, the Federal Trade Commission." *Post*, at 4. That is a questionable suggestion in view of the European Commission's authority to determine liability and impose penalties, dispositions that will remain final unless overturned by the European courts. See *supra*, at 10.

Footnote 10 The term "interested person," Intel notes, also appears in 28 U. S. C. §1696(a), a provision enacted concurrently with the 1964 revision of §1782. Brief for Petitioner 27. Section 1696(a) authorizes federal district courts to "order service … of any document issued in connection with a [foreign] proceeding" pursuant to a request made by the foreign tribunal "or upon application of any interested person." Intel reasons that "[t]he class of private parties qualifying as 'interested persons' for [service] purposes *must* of course be limited to litigants, because private parties … cannot serve 'process' unless they have filed suit." *Ibid.* (emphasis in original). Section 1696(a), however, is not limited to service of *process;* it allows service of "any document" issued in connection with a foreign proceeding. As the Government points out by way of example: "[I]f the European Commission's procedures were revised to require a complainant to serve its complaint on a target company, but the complainant's role in the Commission's proceedings otherwise remained unchanged, [§]1696 would authorize the district court to provide that 'interested [person]' with assistance in serving that document." Brief for United States as *Amicus Curiae* 20, n. 11.

Footnote 11 Section §1782(a) instructs that a district court's discovery 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 … [or may be] the Federal Rules of Civil Procedure." This mode-of-proof-taking instruction imposes no substantive limitation on the discovery to be had.

discovery is denied.

Footnote 12 Most civil-law systems lack procedures analogous to the pretrial discovery regime operative under the Federal Rules of Civil Procedure. See ALI, ALI/Unidroit Principles and Rules of Transnational Civil Procedure, Proposed Final Draft, Rule 22, Comment R–22E (2004) ("Disclosure and exchange of evidence under the civil-law systems are generally more restricted, or nonexistent."); Hazard, Discovery and the Role of the Judge in Civil Law Jurisdictions, 73 Notre Dame L. Rev. 1017, 1018– 1019 (1998) (same). See also Smit, Recent Developments 235, n. 93 ("The drafters [of §1782] were quite aware of the circumstance that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence.").

Footnote 13 See Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U. S. C. Revisited, 25 Syracuse J. Int'l L. & Comm. 1, 13, and n. 63 (1998) (hereinafter Smit, American Assistance) (noting that "[a] similar decision was rendered by the President of the Amsterdam District Court").

Footnote 14 A civil-law court, furthermore, might attend to litigant-parity concerns in its merits determination: "In civil law countries, documentary evidence is generally submitted as an attachment to the pleadings or as part of a report by an expert… . A civil law court generally rules upon the question of whether particular documentary evidence may be relied upon only in its decision on the merits." Smit, Recent Developments 235–236, n. 94.

Footnote 15 Among its proposed rules, the dissent would exclude from §1782(a)'s reach discovery not available "under foreign law" *and* "under domestic law in analogous circumstances." *Post*, at 3. Because comparison of systems is slippery business, the dissent's rule is infinitely easier to state than to apply. As the dissent's examples tellingly reveal, see *post*, at 1–2, a foreign proceeding may have no direct analogue in our legal system. In light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding "in a foreign or international tribunal." While we reject the rules the dissent would inject into the statute, see *post*, at 3–6, we do suggest guides for the exercise of district-court discretion, see *infra*, at 20–23.

Footnote 16 At oral argument, counsel for AMD observed: "In the United States, we could have brought a private action in the district court for these very same violations. In Europe, our only Europe-wide remedy was to go to the [European Commission]." Tr. of Oral Arg. 33.

Footnote 17 The dissent sees a need for "categorical limits" to ward off "expensive, time-consuming battles about discovery." *Post*, at 2. That concern seems more imaginary than real. There is no evidence whatsoever, in the 40 years since §1782(a)'s adoption, see *supra*, at 3–4, of the costs, delays, and forced settlements the dissent hypothesizes. See Smit, American Assistance 1, 19–20 ("The revised section 1782 … has been applied in scores of cases… . All in all, Section 1782 has largely served the purposes for which it was enacted… . [T]here appears to be no reason for seriously considering, at this time, any statutory amendments.").

The Commission, we note, is not obliged to respond to a discovery request of the kind AMD has made. The party targeted in the complaint and in the §1782(a) application would no doubt wield the laboring oar in opposing discovery, as Intel did here. Not only was there no "need for the Commission to respond," *post*, at 5, the Commission in fact made no submission at all in the instant matter before it reached this Court.

Footnote 18 The European Commission's "Leniency Program" allows "cartel participants [to] confess their own wrongdoing" in return for prosecutorial leniency. European Commission *Amicus Curiae* 14–15; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 6.

Footnote 19 The District Court might also consider the significance of the protective order entered by the District Court for the Northern District of Alabama. See App. 73; *supra*, at 6, n. 4; cf. *Four Pillars Enterprises Co.* v. *Avery Dennison Corp.*, 308 F. 3d 1075, 1080 (CA9 2002) (affirming district-court denial of discovery that "would frustrate the protective order of [another] federal [district] court").

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Presuit Discovery in a Comparative Context

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PRESUIT DISCOVERY IN A COMPARATIVE CONTEXT

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INTRODUCTION

In civil litigation around the globe, the usual process is that investigative discovery is allowed (if at all) only after the plaintiff files a substantive complaint.[1] The complaint provides a framework for future discovery and justifies the cost and intrusiveness of discovery on the defendant.

Recently, however, a growing number of jurisdictions — most notably England, Hong Kong, Singapore, Japan, and several of the states of the US — have adopted general mechanisms for presuit investigative discovery. These new procedures differ from presuit preservational discovery, which seeks to preserve information that is in danger of loss prior to discovery in a formal lawsuit. They also differ from the *Norwich Pharmacal* principle, which allows presuit discovery from an involved nonparty who possesses information pertaining to the identity of the putative defendant. In contrast to these procedures, presuit investigative discovery is designed to force or encourage a putative defendant directly to divulge information under no risk of loss to the putative plaintiff before the commencement of a formal, substantive action.

This paper is the first to probe the nature and importance of this new generation of presuit investigative discovery. It begins by comparing commonalities and contrasting differences, with sensitivity to the particular procedural system in which each mechanism is located. Although the mechanisms have a common effect, their details, functions, and successes vary. England, for example, designed its presuit mechanisms to promote a 'cards on the table' approach that facilitates informal dispute resolution before formal commencement. By contrast, Japan designed its 'inquiry' procedure to enable plaintiffs to meet its fact-pleading standard. Singapore's mechanism is broadly available whenever a court finds its use would save costs or otherwise be in the interests of justice. The varied practices and procedures provide rich fodder for comparative exploration.

[1] Terms differ across jurisdictions, but their meanings are substantially similar. For consistency purposes, I use the term 'complaint' to mean the plaintiff's initial filing; 'plaintiff' instead of 'complainant', 'petitioner', and 'applicant'; 'discovery' instead of 'disclosure'; and 'presuit' instead of 'pre-action', 'pre-suit', 'pre-complaint', and 'pre-filing'.

Evaluating these mechanisms reveals some important lessons. The first lesson is that presuit investigative discovery is surprising prevalent in common-law systems, despite their traditional resistance to it. The second is that, regardless of the purported motivation, presuit investigative discovery can be an effective tool for enabling plaintiffs to file sufficient complaints. The third lesson is that the different mechanisms have much commonality among them, including requirements for providing notice, for ensuring any presuit discovery is limited, and for providing cost sanctions and incentives to the parties for participating in good faith.

The paper then offers a place for those lessons in federal-court practice in the United States. It may be that non-US countries can learn from each other's presuit mechanisms as well, but, unlike the common-law countries surveyed in the paper, US federal rules do not permit presuit investigative discovery, and therefore the US has potentially the most to learn and consider. In addition, US pleading rules recently have undergone changes that make presuit discovery particularly attractive. In the past, presuit investigative discovery was seen as unnecessary because the US's liberal notice-pleading standard allowed complainants easy access to full discovery after formal commencement. Recently, however, the twin decisions of *Ashcroft v Iqbal* and *Bell Atlantic Corp v Twombly* have instituted a new pleading standard akin to the fact-pleading standard in other jurisdictions. A comparative assessment of presuit discovery at play in other countries suggests that such a mechanism may be useful and workable in the US as well, and that the US should look to these foreign experiments as models for its own reform.

PRESUIT DISCOVERY IN A NUTSHELL

Common-law countries generally require fact pleading and allow discovery only after the pleadings are complete. In England, for example, the complaint requires a statement of material facts on which the plaintiff relies.[2] If the complaint fails to support a claim with sufficient facts, the judge can strike the claim or prevent the party from giving evidence on that fact at trial.[3] These requirements are designed primarily to define the nature of the dispute and facilitate an orderly discovery process.[4] Other common-law systems have similar requirements, as does the hybrid system of Japan.[5]

With few exceptions, discovery comes only after the plaintiff submits a sufficient complaint. The reasons are twofold. First, a defendant ought not to be forced to bear discovery costs and the attendant invasion of its privacy without some indication of wrongdoing reflected in a formal complaint. Second, because pleadings circumscribe the scope of discovery, discovery without the guideposts of a complaint would be haphazard and inefficient.

[2] CPR 16.4; Zuckerman, A (2006) *Zuckerman on Civil Procedure: Principles of Practice* (2nd ed) Sweet & Maxwell at 238-40; Andrews, N (2003) *English Civil Procedure: Fundamentals of the New Civil Justice System* Oxford University Press at 236-64.

[3] Andrews *Civil Procedure* above n 2 at 521.

[4] Id at 253.

[5] Main, T (2006) *Global Issues in Civil Procedure* West at 28-32 (Australia); Alta R Ct 104 (Alberta); Ont R Civ P 26.05(1) (Ontario); Takwani, CK (1994) *Civil Procedure* (3rd ed) Eastern Books at 107-12 (India); O 18 R 7(1) (Hong Kong), O 18 R 7(1) (Singapore); Goodman, C (2004) *Justice and Civil Procedure in Japan* Oxford University Press at 257.

Nevertheless, common-law systems have recognized that special circumstances can justify a limited reordering of pretrial litigation. For example, countries have adopted procedures for a search order (previously known as an *Anton Piller* order[6]) if a prospective plaintiff fears that key evidence is in imminent danger of being lost.[7] The order will be granted only if the prospective plaintiff can show 'serious harm or injustice' due to a risk that the defendant will destroy or remove material evidence.[8]

Another customary presuit discovery mechanism is the *Norwich Pharmacal* principle, named after the 1973 case. There, the House of Lords revived and modified an old equitable remedy known as the presuit bill of discovery, allowing a plaintiff to obtain discovery from customs officials concerning the identity of a party that had secretly been importing the company's patented drugs.[9] The *Norwich Pharmacal* principle has been widely adopted, permitting a prospective plaintiff to obtain discovery from an involved nonparty to determine the identity of the wrongdoer. In England, courts have extended the principle to information in aid of a claim, even if the putative defendant's identity was known.[10] Other common-law countries have adopted the principle, though not all have adopted England's subsequent expansion.[11]

The search order, or Anton Piller form of presuit discovery, is preservational, not investigative. In other words, the order is designed to ensure that the evidence is available for use at trial; it is not designed to enable a prospective plaintiff to investigate facts. By contrast, the *Norwich Pharmacal* form of presuit discovery is investigative, but it can be sought only from a nonparty, not from the prospective defendant. Neither form of presuit discovery, then, provides viable relief to a plaintiff who needs to obtain facts in the hands of a defendant in order to file a sufficient complaint.

A COMPARISON OF PRESUIT-DISCOVERY MECHANISMS

Until recently, presuit investigative discovery from the putative defendant did not exist, except in certain narrow circumstances. However, since the Woolf Reforms in England and Wales, many common-law countries, and even some civil-law countries, have begun experimenting with such discovery on a much wider scale.[12]

England

In 1998, upon the Final Report and Recommendations of the Right Honorable Lord Woolf,[13] England adopted a series of procedural reforms designed to promote early and

[6] *Anton Piller KG v Mfg Processes Ltd* [1976] 1 All ER 779.
[7] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 604-10.
[8] Platto, C (1990) *Pre-trial and Pre-hearing Procedures Worldwide* Graham & Trotman at 85.
[9] *Norwich Pharmacal Co v Commissioners of Customs & Excise* (1973) 2 All ER 943.
[10] *Ashworth Security Hospital v. MGN Ltd* [2002] UKHL 29; *Bankers Trust Co v Shapira* [1980] 3 All ER 353; Zuckerman *Zuckerman on Civil Procedure* above n 2 at 578-81.
[11] Malaysia, for example, has adopted Norwich Pharmacal but, unlike England, has not extended it. Compare *First Malaysia Finance Bhd v Dato' Mohd Fathi Haji Ahmad* [1993] 2 MLJ 497 with *Teoh v Wan & Co* [2001] 1 AMR 358.
[12] In addition to the countries discussed in the text, it is worth noting that certain Australian rules allow presuit investigative discovery. R Civ P 32.05 (Vict); Family LR 1.05.
[13] Available at: http://www.dca.gov.uk/civil/final/index.htm.

inexpensive dispute resolution and to relegate litigation to a last alternative. In particular, England adopted a set of pre-action Protocols for specific claims and a general pre-action Practice Direction for all claims. The Protocols and Practice Direction are designed to promote a cards-on-the-table approach that facilitates informal dispute resolution before formal commencement or, if presuit settlement fails, to make subsequent formal proceedings more efficient.[14]

Under these reforms, a prospective plaintiff must send the prospective defendant a detailed account of the prospective allegations and a summary of the evidence the plaintiff has supporting them. She may also identify the opponent's documents that she wishes to inspect. The defendant then will respond with disclosures. If the defendant disputes the case, she must explain why and detail her own supporting evidence.[15]

Parties must act reasonably in this pre-action disclosure exchange and in attempting to avoid the necessity of formal litigation.[16] Although the pre-action procedure is not mandatory, failure to follow it in good faith can result in adverse cost apportionment in a subsequent formal lawsuit.[17] This cost consequence 'provides a potent incentive for adopting reasonable attitudes' in pre-action communication and disclosure.[18]

It appears anecdotally that the pre-action reforms have had a salutary impact. In 2006, Adrian Zuckerman wrote: 'There can be little doubt that the pre-action protocols and the culture of co-operation to which they give tangible expression have changed the character of English litigation for the better.'[19]

Because the pre-action protocols are not directly enforceable, however, they may be unable to aid a prospective plaintiff faced with an uncooperative adversary, especially if the adversary possesses the information necessary for the prospective plaintiff to commence a formal action. Like most other countries, England traditionally did not allow formal pre-action disclosure, except in very limited circumstances. As Zuckerman has recognized: 'This could be a cause of considerable hardship where a victim of a wrong was unable to ascertain whether he had a cause of action against another person without access to that person's documents.'[20]

Lord Woolf's report recommended expanding formal pre-action disclosure,[21] and that recommendation has been adopted in a general pre-action disclosure mechanism in CPR 31.16. The idea is, in part, 'to assist potential claimants who could not otherwise establish whether they had grounds for action'.[22]

A court will order presuit disclosure under CPR 31.16 if the prospective parties are likely to become formal parties, if the documents requested fall into the category of standard disclosure, and if disclosure prior to action is desirable in order to dispose fairly

[14] Practice Direction: Pre-Action Conduct para 1; Zuckerman *Zuckerman on Civil Procedure* above n 2 at 42.
[15] Practice Direction: Pre-Action Conduct para 7.1 and Annex A.
[16] Id § III and Annex A.
[17] CPR 31.11, 44.3; Practice Direction: Pre-Action Conduct para 4.6.
[18] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 43.
[19] Id at 43-44. This echoes the assessments of earlier commentators. Andrews *Civil Procedure* above n 2 at 8 (noting that evaluative empirical evidence of the efficacy of the reforms shows improved quality of presuit contact between parties); Byron, R (2001) 'An Update on Dispute Resolution in England and Wales: Evolution or Revolution?' (75) *Tulane Law Review* 1297 (reporting, in 2001, that the Woolf Reforms generally have been successful at changing the culture from pro-litigation to pro-mediation).
[20] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 564.
[21] Final Report 127 para 48.
[22] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 564.

of the anticipated proceedings, assist the dispute to be resolved without proceedings, or save costs.[23] The lodestone is desirability, which is tied to the requested disclosure's scope and cost.[24] The court is more likely to issue an order if the disclosure sought is focused and limited and needed to plead a claim sufficiently.[25]

To ensure that the parties do not abuse the pre-action disclosure mechanism, the court will usually award costs to the party prevailing on the application.[26] However, the court has discretion to allocate costs differently depending upon the parties' conduct.[27]

Hong Kong

The Woolf Reforms in England spurred similar reforms in other common-law countries. Hong Kong, for example, adopted Order 24, Rule 7A, which allows a prospective plaintiff to obtain a court order for presuit investigative discovery of documents relevant to the putative claim. Although the purpose of the provision is to facilitate negotiation, trial preparation, and pre-trial settlement, a court may order only disclosure of particular documents, not general discovery.[28] To be allowed, the petition must be supported by an affidavit specifying the documents sought, demonstrating their relevance to an issue likely to arise out of the prospective claim, showing that the respondent is likely to have the documents in his possession, and stating the grounds on which the claim will be made. If the court finds that these requirements have been met, then the court may grant presuit discovery if relevant and necessary for disposing fairly of the case or for saving costs.[29]

Until recently, presuit discovery under Rule 7A was restricted to personal-injury cases because of concerns that broad presuit discovery would lead to excessive front-load costs or harassing fishing expeditions.[30] In 2004, however, the Hong Kong Working Party on Civil Justice Reform published a Final Report with recommendations that largely followed the lead of the Woolf Reforms.[31] The Final Report noted broad consensus for support for more generalized presuit investigative discovery modeled after CPR 31.16, and it recognized that 'in some cases, a plaintiff with a potentially meritorious claim may be shut out from asserting it in a sustainable form without presuit disclosure of key documents'.[32] The Working Party also recognized that presuit discovery could facilitate settlement.[33]

An initial proposal to broaden presuit investigative discovery beyond personal-injury and death cases was broadly supported by judges, masters, the Bar Association, the Law Society, a set of barrister's chambers, and three firms of solicitors. Several supporters, however, stressed the need for clearly defined limits on the scope of discovery.[34]

[23] CPR 31.16.
[24] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 568-70.
[25] Id; *First Gulf Bank v Wachovia Bank National Assn* [2005] EWHC 2827; *Snowstar Shipping v Graig Shipping PLC* [2003] EWHC 1367.
[26] CPR 48.1; Andrews *Civil Procedure* above n 2 at 614.
[27] Zuckerman *Zuckerman on Civil Procedure* above n 2 at 571.
[28] *The Hong Kong White Book (2006)* Sweet & Maxwell at 454.
[29] O 24 R 8(2) (Hong Kong).
[30] CJR Final Report § 16.3(a)(i) (2004), available at: http://www.civiljustice.gov.hk/fr/paperhtml/toc_fr.html.
[31] Fan, K (2011) 'Mediation and Civil Justice Reform in Hong Kong' (27) *International Litigation Quarterly* 11.
[32] CJR Final Report § 16.3.
[33] Ibid.
[34] Ibid.

In response, the Working Party proposed: 'Parties should be empowered to seek discovery before commencing proceedings [...] along the lines provided for by the CPR.'[35] Accordingly, the Final Report recommended amending Rule 7A to broaden the court's power to order presuit discovery 'to encompass all types of cases (and not merely cases involving personal injury and death claims)'.[36] To assuage concerns about fishing expeditions, the Working Party recommended that any order should list 'specific documents or classes of documents which are "directly relevant" to the issues in the anticipated proceedings', and 'should not extend to "background" documents or possible "train of inquiry" documents'.[37] The Working Party reasoned that

> such a rule strikes a reasonable balance between the need to protect against harassment and fishing applications on the one hand and the need to enable a potentially meritorious plaintiff to bring a claim which could not effectively otherwise be brought.[38]

Following that recommendation, the Hong Kong judiciary adopted an amendment in 2008 that eliminated the personal-injury limitation. Rule 7A now allows for presuit investigative discovery in all cases.[39]

Singapore

Singapore's Rules provide for discovery of documentary and written information via originating summons in a presuit action. They also provide for sanctions for noncompliance with discovery requests in the presuit action.[40]

An application for presuit discovery must be supported by an affidavit asserting that the defendant is likely to be a party to subsequent substantive proceedings and identifying the material facts pertaining to the intended proceedings. The affidavit must also describe the information sought, explain how the information is relevant to an issue likely to arise out of the intended claim, and show that the defendant is likely to have the information in his possession. The scope of discovery is limited to what could have been obtained via normal discovery.[41] A court will order presuit discovery only if necessary for disposing fairly of the cause or for saving costs.[42]

The court may condition an order for presuit discovery on the plaintiff giving security for the costs of the defendant or on such other terms, if any, as the court thinks just.[43] Unless the court orders otherwise, the plaintiff must pay the defendant's costs.[44]

[35] Ibid.
[36] Id Recommendation 75.
[37] Id § 16.3(c).
[38] Id § 16.3(d).
[39] O 24 R 7A.
[40] O 24 R 6, O 24 R 16(1), O 26A R 1. The court also has an inherent power to make procedural orders in the interests of justice. Pinsler, J (2005) 'Is Discovery Available prior to the Commencement of Arbitration Proceedings?' *Singapore Journal of Legal Studies* 64.
[41] O 24 R 6, O 27A R 1.
[42] O 24 R 13(1), O 27A R 2.
[43] O 24 R 6(6)(a), O 27A R 3.
[44] O 24 R 6(9), O 27A R 5.

Japan

In 2003, the Japanese Civil Code was amended to adopt a presuit inquiry process.[45] The motivation for adopting this new presuit procedure was to enable complainants to be able to meet Japan's fact-pleading standard, which requires the complaint to be specific about underlying facts and to itemize the evidence that will be used to prove each allegation.[46]

Under this new procedure, a prospective plaintiff must notify the prospective defendant and provide the reasons for the suit. Once notification is complete, each party has four months to submit a written inquiry to the opposing party to discover facts clearly necessary for preparing the contention or proof.[47] The inquiries posed must be specific, factual, reasonable, relevant to a contested issue, non-offensive, and non-repetitive. The goal is to give a prospective plaintiff an opportunity to have some factual investigation of a claim that might otherwise be insufficient without having to pay the relatively high filing fee for a formal lawsuit. Another hope is that the inquiry process will move the parties toward presuit settlement.[48]

Answers are mandatory, but the Code does not impose a formal sanction for noncompliance.[49] Instead, the Code imposes a duty of cooperation on the parties.[50] However, because this duty is in tension with a Japanese lawyer's ethical duty to zealously represent his client, lawyers often refuse to voluntarily disclose relevant information to opponents.[51]

Although a court can consider cost-allocation sanctions for unjustified discovery refusals if the plaintiff files a formal complaint, courts have supported refusals on a variety of privacy grounds.[52] The lack of sanctions and the broad leeway for refusal have led the Japanese bar to conclude that the inquiry procedure has not been effective as a discovery device.[53]

Civil-Law Countries

Civil-law countries have little, if any, formal discovery in the first place, so one might expect nothing from them in the way of presuit discovery.[54] But even in core civil-law systems, the idea of presuit discovery is spreading. Like common-law systems, many civil-law systems permit some presuit preservational discovery. But courts in France and Italy

[45] Act to Amend Civil Procedure Act and Other Relevant Acts (2003) 15 Heisei Statute No 108 Arts 132-2 to 132-9. The Japanese Code has long allowed a plaintiff to request a presuit evidentiary hearing if necessary to preserve evidence, but this provision has never been held to encompass investigative discovery. Oda, H (1999) *Japanese Law* (2nd ed) Oxford University Press at 401-02.

[46] Chase, O and others (2007) *Civil Litigation in Comparative Context* West at 239.

[47] Oda, H (2009) *Japanese Law* (3rd ed) Oxford University Press at 415.

[48] Goodman, C (2004) 'Japan's New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?' (29) *Brooklyn Journal International Law* 511.

[49] Oda *Japanese Law* above n 47 at 4.

[50] Kojima, T (1998) 'Japanese Civil Procedure in Comparative Law Perspective' (46) *University of Kansas Law Review* 687.

[51] Goodman 'Japan's New Civil Procedure Code' above n 48 at 573.

[52] Oda *Japanese Law* above n 47 at 415.

[53] Goodman 'Japan's New Civil Procedure Code' above n 48 at 572-73.

[54] Merryman, JH and Pérez-Perdomo, R (2007) *The Civil Law Tradition* (3rd ed) Stanford University Press at 114-17.

have indicated a recent willingness to extend that power to circumstances in which the discovery is not truly necessary for preservation of evidence but rather would facilitate resolution of the dispute.[55] It is unclear whether this practice is fleeting or indicative of more concrete change, but it at least provides additional support for presuit discovery.

US States

In addition to foreign nations, several states of the United States have experimented with presuit-discovery mechanisms. Texas is perhaps the strongest proponent. It allows presuit investigative discovery whenever justice or some other benefit outweighs the burden and expense of the discovery requested.[56] Plaintiffs routinely use the presuit-discovery procedure to assist in drafting their complaints.[57]

Alabama, like Texas, has a strong policy favoring presuit discovery for claim investigation. Alabama Rule 27 allows preaction discovery for any 'person who desires to perpetuate his own testimony or that of another person or to obtain discovery under Rule 34 or 35'.[58] The Alabama Supreme Court has construed the rule to allow preaction discovery 'regardless of any need to perpetuate evidence' if the plaintiff wishes to use it to determine whether she has a reasonable basis for filing a lawsuit.[59]

Similarly, Ohio allows a petitioner to bring an action for discovery when she is otherwise unable to file a complaint without the discovery. Ohio Rule 34(D) provides that 'a person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule'.[60] Under this rule, an action for discovery may be used 'to uncover facts necessary for pleading',[61] including facts that would allow a plaintiff to determine if she has a valid cause of action.[62] The Ohio Court of Appeals has added:

> The rule acts as a safeguard against charges that the plaintiff filed a frivolous lawsuit in a case where the wrongdoer or a third party has the ability to hide the facts needed by the plaintiff to determine who is the wrongdoer and exactly what occurred.[63]

Pennsylvania also allows presuit discovery for purposes of composing a complaint. The Pennsylvania rules allow a plaintiff to take testimony or propound interrogatories 'for preparation of pleadings'.[64] The Pennsylvania Supreme Court has interpreted this rule to allow presuit discovery when necessary to formulate a legally sufficient complaint.[65]

[55] Chase *Civil Litigation in Comparative Context* above n 46 at 238-39.
[56] Tex R Civ P 202.1 & 202.4.
[57] Hoffman, L (2007) 'Access to Justice, Access to Information: The Role of Presuit Investigatory Discovery' (40) *University of Michigan Journal of Law Reform* 217 (estimating that Texas presuit discovery has been used approximately 4,500 times from 1999-2005 and that over 50% of Texas attorneys were involved in presuit discovery during that same period).
[58] Ala R Civ P 27.
[59] *Ex parte Anderson*, 644 So 2d 961, 965 (Ala 1994).
[60] Ohio R Civ P 34(D)(1).
[61] *Huge v Ford Motor Co*, 803 NE2d 859, 861 (Ohio App 2004).
[62] *Benner v Walker Ambulance Co*, 692 NE2d 1053, 1055 (Ohio App 1997).
[63] Id.
[64] Pa R Civ P 4001(c) (emphasis added).
[65] *McNeil v Jordan*, 894 A2d 1260, 1275-78 (Pa 2006).

Other states are less overt about the availability of presuit discovery but nonetheless appear to recognize it.[66] In addition, most US states allow equitable bills of discovery.[67] Courts generally have restricted the bill to instances in which discovery cannot otherwise be had under the applicable rules and statutes and where discovery is necessary to secure justice in the underlying proceeding.[68] Thus, most states that do not permit presuit investigative discovery by statute or rule instead allow an equitable action for a bill of discovery.

Connecticut, for example, recognizes an independent equitable action for a bill of discovery. The bill is designed to obtain evidence for use in an action for affirmative relief. The plaintiff must demonstrate that the discovery is material and necessary for proof of, or is needed to aid in proof of or in defense of, another action already brought or about to be brought. He must show that he has no other adequate means of enforcing discovery of the desired material, where 'adequate' takes into consideration convenient, effective, and full relief. Courts presumptively grant the bill absent some well-founded objection.[69]

EVALUATIVE LESSONS

The first takeaway from this survey of presuit discovery around the world is that presuit discovery is surprisingly prevalent among common-law systems. Once seen as something exceptional and carefully limited — as with *Anton Piller* and *Norwich Pharmacal* orders — presuit discovery appears to be experiencing a surge in popularity, with a broadening and emboldening trend.

The second takeaway is that although the asserted goals of presuit discovery fall into two discrete categories — promoting efficiency and rectifying information asymmetry — all investigatory presuit-discovery mechanisms help equalize information in practice. The Hong Kong experience illuminates this point. Hong Kong's pre-2004 presuit-discovery mechanism was designed to promote efficiency and settlement, but in broadening it in light of the Woolf Reforms, the stated goals expanded to add information equalization.[70] Thus, whatever its stated rationale, presuit discovery generally is information equalizing.

The third takeaway is that the details of presuit discovery are strikingly similar across countries. In part, this similarity may reflect the habit of common-law countries to follow England's lead, though that follow-the-leader tendency does not adequately explain the adoption of presuit discovery in US states, which typically avoid looking to international models. The common features of presuit-discovery mechanisms include the following:

1. Notice: the plaintiff must identify the claim, defendant, and information sought.
2. Focus: the information sought must be relevant and discoverable but no broader than what is necessary to enable the plaintiff to file a formal complaint, to facilitate the resolution of the dispute, or to save costs.

[66] Dodson, S (2010) 'Federal Pleading and State Presuit Discovery' (14) *Lewis & Clark Law Review* 43 (identifying New York and Vermont).
[67] Barron, R (1996) 'Existence and Nature of Cause of Action for Equitable Bill of Discovery' (37) *American Law Reports 5th* 645.
[68] Id.
[69] *Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994).
[70] CJR Final Report § 16.3(a)(i).

3. Cost Allocation: except in U.S. states, the plaintiff bears some risk of having to pay costs if she loses her petition for presuit discovery or the subsequent substantive lawsuit.
4. Compliance: the defendant has some legal duty or financial incentive to comply with the presuit-discovery request.

Can other systems use these lessons profitably? The next section considers that question, with particular attention to the US, which lacks a robust pre-action mechanism.

APPLICATION IN THE US

Although the US rarely looks outward for procedural reform, the US federal system could benefit from foreign experiments with presuit discovery. The balance of this paper focuses on how the US system might profitably use those lessons.

Pleading in the US

Despite the gulf between the civil-law and common-law traditions,[71] the global norm of pleading is fact pleading.[72] Different pleading rules require varying levels of detail and evidence, but they coalesce around a common emphasis on facts.

For years, the US followed a different model. According to the 1957 case *Conley v Gibson*, the US Federal Rules 'do not require a claimant to set out in detail the facts upon which he bases his claim'.[73] Indeed, unlike most fact-pleading regimes, Rule 8 deliberately avoids the word 'fact'. Instead of fact pleading, the US federal system has followed 'notice pleading', which requires only that the complaint give 'fair notice' of the claims and the 'grounds' upon which they rest.[74] To be sure, proper notice requires some factual setting, but it requires only enough to differentiate the claim, not to detail or substantiate it. Notice pleading, therefore, is fundamentally different from the fact pleading practiced by the rest of the world.[75]

In 2007, however, the US Supreme Court dramatically changed federal pleading from a system founded on notice to one founded on facts. *Bell Atlantic Corp v Twombly* held that a complaint failed to meet the pleading standard—despite providing sufficient notice—because it did not supply sufficient facts to support the 'plausibility' of the claim.[76] In the 2009 case of *Ashcroft v Iqbal*, the Supreme Court reaffirmed this factual-sufficiency standard, and added a requirement that conclusory allegations without factual support

[71] Of course, individual systems within one of these great traditions differ widely and are themselves dynamic. Thus, I will necessarily use some generalities and extrapolations in this section.

[72] Murray, PL and Stürner, R (2004) *German Civil Justice* Carolina Academic Press at 198 (Germany); Schlosser, PF (1996) 'Lectures on Civil-Law Litigation Systems and American Cooperation with those Systems' (45) *University of Kansas Law Review* 9 (France); Main *Global Issues* above n 5 at 28-32 (Spain, Austria, and Australia), Taruffo, M (2002) 'Civil Procedure and the Path of a Civil Case' in Lena, JS and Mattei, U (eds) (2002) *Introduction to Italian Law* Aspen (Italy); ALI/UNIDROIT, Principles of Transnational Civil Procedure Rule 12.3.

[73] *Conley v Gibson*, 355 US 41, 47-48 (1957).

[74] Id.

[75] Dodson, S (2010) 'Comparative Convergences in Pleading Standards' (158) *University of Pennsylvania Law Review* 441.

[76] *Bell Atlantic Corp v Twombly*, 550 US 544, 556 (2007).

should be disregarded by the court when assessing plausibility.[77] *Iqbal* specifically referred to the need for facts more than twenty times in the opinion. There can be no doubt that these decisions require, both formally and functionally, the pleading of facts. These cases move US federal pleading away from its exceptionalist corner and toward a fact-pleading regime fundamentally more akin to that of the rest of the world.

This new pleading regime does differ instrumentally from the fact pleading practiced in most other countries.[78] The new US fact pleading is a screening device, designed to weed out claims suspected of being meritless. The fact pleading practiced in most countries is an information-forcing, issue-narrowing mechanism, designed to focus the case early on for efficiency purposes. In this respect, then, the pleadings trend in the US is not moving in a straight line directly toward foreign pleading regimes.

Although one ought not let similarities mask differences,[79] one also ought not let differences mask similarities. *Twombly* and *Iqbal* reject mere notice pleading and demand factual sufficiency. Although the new US pleading differs from traditional fact pleading on an instrumental level, it looks quite similar in practice and in effect.

Further, the instrumental differences are not particularly meaningful. For starters, the general purpose of both traditional fact pleading and the new US pleading is the same: efficiency. And, although the two mechanisms purport to achieve that efficiency in different ways, fact pleading in practice ends up having a screening effect. Thus, although they purport to be instrumentally different, the two mechanisms are more instrumentally similar than their stated motives presume.

The primary difference is that other countries recognize the fallibility of the fact-pleading screening effect and have attempted to ameliorate it,[80] while US pleading assumes that a plaintiff's failure to plead supporting facts establishes the meritlessness of the claim. That assumption is wrong. In many cases, particularly those involving secretive conduct or mental state, the plaintiff will lack critical facts because they are in the hands of a defendant who is unwilling to share them. A plaintiff's failure to plead those facts indicates information asymmetry, not necessarily meritlessness.[81]

In the US, plaintiffs facing information asymmetry cannot get the facts that they need from the defendant without discovery, but they cannot get to discovery without first pleading those facts. This catch-22 affects plaintiffs with meritorious claims just as strongly as those with meritless claims. The problem is especially pernicious in the US, which encourages private litigation as a way to enforce public norms.

[77] *Ashcroft v Iqbal*, 556 US 662 (2009).

[78] Clermont, K (2010) 'Three Myths about Twombly-Iqbal' (45) *Wake Forest Law Review* 1337.

[79] Marcus, R (2010) 'Exceptionalism and Convergence: Form versus Content and Categorical Views of Procedure' (49) *Supreme Court Law Review* 521.

[80] In some civil-law countries, for example, if the factual information is largely in the defendant's hands, the judge is less likely to require detailed substantiation in the plaintiff's pleadings. Murray, PL and Stürner, R *German Civil Justice* above n 72 at 231 n 211 and 595; Carchiette, A (2010) 'Responsabilita Civile del Medico e Della Struttura Sanitaria e Canoni di Repartizione dell'Onere Probatorio tra Vittima e Convenuto [Liability in Torts of the Doctor and the Hospital and the Criteria for Distributing the Burden of Proof Between the Plaintiff and the Defendant]' *Diritto e Giustizia* (It.). By contrast, US courts have held that the pleading standard does not lessen in cases of information asymmetry. *Chesbrough v VPA PC*, 2011 WL 3667648 at *9 (6th Cir Aug 23, 2011); *Santiago v Warminster Twp*, 629 F.3d 121, 134 n 10 (3d Cir 2010); *South Cherry St, LLC v Hennessee Group LLC*, 573 F.3d 98, 113-114 (2d Cir 2009).

[81] Miller, A (2010) 'From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure' (60) *Duke Law Journal* 1.

Presuit discovery holds a solution. The idea is simple: give plaintiffs caught in this catch-22 a limited opportunity for presuit discovery, carefully circumscribed and targeted at the missing facts causing the catch-22 in the first place. Such discovery would benefit plaintiffs with meritorious claims who otherwise would be screened out by a fact-pleading standard. It also could benefit innocent defendants by providing a low-cost opportunity to demonstrate that a claim is meritless. Finally, it should benefit the system as a whole by focusing the pleading screen on truly meritless cases rather than on information-asymmetry cases (some of which could be meritorious).[82]

The US federal rules, however, currently do not permit any presuit, investigative discovery.[83] Accordingly, US rulemakers should consider adopting a presuit-discovery mechanism, modeled on the mechanisms of other countries, that allows plaintiffs to access discovery for purposes of investigating those critical facts needed to file a sufficient pleading. I and others have urged such adoption, but this paper is the first to offer support from a comparative perspective.[84]

Presuit Discovery in the US

Presuit, investigative discovery in the US should have several features, each of which garners support from existing presuit-discovery mechanisms in other countries. Recall that presuit-discovery mechanisms have four common characteristics:

1. Notice: the plaintiff must identify the claim, defendant, and information sought.
2. Focus: the information sought must be relevant and discoverable but no broader than what is necessary to enable the plaintiff to file a formal complaint, to facilitate the resolution of the dispute, or to save costs.
3. Cost Allocation: except in US states, the plaintiff bears some risk of having to pay costs if she loses her petition for presuit discovery or the subsequent substantive lawsuit.
4. Compliance: the defendant has some legal duty or financial incentive to comply with the presuit discovery request.

Presuit discovery in US federal courts should draw upon these principles, with some modifications to reflect the unique structures of US civil procedure.

First, notice. The plaintiff should identify the putative defendant, the anticipated claim, and the information sought. Doing so will give the defendant notice of the anticipated lawsuit and the opportunity to settle the dispute, to provide any requested information informally, or to contest the presuit-discovery request. It also will supply the court with the basic information needed to adjudicate the presuit-discovery request. This requirement is consistent with most other presuit-discovery mechanisms, and there is nothing to suggest that American procedure should deviate from them.

[82] A full defense of these benefits is set out in Dodson, S (2010) 'New Pleading, New Discovery' (109) *Michigan Law Review* 55.

[83] Hoffman 'Access to Justice' above n 57 at 227.

[84] Bone, R (2010) 'Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal' (85) *Notre Dame Law Review* 849; Clermont, K and Yeazell, S (2010) 'Inventing Tests, Destabilizing Systems' (95) *Iowa Law Review* 821; Dodson 'New Pleading' above n 82; Hoffman 'Access to Justice' above n 57 at 227; Spencer, A (2009) 'Understanding Pleading Doctrine' (108) *Michigan Law Review* 1.

Second, focus. Presuit discovery in US federal courts should be restricted to the minimum discovery necessary to rectify the information asymmetry that prevents a plaintiff from filing a sufficient pleading. To achieve this narrow focus, the plaintiff should be required to certify that, without certain facts, she cannot file a sufficient pleading because of information asymmetry. To illustrate, a plaintiff who believes she was fired for unlawful race discrimination could petition for presuit discovery by certifying that she cannot file a sufficient pleading without obtaining from the defendant some evidence supporting a plausible inference of unlawful discriminatory animus.

A critical effect of this requirement is that it forces the plaintiff to evaluate her claim honestly; if she seeks presuit discovery, she essentially concedes dismissal of her claim if the discovery reveals no evidence of unlawful conduct. Thus, a plaintiff will not seek presuit discovery unless she truly needs it. Forcing this concession from the plaintiff should keep presuit discovery confined to those cases in which it is truly needed to serve its purposes.

This requirement finds support from the presuit-discovery mechanisms of several US states. Alabama, for example, requires the petitioner must file a verified petition that identifies the information the petitioner desires to obtain, and that states that he presently is unable to bring the action without the information.[85] A Connecticut petitioner must show that the discovery sought 'is material and necessary' for proof of the claim and that there are no other adequate means of enforcing discovery of the desired material.[86] A Pennsylvania petitioner is required to describe the materials sought and 'state with particularity the probable cause for believing the information will materially advance his pleading', as well as 'averring that, but for the discovery request, he will be unable to formulate a legally sufficient pleading'.[87] Ohio permits presuit discovery 'to uncover facts necessary for pleading'.[88] These state analogues indicate that similar requirements in federal court should be adequate and workable. No study of which I am aware has suggested otherwise.

The requirement also gathers support from the mechanisms of Japan, which allows discovery of those facts clearly necessary for preparing the contention or proof,[89] and Victoria, which allows presuit discovery only if, after making all reasonable inquiries, the applicant lacks sufficient information to decide whether to file a formal lawsuit, and the defendant is likely to possess that information.[90] Tying presuit discovery to the inability to file a legally sufficient complaint—as opposed to the inability to *decide* to file—is slightly more concrete than Victoria's rule.

England, Hong Kong, and Singapore allow presuit discovery more broadly—to facilitate resolution of the dispute or to save costs.[91] And Texas allows presuit discovery whenever justice or some benefit outweighs its burden and expense.[92] I am not necessarily opposed to considering broader presuit discovery under the right circumstances. But

[85] Ala R Civ P 27(a), *Ex parte Anderson*, 644 So 2d 961, 965 (Ala 1994).
[86] *Berger v Cuomo*, 644 A2d 333, 337 (Conn 1994).
[87] *McNeil v Jordan*, 894 A2d 1260, 1278 (Pa 2006).
[88] *Huge v Ford Motor Co*, 803 NE2d 859, 861 (Ohio App 2004).
[89] Oda *Japanese Civil Procedure* above n 47 at 419.
[90] R Civ P 32.05.
[91] CPR 31.16 (England), O 24 R 8(2) (Hong Kong), O 24 R 13(1), O 27A R 2 (Singapore).
[92] Tex R Civ P 202.1 & 202.4.

expansive presuit discovery would fundamentally alter the current litigation structure in US federal courts, which presumes that pleadings precede discovery. I seek, therefore, only a mild reordering based on the specific problem of the new US pleading regime. It is worth noting that even the liberal forms of presuit discovery are more likely to be granted if the request is narrow and limited to the most critical information.[93]

A corollary is that the discovery ordered should be relevant to the claim and no broader than normal discovery. This requirement tracks the spirit of all other presuit-discovery mechanisms. Presuit discovery in US federal courts, however, generally should be more limited in order to keep costs down and to safeguard against the risk that presuit discovery will be overblown before any formal pleadings have framed the dispute. To cabin presuit discovery, a federal court should define stepwise progressions, set default limits, or restrict initial discovery to certain types of discovery vehicles. These additional limits are modeled after the practice of Texas courts, which routinely impose limits on presuit discovery,[94] though the better course would be to codify the preference for such limits ex ante. The idea is that when presuit discovery provides an advance look at the key facts needed to state a claim, it ought to be quick and cheap.

Third, cost allocation. The plaintiff should bear the risk that presuit discovery will reveal no evidence of unlawful conduct. The plaintiff, after all, is the party seeking information about the merit of her claim; the defendant compelled to answer may be truly innocent. Accordingly, the presumption should be that the plaintiff must pay for the costs of presuit discovery.

However, if the plaintiff discovers information that enables her to plead her claim sufficiently, then she was correct to seek presuit discovery (and the defendant was wrong to resist it). In that event, the cost allocation should revert to the normal cost-allocation rule in the US that the parties bear their own costs.

This cost-allocation proposal draws on several examples in other countries but reflects slight modifications to accommodate the default 'American Rule' of cost allocation.[95] Other presuit-discovery mechanisms generally follow a 'loser pays' rule. English courts, for example, typically allocate costs to the party who prevails on a presuit-disclosure application.[96] But Singapore requires the plaintiff to foot the bill and even post a bond in advance as a condition precedent to seeking presuit discovery.[97] My cost-allocation proposal begins with Singapore's presumption but allows that presumption to be overcome—and revert back to the American Rule—if the plaintiff 'prevails' by successfully obtaining the information she needs to file a sufficient complaint. The retention of this US cost-allocation norm makes adoption in the US more palatable.

Fourth, compliance. If the defendant stonewalls proper presuit-discovery requests, then a court should have the authority to shift costs back on the defendant as a sanction for the defendant's unreasonable conduct. The experience of other countries suggests that the availability of cost shifting for obstructionist conduct is critical; the Japanese Code's

[93] *Briggs & Forrester Electric Ltd v Governors of Southfield School for Girls* [2005] EWHC (TCC) 1734; *Snowstar Shipping v Graig Shipping PLC* [2003] EWHC 1367; *First Gulf Bank v Wachovia Bank National Assn* [2005] EWHC 2827; CJR Final Report § 16.3 (2004).

[94] Hoffman 'Access to Justice' above n 57 at 259.

[95] *Alyeska Pipeline Service Co v Wilderness Society*, 421 US 240 (1975).

[96] Above n 26.

[97] O 24 R 6, O 27A R 3.

failure to provide for formal sanctions for noncompliance with presuit-discovery requests has rendered its presuit-discovery mechanism largely ineffective. Formal sanctions are important, then, and cost shifting seems to be the easiest way to impose them. The normal discovery rules in the US already allow cost shifting as a sanction for obstructionist discovery tactics, and that sanction should continue to be available for presuit discovery as well.[98] This type of sanction also is in line with the way other countries deal with discovery sanctions.

Caveats and Responses

I acknowledge that urging procedural reform based on foreign models is dangerous business, particularly for a country as exceptionalist as the US. The American federal civil-justice system is like no other, with its history of notice pleading, its long commitment to the most liberal discovery on the world, its love affair with juries, its relative openness to class actions and punitive damages, its liberal joinder rules, and its embrace of public litigation.[99] Civil procedure draws from cultural and social norms that run deep,[100] and the longstanding uniqueness of American procedure makes transplantation tricky.[101] Further, procedure within a system is interconnected, such that the exceptionalist features of US procedure drive and influence other features,[102] thereby making change to one feature difficult.[103]

Despite these barriers, I hold out hope that the US federal system could profitably adopt a presuit-discovery mechanism of the type I propose above, modeled on the experiences of other countries. There are three reasons why.

First, a fundamental change has already happened in the US: The Supreme Court's recent decisions in *Twombly* and *Iqbal* have moved the US away from notice pleading and toward a fact-pleading model more akin to that of the global norm. That change ought to make comparative reform in this area more plausible and less jarring.[104] Further, this pleading change tugs at the interconnected procedural web, suggesting that a conforming change to discovery might be appropriate and have real advantages for the new pleading system in the US.

[98] Fed R Civ P 37.

[99] Dodson, S (2008) 'The Challenge of Comparative Civil Procedure' (60) *Alabama Law Review* 133. Some, however, see a waning of U.S. exceptionalism in a number of areas. Dodson, S and Klebba, J (2011) 'Global Civil Procedure Trends in the Twenty-First Century' (34) *Boston College International and Comparative Law Review* 1; Marcus, R (2007) 'Confessions of a Federal "Bureaucrat": The Possibilities of Perfecting Procedural Reform' (35) *Western State University Law Review* 103; Rowe, T (2007) 'Authorized Managerialism under the Federal Rules—and the Extent of Convergence with Civil-Law Judging' (36) *Southwestern University Law Review* 191.

[100] Clermont, K (2003) 'Why Comparative Civil Procedure?' in Huang, K (2003) *Introducing Discovery into Civil Law* Carolina Academic Press; Kötz, H
(2003) 'Civil Justice Systems in Europe and the United States' (13) *Duke Journal of Comparative and International Law* 61.

[101] Marcus, R (2005) 'Putting American Procedural Exceptionalism into a Global Context' (53) *American Journal of Comparative Law* 709; Miller, G (1997) 'The Legal-Economic Analysis of Comparative Civil Procedure' (45) *American Journal of Comparative Law* 905.

[102] Wright, CA and Kane, MK (2002) *Law of Federal Courts* (6th ed) West at 470.

[103] Marcus 'American Procedural Exceptionalism' above n 101 at 710; Reitz, J (1990) 'Why we probably cannot Adopt the German Advantage in Civil Procedure' (75) *Iowa Law Review* 987.

[104] Dodson 'Comparative Convergences' above n 75 at 468-69.

Second, the adoption of a limited presuit-discovery mechanism is a relatively modest reform. Comparativists have warned—rightly so—that transplantation must be 'limited in scope and sensitive to context'.[105] The presuit-discovery mechanism that I have proposed fits those requirements.

Third, the US need not look solely outward in considering presuit-discovery models.[106] As discussed above, several states of the US have their own. Domestic practice thus supports and enhances the viability of emulating other countries' experiences.

CONCLUSION

At a minimum, a comparative approach suggests that it would be wrong to think of presuit investigative discovery in US federal courts as novel or outlandish. As other countries have proposed, a pleading system that requires facts before discovery needs some release valve for critical facts that the plaintiff otherwise cannot obtain before discovery. US rulemakers should consider presuit-discovery reform based on the mechanisms adopted in other countries.

[105] Clermont 'Why Comparative Procedure' above n 100.

[106] Dubinsky, P (2008) 'Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law' (44) *Stanford Journal of International Law* 1 (suggesting that U.S. proceduralists tend to look inward rather than outward for reform and interpretive purposes); Gidi, A (2006) 'Teaching Comparative Civil Procedure' (56) *Journal of Legal Education* 502 ("American proceduralists are among the most parochial in the world.").

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Note
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THE AÉROSPATIALE DILEMMA: WHY U.S. COURTS IGNORE BLOCKING STATUTES AND WHAT FOREIGN STATES CAN DO ABOUT IT

"Blocking statutes" are foreign laws that prohibit the transfer of information to the United States for purposes of litigation. Though many countries have adopted blocking statutes in recent decades, these statutes have met an ignoble fate in the U.S. courts. Today, U.S. judges routinely order foreign litigants to produce discovery in violation of blocking statutes, thereby subjecting them to a Hobson's choice: flout a U.S. court order and face sanctions, or violate foreign law and risk civil and criminal penalties. In the past decade, U.S. court-ordered blocking-statute violations have increased by 2,500 percent.

This Note presents an empirical analysis of the blocking-statute conflict and provides fresh guidance for foreign states. My study of fifty-six relevant cases reveals that, in determining whether to order litigants to violate blocking statutes, U.S. courts often consider whether foreign states actively enforce them. In at least twenty-three opinions, U.S. courts have found that, because the blocking statute lacked an "enforcement history," the prospect of prosecution for violating the relevant statute was "slight and speculative." In all twenty-three opinions, the courts went on to order violations of foreign law. By contrast, in the three opinions where courts found that foreign states actively enforced blocking statutes, courts refused to order their violation.

***232** *U.S. courts have been sending a message: blocking statutes will not receive deference unless foreign states enforce them. Foreign states could respond by signaling renewed interest in their blocking statutes and penalizing parties that violate those statutes in response to U.S. court orders. If past decisions are any guide, just a few highly publicized prosecutions would have an appreciable effect on U.S. judges' reasoning. Blocking statutes might thereby be transformed, in short order, from "paper tigers" to blockbusters.*

Introduction

At the height of the telecom frenzy of the late 1990s, Motorola fell victim to one of the most costly financial frauds in its industry's history.[1] Eager to enter the emerging Turkish market, the company loaned more than $2 billion to Telsim, a Turkish telecommunications company owned in large part by one family: the Uzans.[2] But within a few years, Motorola's relationship with Telsim began to sour--and by the early 2000s Telsim was in default.[3] Motorola soon learned that the Uzans had siphoned off Telsim's assets and were planning to sell the company for scrap.[4]

Motorola sued and eventually won a $3 billion judgment against the Uzans in the Southern District of New York.[5] But by the time that judgment was rendered, several key members of the family had become international fugitives.[6] Motorola's lawyers spent most of the next decade locked in a global paper chase with the Uzans, trying to cut their way through a maze of shell companies to reach the family's assets.[7] In 2012, after nine years of failure, the ***233** Southern District permitted Motorola to serve ex parte discovery requests on several international banks in an attempt to gather information about the Uzans' assets and whereabouts.[8]

Three of the banks--located in France, the United Arab Emirates, and Jordan-- resisted Motorola's discovery requests. Each argued that its country's bank secrecy laws prevented it from revealing information about the Uzans for purposes of U.S. litigation.[9] Some could face both civil and criminal penalties were they to comply.[10] The court rejected the banks' arguments and ordered production of the requested information under threat of sanction.[11] It did so in full recognition that the production it ordered violated the letter of French, Emirati, and Jordanian law, respectively.[12]

It is worth emphasizing just what happened in *Uzan*. The Southern District of New York ordered three banks--nonparties to the litigation before it--to *violate their own countries' laws*.[13] Those banks faced a choice: refuse to comply with the court's order and face sanctions, or violate foreign law and risk criminal and civil penalties. Thirty years ago, the court's order in *Uzan* would have been truly extraordinary. In fact, until 1987, it was unclear whether U.S. courts could *ever* order violations of foreign law.[14] But today, in the wake of the Supreme Court's decision in *Société Nationale Industrielle Aérospatiale v. U.S. District Court,*[15] decisions like *Uzan* have become commonplace. In the past decade, U.S. courts have ordered foreign parties to break their own countries' laws with increasing frequency.[16] These orders represent an unprecedented development in international law.[17]

Almost all of the U.S. court-ordered violations of foreign law contravene foreign 'blocking statutes.'[18] Like the French, Emirati, and Jordanian bank ***234** secrecy laws at issue in *Uzan,* blocking statutes prohibit the transmission of documents or other evidence located in the enacting country to other countries for purposes of foreign litigation.[19] To date, U.S. courts have considered whether to order at least forty-two individual violations of foreign blocking statues.[20] Courts ordered violations in thirty-seven of those instances.[21] In each, the relevant blocking statute provided for both civil and criminal penalties.[22]

"Court-ordered law breaking"[23] is an outgrowth of a well-documented problem: international conflict over the extension of the United States' discovery regime beyond its borders. Over the course of the last century, the U.S. discovery regime has become notorious for its breadth and party-driven character.[24] The Federal Rules of Civil Procedure require parties to produce all materials that are "relevant to any party's claim or defense

and proportional to the needs of the case," whether or not those materials are admissible in evidence.[25] This approach lies in stark contrast to that of most other countries, particularly civil-law jurisdictions, where discovery is comparatively minimal and the judiciary closely supervises evidence taking.[26] The disparity between the broad scope of discovery under the Federal Rules and the narrower scope in foreign legal systems has given rise to blocking statutes.[27] Most blocking statutes were passed between 1950 and 1990 in response to particular U.S. investigations or litigation that the international community perceived as overreaching.[28] And, in turn, the rise of foreign blocking statutes bred court-ordered law breaking.

The blocking-statute conflict has generated lively but one-sided literature. Most commentators have argued that court-ordered law breaking is bad law ***235** and bad policy and have derided the phenomenon as shortsighted.[29] Curiously, however, scholars' solutions to the blocking-statute conflict have largely focused on what U.S. actors should do in future cases-- while at the same time acknowledging that the U.S. courts have shown little interest in reversing course.[30] That juxtaposition suggests that, though their proposals have been sensible, commentators have been engaged in a measure of wishful thinking. This Note takes a different tack. Rather than consider the blocking-statute conflict from the perspective of U.S. actors, it examines courses of action available to *foreign states*. It asks: At this stage in the blocking-statute conflict, what options do foreign states have?

This inquiry proceeds in three parts. Part I sets out necessary background, beginning with a brief history of the extraterritorial-discovery conflict and a description of the corpus of foreign blocking statutes as it stands today. It then introduces the test that U.S. courts apply when deciding whether to compel discovery in spite of applicable blocking statutes, derived from the Supreme Court's decision in *Aérospatiale*.[31] Finally, using Geoffey Sant's comprehensive study of blocking-statute cases in *Court-Ordered Law Breaking,* this Note shows that the U.S. courts' application of the *Aérospatiale* test has thus far been remarkably one-sided. In 88 percent of cases where U.S. courts applied *Aérospatiale* to blocking-statute conflicts, courts compelled at least one violation of foreign law.[32]

Part II analyzes the blocking-statute cases from the perspective of a foreign state. It begins by showing that, in at least twenty-six instances, U.S. courts have considered the enforcement histories of blocking statutes in determining whether to order litigants to violate them. In twenty-three of those twenty-six instances, courts held that a foreign state's failure to enforce its blocking statute weighed in favor of ordering unlawful production. Those holdings have faced foreign sovereigns with what I call the "*Aérospatiale* Dilemma." If foreign sovereigns want to protect their citizens and companies from U.S. discovery orders, they must first prosecute their citizens and companies for complying with U.S. discovery orders. Part II concludes by arguing that, viewed properly, the *Aérospatiale* Dilemma is in fact an *opportunity* for foreign states. By engaging in active enforcement of their blocking statutes, foreign states could influence future applications of the *Aérospatiale* test in U.S. courts.

***236** Part III explores that potential response to the *Aérospatiale* Dilemma. Using a series of U.S. cases, Part III analyzes which blocking-statute enforcement actions have the greatest potential to confront the *Aérospatiale* Dilemma. Were a foreign executive to pick a bellwether case, provide clear warning ex ante that it intended to enforce its blocking statute, and then *follow through* on that threat, that action would likely have an appreciable impact on the U.S. courts' future treatment of that statute. Foreign sovereigns might thereby reinvigorate their blocking statutes.

I. American-Style Discovery and Its Discontents

Court-ordered law breaking is a big deal. In 1983, Rosenthal and Yale-Loehr remarked that "the most important problem in transnational litigation is the conflict faced by the multinational enterprise caught between U.S. laws

compelling discovery and foreign laws prohibiting it."[33] Nearly three decades later, the American Bar Association wrote that, in the year 2012, "[foreign] [l]itigants often face[d] a Hobson's Choice: violate foreign law ... or choose noncompliance with a U.S. discovery order."[34] Though separated by many years, these two assessments show that the blocking-statute conflict has proven an enduring nuisance. And today, there is little sign of improvement.[35]

The roots of the blocking-statute conflict lie in the extraterritorial application of U.S. substantive law. A century ago, it was a remarkable proposition that one country's laws could be applied to acts that happened beyond its borders.[36] In 1909, the U.S. Supreme Court laid down *the American Banana* "universal rule": whether an act was lawful "must be determined wholly by the law of the country where the act is done."[37] The "territorial principle" constrained U.S. courts--the idea that "the power of American law end[ed] at the country's boundaries" meant that where an act took place was the ultimate determinant of which country's laws governed it.[38]

Throughout the 20th century, however, U.S. courts eroded *American Banana's* "universal rule."[39] As the global economic system moved in fits and starts toward integration, the extraterritorial reach of U.S. laws expanded in areas like antitrust, securities, and even criminal law.[40] The extraterritorial ***237** reach of U.S. substantive law grew so dramatically in the second half of the twentieth century that, by 1980, one commentator joked that America's greatest exports had become "rock music, blue jeans, and United States law."[41]

Of all the conflicts that extraterritorial applications of U.S. law have set in motion, none have been the source of more friction than court-ordered discovery.[42] No country outside the United States permits the broad, party-directed discovery sanctioned by the Federal Rules of Civil Procedure.[43] As the reach of U.S. law has grown, the clash of discovery systems has been so stark that "[a]ttempts by U.S. litigants to gather evidence abroad for U.S. litigation have been viewed as usurping foreign sovereignty, similar to how the U.S. might view it if foreign nations set up their own prosecutors or police within the United States."[44]

For decades, foreign states have fought against expansive U.S. extraterritorial discovery. At times, foreign officials have expressed their displeasure with U.S. practices in the media and through diplomatic notes.[45] Many have gone further to adopt blocking statutes. Blocking statutes limit the production of documents or other evidence located within the enacting state to a foreign state for purposes of foreign litigation.[46] Countries began to pass these statutes in the 1950s and have continued to do so in waves--usually in response to particular, controversial U.S. extraterritorial investigations-- with the most recent wave in the late 1980s.[47]

Today, at least fifteen countries have passed blocking statutes.[48] Some enacted blocking statutes for the express purpose of thwarting U.S. discovery.[49] ***238** Others passed statutes that, while not directed expressly against U.S. discovery orders, operate to the same effect.[50] Most blocking statutes aim to prevent what enacting states viewed as U.S. infringements on their sovereignty.[51] In some cases, distaste for substantive U.S. law also motivated foreign legislatures.[52] And still other countries enacted blocking statutes to protect vital industries from the economic burdens of U.S. antitrust and securities laws.[53]

Blocking statutes come in several forms. The global corpus of blocking statutes can be subdivided into three categories:[54]

> 1) Content-based blocking statutes. These statutes prohibit disclosure of specified materials in response to foreign discovery orders unless first approved through designated government channels.

One example is the French blocking statute.[55] Another is China's state-secrets law, which prohibits the transfer of data that might reveal "secrets concerning ... [s]tate affairs ... [or] national economic and social development."[56] Other prominent examples include data-privacy laws, of the sort that have recently proliferated across Europe.[57]

2) Discretionary-prohibition blocking statutes. This type of statute grants government actors discretionary authority to forbid compliance with particular foreign discovery orders. The U.K. Protection of Trading Interests Act, for instance, authorizes officials to prohibit compliance with foreign discovery orders that would infringe upon the sovereignty or security of the United Kingdom.[58] Australia and Canada have adopted similar legislation.[59]

3) Industry-specific blocking statutes. These types of statutes prohibit disclosure of information concerning particular industries. Examples include bank secrecy laws,[60] statutes prohibiting disclosure of information regarding the production ***239** of uranium,[61] and statutes forbidding disclosure related to shipping industries.[62]

Blocking statutes prescribe both civil and criminal penalties for violators.[63] Thus, in at least fifteen countries, parties may be fined or sent to jail for producing evidence in response to U.S. investigations or litigation.

Thirty years ago, blocking statutes faced an uncertain fate in the U.S. courts, as the federal circuits found themselves divided over whether foreign entities could *ever* be forced to produce materials in violation of foreign laws.[64] As the D.C. Circuit wrote in 1987, "it cause[d] ... considerable discomfort to think that a court of law should order a violation of law, particularly on the territory of the sovereign whose law is in question."[65] With the circuits split, it appeared possible that blocking statutes might resolve the extraterritorial-discovery conflict in foreign states' favor.

That changed when the U.S. Supreme Court decided *Société Nationale Industrielle Aérospatiale v. U.S. District Court*.[66] There, American plaintiffs brought suit against two French corporations following an airplane crash in the United States.[67] When the plaintiffs sought discovery, the defendants claimed that the French Blocking Statute forbid them from complying with the plaintiffs' request and moved for a protective order.[68] Both the trial and appellate courts ordered the defendants to violate the French Blocking Statute and produce the requested documents.[69] In a 5-4 decision, the Supreme Court affirmed that U.S. litigants may initiate "any discovery pursuant to ... the Federal Rules of Civil Procedure" against foreign counterparts, and that "[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute."[70]

The *Aérospatiale* majority expressly refused to "articulate specific rules to guide [the] delicate task of adjudicat[ing]" the conflict between motions to compel and applicable blocking statutes.[71] Instead, it instructed lower courts to adjudicate conflicts based on "[their] knowledge of the case and of the claims and interests of the parties and the governments whose statutes and policies ***240** they invoke."[72] In response, the dissent lamented

the majority's "failure to provide lower courts with any meaningful guidance" about how to resolve blocking-statute conflicts.[73] And indeed, in *Aérospatiale*'s wake, commentators have largely agreed that the majority's opaque decision was "regrettable."[74] Despite its vague guidance, *Aérospatiale* did mark one clear advance in the law. Today, if a case is properly before a U.S. court, the judge *can* order discovery in spite of a clearly applicable blocking statute.

Scholarly opprobrium notwithstanding, U.S. courts have applied *Aérospatiale* to the best of their ability. Part II, below, discusses the various '*Aérospatiale* tests' that the lower courts have developed. But before considering those tests, it is useful to take a global view of blocking statutes' fates in the U.S. courts thus far. Since *Aérospatiale* was decided in 1987, blocking statutes have ceased posing any serious obstacle to otherwise-justified U.S. discovery.[75] Geoffrey Sant proved that claim quantitatively in his article *Court-Ordered Law Breaking*.[76] In his study, Sant identified fifty-six opinions that referenced *Aérospatiale* in considering whether to order violations of foreign law.[77] He found "overwhelming evidence of pro-forum bias" in the lower courts' applications of *Aérospatiale*[78]

Sant's study confirmed that foreign states' blocking-statute gambit has largely failed. In all but a small minority of cases, U.S. courts have rejected the foreign litigants' blocking-statute defense--thereby rendering blocking statutes "paper tigers" in all but a few instances.[79] What is less clear, however, is the future of blocking statutes, and, by extension, the extraterritorial-discovery conflict more broadly. Are blocking statutes destined to gather dust?

*241 II. Blocking Statutes in the U.S. Courts

Now that foreign states' blocking-statute gambit has failed, what can they do about it? The answer emerges from a review of the cases in Sant's dataset and an analysis of the factors that motivated the courts in those decisions.[80]

The U.S. courts' opinions in blocking-statute cases should guide future action. Recall that, as discussed above, the *Aérospatiale* opinion explicitly refused to "articulate specific rules" to guide the lower courts in resolving conflicts between blocking statutes and U.S. discovery requests.[81] As a result, lower courts have developed and applied a variety of multi-factor balancing tests in the blocking-statute cases. A few courts have fashioned three-part[82] or four-part[83] tests, gleaned from the language in *Aérospatiale*. Others have applied the five-factor test set out in the Restatement of Foreign Relations Law, which the *Aérospatiale* opinion cited as "relevant to any comity analysis."[84] Still others, following the Court's instruction to adjudicate conflicts based on their own "knowledge of the case," have applied the five-factor Restatement test plus other factors not considered in *Aérospatiale* itself.[85]

These variations are deceiving. Regardless of how they have phrased their tests, lower courts have been cognizant of the Supreme Court's instruction to adjudicate blocking-statute conflicts based on *all* their knowledge of "claims and interests of the parties and the governments whose statutes and policies ***242** they invoke."[86] No court has explicitly refused to consider otherwise-relevant information on formalistic grounds.[87] Thus, for analytical purposes, foreign states should think of the *Aérospatiale* "test" expansively--in view of *all* the factors courts have considered.

All told, courts have considered the following seven factors in determining whether to order production in violation of foreign blocking statutes: (1) the importance of the documents or of information requests to the litigation; (2) the degree of specificity of the requests; (3) where the information originated; (4) the good faith of the party resisting discovery; (5) the availability of alternative means of securing the information; (6) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance would

undermine important interests of the foreign state ("balancing national interests"); (7) the hardship of compliance on the party resisting discovery.

Blocking-statute opinions since *Aérospatiale* have methodically balanced some combination of these factors in reaching their decisions. The nature of multi-factor balancing tests makes it impossible to determine which factor or factors were most influential in the judge's decision. But luckily, in considering the available options in the blocking-statute conflict, foreign states need not determine which factor was most influential in any given decision. Instead, considering the opinions from foreign states' perspective will reveal what--if anything--those states can do to affect future applications of the *Aérospatiale* test in the U.S. courts.

Of the seven *Aérospatiale* factors listed above, four lie outside of foreign states' control. In any particular extraterritorial-discovery dispute, the foreign state cannot affect (1) the importance of the documents to the litigation; (2) the degree of specificity of the request; (3) where the information originated,[88] or (4) the good faith of the party resisting discovery. Those factors inevitably vary with the facts of each case and with the whims of the parties.

In contrast, foreign states can affect future applications of the three other *Aérospatiale* factors: (5) the availability of alternative means of securing the information; (6) the extent to which compliance with the discovery request would undermine foreign states' national interests (the "balancing national interests" factor); and (7) the hardship of compliance on the party resisting discovery. Foreign states seeking to enforce their blocking statutes should strategically focus on how U.S. courts treat these factors.

***243** Subpart A discusses how foreign states might affect the availability of alternative means of securing requested information. It concludes that, because the U.S. courts have interpreted that factor restrictively, further development of "alternative means" is not a fruitful avenue for change. Subpart B then discusses how foreign states might affect U.S. courts' applications of the "balancing national interests" and "hardship" factors. It concludes that U.S. courts have provided foreign states an opportunity to affect how they apply these factors in future cases.

A. The "Alternative Means" Factor

This factor asks courts to consider "the availability of alternative means of securing the information" that the requesting party is seeking from the party burdened by the blocking statute.[89] Foreign states can affect this factor by ensuring that viable alternatives to U.S. court-ordered production are available to litigants in the U.S. courts. The Hague Convention on Evidence Taking provides the most prominent alternative to U.S. court-ordered production.

The Hague Convention is an international evidence-gathering agreement.[90] It has fifty-eight signatories, including the United States, France, Switzerland, Great Britain, and China.[91] Under the Convention, parties seeking extraterritorial discovery would first transmit 'letters rogatory' (i.e., letters requesting the transfer of evidence) to a designated Central Authority in the state where the evidence is located.[92] That Authority then either approves or disapproves of the request and, where approved, manages the subsequent transfer of materials.[93] The Convention intended for these procedures to provide a uniform international procedure for evidence gathering that would ameliorate conflicts between international discovery regimes.[94] For litigants in the U.S. courts, the Hague Convention process is available any time the information sought is held within the borders of a Convention signatory. It would thus appear that, at least when all involved entities are Hague Convention signatories, the "alternative means" factor should always weigh against ordering violations of foreign law, because the Convention provides a means of gathering information less intrusive than the Federal Rules.

U.S. courts have not agreed with this proposition. In *Aérospatiale,* the Supreme Court held that the Hague Convention procedures were not a binding "first resort" for U.S. litigants.[95] Use of the Convention in the U.S. courts has ***244** been in continuous decline since.[96] Contemporary U.S. courts have interpreted the "alternative means" factor to call not for an examination of the *availability* of alternative means for evidence gathering--as is provided for in the *Restatement (Third) of Foreign Relations Law*--but rather "an evaluation of the *merits* of the alternative means of obtaining the information."[97] Courts have routinely found that, because the Hague Convention process is time-consuming and provides a foreign vetogate, "simply ordering the violation of foreign law is the preferable means of obtaining information."[98]

By interpreting the "alternative means" factor as an evaluation of the merits of alternative discovery mechanisms, U.S. courts have effectively closed this avenue as a realistic means of foreign-state intervention in the blocking-statute conflict. U.S. courts have repeatedly held that acceptable "alternative means" must be "'similar' in speed, cost, and effectiveness to a U.S. court ordering the production of documents."[99] Indeed, imagining an alternative discovery mechanism as speedy and cost-effective as a U.S. court order is difficult.[100] Any process that provides the opportunity for a foreign-state veto will be by definition slower, more costly, and less effective than the procedures outlined in the Federal Rules. Under the U.S. courts' contemporary conception of the "alternative means" factor, providing another alternative discovery mechanism would likely be self-defeating.

B. The "Balancing National Interests" and "Hardship" Factors

The *Aérospatiale* test's "balancing national interests" factor calls for courts to consider "the extent to which noncompliance with [a given discovery] request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located."[101] The "hardship" factor calls for courts to evaluate "the hardship of compliance on the party from whom discovery is sought."[102] The remainder of this Part will show that, by initiating enforcement actions under their blocking statutes, foreign states could affect future applications of these two *Aérospatiale* factors in the U.S. courts.

Because several *Aérospatiale* factors are not susceptible to foreign-state influence, and because the U.S. courts have interpreted the alternative means factor so restrictively, the balancing national interests and hardship factors ***245** represents foreign states' best remaining opportunities to affect future applications of *Aérospatiale* in the U.S. courts. I thus set out to determine how those factors have been applied in the opinions.

My most notable finding was that, in at least twenty-one instances, U.S. courts have held that foreign states' failure to enforce their blocking statutes (a) showed that no serious foreign state interest would be undermined by ordering violations of those statutes, or (b) undermined litigants' claims that compelling violation would constitute a hardship.[103] In other words, when foreign entities have raised the blocking-statute excuse, U.S. courts have often looked to the enforcement histories of the statutes, and, where the relevant statute had not been actively enforced, the courts held that the lack of enforcement weighed in favor of ordering their violation. These holdings have created what I call the '*Aérospatiale* Dilemma.' If foreign states are to protect their citizens and companies from U.S. discovery using blocking statutes, they must first use those statutes to prosecute and punish those very same entities.

Until now, no academic work has quantified the rise of the *Aérospatiale* Dilemma. As part of my effort to provide strategic advice to foreign states, I set out to measure the effect of the *Aérospatiale* Dilemma using the fifty-six opinions collected in Geoffrey Sant's "Court-Ordered Law Breaking." I began by narrowing the fifty-six cases compiled in Sant's article to match my inquiry. Because I wanted to investigate only those cases where U.S. federal judges considered whether to order violations of foreign blocking statutes, I excluded all state-court cases, and all

cases where courts considered whether to violate foreign injunctions or court orders rather than foreign statutes. I then excluded cases where courts considered litigants' arguments that a discovery order would violate foreign law, but did not proceed with a full *Aérospatiale* analysis because they found that there was no actual conflict of laws.

Many of the remaining cases involved multiple foreign defendants or statutes, and courts often considered whether to order violations of multiple foreign laws in a single opinion. I thus further divided opinions in Sant's dataset to reflect the number of *individual* blocking-statutes violations that U.S. courts considered. I found that the federal courts have considered whether to order at least forty-two individual violations of foreign blocking statutes since *Aérospatiale*.[i] An analysis of those forty-two contemplated orders follows.

Courts compelled foreign parties to produce discovery in violation of foreign law in thirty-seven of those forty-two contemplated orders, and refused to order violations of foreign law in only five.[ii] Thus, when faced with conflict between motions to compel and foreign blocking statutes, U.S. federal courts ordered violations of foreign law 88 percent of the time.

Of the forty-two instances where federal courts considered the blocking-statute excuse, twenty-six explicitly considered the enforcement histories of the ***246** foreign laws at issue.[104] In twenty-three of those twenty-six instances, courts found either (a) that there was evidence that the blocking statute had *not* been enforced in similar situations, or (b) that the objecting entity had offered no evidence as to the statute's enforcement history.[iii] In all twenty-three of those instances, the courts went on to order production in violation of foreign law.[105] In contrast, of those twenty-six instances where courts considered the enforcement histories of foreign laws, those courts found evidence that the relevant statute *had* been actively enforced in only three.[iv] In all three of those instances, the courts ultimately refused to order production.[106]

These data provide three important insights. First, when courts have faced conflicts between motions to compel and blocking statutes, they have explicitly considered blocking statutes' enforcement histories in 63 percent of all instances. Second, in those instances where courts have considered blocking statutes' enforcement histories, the presence or absence of active enforcement has always been a bellwether for the ultimate disposition. When courts have explicitly found that a relevant blocking statute has not been enforced in similar cases, they have always ordered production. But in the very few cases where courts found that a relevant blocking statute *had* been enforced in cases like the one at bar, they have always refused to order production. The lesson is that, while courts have not considered enforcement history in every case, it has been an unfailing indicator of the ultimate outcome in cases where they have.

Before moving to consider the strategic import of these findings, it is useful to breathe some life into the numbers with an illustrative case. The case discussed in this Note's Introduction--*Motorola Corp. v. Uzan*--brings the enforcement-history inquiry into focus.[107] As discussed above, blocking-statute conflicts arose in *Uzan* after Motorola filed ex parte discovery requests against banks in France, Jordan, the United Arab Emirates, and Switzerland.[108] Each bank raised its home-country blocking statute as an excuse to not produce the requested discovery.[109] In considering whether to order violations of the four blocking statutes, the court wrote:

> [S]everal of the nations whose laws are here involved have enacted legislation prohibiting the release of ... the information here sought, sometimes on pain of criminal prosecution, thereby suggesting a strong competing interest. But is this for real? If a given country truly values its national policy of, say, criminalizing compliance with a U.S. court subpoena, it will prosecute its citizens for so complying. ...

> ***247** [T]he extent to which the relevant country has actually enforced the prohibition is a strong indicator of the strength of the state interest.[110]

In light of that observation, the court then considered each of the relevant blocking statutes in turn. In considering the Jordanian and Emirati bank secrecy laws, it wrote that "the Court's attention has now been focused on the total paucity of published prosecutions of banks or their officers in Jordan and the UAE for complying with discovery ordered by a foreign court."[111] Similarly, in considering the French Blocking Statute, the court wrote "it appears that when a foreign court orders production of French documents even though the producing party has raised the 'excuse' of the French blocking statute, the French authorities do not, in fact, prosecute or otherwise punish the producing party."[112] The court went on to order the Jordanian, Emirati, and French banks to produce discovery, notwithstanding their countries' blocking statutes.

In contrast, the *Uzan* court quashed a motion to compel production of materials located in Switzerland. The court began by noting evidence that "[t]he Swiss Federal Office for Statistics reports 28 prosecutions [under the Swiss bank secrecy laws] between 1987 and 1996, and although that number has not been recently updated, anecdotal evidence presented to the Court indicates ongoing, vigorous, and serious enforcement."[113] The court was particularly impressed that, in 2013, the Swiss had imposed a three-year prison sentence on a Swiss banker after he turned over protected information while cooperating with German tax collectors.[114] It concluded that the enforcement history of the Swiss blocking statute "strongly favor[ed] denying the release" of the information held by the Swiss bank, and quashed the motion to compel.

With *Uzan* as illustration, and the data presented above as proof, a comprehensive view of the *Aérospatiale* Dilemma emerges for the first time. My research confirms what commentators have suspected: U.S. courts have often responded to foreign entities' blocking-statute excuses by demanding evidence of the statutes' enforcement histories. As discussed above, those histories have proven dispositive.[115]

With those findings in view, the *Aérospatiale* Dilemma bespeaks its own solution. Foreign states could affect future applications of the *Aérospatiale* factors in the U.S. courts by establishing enforcement histories for their blocking statutes. It makes little difference that some courts--like the court in *Uzan*--have considered enforcement history as evidence of a foreign state's national interests, while others have considered enforcement history as evidence of the objecting entity's hardship of compliance. Regardless of the ***248** label, my research indicates that courts have consistently refused to order violations of foreign blocking statutes where there is evidence that they have been actively enforced. The U.S. courts have thus provided foreign states an opportunity. Foreign states can reinvigorate their blocking statutes by engaging in selective, strategic enforcement actions against those who violate them.

III. Creating Enforcement Risk

This Part illustrates how foreign states could seize the opportunity to establish enforcement histories for their blocking statutes. It uses a series of copyright-infringement cases to illustrate how the Chinese government recently just missed such an opportunity. The discussion that follows further illustrates the role that enforcement history plays in U.S. courts' applications of *Aérospatiale,* and suggests a path forward for foreign states.

In 2011, the clothier Gucci filed a lawsuit against several Chinese e-commerce companies, alleging that those companies had produced and sold knock-offs in violation of Gucci trademarks.[116] At discovery, Gucci sought account records from several Chinese banks, including Bank of China, who had done business with the alleged infringers.[117] Bank of China resisted the discovery requests, claiming that the Chinese Bank Secrecy Laws prohibited the transfer of the requested materials to the United States.[118] In *Gucci America v. Li,* a magistrate judge ordered the Bank of China to comply with the plaintiff's discovery request notwithstanding applicable provisions of the Chinese Bank Secrecy Law.[119] In applying the *Aérospatiale* factors, the judge noted that "the Bank has cited no specific instance in which a Chinese financial institution was punished for complying with a foreign court order directing the production of documents."[120]

Shortly after the court rendered its decision in *Gucci,* the China Banking Regulatory Commission (CBRC) sent a letter directly to four Southern District of New York judges with similar copyright-infringement cases pending on their dockets.[121] In that letter, the CBRC "assert[ed] that Chinese law prohibits the Bank[] from disclosing customer account information pursuant to a U.S. court order," and warned that the Bank would face penalties if it did so.[122] After ***249** receiving the letter, the *Gucci* court did not amend its ruling.[123] The Bank of China thus produced the requested account information as ordered.[124]

Nine months after *Gucci* was rendered, a nearly identical discovery dispute arose in the *Tiffany (NJ), LLC v. Forbse.*[125] Tiffany & Co.--the high-end jeweler--had sued several Chinese companies for copyright infringement, and sought account records from the Bank of China.[126] Again, the Bank claimed it was prohibited from complying with the request by the Chinese Bank Secrets Law.[127] But by the time *Forbse* arose, enough time had passed that the consequences of the magistrate judge's ruling in *Gucci* had become apparent. The *Forbse* court noted that the Bank had complied with the production order issued in *Gucci,* and had "not actually been punished in any manner for complying" with the request, despite "the prospect of sanctions hinted at by the [Chinese Banking Regulatory Commission]" in its letter.[128]

The *Forbse* court cited *Gucci's* example in reaching its decision. It viewed the Chinese government's failure to punish the Bank after *Gucci* as an indication that the law was not actively enforced, and thus held that the prospect that the Bank would be punished for complying with Tiffany's request was "speculative at best."[129] The court then ordered production notwithstanding the Chinese Bank Secrecy Law.[130] In a later opinion awarding damages to Tiffany's, the court made no mention of any enforcement action carried out by the Chinese authorities against the Bank of China for producing account records in response to its earlier order.[131] It thus appears that, even after this second violation, the Chinese authorities took no action.

These cases illustrate how the U.S. courts have tested foreign states' seriousness about their blocking statutes and bring into focus the opportunity that the Chinese authorities missed. During the nine months that elapsed between *Gucci* and *Forbse,* the Bank of China produced customer account information in violation of the Chinese Bank Secrecy Law. The Chinese Banking Regulatory Commission asserted--in its letter to the U.S. judges--that such production would indeed violate the law. Yet Chinese authorities did not move to prosecute or punish the Bank of China. The court in *Forbse* took notice, and held that the Chinese authorities' failure to punish the Bank after *Gucci* undermined the Bank's blocking-statute excuse in *Forbse*.

***250** Cases like *Gucci* are opportunities for foreign states to build respect for their blocking statutes and change the course of U.S. courts' future applications of the *Aérospatiale* factors. In fact, *Gucci* is emblematic of the sort of case that foreign states should utilize to establish enforcement histories for their blocking statutes. That is for

three reasons, all of which respond to foreign states' assumed goal: rendering their blocking statutes effective in future cases in the U.S. courts, while limiting negative domestic consequences of their enforcement actions.

First, the facts in *Gucci* were likely to be similar to future cases involving blocking-statute conflicts. Requests that banks produce customer account information give rise to more blocking-statute conflicts than any other type of discovery request.[132] Thus, had the Chinese authorities punished the Bank of China for complying with the court's order in *Gucci,* the U.S. courts would have had little choice but to recognize similarities in precisely the sort of case most likely to arise again in the future. For that reason, enforcement actions in response to violations of bank secrets would provide foreign states the most "bang for their buck" in future blocking-statute cases.

Second, the Bank of China itself was--at least potentially--morally and legally culpable for doing business with obvious counterfeiters. The *Gucci* court suggested that the Bank of China had "actively assisted [the] Defendants in concealing illegally-obtained profits," though it could not confirm such a finding on the record before it.[133] Whether or not the Bank of China had actually engaged in any legal wrongdoing before *Gucci* was decided, its situation is suggestive of another attraction to cases like *Gucci* as vehicles for establishing enforcement history. Commentators have speculated that one reason foreign states have failed to enforce their blocking statutes is that they are hesitant to punish innocent parties who have been caught in an international catch-22.[134] The distaste fulness of such enforcement-- and the public relations risk that flows from it--is diminished where there is reason to believe that the burdened entity is not morally and legally blameless.

Third, the Chinese authorities could have punished the Bank of China without endangering the bank's long-term financial health. The Bank of China is part of the Global Fortune 500, with a market capitalization of $141.3 billion.[135] By targeting financially buoyant institutions like the Bank of China ***251** in future enforcement efforts, foreign states could limit the economic damage caused by strategic enforcement.

Foreign states should take note of the opportunity that the Chinese authorities missed in *Gucci*. When an entity violates a blocking statute in response to a U.S. court order, in a situation (1) that is likely to be similar to future blocking-statute disputes, (2) where the burdened entity is otherwise morally or legally culpable, and (3) where civil penalties will not have an overlarge effect on the burdened entity's financial health, the state has an opportunity to create enforcement history at limited cost. The cases give us reason to believe that blocking statutes might thereby be transformed--from paper tigers to blockbusters.

Conclusion

The extraterritorial-discovery conflict has been a source of international conflict for decades. It has given rise to diplomatic protests, foreign retaliation, and--of course--blocking statutes. Today, the United States' infamous discovery regime appears to have triumphed over foreign attempts to thwart it. The blocking-statute cases, however, reveal an opportunity for foreign states. By responding to the *Aérospatiale* Dilemma with selective, strategic enforcement actions, foreign states could alter the balance of considerations that confront U.S. courts in blocking-statute cases. The opportunity is there, waiting for takers.

Footnotes

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1 *See* Matthew Swibel, *Dial 'D' For Dummies,* Forbes (Mar. 18, 2002), https://www.forbes.com/forbes/2002/0318/086.html [https://perma.cc/36BL-GZ9Z].

2 *Id*.

3 *Id*.

4 *Id*.

5 Motorola Credit Corp. v. Uzan, 274 F. Supp. 2d 481 (S.D.N.Y. 2003), *vacated in part on other grounds,* 388 F.3d 39 (2d Cir. 2004).

6 Motorola Credit Corp v. Uzan, 73 F. Supp. 3d 397, 398 (S.D.N.Y. 2014).

7 *Id*.

8 *Id*. at 398-99.

9 *See id*. at 401-02. As discussed below, the court allowed Motorola to serve a discovery request on a Swiss bank in addition to those listed here. Only the French, Emirati, and Jordanian banks are relevant for present purposes.

10 *Id*.

11 *Id*. at 405.

12 *Id*.

13 *Id*.

14 *See In re* Sealed Case, 825 F.2d 494, 497 (D.C. Cir. 1987) ("The federal courts have disagreed about whether a court may order a person to take specific actions on the soil of a foreign sovereign in violation of its laws and about what sanctions the court may levy against a person who refuses to comply with such an order.").

15 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

16 *See* Geoffrey Sant, *Court-Ordered Law Breaking,* 81 Brook. L. Rev. 181, 181 (2015) ("Perhaps the strangest legal phenomenon of the past decade is the extraordinary surge of U.S. courts ordering individuals and companies to violate foreign law.").

17 *Id*.

18 *Id.; see also* Am. Bar Ass'n, Proposed Resolution and Report #103, at 3 (2012), https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_103.authcheckdam.doc [https://perma.cc/3Z4E-FTEU] (identifying blocking-statute conflicts as the primary source of court-ordered law breaking).

19 *See* Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 972 (5th ed. 2011).

20 *See infra* endnote (i); discussion *infra* Part II (presenting the results of my own study of blocking-statute cases); *see also* Sant, *supra* note 16, at 194--97 (presenting results of author's study of blocking-statute cases).

21 *See infra* endnote (ii).

22 *See id*.

23 The phrase "court-ordered law breaking" is Geoffrey Sant's. I make use of it throughout this Note.

24 *See* Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?,* 52 Depaul L. Rev. 299, 306-07 (2002) (comparing U.S. discovery to other common- and civil-law regimes and concluding "the number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets [the United States] apart").

25 Fed. R. Civ. P. 26(b)(1).

26 *See* Subrin, *supra* note 24, at 306.

27 *See* Mark A. Cotter, *The Hague Evidence Convention: Selfish U.S. Interpretation Aggravates Foreign Signatories and Mandates Changes to Federal Discovery Rules,* 6 Fla. J. Int'l L. 233, 243 (1991) ("This friction has led ... to the enactment of 'blocking' statutes designed to counter U.S. efforts to require extraterritorial production of information.").

28 *See* Wallace, *infra* note 47 and accompanying text.

29 *See, e.g.,* Am. Bar Ass'n, *supra* note 18, at 16; Daniel S. Alterbaum, Comment, Christopher X *and CNIL: A Clarion Call to Revitalize the Hague Conventions,* 38 Yale J. Int'l L. 217, 225 (2013); Patricia Anne Kuhn, Société Nationale Industrielle Aérospatiale: *The Supreme Court's Misguided Approach to the Hague Evidence Convention,* 69 B.U. L. Rev. 1011, 1060-65 (1989); Sant, *supra* note 16, at 192.

30 *See, e.g.,* Kuhn, *supra* note 29, at 360-65.

31 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

32 *See infra* endnote (ii) and accompanying text.

33 Douglas E. Rosenthal & Stephen W. Yale-Loehr, *Two Cheers for the ALI Restatement's Provisions on Foreign Discovery,* 16 N.Y.U.J. Int'l L. & Pol. 1075, 1075 (1984).

34 Am. Bar Ass'n, *supra* note 18, at 18.

35 *See* Sant, *supra* note 16, at 192 (presenting findings that from 2004-2014, U.S. courts ordered violations of foreign discovery-blocking laws with increasing frequency).

36 *See* Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles,* 19 B.C. Int'l & Comp. L. Rev. 297, 298 (1996).

37 Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

38 Gibney, *supra* note 36, at 297.

39 *Id*. at 298-300, 303.

40 *Id*.

41 V. Rock Grundman, *The New Imperialism: The Extraterritorial Application of United States Law,* 14 Int'L L. 257, 257 (1980).

42 Restatement (Third) of Foreign Relations Law § 442 rep.'s n.1 (Am. Law Inst. 1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States").

43 *See* Subrin, *supra* note 24 at 306-07.

44 *See* Sant, *supra* note 16, at 184-85.

45 *See, e.g.,* FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1306 n.18 (D.C. Cir. 1980) (providing text of French diplomatic note that "expressed formal reservations regarding the application in France of the principle of pre-trial discovery of documents characteristic of common law countries"); M. D. Copithorne, *Canadian Practice in International Law During 1978 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs,* 17 Can. Y.B. Int'l L. 334, 337 (1979) ("The Government of Canada wishes to state its serious objection to the imposition of any sanction by the judicial branch of the United States Government for failure to produce documents or to disclose information located in Canada where such production would require a person or corporation in Canada to perform an act or omission ... which is prohibited by [Canadian law].").

46 *See* Born & Rutledge, *supra* note 19, at 972 (defining "blocking statute" by reference to the statutes' effects).

47 *See* Cynthia Day Wallace, The Multinational Enterprise and Legal Control: Host State Sovereignty in an Era of Economic Globalization 804-15 (2d ed. 2002) (providing detailed history of blocking statutes' emergence across the globe).

48 Restatement (Third) of Foreign Relations Law § 442 rep.'s n.1 (Am. Law Inst. 1987).

49 *See* Wallace, *supra* note 47.

50 *Id*.

51 Cotter, *supra* note 27, at 243-45 ("Blocking statutes are interested primarily in preventing what the enacting state views as an infringement of its sovereignty.").

52 *Id*. (discussing blocking statutes passed in England, Australia, Canada, France, and South Africa in response to U.S. investigation into worldwide uranium cartel in the 1970s).

53 *See* Wallace, *supra* note 47 at 812-13 (describing German blocking statute enacted in response to FTC investigation of German shipping industry).

54 Born and Rutledge describe categories (1) through (3), as they appear here, in Born & Rutledge, *supra* note 19, at 974. Category (4) is my own addition.

55 *See* Wallace, *supra* note 47, at 809 (quoting French Law No. 68-678 of 26 July 1968).

56 Lynn M. Marvin & Yohance Bowden, *Conducting U.S. Discovery in Asia: An Overview of E-Discovery and Asian Data Privacy Laws,* 21 Rich. J.L. & Tech. 1, 24 (2014).

57 *See* Council Directive 95/46, 1995 O.J. (L 281) 31-38 (EC).

58 *See* Born & Rutledge, *supra* note 19, at 974.

59 *Id*.

60 *Id*.

61 *Id*.

62 *Id*.

63 George L. Blum, Annotation, *Effect of Intersection Between Discovery Rules and International Privacy Laws,* 1 A.L.R. 7th Art. 1 (2015).

64 *See In re* Sealed Case, 825 F.2d 494, 497 (D.C. Cir. 1987).

65 *Id*. at 498.

66 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987).

67 *Id*. at 524.

68 *Id*. at 526-27.

69 *Id*. at 546-47.

70 *Id*. at 541-42, 544 n.29.

71 *Id*. at 546.

72 *Id*.

73 *Id*. at 548.

74 *See* Sant, *supra* note 16, at 186 (summarizing negative scholarly reaction to *Aérospatiale)*.

75 *See* Alterbaum, *supra* note 29, at 223 ("[U.S.] courts have rarely ruled in favor of foreign entities asserting their domiciles' blocking statutes as a defense against complying with a subpoena."); Marvin & Bowden, *supra* note 56, at 11 ("Since *Aérospatiale,* U.S. courts have overwhelmingly required production notwithstanding blocking statutes."); John T. Yip, *Addressing the Costs and Comity Concerns of International E-Discovery,* 87 Wash. L. Rev. 595, 598 (2012) ("American courts ... often compel producing parties to hand over [discovery] even though doing so would violate foreign blocking statutes.") (collecting cases).

76 *See generally* Sant, *supra* note 16.

77 *See id*. at 196 n.107.

78 *Id*. at 184.

79 *See* M.C. Seham, *Transnational Labor Relations: The First Steps Are Being Taken, in* 19 United Nations Library on Transnational Corporations, Transnational Corporations and National Law 236, 220 (Seymour J. Rubin et al. eds., 1994); *see also* Wallace, *supra* note 47, at 875 (detailing blocking statutes' reception in U.S. courts).

80 As described above, Sant identified fifty-six cases in which courts applied *Aérospatiale* in determining whether to order violations of foreign laws. I replicated Sant's results by KeyCiting *Aérospatiale* on WestlawNext, and sorting through the 452 citing cases. I arrived at the same result: fifty-six cases where courts discussed *Aérospatiale* in considering conflicts between U.S. discovery orders and foreign law.

81 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 547 (1987).

82 *See, e.g.,* Valois of Am., Inc. v. Risdon Corp., 183 F.R.D. 344, 346 (D. Conn. 1997); *In re* Aircrash Disaster Near Roselawn, Ind., October 31, 1994, 172 F.R.D. 295, 309 (N.D. Ill. 1997) (applying three-part test consisting of (1) the particular facts of the case at bar; (2) the sovereign interests at stake; and (3) the likelihood that resort to alternative discovery mechanisms will prove effective).

83 *See, e.g.,* Bodner v. Paribas, 202 F.R.D. 370, 374-75 (E.D.N.Y. 2000) (applying four-factor tests consisting of "(1) the competing interests of the nations whose laws are in conflict; (2) the hardship of compliance ...; (3) the importance to

the litigation of the information ...; and (4) the good faith of the party resisting discovery"); First Am. Corp. v. Price Waterhouse LLP, 154 F.3d 16, 22 (2d Cir. 1998).

84 *Aérospatiale,* 482 U.S. at 544 n.28. The five factors of the Restatement test are: (1) "the importance to the ... litigation of the documents or other information requested;" (2) "the degree of specificity of the request;" (3) "whether the information originated in the United States;" (4) "the availability of alternative means of securing the information;" and (5) "the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine important interests of the state where the information is located." Restatement (Third) of Foreign Relations Law § 442(1)(c) (Am. Law Inst. 1987).

85 *See, e.g.,* Wultz v. Bank of China Ltd., 910 F. Supp. 2d 548, 552-53 (S.D.N.Y. 2012); Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468, 1475 (9th Cir. 1992).

86 *Aérospatiale,* 482 U.S. at 546.

87 In reviewing the fifty-six cases in Sant's dataset, I did not find one instance where a court refused to consider otherwise relevant information because it did not "fit" into one of that jurisdiction's previously articulated factors.

88 Admittedly, a foreign state might affect this factor tangentially. For instance, the state might invest in massive server farms that would increase the digital storage space available to its citizens in their home country. But because this Note trains its focus on purely legal strategies available to foreign states, it does not engage that speculative prospect.

89 *See* Restatement (Third) of Foreign Relations Law § 442(1)(c).

90 Born & Rutledge, *supra* note 19, at 1026-30.

91 *Id*.

92 *Id*.

93 *Id*.

94 *Id*.

95 Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 540 (1987).

96 *See* Gary B. Born, *The Hague Evidence Convention Revisited: Reflections on Its Role in U.S. Civil Procedure,* 57 L. & Contemp. Probs. 77, 90 ("Foreign states are also dissatisfied with the current *Aérospatiale* analysis ... [and] their disappointment has increased as U.S. lower courts ignore the [Hague] Convention's procedures with greater frequency.").

97 Sant, *supra* note 16, at 206 (emphasis added).

98 *Id*. at 206-07.

99 *Id*. at 208.

100 *Id*.

101 Restatement (Third) of Foreign Relations Law § 442(1)(c) (Am. Law Inst. 1987).

102 Bodner v. Paribas, 202 F.R.D. 370, 375 (E.D.N.Y. 2000)

103 *See infra* endnote (iii) and accompanying text.

i **French Blocking Statute**

1) TruePosition, Inc. v. LM Ericsson Tel. Co., Civil Action No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012).

2) Coloplast A/S v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011).

3) *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010).

4) Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008).

5) *In re* Enron Corp., No. 01-16034 (AJG), 2007 WL 8317419 (Bankr. S.D.N.Y. My 18, 2007).

6) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

7) *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014).

German Federal Data Protection Act

8) BrightEdge Techs., Inc. v. Searchmetrics, GmbH., No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014).

9) *In re* Baycol Prods. Litig., MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003).

10) Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-cv-1345-L (DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013).

Chinese State Secrets Act

11) Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992).

12) Wultz v. Bank of China Ltd., 942 F. Supp. 2d 452 (S.D.N.Y. 2013).

13) Tiffany (NJ) LLC v. Qi, 276 F.R.D. 143 (S.D.N.Y. 2011).

Chinese Tort Liability Law

14) Stream Sicav v. RINO Int'l Corp., No. CV 10-08695-VBF (VBKx), 2011 WL 4978291 (CD. Cal. Oct. 11, 2011).

Chinese Bank Secrets Law

15) Tiffany (NJ) LLC v. Qi, No. 10 Civ. 9471(WHP), 2011 WL 11562419 (S.D.N.Y. Nov. 14, 2011).

16) Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012).

17) Tiffany (NJ) LLC v. Qi, 276 F.R.D. 143 (S.D.N.Y. 2011).

18) Gucci Am., Inc. v. Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011).

19) Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238 (S.D.N.Y. 2010).

Swiss Banking Act
20) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

21) S.E.C. v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323 (N.D. Tex. 2011).

Swiss Penal Code
22) S.E.C. v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323 (N.D. Tex. 2011).

Malaysian Bank Secrets Law
23) Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010).

Chilean Bank Secrets Law
24) Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank, No. 09-20613-CIV, 2010 WL 2162868 (S.D. Fla. May 26, 2010).

South African Protection of Businesses Act
25) *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. My 23, 2010).

Israeli Basic Laws relating to the Protection of Privacy
26) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).

Israeli Bank Secrecy Ordinance
27) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).

28) Wultz v. Bank of China Ltd., 298 F.R.D. 91 (S.D.N.Y. 2014).

Israeli Prohibition on Money Laundering
29) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).

Israeli Prohibition on Terror Financing
30) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009).

British Bank Secrecy Law
31) Weiss v. Nat'l Westminster Bank, PLC, 242 F.R.D. 33 (E.D.N.Y. 2007).

Singapore Government Secrets Law
32) *In re* Air Crash at Taipei, Taiwan on October 31, 2000, 211 F.R.D. 374 (C.D. Cal. 2002).

Singapore Bank Secrecy Law
33) CE Int'l Res. Holdings, LLC v. S.A. Minerals Ltd. P'ship, No. 12-CV-08087(CM)(SN), 2013 WL 2661037 (S.D.N.Y. June 12, 2013).

United Arab Emirates Bank Secrecy Law
34) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

Jordanian Bank Secrecy Law
35) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014).

36) Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013).

Lebanese Bank Secrecy Law
37) Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013).

Ecuadorian Bank Secrecy Law
38) *In re* Chevron Corp., No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012).

Ecuadorian Professional Disclosure Law
39) Chevron Corp. v. Donziger, 296 F.R.D. 168 (S.D.N.Y. 2013).

Uruguayan Bank Secrets Law
40) NML Capital, Ltd. v. Republic of Argentina, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ. 2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013).

Spanish Law of Civil Procedure
41) Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. Aug. 1, 2005).

Mexican Holding Company Nondisclosure Law
42) British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370 (JFK)(FM), 2000 WL 713057 (S.D.N.Y. June 2, 2000).

ii **Courts ordered violations of foreign law**

1) Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013) (ordering violation of Jordanian Bank Secrecy Law).

2) Linde v. Arab Bank, PLC, 706 F.3d 92 (2d Cir. 2013) (ordering violation of Lebanese Bank Secrecy Law).

3) NML Capital, Ltd. v. Republic of Argentina, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ. 2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522 (S.D.N.Y. Feb. 8, 2013) (ordering violation of Uruguayan Bank Secrets Law).

4) Pershing Pac. W., LLC v. MarineMax, Inc., No. 10-cv-1345-L (DHB), 2013 WL 941617 (S.D. Cal. Mar. 11, 2013) (ordering violation of German Federal Data Protection Act).

5) Chevron Corp. v. Donziger, 296 F.R.D. 168 (S.D.N.Y. 2013) (ordering violation of Ecuadorian Professional Disclosure Law).

6) Wultz v. Bank of China Ltd., 298 F.R.D. 91 (S.D.N.Y. 2014) (ordering violation of Israeli Banking Ordinance).

7) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Basic Laws Relating to the Protection of Privacy).

8) BrightEdge Techs., Inc. v. Searchmetrics, GmbH., No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062 (N.D. Cal. Aug. 13, 2014) (ordering violation of German Data Protection Act).

9) Richmark Corp. v. Timber Falling Consultants, 959 F.2d 1468 (9th Cir. 1992) (ordering violation of Chinese State Secrets Law).

10) Wultz v. Bank of China Ltd., 942 F. Supp. 2d 452 (S.D.N.Y. 2013) (ordering violation of Chinese State Secrets Law).

11) *In re* Chevron Corp., No. 11-24599-CV, 2012 WL 3636925 (S.D. Fla. June 12, 2012) (ordering violation of Ecuadorian Bank Secrets Law).

12) Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012) (ordering violations of Chinese Bank Secrets Law).

13) TruePosition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012 (E.D. Pa. Mar. 6, 2012) (ordering violation of French Blocking Statute).

14) *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496 (N.D. Cal. Oct. 23, 2014) (ordering violation of French Blocking Statute).

15) Coloplast A/S v. Generic Med. Devices, Inc., No. C10-227BHS, 2011 WL 6330064 (W.D. Wash. Dec. 19, 2011) (ordering violation of French Blocking Statute).

16) Stream Sicav v. RINO Int'l Corp., No. CV 10-08695-VBF (VBKx), 2011 WL 4978291 (CD. Cal. Oct. 11, 2011) (ordering violation of Chinese Tort Liability Law).

17) Gucci Am., Inc. v. Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011) (ordering violation of Chinese Bank Secrecy Law).

18) Consejo de Defensa del Estado de la Republica de Chile v. Espirito Santo Bank, No. 09-20613-CIV, 2010 WL 2162868 (S.D. Fla. May 26, 2010) (ordering violation of Chilean Secrecy Law).

19) Gucci Am., Inc. v. Curveal Fashion, No. 09 Civ. 8458(RJS)(THK), 2010 WL 808639 (S.D.N.Y. Mar. 8, 2010) (ordering violation of Malaysian Bank Secrecy Law).

20) *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220 (E.D.N.Y. My 23, 2010) (ordering violation of South African Protection of Businesses Act).

21) *In re* Air Cargo Shipping Servs. Antitrust Litig., 278 F.R.D. 51 (E.D.N.Y. 2010) (ordering violation of French Blocking Statute).

22) Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238 (S.D.N.Y. 2010) (ordering violation of Chinese Commercial Banking Law).

23) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Prohibition on Money Laundering).

24) Linde v. Arab Bank, PLC, 262 F.R.D. 136 (E.D.N.Y. 2009) (ordering violation of Israeli Anti-Terrorism Financing Law).

25) *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833 (Bankr. D. Del. 2009) (ordering violation of French Blocking Statute).

26) Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429 (E.D.N.Y. 2008) (ordering violation of French Blocking Statute).

27) Weiss v. Nat'l Westminster Bank, 242 F.R.D. 33 (E.D.N.Y. 2007) (ordering violation of British Bank Secrecy Law).

28) Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (ordering violation of Jordanian Bank Secrecy Law).

29) Linde v. Arab Bank, PLC, 463 F. Supp. 2d 310 (E.D.N.Y. 2006) (ordering violation of Lebanese Bank Secrecy Law).

30) Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017 (S.D.N.Y. Aug 1, 2005) (ordering violation of Spanish Law of Civil Procedure).

31) British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370 (JFK)(FM), 2000 WL 713057 (S.D.N.Y. June 2, 2000) (ordering violation of Mexican Holding Company Nondisclosure Law).

32) *In re* Enron Corp., No. 01-16034 (AJG), 2007 WL 8317419 (Bankr. S.D.N.Y. July 18, 2007) (ordering violation of French Blocking Statute).

33) *In re* Air Crash at Taipei, Taiwan on October 31, 2000, 211 F.R.D. 374 (C.D. Cal. 2000) (ordering violation of Singapore Government Secrets Law).

34) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of French Blocking Statute).

35) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of Emirati Bank Secrecy Law).

36) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (ordering violation of Jordanian Bank Secrecy Law).

37) *In re* Baycol Prods. Litig., MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003) (ordering violation of German Federal Data Privacy Act).

Courts refused to order violations of foreign law

1) Tiffany (NJ) LLC v. Qi, 276 F.R.D. 143 (S.D.N.Y. 2011) (refusing to order violations of Chinese banking laws; ordering parties to proceed through Hague Convention).

2) Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866 (S.D.N.Y. May 23, 2012) (refusing to order violation of Chinese Bank Secrets Law; ordering party to proceed through Hague Convention against one defendant).

3) S.E.C. v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323 (N.D. Tex. 2011) (refusing to order violations of Swiss Banking Act; ordering parties to proceed through Hague Convention).

4) *In re* Baycol Prods. Litig., MDL No. 1431 (MJD/JGL), 2003 WL 22023449 (D. Minn. Mar. 21, 2003) (refusing to order violation of German Federal Data Protection Act; denied motion to compel discovery). 5) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (S.D.N.Y. 2014) (refusing to order violation of Swiss Banking Act).

104 *See infra* endnotes (iii) and (iv).

iii **No evidence that foreign blocking statute had been enforced**

1) Linde v. Arab Bank, PLC, 706 F.3d 92, 114 (2d Cir. 2013) ("[T]he record ... does not show 'that defendant or its employees have been prosecuted for the Bank's voluntary productions in other cases.'").

2) Linde v. Arab Bank, PLC, 706 F.3d 92, 114 (2d Cir. 2013) (same with regard to Lebanese bank-secrecy law).

3) NML Capital, Ltd. v. Republic of Argentina, Nos. 03 Civ. 8845(TPG), 05 Civ. 2434(TPG), 06 Civ. 6466(TPG), 07 Civ. 1910(TPG), 07 Civ. 2690(TPG), 07 Civ. 6563(TPG), 08 Civ. 2541(TPG), 08 Civ. 3302(TPG), 08 Civ. 6978(TPG), 09 Civ. 1707(TPG), 09 Civ. 1708(TPG), 2013 WL 491522, at *11 (S.D.N.Y. Feb. 8, 2013) ("Since [the defendant] has not provided any cases where parties in its position have been fined or prosecuted for disclosing under similar circumstances, this factor weighs in favor of compliance.").

4) Chevron Corp. v. Donziger, 296 F.R.D. 168, 207 (S.D.N.Y. 2013) ("[T]he record reveals that [the objecting entity] has provided ... [similar] documents and materials throughout the history of this case when such materials were thought

helpful to their position. Not once has he been prosecuted or subjected to any penalty. The absence of any such evidence weighs against a finding that a party faces hardship if it complies with a discovery request.").

5) Wultz v. Bank of China Ltd., 298 F.R.D. 91, 103 (S.D.N.Y. 2014) ("I find Hapoalim's argument as to Israel's interests not entirely persuasive. Hapoalim fails to cite even one example of a civil or criminal penalty that was ever actually enforced in connection with these laws.").

6) BrightEdge Techs., Inc. v. Searchmetrics, GmbH., No. 14-cv-01009-WHO (MEJ), 2014 WL 3965062, at *5 (N.D. Cal. Aug. 13, 2014) ("Here, Searchmetrics has not provided any argument as to whether parties in its position have been fined or prosecuted for disclosing personal data under similar circumstances, this factor weighs in favor of compliance.").

7) Wultz v. Bank of China Ltd., 942 F. Supp. 2d 452, 468 (S.D.N.Y. 2013) ("With regard to hardship, it remains the case that BOC has produced no evidence of a bank or its employees being meaningfully punished for disclosing confidential information to a U.S. court in contravention of Chinese law. As Dr. Peerenboom states: 'the Chinese authorities have apparently not yet actually sanctioned a bank for disclosing confidential information to a foreign court under threat of sanctions in violation of Chinese law.'").

8) *In re* Chevron Corp., No. 11-24599-CV, 2012 WL 3636925, at *15 (S.D. Fla. June 12, 2012) ("It is also worth noting that de Alba's research reveals no public record or history of violation and/or enforcement of the banking laws at issue[.] ... Because of this, in her opinion, it is not likely that the bank's employees or its officers would be subject to 'adverse legal consequences such as the loss of their banking licensees or punishment, if they complied with such an order.'").

9) Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *9 (S.D.N.Y. May 23, 2012) ("In response, [the Plaintiff] notes that despite the prospect of sanctions hinted at by the [Chinese Authorities before an earlier production order], [the Defendant] has not actually been punished in any manner for complying with Judge Sullivan's [earlier] order.").

10) TruePosition, Inc. v. LM Ericsson Tel. Co., No. 11-4574, 2012 WL 707012, at *6 (E.D. Pa. Mar. 6, 2012) ("Notably, as Trueposition points out, ETSI has presented no evidence that the French Blocking Statute has ever been enforced in the context of a federal suit, not even an antitrust case, filed in the United States regarding jurisdictional discovery.").

11) *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. C-07-5944-SC, 2014 WL 5462496, at *7 (N.D. Cal. Oct. 23, 2014) ("[The Defendant] has pointed to no similar case, nor indeed any other case, in which the Blocking Statute was enforced against a French company. As such the Court finds the risk of prosecution in this case, if any, is minimal.").

12) *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MD-1775, 2010 WL 2976220, at *2 (E.D.N.Y. July 23, 2010) ("The possibility that SAA will suffer hardship in complying with a discovery order is speculative at best. Although the defendant cites the prospect of criminal sanctions if it violates the blocking statute, it has cited no instance in which such sanctions have ever been imposed.").

13) *In re* Air Cargo Shipping Services Antitrust Litig., 278 F.R.D. 51, 53-54 (E.D.N.Y. 2010) (quoting *Bodner v. Banque Paribas,* 202 F.R.D. 370, 375 (E.D.N.Y. 2000) ("As held by numerous courts, the French Blocking Statute does not subject defendants to a realistic risk of prosecution, and cannot be construed as a law intended to universally govern the conduct of litigation within the jurisdiction of a United States court.").

14) Milliken & Co. v. Bank of China, 758 F. Supp. 2d 238, 250 (S.D.N.Y. 2010) (quoting *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-MDL-1775, 2010 WL 2976220, at *2 (E.D.N.Y. My 23, 2010) ("[T]he possibility that [the Bank] will suffer hardship in complying with the discovery order is speculative at best. Although the defendant cites the prospect of [ ] sanctions, ... it has cited no instance in which such sanctions have been imposed.")).

15) *In re* Glob. Power Equip. Grp. Inc., 418 B.R. 833, 850 (Bankr. D. Del. 2009) ("Maasvlakte has presented no evidence to suggest that ALE or Maasvlakte faces a significant risk of prosecution if it complies with the discovery requests pursuant to an order of this Court.").

16) Strauss v. Credit Lyonnais, S.A., 249 F.R.D. 429, 455 (E.D.N.Y. 2008) ("Moreover, considering that Credit Lyonnais has not faced any articulated harm following its previous disclosure of protected information in a press release, or following its *Strauss* production, Credit Lyonnais fails to explain why it continues to believe that such hardship is either imminent or inevitable.").

17) Reino de Espana v. Am. Bureau of Shipping, No. 03CIV3573LTSRLE, 2005 WL 1813017, at *8 (S.D.N.Y. Aug. 1, 2005) (noting that the Article's "record of enforcement" indicated that it had "become a relic," and going on to order production).

18) British Int'l Ins. Co. Ltd. v. Seguros La Republica, S.A., No. 90Civ.2370 (JFK)(FM), 2000 WL 713057, at *10 (S.D.N.Y. June 2, 2000) (noting that company's previous production of material in violation of relevant blocking statute indicated that "the terms of [the relevant statute] are not applied inflexibly, and that holding companies and their constituent companies retain the ability to 'deal' when faced with a discovery request that arguably violates Mexican law").

19) *In re* Enron Corp., No. 01-16034 (AJG), 2007 WL 8317419, at *2 (Bankr. S.D.N.Y. July 18, 2007) (citing Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 30 (S.D.N.Y. 1984) ("[P]laintiffs' fears of criminal prosecution under the French Blocking Statute appear to have no sound basis and ... [t]here is little evidence that the statute has been or will be enforced.") (internal quotation marks omitted).

20) *In re* Air Crash at Taipei, Taiwan on October 31, 2000, 211 F.R.D. 374, 379 (CD. Cal. 2000) ("[D]efendant [has not] presented any evidence regarding the manner and extent to which Singapore enforces its secrecy laws.").

21) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 405 (S.D.N.Y. 2014) ("[T[he Court's attention has now been focused on the total paucity of published prosecutions of banks or their officers in Jordan ... for complying with discovery ordered by a foreign court. Nor have the objecting banks identified any such prosecutions, published or otherwise.").

22) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 403 (S.D.N.Y. 2014) ("In practice ... it appears that when a foreign court orders production of French documents even though the producing party has raised the 'excuse' of the French blocking statute, the French authorities do not, in fact, prosecute or otherwise punish the producing party.").

105 Compare the cases in endnote (iii) (cases discussing lack of enforcement history), with the cases in endnote (ii) (collecting cases where courts ordered violations of foreign law).

iv **Evidence that foreign blocking statute had been enforced**

1) Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397, 404 (S.D.N.Y. 2014) ("The Swiss Federal Office for Statistics reports 28 prosecutions between 1987 and 1996, and although that number has not been recently updated, anecdotal evidence presented to the Court indicates ongoing, vigorous, and serious enforcement, as in a three-year prison sentence in 2013 for a former employee of Bank Julius Baer who aided German tax collectors. ... In such circumstances, a balancing of interests strongly favors denying the release of the subpoenaed information from bank branches located in Switzerland, and the other *Aerospatiale* factors do not overcome this conclusion.").

2) Tiffany (NJ) LLC v. Qi, 276 F.R.D. 143, 158-59 (S.D.N.Y. 2011) ("[T]he Banks here have cited Chinese cases in which a commercial bank was held liable to its customer after turning over the individual's funds or information to a third party .... [These cases] demonstrate[] that Article 253(A) statute has been used to prosecute individuals and that violations can result in serious punishment.").

3) S.E.C. v. Stanford Int'l Bank, Ltd., 776 F. Supp. 2d 323, 339-40 (N.D. Tex. 2011) ("Swiss authorities have prosecuted individuals and entities for failing to heed laws designed to promote that interest[.] ... Accordingly, the Court finds that SG Suisse may face substantial hardship should the Court order it to comply with the Receiver's request. This factor weighs in SG Suisse's favor.").

106 Compare the cases in endnote (iv) (cases noting active enforcement history), with the cases in endnote (ii) (collecting cases where courts refused to order violations of foreign law).

107 Motorola Credit Corp. v. Uzan, 73 F. Supp. 3d 397 (2014).

108 *Id*. at 401.

109 *Id*.

110 *Id*. at 402.

111 *Id*. at 405.

112 *Id*. at 403.

113 *Id*. at 404.

114 *Id*.

115 *See infra* endnote (iii).

116 Gucci Am., Inc. v. Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011), *vacated on other grounds,* 768 F.3d 122 (2d Cir. 2014).

117 *Id*. at *l.

118 *Id*.

119 *Id*. at *13.

120 *Id*. at *11.

121 Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2012 WL 1918866, at *6 (S.D.N.Y. May 23, 2012).

122 *Id*.

123 *See id*. at *9.

124 *See id*.

125 *Id*. at *2.

126 *Id*.

127 *Id*.

128 *Id*. at *9.

129 *Id*.

130 *Id*. at *13.

131 *See* Tiffany (NJ) LLC v. Forbse, No. 11 Civ. 4976(NRB), 2015 WL 5638060, at *2 (S.D.N.Y. Sept. 22, 2015).

132 *See infra* endnote (i).

133 Gucci Am., Inc. v. Li, No. 10 Civ. 4974(RJS), 2011 WL 6156936, at *12 (S.D.N.Y. Aug. 23, 2011).

134 *See* Sant, *supra* note 16, at 221 ("Foreign governments, more respectful of this conflict than U.S. courts, have usually not punished companies that obey a U.S. court order and produce documents in violation of the law. Foreign regulators apparently recognize that companies facing a no-win situation should not be punished").

135 *See Bank of China,* Forbes, http://www.forbes.com/companies/bank-of-china [https://perma.cc/263P-9V7Q].

106 CALR 231

End of Document

Evidence Requests

Español

The Office of International Judicial Assistance ("OIJA") serves as the Central Authority for the United States pursuant to the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, T.I.A.S. No. 7444, 23 U.S.T. 2555 ("HCCH 1970 Evidence Convention"). In addition, OIJA handles evidence requests received from non-Convention States through diplomatic channels. Please note the United States is not a party to the Inter-American Convention on Letters Rogatory for purposes of obtaining evidence.

I. *Inbound Evidence Requests*

OIJA strongly encourages members of the HCCH 1970 Evidence Convention to utilize the Model Letter of Request form. Whether received pursuant to the HCCH 1970 Evidence Convention or through diplomatic channels, OIJA reviews incoming requests to assess whether they can be executed under our legal system. Our OIJA Evidence and Service Guidance addresses common requests that cannot be executed under our legal system and will thus be returned without execution (see link below).

Generally, an executable request must include the names of the parties in the foreign proceeding and a sufficiently detailed description of the nature of the underlying proceeding. If documentary evidence is sought, the request must include a description of the documents sufficient to allow the competent authority executing the request to identify them. If the request seeks witness testimony, the request must include the name and contact information of the witness and a list of specific questions to be posed, as well as any instructions that the Requesting Authority may have regarding the manner of questioning, i.e., whether sworn or unsworn and whether any privileges are applicable. All this information must be provided in English. Unless a deposition is specifically requested, the method of obtaining witness testimony is through answers to written interrogatories. Please note, consistent with Articles 14(2) and 26 of the HCCH 1970 Evidence Convention, OIJA will seek reimbursement for certain costs, such as court reporter fees.

After confirming that requests comply with applicable international requirements and U.S. law, OIJA moves forward with execution or refers the request to the appropriate United States Attorney's Office (USAO). Where a witness provides the requested evidence voluntarily, a request may be quickly executed. However, where a witness must be compelled to provide the requested evidence, the USAO must initiate judicial proceedings in the United States under 28 U.S.C. § 1782, which will require additional time for execution.

OIJA discourages the submission of duplicate requests. Instead, Requesting Authorities should request status updates by contacting OIJA@usdoj.gov. We encourage Requesting Authorities to provide us with an e-mail address to which inquiries and updates may be sent and to contact OIJA to update or modify a previously submitted request. When requested evidence is no longer needed, we ask that the Requesting Authority promptly notifies OIJA.

II. *Outbound Evidence Requests*

As the Central Authority pursuant to the HCCH 1970 Evidence Convention, OIJA processes Letters of Request issued by a foreign judicial authority for the collection of evidence, whether documentary or testimonial, in the United States. *OIJA does not process, review, or transmit Letters of Request or letters rogatory for the collection of evidence in a foreign state in private U.S. litigation matters*.

Questions can be directed to OIJA at OIJA@usdoj.gov. Our mailing address can be found under Contact Us.

Links:

HCCH 1970 Evidence Convention

HCCH 1970 Evidence Convention Specialized Section

HCCH 1970 Evidence Convention

HCCH 1970 Evidence Convention Central Authorities

HCCH 1970 Evidence Convention Model Letter of Request

U.S. Department of State Guidance

U.S. Department of State Circular: Preparation of Letters Rogatory

U.S. Department of State: Country Information

OIJA Guidance

OIJA Evidence and Service Guidance (English)

OIJA Guía de Notificación y Pruebas (Spanish)

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28 U.S.C. § 1781

28 U.S.C. § 1782

Updated April 17, 2024

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LEGAL UPDATE Jun 15, 2022

US Supreme Court Clarifies the Scope of 28 U.S.C. § 1782

The federal statute 28 U.S.C. §1782 allows litigants in a foreign proceeding to obtain discovery in the United States, under the broad US discovery rules, for use in such proceedings. Although Section 1782's use has been expanding (which you can read about here) and has been applied even to documents held overseas (which you can read about here and here), there was a split in authority regarding whether the statute was broad enough to permit US courts to authorize discovery for use in private arbitrations overseas. The Fourth and Sixth Circuit courts of appeals held that it was broad enough to cover private arbitrations, while the Second, Fifth and Seventh Circuits held that the statute does not extend to private arbitrations. On June 13, 2022, the US Supreme Court resolved the split and sided with the courts holding that the statute does ***not*** extend to private arbitrations overseas.[1]

In a unanimous decision, the Court examined language in Section 1782 that the discovery ordered by a US Court must be "for use in a proceeding in a foreign or international tribunal."[2]The Court held that the word "tribunal," standing alone, could refer not only to a court, but "can also be used more broadly to refer to any adjudicatory body." The Court found that Congress intended "tribunal" to be used in that broader sense because a prior iteration of the statute had referred specifically to "judicial proceeding[s]." Congress's amendment simply to "tribunal" was intended to make the statute broader.[3]The Court continued, however, that "'[t]ribunal' does not stand alone—it belongs to the phrase 'foreign or international tribunal.'" Based on that context, the Court found that the statute refers to "a tribunal imbued with governmental authority by one nation" or "a tribunal imbued with governmental authority by multiple nations."[4]

The Court found support for this holding in the statute's history, including the statute's previous references to "courts" and "judicial proceedings" and its emphasis on "respecting foreign nations and the governmental and intergovernmental bodies they create."[5]The Court also looked at the discovery available under the Federal Arbitration Act ("FAA"), which is narrower than that provided for in Section 1782. The Court therefore concluded that if Section 1782 covered private arbitrations, there would be a "mismatch between foreign and domestic arbitration" in which foreign litigants would be entitled to broader discovery under Section 1782 than domestic litigants operating under the FAA.[6]

The Court next examined whether the two arbitrations at issue in the cases before it qualified as "foreign or international tribunals" for purposes of Section 1782. The first arbitration was a private arbitration, pursuant to a private contract, before a "private dispute-resolution organization" operating under that organization's own rules. The Court quickly concluded that this arbitral body did not qualify as a "foreign or international tribunal" under Section 1782.[7]The second arbitration involved a foreign sovereign as one of the arbitrating parties and was undertaken pursuant to an international treaty that provided an option to arbitrate. Nonetheless, the Court held that this arbitration did not qualify under Section 1782 because the arbitration was before an ad hoc arbitration panel formed specifically for the purpose of hearing a dispute between the foreign sovereign and a non-sovereign party. Thus, the international treaty did "not itself create" the panel, the panel was not affiliated with any sovereign, and there was no indication that the panel could exercise governmental authority.[8]

The Court's decision not only resolves an important circuit split, but provides guidance to courts going forward about how to distinguish "foreign and international tribunals" from private tribunals for purposes of Section 1782. The Court's decision also narrows somewhat the broad scope of Section 1782 by limiting the types of proceedings to which it applies. Nonetheless, Section 1782 will remain a powerful tool for overseas litigants proceeding in forums other than private arbitrations.

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1. *ZF Automotive US, Inc. v. Luxshare Ltd.*, Case Nos. 21-401 and 21-518, available at https://www.supremecourt.gov/opinions/21pdf/21-401_2cp3.pdf.
2. 28 U.S.C. § 1782(a).
3. Opinion at 6.
4. *Id.* at 7-9.
5. *Id.* at 9-11.

6. *Id.* at 11.
7. *Id.* at 11-12.
8. *Id.* at 12-17.

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Wendy Brooks Crew (Alabama, USA) and Oren Weinberg (Ontario, Canada)

Welcome to Charleston, South Carolina. Our Education Programs are based on a hypothetical family who is experiencing some significantly complicated legal issues. With guidance from our expert legal teams on each panel, we will debate the merits of our family's legal problems and propose solutions to solve their family law woes.

Thursday, February 6, 2025

8:30 to 8:40 AM **Introduction and Welcome from the Chapter Presidents**

Wendy Brooks Crew (Alabama, USA) & Oren Weinberg (Ontario, Canada)

8:40 to 9:10 AM **Welcome to Charleston**

Our Opening Speaker will welcome all fellows with a fascinating tale of the history of this great city.

Katherine Pemberton, Museum Director of the Powder Magazine Museum and Director of Programming for the National Society of Colonial Dames in America in the State of South Carolina

9:10 to 9:20 AM **Mobile Families and Conflicts in Laws**

You will be introduced to a highly mobile family. For each panel, a team of international lawyers will advise and guide our family through a complex maze of international family law problems, which will highlight the complex conflict of laws problems that may exacerbate litigation, and, hopefully, propel settlement.

Peter and Kay are a highly mobile, international couple, that are finding themselves in a lot of legal trouble as they navigate starting a family, marrying, divorcing, and addressing their finances. We have assembled some of the most sophisticated global legal teams to provide advice to Peter and/or Kay.

Introduction by Melissa Kucinski, Managing Partner of the "IAFL International Law Firm"

9:20 to 10:20 AM **Valuing an international business**

Kay is the part-owner of an international lumber and shipping company. The company is headquartered in Wilmington, Delaware, United States, but has its warehouse and shipping facility in Canada. Peter is the owner of an import/export company that has done significant business throughout the Asia-Pacific region, including in Singapore. Its headquarters is in London, and it has a satellite office in Melbourne, Australia.

Both Kay and Peter need to value these international companies, and they agree to hire Mr. Brian Burns to conduct a neutral business valuation of each.

Speakers: Brian Burns (Richmond, Virginia), Ian Kennedy, AM (Melbourne, Australia), Mélissa Chevalier (Montreal, QC, Canada)

10:20 to 10:30 AM **DivorceLawyer.com speaking**
10:30 to 10:50 **Break**

10:50 to 12:00 PM **International Parentage and Surrogacy**

Peter and Kay are madly in love, but Kay is having difficulty conceiving a child, something she desperately wants. The couple is not yet married. Kay is living in Paris, France in a home owned by Peter, but travels frequently to Canada, where she oversees operations for her family's business. Peter is spending time between England and France. He periodically travels to the Asia-Pacific region to engage in business as part of his international import/export company. Kay travels to the United States where she reconnects with her good friend, Rachael, who is willing to be the surrogate that carries Kay's child.

Speakers: Colin Rogerson (London, England), Bruce Hale (Boston, Massachusetts), Shirley Eve Levitan (Toronto, Canada)

Friday, February 7, 2025

8:30 to 10:00 AM **The International Movement of Children**

Kay's child, Marlene, is born through Rachael. Kay and Marlene will spend approximately four months each year in France, Canada, and the United States with the child, although she may periodically visit Peter while he is on job assignment elsewhere. During one visit with Peter in Singapore, where he was negotiating a new contract for his company, Peter proposes that they temporarily relocate to Singapore for one year. Kay agrees to the temporary relocation, but, concerned about packing the family's households with a now 2-year-old toddler, Kay travels to the United States and leaves Marlene with Rachael, who is also the child's godmother. Rachael has a close connection to Marlene and is very concerned about the family's plans to relocate to Singapore. Rachael refuses to return Marlene to Peter and Kay when it comes time for the move. Peter and Kay file a lawsuit in New York, where Rachael is living, seeking Marlene's return.

Speakers: Richard Min (New York, New York), Isabelle Rein-Lescasteryres (Paris, France), Alexandra Carr (Toronto, Canada)

10:00 to 10:10 AM **CBIZ Speaking**
10:10 to 10:30AM **Break**

10:30 to 12:00 PM **The role of fault in dividing international assets, the transfer of assets between countries and other considerations**

Fast forward. Peter and Kay manage to resume care and custody of Marlene from Rachael. Rachael is in jail in the United States for having kidnapped Marlene. Peter and Kay have reconciled and remained in Singapore beyond the one year originally contemplated. They marry in a small private ceremony at home in Singapore. Marlene is now age 5, It's finally time for Peter and Kay to enroll Marlene in school, and Kay would like the child to attend an elite private boarding school in Canada. Peter and Kay get into a fight. Kay moves out with Marlene and goes to her family home in Canada. She rekindles a relationship with Jason, an old boyfriend from university, who now plays for the National Hockey League (NHL). Jason lives most of the year in New York and is spending substantial time with Kay in Peter and Kay's two-bedroom apartment on the Upper East Side, which Peter and Kay had utilized as a pied a terre. When Peter finds out, he decides to divorce Kay.

The couple has the following key assets:

For Kay: Bank and Brokerage accounts in Canada, the United States, Singapore, and France; retirement assets in New York; a share in the family

business in Canada, which is held in a trust; a small condo in Paris; an inheritance right in the real estate where she resides while in Canada; among other things.

For Peter: Bank and Brokerage accounts in England, France, Singapore, and Australia; retirement assets in England; his import/export company that is headquartered in London; a house in Paris, France; an apartment in New York, among other things.

Speakers: Karon Bales (Toronto, Canada), Gretchen Beall Schumann (New York, NY), Tim Amos, KC (London, England), Kai Yun Wong (Singapore)

Saturday, February 8, 2025

8:15 to 9:15 AM **US Chapter and Canadian Chapter Business Meetings**

9:15 to 9:35 AM **Break**
9:35 to 9:40 AM **Wilmington speaking**
9:45 to 11:15 AM **International Discovery**

Peter and Kay are in the thick of litigation in France (for child custody), Singapore (for divorce), and Canada (for the division of certain assets). They realize that for all aspects of their case, they are going to need information from within and without each country. They each independently consult their legal teams about how to obtain the necessary disclosures.

As a reminder, the parties have the following assets:

For Kay: Bank and Brokerage accounts in Canada, the United States, Singapore, and France; a share in the family business in Canada; a small condo in Paris; her relative having passed, real estate where she resides while in Canada as well as real estate in Alabama where she stays while visiting Rachael; among some other assets. Peter also suspects that Kay owns 40% of a subsidiary of her family's business that has multiple sites in the Alabama Gulf shores.

For Peter: Bank and Brokerage accounts in England, France, Singapore, and Australia; his import/export company that is headquartered in London; a house in Paris, France; among some other assets. Peter also owns real estate in London which he inherited from a wealthy aunt. He and Kay stayed in one of the properties from time to time when on vacation and/or passing through London *en route* to Singapore.

Both are also very wary of the other hiding additional assets and consult their respective teams on how to obtain as much financial information about the other as possible and the most efficiently.

Speakers: Frances Auchincloss Goldsmith (Paris, France), Jane Keir (London, England), Kenneth Fishman (Toronto, Canada), Jessica Kirk Drennan (Birmingham, Alabama)

142 S.Ct. 2078
Supreme Court of the United States.

ZF AUTOMOTIVE US, INC., et al., Petitioners
v.
LUXSHARE, LTD.
AlixPartners, LLP, et al., Petitioners
v.
The Fund for Protection of Investors' Rights in Foreign States

No. 21-401
|
Argued March 23, 2022
|
Decided June 13, 2022[1]

Synopsis

Background: In first case, buyer of two business units filed ex parte application to serve subpoenas on seller and its senior officers for production of documents and testimony for use in upcoming arbitration proceedings in Germany against seller. The United States District Court for the Eastern District of Michigan, Laurie J. Michelson, J., 547 F.Supp.3d 682, overruled objections to order of Anthony P. Patti, United States Magistrate Judge, 2021 WL 2154700, granting in part and denying in part seller's and officers' motion to quash subpoenas, and the District Court, Michelson, J., 555 F.Supp.3d 510, granted buyer's motion to compel the previously ordered discovery and denied seller's motion to stay. Seller appealed. The United States Court of Appeals for the Sixth Circuit, 15 F.4th 780, denied stay pending appeal. The United States Supreme Court granted a stay and certiorari before judgment. In second case, Russian corporation that was assignee of shareholder in bankrupt nationalized private Lithuanian bank filed application for domestic discovery from New York limited liability partnership (LLP) for use in foreign arbitration proceeding initiated by Russian corporation pursuant to bilateral investment treaty between Lithuania and Russia alleging that Lithuania expropriated certain investments from bank. The United States District Court for the Southern District of New York, Analisa Torres, J., 2020 WL 3833457, granted discovery application, and, 2020 WL 5026586, denied reconsideration. LLP appealed. The United States Court of Appeals for the Second Circuit, Cabranes, Circuit Judge, 5 F.4th 216, affirmed. Certiorari was granted, and cases were consolidated.

Holdings: The Supreme Court, Justice Barrett, held that:

term "foreign tribunal," within meaning of federal statute permitting domestic discovery for use in a foreign or international tribunal proceeding, meant tribunal imbued with governmental authority by one nation;

term "international tribunal," within meaning of statute, meant tribunal imbued with governmental authority by multiple nations;

private adjudicatory bodies do not fall within the scope of the statute; abrogating *Servotronics, Inc. v. Boeing Co.*, 954 F. 3d 209, and *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F. 3d 710;

foreign arbitral panel involved in first case was not "foreign tribunal" within meaning of statute; and

foreign ad hoc arbitral panel involved in second case was not "international tribunal" within meaning of statute.

District Court reversed in first case; Court of Appeals reversed in second case.

**2080 *Syllabus*[*]

***619** These consolidated cases involve arbitration proceedings abroad for which a party sought discovery in the United States pursuant to 28 U.S.C. § 1782(a)—a provision authorizing a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal." In the first case, Luxshare, Ltd., a Hong Kong-based company, alleges fraud in a sales transaction with ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation. The sales contract signed by the parties provided that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), a private dispute-resolution organization based in Berlin. To prepare for a DIS arbitration against ZF, Luxshare filed an application under § 1782 in federal court, seeking information from ZF and its officers. The District Court granted the request, and ZF moved to quash, arguing that the DIS panel was not a "foreign or international tribunal" under § 1782. The District Court denied ZF's motion. The Sixth Circuit denied a stay.

The second case involves AB bankas SNORAS (Snoras), a failed Lithuanian bank declared insolvent and nationalized by Lithuanian authorities. The Fund for Protection of Investors' Rights in Foreign States—a Russian corporation assigned the rights of a Russian investor in Snoras—initiated a proceeding against Lithuania under a bilateral investment treaty between Lithuania and Russia, claiming that Lithuania expropriated investments. Relevant here, the treaty establishes a procedure for resolving "any dispute between one Contracting Party and [an] investor of the other Contracting Party concerning" investments in the first Contracting Party's territory, and offers parties four options for dispute resolution. App. to Pet. for Cert. in No. 21–518, pp. 64a–65a. The Fund chose an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law, with each party selecting one arbitrator and those two ***620** choosing a third. After initiating arbitration, the Fund filed a § 1782 application in federal court, seeking information from Simon Freakley, who was appointed as a temporary administrator of Snoras, and AlixPartners, LLP, a New York-based consulting firm where Freakley serves as CEO. AlixPartners resisted discovery, arguing that the ad hoc arbitration panel was not a "foreign or international tribunal" under § 1782 but instead a private adjudicative body. The District Court rejected that argument and granted the Fund's discovery request. The Second Circuit affirmed.

Held: Only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under 28 U.S.C. § 1782, and the bodies at issue in these cases do not qualify. Pp. 2085 – 2092.

(a) Section 1782(a) provides that a district court may order discovery "for use in a proceeding in a foreign or international tribunal." Standing alone, the word "tribunal" can be used either as a synonym for "court," in which case it carries a distinctively governmental flavor, or more broadly to refer to any adjudicatory body. While a prior version of § 1782 covered "any judicial proceeding" in "any court in a foreign country," § 1782 (1958 ed.), Congress later expanded the provision to cover proceedings in a "foreign or international tribunal." That shift created " 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.' " *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258, 124 S.Ct. 2466, 159 L.Ed.2d 355 (alterations omitted). But while a "tribunal" thus need not be a formal "court," read in context—with "tribunal" attached to the modifiers "foreign or international"—§ 1782's phrase is best understood to refer to an adjudicative body that exercises governmental authority.

"Foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. This reading of "foreign tribunal" is reinforced by the statutory defaults for discovery procedure under § 1782, which permit district courts to prescribe the practice and procedure, "which may be in whole or part *the practice and procedure of the foreign country or the international tribunal*." § 1782(a) (emphasis added). The statute thus presumes that a "foreign tribunal" follows "the practice and procedure of the foreign country." That the default discovery procedures for a "foreign tribunal" are governmental suggests that the body is governmental too.

Similarly, an "international tribunal" is best understood as one that involves or is of two or more nations, meaning that those nations have ***621** imbued the tribunal with official power to adjudicate disputes. So understood, a "foreign tribunal" is a tribunal imbued with governmental authority by one nation, and an "international tribunal" is a tribunal imbued with governmental authority by multiple nations. Pp. 2085 – 2088.

(b) Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign "courts." Congress established the Commission on International Rules of Judicial Procedure, see §§ 1–2, 72 Stat. 1743, and charged the Commission with improving the process of judicial assistance, specifying that the "assistance and cooperation" was "*between the United States and foreign countries*" and that "the rendering of assistance *to foreign courts and quasi-judicial agencies*" should be improved. *Ibid.* (emphasis added). In 1964, Congress adopted the Commission's proposed legislation, which became the modern version of § 1782. Interpreting § 1782 to reach only bodies exercising governmental authority is consistent with Congress' charge to the Commission. The animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies adjudicating purely private disputes abroad would serve that end.

Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows. Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration. Pp. 2087 – 2089.

(c) The adjudicative bodies in these cases are not governmental or intergovernmental tribunals that fall within § 1782. The dispute between Luxshare and ZF involves private parties that agreed in a private contract that DIS, a private dispute-resolution organization, would arbitrate any disputes between them. No government is involved in creating the DIS panel or prescribing its procedures. Contrary to Luxshare's suggestion, a commercial arbitral panel like the DIS panel does not qualify as governmental simply because the law of the country in which it would sit (here, Germany) governs some aspects of arbitration and courts play a role in enforcing arbitration agreements.

The ad hoc arbitration panel at issue in the Fund's dispute with Lithuania presents a harder question. A sovereign is on one side of the dispute, ***622** and the option to arbitrate is contained in an international treaty rather than a private contract. Yet neither Lithuania's presence nor the treaty's existence is dispositive, because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit. What matters is whether the two nations intended to confer governmental authority on an ad hoc panel formed pursuant to the treaty. See *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220. The treaty offers a choice of four forums to resolve disputes. The inclusion of courts as one option for dispute resolution reflects Russia and Lithuania's intent to give investors the choice of bringing their disputes before a pre-existing governmental body. By contrast, the ad hoc arbitration panel is not a pre-existing body, but one formed for the purpose of

adjudicating investor-state disputes. Nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. The ad hoc panel has authority because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority. Any similarities between the ad hoc arbitration panel and other adjudicatory bodies from the past are not dispositive. For purposes of § 1782, the inquiry is whether the features of the adjudicatory body and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority. Pp. 2088 – 2092.

No. 21–401, reversed; 5 F. 4th 216, reversed.

BARRETT, J., delivered the opinion for a unanimous Court.

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Opinion

Justice BARRETT delivered the opinion of the Court.

***623** ****2083** Congress has long allowed federal courts to assist foreign or international adjudicative bodies in evidence gathering. The current statute, 28 U.S.C. § 1782, permits district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal." These consolidated cases require us to decide whether private adjudicatory bodies count as "foreign or international tribunals." They do not. The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill.

I

Both cases before us involve a party seeking discovery in the United States for use in arbitration proceedings abroad. In both, the party seeking discovery invoked § 1782, which permits a district court to order the production of certain ***624** evidence "for use in a proceeding in a foreign or international tribunal." And in both, the party resisting discovery argued that the arbitral panel at issue did not qualify as a "foreign or international tribunal" under the statute.

****2084** But while these cases present the same threshold legal question, their factual contexts differ. We discuss each in turn.

A

The first case involves an allegation of fraud in a business deal gone sour. ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation, sold two business units to Luxshare, Ltd., a Hong Kong-based company, for almost a billion dollars. Luxshare claims that after the deal was done, it discovered that ZF had concealed information about the business units. As a result, Luxshare says, it overpaid by hundreds of millions of dollars.

In the contract governing the sale, the parties had agreed that all disputes would be "exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS)." App. in No. 21–401, p. 93. DIS is a private dispute-resolution organization based in Berlin. The agreement, which is governed by German law, provides that arbitration take place in Munich and that the arbitration panel be formed by Luxshare and ZF each choosing one arbitrator and those two arbitrators choosing a third.

With an eye toward initiating a DIS arbitration against ZF, Luxshare filed an *ex parte* application under § 1782 in the U.S. District Court for the Eastern District of Michigan, seeking information from ZF and two of its senior officers. (Section 1782 allows a party to obtain discovery even in advance of a proceeding. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259, 124 S.Ct. 2466, 159 L.Ed.2d 355 (2004).) The District Court granted the request, and Luxshare served subpoenas on ZF and the officers.

***625** ZF moved to quash the subpoenas, arguing (among other things) that the DIS panel was not a "foreign or international tribunal" under § 1782. As ZF acknowledged, however, Circuit precedent foreclosed that argument. See *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (C.A.6 2019). The District Court ordered ZF to produce documents and an officer to sit for a deposition, and the Sixth Circuit denied ZF's request for a stay.

We granted a stay and certiorari before judgment to resolve a split among the Courts of Appeals over whether the phrase "foreign or international tribunal" in § 1782 includes private arbitral panels. Compare *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (C.A.4 2020); *Abdul Latif*, 939 F.3d 710, with *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (C.A.2 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (C.A.5 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (C.A.7 2020).

B

The second case began with a dispute between Lithuania and a disappointed Russian investor in AB bankas SNORAS (Snoras), a failed Lithuanian bank. After finding Snoras unable to meet its obligations, Lithuania's central bank nationalized it and appointed Simon Freakley, currently the CEO of a New York-based consulting firm called AlixPartners, LLP, as a temporary administrator. After Freakley issued a report on Snoras' financial status, Lithuanian authorities commenced bankruptcy proceedings and declared Snoras insolvent. The Fund for Protection of Investors' Rights in Foreign States—a Russian corporation and the assignee of the Russian investor—claims that Lithuania expropriated certain investments from Snoras along the way.

The Fund initiated a proceeding against Lithuania under a bilateral investment ****2085** treaty between Lithuania and Russia (titled "Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania ***626** on the Promotion and Reciprocal Protection of the Investments"). App. to Pet. for Cert. in No. 21–518, p. 56a. The treaty seeks to promote "favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party." *Ibid*.

Relevant here, the treaty addresses the procedure for resolving "any dispute between one Contracting Party and [an] investor of the other Contracting Party concerning" investments in the first Contracting Party's territory. *Id.*, at 64a. It provides that if the parties cannot resolve their dispute within six months, "the dispute, at the request of either party and at the choice of an investor, shall be submitted to" one of four specified forums. *Id.*, at 64a–65a. The Fund chose "an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)," with each party selecting one arbitrator and those two choosing a third. *Id.,* at 65a; App. in No. 21–518, p. 159a. Under the treaty, "[t]he arbitral decision shall be final and binding on both parties of the dispute." App. to Pet. for Cert. in No. 21–518, at 65a.

After initiating arbitration, but before the selection of arbitrators, the Fund filed a § 1782 application in the U.S. District Court for the Southern District of New York, seeking information from Freakley and AlixPartners about Freakley's role as temporary administrator of Snoras. AlixPartners resisted discovery, arguing that the ad hoc arbitration panel was not a "foreign or international tribunal" under § 1782 but instead a private adjudicative body. The District Court rejected that argument and granted the Fund's discovery request.

The Second Circuit affirmed. Unlike the Sixth Circuit, the Second Circuit had previously held that a private arbitration panel does not constitute ****2092** a "foreign or international tribunal" under § 1782. See *National Broadcasting Co.*, 165 F.3d 184. But it still had to decide how to classify the ad hoc panel that would adjudicate the dispute between the ***627** Fund and Lithuania. After employing a multifactor test to determine " 'whether the body in question possesses the functional attributes most commonly associated with private arbitration,' " it concluded that the ad hoc panel was "foreign or international" rather than private. 5 F.4th 216, 225, 228 (2021).

We granted certiorari and consolidated the two cases. 595 U.S. ——, 142 S.Ct. 638, 211 L.Ed.2d 397 (2021).

II

We begin with the question whether the phrase "foreign or international tribunal" in § 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies. If the former, all agree that § 1782 permits discovery to proceed in both cases. If the latter, we must determine whether the arbitral panels in these cases qualify as governmental or intergovernmental bodies.

A

Section 1782(a) provides:

> "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."

****2086** The key phrase for purposes of this case is "foreign or international tribunal."

Standing alone, the word "tribunal" casts little light on the question. It can be used as a synonym for "court," in which case it carries a distinctively governmental flavor. See, *e.g.,* Black's Law Dictionary 1677 (4th ed. rev. 1968) ("[t]he seat of a judge" or "a judicial court; the jurisdiction which the judges exercise"). But it can also be used more broadly to refer to any adjudicatory body. See, *e.g.,* American Heritage Dictionary 1369 (1969) ("[a]nything having the power of ***628** determining or judging"). Here, statutory history indicates that Congress used "tribunal" in the broader sense. A prior version of § 1782 covered "any judicial proceeding" in "any court in a

foreign country," 28 U.S.C. § 1782 (1958 ed.), but in 1964, Congress expanded the provision to cover proceedings in a "foreign or international tribunal." As we have previously observed, that shift created " 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.' " *Intel*, 542 U.S. at 258, 124 S.Ct. 2466 (alterations omitted). So a § 1782 "tribunal" need not be a formal "court," and the broad meaning of "tribunal" does not itself exclude private adjudicatory bodies.[1] If we had nothing but this single word to go on, there would be a good case for including private arbitral panels.

This is where context comes in. "Tribunal" does not stand alone—it belongs to the phrase "foreign or international tribunal." And attached to these modifiers, "tribunal" is best understood as an adjudicative body that exercises governmental authority.[2] Cf. *FCC v. AT&T Inc.*, 562 U.S. 397, 406, 131 S.Ct. 1177, 179 L.Ed.2d 132 (2011) ("[T]wo words together may assume a more particular meaning than those words in isolation").

Take "foreign tribunal" first. Congress could have used "foreign" in one of two ways here. It could mean something ***629** like "[b]elonging to another nation or country," which would support reading "foreign tribunal" as a governmental body. Black's Law Dictionary, at 775. Or it could more generally mean "from" another country, which would sweep in private adjudicative bodies too. See, *e.g.,* Random House Dictionary of the English Language 555 (1966) ("derived from another country or nation; not native"). The first meaning is the better fit.

The word "foreign" takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations. That is why "foreign" suggests something different in the phrase "foreign leader" than it does in "foreign films." Brief for Petitioners in No. 21–401, pp. 20–21; Brief for Respondent in No. 21–401, pp. 7–8. The phrase "foreign leader" brings to mind "an official of a foreign ****2087** state, not a team captain of a European football club." Brief for United States as *Amicus Curiae* 17. So too with "foreign tribunal." "Tribunal" is a word with potential governmental or sovereign connotations, so "foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. See *id.,* at 14–15 (a governmental adjudicator is "one whose role in deciding the dispute rests on" a "nation's sovereign authority").

This reading of "foreign tribunal" is reinforced by the statutory defaults for discovery procedure. In addition to authorizing district courts to order testimony or the production of evidence, § 1782 permits them to "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." § 1782(a) (emphasis added). The reference to the procedure of "the foreign country or the international tribunal" parallels the authorization for district ***630** courts to grant discovery for use in a "foreign or international tribunal" mentioned just before in § 1782. The statute thus presumes that a "foreign tribunal" follows "the practice and procedure of the foreign country." It is unremarkable for the statute to presume that a foreign court, quasi-judicial body, or any other governmental adjudicatory body follows the practice and procedures prescribed by the government that conferred authority on it.[3] But that would be an odd assumption to make about a private adjudicatory body, which is typically the creature of an agreement between private parties who prescribe their own rules. See *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010). That the default discovery procedures for a "foreign tribunal" are governmental suggests that the body is governmental too.

Now for "international tribunal." "International" can mean either (1) involving or of two or more "nations," or (2) involving or of two or more "nationalities." American Heritage Dictionary, at 685 ("[o]f, relating to, or involving two or more nations or nationalities"); see also Random House Dictionary, at 743 ("between or among nations; involving two or more nations"; "of or pertaining to two or more nations or their citizens"). The latter definition is unlikely in this context because an adjudicative body would be "international" if it had adjudicators of different nationalities—and it would be strange for the availability of discovery to turn on the national origin

of the adjudicators. So no party argues that "international" carries that meaning here. A tribunal is "international" when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes. See Tr. of Oral Arg. 77 (the United States arguing that "the touchstone" is ***631** whether the body is "exercising official power on behalf of the two governments").

So understood, "foreign tribunal" and "international tribunal" complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.

****2088** B

Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq*.

From the start, the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create. From 1855 until 1964, § 1782 and its antecedents covered assistance only to foreign "courts." See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630; Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769; Act of Feb. 27, 1877, ch. 69, § 875, 19 Stat. 241; Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949; 28 U.S.C. § 1782 (1958 ed.). And before 1964, a separate strand of law covered assistance to " 'any international tribunal or commission ... in which the United States participate[d] as a party.' " Act of June 7, 1933, ch. 50, 48 Stat. 117. The process of combining these two statutory lines began when Congress established the Commission on International Rules of Judicial Procedure. See Act of Sept. 2, 1958, Pub. L. 85–906, §§ 1–2, 72 Stat. 1743. It charged the Commission with improving the process of judicial assistance, specifying that the "assistance and cooperation" was "*between the United States and foreign countries*" and that "the rendering of assistance *to foreign courts and quasi-judicial agencies*" should be improved. *Ibid.* (emphasis added). In 1964, Congress adopted the Commission's proposed legislation, which became the modern version of § 1782.

***632** Interpreting § 1782 to reach only bodies exercising governmental authority is consistent with Congress' charge to the Commission. Seen in light of the statutory history, the amendment did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered. By broadening the range of governmental and intergovernmental bodies included in § 1782, Congress increased the "assistance and cooperation" rendered by the United States to those nations.

After all, the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end. Such a broad reading of § 1782 would open district court doors to any interested person seeking assistance for proceedings before any private adjudicative body—a category broad enough to include everything from a commercial arbitration panel to a university's student disciplinary tribunal. See Brief for Petitioners in No. 21–401, at 19. Why would Congress lend the resources of district courts to aid purely private bodies adjudicating purely private disputes abroad?

Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery than the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery, see 9 U.S.C. § 7, while district courts can entertain § 1782 requests from foreign or international tribunals or any "interested person," 28 U.S.C. § 1782(a). In addition, prearbitration discovery is off the table under the FAA but broadly available under § 1782. See *Intel*, 542 U.S. at 259, 124 S.Ct. 2466 (holding that discovery is available for use in proceedings "within reasonable contemplation"). Interpreting § 1782 to reach private arbitration would therefore create a notable

mismatch between foreign and domestic arbitration. And as ***633** the Seventh Circuit observed, "[i]t's hard to conjure a rationale ****2089** for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations." *Rolls-Royce*, 975 F.3d at 695.

* * *

In sum, we hold that § 1782 requires a "foreign or international tribunal" to be governmental or intergovernmental. Thus, a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within § 1782.

III

That leaves the question whether the adjudicative bodies in the cases before us are governmental or intergovernmental. They are not.

A

Analyzing the status of the arbitral panel involved in Luxshare's dispute with ZF is straightforward. Private parties agreed in a private contract that DIS, a private dispute-resolution organization, would arbitrate any disputes between them. See *Stolt-Nielsen*, 559 U.S. at 682, 130 S.Ct. 1758 ("[A]n arbitrator derives his or her powers from the parties' agreement to forgo the legal process and submit their disputes to private dispute resolution"). By default, DIS panels operate under DIS rules, just like panels of any other private arbitration organization operate under private arbitral rules. The panels are formed by the parties—with each party selecting one arbitrator and those two arbitrators choosing a third. No government is involved in creating the DIS panel or prescribing its procedures. This adjudicative body therefore does not qualify as a governmental body.

Luxshare weakly suggests that a commercial arbitral panel like the DIS panel qualifies as governmental so long as ***634** the law of the country in which it would sit (here, Germany) governs some aspects of arbitration and courts play a role in enforcing arbitration agreements. See Brief for Respondent in No. 21–401, at 26–27; *Boeing*, 954 F.3d at 213–214. But private entities do not become governmental because laws govern them and courts enforce their contracts—that would erase any distinction between private and governmental adjudicative bodies. Luxshare's implausibly broad definition of a governmental adjudicative body is nothing but an attempted end run around § 1782's limit.

B

The ad hoc arbitration panel at issue in the Fund's dispute with Lithuania presents a harder question. A sovereign is on one side of the dispute, and the option to arbitrate is contained in an international treaty rather than a private contract. These factors, which the Fund emphasizes, offer some support for the argument that the ad hoc panel is intergovernmental. Yet neither Lithuania's presence nor the treaty's existence is dispositive, because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit. What matters is the substance of their agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty? See *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014)

("As a general matter, a treaty is a contract, though between nations," and "[i]ts interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent").

****2090** The provision regarding ad hoc arbitration appears in Article 10, which permits an investor to choose one of four forums to resolve disputes:

> "a) [a] competent court or court of arbitration of the Contracting Party in which territory the investments are made;
>
> "b) the Arbitration Institute of the Stockholm Chamber of Commerce;
>
> ***635** "c) the Court of Arbitration of the International Chamber of Commerce;
>
> "d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)." App. to Pet. for Cert. in No. 21–518, at 64a–65a.

The options on this menu vary in form. For example, a "competent court or court of arbitration of the Contracting Party" (*i.e.,* the state in which an investor does business) is clearly governmental; a court "of " a sovereign belongs to that sovereign. The inclusion of courts on the list reflects Russia and Lithuania's intent to give investors the choice of bringing their disputes before a pre-existing governmental body.

An ad hoc arbitration panel, by contrast, is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes. And nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority. For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum. In addition, the ad hoc panel "functions independently" of and is not affiliated with either Lithuania or Russia. 5 F.4th at 226. It consists of individuals chosen by the parties and lacking any "official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity." *Ibid.* And it lacks other possible indicia of a governmental nature. See *ibid.* ("[T]he panel receives zero government funding," "the proceedings ... maintain confidentiality," and the " 'award may be made public only with the consent of both parties' ").[4]

***636** Indeed, the ad hoc panel at issue in the Fund's dispute with Lithuania is "materially indistinguishable in form and function" from the DIS panel resolving the dispute between ZF and Luxshare. Brief for George A. Bermann et al. as *Amici Curiae* 19. In a private arbitration, the panel derives its authority from the parties' consent to arbitrate. The ad hoc panel in this case derives its authority in essentially the same way. Russia and Lithuania each agreed in the treaty to submit to ad hoc arbitration if an investor chose it. The Fund took Lithuania up on that offer by initiating such an arbitration, thereby triggering the formation of an ad hoc panel with the authority to resolve the parties' dispute. That authority exists because Lithuania and the Fund consented to the arbitration, not because Russia and Lithuania clothed the panel with governmental authority. Cf. ****2091** *Granite Rock Co. v. Teamsters*, 561 U.S. 287, 299, 130 S.Ct. 2847, 177 L.Ed.2d 567 (2010) ("[T]he first principle that underscores all of our arbitration decisions" is that "[a]rbitration is strictly 'a matter of consent' "); *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 648–649, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) ("[A]rbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration"). So inclusion in the treaty does not, as the Fund suggests, automatically render ad hoc arbitration governmental. Instead, it reflects the countries' choice to offer investors the potentially appealing option of bringing their disputes to a private arbitration panel that operates like commercial arbitration panels do. In a treaty designed to attract foreign ***637** investors by offering "favourable conditions for investments," App. to Pet. for Cert. in No. 21–518, at 56a, that choice makes sense.

None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. Governmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured. The point is only that a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it. The relevant question is whether the nations intended that the ad hoc panel exercise governmental authority. And here, all indications are that they did not.

The Fund tries to bolster its case by analogizing to past adjudicatory bodies: (1) the body at issue in the dispute over the sinking of the Canadian ship *I'm Alone*, which derived from a treaty between the United States and Great Britain; and (2) the United States-Germany Mixed Claims Commission. There appears to be broad consensus that these bodies would qualify as intergovernmental. Ergo, the Fund says, the ad hoc panel must be intergovernmental too.

This does not follow. It is not dispositive whether an adjudicative body shares some features of other bodies that look governmental. Instead, the inquiry is whether those features and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority. And though we need not decide the status of the *I'm Alone* and Mixed Claims commissions, it is worth noting some differences between the treaties providing for them and the treaty at issue here. For instance, those treaties specified that each sovereign would be involved in the formation of the bodies, and, with respect to the treaty creating the Mixed Claims Commission in particular, it also specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other ***638** officers to assist in the proceedings. See Convention Between the United States and Great Britain for Prevention of Smuggling of Intoxicating Liquors, Art. IV, Jan. 23, 1924, 43 Stat. 1761–1762, T. S. No. 685; Agreement Between the United States and Germany for a Mixed Commission to Determine the Amount To Be Paid by Germany in Satisfaction of Germany's Financial Obligations Under the Treaty Concluded Between the Two Governments on August 25, 1921, Arts. II, III, IV, V, Aug. 10, 1922, 42 Stat. 2200, T. S. No. 665. So while there are some similarities between the ad hoc arbitration panel and the *I'm Alone* and Mixed Claims commissions, there are distinctions too. Thus, even taking the Fund's argument on its own terms, its analogies are less helpful than it hopes.

* * *

In sum, only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies. We reverse the order of the District Court in No. 21–401 denying the motion to quash, and we reverse the judgment of the Court of Appeals in No. 21–518.

It is so ordered.

All Citations

596 U.S. 619, 142 S.Ct. 2078, 213 L.Ed.2d 163, 22 Cal. Daily Op. Serv. 5774, 2022 Daily Journal D.A.R. 5836, 29 Fla. L. Weekly Fed. S 334

Footnotes

1 Together with No. 21–518, *AlixPartners, LLP, et al.* v. *Fund for Protection of Investors' Rights in Foreign States*, on certiorari to the United States Court of Appeals for the Second Circuit.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Luxshare argues that commercial arbitral panels are § 1782 tribunals because they "fit comfortably" under the "quasi-judicial paradigm" from our decision in *Intel*. Brief for Respondent in No. 21401, p. 19. There, we recognized that the body at issue, the Commission of the European Communities, was a § 1782 tribunal in part because it was a "first-instance decisionmaker" that rendered dispositive rulings reviewable in court. 542 U.S. at 254–255, 258, 124 S.Ct. 2466. But we did not purport to establish a test for what counts as a *foreign or international* tribunal. The issue before us now—whether a private arbitral body qualifies as a "foreign or international tribunal"—was not before us in *Intel*. No one there disputed that the body at issue exercised governmental authority.

2 The parties do not dispute that the bodies at issue are sufficiently adjudicatory, so we need not precisely define the outer bounds of § 1782 "tribunals." The issue here is only whether the statute requires "tribunals" to be governmental or intergovernmental bodies.

3 The provision makes the similarly unremarkable assumption that an "international tribunal" defaults to the rules on which the relevant nations agreed.

4 Comparing Article 10 of the treaty (governing investor-state disputes) with Article 11 (governing state-to-state disputes) further suggests that the ad hoc panel under Article 10 is of a nongovernmental nature. Article 11 provides that an unsettled dispute between the countries "shall, upon the request of either Contracting Party, be submitted to an Arbitral Tribunal." App. to Pet. for Cert. in No. 21–518, p. 65a. Each country is involved in forming that arbitral body and funds its operations. See *id.*, at 66a–67a. Article 11 also provides, under some circumstances, for the countries to invite officials of the International Court of Justice to appoint the body's members. *Id.*, at 66a. This reflects a higher level of government involvement and highlights the absence of such details in Article 10's ad hoc arbitration option.

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