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Use in International Litigation:
Evidence Located in the
United States

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This article focuses on section 1782 of Title 28 of the US Code which provides a powerful mechanism to obtain potential evidence for use in a non-US litigation.

A US federal statute entitled ‘Assistance to foreign and international tribunals and to litigants before such tribunals’, 28 USC section 1782, governs the taking of evidence in the United States for use in foreign (ie non-US) litigation. Section 1782 contemplates two ways in which a party may apply to take evidence located in the United States for use in foreign litigation. First, an application may be made ‘pursuant to letter rogatory issued, or request made, by a foreign or international tribunal’. Secondly, an application may be made ‘by any interested person’ directly to the US court.

A typical example of the first method would be reliance on the letter of request procedure of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.¹ This procedure requires a party to apply, first, to the court in which the action is pending, asking that court to issue a letter of request. This letter of request is in

turn transmitted to the central authority in the United States, the Civil Division of the Department of Justice. The Department of Justice then transmits the letter of request to the office of the US Attorney’s Office for the judicial district in which the witness resides or in which the evidence is found.

The US Attorney’s Office will then contact the witness to determine whether he or she wishes to appear voluntarily. If the witness does not wish to appear voluntarily, the US Attorney’s Office applies to the district court pursuant to section 1782 for an order compelling the witness to appear or to produce the evidence.²

By contrast to this rather lengthy and circuitous route, the second method of proceeding under section 1782 is straightforward. A party to a foreign litigation may apply directly to the appropriate US district court for an order pursuant to section 1782

– bypassing altogether the non-US court in which the action is pending and avoiding the Department of Justice and the US Attorney’s Office.

Moreover, not only is the direct application procedure of section 1782 a more efficient method of obtaining discovery of material located in the United States (ie you don’t have to apply first to the foreign court and go through the Department of State), but also a party to a non-US lawsuit may be able to obtain broader discovery using the direct application procedure of section 1782 than it would under the letter of request mechanism of the Hague Evidence Convention. This can be illustrated by considering the English case of *Panayiotou v Sony Music Entertainment*,³ which relates to singer George Michael’s attempts, during the pendency of his suit against Sony, to secure discovery from certain non-party Sony entities located in New York City.

In *Panayiotou*, Michael applied to the English court under RSC Ord 39, r 2 for a letter of request addressed to the proper authorities in the United States seeking production of documents in the possession of the non-party Sony entities. The English court issued a letter of request with respect to *some*, but not all, of the documents sought. The reason the court limited the scope of the material available to Michael was because it found that the standard applicable to an outgoing letter of request relating to documents in the possession of a non-party in another country was the same as the standard applicable to a subpoena to produce documents addressed to a non-party in England for use in an English lawsuit. Thus, the court stated that there were limits on the scope of the documents that could be made the subject of a letter of request:

- (1) the documents must be specifically identified;
- (2) the documents must be admissible in evidence;
- (3) the documents must be directly material to an issue in the action; and

- (4) the court must be satisfied that the documents existed or had existed and that they were likely to be in the possession of the person from whom production was being sought.

Applying this standard to the case before it, the English court found that Michael was entitled to some documents, but not others. However, had Michael applied directly to a New York federal court under section 1782, it is likely that he would have obtained *all* – rather than just some – of the documents sought. This is because a New York federal court would have applied US standards, which impose no explicit limitation on the scope of documents available from non-parties. Moreover, Michael would also have been able to take depositions of the Sony non-parties had he wanted if he had relied on section 1782. Curiously, however, all this might not have been the case had the non-party Sony entities been located somewhere other than New York. The remainder of this article focuses on section 1782 and why the scope of discovery under section 1782 might depend on the location in the United States of the party from which discovery is sought.

Text and aims of section 1782

The text

Section 1782 provides in relevant part:

‘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*. 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.’ (Emphasis added.)

Aims of the section

Section 1782 was promulgated with the ‘twin aims’ of ‘providing...assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts’.⁴

Exclusive subject-matter jurisdiction in federal courts

Section 1782 grants exclusive subject matter jurisdiction to federal courts, specifying that 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’.

Three key elements

There are three key elements to section 1782:

- (1) The application must be made pursuant to a letter rogatory, a request by a foreign or international tribunal, or by an interested person.
- (2) The application for an order should be made to the ‘district court of the district in which a person resides or is found’.
- (3) The material sought must be ‘for use in a proceeding in a foreign or international tribunal’.

Key elements of section 1782

Application by letter rogatory, foreign tribunal request, or any interested person

Letter rogatory or letter of request

Prior to its amendment in 1964, a section 1782 application could be made only by letter rogatory.

A letter rogatory is the medium through which a country, speaking through its courts, requests the assistance of another country in the administration

of justice in the requesting country.⁵

The 1964 amendments preserved the right of a party to apply by letter rogatory or letter of request, but broadened section 1782 to permit ‘any interested person’ to apply for discovery.

Any interested person

While the words ‘any interested person’ are vague, it is clear from the legislative history that they include a party to the foreign or international litigation.⁶

This is important because it means that a party to litigation before a foreign court can seek discovery directly from a US district court, without first having to apply to the foreign court for letters rogatory.⁷

Application made to district court of area in which a person resides or is found

A question arises as to the territorial scope of section 1782. While section 1782 provides that ‘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’, it does not specify whether the person is required to produce material that is located outside the United States.

*Re Application of Sarrío SA*⁸ addresses this issue. The case involved a section 1782 application for an order requiring Chase Manhattan Bank and ‘its direct and indirect subsidiaries and affiliates’ to make available evidence that was located in Spain for use in Spanish proceedings. The district court denied the application. The Second Circuit reversed the district court’s decision on the ground that a ‘change in circumstances on appeal makes it unnecessary for us to decide...the geographic reach of section 1782’.⁹

However, in *Sarrío*, the court did offer some analysis of the extraterritorial reach of section 1782, and indicated that, were the issue to reach it, it would find that section 1782 did not apply to evidence

located abroad. The court noted that on its face, section 1782 ‘does not limit its discovery power to documents located outside of the United States’.¹⁰ But the Court also pointed out that the legislative history of section 1782 and a declaration by Professor Hans Smit, who had prepared the final draft of section 1782, both suggested that section 1782 did not apply to material located outside the United States. The Court stated that ‘despite the statute’s unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States’.¹¹

Use in a proceeding at a foreign or international tribunal

The word ‘tribunal’ was substituted for ‘court’ in the 1964 amendments in order to ‘make it clear that assistance is not confined to proceedings before conventional courts’.¹²

Private arbitration panel

It has been held both by the Second Circuit and the Fifth Circuit that a private arbitration panel is not a ‘tribunal’ for the purposes of section 1782.¹³

Other ‘tribunals’

Section 1782 applications have been granted to provide assistance in various different institutional settings:

- (1) *Re Amtsgericht Ingolstadt*—granting an application to obtain a blood sample for a paternity suit in Germany¹⁴;
- (2) *Re Lancaster Factoring Co*—granting an application for a bankruptcy proceeding in Italy¹⁵;
- (3) *Esses*—granting an application for a Hong Kong proceeding to appoint an administrator for an estate.¹⁶

There has been a general reluctance to extend use of the statute to non-official, non-governmental agencies. See, for example, *Re Application of*

Wilander,¹⁷ in which a sports federation, as ‘a non-governmental private agency’ is not a ‘tribunal’ for the purposes of section 1782.

Discretion of the district court

With the exception of the three requirements set forth above, section 1782 contains no explicit standards. Rather it ‘leaves the issuance of an appropriate order to the discretion of the court’.¹⁸

Few limits on a court’s discretion

The courts have generally rejected arguments that section 1782 contains limits on their discretion. There is no requirement that a foreign litigant should seek the requested discovery in its local court prior to making a section 1782 application.¹⁹ In addition, there is no requirement that the foreign proceeding for which the discovery is sought must be pending at the time the section 1782 application is made.²⁰ Courts have been divided on the issue of how likely a proceeding must be before granting a section 1782 order, however. For the Second Circuit, the proceedings must be ‘imminent – very likely to occur and very soon to occur.’²¹ For the DC Circuit, there must be reliable indications of the likelihood that proceedings will be instituted ‘within a reasonable time’.²²

The foreign country in which the discovery material is to be used is not required to grant reciprocal discovery procedures for use by US litigants²³ and there is no requirement that the material sought must be admissible in the foreign proceeding.²⁴

Although, in the main, courts have rejected attempts to impose limits on their discretion, they have been split over one very significant issue: whether section 1782 contains an implicit discoverability requirement.

Discoverability requirement

Overview of the US federal court system

As noted above, section 1782 grants exclusive subject-matter jurisdiction to US federal courts, specifying that an application for an order would be made to the ‘district court of the district in which a person resides or is found.’ In order to provide non-US practitioners with some of the background necessary to understand the discoverability requirement, a simplified account of the US federal court system is set out below.

The US federal court system comprises district courts, circuit courts and the Supreme Court. District courts are the federal courts of first instance. There are over 90 district courts in the United States, with at least one in each state. Each district court has jurisdiction over a particular district, which could be a state or part of a state. New York, for example, is divided into four judicial districts, each with a corresponding court. Vermont, a smaller state, has only one district court.

District courts are organised into 12 judicial circuits. The First Circuit, for example, comprises the district courts of Maine, New Hampshire, Massachusetts, Rhode Island and Puerto Rico. The Second Circuit comprises the district courts of New York, Connecticut and Vermont. Each circuit has a Court of Appeals, which has jurisdiction to hear appeals from the district courts within that circuit. The Supreme Court, the highest court in the United States, is the appeals court of last resort.

Decisions of the Supreme Court bind all lower courts. Decisions of a circuit court bind all district courts within that circuit, but constitute only persuasive authority for other circuit courts or for district courts in other circuits. Decisions of one district court constitute only persuasive authority for other district courts.

Owing to the independence of federal courts from each other, different district and circuit courts can, and often do, offer different interpretations of the

same federal statute. Splits among district courts in the same circuit are resolved by the Court of Appeals for that circuit; splits among circuit courts by the Supreme Court.

US discovery practices

It is conventional wisdom that the United States permits far more extensive pre-trial discovery than other jurisdictions; depositions are a common feature of discovery in the United States, but rare in other jurisdictions. The difference between US pre-trial discovery practices and those of civil law countries is particularly marked. In civil law countries, the gathering of evidence is by the court and not the parties. This has been remarked upon by US courts:

‘In the United States . . . civil pretrial discovery is not only extensive, but is in the first instance conducted by the parties themselves. Such a concept is alien to the ways of most civil law countries, where the taking of all evidence is exclusively a function of the court. In those countries, discovery American-style is often considered an affront to the nation’s judicial sovereignty.’²⁵

Because US pre-trial discovery practices are broader than those of other jurisdictions, US courts have been confronted with applications for material under section 1782 which would not be discoverable in the foreign jurisdiction. Section 1782 does not explicitly preclude the discovery of such material, but courts have disagreed on the issue of whether section 1782 contains an implicit discoverability requirement – a requirement that no section 1782 order can be granted unless the material sought would be discoverable in the foreign jurisdiction in which it is to be used.

The circuit split

While the First and Eleventh Circuits have imposed a discoverability requirement, the Second Circuit has rejected that requirement,

with other circuit courts tending to follow the Second Circuit.

Imposition of the discoverability requirement

The Courts of Appeals for the First and Eleventh Circuits have imposed a discoverability requirement.²⁶ California district court has also adopted the discoverability requirement.²⁷

Courts which have adopted a discoverability requirement have advanced two rationales.

- (1) The fear of offending foreign courts. The notion here is that it would be offensive to a foreign court to permit a litigant before it to secure discovery in the United States that the foreign court itself could not or would not grant. The *Asta* court has noted that ‘foreign countries may be offended by the use of US procedures to circumvent their own procedures and laws’.²⁸
- (2) The concern that, without the discoverability requirement, a US litigant before a foreign court would be at a disadvantage relative to its foreign opponent. The notion here is that while a foreign party could invoke section 1782 to seek broad discovery against its US opponent, the US party would be limited to the discovery procedures of the foreign jurisdiction. The *Asta* court observed: ‘Congress did not amend Section 1782 to place U.S. litigants in a more detrimental position than their opponents when litigating abroad.’²⁹

Rejection of the discoverability requirement

The Second Circuit

The Second Circuit has refused to follow its sister circuits and rejected the discoverability requirement.³⁰

The main reason why the Second Circuit rejected the discoverability requirement is straightforward: there is nothing in the language of section 1782 that would require that the foreign country provide for the discovery of the material sought in *Gianoli*.³¹ The Second Circuit has also addressed the reasons offered by the First and Eleventh Circuits for the imposition of the discoverability requirement:

- (1) To the objection that a foreign court might be offended by a grant of discovery, the *Euromepa* court replied that the foreign court could indicate its objection by excluding from evidence any material obtained using section 1782.³²
- (2) To the objection that, without a discoverability requirement, a US litigant before a foreign court would be disadvantaged, the *Euromepa* court responded that the district court should deal with this concern by ‘issuing a closely tailored discovery order rather than by simply denying relief outright’.³³

This is not to say that the Second Circuit denies the importance of the policy considerations that other circuit courts have invoked to justify the discoverability requirement. Rather, it rejects the view that these concerns compel a district court to deny a request where that requirement is not met. Thus, in *Gianoli*, the court said, ‘we believe that Congress intended that these concerns be addressed by a district judge’s exercise of discretion’.³⁴ The *Gianoli* court affirmed that the discoverability of the material in the foreign jurisdiction was one factor judges could consider in exercising their discretion.

In the subsequent case of *Euromepa*, the Second

Circuit went further than *Gianoli* and narrowed the role the discoverability factor could play in the exercise of a judge's discretion. The court held that it was not desirable for district judges to conduct an *extensive examination* of foreign law to determine the discoverability of the material sought in the foreign jurisdiction.³⁵ This is because it would be inefficient for judges to devote their resources to attempting to gain a sufficient understanding of the law of the foreign country to determine whether the material sought would be discoverable there.

The *Euromepa* court held that district courts should, instead, limit their inquiry into discoverability to 'authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782'.³⁶ An example of acceptable authoritative proof would be a 'forum country's judicial, executive, or legislative declarations'.³⁷ In *CBG Corp*, affidavits were submitted by foreign attorneys offering explanations and interpretations of English discovery provisions.³⁸ This form of proof was rejected as not sufficiently 'authoritative' because it was inevitably partisan and constituted simply a 'battle-by-affidavit of international legal experts'.³⁹

The Third Circuit

The Third Circuit has resolved prior inconsistency among district court cases by resolutely rejecting the existence of a discoverability requirement, regardless of whether the applicant is a private litigant or the foreign tribunal.⁴⁰

The Fourth Circuit

The Fourth Circuit has also rejected a discoverability requirement, although the court limited its holding to instances where the request is from a foreign tribunal rather than one made by a private litigant.⁴¹ Recognising the statute's underlying principles of comity and cooperation, the court observed that '[s]econd-guessing the evidentiary request of a foreign court based on the foreign nation's own discovery rules would directly contradict these important principles'.⁴² However, the court observed that when a private litigant seeks discovery, these same principles are

not applicable and there is a valid concern that the statute might be used by these litigants to circumvent foreign discovery rules.⁴³

The Fifth Circuit

The Fifth Circuit has been cited as one of the circuits with a discoverability requirement.⁴⁴ An analysis of cases, however, does not necessarily support this conclusion.

The case cited for this proposition, *Re First Court of First Instance, Caracas, Venezuela*,⁴⁵ only addressed this issue in *dictum*. At issue in that case was a section 1782 application from a foreign court. The Fifth Circuit held, in that context, that there was no discoverability requirement. The court then mentions in its discussion that, in the interests of comity, an inquiry into the discoverability of the requested evidence might be appropriate when the applicant is a private litigant.⁴⁶

Since then two recent cases decided by district court within the Fifth Circuit indicate an inclination towards rejecting a discoverability requirement.

In *Re Duizendstraal*,⁴⁷ the court granted an application from a private litigant in a Dutch civil proceeding where the Dutch court had expressed approval of US discovery practices. Although not the basis of its decision, the court further noted that despite conflicting authority regarding the discoverability requirement, 'the Second Circuit has been influential with its extensive analysis of 0 § 1782'.⁴⁸

In *Re Application of Time, Inc.*⁴⁹ the court held that section 1782 does not impose a blanket discoverability requirement. The court stated that the language in *Re First Court of First Instance, Caracas, Venezuela*, suggesting that the Fifth Circuit had adopted the discoverability requirement, was only *dictum*.

The Seventh Circuit

A district court in the Seventh Circuit has observed in *Elm Energy* that 'a plain reading of the

statute does not require a district court to explore whether the discovery is allowed in the foreign forum'.⁵⁰

Scope of discovery under section 1782 application

Section 1782 provides some guidance as to its scope, stating:

‘The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or international tribunal, for taking the testimony or statement or producing the document or 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 this testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.’

Section 1782 does not provide unlimited discovery. It is settled that the goals of section 1782:

‘. . . do not in turn mean that a party in foreign litigation is entitled to unbridled and unlimited discovery under the statute. To the contrary, under the terms of the statute, the discovery process is generally guided by the Federal Rules of Civil Procedure.’⁵¹

In granting a section 1782 order, the district courts have a great deal of discretion to limit, or impose conditions on the grant of, discovery if the circumstances warrant.⁵²

Federal Rules of Civil Procedure

Generally, courts have followed the Federal Rules of Civil Procedure. *BetaChem* (see footnote 50) concerned a dispute which arose following the

grant of a section 1782 order requiring BetaChem to produce certain documents, which was also accompanied by the entry of a protective order to secure the confidentiality of certain documents. BetaChem produced certain documents in abbreviated form, and Bayer AG moved to compel the production of these documents in their complete form. The Third Circuit held that the district court did not abuse its discretion in denying this motion, noting that Rule 26 ‘expressly grants a district judge the authority to deny discovery when the information sought is “unreasonably cumulative”.’ The Third Circuit added:

‘Although the information already obtained may not be in the form most desired by Bayer, we cannot say that the District Court abused its discretion by denying Bayer’s request for certain unredacted documents.’⁵³

Practicalities of a section 1782 application

While section 1782 does not explicitly address whether an application is required to be made on notice or *ex parte*, it is in this writer’s experience that it is acceptable to make it *ex parte*.

A dispute over section 1782 discovery if it occurs at all, takes place not when the application is made, but when the party from whom discovery is sought moves for a protective order or to quash a subpoena.

Strategy for seeking section 1782 discovery

When making a section 1782 application to a district court which has either adopted or not explicitly rejected the discoverability requirement, it is important to note that the two concerns which led some courts to adopt that requirement are not present in every case. In cases where those concerns are not raised, it is possible to argue that the discoverability requirement does not apply.

Thus, where there is a concern about offending a foreign court, such concern is inapplicable where the material sought is for use in a foreign jurisdiction where it has been held that a section 1782 application for material not discoverable in that jurisdiction does not constitute an interference with its sovereignty. For example, in *South Carolina Insurance Co v Assurantie Maatschappij 'De Zeven Provinciën' NV*,⁵⁴ the English House of Lords refused to enjoin a defendant from proceeding with a section 1782 application for discovery from a non-party located in the United States. This is in spite of the fact that, in England, non-parties cannot be compelled to provide pre-trial discovery. The House of Lords held that a section 1782 application for material not discoverable in England was not ‘an interference with the English court’s control of its own processes’.⁵⁵

Where there is a concern about placing a US party to a foreign proceeding at a disadvantage, such concern is misplaced where the applicant seeks to discover material from a non-party located in the United States. For there will no doubt be cases where a US party to a foreign litigation, rather than being disadvantaged by section 1782, will in fact benefit from it by being able to secure discovery from non-parties located in the United States.

Strategy for resisting section 1782 discovery

When a US party to foreign litigation wishes to oppose discovery sought pursuant to a section 1782 order in a district court, which has either rejected or not explicitly adopted the discoverability requirement, it should bear in mind the holding of the Second District in *Euromepa*. In *Euromepa*, the court directed district courts to address their concern about placing a US party at a disadvantage relative to its foreign opponent ‘by issuing a closely tailored discovery order’.⁵⁶

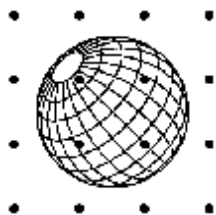
Thus, a US party resisting a section 1782 application could argue that the court should grant an order only on the condition that its foreign opponent provide reciprocal discovery.⁵⁷

Conclusion

In seeking evidence located in the United States for use in non-US litigation, non-US practitioners must suppress their instincts to apply first to the foreign court in which the action is pending – the appropriate procedure under the Hague Evidence Convention. It is quicker and more efficient to make a direct application under section 1782.

1. For a good description of this first, indirect method of making a section 1782 application, see David Epstein, ‘Obtaining Evidence in the United States for Use in Foreign Courts’, forthcoming September issue of *Business Law International*.
2. Parties to foreign litigation in countries which are not parties to the Hague Evidence Convention would file a letter of request through diplomatic channels. Such letters of request are filed pursuant to 28 USC § 1781(a)(1), and are referred to the Department of Justice through the Department of State. The procedure for the treatment of letters of request from the courts of countries that are not parties to the Hague Evidence Convention is similar to that of letters of request from the courts of Convention countries.
3. [1994] 1 All ER 755 (Ch D).
4. *Re Application of Esses*, 10 F3d 873, 876 (2d Cir 1996), quoting *Application of Malev Hungarian Airlines*, 964 F2d 97, 100 (2d Cir 1992).
5. *Tiedeman v The Signe* 37 F Supp 819, 820 (ED La 1941) aff’d 133 F2d 719 (5th Cir 1943).
6. 1964 USCCAN 3782, 3789.
7. *Malev* 964 F2d at 97, 101 (2d Cir 1992); *John Deere Ltd v Sperry Corp* 754 F2d 132, 136 (3d Cir 1985).
8. 119 F3d 143 (2d Cir 1997).
9. *Ibid* at 147.
10. *Ibid* at 147.
11. *Ibid* at 147.
12. 1964 USCCAN at 3788.
13. *Re Application of NBC Inc*, 165 F3d 184 (2d Cir 1999), holding that the International Chamber of Commerce arbitral panel was not a ‘tribunal’ for the purposes of section 1782 and *Republic of Kazakhstan v Biedermann Int’l*, 168 F3d 880 (5th Cir 1999), holding that the Stockholm Chamber of Commerce arbitral panel was not a ‘tribunal’ for the purposes of section 1782.
14. 82 F3d 590 (4th Cir 1996).

15. 90 F3d 38 (2d Cir 1996).
16. 101 F3d at 875.
17. No Civ A96 Misc 98, 1996, WL 421938, at *2 (EDPa July 24, 1996).
18. 1964 USCCAN at 3788.
19. *Malev* 964 F2d at 100.
20. *Re Letter of Request From Crown Pros Serv*, 870 F2d 686, 690-91 (DC Cir 1989); *Re Request for Assistance From Ministry of Legal Affairs of Trinidad and Tobago*, 848 F2d 1151, 1154-55 (11th Cir 1988) cert denied, 488 US 1005 (1989).
21. *Application for Intern Judicial Assistance*, 936 F2d 702, 706 (2d Cir 1991).
22. *Crown Pros Serv* 870 F2d at 692.
23. *John Deere* 754 F2d at 137.
24. *Trinidad* 848 F2d at 1156; *John Deere* 754 F2d at 136-137.
25. *Boreri v Fiat SPA* 763 F2d 17, 19 (1st Cir 1985).
26. *Application of Asta Medica SA* 981 F2d 1, 5-7 (1st Cir 1992); *Lo Ka Chun v Lo To* 858 F2d 1564, 1566 (11th Cir 1988); *Trinidad* 848 F2d at 1156.
27. *Re High Ct of Justice, Chancery Div, England*, 147 FRD 223 (CD Cal 1993).
28. *Asta* 981 F2d at 6; *Re Court of Comm'r of Patents For Rep of S Afr* 88 FRD 75, 77 (ED Pa 1980).
29. *Asta* 981 F2d at 5-6; *High Court of Justice* 147 FRD at 226.
30. *Application of Gianoli Alduante* 3 F3d 54 (2d Cir 1993); *Euromepa SA v Esmerian, Inc* 51 F3d 1095 (2d Cir 1995); *Re Metallgesellschaft AG* 121 F3d 77, 79 (2d Cir 1997), reversing and remanding an order that denied application for discovery in a German labour court proceeding and constituted an abuse of the district court's discretion; *Esses* 101 F3d at 876, rejecting the argument that English probate law would forbid discovery and affirming the grant of application in a Hong Kong proceeding to appoint a trust administrator.
31. 3 F3d at 59.
32. *Euromepa* 51 F3d at 1101.
33. *Ibid*.
34. *Gianoli* 3 F3d at 60.
35. *Euromepa* 51 F3d at 1099.
36. *Ibid* at 1100.
37. *Re Application of CBG Corp* 1997 WL 348053 at *4 (D Conn 28 Feb 1997) (quoting *Euromepa* 51 F3d at 1100).
38. *Ibid* at *5.
39. *Ibid*.
40. *Re Bayer AG* 146 F3d 188 (3d Cir 1998), remanding the application of a drug manufacturer in a patent infringement case in Germany for reconsideration by district court.
41. *Amtsgericht* 82 F3d at 590, affirming an order to provide a blood sample for a paternity suit pending in Germany.
42. *Ibid* at 591.
43. *Ibid* at 592.
44. *Elm Energy and Recycling Ltd v Basic* No 96-C-1220, 1996 US Dist Lexis 15255 (ND Ill 8 Oct 1996).
45. 42 Fd 308 (5th Cir 1995).
46. *Ibid* at 310.
47. In *Re Duizendstraal* 46 No 3:95-MC-150-X, 1997 WL 195443 (ND Tex 16 Apr 1997).
48. *Ibid* at *2.
49. 1999 WL 804090, *6 (ED La 6 Oct 1999).
50. 1996 US Dist LEXIS 15255, English proceeding involving a contract dispute over the construction of an environmental plant.
51. *Bayer Ag v BetaChem* 173 F3d 188, 191 (3d Cir 1999).
52. *Metallgesellschaft AG* 121 F3d at 79, 'the permissive language of section 1782 vests district courts with discretion to grant, limit or deny discovery'.
53. *BetaChem* 173 F3d at 192.
54. [1986] 3 All ER 487 HL (E).
55. *Ibid* at 497.
56. *Euromepa, supra* 51 F3d at 1101.
57. Hans Smit, 'Recent Developments In International Litigation' (1994) 35 S Tex L Rev 215, 237: 'The American court may decide to condition the assistance sought by the foreign party on its making available to the American party the disclosure it seeks'; 1964 USCCAN at 3788: section 1782 'leaves the issuance of an appropriate order to the discretion of the court, which, in proper cases . . . may impose conditions it deems desirable'.



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