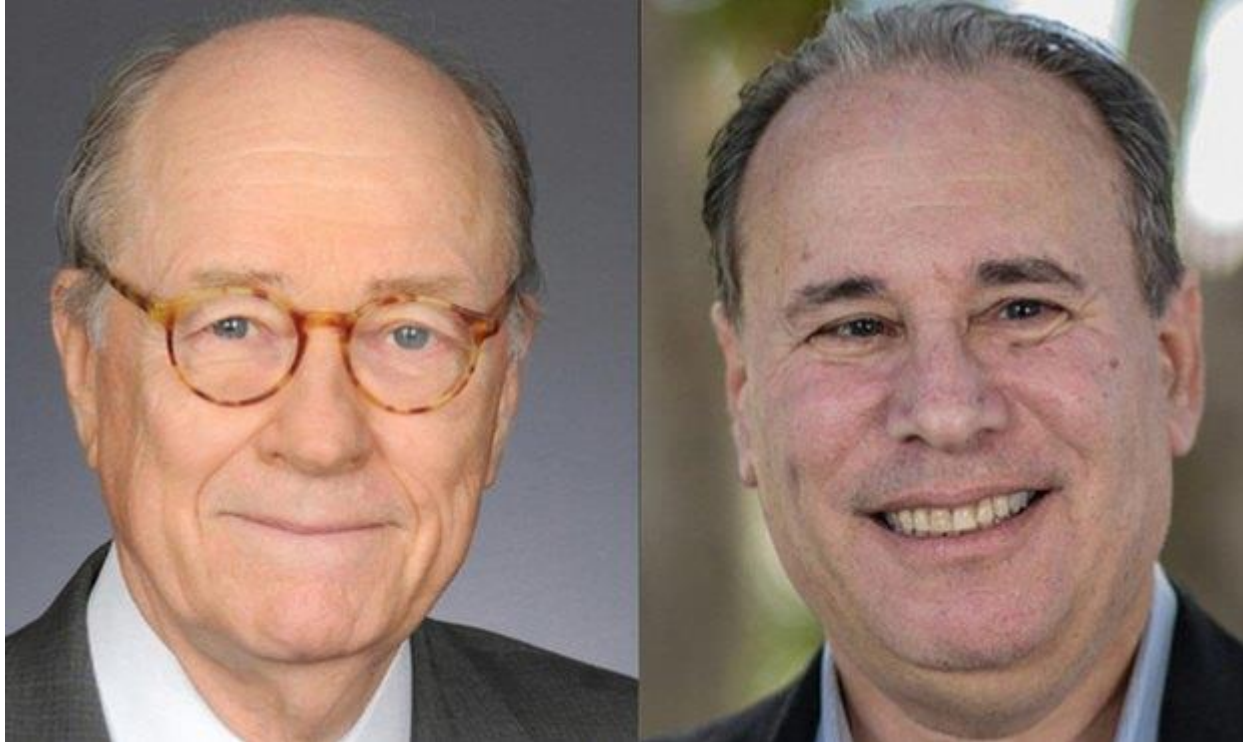


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Section 1782 Practice Pointers From Recent Decisions

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By **Lawrence W. Newman and David Zaslow** | November 25, 2024 at 10:49 AM



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Background of the Statute

First, some background. Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses, in aid of foreign proceedings. A Section 1782 application is typically initiated through an *ex parte* application and does not require that the foreign proceeding even be pending at the time of the application (provided that the proceeding is in "reasonable contemplation").

Section 1782 authorizes a district court to grant a petition for judicial assistance if three statutory requirements are met: (1) the request for discovery is made "by a foreign or international tribunal" or "any interested person;" (2) the discovery requested is "for use in a proceeding in a foreign or international tribunal;" and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made.

If these statutory requirements are met, the district court may—although it is not required to—exercise its discretion and grant the application. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court identified four non-exclusive factors that a district court should consider in exercising its discretion and, ever since, it has been essentially *de rigueur* for every Section 1782 decision to discuss those factors. They are: (1) whether the person from whom discovery is sought is a party to the foreign proceeding (with discovery being much more difficult to obtain from a party); (2) the receptivity of the foreign court to U.S. assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign truth-gathering restrictions; and, (4) whether the request is unduly intrusive or burdensome.

Using Section 1782 Discovery in Aid of Arbitration

In only its second Section 1782 decision ever, the United States Supreme Court held, in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022), that, with narrow exceptions, Section 1782 discovery is not available in aid of international arbitration proceedings. That holding was the backdrop for the Second Circuit’s recent decision in *In Re Matter of the Ex Parte Application of B&C KB Holding GmbH*, No. 23-1014 (2d Cir. June 26, 2024).

In 2021, B&C acquired the European-based Schur group in a transaction facilitated by Goldberg Lindsay & Co. LLC and Michael Dees (“Appellants”). B&C later filed criminal complaints in Austria against several executives at Schur based on alleged misconduct; it also commenced arbitration proceedings against related entities before a panel of the German Arbitration Institute. B&C then filed a Section 1782 application seeking discovery from Appellants for use in the pending criminal investigation in Austria.

Appellants argued that the application should be denied because, under *ZF Automotive*, the German arbitration did not itself qualify as an eligible foreign proceeding for which Section 1782 discovery could be ordered and B&C was actually using discovery supposedly in aid of the criminal investigations as a pretext to obtain discovery for use in the arbitration. Thus, the “for use” requirement was not met.

The Second Circuit held that the Appellants’ argument was foreclosed by Second Circuit precedent holding that “Section 1782 does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise.” Thus, the “for use” defense was not available. At the same time, the court also made clear that, if a party demonstrates that an applicant was in fact attempting to use foreign litigation as a ruse for obtaining discovery for use in other foreign proceedings, a district court could decide whether there was good cause to deny the application or to enter a protective order, but that would be under the discretionary factors.

The upshot is that *ZF Automotive* will not be an absolute bar to using Section 1782 to obtain discovery that can be used in an arbitration if there is some other foreign, non-arbitral proceeding in which that same discovery could be used. The loophole is potentially even broader given that Section 1782 is not limited to pending proceedings but can be used in aid of proceedings that are “reasonably contemplated.”

Section 1782 in Aid of Judgment Enforcement

In 1998, in *Euromepa SA v. R. Esmerian Inc.*, the Second Circuit addressed whether proceedings to identify assets of a French bankruptcy estate were sufficiently “adjudicative” to meet the “for use” requirement of Section 1782. The court reasoned that the French bankruptcy matter was “not an adjudicative proceeding” because the merits of the dispute between the parties had already been adjudicated and would not be considered again in the bankruptcy proceeding.

Two subsequent decisions—*Jiangsu Steamship Co. v. Success Superior Ltd.*, 2015 U.S. Dist. LEXIS 18388 (S.D.N.Y. Jan. 6, 2015) and *In re MT Baltic Soul Produktentankschiff-ahrts-gesellschaft mgH & Co. KG*, 2015 WL 5824505 (S.D.N.Y. Oct. 16, 2015)—relied on *Euromepa* as establishing a bright line rule categorically

excluding post-judgment enforcement proceedings as qualifying “foreign proceedings” under Section 1782 because they were non-adjudicative.

More recently, however, the same issue was addressed in *In Re Uphealth Holdings, Inc* 2024 U.S. Dist. LEXIS 16688 (S.D.N.Y. Sept. 16, 2024), where, the court rejected the argument that Section 1782 cannot be used in aid of foreign, post-judgment (or, in that case, post-arbitration award) enforcement actions. The court relied on the Second Circuit’s decision in *Nigeria v. VR Advisory Services Ltd*, 27 F.4th 136 (2d Cir. 2022), which said that “the district court misread *Euromepa* to the extent that it understood that case to hold that the mere completion of an initial adjudication of a dispute categorically disqualifies a foreign proceeding under [Section] 1782’s statutory ‘proceeding’ requirement.”

Although this should not be considered full-throated support that Section 1782 may be used for the purpose of asset discovery, it was certainly a rejection of the argument that *Euromepa* mandated that such requests be denied. *VR Advisory Services*, *Uphealth Holdings*, and other decisions such as *In re JSC BTA Bank*, 577 F.Supp.3d 262 (S.D.N.Y. 2021) (“section 1782 relief may properly be granted to take discovery of assets in order to enforce an existing judgment provided that the applicant has adequately identified the proceeding and demonstrated that the materials sought could be employed to some advantage in the proceeding”) can be used to argue in favor of using Section 1782 in aid of post-judgment asset discovery.

What if the Witness Agrees to Testify in the Foreign Proceeding?

As the lower courts have applied the *Intel* factors, they have focused on whether the discovery sought under Section 1782 applications is unobtainable in the foreign forum because it is outside the foreign tribunal’s jurisdictional reach. But what if a person from whom a deposition is sought under Section 1782 promises to provide evidence in the foreign court? Does such a commitment obviate the need for the Section 1782 deposition because the evidence is now obtainable in the foreign proceeding?

A district court addressed that issue in the recent decision in *In re Application of Alpine Partners BVI L.P.*, 2024 U.S. Dist. LEXIS 176012 (D. N.J. Sept. 27, 2024),. Petitioner sought, under Section 1782, the deposition of one Ms. Curran, which was to be used in aid of a lawsuit in Bermuda. Ms. Curran argued that the deposition was unnecessary because she voluntarily agreed to testify at trial in Bermuda. She contended that authorizing a pretrial deposition under such circumstances would needlessly proliferate Section 1782 discovery proceedings and subject every witness in the United States involved in a foreign proceeding to cross-examination twice, once in a deposition and a second time at trial.

The district court disagreed. It grounded its decision in the different functions served by a pretrial deposition and testimony at trial. The discovery being sought under Section 1782 is a *pretrial deposition* noticed to gather evidence, whether ultimately admissible testimony or not, and to preserve evidence ahead of a trial. The court also noted that, if Ms. Curran changed her mind and refused to testify (or was rendered incapacitated to testify) in the Bermuda proceedings, the Bermuda court would have no jurisdiction to compel her testimony. The court denied the motion to quash the deposition subpoena.

The court’s first point is an interesting one for lawyers who practice in the Section 1782 area because there is no reason to limit its logic to situations in which a witness agrees to testify at trial. It is generally accepted that Section 1782 may not be used to obtain discovery from a party to a foreign proceeding. But it is also the case that U.S.-style depositions are not available in other countries. Therefore, following the logic of *Alpine*, one could argue that the deposition of a party to a foreign proceeding should be available because the evidence sought in the pretrial deposition is not the same as the evidence that would be available during a trial in the foreign court. Based on many years of precedent, however, it is unlikely that courts would accept this argument.

It is also worth noting that there are cases that go the other way. *In re Pinchuk*, 2014 U.S. Dist. LEXIS 59988, 2014 WL 1745047 (S.D. Fla. Apr. 30, 2014), was also a case in which, in response to a Section 1782 deposition

subpoena, the subject of the discovery agreed to testify in the foreign proceeding. The court ruled as follows (prior to *ZF Automotive*):

The Discovery Subjects also seek to quash the deposition subpoena issued to Mr. Korf. In return, they have agreed to make him available as a witness at the LCIA proceedings. In so doing, the Discovery Subjects have alleviated any concern that Mr. Korf's testimony will be unavailable in the LCIA proceeding. This is sufficient to quash the deposition subpoena issued to Mr. Korf.

One final point about Section 1782 practice. When the Supreme Court held in *ZF Automotive*, that, generally, Section 1782 discovery is not available in aid of international arbitration proceedings, numerous commentators (including us) noted that, although that case addressed ad hoc arbitration under a bilateral investment treaty, it seemed likely that parties in future cases would argue that the ruling should not apply to arbitrations constituted under the International Centre for the Settlement of Investment Disputes ("ICSID").

A recent Second Circuit decision seems to have foreclosed that argument. In *Webuild S.P.A. v. WSP USA Inc.*, 108 F.4th 138 (2d Cir. 2024), the Second Circuit held that an arbitral tribunal constituted under ICSID was not a "foreign or international tribunal" within the meaning of Section 1782 because the specific ICSID tribunal at issue did not possess the attributes that evidence an intent to imbue the panel with the requisite governmental authority, the test that the Supreme Court set forth in *ZF Automotive*. Though nominally limited to its facts, it seems unlikely that the same reasoning would not apply to other ICSID tribunals.

Lawrence W. Newman is of counsel and **David Zaslowsky** is a partner in the New York office of Baker McKenzie. The authors express their appreciation to **Chehak Gogia**, an associate in the New York office, for her contributions to this article.