

---

---

Obtaining Evidence for Use  
in International Tribunals  
under 28 U.S.C. § 1782

---

---

SECOND EDITION

Edited by

**Edward M. Mullins**  
**Lawrence W. Newman**

**JURIS**

### **Questions about This Publication**

For assistance with shipments, billing or other customer service matters, please email the Customer Services Department:  
[customerservice@jurispub.com](mailto:customerservice@jurispub.com)

To obtain a copy of this book, please visit  
[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

For questions of an editorial nature, contact the Editorial Department at:  
[editorial@jurispub.com](mailto:editorial@jurispub.com)

To obtain a copy of this book, please visit:  
[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

© 2024

JurisNet, LLC

All Rights Reserved

---

Printed in the United States of America  
ISBN: 978-1-944825-64-5

---

JURIS  
52 Elm Street, Suite 7  
Huntington, New York 11743  
USA  
[www.arbitrationlaw.com](http://www.arbitrationlaw.com)

## SUMMARY CONTENTS

<i>Contents</i> .....	v
<i>Foreword</i> .....	xi
<i>Introduction</i> .....	xiii
<i>Biographies</i> .....	xvii
CHAPTER 1 The History of 28 U.S.C. § 1782 .....	1
<i>Robert H. Smit, Tyler B. Robinson and Lauren W. Brazier</i>	
CHAPTER 2 Comparing Section 1782 with Other Cross-Border Discovery Methods—Letters Rogatory, Diplomatic/ Consular Channels and Other Avenues .....	25
<i>Timothy G. Nelson and Gregory A. Litt</i>	
CHAPTER 3 Section 1782’s “For Use” Statutory Requirement .....	37
<i>Leif T. Simonson, Darryl G. Stein, and Joseph B. Rome</i>	
CHAPTER 4 What Are Section 1782 Foreign or International Tribunals Outside the Arbitral Setting? .....	69
<i>Arnoldo B. Lacayo, Annette C. Escobar and Raul Torrao</i>	
CHAPTER 5 Found in the District: Statutory Requirement Rooted in Personal Jurisdiction .....	83
<i>Rima Y. Mullins and Edward M. Mullins</i>	
CHAPTER 6 Possession and Control under the Federal Rules of Civil Procedure .....	97
<i>David R. Cohen and Bradley C. Whitecap</i>	

**SUMMARY CONTENTS**

CHAPTER 7	Discretionary Factors under <i>Intel</i> .....	121
	<i>Thomas C. Sullivan and Bruce S. Marks</i>	
CHAPTER 8	Use of Section 1782 in Aid of Arbitration.....	161
	<i>David Zaslowsky and Kristina Fridman</i>	
CHAPTER 9	Application of the Federal Rules of Civil Procedure to Section 1782 Discovery.....	181
	<i>Andrea E. Neuman, Nancy E. Hart, and R. Matthew Burke</i>	
APPENDIX A:	28 U.S.C. § 1782 Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals .....	207
APPENDIX B:	<i>Intel Corp. v. Advanced Micro Devices, Inc.</i> .....	211
<i>Index</i> .....		239

## CONTENTS

<i>Foreword</i> .....	xi
<i>Introduction</i> .....	xiii
<i>Biographies</i> .....	xvii
CHAPTER 1 The History of 28 U.S.C. § 1782 .....	1
<i>Robert H. Smit, Tyler B. Robinson and Lauren W. Brazier</i>	
I. Introduction.....	1
II. Predecessor Sections.....	4
A. Overview of Judicial Assistance prior to 1964 .....	4
B. Judicial Assistance Available to Foreign Courts and Litigants.....	5
1. Early Efforts to Assist with Foreign Letters Rogatory .....	5
2. The 1948 Consolidation into Section 1782.....	7
C. Judicial Assistance Available to International Tribunals and Litigants before International Tribunals .....	8
III. Background to the Commission.....	11
IV. The Work of the Commission and 1964 Remodel of Section 1782 .....	13
A. Policy Goals of the Commission in Review of Section 1782.....	14
B. Specific Amendments .....	16
1. Jurisdiction to Assist a “Foreign or International Tribunal” .....	16
2. Order Issued “Pursuant to a Letter Rogatory” or “Upon the Application of Any Interested Person”.....	18
3. Ability to Assist with “Testimony or Statement or...a Document or Other Thing” .....	19
4. Deletion of Requirement That Judicial Assistance Only Be Offered to Countries “with Which the United States Is at Peace”.....	19

## CONTENTS

5.	Deletion of Requirement That Foreign Proceeding Be “Pending” .....	20
6.	Discretion Afforded to the District Court Which “May Order” Assistance and “May Direct” / “Prescribe” the Procedure .....	20
7.	Other Procedural Improvements .....	21
V.	Section 1782 Today .....	21
CHAPTER 2	Comparing Section 1782 with Other Cross-Border Discovery Methods—Letters Rogatory, Diplomatic/ Consular Channels and Other Avenues .....	25
	<i>Timothy G. Nelson and Gregory A. Litt</i>	
I.	“Inbound” Letters Rogatory .....	26
II.	Alternatives to Seeking “Judicial” Assistance: Diplomatic or Consular Channels .....	30
III.	Whether Extraterritorial Subpoenas Could Be Issued .....	32
IV.	Concluding Thoughts .....	35
CHAPTER 3	Section 1782’s “For Use” Statutory Requirement .....	37
	<i>Leif T. Simonson, Darryl G. Stein, and Joseph B. Rome</i>	
I.	Overview .....	37
II.	The Timing Requirement .....	40
A.	Pre- <i>Intel</i> Jurisprudence .....	40
B.	<i>Intel</i> —the “Within Reasonable Contemplation” Requirement .....	44
C.	Post- <i>Intel</i> Decisions regarding the “Within Reasonable Contemplation” Requirement .....	45
III.	Foreign Discoverability .....	51
IV.	Foreign Admissibility .....	55
V.	Affirmative “For Use” Requirements .....	58
CHAPTER 4	What Are Section 1782 Foreign or International Tribunals Outside the Arbitral Setting? .....	69
	<i>Arnoldo B. Lacayo, Annette C. Escobar and Raul Torrao</i>	

## CONTENTS

I.	Interpretive Evolution of “Foreign or International Tribunals” .....	72
II.	Entities Considered “Foreign or International Tribunals” by Federal Courts Pre- <i>ZF Auto. US, Inc.</i> ....	74
A.	Patent and Intellectual Property Offices.....	74
B.	Trade Commissions, Negotiable Instrument and Banking Committees and Mercantile Tribunals.....	75
C.	Bar Associations and Lawyer Disciplinary Bodies	76
D.	Criminal Courts and Investigations .....	77
E.	Other Administrative Bodies.....	77
F.	Entities Not Considered a “Foreign or International Tribunal” by Federal Courts .....	78
G.	Conciliatory Bodies.....	78
H.	Police Authority .....	79
III.	Final Considerations .....	80
CHAPTER 5	Found in the District: Statutory Requirement Rooted in Personal Jurisdiction .....	83
	<i>Rima Y. Mullins and Edward M. Mullins</i>	
I.	Court Approaches to Section 1782’s “Found in the District” Requirement.....	83
A.	<i>Daimler AG v. Baumann</i> .....	86
B.	Post- <i>Daimler</i> .....	87
C.	<i>In re del Valle Ruiz</i> .....	91
II.	Conclusion .....	93
CHAPTER 6	Possession and Control under the Federal Rules of Civil Procedure.....	97
	<i>David R. Cohen and Bradley C. Whitecap</i>	
I.	“Possession and Control” in the Context of Cross-Border Discovery.....	103
II.	Practical Limitations on the Use of Section 1782.....	112
III.	Final Considerations .....	119

## CONTENTS

CHAPTER 7	Discretionary Factors under <i>Intel</i> .....	121
	<i>Thomas C. Sullivan and Bruce S. Marks</i>	
I.	Beyond the Statutory Requirements .....	121
A.	The Pre- <i>Intel</i> Foreign Discoverability Rule Split among the Circuits .....	121
1.	Application of a Foreign Discoverability Rule.....	121
2.	Application of a Foreign Discoverability Rule to Private Litigants Only .....	123
3.	No Foreign Discoverability Requirement.....	124
B.	<i>Intel</i> Eliminated the Blanket Foreign Discoverability Requirement.....	125
II.	Discretionary Factors to Be Considered by a U.S. Court .....	130
A.	Factor 1: Whether the Party from Whom Discovery Is Sought Is a Participant in a Foreign Proceeding or Already Subject to the Jurisdiction of the Foreign Tribunal .....	131
B.	Factor 2: The Nature of the Foreign Tribunal, the Character of the Proceedings Underway Abroad, and the Receptivity of the Foreign Tribunal to Such Judicial Assistance.....	140
1.	The Nature of the Foreign Tribunal and Character of Proceedings Underway .....	141
2.	Receptivity of the Foreign Tribunal to Judicial Assistance.....	141
3.	A Battle of Foreign Law Experts Is Not Favored .....	147
4.	There Is No Requirement the Discovery Be Admissible in the Foreign Proceeding .....	149
5.	Relevance Remains an Issue.....	150
C.	Factor 3: Whether the Request Conceals an Attempt to Circumvent Foreign Proof-Gathering Restrictions or Other Policies of a Foreign Country or the United States .....	151
D.	Discretionary Consideration of Foreign Discoverability and Attempts to Circumvent Foreign Proof-Gathering Restrictions .....	151



## CONTENTS

E.	Factor 4: Whether the Requests Are Unduly Intrusive or Burdensome .....	159
CHAPTER 8	Use of Section 1782 in Aid of Arbitration.....	161
	<i>David Zaslowsky and Kristina Fridman</i>	
I.	Uniformity in Applying Section 1782 to Private Arbitration prior to <i>Intel</i> .....	162
II.	The <i>Intel</i> Decision.....	166
III.	Eighteen Years of Uncertainty until <i>ZF Automotive</i> ...	167
IV.	Section 1782 in Aid of Investor-State Arbitration.....	172
V.	What Makes a Tribunal “International”? .....	176
CHAPTER 9	Application of the Federal Rules of Civil Procedure to Section 1782 Discovery.....	181
	<i>Andrea E. Neuman, Nancy E. Hart, and R. Matthew Burke</i>	
I.	Introduction.....	181
II.	Application of the Federal Rules of Civil Procedure..	182
A.	The Breadth of Discovery Available under Section 1782 as Shown in <i>Maria Aguinda Salazar, et al. v. Chevron Corp. (“Lago Agrio Litigation”)</i> .....	182
B.	The Scope of Permitted Discovery Nonetheless Must Be in Accordance with the Restraints Imposed by the Federal Rules of Civil Procedure.....	188
C.	In Some Jurisdictions, Courts Are Required to Either Limit Faulty Requests or Provide Applicants with an Opportunity to Limit the Scope of the Requests.....	192
D.	Jurisdictions Are Split as to whether Documents Located Abroad Are Discoverable under Section 1782 .....	194
E.	Third Parties Lack Standing to Challenge Requests as Unduly Intrusive or Burdensome....	197
F.	Reciprocal Discovery .....	198

**CONTENTS**

G. Confidentiality Orders and Use in Other Proceedings.....	200
H. Motions to Quash Subpoenas Issued Pursuant to Section 1782 .....	204
APPENDIX A: 28 U.S.C. § 1782 Assistance to Foreign and International Tribunals and to Litigants Before Such Tribunals .....	207
APPENDIX B: <i>Intel Corp. v. Advanced Micro Devices, Inc.</i> .....	211
<i>Index</i> .....	239