Private Preference, Public Process: U.S. Discovery in Aid of Foreign and International Arbitration

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Private Preference, Public Process:  
U.S. Discovery in Aid of Foreign and International Arbitration

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Abstract

We examine whether the parties to international commercial arbitration ought to have access to discovery through the federal courts of the United States. 28 U.S.C § 1782 permits U.S. courts to compel the exchange of information “for use in a proceeding in a foreign or international tribunal.” It is unclear whether this language covers proceedings before private arbitral tribunals. As far as policy is concerned, previous approaches to this question have focused on an important tension. On the one hand, judicially compelled discovery appears to be incompatible with the speed and simplicity often regarded as essential characteristics of private arbitration. On the other hand, when an arbitration agreement contemplates such discovery, courts ought to give effect to the fundamental policy of respecting the will of the parties. We suggest that courts considering § 1782 applications ought to go beyond these essentialist and contractarian approaches and take into account broader public interests. This requires consideration of: the interests of non-parties who may be targeted for discovery; the burden the proceedings might place on U.S. courts and implications for the courts’ ability to generate and deliver public goods; whether the proceedings will circumvent existing limitations on discovery or in some other way compromise the integrity of U.S. courts; and the impact on providers of U.S. legal services. We support our policy analysis through a detailed review of recent applications under § 1782, including those that did not result in published opinions. Our empirical analysis reveals as-yet unrecognized ways in which § 1782 has been used by private parties to international commercial arbitration to circumvent both foreign and domestic limitations on pre-filing discovery and pre-judgement asset discovery. These findings, which we hope will motivate further inquiry, suggest that U.S. courts ought to be cautious in their willingness to extend § 1782 discovery to private litigants in international commercial arbitration and that systemic oversight is warranted to ensure that § 1782 applications do not adversely affect U.S. courts.

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1. Introduction

Should U.S.-style discovery be a feature of private arbitration? Traditionally, the answer has been a clear “no.” Avoiding U.S. discovery was understood to be one of the main reasons for choosing arbitration over litigation and, indeed, for avoiding the U.S. court system. In a remarkable turn, however, parties to both investor-state and commercial arbitrations taking place outside the United States have begun to request discovery. Even more remarkably, they have begun to call on U.S. federal courts for assistance in obtaining such discovery under a federal statute entitled “Assistance to foreign and international tribunals and to litigants before such tribunals,” codified at 28 U.S.C § 1782. The U.S. courts have diverged in their responses to these requests,\(^1\) in part because the applicable statutory provision is ambiguous\(^2\) and the only U.S. Supreme Court decision to interpret that provision did not squarely consider its relevance in the context of commercial arbitration.\(^3\) Section 1782, permits, but does not require, U.S. federal courts to provide discovery assistance to “foreign or international tribunals.” It is unclear whether private arbitral tribunals with foreign or international characteristics fall within the scope of this term, and, if they do, how U.S. federal courts ought to exercise their discretion in granting or denying requests.

We believe that cases involving requests to U.S. courts for discovery under 28 U.S.C. § 1782 raise a policy question of first-order importance in the law of civil procedure: to what extent can private parties, invoking the authority of a private agreement, control the resources of the publicly sponsored courts?\(^4\) In other words, to what extent can private parties contract for procedure available only in a public court when they already have contracted for a non-public dispute resolution process that is characterized by an absence of such procedure?\(^5\) Two of the authors have examined a variant on this topic, but that earlier work focused exclusively on parties to litigation who try to opt out of the ordinary rules of civil procedure while remaining within the public court system for the resolution of their dispute.\(^6\) Now we

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2. See infra text accompanying notes 60–74.


5. We focus here on parties who attempt to use a combination of public and private processes to resolve a single dispute. Parties might prefer to use exclusively public or private processes to resolve any given dispute, but choose different methods to resolve different types of disputes that might arise from their relationship. For documentation and analysis of this latter phenomenon, see Christopher R. Drahozal & Erin O’Hara O’Connor, *Unbundling Procedure: Carve-Outs From Arbitration Clauses*, 66 FLA. L. REV. 1945 (2014).

consider parties to private foreign or international arbitration who try to opt into the public courts and the ordinary rules of civil procedure for the purpose of obtaining information ostensibly for use in the arbitral proceeding. Each of these scenarios raises the same general policy concerns about contracting for procedure, but the application to foreign or international arbitration forces us to consider at least two new issues. One of those issues is whether the U.S. courts should take the same approach to requests for discovery in connection with foreign or international arbitration as they do in connection with domestic arbitration. In other words, should contracting for procedure be equally acceptable whether it involves domestic, foreign, or international arbitral proceedings? Another issue is whether requests for discovery for use in private arbitration merit the same response as requests connected to proceedings before public bodies such as foreign courts, or tribunals authorized by treaties? Or to put it another way, is placing U.S. judicial resources at the disposal of participants in private arbitrations abroad any different from putting them at the disposal of participants in non-U.S. public proceedings?

The existing literature about discovery requests under 28 U.S.C. § 1782 largely ignores these questions, which we regard as fundamental to notions of party autonomy and institutional adaptation. Courts and commentators concluding that private arbitral tribunals fall outside the language of the statute take an approach we think is best described as essentialist: they focus on whether judicially compelled discovery is compatible with their understanding of the essential characteristics of arbitration. The essentialist position is allied with an objective notion of party preference for rules of procedure that is shaped by existing institutional forms. The leading alternative to the essentialist approach is one we label contractarian. The contractarian approach suggests that if the arbitration agreement, properly interpreted, permits the request for judicial assistance to aid in discovery, a court should accede to the request in order to comply with a general policy in favor of enforcing arbitration agreements. The contractarian position is allied with a subjective notion of party preference that is dynamic and less constrained by existing institutional forms.

Both the essentialist and contractarian approaches capture important aspects of the difficult issues that pertain to litigant choice and dispute resolution processes. For many parties, judicially compelled discovery—by which we mean procedures such as depositions, interrogatories, and document production that mandate or permit information exchange related to the parties’ claims and defenses after the initiation of the lawsuit but before a hearing on the merits—is incompatible with the essentialist concept of arbitration. This means that even on the contractarian view, there are many situations in which providing assistance would be inconsistent with the intentions of the parties to the arbitration agreement. At the same time, the contractarian approach acknowledges the fundamental value of respecting the intentions of the parties to an arbitration agreement concerning the procedure that should be used to resolve their dispute.

Both the essentialist and the contractarian approaches ignore another set of considerations that ought to be taken into account by U.S. courts when deciding whether to compel discovery in connection with arbitration under § 1782: the interests of the public. Consider an arbitration agreement that explicitly authorizes arbitrators to seek the assistance of U.S courts in compelling oral testimony and document

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production. Enforcement of such an agreement implicates more than the interests of the parties to the arbitration or of the arbitrator. Most obviously, it affects the interests of the targets of discovery, who may not be parties to the arbitration agreement. This kind of discovery also affects the interests of those who use or would use the U.S. courts, which are a public resource in every sense of the term: they are governed by public law, funded by tax dollars, and their judges are considered to be public officials. But the availability of discovery assistance under § 1782 carries unrecognized costs that need to be considered: it affects the court’s allocation of resources, especially during the current period of budget scarcity when litigants face queuing and a narrowing of procedural options; it interferes with the court’s capacity to develop new legal principles in a transparent way given the norms of secrecy that are attached to arbitration; it suppresses the court’s ability to generate information as a by-product of litigation that is useful to consumers, regulators, and future litigants, because of the closed nature of arbitral proceedings; and it affects the integrity of the courts to the extent it allows parties to circumvent increasingly strict limitations on discovery ordinarily imposed in U.S. litigation. Of course, there also may be benefits to the public associated with compelling discovery under § 1782, including those that flow to U.S. providers of legal services who earn revenue from representing the affected parties. It is far from clear, however, whether those benefits outweigh the costs.

The premise of this chapter is that arbitration agreements that demand access to the public courts represent attempts by private parties to control the deployment of public resources and the creation of public goods, including the information that typically becomes available to the public through the judicial process of discovery, at least when the parties rely upon the information they have exchanged and file it with the court or incorporate the information in legal argument. There is no reason to presume that arbitration agreements that pre-commit to discovery under § 1782 are compatible with the public interest; at a minimum, there is no reason to presume that the parties to such agreements take the public interest into account. As two of the authors have argued elsewhere, in the absence of clear statutory direction, judges charged with regulating access to the public courts should take the public interest into account when deciding whether to respect the parties’ agreements about the terms on which such access is available.

As a baseline for discussion, we begin by describing the types of discovery available in proceedings before the U.S. courts as well as the assistance provided by the U.S. courts in connection with proceedings in domestic arbitral tribunals and publicly-sponsored foreign or international tribunals. Against this background, we turn to unresolved and controversial questions of the types of assistance that ought to be made available in private arbitration that does not qualify as domestic. We analyze the text and legislative history to 28 U.S.C. § 1782, and consider the significance of Justice Ginsburg’s opinion in Intel, the first and only Supreme Court case concerning § 1782. Then we describe the types of private arbitration-related applications that have been made under § 1782 since Intel was handed down. These include a surprising number of applications designed to uncover information about a party’s assets before a judgment has been entered, rather than information bearing on the merits of the dispute, a use of the statute that almost certainly was not contemplated by its drafters. Next we consider the policy

8 See generally Contracting for Procedure, supra note 7.
10 For an example of a case involving a § 1782 application in connection with a foreign arbitration that contemplates party secrecy, see In re Pinchuk, 2014 WL 1745047, at *3 (S.D. Fla. Apr. 30, 2014) (“The Discovery Subjects may produce documents with a “Confidential” designation to be set out in the proposed protective order . . . or an “Attorneys’ Eyes Only” (“AEO”) designation.”) [hereinafter Pinchuk].
11 Contracting for Procedure, supra note 7, at 541 (raising concerns that “contract procedure produces law in the shadow of bargaining without significant mechanisms to assure accountability or compliance with public norms”).
12 Intel, supra note 4.
considerations that U.S. courts ought to take into account when faced with a request for assistance by arbitral parties or an arbitrator in a foreign or international proceeding.

2. Background

a. Discovery in U.S. Courts

Discovery practice in the United States generally is regarded as exceptional from the perspective of other legal systems. The rules that authorize and even mandate the exchange of information between the plaintiff and the defendant to a civil action in a federal court (and in many state courts) are among the most distinctive features of the U.S. system of adjudication. The guiding principle was expressed by the Supreme Court in the landmark decision of Hickman v. Taylor: “Civil trials no longer need be carried on in the dark. The way is now clear for the parties to obtain the fullest possible knowledge of the issues and the facts before trial.” Until recently, the rules authorizing information exchange generally were defended as critical to a legal system that depends primarily upon private litigation, rather than concentrated bureaucratic mechanisms, to enforce statutory and common law rights. Currently, however, the rules of discovery face criticism from many quarters as expensive, time-consuming, and subject to strategic misuse.

Although discovery practice is subject to modification by the parties, it also is subject, and increasingly so, to strict judicial oversight and limitations under the Federal Rules. Moreover, traditionally, and under current federal practice, opportunities for discovery before a lawsuit has been commenced are limited (and largely disfavored).

In addition, the information available through discovery mostly concerns claims and defenses, notwithstanding the parties’ strategic interest in obtaining information about the nature, value, and location of the other party’s assets. However, this kind of “asset discovery” is typically ordered only

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18 For example, depositions now are subject to presumptive time limits, although they may be altered by the district court. See Fed. R. Civ. P. 30.
20 Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”) Jeffrey W. Stempel & David F. Herr, Applying Amended Rule 26(B)(1) in Litigation: The New Scope of Discovery, 199 F.R.D. 396, 408-09 (2001) (“An item of information sought is relevant to a claim or defense if the requesting party can articulate a logical relationship between the information sought and possible proof or refutation of the claim or defense at trial.”).
21 Caisson Corp. v. Cnty. W. Bldg. Corp., 62 F.R.D. 331, 335 (E.D. Pa. 1974) (“[I]t is clear that in an attempt to discover assets by which to satisfy its judgment, plaintiff is entitled to a very thorough examination of the judgment debtor.”).
after a judgment has been rendered. The Federal Rules do not generally contemplate prejudgment asset discovery, and nearly every state requires that a claimant obtain a favorable judgment before asset discovery is available. A judgment creditor, however, often may use the discovery process to uncover information about assets on a global scale. Such requests are subject to the ordinary relevance requirements on discovery requests, defined in terms of likelihood of leading to judgment satisfaction, even at the post-judgment stage.

The Federal Rules governing discovery also make a clear distinction between information exchange between the parties and information that may be demanded from a third party who is not under the control of one of the parties. For example, although Rule 26 mandates the exchange of information between the parties that may be used to support claims and defenses “without awaiting a discovery request,” witnesses who are so designated are not under an obligation to provide information about the testimony they will provide. Although the mechanism of oral deposition may be used to question any person, if the deponent is not a party, the notice of deposition is not sufficient to compel the witness’s attendance. As one federal magistrate judge has explained, “Orders barring the taking of . . . depositions altogether are both unusual and disfavored . . . On the other hand, non-party witnesses may be subject to somewhat greater protection against costly but marginally relevant discovery than are the parties.” The Federal Rules limit the use of written interrogatories to the parties themselves, and the production of property from a non-party is subject to the greater protections of Federal Rule 45 which requires issuance of a subpoena.

22 The Supreme Court has recently cited the enduring relevance of the “historical rule” barring prejudgment discovery and attachment. See Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 330 (1999) (“A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment . . . to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse.”) (citations omitted).

23 Kern Alexander, The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation, 11 FLA. J. INT'L L. 487, 512 (1997) (“[S]uch [prejudgment discovery] orders in the United States would infringe the defendant's due process rights under the Fifth and Fourteenth Amendments.”). The parties are required under Federal Rule 26(a), without awaiting a discovery request, to “provide to the other parties . . . for inspection and copying . . . any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.” Fed. R. Civ. P. 26(a)(1)(A)(iv).


25 Aaron D. Simowitz, Transnational Enforcement Discovery, 83 FORDHAM L. REV. 3293, 3312 (2015) (“Creditors clearly enjoy the ability to obtain information from the debtor or from third parties that could, even in attenuated fashion, lead to the debtor's assets. This includes shining a light on the debtor's assets around the world.”). Rule 69(a)(2) allows an award creditor to obtain discovery from an award debtor. See Fed. R. Civ. P. 69(a)(2). See also Universitas Educ., LLC v. Nova Group, Inc., 2013 WL 57892 (S.D.N.Y. Jan. 4, 2013) (applying Rule 69(a)(2) following the confirmation of an arbitral award); Costomar Shipping Co., Ltd. v. Kim-Sail, Ltd., 1995 WL 736907, at *3 (S.D.N.Y. Dec. 12, 1995) (“[T]he judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.”) (citations omitted).

26 Fed. R. Civ. P. 26(a) (required disclosure between parties).


Finally, the discovery process as a whole now is subject to the limiting principle of proportionality—a concept with which legal systems outside the U.S. are familiar (although in different contexts)—that authorizes and even requires the judge to use discretion in limiting the scope of discovery of even relevant information when the costs are thought to exceed the benefits. Assessing whether a discovery request is proportional to the nature of the litigation surely is affected by the non-party status of the target of the discovery request. Indeed, under certain circumstances the court may order reimbursement of a non-party’s costs of complying with a discovery request.

b. Discovery in Arbitration Proceedings

Our focus here is on situations in which the parties seek to use the information obtained through discovery not in a dispute that is pending in and to be resolved by a federal court, but rather in a foreign or international arbitration before a privately-sponsored tribunal—and sometimes, simply in contemplation of a foreign or international arbitration that has not yet been filed.

Discovery has traditionally played only a limited role in arbitration proceedings. Many arbitration agreements only address the issue indirectly, through instruments incorporated by reference, which usually either are the rules of the arbitration institution they have selected or the procedural law they have selected to govern the arbitration (which is nearly always the law of the arbitral seat the parties have chosen). Those rules and laws typically grant arbitrators broad discretion over the matter. In practice, however, that discretion appears to be exercised in a restrained fashion. The conventional view...
is that discovery is granted only for specific documents, or for categories of documents defined by particular limitations (e.g., author/recipient, subject matter, date). As to testimony, most institutional rules say nothing about the power of the tribunal to order a party to procure the attendance of a witness at the hearing. As a result, third parties are considered beyond the reach of the tribunal. However, the power to compel attendance of corporate officers, senior employees, or other key witnesses within the control of one party is presumptively considered to be part of the tribunal’s inherent evidence-taking authority.

Insofar as asset discovery is concerned, the scant literature we have found suggests that it is only available, if at all, from a court after an award has been rendered, in connection with the process of recognition and enforcement. Prior to an award being rendered, parties are left to their own devices to locate and identify assets. The situation changes, however, after the award has been rendered if the successful party seeks judicial recognition and enforcement, in which case the issue is governed by the rules of the relevant court. For instance, if a party seeks recognition and enforcement of a foreign arbitral award in a U.S. court, the “New York Convention” will most likely apply. The Convention sets out the grounds on which recognition and enforcement may be refused. It also provides that if the award is recognized and enforced, the party holding the award is entitled to rely on local rules governing enforcement. As noted above, U.S. law permits asset discovery in aid of enforcement.

c. Discovery Assistance from U.S. Courts in Domestic Arbitration

In addition to requesting a discovery order from the arbitral tribunal, a party may seek the assistance of U.S. courts in compelling discovery related to an ongoing arbitration. Although our focus is on requests for assistance with discovery in aid of private foreign or international arbitration, it is helpful to compare requests for assistance with discovery in aid of other types of proceedings. For instance, U.S. courts also receive requests for assistance with domestic arbitrations—that is to say arbitrations based in

the Uniform Law Commissioners rejected a motion to extend civil discovery rules to arbitrations. Timothy Heinz, A Harbinger for FAA? Revised Uniform Arbitration Act Goes to the States, 2001 DISP. RESOL. MAG. 14, 17 (2001). Although the RUAA gives arbitrators discretion to order discovery, it cautions them to use it only when “appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective.” RUAA, supra note 37. The commentary suggests that the RUAA was “meant to discourage most forms of discovery in arbitration.” Id. at cmt. ¶ 3.

38 NATHAN O’MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION, ¶3.35 (2012) (“Requests for disclosure which look to obtain ‘all documents’ within a vague time frame, ‘relating’ to a broad topic, will in most cases be judged by tribunals to be too broad or in violation of the ‘narrow and specific’ standard,”); JEFF WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 860 (2012) (“Specificity is the key means to ensure that document production in arbitration does not equate to broad-ranging common law style discovery.”).

39 BORN, supra note 28, at 2350.

40 The picture is somewhat more complicated in the United States under the FAA. See infra text accompanying note 47.

41 BORN, supra note 28, at 2351.

42 D. Brian King & Rahim Moloo, Enforcement After the Arbitration: From National Courts to Public International Law Fora, in FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 396-400 (Franco Ferrari ed., 2013) (recommending hiring private asset tracing firms to identify and locate assets at the onset of a dispute).


44 Id., Art. 3.

45 Supra note 26 and accompanying text.
the U.S. In those cases, the federal district court in the district in which the arbitration takes place may assist with discovery as provided in § 7 of the Federal Arbitration Act (FAA):

The arbitrators. . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitors.46

At first glance, it is not obvious that this provision even permits pre-hearing discovery: read literally, § 7 only permits courts to compel testimony and document production in the presence of the arbitrators. Nonetheless, it is accepted that there is an implied power to order pre-hearing discovery from parties to the arbitration agreement.47 We have located no reported decision or commentary suggesting that this pre-hearing discovery extends to include asset discovery. And in any event, the parties to an arbitration agreement may expand, at least as between themselves (as opposed to third parties), the power of the tribunal to order discovery.48

The scope of § 7 is limited in at least two important respects. First, the circuit courts of appeal are divided on whether § 7 permits arbitrators to order pre-hearing discovery or deposition from third parties and the Supreme Court has not addressed the question.49 Second, § 7 only empowers arbitrators—not parties—to subpoena documents or witnesses.50 The provision likewise only authorizes federal courts to enforce subpoenas issued by the arbitrators. There is no provision for assistance with discovery in contemplation of an arbitration proceeding that has not yet been filed.

Parties to domestic arbitrations also sometimes seek assistance with discovery from state rather than federal courts. The powers of state courts in such cases are governed by state laws that differ in some

47 See N.Y.C. Bar Comm. Int’l Commercial Disputes, Obtaining Evidence from Non-Parties in International Arbitration in the United States, 20 AM. REV. INT’L ARB. 421 (2009) [hereinafter Obtaining Evidence] citing Life Receivables Trust v. Syndicate 102 at Lloyd’s of London, 549 F.3d 210, 217 (2d Cir. 2008) (“[A]n arbitrator’s power over parties stems from the arbitration agreement, not section 7 … Where agreements so provide, that authority includes the power to order discovery from the parties in arbitration since the FAA lets parties tailor some, even many features of arbitration by contract, including . . . procedure.”) (citations and quotations omitted).
50 See Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1980) (“While an arbitration panel may subpoena documents or witnesses, the litigating parties have no comparable privilege.”).
respects from the FAA, and probably are not preempted by the federal statute.\textsuperscript{51} Many states have adopted a version of either the Uniform Arbitration Act (UAA) or the Revised Uniform Arbitration Act (RUAA), both of which contain language on discovery that is substantially similar to the language of the FAA. The relevant caselaw effectively tracks interpretations of the FAA.\textsuperscript{52} However, some state legislation, including arbitration statutes based on the UAA and the RUAA, is more explicit than the FAA about permitting pre-hearing discovery.\textsuperscript{53} Moreover, the RUAA, and some other state legislation as well, permits state courts to enforce discovery-related orders issued by arbitrators in other states.\textsuperscript{54} Accordingly, a person may be able to circumvent any territorial limitations on § 7 of the FAA by applying to a state court in the state where a witness is located.

d. Statutory Framework for Discovery from U.S. Courts in Aid of Public Proceedings

U.S. courts also receive requests for assistance with proceedings before publicly-sponsored foreign or international tribunals. For our purposes a public tribunal is any adjudicative body that is either a) an agency or instrumentality of a foreign nation state or b) created by a treaty between such nation states.\textsuperscript{55} So, for example, litigation in the English High Court would qualify as a proceeding before a public tribunal, as would arbitration in the International Centre for the Settlement of Investment Disputes (ICSID) (which is created by the ICSID Convention). By contrast, arbitration before the London Court of International Arbitration would qualify as a proceeding before a private tribunal.

Requests for discovery in aid of proceedings before non-U.S. publicly-sponsored tribunals are governed by 28 U.S.C. § 1782. As now enacted, § 1782 provides in relevant part:

\begin{quote}

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 . . . 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 . . . 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.\textsuperscript{56}
\end{quote}

This version of the statute reflects 1964 amendments that replaced the phrase “judicial proceeding” with “proceeding in a foreign or international tribunal.” The amendments also expanded the scope of the statute from testimony and statements to include documentary evidence; eliminated the requirement that the proceedings be pending; and permitted persons rather than courts or tribunals to apply for assistance.\textsuperscript{57} These reforms were enacted in response to the legislative proposals of the

\textsuperscript{51} Compare Obtaining Evidence, supra note 48 (arguing that the FAA does not preempt state procedural rules), and ImClone Sys. v. Waksal, 802 N.Y.S.2d 653 (App. Div. 2005).

\textsuperscript{52} See generally RUAA, supra note 37, cmt. ¶ 3, 6, 8 (reviewing cases).

\textsuperscript{53} See Obtaining Evidence; UAA, supra note 37, § 7(b); RUAA, supra note 37, §§ 17(b)–(d), cmt. 5, 6.

\textsuperscript{54} RUAA, supra note 37, § 17(g).

\textsuperscript{55} Cf. S.I. Strong, Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration, 1 STAN. J. COMPLEX LITIG. 295 (2013) (discussing how to categorize tribunals, for § 1782 purposes, empowered by treaties, contracts, or a combination of both in terms of their source of authority and grant of jurisdiction).


\textsuperscript{57} Compare Act of May 24, 1949, ch. 139, § 93, 63 Stat. 89, 103 (1949), and Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995 (1964). The first statute providing for assistance to foreign courts in obtaining evidence located in the United States dates to 1855. Subsequent statutes were passed in 1863,
Columbia Project on International Procedure and were broadly designed to facilitate the conduct of transnational litigation and thereby promote international “intercourse.” The legislative history provides:

The steadily growing involvement of the United States in international intercourse and the resulting increase in litigation with international aspects have demonstrated the necessity for statutory improvements and other devices to facilitate the conduct of such litigation. Enactment of the bill into law will constitute a major step in bringing the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects. It is hoped that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures.\textsuperscript{58}

Despite the fact that recognition and enforcement proceedings are a regular feature of international litigation, the 1964 amendments only evinced concern with proceedings related to the merits of the dispute. The purpose of the Commission that eventually transmitted the proposed revisions to Congress, as articulated by the Act creating it, was “to improve and codify international practice in civil, criminal, and administrative proceedings.”\textsuperscript{59} In keeping with this aim, both the Columbia report on which the Commission relied, as well as the report of the Commission itself, focused on securing evidence to be used during litigation.\textsuperscript{60} Once the proposed revisions were in the hands of Congress, it referred to them as collectively seeking “to improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects.”\textsuperscript{61} None of the relevant documents refer to “assets” or “enforcement proceedings” connected to litigation abroad.\textsuperscript{62} As we shall see, this stands in contrast with the use to which § 1782 has been put by parties to commercial arbitration who, at least post-

\textit{Intel}, have sought to use proceedings in U.S. courts as a way to locate assets before an award has been rendered.\textsuperscript{63}

The meaning of the term “tribunal” in this provision was considered by the U.S. Supreme Court in \textit{Intel}.\textsuperscript{64} The issue there was whether a quasi-judicial tribunal, in this case, the Commission of the European Communities acting through the Directorate-General for Competition, qualified as a foreign tribunal for the purposes of the statute. The Court concluded that the European Commission qualified for


\textsuperscript{60} Hans Smit & Arthur Miller, \textit{International Co-Operation in Civil Litigation—A Report on Practices and Procedures Prevailing in the United States}, \textit{Proj. on Int’l Proc. of Colum. Univ. L. S. 1} (1961) (observing “the unparalleled growth in civil litigation with international aspects” had created a need for reform of the procedures for “soliciting and providing international cooperation in civil litigation…”); H.R. DOC. No. 88–88, at 45 (1963) (“Section 1782 makes clear that . . . judicial assistance may be sought not only to compel testimony and statements but also to require the production of documents and other tangible evidence. It thus recognizes that the need for obtaining tangible evidence may be as imperative as the need for obtaining oral evidence.”).

\textsuperscript{61} S. REP. NO. 88–1580, at 14 (1964). Indeed, the proposed amendments focused on issues exclusively relevant to merits disputes, such as perjury, foreign official records, land title, and patents. \textit{Id.} at 14–19.

\textsuperscript{62} The legislative history only refers to “enforcement” in the context of enforcing subpoenas, \textit{id.} at 10, and clarifying that providing service of process in connection with a foreign dispute does not require recognition or enforcement of the subsequent judgment. \textit{Id.} at 17. By contrast, the reports of both the Columbia Project and the Rules Commission are replete with references to “obtaining evidence.”

\textsuperscript{63} \textit{See infra} notes 83–107 and accompanying text.

\textsuperscript{64} \textit{See infra} text accompanying note 66.
§ 1782 assistance given that it acted as a first-instance adjudicator, could determine liability and impose penalties, and that its final disposition—reviewable by the European courts—was within reasonable contemplation.65

The Court in Intel also confirmed that even when proceedings are contemplated or pending before a qualifying tribunal, “a district court’s compliance with a § 1782 request is not mandatory.”66 The Court went on to give guidance on the exercise of that discretion, by providing the following four factors: (1) whether “the person from whom discovery is sought is a participant in the foreign proceeding,” because “the need for § 1782 aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant”; (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 U.S. federal-court judicial assistance”; (3) “whether the § 1782 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 request is otherwise “unduly intrusive or burdensome.”67

A notable feature of this approach is that it rejects the “foreign discoverability rule” favored by some lower courts. That rule held that requests for assistance must be refused where the law of the requesting state does not permit the means of discovery requested.68 It was motivated by a desire to avoid assisting a private party in circumventing foreign discovery rules both out of considerations of comity69 and to effectuate the purpose of § 1782.70 Courts employing this rule differentiated between discoverability, which was assumed to be easily ascertainable, and admissibility, which was treated as a matter of comparative law.71 Intel effectively said that the lower courts had it backwards, making clear the

65 Intel, supra note 4 at 255 n.9, 257–58.
66 Id. at 264.
67 Id. at 264–65. Lower courts applying Intel have cast the Court’s approach as involving two steps: a threshold inquiry that asks whether the request is authorized and then a discretionary inquiry that asks whether discovery should be granted. The threshold inquiry assumes that discovery is “authorized, though not required, when (1) it is directed at a resident of the district in which the court sits; (2) it is intended for use before a foreign tribunal; (3) it is based upon the application of a person interested in a foreign proceeding; and (4) it does not require disclosure of privileged materials.” In re Hanwha Azdel, Inc., 979 F. Supp.2d 178, 180 (D. Mass. 2013) (citing In re Chevron Corp., 762 F. Supp.2d 242, 246 (D. Mass. 2010) (citing Intel, supra note 4, at 256)). Only if the threshold is met ought the district court proceed to the discretionary factors.
68 See, e.g., In re Asta Medica, S.A., 981 F.2d 1 (1st Cir. 1992) (requiring that § 1782 applications be examined under the controlling discovery rules in the foreign or international tribunal) [hereinafter Asta Medica]; Lo Ka Chun v. Lo To, 858 F.2d 1564, 1566 (11th Cir. 1988) (same).
69 See In re Letter Rogatory in the Matter of Elec. Data Systs. Corp., 42 F.3d 308, 311 (5th Cir. 1995) (“[C]ourts in the United States have routinely undertaken a discoverability determination . . . to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules . . . out of a fear of offending the forum nation by furthering a scheme to obviate that nation's discovery rules”); In re Letter of Request from the Amtsgericht Ingolstadt, Fed. Republic of Ger., 82 F.3d 590, 592 (4th Cir. 1996) (“The rationale for assessing the discoverability of a private litigant's request under the foreign nation's rules is to prevent circumvention of foreign restrictions on discovery and avoid offense to foreign tribunals.”) (internal quotations and citations omitted).
70 Asta Medica, supra note 69, at 7 (1st Cir. 1992) (finding the “broader goal of the statute . . . would be defeated” if courts interpreted it to require granting discovery otherwise unavailable or prohibited under foreign law because that “would lead some nations to conclude that United States courts view their laws and procedures with contempt”) (internal quotations omitted).
71 Id. at 7 n.6 (“The district court need not explore whether the information the applicants seek is admissible in the foreign jurisdiction or other issues of foreign law.”).
Supreme Court prioritized admissibility over discoverability. The Court also ruled that reciprocity concerns did not justify across-the-board refusal of assistance in discovery since assistance can be conditioned on reciprocal exchange of information.

e. Requests for Discovery from U.S. Courts in Aid of Foreign Arbitration Post-Intel

Now we turn to the focus of this chapter: requests to U.S. federal courts for assistance with discovery in aid of proceedings before private foreign or international tribunals. Prior to 2004, there were relatively few decisions on requests of this sort, and the published opinions unanimously rejected the § 1782 application in question. However, the attitude of the courts appears to have changed since 2004 as a result of the decision in Intel, with many post-Intel courts granting § 1782 applications in connection with foreign commercial arbitration.

We attempted to review all post-Intel published opinions resulting from § 1782 applications in connection with private arbitration, ultimately identifying 22 published opinions. However, a great deal

72 Intel, supra note 4, at 262 (“When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless.”) (emphasis added).
73 Id. Prior to Intel, however, lower courts did not seem inclined to condition discovery assistance under § 1782 on reciprocal information exchange. See In re Malev Hungarian Airlines, 964 F.2d 97, 101 (2d Cir. 1992). (“Congress intended . . . § 1782 would provide an avenue for judicial assistance to foreign or international tribunals whether or not reciprocal arrangements existed.”) (emphasis added). In Malev, the applicant had offered to “engage in reciprocal discovery.” Id. at 102 n.4. It should be noted that reciprocity in this context refers to maintaining parity between opposing parties by ensuring discovery is available to both sides in a single dispute, rather than encouraging foreign courts to provide similar assistance when a future dispute is pending in a U.S. tribunal. For a discussion of reciprocity in the latter sense, see infra, notes 154–58 and accompanying text.
74 See Biedermann, supra note 2, at 883 (“we conclude that the term ‘foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations’); NBC, supra note 2, at 191 (“Congress did not intend for that statute to apply to an arbitral body established by private parties.”). See also In re Medway Power Ltd., 985 F.Supp. 402, 403 (S.D.N.Y. Nov. 20, 1997) (“[T]he legislative history of Section 1782 confirms Congress’ intent in adding the term ‘tribunal’ was to extend the statute to public, official adjudicatory proceedings.”) [hereinafter Medway]. But see In re Technostroyexport, 853 F. Supp. 695, 697–99 (S.D.N.Y. May 6, 1994) (stating that “an arbitrator or arbitration panel is a ‘tribunal’ under § 1782” but distinguishing between requests by the arbitral tribunal and requests by the parties, and rejecting the petition for discovery on the ground that “parties to arbitrations in those countries cannot bypass the arbitrators and go directly to court”) [hereinafter Technostroyexport].
75 We conducted a search using Westlaw’s Keycite service covering the time period of all post-Intel cases (June 21, 2004 through present). Filtering for only cases that cite to Intel, we searched for those including the word “arbitration.” This generated 99 results, which were screened for redundancy (e.g. a district and appeals court decision in the same dispute would not both be cited) or irrelevance (e.g. cases concerning investment treaties which merely mention private arbitration were excluded). Ultimately, we identified 22 opinions using this method. Tallying is not without complication, given that international commercial disputes often involve simultaneous proceedings in different forums, which may include both court and arbitral proceedings. In at least one case, respondents disputed whether the § 1782 applicant genuinely intended to use the information sought in the relevant foreign court proceeding, arguing instead that the applicant’s intention was to use it in arbitration while avoiding the issue of arbitral tribunals’ classification under § 1782. See In re Michael Wilson, 2007 WL 2221438, at *2 (D. Colo. July 27, 2007) (“Respondents argue that . . . the foreign [judicial] tribunals will not allow the information sought to be used in the foreign proceedings. Specifically, Respondents contend that the information received is more
of trial court activity, particularly in the area of discovery, is not reflected in published opinions.\textsuperscript{76} Accordingly, we also attempted to review all § 1782 applications related to private arbitration that appeared in the dockets of U.S. district courts during the three-year period from October 1, 2012 to October 1, 2015. This docket research provided a more complete picture of the landscape of § 1782 activity than our review of published opinions.\textsuperscript{77} We manually screened for § 1782 applications relating to private arbitration, including all applications that referred to proceedings before private non-domestic arbitrations, even if they also referred to proceedings before foreign courts or other foreign or international publicly-sponsored tribunals. We analyzed the applications with respect to: the requesting party, the target of the request, the timing of the application in the context of the parties’ dispute, and whether the information sought relates to the merits or to a party’s assets. Along all but the last of these dimensions, the profile of the applications that led to published opinions was comparable to the profile of the applications uncovered by our docket research.

The results of our analyses of both the published opinions and the docket review are set out in the Appendix. To summarize, the nature of the requestor of the assistance never varied: our search yielded no instances in which arbitrators initiated the request.\textsuperscript{78} Requests were invariably made by one of the parties to the dispute, including a few cases in which the same party made multiple requests leading to published opinions. Given the lack of formal involvement by the arbitral tribunal, it is interesting to note that almost likely to be used in private arbitration proceedings, which Respondents contend are not subject to Section 1782.

\textsuperscript{76} David A. Hoffman, Alan J. Izenman, & Jeffrey R. Lidicker, \textit{Docketology, District Courts, and Doctrine}, 85 \textit{WASH. U. L. REV}. 681, 727 (2007) (“In our view, docketology’s main contribution is to starkly expose how little trial court work is explained through written opinions. An astonishingly low 3% of all orders are available on the databases; more than 80% of difficult orders are similarly ‘hidden’ without explanation.”).

\textsuperscript{77} We used the following methodology: The docket search was conducted using Bloomberg Law, which houses an interface offering inter-jurisdictional, text-based searches of the PACER database. We searched dockets with filing dates between October 1, 2012 and October 1, 2015, using the terms [“28 U.S.C. 1782” or (“§ 1782” n/5 appl!)]. This generated 474 results. These were manually screened for § 1782 applications relating to private arbitration, reducing the number of new results to 20 dockets (not counting eight which had already been found during our search of published opinions). Some of the material in some of these dockets was not immediately available in electronic form via Bloomberg. Of the 28 dockets not available via Bloomberg, 16 were available via PACER. The remaining 12 dockets included six in the S.D.N.Y. These were obtained by manually photocopying the relevant dockets in the courthouse (save for one, which the courthouse reported as “lost”). We attempted to obtain the remaining six using Bloomberg’s courier service. Four were under seal, and two had updated docket numbers that were not reflected online. We are grateful to Bloomberg for its assistance in obtaining these documents and ascertaining the status of those that were unobtainable. We included all applications that referred to proceedings before private non-domestic arbitrations, even if they also referred to proceedings before foreign courts or other foreign or international publicly-sponsored tribunals.

\textsuperscript{78} Recall that the text of § 1782 itself envisages requests emanating from or endorsed by the foreign tribunal, see 28 U.S.C. § 1782 (1964) (“The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal.”).
none of the published opinions indicate whether the § 1782 application was made with the consent or even the knowledge of the arbitrator.\footnote{But see Hallmark, supra note 2, at 952 (“[T]he Israeli arbitrator has stated his ‘receptivity’ to this Court's assistance.”).}

The majority of the published opinions involve requests for information to be obtained not from the other party to the arbitration, but rather from a third party who had not assented to the arbitration proceeding and was not a party to the arbitration agreement. This opens the possibility, discussed in one opinion, that the § 1782 application would be made without the knowledge of the other party to the dispute. We note that the published opinions largely did not involve use of a letter rogatory or other document from a local court.

Although a small number of requests for assistance were made before the initiation of arbitral proceedings, the majority of requests were made post-initiation. In many cases, related proceedings before arbitral tribunals and courts were taking place in multiple jurisdictions at the time of the § 1782 application. In some cases the record suggests that the party seeking § 1782 discovery intended to use the information sought in additional actions unrelated to the arbitral proceeding.\footnote{See, e.g., In re Consorcio, 685 F.3d 987, 989 (11th Cir. 2012) (granting § 1782 application in connection with pending arbitration, where applicant admitted intent to use information obtained in connection with “contemplated civil and private criminal suits” in Ecuador), vacated on other grounds, In re Consorcio, 747 F.3d 1262 (11th Cir. 2014) [hereinafter Consorcio]; In re Finserve, Ltd., 2011 WL 5024264, at *1 (D.S.C. Oct. 20, 2011) (“Finserve . . . requests this Court to issue an Order of Judicial Assistance authorizing counsel to issue subpoenas to Petrosyan, compelling him to appear at a deposition and to produce documents for use in arbitration proceedings before LCIA and in such other proceedings in other jurisdictions as shall be appropriate.”) (emphasis added); Babcock, supra note 2, at 242 (suggesting applicant seeks to “open a new front to obtain materials” from respondent despite not having taken steps to initiate arbitration, facilitating the possibility of future litigation).}

The materials we reviewed were silent on whether the information sought and obtained was later used in connection with litigation before U.S. courts.

<table>
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<th>TABLE 1. Target, Timing, and Focus of § 1782 Applications</th>
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<tbody>
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<td>Target Party</td>
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<td>Third Party</td>
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<td>Timing in relation to foreign arbitration</td>
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<td>Related to assets</td>
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There was one striking difference between the applications that led to published opinions and those uncovered by our docket research. The ideal-typic use, in which one party to a pending or reasonably contemplated arbitration seeks information related to the merits of a claim or defense,\footnote{See, e.g., Daniel J. Rothstein, A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration, 19 AM. REV. INT'L ARB. 61, 65 (2008) (discussing the procedural costs of evidence-taking versus “the parties’ right to present their case”); Hans Smit, Recent Developments in International Litigation, 35 S. TEX. L. REV. 215, 232 (1994) (discussing how evidence might alter the assessment of the merits, persuading a party or foreign official to drop or pursue the foreign arbitration.).} only fit a minority of the applications we found in recent district court dockets. Of the 20 applications we found via docket search (i.e., applications in the past 3 years that had not led to published opinions), 15
sought discovery related to assets for attachment or enforcement purposes.\textsuperscript{82} Many of these occurred either after the arbitral award was issued, or after a court order in a proceeding related to the arbitration—typically one seeking attachment.\textsuperscript{83} However, in at least 4 cases,\textsuperscript{84} asset discovery was sought before any merits proceeding was commenced—possibly representing, as one judge suggested, an attempt to assess whether it was financially worthwhile to initiate arbitration.\textsuperscript{85} Only 2 of the applications seeking asset discovery resulted in published opinions—both within the past year—which means that what appears to be an important strategic use of § 1782 in connection with private arbitration may have gone unnoticed by many observers.

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No foreign arbitration initiated & 4 \\
(Pre-Filing Interim Relief) & \\
Foreign arbitration ongoing & 2 \\
Foreign arbitration initiated but & 2 \\
status unknown & \\
Foreign arbitration concluded & 9 \\
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Three features of the applications seeking asset discovery stand out: (1) although the parties had agreed to resolve their dispute through arbitration the § 1782 application was ostensibly sought in assistance of enforcement-related judicial proceedings; (2) they bear the markings of a high degree of routinization insofar as legal arguments presented by the requestor and the rationale stated by the court;\textsuperscript{86} (3) in a significant number of cases the request was not opposed or the opposing party did not appear.\textsuperscript{87}

\textsuperscript{82} See Appendix. In one of these, Order on Motion for Miscellaneous Relief, \textit{In re} Harbour Victoria Inv. Holdings, No. 1:15-mc-00127-AJN (S.D.N.Y. June 29, 2015), ECF No. 23, there were both ongoing domestic confirmation proceedings and foreign enforcement proceedings at the time the § 1782 application was made. The judge presiding over the domestic confirmation proceeding had denied the sought-after asset discovery due to jurisdictional issues (the discovery was predicated on a corporate alter ego theory relating to a New York real estate company). In the § 1782 case, the judge noted that it appeared the applicant was attempting to “evade the denial of its discovery request in the U.S. confirmation proceeding, and that, if granted, Petitioner would in fact use the discovery in the ongoing U.S. proceeding.” \textit{Id.} at 7. However, the judge assumed without deciding that the applicant was seeking discovery in connection with enforcement proceedings in India, and ultimately denied the request on the \textit{Intel} discretionary factors (citing the evasion and fishing expedition supicions). \textit{Id.} at 12.

\textsuperscript{83} See Appendix.

\textsuperscript{84} \textit{Id.} We say “at least” because in some cases the party submissions—at least those not under seal—and subsequent order in the § 1782 proceeding were vague about the status of foreign proceedings.


\textsuperscript{86} The parties’ submissions take a formulaic approach to the request, using uncorroborated and conclusory language that was typical of requests for provisional relief pre-\textit{Sniadach} and its progeny. \textit{See} \textit{Sniadach} v. Family Fin. Corp. of Bay View, 395 U.S. 337 (1969).

\textsuperscript{87} The average number of docket entries (i.e., submissions and orders) in applications seeking asset discovery is 7 per docket; for applications seeking discovery related to the merits, it is 35. We use this as
(4) the handful of applications made prior to obtaining an arbitration award (or even prior to initiating arbitration) were handled, by both the applicants and the courts, in much the same way as applications made after an award, without taking into account the fact that pre-award asset discovery would not be available under either U.S. law or the law of the seat.88

The application in In re Lauritzen illustrates these features.89 In Lauritzen, the parties’ agreement called for all disputes arising out of the contract to be arbitrated in London. Following cargo damage sustained while the vessel “Ocean Prefect” was en route from China to Venezuela, a payment dispute arose between the parties.90 Prior to commencing arbitration, the claimant initiated attachment proceedings in Panama to secure part of their claim, alleging the defendant owned bunkers aboard a different vessel docked in a Panamanian port.91 The defendant disputed that it owned the bunkers in question, and the claimant filed a § 1782 application. The targets of the application were nine New York banks that may have acted as intermediaries for payments related to the ship currently docked in Panama.

The memorandum of law supporting the claimant’s application referred in passing to the London arbitration: however, the papers easily could be read to give the impression that this was a Panama-centric dispute. Indeed, only a cursory discussion was offered as to why the Panamanian court qualified as a “foreign tribunal” for purposes of § 1782:

In Intel, the Supreme Court confirmed a low threshold for satisfying the “foreign or international tribunal” requirement by concluding that the Directorate General (i.e., a governmental investigative body and not a court) is a “tribunal” for the purposes of satisfying the requirements of § 1782. The Court also stated that “[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 light of the expansive definition of the term “tribunal,” the Panamanian Court proceeding clearly constitutes a “proceeding in a foreign or international tribunal.”92

Despite the fact that the parties’ agreement called for arbitration in London, governed by English law, the memorandum of law did not discuss whether the attachment proceeding or the discovery would be permissible in the eyes of either the lex fori/lex causae93 or the tribunal.94 The petitioner simply made a conclusory assertion that none of the policy considerations identified in Intel, including the policy against circumventing foreign proof-gathering restrictions, weighed against granting relief.

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88 This calls to mind Justice Breyer’s statement in dissent in Intel: “[A] court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, and (2) the discovery would not be available under domestic law in analogous circumstances . . . Where there is benefit in permitting such discovery, and the benefit outweighs the cost of allowing it, one would expect either domestic law or foreign law to authorize it.” Intel, supra note 4, at 270 (Breyer, J., dissenting).
90 Id. at ¶ 8–9.
91 Id. at ¶ 11–13.
93 In this case, both are English law.
94 The latter omission makes sense, perhaps, in light of the fact that a tribunal had not been assembled, nor was there any indication of plans to initiate arbitration in the immediate future.
Granting Petitioner’s request for relief is consistent with the guidance provided by the Intel court since the Banks will not be parties to or participants in the Non-U.S. proceeding. The nature of the foreign proceeding does not implicate any factor or policy that would weigh against granting the Petitioner’s request. Nor would granting the assistance requested by the Petitioner offend any foreign jurisdiction or constitute a circumvention of foreign proof-gathering rules. Finally, the requests are neither unduly intrusive nor burdensome.95

The other party to the arbitration did not appear in the action.96 The docket lists no submission that would corroborate the key underlying facts in the application, such as the nature of the parties’ agreement or what the parties plan to do subsequent to the conclusion of the attachment dispute.97 Nowhere in the docket materials did we locate a submission that identified the requestor’s rationale for targeting the nine banks in question. Although the order “is without prejudice to any objections respondents may have” to subsequent discovery requests, there is no procedural history past the issuance of the order.98 One month later, Lauritzen made another application that was identical in all significant respects save for the fact that the attachment proceeding this time was in Ghana, where another ship with bunkers allegedly belonging to the award debtor had docked.99

Lauritzen unfolded no differently from another case with a wholly dissimilar procedural backdrop. In Bulk Atlantic, the § 1782 applicant was another party to a shipping agreement governed by English law with disputes to be arbitrated in London.100 Yet the procedural similarities end there. Rather than emerging in the midst of a disputed attachment proceeding prior to an allegedly contemplated arbitration, this application occurred after the arbitrator issued a final award issued in favor of the applicant.101 The application stated that the party planned to seek recognition and/or to obtain security through attachment actions.102 However, these proceedings had not yet been initiated. Under the circumstances, the applicant was seeking information related to wire transfers from nine New York banks, with the goal of locating defendant’s assets to determine where to initiate such proceedings.103

95 Lauritzen Memorandum, supra note 93, at 7.
96 The potential for misrepresentation—or, at the least, the incomplete statement of relevant facts—opened up by the other party’s non-participation should be taken seriously. In In re Hanwha Azdel, Inc., 979 F.Supp.2d 178, 180 (D. Mass. Oct. 29, 2013), the party stated that the arbitration was taking place in Paris, when in fact it was in the United States (but being conducted under the rules of the ICC, which is headquartered in Paris). This only emerged after obtaining an order, Endorsed Order Granting Motion for Order Allowing Discovery, Hanwha Azdel, Inc. v. Crane & Co. Inc., No. 3:13-mc-93004 (D. Mass. Oct. 29, 2013), ECF No. 8, in the case that was subsequently challenged by the petitioner’s opponent in the arbitration, Sabic Innovative Plastics US LLC’s Memorandum of Law in Support of Its Motion to Quash the Subpoena to Crane & Co. and to Vacate the Court’s Order of May 8, 2013, Hanwha Azdel, Inc. v. Crane & Co. Inc., No. 3:13-mc-93004 (D. Mass. Oct. 29, 2013), ECF No. 26.
97 There is a declaration under penalty of perjury from the named attorney on the case, but it declares the veracity of only five facts: (1) counsel status and bar admission; (2) that the attorney was contacted by Lauritzen’s Panamanian counsel; (3) that Lauritzen’s attachment complaint is true and exact as represented herein; (4) that the attachment order is true and exact as represented herein; (5) that the court order admitting the complaint is true and exact. See generally Declaration of James H. Powers, In re Lauritzen Bulk Bunkers A/S, Docket No. 1:13-mc-00201 (S.D.N.Y. June 11, 2013), ECF No. 3.
102 Id. at ¶ 10–11.
103 Id. at ¶ 12–14.
Thus, the Lauritzen application was in many respects the inverse of the Bulk Atlantic application. Whereas the former came after an attachment order, but before the arbitration proceedings were initiated, the latter came after the arbitral award, but before attachment or enforcement proceedings.

Nonetheless, the situations were presented as if they were identical as far as § 1782 is concerned. We question whether this equivalence ought to be assumed by the courts. In addition, in each case, the petitioner framed the procedural backdrop as if the only relevant proceeding were the attachment proceeding, even though in one case it had already resulted in an attachment order, and in the other the whole proceeding was hypothetical. Indeed, the legal argument excerpted above was literally lifted, verbatim, with the only modification being replacement of “Panamanian” with the word “London.” Yet this application was granted in a nearly identical order that was the same in all substantive respects.

Both of these dockets contain only 4 entries. It is possible that a party objected to the ordered discovery subsequent to this initial disposition. However, as it has been over 2 years since they concluded, it may be concluded that no objection occurred.


Whether U.S. federal courts can order discovery to assist in foreign private arbitrations turns on whether those proceedings are covered by § 1782. Unfortunately, the deceptively simple phrase “foreign or international tribunal” is highly ambiguous as applied to a private arbitral tribunal.

The most difficult issue is posed by the term “tribunal.” On the one hand, the ordinary meaning of the term encompasses a private arbitral tribunal. This view is supported by the writings of Hans Smit, who led the Columbia Project on International Procedure that inspired the 1964 amendments to § 1782 and is widely praised as the architect of the statute. Writing in 1965, after the statute’s amendment, Smit said, “[t]he term ‘tribunal’ embraces all bodies exercising adjudicating powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” Referring to another product of the 1964 amendments concerning assistance with letters rogatory, Smit wrote, “[t]he term tribunal was chosen deliberately as being both neutral and encompassing” and reiterated that it was intended to include arbitral tribunals. Smit’s definition of the term “tribunal” was quoted with approval by Justice Ginsburg in Intel in support of the argument that § 1782 covers quasi-judicial proceedings. Some courts have read this passage as a strong suggestion that § 1782 covers private arbitration, but Justice

104 See infra, text accompanying notes 93 and 96.
105 Compare Lauritzen Memorandum, supra note 93, at 6–7, with Memorandum of Law in Support of an Application for an Order Granting Discovery Pursuant to 28 U.S.C. § 1782 at 6–7, In re Bulk Atlantic, Inc., No. 1:13-mc-00291 (S.D.N.Y. Aug. 13, 2013) ECF No. 2. Indeed, as these citations indicate, the relevant legal argument even comes at the same place within the document, in the same docket entry. Of course, the two applications were made by the same firm. However, that does not mean this phenomenon is idiosyncratic: a majority of the § 1782 applications seeking asset discovery were filed by just three firms.
107 Justice Ginsburg, who authored the majority opinion in Intel, earlier in her career was Associate Director of the project, replacing Arthur R. Miller.
109 Id. at 1021 n.36.
110 Id. at 1021.
111 Courts persuaded by this view tend to emphasize Intel’s reliance on Smit’s post-enactment writing. Babcock, supra note 2, at 238–39 (“[I]n discussing the meaning of the term ‘tribunal’ . . . the Court in Intel favorably quoted an article by Professor Smit . . . Although this quotation in Intel is as a formal matter
Ginsburg’s opinion does not explicitly endorse this aspect of Smit’s statement. In fact, our view is that the best reading of Justice Ginsburg’s opinion is that it remains agnostic on the question of whether arbitral tribunals are included; moreover, in our view one must proceed cautiously before presuming that the factors identified in that opinion with respect to publicly-sponsored decisional tribunals can be transplanted and applied in the private arbitral context. Certainly, the Court did not consider the question in an explicit and sustained way.

Indeed, notwithstanding Smit’s post-enactment comments, the legislative history suggests that the 1964 amendments did not embrace the view that the term “foreign or international tribunal” would encompass a private arbitral tribunal. Rather, the purpose of this language was to extend § 1782 to state-sponsored non-judicial tribunals and intergovernmental tribunals created by treaties to which the United States was not a party. Neither the 100-page report prepared for Congress by the Columbia Project, nor the oft-cited Senate report constituting the bulk of the legislative history, mentions arbitration or arbitral tribunals. The relevant portions of those reports focus on the need for assistance to administrative

dicta, its considered inclusion offers meaningful insight regarding the Supreme Court's view of arbitral bodies in the context of § 1782(a”). Roz, supra note 2, at 1225 (noting Intel “quoted approvingly language that included ‘arbitral tribunals’ within the term's meaning in § 1782(a)” and finding arguments that pre-Intel interpretations survive unavailing). At times this is combined with a discussion of the court’s general sense that Intel intended to broaden the scope of § 1782. See Hallmark, supra note 2, at 956 (“[T]he post-amendment writings are by the Reporter for the responsible legislative committee and his understanding of the scope of the amendments is consistent with the general thrust of the Supreme Court's expansive interpretation of those amendments.”).

112 In re Grupo Unidos Por El Canal, S.A., 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015) (“This court finds that those cases relied too heavily on the Supreme Court's inclusion of the phrase ‘arbitral panel’ in a parenthetical quotation and a definition in one treatise which would make sweeping changes to the jurisprudence surrounding § 1782 not presented squarely to the Supreme Court in its case.”) [hereinafter GUPC]; La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 486 (S.D. Tex. 2008), aff’d sub nom. El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, No. 08-20771, 2009 WL 2407189 (5th Cir. 2009) (“Here lies the trap for the unwary traveler. Because in between agreeing with Congress' report that § 1782 applied to administrative and quasi-judicial agencies Smit, not Congress, and not the Supreme Court, was of the opinion § 1782 also applied to arbitral tribunals. The Supreme Court gave no indication they agreed with Smit on this issue.”). 113 As the district court in Finserve, supra note 81, observed:

[W]hile the United States Supreme Court in Intel cited the commentator Smit with approval, it deleted part of Smit’s definition of ‘tribunal’, the part that included ‘all bodies exercising adjudicatory powers’. This deletion could be interpreted to support a finding that private arbitration organizations are not ‘foreign tribunals.’ The court in Intel does not directly address the issue . . . and the quote from Smit does not solve this interpretational dilemma.

Id. at *2. Moreover, prior to the Court’s decision in Intel, both the Second and the Fifth Circuits held that § 1782 did not encompass private foreign or international arbitration proceedings. See Biedermann, supra note 2, at 883 (“we conclude that the term ‘foreign and international tribunals’ in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations”); NBC, supra note 2, at 191 (“Congress did not intend for that statute to apply to an arbitral body established by private parties”). The Court in Intel did not cite to those decisions and did not explicitly or even implicitly abrogate them, for the question of private arbitral proceedings was not presented.

114 Smit & Miller, supra note 61.

tribunals, quasi-judicial agencies, investigating magistrates, and intergovernmental tribunals. Moreover, courts, arbitral tribunals, and commentators at the time typically referred to those involved in arbitration as “parties”; by contrast, the legislative history and the Columbia Report both referred almost exclusively to “litigants,” evincing a focus on civil litigation. None of the publications on international judicial assistance referenced in the bibliography to the Columbia Report mentioned arbitration. Finally, the broader context in which the amendments were enacted suggests that it is unlikely that Congress intended to extend discovery to international arbitration as a means of facilitating private arbitration. At the time of the amendments to §1782, the United States had recently declined to join the 1958 “New York Convention” (on Recognition and Enforcement of Foreign Arbitral Awards) “because of fundamental misgivings about international commercial arbitration.” In any event, at that time compelled testimony and document production were not prominent features of arbitration (although international arbitrators did have discretion to order discovery). One memorable—though possibly overstated—formulation held: “The fundamental differences between the fact-finding process of a judicial tribunal and that of a panel of arbitrators demonstrate the need of pretrial discovery in the one and its superfluity and utter incompatibility in the other.”

Another source of ambiguity in §1782 is the phrase “foreign or international.” A threshold question is whether it is a composite phrase or whether the terms “foreign” and “international” must be given separate meanings. Other issues include: does the foreign or international character of a tribunal stem from the place of the arbitration? The nationality of the arbitrators? The facts of the dispute? The governing law? The parties? And when—if ever—can a tribunal be “international” but not foreign?

116 NBC, supra note 2, at 189–90 (“[T]he legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.”); Biedermann, supra note 2, at 882 (finding “no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration”); Medway, supra note 75, 403–04 (“The legislative history of Section 1782 confirms Congress’ intent in adding the term ‘tribunal’ was to extend the statute to public, official adjudicatory proceedings.”).


118 Smit & Miller, supra note 61 at 102–03.

119 David Rothstein, A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration, 19 Am. Rev. Int’l Arb. 61, 62, 74 (2008) (arguing that joining the New York Convention would have been the “most basic assistance” it could provide to private foreign arbitration, such that it would be inconsistent to be focused on evidentiary assistance).

120 In 1953 the International Law Commission attempted to codify rules of arbitral procedure by studying “international accepted practice.” Article 15 contains the provision on production of evidence:

... 2. The parties shall co-operate with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.


122 See Applicability and Best Practices, supra note 8.
Courts are sometimes pressed to interpret these terms expansively. For instance, in 1998 Smit suggested a tribunal should be deemed international “when any of the parties before it, or any of the arbitrators, is not a citizen or resident of the United States,” and should be deemed foreign “when it is held anywhere outside the United States or is created under the law of a foreign country.”123 Yet as the Second Circuit noted, when combined with his definition that “tribunal” refers to “all bodies with adjudicatory functions,”124 this would implausibly broaden the scope of disputes covered by § 1782.125 Moreover, regardless of the precise criteria adopted, the Second Circuit was concerned that extending § 1782 to include private arbitral tribunals would create an “entirely new category of disputes concerning . . . the characterization of arbitral panels as domestic, foreign, or international.”126

In light of the foregoing, it is hardly surprising that since the decision in Intel there has been no judicial consensus on whether § 1782 covers private arbitration. The ostensibly divergent jurisprudence can be distilled into three strands. First, some cases take the view that Intel expands the definition of “foreign or international tribunal” so that finding § 1782 covers private arbitration is either compelled or strongly suggested.127 A second strand relies heavily on functional factors that are derived from Justice Ginsburg’s analysis of whether the statute applied to a quasi-judicial public tribunal. These cases come out both ways on the question of whether § 1782 reaches private arbitration, but the common thread is that they see Intel as establishing criteria by which all proceedings will be evaluated.128 Finally, a third strand rejects reliance on Smit’s post-enactment definition of tribunal,129 and the cases in this group

124 Id.
125 NBC, supra note 2, at 191 n.9 (“[I]f the parties in a domestic arbitration simply appointed one foreign arbitrator to an otherwise entirely domestic panel dealing with a purely domestic dispute, that appointment would make § 1782 available.”).
126 NBC, supra note 2, at 191. This concern has been reiterated by subsequent courts and commentators. See, e.g., La Comision, supra note 2; In re Grupo Unidos, 2015 WL 1815251, *10 (N.D. Cal. 2015); Arthur Rovine, Section 1782 and International Arbitral Tribunals: Some Key Considerations in Key Cases, 23 AM. REV. INT’L ARB. 461, 464–65 (2012).
127 Courts persuaded by this view tend to emphasize Intel’s reliance on Smit, in light of his post-enactment writing. See Babcock, supra note 2, at 238–39 (“[I]n discussing the meaning of the term ‘tribunal’ . . . the Court in Intel favorably quoted an article by Professor Smit . . . Although this quotation in Intel is as a formal matter dicta, its considered inclusion offers meaningful insight regarding the Supreme Court’s view of arbitral bodies in the context of § 1782(a).”); Roz, supra note 2, at 1225 (noting Intel “quoted approvingly language that included ‘arbitral tribunals’ within the term’s meaning in § 1782(a)” and finding arguments that pre-Intel interpretations survive unavailing). At times this is combined with a discussion of the court’s general sense that Intel intended to broaden the scope of § 1782. Hallmark, supra note 2, at 956 (“the post-amendment writings are by the Reporter for the responsible legislative committee and his understanding of the scope of the amendments is consistent with the general thrust of the Supreme Court’s expansive interpretation of those amendments.”).
128 Winning, supra note 2, at *8–10 (conducting a functional analysis and concluding a private arbitration was a “foreign tribunal” because the English courts could review the award); Operadora, supra note 2, at *11 (“The Court finds that the source of the ICC Panel's authority and its purpose are functional attributes that militate against classifying it as a foreign or international proceeding under § 1782.”); OJSC Ukraïa v. Carpatsky Petrol., 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (finding that the Stockholm arbitration tribunal is a “first-instance decisionmaker” whose awards are subject to review such that it qualifies under a functional test).
129 GUPC, supra note 113, at *8 (“This court finds that those cases relied too heavily on the Supreme Court's inclusion of the phrase ‘arbitral panel’ in a parenthetical quotation and a definition in one treatise which would make sweeping changes to the jurisprudence surrounding § 1782 not presented squarely to the Supreme Court in its case.”); La Comision, supra note 2.
consequently continue to apply the pre-Intel analysis developed by the Second and Fifth Circuits to exclude private arbitrations from the scope of § 1782, even when the request is made by the arbitrators. On the threshold issue of applicability of the statute to private arbitral proceedings, our view is most closely aligned with the third-strand of cases. We do not believe that § 1782 plainly includes requests in aid of private arbitration or that Smit’s view on this issue was endorsed by Justice Ginsburg in Intel. However, as set out below, we take a different view of the policy considerations that ought to be used to resolve this ambiguity.

We also believe that the interpretive issues concerning the meaning of “foreign or international” can be resolved relatively easily using conventional approaches to statutory interpretation.

For instance, we would apply the maxim that every word of a statute must be given meaning and hold that “foreign tribunal” means something separate from “international tribunal.” This would be consistent with the legislative history of § 1782 which suggests that the drafters used different terms to refer to state-sponsored tribunals and intergovernmental tribunals established by treaty.

It is also clearly desirable to read § 1782 in a way that avoids conflict with other federal laws—indeed, the Intel decision itself cautioned that requests for discovery should not be awarded if at odds with U.S. law. A broad reading of the phrase “foreign or international tribunal” could lead to conflicts with § 7 of the FAA. Recall that § 7 only provides for assistance to tribunals whose arbitrators, or a majority of them, are sitting in a district of the U.S. federal courts. The obvious way to avoid conflict is to hold that § 1782 applies only to private tribunals that either sit outside the United States or for some other reason

130 GUPC, supra note 113, at *11 (“This court concurs with the reasoning of the NBC and Biedermann courts regarding the ambiguity of the statutory language and the clearer instruction of the legislative history and policy considerations, and concludes that private arbitrations established by contract are not ‘tribunals’ under Section 1782.”); Rhodianyl, supra note 76, at *48–49 (“The court . . . find[s] it extremely doubtful that [Intel] would have intended its opinion to throw open the interpretative doors of § 1782 to reach purely private arbitrations, since such an interpretation would effectively overrule—without any analysis or even mention of—two prominent decisions finding that that statute had no such application, NBC and Biedermann.”); La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 486 (S.D. Tex. 2008) (“In stark contrast to the opinion of one article appearing incidentally in a Supreme Court decision, the Fifth Circuit has tackled the issue squarely.”). See supra note 75 for a synopsis of the pre-Intel view.

131 See GUPC, supra note 2, at *7 (“Interpreting § 1782 to apply to voluntary, private international arbitrations would be a body blow to such arbitration . . . [and] would create a tremendous disincentive to engage in such arbitration.”) (internal quotations omitted); Rhodianyl, supra note 76, at *49 (“Congress would not have intended such a sweeping interpretation of § 1782, where the necessary result would be a contradiction of another strong policy, encouraging the use of arbitration.”)

132 Biedermann, supra note 2, at 883 (noting the possibility of conflict between § 1782 and the FAA if the former was interpreted to cover private arbitral tribunals). See also Intel, supra note 4, at 270 (“[A] court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, and (2) the discovery would not be available under domestic law in analogous circumstances. The Federal Rules of Civil Procedure, for example, make only limited provisions for nonlitigants to obtain certain discovery. See Fed. Rule Civ. Proc. 27.”). Some courts considering § 1782 applications post-Intel have recognized that applications for discovery assistance under § 1782 are subject to the Federal Rules of Civil Procedure. See, e.g., In re Clerici, 481 F.3d 1324, 1336 (11th Cir. 2007) (“Once discovery is authorized under § 1782, the federal discovery rules, Fed. R. Civ. P. 26-36, contain the relevant practices and procedures for the taking of testimony and the production of documents.”); Chevron Corp. v. Camp, 2010 WL 3418394, at *6 (W.D.N.C. Aug. 30, 2010) (determining that the court “must apply the Federal Rules of Civil Procedure” in determining what discovery is to be taken under § 1782). According to this view, the party making the § 1782 request must certify that it has first “in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” Fed. R. Civ. P. 26(c)(1).
cannot rely on § 7 of the FAA.133 This reading also has the virtue of being easily administered, addressing the Second Circuit’s fears about disputes around the characterization of tribunals.134 In addition, the broad reading of § 1782 could generate conflicts with provisions of the Federal Rules of Civil Procedure that set out how one federal court should assist in compelling discovery in aid of proceedings in another federal court or that limit the availability of discovery in various respects. This potential for conflict is particularly clear when it comes to asset discovery. As we have seen, asset discovery generally is not available pre-judgment in federal court, and it is not available in domestic commercial arbitrations. Yet § 1782 is being used in a significant number of cases for just this purpose.

4. Reframing the Discussion to Include Other Considerations of Public Policy

The preceding discussion should make clear that conventional legal analysis of the text and legislative history of § 1782 does not conclusively answer the question of whether it covers discovery in aid of proceedings before private foreign arbitral tribunals. Moreover, although some lower courts in the United States have read Justice Ginsburg’s decision in Intel as a signal that the statute does embrace private arbitral tribunals, the question was not presented in that case and the Court did not give the question the full consideration that it deserves. Under the circumstances, it seems appropriate to refer to policy considerations to answer each of these questions. As in other areas of civil procedure, it is important to consider whether permitting resort to the U.S. courts is consistent with not only the private interests of the parties but also broader public interests. So far, discussion of this issue has revolved around two approaches, which we have called essentialist and contractarian.

a. Essentialist and Contractarian Approaches and their Limitations

In one of the leading opinions on § 1782, the Second Circuit set out an approach we consider to be illustrative of the “essentialist” approach to the policy question of whether § 1782 should apply to private arbitration. Writing for the appeals panel, Judge Cabranes stated that permitting discovery pursuant to § 1782 in the arbitration context would undermine some of the main advantages of arbitration over litigation. He argued that arbitration’s popularity can be traced to the fact that it is cheaper, faster and simpler than litigation, and as a result “normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties.”135 Permitting § 1782 discovery would undermine these advantages and conflict with the federal policy favoring arbitration. This can be interpreted as an argument that both the private interests of the parties to the arbitration and the public interest in promoting a particular form of arbitration weigh against permitting judicial assistance with discovery. At the very least this approach supports a presumption against the practice.

133 See Applicability and Best Practices, supra note 9, at 33–34, Walter B. Stahr, Discovery Under 28 U.S.C. § 1782 for Foreign and International Proceedings, 30 VA. J. INT’L L. 597, 620–21 (1990) (presuming applicability of § 1782 to commercial arbitration and suggesting that discretion should be exercised to decline requests for assistance in connection with international tribunals in the United States). We have found only two 1782 applications for assistance relating to arbitrations seated in the United States but with international aspects. In each of these cases the U.S. courts decided that § 1782 does not cover private arbitration and declined to address the issue of whether it applies to arbitrations conducted in the U.S. See GUPC, supra note 113; Dubey, supra note 2. In Grupo, neither the parties nor arbitrators were U.S. citizens, the dispute concerned a construction project in Panama, and the substantive law was Panamanian. In Dubey, while most of the parties to the arbitration were U.S. citizens or corporations and the arbitration was under the auspices of the AAA, the dispute was conducted pursuant to its “International Dispute Resolution Procedures.”
134 Applicability and Best Practices, supra note 9, at 35.
135 NBC, supra note 2, at 190–191 (quoting Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995)).
The essentialist approach to arbitration has been embraced in recent decisions of the Supreme Court. For instance, in *Hall Street Associates, LLC v. Mattel, Inc*, the Court refused to enforce an arbitration agreement that would expand the scope of judicial review of an arbitration award beyond the limited scope specified in the FAA reasoning that limited post-arbitration review was needed “to maintain arbitration’s essential virtue of resolving disputes straightaway.” Similarly, the court has refused to allow either arbitrators or state law to provide for class actions in arbitration in cases where the arbitration agreement is silent on the ground that this would change the nature of arbitration as envisaged by the FAA.

The fundamental objection to the essentialist approach is that arbitration can mean different things to different people and at different times. Private parties may prefer to deviate from the classical model of arbitration, and if they express that preference in a formal agreement it is not obvious how their interests are served by having their wishes thwarted. The essentialist perspective also leaves no room for considering whether there is a public interest in facilitating these kinds of deviations from the classical model of arbitration.

This brings us to a leading alternative to the essentialist approach, the contractarian approach. This approach places great weight on the widely recognized policy in favor of enforcing privately negotiated arbitration agreements. Prior to the recent set of Supreme Court decisions favoring the essentialist approach, most circuits held that the policy of giving effect to private agreements should take precedence over even the policy of encouraging efficient and speedy dispute resolution. Based on this policy consideration, the contractarian approach dictates that the critical determinant of whether to provide discovery in aid of arbitration is the agreement between the parties—§ 1782 discovery should be permitted if but only if the arbitration agreement, properly interpreted, provides for it. This approach


137 See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (holding where arbitration agreement is silent arbitrators may not authorize a class action because of the extent to which it would change the nature of arbitration); *AT&T Mobility v. Concepcion*, 563 U.S. 321 (2011) (holding state law may not require class action arbitration because it is not a feature of arbitration as envisioned by the FAA) [hereinafter *Concepcion*].

138 In *NBC*, supra note 2, at 191 and n.8, Judge Cabranes adverted to the possibility of parties making provision for discovery in their arbitration agreement but did not offer any way of giving effect to such an agreement in the case of a tribunal sitting overseas.

139 See, e.g., *Hall Street*, supra note 137, 587–88 (refusing to enforce an agreement to expand judicial review because of “arbitration’s essential virtue of resolving disputes straightaway” and stating that the contrary result would “bring arbitration theory to grief in post arbitration process”) (internal citations and quotations omitted); *Concepcion*, supra note 138.

140 See, e.g., *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 410 (3d Cir. 2004) (“Although efficiency is certainly an objective of parties who favor arbitration over litigation . . . efficiency is not the principle goal of the FAA. Rather, the central purpose of the FAA is to give effect to private agreements.”); *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) (“When, as here, the parties agree contractually to subject an arbitration award to expanded judicial review, federal arbitration policy demands that the court conduct its review according to the terms of the arbitration contract. And if substantial evidence and error of law review seems less efficient than the normal scope of arbitration review, that should not cause much pause.”) (citations omitted); *Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993 (5th Cir. 1995) (“[T]he parties contractually agreed to permit expanded review of the arbitration award by the federal courts . . . Such a contractual modification is acceptable because, as the Supreme Court has emphasized, arbitration is a creature of contract.”)

141 See Applicability and Best Practices, supra note 8, at 30–32, 35–36 (proposing that § 1782 applications only be allowed by the parties with the approval of the arbitrators relying in part on the idea that “arbitration is a consensual proceeding arising out of a contractual agreement”). See also Smit, supra note 124, at 9 (“[T]he rule in relation to international arbitral tribunals should be that American court
places a great deal of weight on the interpretation of the arbitration agreement. We leave it to others to address the roles that courts as opposed to arbitrators ought to play in this interpretive process and what techniques they should use.

Interestingly, it is unclear whether the contractarian approach supports the not-uncommon current practice of providing judicial assistance with discovery prior to the initiation of arbitration proceedings or without the approval of the tribunal. The cases in which these kinds of requests have been granted contain no indication that the arbitration agreement explicitly provides for this sort of assistance. Under the contractarian approach, when the arbitration agreement is silent assistance should only be provided if permitted by applicable institutional rules or procedural legislation incorporated by reference into the agreement. However, our sense is that those rules and statutes typically only provide for assistance at the request of—or at least with the input of—the arbitrators.\footnote{For instance, the most common set of guidelines on the issue are the IBA Rules on the Taking of Evidence in International Arbitration, which contemplate a post-initiation decision under supervision of the arbitrators. They provide, “The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.” IBA RULES, Art. 2(1).}

The contractarian approach has been endorsed by at least one court as well as prominent commentators such as Hans Smit and the New York City Bar Association.\footnote{\textit{Id}.} Nonetheless, we believe it has an important shortcoming: it gives effect to the private interest in enforcing arbitration agreements without regard to the implications for public interests.\footnote{\textit{Cf.} Kevin M. Clermont, \textit{Governing Law on Forum-selection Agreements}, 66 HASTINGS L.J. 643, 673 (2015) (stating that “[c]ertain [procedural] matters still remain beyond the control of the parties,” and explaining that determining the governing law for forum-selection agreements is one of them given its importance to sovereign interest).} Existing U.S. law makes it clear that there are situations in which public interests trump private interests in enforcing agreements about procedure. For instance, in \textit{Atlantic Marine Construction Co. v. U.S. Dist. Court for Western Dist. of Tex.}, the Court held that public interests must be considered in determining whether to give effect to a forum-selection clause.\footnote{134 S. Ct. 568, 581–82 (2013) (“In the typical case not involving a forum-selection clause, a district court considering a § 1404(a) motion . . . must evaluate both the convenience of the parties and various public-interest considerations . . . When parties agree to a forum-selection clause . . . a district court may consider arguments about public-interest factors only.”). \textit{See also} Matthew J. Sorensen, \textit{Enforcement of Forum-Selection Clauses in Federal Court After Atlantic Marine}, 82 FORDHAM L. REV. 2521, 2560 (2014) (“[U]nder \textit{Atlantic Marine} . . . [t]he presence of a valid forum-selection clause transforms the analysis because all private interests will weigh in favor of dismissal and only overwhelming public interests will prevent it.”).}

b. Discovery Assistance and a Public Interest Approach

So how are broader public interests affected by enforcement of arbitration agreements that provide for judicially assisted discovery? We believe that enforcement has potential effects, both direct...
and indirect, for at least four distinct sets of interests that are not spoken for by the parties to the arbitration agreement. Moreover, we do not regard these interests as “special” interests as that term often is used in the literature of public choice and elsewhere. Rather, we view them as among the most basic considerations that must be taken into account whenever a sound system of civil procedure is established, reformed, or operationalized.

1. Third parties who have not assented to the arbitration agreement—As previously discussed, the majority of requests for assistance from U.S. courts seek information from persons who are not parties to the arbitration agreement. U.S. policy favors the enforcement of arbitration agreements, even in the international context. And the parties to an agreement have broad authority to contract over the terms of their proceedings. But they do not have authority to waive or diminish the rights of third parties who are not contractually bound by the agreement and whose interests have not been considered. Therefore, although the parties have authority to decide whether they will participate in third-party discovery, they do not have authority to impose the costs of that judicial process upon a third party without independent review.

2. Consumers of U.S. Judicial Services—Next, there are the interests of non-parties who might use, rely on, or benefit from the work of the U.S. courts. They are affected to the extent that those courts are burdened with responding to additional requests for assistance in disputes at a time of budget scarcity. Rather than reducing the burden of U.S. courts, by siphoning disputes to an alternative system, arbitration combined with the possibility of requests for assistance under § 1782 may increase the burden. This burden may manifest not only as docket-clogging that results in increased delays, but also as increased costs to litigants in the form of filing fees or taxes borne by U.S. taxpayers.

Judicially-supervised discovery in support of arbitration does not generate the same kinds of benefits that flow from other forms of judicially-supervised discovery. Although information exchange under the Federal Rules is not public, materials obtained through discovery must be filed with the court “when they are used in the proceeding or the court orders filing.” Of course, a party may seek to place materials under seal or to secure confidentiality in some other form; but the general understanding is that information obtained through discovery will inform the parties’ submissions to the court, educate the court about the dispute, and provide the factual predicate for the application of law in the court’s decision making process. This sequential process of information exchange between the parties, information-sharing with the court, and information-consideration by the judge serves the public’s interests in legal adaptation and doctrinal uniformity. Arbitration erects barriers to the flow of information: the parties wish to maintain the secrecy of information, proceedings are private, and decisions may not be publicly available.

Litigation ordinarily serves as a public good that replenishes and refines the base of law and information available to consumers, citizens, and regulators, but litigation in support of private arbitration

serves none of these purposes unless the information is made available on terms that are comparable to those in litigated suits.\textsuperscript{150}

We recognize, however, that the consumers of U.S. judicial services may derive offsetting benefits from expanded access to § 1782 in international arbitration. The mere fact that a dispute is being resolved by a foreign or international tribunal does not mean that consumers of U.S. judicial services (beyond the immediate parties to the dispute) have no interest in having those private disputes resolved effectively and efficiently. The prospect of effective and efficient dispute resolution—our shorthand for a mode of dispute resolution that furthers the private interests of the participants as well as public interests—tends, among other things, to encourage mutually beneficial dealings among parties.\textsuperscript{151} In an increasingly interdependent world, even if the parties to the dispute are ostensibly foreign nationals, their shareholders or creditors or employees or suppliers or customers might be consumers of U.S. judicial services who will benefit, at least prospectively, from effective dispute resolution. For all these reasons, there are many proceedings before foreign or international arbitral tribunals in which users or beneficiaries of the U.S. court system might have a stake. The public interest tends toward permitting U.S. courts to use § 1782 to enhance the effectiveness of those proceedings.\textsuperscript{152}

Users of the U.S. courts might also benefit indirectly from enhancing the effectiveness of foreign or international proceedings. First, those enhancements might discourage people from bringing disputes in which U.S. stakeholders have no interest to U.S. courts. Second, providing assistance to foreign or international tribunals might encourage them to provide reciprocal assistance to U.S. courts.\textsuperscript{153} Arguably, inducing foreign courts to respond in kind to the provision of discovery assistance by U.S. courts was one rationale behind the 1964 amendments to § 1782.\textsuperscript{154} However, the principle of reciprocity has limited

\textsuperscript{150} See, e.g., Del. Coal. For Open Gov’t, Inc. v. Strine, 733 F.3d 510 (3d Cir. 2013), cert. denied, 134 S. Ct. 1551 (2014) (invalidating on First Amendment grounds Delaware statute permitting state judges to hold closed-door arbitrations on a fee-for-service basis in the publicly-funded courthouse).

\textsuperscript{151} The availability of § 1782 discovery may induce socially desirable behavior on the part of firms that know they may be compelled to produce documents and witnesses before a foreign arbitral tribunal. However, to the extent the targets of § 1782 requests are third parties, this \textit{ex ante} effect may be diminished.

\textsuperscript{152} Of course, there will be imperfect overlap between the individuals who benefit from the effective and efficient resolution of commercial disputes before foreign or international arbitral tribunals—such as shareholders—and those who bear the burden of increased court costs due to § 1782 applications.

\textsuperscript{153} For judicial recognition of this rationale, see \textit{In re Court of the Comm’r of Patents for the Republic of S. Afr.}, 88 F.R.D. 75, 77 (E.D. Pa. 1980) (noting “section 1782 was amended in 1964 in order to improve practices of international cooperation in litigation,” and that “Congress expects the district courts to grant requests that will spur reciprocity of cooperation”) (internal quotations omitted); Application for an Order for Judicial Assistance in a Foreign Proceeding in High Court of Justice, Chancery Div., Eng., 147 F.R.D. 223, 226 (C.D. Cal. 1993) (stating that “may invite reciprocation by foreign courts when the situation is reversed and our courts seek similar assistance in a distant forum”).

\textsuperscript{154} There is one stray comment about prompting foreign courts to respond in kind. \textit{See To Improve Judicial Procedures For Serving Documents, Obtaining Evidence Anc Proving Documents In Litigation With International Aspects: Hearing on H.R. 7031 before the H. Comm. on the Judiciary}, 88th Cong. 19-20 (1963) (statement of Harry LeRoy Jones, Dir., Comm’n on Int’l Rules of Judicial Proc.) (“The present section has been deemed insufficient because it limits assistance . . . The revision will cure these deficiencies. It will emphasize to foreign Courts the availability of our reciprocity when letters rogatory to take testimony are sent to their courts or when we seek to take testimony by deposition.”). Most of the legislative history, however, suggests the drafters initially thought their work would drive statutory change in other countries, or lead to treaty formation. \textit{To Amend the Act of September, 2, 1958, to Establish a Commission and Advisory Committee on International Rules of Judicial Procedure: Hearing on H.R. 8650 and H.R. 8832 Before the H. Comm. on the Judiciary}, 88th Cong. 10 (1963) (statement of
relevance to private arbitral tribunals. Even if discovery in aid of private arbitration could motivate reforms abroad.155 Yet this prospect can cut both ways: foreign governments may seek to counteract or discourage discovery ordered by U.S. courts.156 On balance, with respect to § 1782, there are reasons to be skeptical about the prospects for spurring foreign developments that will benefit U.S. litigants.157

3. Integrity of U.S. judicial proceedings—The public overall has an interest in maintaining the integrity of proceedings before U.S. courts. These interests could conceivably be undermined if U.S. courts are asked to assist in foreign or international proceedings that are abusive or tainted by corruption or bias. Such cases will presumably be rare, especially when reputable arbitrators or arbitral institutions are involved. (We reject the proposition that proceedings in which discovery is not permitted necessarily lack integrity.).158

Section 1782 might also work to undermine the integrity of U.S. proceedings by allowing parties to circumvent limitations on discovery that would otherwise be imposed by U.S. courts. One such limitation is the limitation on pre-filing discovery. U.S. law significantly limits the availability of pre-filing discovery; discovery is available under Federal Rule 27 to perpetuate testimony, but not to uncover evidence to support the filing of a lawsuit. Can information obtained through § 1782 subsequently be used to help file a lawsuit in the U.S.? Does it matter whether that was the party’s original intent—and, relatedly, how should a district court discern such intent?159 Although we may agree that greater

Harry LeRoy Jones, Dir., Comm’n on Int’l Rules of Judicial Proc.) (“The program will be completed in two stages. The first will consist of the gathering of information on the law, procedure and practice of foreign countries. The second will consist of efforts to bring about the harmonization of the foreign law and practice with our own, either by way of inducing the foreign country unilaterally to change its law to accord with ours, or by the drafting of procedural treaties for negotiation by the Secretary of State.”)

155 Contracting for Procedure, supra note 7, at 554 (“Public law may respond to private procedural orderings by addressing deficiencies in those arrangements, or it may ratify private orderings through legislative codification or the adoption of judicial standards.”).

156 One illustration are the “blocking statutes” passed in many Latin American countries as a response to forum non conveniens dismissals. M. Ryan Casey & Barrett Ristroph, Boomerang Litigation: How Convenient Is Forum Non Conveniens in Transnational Litigation?, 4 B.Y.U. INT’L L. & MGMT. REV. 21, 29 (2007) (“Blocking statutes send the message to U.S. courts that if transnational cases are dismissed, the foreign national-plaintiff may never have relief.”).

157 Indeed, in Intel itself, the European Commission explicitly opposed the introduction of the sought-after discovery into the European proceedings. The lower on remand court cited this opposition in denying the § 1782 application on discretionary grounds. Advanced Micro Devices v. Intel Corp., 2004 WL 2282320, at *2 (N.D. Cal. Oct. 4, 2004) (“[T]he EC is not receptive to judicial assistance in this case . . . it is significant to this Court that the Supreme Court cited to the EC’s two amicus curiae briefs to support the finding that the EC ‘does not need or want’ this Court’s assistance in obtaining the documents AMD seeks.”). This anti-U.S. discovery view is reflected in commentary about arbitration from “across the pond.” See Peter Ashford, Document Production in International Arbitration: A Critique from “Across the Pond”, 10 LOY. U. CHI. INT’L L. & MGMT. REV. 1, 4 (2012) (“[T]he question . . . of whether the common law and the US-style in particular produces a better standard or quality of justice has been . . . answered by the international arbitration community--and not in a manner that would please proponents of US-style discovery.”).


159 See Glock v. Glock, 797 F.3d 1002 (11th Cir. 2015) (finding there is no statutory bar on use of documents obtained under § 1782 in U.S. civil litigation). The court noted that the district court hearing the § 1782 application has the discretion to reject the application if it believes that the applicant “is
opportunities for pre-filing discovery should be available to U.S. litigants given changes in pleading and sanction rules, we believe that a process of reform should be direct and not in the first instance directed by the interest of parties to private arbitration.

The cases in which § 1782 is being used for asset discovery raise similar concerns. The pre-award cases circumvent limitations on the availability of pre-award asset discovery. The post-award cases circumvent the procedures set out in the New York Convention and the Federal Arbitration Act for enforcing an award.

Finally, parties to international tribunal may face different rules of privilege than those applicable in the United States. However, U.S. courts ought to hesitate before undermining privacy interests that are legitimate and indeed traditional under U.S. rules of evidence.160

4. Providers of Legal Services in the United States—Another set of interests to be considered are those of providers of legal services located in the U.S. The professional interests of lawyers do not inevitably align with those of the legal system as a whole, a lesson that has been slowly learned in the context of complex litigation and class action practice—and currently with respect to the rules of discovery. Nonetheless, legal services represent an important component of the U.S. economy, employing roughly 750,000 workers and generating the highest labor productivity among all U.S. professional service sectors.161 The public interest includes the interests of the people behind those figures.

U.S. legal service providers benefit to the extent that they are retained in connection with § 1782 applications and any resulting discovery proceedings. U.S. firms have enjoyed a dominant position worldwide for legal services connected with resolution of transnational disputes, but that position has been challenged by the increasing attractiveness of foreign arbitration as a mechanism for dispute resolution.162 An expansive interpretation of § 1782 allows U.S. providers to benefit from foreign arbitrations in which they might not otherwise be involved.

Although U.S. legal service providers are likely to benefit if disputing parties have greater access to § 1782, they would probably benefit even more if those parties resolved their disputes through domestic—i.e. U.S.-seated—as opposed to foreign arbitration. This means that U.S. firms have competing interests. On the one hand, they ought to favor maximal judicial assistance to foreign or international arbitrations in order to maximize revenue from § 1782 applications. On the other hand, they have an interest in limiting the scope of § 1782 in order to encourage parties to resolve their disputes in domestic arbitration. A compromise might be to ensure that U.S. courts provide no more assistance in connection with proceedings before foreign or international tribunals than they do for domestic arbitration proceedings. Given the current limitations of § 7 of the FAA, this implies that assistance should only be available to the arbitrators and should not be available prior to initiation of arbitration proceedings, regardless of the terms of the arbitration agreement. In some circuits, maintaining parity with domestic arbitration also means that assistance should not be available against non-parties to the arbitration

agreement. Naturally, under this approach changes in the law governing domestic arbitrations will require corresponding changes in practices with respect to foreign or international proceedings.163

5. Implementation of the Public Interest Approach

We believe that implementation of the “public interest” approach is best conducted by the district courts, on a case-by-case basis, subject to appellate review and monitoring by the Administrative Office of the U.S. courts. For the moment, any burden on the American courts does not seem to justify a blanket bar on permitting § 1782 to be used to obtain assistance with private foreign arbitrations, and there are offsetting benefits to U.S. legal service providers. At present, the volume of requests is too low to create a significant burden on the U.S. courts. We acknowledge, however, that the situation could change if the courts were to send a clear signal welcoming these kinds of applications. It is also important to note the circumvention risk. Even if the United States adopted a blanket prohibition on discovery in aid of foreign private arbitral tribunals, parties might get around it by strategically initiating proceedings before public tribunals. The course of events in Lauritzen suggests that parties can successfully use a related public proceeding—such as the Panamanian attachment proceeding—as the basis for successfully claiming their request for assistance relates to the public proceeding instead of a private arbitration.

The other policy concerns raised by these kinds of applications can be addressed on a case-by-case basis. Specifically, we believe that district courts should exercise their discretion under § 1782 to ensure that assistance is only granted when the following conditions are satisfied.

First, the agreement, properly interpreted, must permit judicially assisted discovery—to dispense with this requirement would undermine the well-recognized policy in favor of enforcing arbitration agreements that provide for cheap, fast and simple dispute resolution. In many cases we suspect that the best interpretation of the arbitration agreement will be that judicially compelled discovery can only be sought with the approval of the arbitrators. The exception to this rule would come into play when the arbitrator itself seeks discovery; in that situation, the arbitrator would be making the argument that discovery is essential to the integrity of the arbitral proceeding, and that institutional argument, in appropriate cases, could outweigh the parties’ autonomy interest as reflected in their ex ante agreements.

Second, consistent with the overriding principle of proportionality that now is intended to inform U.S. discovery practice, our view is that third-party discovery ought to be permitted only if the court determines that the costs of such disclosure are outweighed by the benefits. Courts also should consider whether, despite the American rule on attorney’s fees, an individual’s costs of challenging a request for discovery ought to be recoverable, even if not presumptively so, as they sometimes are in domestic proceedings.164

Third, district courts should consider whether the requested assistance would compromise the integrity of the U.S. courts by circumventing limitations on discovery imposed in U.S. proceedings. In order to ascertain whether a party is attempting to circumvent limitations on pre-filing discovery in U.S. litigation, district courts should require parties to provide more information about the uses to which information will be put. They should also explicitly consider whether it is appropriate to permit either pre-award or post-award pre-judgment asset discovery that would not be available to the parties, under either U.S. or foreign law, without resort to § 1782. Moreover, serious attention ought to be given to whether the parties are seeking to maintain under seal information that would not typically be regarded as deserving of confidentiality in a U.S. court.

163 In Intel the Court rejected the idea that § 1782 discovery should only be available if comparable discovery is available under domestic law citing the difficulty of determining whether a foreign proceeding has a direct analogue in domestic law. Intel, supra note 4, at 263. We do not anticipate this being a significant obstacle in relation to foreign or international proceedings whose analogues are governed by the FAA.

Our research suggests that some district courts would have to deviate from their current practices in order to implement these requirements.

6. Conclusion

The extent to which private parties should be able to control how the U.S. courts assist in resolving their dispute about access to information pertinent to an arbitral proceeding requires attention to both private and public interests. This especially true in settings where the text and legislative history of the relevant statutory provisions fail to provide conclusive guidance. In the case of 28 U.S.C. § 1782, the text and legislative history leave doubt about how district courts ought to treat requests for judicial assistance with discovery in aid of proceedings before private foreign or international tribunals. We believe that principles derived from analysis of the relevant public and private interests can be synthesized into a workable interpretation of § 1782. The provision should be interpreted to permit but not require assistance to private foreign or international tribunals. A request for assistance should only be granted if it would be consistent with the intentions of the parties as expressed in their agreement, properly interpreted; if it will not place an undue burden on a non-party; and if it will not compromise the integrity of the U.S. courts. In addition, the effects of such requests must be monitored continually to ensure against unintended and adverse effects on the essential public goods provided by the U.S. courts.
### APPENDIX

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<td>La Comision Ejecutiva v. Nejapa Corp.</td>
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<td>OJSC Ukrnafta v. Carpatsky Petroleum</td>
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<td>In re Operadora of Mexico</td>
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<td>626 F.Supp.2d 882</td>
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<td>La Comision Ejecutiva v. El Paso Corp.</td>
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<td>In re Babcock Borsig</td>
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<td>In re Hallmark Capital</td>
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<td>In re Roz Trading</td>
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* Cases available via Westlaw have either a Westlaw citation, or a Federal Reporter citation (if available) in this column. Cases available only via Bloomberg’s docket search, or via PACER, have a docket number.

** Note: In this case, the district court assumed without deciding that the sought-after discovery would be used in connection with a foreign proceeding, although noting reasons to believe the information actually was intended to be used in connection with ongoing U.S. confirmation proceedings. Order on Motion for Miscellaneous Relief at 8, In re Harbour Victoria Inv. Holdings, No. 1:15-mc-00127-AJN (S.D.N.Y. June 29, 2015), ECF No. 23.