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**Class Arbitration in the United States:
What Foreign Counsel Should Know**

William H Baker

**US Discovery in Aid of Foreign or International Proceedings:
the Rise of 28 USC, s 1782**

Jane Wessel and Peter J Eyre

The Energy Charter Treaty – Awards Rendered

Kaj Hobér

The IBA Conflicts Guidelines – Who’s Using Them and How?

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**The Interaction Between Arbitration and Mediation:
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Renate Dendorfer and Jeremy Lack

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Ramon Mullerat and Juliet Blanch

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CONTENTS

Chairs' Message	1
Editor's Note	3
Andrew Foyle	
Class Arbitration in the United States: What Foreign Counsel Should Know	4
William H Baker	
US Discovery in Aid of Foreign or International Proceedings: the Rise of 28 USC, s 1782	23
Jane Wessel and Peter J Eyre	
The Energy Charter Treaty – Awards Rendered	36
Kaj Hobér	
The IBA Conflicts Guidelines – Who's Using Them and How?	58
Judith Gill	
The Interaction Between Arbitration and Mediation: Vision v Reality	73
Renate Dendorfer and Jeremy Lack	
The Liability of Arbitrators: a Survey of Current Practice	99
Ramon Mullerat and Juliet Blanch	
Books	124
General Index	126
Guidelines for Contributors	inside back cover

US Discovery in Aid of Foreign or International Proceedings: the Rise of 28 USC, s 1782

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With the dramatic growth of disputes involving companies doing business around the world, a United States statute, 28 USC, s 1782, which was only rarely invoked until recently, provides a powerful discovery tool. The provision allows parties involved in disputes outside the United States to obtain documents and testimonial evidence from companies or individuals within the United States. US federal courts have broad discretion to order this discovery, provided the application meets certain statutory threshold requirements. Recent developments, including a United States Supreme Court decision, have effectively increased the availability and utility of s 1782 as an important tool for parties engaged in international disputes.

Introduction

For over one hundred and fifty years, federal courts in the United States have had the authority to provide discovery assistance in the United States to parties involved in non-US disputes.¹ Federal courts had provided this discovery assistance sparingly and inconsistently. Then, in 2004, the United States Supreme Court rendered a decision, *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241 (2004), which has led to renewed interest in this statutory tool.

¹ Act of 2 March 1855, ch 140, s 2, 10 Stat 630.

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In large part, this reinvigoration has occurred because the Supreme Court's holding gave full force and effect to the plain language and broad purposes of 28 USC, s 1782; whereas, previously, some federal courts had appeared reluctant to apply the statutory provision according to its terms. In the post-*Intel* world, discovery under 28 USC, s 1782 seems to be easier to obtain and this, coupled with the enormous growth of international business (and hence of international disputes), explains the manifest heightened interest in this powerful statutory provision. In the short time since *Intel*, there have been 23 applications for assistance pursuant to s 1782, and relief has been granted, at least in part, in 17 of those cases.²

Although several fundamental issues of interpretation have been resolved by *Intel* and its progeny, several areas of uncertainty linger. The goal of this article is to explain the current state of affairs regarding s 1782 – in terms of both those issues that have been resolved and those where some uncertainty still remains.

The statute

Section 1782 of Title 28 of the United States Code, 'Assistance to foreign and international tribunals and to litigants before such tribunals', is intended as a vehicle for obtaining assistance from United States federal courts in gathering evidence from domestic entities and persons for use in foreign and international tribunals. Section 1782(a) provides:

'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ... The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person ... 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.'³

² These data, which only encompass reported applications and decisions, were compiled by the authors on 16 February 2007, using a variety of research tools including Westlaw.

³ 28 USC, s 1782.

Intel's analytic framework

As detailed in *Intel*, s 1782 marks the culmination of the US Congress' progressive expansion of the statutory duty of federal district courts to assist 'in obtaining documentary and other tangible evidence' for use in proceedings before a 'foreign or international tribunal'.⁴ Courts and commentators have widely recognised that the changes to the statute have 'allowed more liberal discovery'.⁵

Prior to *Intel*, there was a division among the federal courts about whether or not they could provide assistance to parties involved in foreign proceedings only if the foreign tribunal itself would allow such discovery. Because most foreign tribunals tend to limit discovery (particularly in relation to broad discovery in the United States), this meant that s 1782 was rarely used in aid of foreign proceedings. The Supreme Court agreed to hear *Intel* in order to resolve this split among the lower courts. After considering the plain language of the provision and its legislative history, the Supreme Court held that s 1782 did not impose any sort of 'foreign-discoverability requirement'.⁶ Thus, *Intel* opened the door to accessing documents or receiving deposition testimony from US residents, in aid of foreign proceedings, irrespective of the scope of discovery permitted in the foreign tribunal.

Probably the most valuable aspect of the *Intel* decision is the analytic framework it set forth for courts to use when faced with applications for relief pursuant to s 1782. Whatever implied limitations the federal courts had been reading into this section prior to 2004 were swept away by the Supreme Court's ruling in *Intel*,⁷ which held that the plain language of this provision controls.

Accordingly, there are two basic enquiries associated with a s 1782 application. The first is whether the prerequisites for invoking the district court's assistance have been met. The second concerns the extent and manner of assistance the court might provide. One court has put this analytic process in terms of two sequential questions: (1) is the court *authorised* to grant the request? and (2) if so, *should* the court exercise its discretion to grant the request?⁸

4 *Intel*, 542 US at 248-49; 28 USC, s 1782. Most recently, the statute was amended in 1964.

5 See, eg, *Fleischmann v McDonald's Corp*, No 06-4485, 2006 WL 3530582, at *3 (ND Ill Dec 6, 2006) (internal citations omitted); Roger J Johns and Anne Keaty, *The New and Improved Section 1782: Supercharging Federal District Court Discovery Assistance to Foreign and International Tribunals*, 29 Am J Trial Advoc 649 (2006).

6 *Intel*, 542 US at 253.

7 542 US 241.

8 *In re Application of Grupo Quimma, SA*, No Misc 8-85, 2005 WL 937486, at *2 (SDNY Apr 22, 2005).

Threshold requirements

To satisfy the threshold requirements of s 1782, an applicant must simply show:

- (1) The person from whom discovery is sought 'resides' (or is found) in the district of the district court to which the application is made;
- (2) The application is made by a foreign or international tribunal or 'any interested person';
- (3) The discovery is 'for use' in a foreign or international proceeding; and
- (4) The proceeding is before a foreign or international 'tribunal'.⁹

Location or residence

Section 1782 requires that the 'person' from whom discovery is sought 'reside' or 'be found' in the district where the court sits.¹⁰ The term 'person' in s 1782 applies to individuals, corporations, and other entities.¹¹ 'District' refers to a geographic region in which a particular federal court may properly exercise jurisdiction. As long as the target of the discovery request can be found in the district of the court where the application is filed, this requirement will be satisfied.¹² There is no requirement that presence in the district be permanent or continuous.¹³ For instance, the US Court of Appeals for the Second Circuit has indicated that an individual who lives and works in a foreign country must provide deposition testimony, pursuant to s 1782, if he or she has been served while temporarily in the district.¹⁴

Interested person

The Supreme Court has expressly held that any entity with 'participation rights' in a foreign proceeding has a 'reasonable interest in obtaining [judicial] assistance' under s 1782 and therefore qualifies as an *interested*

9 28 USC, s 1782; see also *In re Application of the Procter & Gamble Co*, 334 F. Supp 2d 1112, 1113 (ED Wis 2004); *In re Application of Guy*, No M 19-96, 2004 WL 1857580, at *1 (SDNY Aug 19, 2004). Note that some courts treat the 'for use' and 'tribunal' elements as one enquiry, whereas others assess them separately. Compare *Guy*, 2004 WL 1857580, at *1 and *Fleischmann*, 2006 WL 3530582, at *3 n 1.

10 28 USC, s 1782.

11 See, eg, *Procter & Gamble*, 334 F Supp 2d 1112; *Intel*, 542 US 241.

12 See, eg, *In re Matter of the Application of Oxus Gold plc*, Misc No 06-82, 2006 WL 2927615, at * 5 (DNJ Oct 10, 2006).

13 *Id.*

14 See *Edelman v Taittinger*, 295 F 3d 171, 180 (2d Cir 2002).

person ‘within any fair construction of that term’.¹⁵ That is, any party to a foreign or international proceeding clearly meets this threshold requirement and can seek discovery pursuant to s 1782.

For use

The statute requires that the documents or deposition testimony received through a s 1782 application must be ‘for use’ in the foreign proceeding. However, after *Intel*, no federal court has held that the discovery sought is available only if it will definitely be used in the foreign proceeding. Instead, courts have generally interpreted the ‘for use’ requirement quite broadly. For example, in *Fleischmann v McDonald’s Corp*, No 06-4485, 2006 WL 3530582, at *7 (ND Ill Dec 6, 2006), the court held that s 1782’s specific reference to the Federal Rules of Civil Procedure suggests that courts should grant s 1782 applications whenever such discovery ‘is relevant to the claim or defense of any party, or for a good cause’ or if it relates to ‘any matter relevant to the subject matter involved in the foreign action’. In *Fleischmann*, the court specifically held that an applicant need not show that the discovery is reasonably calculated to lead to admissible evidence in the foreign proceeding.¹⁶ Therefore, it appears that an applicant for discovery pursuant to s 1782 need only demonstrate that the discovery sought is relevant – even if it may not be admissible – to meet this requirement.¹⁷

Tribunal

In contrast to an earlier version of the statute, which limited assistance to a foreign ‘judicial proceeding’, 28 USC s 1782 currently extends to proceedings before a ‘tribunal’.¹⁸ No limitation appears in the language of the statute as to the type of ‘tribunal’ that is within the scope of s 1782. Congress understood this change to broaden the reach of judicial assistance to all bodies with adjudicatory functions.¹⁹ The Supreme Court noted that this

15 *Intel*, 542 US at 256 (internal citations omitted).

16 *Fleischmann*, 2006 WL 3530582, at *7 (internal citations omitted). To require such a showing would arguably run foul of *Intel*’s holding that s 1782 contains no foreign discoverability requirement.

17 A different framework is applied in the discretionary part of the *Intel* analysis when considering the receptivity of the foreign or international tribunal to the information that is sought in the s 1782 application. See *infra*.

18 See Act of 25 June 1928, Pub L No 80-773, ch 646; see generally Okezie Chukwumerije, *Int’l Jud Assistance: Revitalizing Section 1782*, 37 Geo Wash Int’l L Rev 649 (2005). Section 1782 was most recently amended in 1964.

19 See *Intel*, 542 US at 258; S Rep No 88-1580, at 7 (1964).

revision reflects ‘Congress’ recognition that judicial assistance would be available “whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature”.²⁰ One of the primary drafters of the current version of s 1782, Professor Hans Smit, has confirmed what appears in the legislative report accompanying the revised statute: ‘The word “tribunal” is used to make it clear that assistance is not confined to proceedings before conventional courts.’²¹

Federal courts have regularly found that foreign courts are ‘tribunals’ for the purposes of s 1782.²² In *Intel*, the Supreme Court found that the European Commission is a ‘tribunal’.²³ It reached this conclusion because the European Commission acts as the ‘first-instance decisionmaker’ in the antitrust context.²⁴

Recently, federal courts have had occasion to consider, in light of the approach taken by the *Intel* court, whether arbitral tribunals are ‘tribunals’ for purposes of s 1782. There is no dispute that arbitral tribunals, which have been established by government entities (such as ICSID arbitrations), are ‘tribunals’ within the meaning of s 1782. This understanding is confirmed by two cases decided before *Intel*.²⁵ Moreover, in *In re Matter of the Application of Oxus Gold plc*, Misc No 06-82, 2006 WL 2927615 (DNJ Oct 10, 2006), a federal magistrate judge in New Jersey held that an arbitration tribunal convened pursuant to the dispute resolution provisions of a bilateral investment treaty under UNCITRAL Rules is a ‘tribunal’ as that term is used in s 1782.²⁶ On 2 April 2007, this decision was confirmed *in toto* by the Chief Judge of the US District Court for the District of New Jersey.²⁷

On 19 December 2006, the US District Court for the Northern District of Georgia ruled that a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic

20 *Intel*, 542 US at 259 (citing S Rep No 1580, at 9) (emphasis omitted).

21 S Rep No 88-1580, at 7; see also Hans Smit, *Am Jud Assistance to Int’l Arb Tribunals*, 8 Am Rev Int’l Arb 153, 156 (1997).

22 See, eg, *In re Application of Imanagement Services Ltd*, No 05-2311, 2006 WL 547949, at *2 (D Conn Mar 3, 2006).

23 *Intel*, 542 US at 258. See also *In re Application of Microsoft Corp*, 428 F Supp 2d 188, 193 (SDNY 2006) (following *Intel* and concluding that the European Commission is a tribunal).

24 See *Intel*, 542 US at 258.

25 See *National Broad Co, Inc v Bear Stearns & Co, Inc*, 165 F 3d 184 (2d Cir 1999); *Republic of Kazakhstan v Biedermann Int’l*, 168 F 3d 880 (5th Cir 1999).

26 See generally Jane Wessel and Peter J Eyre, *US Discovery in Aid of Non-US Arbitration Proceedings: In re Matter of the Application of Oxus Gold plc*, 17 World Arb & Mediation Rep 381, 399 (2006).

27 *Oxus Gold plc*, Misc No 06-82, 2007 WL 1037387 (DNJ 2 April 2007).

Chamber in Vienna also qualifies as a ‘tribunal’ for purposes of s 1782.²⁸ The court rejected the Second Circuit’s pre-*Intel* reasoning in *National Broadcasting*, which had held that s 1782 did not apply to private commercial arbitration.²⁹ By contrast, the court in *In Re Application of Roz Trading Ltd*, concluded that *Intel* had rejected categorical limitations on the scope of s 1782 and recognised the breadth of the term ‘tribunal’.³⁰ The *Roz* court therefore found that the interpretation of s 1782 should begin and end with the language of the statute (including the meaning of ‘tribunal’), because the relevant statutory language is ‘unambiguous’.³¹ The *Roz* court concluded that the plain meaning of the term ‘tribunal’ clearly encompasses private commercial arbitration; therefore, this threshold requirement was met.

The *Roz* court found that it was unnecessary to examine the legislative history of s 1782, because the relevant language was unambiguous.³² Nevertheless, the court analysed the legislative history and concluded that it supported an interpretation of ‘tribunal’ that encompasses private commercial arbitration.³³

The present statutory language has been in effect since 1964, when a significant revision took place. In recounting the history of s 1782 in *Intel*, the Supreme Court approvingly quoted Professor Hans Smit’s article (written one year after the revision) which 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’.³⁴ Given Hans Smit’s seminal role in the process leading to the 1964 revision of s 1782, his contemporaneous statement provides an especially strong indication of the understanding and intended scope of the statute to encompass ‘arbitral tribunals’, along with other tribunals.³⁵

28 *In re Application of Roz Trading Ltd*, CA No 1:06-02305, 2006 WL 3741078 (ND Ga Dec 19, 2006). Jane Wessel and Peter Eyre, as well as other Crowell & Moring attorneys, represented the successful applicant in *Roz Trading*. The respondent in *Roz Trading* appealed this ruling to the Eleventh Circuit Court of Appeals, but the Eleventh Circuit dismissed the appeal after finding that the District Court’s order as not final.

29 *Id* at *5.

30 *Id* at *6.

31 *Id* at *4.

32 *Id*.

33 *Id*.

34 *Intel*, 542 US at 258 (quoting Hans Smit, *Int’l Litig under the United States Code*, 65 Colum L Rev at 1026-27 (1965)) (emphasis added).

35 See Hans Smit, *Int’l Litig under the United States Code*, 65 Colum L Rev at 1026-27 (1965).

As one of the authors of this article recently suggested elsewhere,³⁶ there is no reason to believe that the US Congress intended to limit the availability of s 1782 discovery to certain types of arbitration. This is especially so where investment arbitration of the type involved in *Oxus Gold* – which was held to be within the ambit of s 1782 – did not yet exist at the time of the enactment of s 1782 in its present form and so cannot have been within the contemplation of Congress. International commercial arbitration, on the other hand, was well known at that time, and was within the scope of the language chosen by Congress.

Equitable considerations

If a federal court concludes that the applicant meets the threshold requirements, it must then determine whether it should exercise its discretion to order discovery. The Supreme Court, in *Intel*, set forth three non-exclusive considerations to guide courts in deciding whether to exercise their discretion:

- (1) Whether or not the person from whom discovery is sought is a participant in the foreign proceeding;
- (2) The nature of the foreign tribunal and whether the foreign tribunal would be receptive to US federal court judicial assistance; and
- (3) Whether the document request is unduly intrusive or burdensome.³⁷

Intel set forth this framework, but cautioned that discretion should be exercised in light of the overriding purposes of s 1782: ‘providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts’.³⁸ District courts have also considered other factors, including the timing of the application and the location of the documents sought, and those are considered below.³⁹

Party to the foreign proceeding

In *Intel*, the Supreme Court noted that if the person from whom discovery is sought is a participant in the foreign proceeding, ‘the need for [s 1782] aid

36 Jane Wessel, *A Tribunal by Any Other Name: US Discovery in Aid of Non-US Arbitration*, 2005 Int'l Arb L Rev 139 (2005).

37 *Intel*, 542 US at 264; see also *In re Application of Servicio Pan Americano de Proteccion, CA*, 354 F Supp 2d 269, 273 (SDNY 2004).

38 *Intel*, 542 US at 252; see also *Norex Petroleum Ltd v Chubb Ins Co of Canada*, 384 F Supp 2d 45, 48-49 (DDC 2006); *Servicio Pan Americano de Proteccion*, 354 F Supp 2d at 275.

39 See, eg, *Fleischmann*, 2006 WL 3530582, at *3; *Norex Petroleum*, 384 F Supp 2d at 46.

generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad'.⁴⁰ In such cases, the foreign tribunal has the ability to order the parties to the foreign proceeding to produce documents and make individuals available for depositions. Where the person from whom discovery is sought is not a party to the foreign proceedings, this factor will weigh in favour of the exercise of the court's discretion to grant s 1782 relief. But even where discovery is sought from a party to the foreign proceedings, courts have still granted relief pursuant to s 1782 if other factors indicate that this would be appropriate.⁴¹

Nature of the tribunal

In virtually every post-*Intel* case involving s 1782, the party opposing discovery has argued that the foreign tribunal would not be 'receptive' to any evidence produced pursuant to s 1782. According to this argument, any federal court assistance would be futile, because the foreign tribunal would not consider the evidence. More than any other factor set forth in *Intel*, this issue has been outcome-determinative. Among federal courts, the consensus is that s 1782 relief is appropriate unless the party opposing discovery presents authoritative and affirmative proof that the 'foreign tribunal would reject evidence obtained with the aid of [s 1782]'.⁴² The following quotation captures the approach taken by most courts in their analysis of this discretionary factor:

'Such [authoritative proof], as embodied in a forum country's judicial, executive or legislative declarations that *specifically address the use of evidence gathered under foreign procedures*, would provide helpful and appropriate guidance to a district court in the exercise of its discretion. Absent this type of clear directive ... a district court's ruling should be informed by section 1782's overarching interest in "providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." ... In the absence of such proof, "it is unwise – as well as in tension with the aims of section

40 *Intel*, 542 US at 264; see also *In re Application of Grupo Quimma, SA*, No Misc 8-85, 2005 WL 937486 (SDNY Apr 22, 2005) (exercising discretion to order discovery requested by applicant, because, in part, discovery was being sought from entities that were not participants in the foreign proceeding).

41 See, eg, *Procter & Gamble*, 334 F Supp 2d at 1114-15.

42 See, eg, *In re Application of Imanagement Serv, Ltd*, No Misc 05-89, 2005 WL 1959702, at *3 (EDNY Aug 16, 2005); *In re Application of Guy*, No M 19-96, 2004 WL 1857580, at *2 (SDNY Aug 19, 2004).

1782 – for district judges to try to glean the accepted practices and attitudes of other nations from what are likely to be conflicting, and perhaps, biased interpretations of foreign law.”⁴³

As noted above, the mere fact that the foreign tribunal itself provides for only limited discovery is an insufficient basis for rejecting a s 1782 application.⁴⁴

The European Commission, for instance, has made affirmative representations that it will not consider any evidence obtained through s 1782 applications. As a result, federal courts have generally refused to grant discovery assistance when the party seeking s 1782 relief is involved in proceedings before the European Commission. In the remand of *Intel* (in which the US District Court for the Northern District of California re-evaluated the s 1782 application in light of the Supreme Court’s guidance), the foreign tribunal itself explicitly stated that it would *reject* any documents obtained through s 1782, thus precluding the argument that the documents were being obtained for use in those proceedings.⁴⁵ Accordingly, the district court denied the application.⁴⁶

In *Schmitz v Bernstein Liebhard & Lifshitz*, 376 F 3d 79 (2d Cir 2004), the German Ministry of Justice explicitly requested that the district court deny petitioner’s s 1782 application on the grounds that production of *any* documents would compromise the ongoing criminal investigation in Germany and violate the rights of potential criminal defendants there. As a consequence, the application was denied.⁴⁷

In the absence of this kind of explicit indication of the foreign tribunal’s unwillingness to consider discovery obtained through the s 1782 process, federal district courts have not made any assumptions about whether the foreign tribunal would be receptive to discovery assistance.

43 *In re Application of Imanagement Serv, Ltd*, 2005 WL 1959702, at *3 (emphasis in original; internal citations omitted); see also *Grupo Qumma*, 2005 WL 937486, at *3; *Servicio Pan Americano de Proteccion*, 354 F Supp 2d at 275.

44 See, eg, *Intel*, 542 US at 260-61; *Servicio Pan Americano de Proteccion*, 354 F Supp 2d at 275.

45 See *Advanced Micro Devices, Inc v Intel Corp*, No CA 01-7033, 2004 WL 2282320, at *2 (ND Cal Oct 4, 2004).

46 *Id*; see also *In re Application of Microsoft Corp*, 428 F Supp 2d 188, 194 (SDNY 2006); *In re Application of Microsoft Corp*, No 06-10061, 2006 WL 1344091, at *4 (D Mass Apr 19, 2006).

47 *Schmitz*, 376 F 3d at 82-83.

Intrusiveness

In *Intel*, the Supreme Court held that ‘unduly intrusive or burdensome requests may be rejected or trimmed’.⁴⁸ This consideration has not served as a basis for rejecting a s 1782 application, but rather, courts have frequently ordered parties to modify discovery requests to make them less burdensome.⁴⁹

Location of documents

A distinction must be drawn between the location of the *person* from whom the discovery is sought and the location of the *discovery* that is sought. Since *Intel*, two cases have expressly addressed the situation where the parties from whom discovery is sought reside in the district, but the documents at issue are held outside the district. In *Norex Petroleum Ltd v Chubb Ins Co of Canada*, 384 F Supp 2d 45, 46 (DDC 2005), the district court denied the s 1782 application ‘where the documents at issue are held in a foreign country by the non-party’s foreign parent corporation’.⁵⁰ *Norex Petroleum* presents a fairly extreme fact situation – not only were the documents outside the country, but the party from whom discovery was sought was not even in control of the documents.

In re Application of Gemeinschaftspraxis Dr Med Schottdorf, No M19-88, 2006 WL 3844464 (SDNY Dec 29, 2006), the court rejected the suggestion that s 1782 assistance is inappropriate when documents are located outside the United States. Indeed, the court ordered the party from whom discovery was sought to produce documents, even though they were kept outside the United States. The court reached this decision because ‘[t]here is no such express restriction in the statute, and the [c]ourt is unwilling to engraft one in to it’.⁵¹ The *Schottdorf* court relied on *Intel* and found such a restriction ‘would be squarely at odds with the Supreme Court’s instruction that [s] 1782 should not be construed to include requirements that are not plainly provided for the text of the statute’.⁵²

The statute is silent on where documents must be located. It would seem to defeat the broad purpose of the statute to allow a party, with full control over documents, to avoid production simply because those documents are

48 *Intel*, 452 US at 265.

49 See, eg, *In re Matter of the Application of Oxus Gold plc*, Misc No 06-82, 2006 WL 2927615 (DNJ Oct 10, 2006).

50 *Norex Petroleum*, 384 F Supp 2d at 46.

51 *Schottdorf*, 2006 WL 3844464, at *5.

52 *Id.*

kept outside the district. Because s 1782 incorporates the Federal Rules of Civil Procedure, it is logical to insist that an entity from whom discovery is sought produce all documents in its ‘possession, custody or control’.⁵³ This approach is consistent with the purpose of s 1782, and federal courts already have experience managing this standard – this reduces inefficiency associated with crafting and administering a new standard.

Timing

In *Intel*, the Supreme Court reviewed the legislative history of s 1782 and determined that the foreign or international proceeding need not be ‘pending’ in order for federal courts to grant assistance.⁵⁴ During the 1964 revision of the statute, Congress deleted the requirement that a proceeding be pending,⁵⁵ and the Supreme Court held that a dispositive ruling only be ‘within reasonable contemplation’.⁵⁶ Indeed, in *Intel* itself, the European Commission was still conducting its investigation, yet the Supreme Court held that the timing of the s 1782 application was appropriate. The following quotation captures the dominant view on this issue:

‘In short, we reject the view, expressed in *In re Ishihara Chemical Co.*, that §1782 comes into play only when adjudicative proceedings are “pending” or “imminent.” See 251 F.3d, at 125 (proceeding must be “imminent – very likely to occur and very soon to occur” (internal quotation marks omitted)). Instead, we hold that §1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation. See *Crown Prosecution Serv. of United Kingdom*, 870 F.2d, at 691; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1155, and n. 9 (11th Cir. 1988); Smit, *International Litigation* 1026 (“It is not necessary ... for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.”).⁵⁷

53 See Fed R Civ P 34.

54 *Intel*, 542 US at 258-59.

55 *Id.*

56 *Id.*

57 *Id.*

Conclusion

Given the strategic advantage that s 1782 can provide to parties involved in disputes outside the United States, it is likely that this powerful discovery tool will attract significant attention in the coming months and years. Federal courts will be faced with applications raising new issues, including those mentioned in this article, that test the boundaries of s 1782. This statutory provision, in its current form, offers an unparalleled opportunity in appropriate circumstances to obtain critical documents and testimonial evidence from persons found in the United States to support proceedings outside the United States.