

THE USE AND ABUSE OF 28 U.S.C.
§ 1782 LITIGATION IN ENGLAND

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This paper considers the use and misuse in England of the U.S. district court’s power under 28 U.S.C. § 1782 to order a person to give evidence or produce documents for use in a proceeding in a foreign tribunal “upon the application of any interested person.” It examines the U.S./U.K. cross-border cases, and raises the question whether the substantial fees in such cases justify the exercise.

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I. INTRODUCTION

The purpose of this paper¹ is to consider the use and misuse in England² of the U.S. district court’s power under 28 U.S.C. § 1782 to order a person to give evidence or produce documents

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1. It is written to honour a close and faithful friend over many years and a brilliant scholar and teacher. Its subject is particularly appropriate because of Professor Silberman’s interest in it: see Linda Silberman, *Discovery, Arbitration, and 28 USC § 1782: Rules or Standards*, in *ESSAYS IN INT’L LITIG. FOR LORD COLLINS* 293 (Harris & McLachlan eds., 2022).

2. The overwhelming majority of international cases in the United Kingdom are litigated in England, and especially in the Commercial Court in London. But for § 1782 applications emanating from Scotland, see *In re Kidd*, No. 20-mc-00016, 2020 WL 2404928, (D. Conn. May 12, 2020) (denying respondents’ motion to quash); *id.* No. 20-mc-00016, 2020 WL 3035960 (D. Conn. June 5, 2020) (granting respondents’ motion to stay); *id.* No. 20-cv-00800, 2020 WL 5594122 (D. Conn. Sept. 18, 2020) (sustaining in part and overruling in part respondents’ objections to order denying respondents’ motion to quash).

for use in a proceeding in a foreign tribunal “upon the application of any interested person.”³

It is not its intention to consider the central question dealt with twice by the United States Supreme Court, namely what is a “tribunal” for this purpose, although this author would note that the first decision, *Intel Corp. v. Advanced Micro Devices, Inc.*,⁴ holding that the European Commission’s Directorate General for Competition when conducting an investigation into alleged violation of competition laws, was a “foreign tribunal” for the purposes of § 1782, is, to European eyes, hardly less than bizarre. On the other hand, the conclusion in the second case, *ZF Automotive US, Inc v. Luxshare, Ltd.*,⁵ that a commercial arbitral tribunal is not a foreign tribunal is plainly right, and the division between the circuits arose mainly because of loose language in the *Intel* decision.

Nor is this paper concerned with the use of § 1782 pursuant to letters rogatory issued by a foreign tribunal. But two points should be made on that subject which are relevant to this paper. First, under Article 23 of the Hague Evidence Convention, inserted at the proposal of the United Kingdom, a Contracting State may declare “that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.” The phrase “pre-trial discovery of documents as known in Common Law countries” obscures significant differences between the procedures available in countries following the practice contained in the English Civil Procedure Rules 1998 and the

3. So far as material to this paper, § 1782(a) reads:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.

28 U.S.C. § 1782(a).

4. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

5. *ZF Auto. U.S., Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022); *see also In re Alpene, Ltd.*, No. 21 MC 2547, 2022 WL 15497008, at *4 (E.D.N.Y. Oct. 27, 2022) (holding § 1782 does not apply to an ICSID tribunal).

much more extensive procedures available in the United States. These differences can include wide-ranging requests for non-parties to make oral depositions or to produce documents which may not necessarily be relevant to the issues but could possibly assist the claimant to formulate allegations against the defendant. The United Kingdom's reservation under Article 23 contains a statement of its intended scope, which is reflected in the Evidence (Proceedings in Other Jurisdictions) Act 1975. Since the amendments in 1999 to what is now the Senior Courts Act 1981,⁶ it is possible for a party to litigation to, in effect, obtain discovery of documents in the hands of non-parties to litigation, and there is no reason why parties should not ask the English court to employ letters rogatory to obtain material from third parties in the United States.⁷

Rather the purpose of this paper is to look at the operation of § 1782 from the standpoint of the proposed end-user of the material obtained, or sought to be obtained, under § 1782. In the cases considered, a party to English litigation had obtained, or was seeking, to obtain documents or oral evidence in the United States for use in the English proceedings. In some of the English cases, the use of § 1782 was entirely uncontroversial. In several cases, however, one of the parties not only objected to its use but sought an injunction (a variant on an anti-suit

6. A new section 34. See Civil Proc. Rules, CPR, r. 31.17(3), which provides that the court may make an order against non-parties only where—(a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs. The court may authorise an application to be brought against a third party who was outside the jurisdiction for an order to produce documents which were located within England: *see* *Gorbachev v. Guriev* [2022] EWCA Civ 1270, [2023] 2 WLR 1 [83] (“To require the production of documents located within the jurisdiction does not involve any illegitimate interference with the sovereignty of the state where the owners of the documents . . . are located.”).

7. But the English court will not allow foreign letters rogatory to be used jurisdiction for pre-trial investigatory discovery and evidence may be obtained only for the purpose of proving (or disproving) a case at trial: *see* *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547 (HL) 561-62 (finding that the relevant statute excluded use of foreign letters rogatory for pre-trial discovery); *Refco Capital Markets v. Credit Suisse (First Boston), Ltd.* [2001] EWCA Civ 1733, [2002] CLC 301 [1] (“D]iscovery against non-parties was something the English court would not provide because it simply was not part of its procedure.”); *Allergan, Inc. v. Amazon Medica* [2018] EWHC (QB) 307 [77] (“[T]his is fundamentally a request other than for trial evidence and therefore one which this court has no jurisdiction to grant.”).

injunction) to restrain the other party from continuing with its § 1782 application.

In theory, at least, there should be very few occasions in which the English court should object to the use of § 1782 in support of its proceedings. That is because the U.S. Supreme Court in *Intel* not only recognized that comity concerns may be important as touchstones for a district court's exercise of discretion,⁸ it specifically listed one of the factors to be taken into account in deciding whether to apply § 1782 was the "receptivity of the foreign . . . court . . . abroad to U.S. federal-court judicial assistance."⁹ Some of the other factors also contribute to the likely absence of objections if they are satisfied, namely, whether "the person from whom discovery is sought is a participant in the foreign proceeding," because if so "the need for § 1782(a) aid generally

8. *Intel Corp.*, 542 U.S. at 261. For some recent examples, among many others, see *In re Piraeus Bank*, No. 20-mc-210, 2020 WL 2521322, at *2 (S.D.N.Y. May 18, 2020) (finding no proof that a foreign court would reject assistance); *In re Akhmedova*, No. 5-20-MC-1099, 2020 WL 6376651, at *3 (W.D. Tex. Oct. 30, 2020) (finding that English courts would likely be receptive).

9. *Intel Corp.*, 542 U.S. at 264. For some recent examples, among many others, see *In re Piraeus Bank*, No. 20-mc-210, 2020 WL 2521322, at *2 (S.D.N.Y. May 18, 2020) (finding no proof that a foreign court would reject assistance); *In re Akhmedova*, No. 5-20-MC-1099, 2020 WL 6376651, at *3 (W.D. Tex. Oct. 30, 2020) (finding that English courts would likely be receptive); *In re Tovmasvan*, 557 F Supp. 3d 348 (D.P.R. 2021) (finding no indication that English courts would reject assistance); *In re Al Sadeq*, No. 21-mc-06 2022 WL 825505, at *41 (M.D.N.C. Mar. 18, 2022) (noting that courts frequently authorize depositions in connection with U.K. proceedings); *In re Pishevar*, No. 21-mc-105, 2023 WL 2072454, at *3 (D.D.C. Feb. 17, 2023) (finding no proof that the foreign tribunal would reject assistance). Resolving earlier conflicts between the Circuits, the Supreme Court held in *Intel Corp.*, 542 U.S. at 260, that there was no "blanket foreign-discoverability rule on the provision of assistance" under § 1782, and so material sought pursuant to § 1782 need not be discoverable under the law of the country for which it is intended: see also *Euromepa, S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1099–1100 (2d Cir. 1995) ("[A] district court's inquiry into the discoverability of requested materials should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782."); *In re Mariani*, No. 20 Misc. 152, 2020 WL 1887855, at *2 (S.D.N.Y. Apr. 16, 2020) (noting that petitioner produced evidence that an Italian court would be receptive to materials produced pursuant to a § 1782 application); *In re Batbold*, No. 21-MC-218, 2023 WL 2088524, at *6 (S.D.N.Y. Feb. 17, 2023) (explaining that the third Intel factor "weighs against [a § 1782] application only if permitting discovery would violate 'the clearly established procedures of a foreign tribunal'" in light of "authoritative proof.") (quoting *In re Arida, L.L.C.*, No. 19-MC-522, 2020 WL 7496355, at *8 (S.D.N.Y. Dec. 21, 2020)).

is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad;” whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country . . .” and whether the request is “unduly intrusive or burdensome.” More recently the U.S. Supreme Court confirmed that “[a]fter all, the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.”¹⁰

For example, a U.S. court may refuse assistance under § 1782 where the court suspects that the discovery is being sought for the purposes of harassment:

[I]f the district court determines that a party’s discovery application under section 1782 is made in bad faith, for the purpose of harassment, or unreasonably seeks cumulative or irrelevant materials, the court is free to deny the application in toto, just as it can if discovery was sought in bad faith in domestic litigation.¹¹

II. UNCONTROVERSIAL USE OF § 1782 MATERIAL IN ENGLAND

The emphasis on § 1782 in discussion of the English cases has tended to be on its potential abuse, but the evidence of published judgments is that often the use of § 1782 for the purposes of English litigation is entirely uncontroversial. For example, in the ultimately unsuccessful Yukos claim for conspiracy to rig the auction of Yukos shares in Russia, the judge, recognizing that, in assessing events of many years ago, it must be the documentary evidence which is ordinarily of most assistance, if only to test the accuracy and reliability of the oral evidence, relied on documents which had been obtained in the United States under § 1782.¹² In another uncontroversial case, a witness gave evidence in an English trial by video-link pursuant to a § 1782 order.¹³

10. *ZF Auto*, 142 S. Ct. at 2088.

11. *Euromepa*, 51 F.3d at 1101 n.6; *see also* *Brandi-Dohrn v. IKB Deutsche Industriebank A.G.*, 673 F.3d 76, 78 (2d Cir. 2012) (“Although the District Court did not suspect bad faith, it did suspect that the evidence sought was actually for use in German counsel’s other securities fraud cases.”).

12. *Yukos Finance B.V. v. Lynch* [2019] EWHC (Comm) 2621 [7].

13. *ACL Netherlands B.V. v. Lynch* [2022] EWHC (Ch) 1178, 1178 [28].

When Nigeria was granted an extension to challenge an arbitration award made several years before on grounds that a gas processing contract, the arbitration clause contained in it, and arbitration awards based on it had been procured by fraud, the judge relied on evidence obtained in New York, pursuant to § 1782, over the objection of the defendants, where the documents obtained had proved bribes had been paid to Nigerian officials.¹⁴

In another case, Nokia claimed that the operation of chips inside phones manufactured by the defendants infringed its patents. The chips were made by Qualcomm, and Nokia sought to prove infringement by doing experiments and by obtaining disclosure from Qualcomm in the United States under § 1782. Because of the highly confidential nature of the § 1782 materials from Qualcomm, the court sat in private nearly all the time when discussing infringement. In deciding what to include in the judgment, Meade, J. said that he “would have been willing to take into account that third party disclosure procedures such as those under 1782 are a useful and necessary tool . . .”¹⁵

III. INJUNCTIONS TO RESTRAIN THE USE OF § 1782

A. *Caution and Comity: The South Carolina Case*

In *South Carolina Insurance Co. Respondents v. Assurantie Maatschappij “de Zeven Provinciën” NV v. Al Ahlia Insurance Co.*,¹⁶

14. *Federal Republic of Nigeria v. Process & Industrial Developments Ltd* [2020] EWHC 2379 (Comm) [124], [189]–[190] (Sir Ross Cranston, sitting as High Court judge). See, most recently, *Federal Republic of Nigeria v. VR Advisory Services, Ltd*, No. 21-MC-7, 2023 WL 2477889 (S.D.N.Y. Mar. 13, 2023), for an attempt to prevent use of the documents. This case was one of many arising out of a failed agreement for the process of gas in Nigeria with a BVI company incorporated by an Irish national and former music manager engaged in the Nigerian arms trade, and his associate. For the history of this case, which, as the Court of Appeals for the Second Circuit said, has spawned a decade of litigation spanning three continents, see *Federal Republic of Nigeria v. VR Advisory Services, Ltd.*, 27 F.4th 136 (2d Cir. 2022), at 142 *et seq.*

15. *Nokia Technologies O.Y. v. Oneplus Limited Technology (Shenzhen) Co., Ltd.* [2022] EWHC 2814 (Pat), [12] (Meade, J.). For other uncontroversial examples of the use of § 1782, see also *Navitaire Inc. v. EasyJet Airline Co. Ltd.* [2005] EWHC 282 (Ch), [2006] RPC 4, [42], [76]–[77] (Pumfrey, J.); *Sawyer v. Atari Interactive Inc.* [2005] EWHC 2351 (Ch), [2006] ILPr 8 (Lawrence Collins, J.).

16. *South Carolina Insurance Co. v. Assurantie Maatschappij “de Zeven Provinciën” NV v. Al Ahlia Insurance Co.* [1987] AC 24 (HL).

the plaintiffs, South Carolina Insurance, were a U.S. insurance company that reinsured the liability of another U.S. insurance company, UNI. South Carolina Insurance re-reinsured their risk with the defendants in London. South Carolina Insurance satisfied claims by UNI, and claimed against the defendants under the contract of re-insurance and brought proceedings in the Commercial Court in London. The defendants resisted summary judgment on the basis, *inter alia*, that South Carolina Insurance had misrepresented the retention on the reinsurance, and had not disclosed a “previous atrocious” loss record on the business in question. To make good these defenses, the defendants wished to obtain documents in the possession of the underwriting agent for UNI and the loss adjusters who investigated the claims. Both the underwriting agents and the loss adjusters were based in the State of Washington. The defendants then applied in the federal court in Seattle under § 1782 for discovery of documents in the possession of the underwriting agents and the loss adjusters and for deposition of their officers.

In England, South Carolina Insurance applied for an injunction to restrain the defendants from proceeding further with their § 1782 application and for a declaration that it was an abuse of the process of the English court. An injunction was granted by Hobhouse, J. and the Court of Appeal on the basis that, once parties had submitted to the jurisdiction of the English court, it was a fundamental principle that the applicable procedural rules were those of the English court, and it was for that court to control the proceedings and ensure that litigation was conducted in accordance with its procedure. Griffiths, L.J. said:

Once the parties have chosen or accepted the court in which their dispute is to be tried they must abide by the procedure of that country and that court must be master of its own procedure. Litigation is expensive enough as it is, and if a party fighting a case in this country has to face the prospect of fighting procedural battles in whatever other jurisdiction his opponent may find a procedural advantage it may impose intolerable burdens, and encourage the worst and most oppressive form of procedural forum shopping. We should set our face against any such situation developing.¹⁷

17. *Id.* at 358.

The decision was reversed by the House of Lords,¹⁸ which took these matters into account: (1) South Carolina Insurance's lawyers had told UNI not to authorize the underwriting agents and the loss adjusters to provide documents to the plaintiffs; (2) the underwriting agents and the loss adjusters were not agents of South Carolina Insurance, the reinsurers, and therefore discovery of documents by South Carolina Insurance in England would not extend to relevant documents held by them; (3) if the defendant re-re-insurers were to achieve their legitimate object of inspecting relevant documents held by the underwriting agents and the loss adjusters, some other means had to be found to enable them to do so; (4) there was no way in which a party to an action in the High Court in England could compel pre-trial discovery as against a person which was not a party to such action,¹⁹ either by way of the disclosure and inspection of documents in its possession or power, or by way of giving oral or written testimony; (5) it was not possible to decide in advance how the United States district court would see fit to exercise the discretion conferred on it by § 1782 in the circumstances of this case; (6) the defendants' conduct was not an interference with the English court's control of its own process, because under the civil procedure of the English court, the court did not, in general, exercise any control over the manner in which a party obtained the evidence which it needed to support its case; (7) even though the defendants might be said to have accepted the jurisdiction of the English court, the defendants had not in any way departed from, or interfered with, the procedure of the English court, and all that they had done was what any party preparing its case in England was entitled to do, namely to try to obtain in a foreign country, by means lawful in that country, documentary evidence which they believed that they needed in order to prepare and present their case; (8) to the extent that South Carolina Insurance's costs had increased, that was self-imposed because it had refused access to the material held by the underwriting agents and the loss adjusters.²⁰

18. The discussion in that decision of the principles for the grant of injunctions in general has been superseded by later decisions: *see* *Convoy Collateral Ltd v. Broad Idea International Ltd.* [2021] UKPC 24, [2023] AC 389 (on appeal from BVI).

19. There is now limited ability to obtain disclosure from third parties. CPR, *supra* note 6, r. 31.17; Senior Courts Act 1981, § 34 (Eng.).

20. It seems from *In re Duizendstraal*, No. 3:95-MC-150-X, 1997 WL 195443 (N.D. Tex. Apr. 16, 1997), that a Dutch court took a similar approach

B. *Injunctions Refused*

The effect of the decision in the *South Carolina* case was for most practical purposes to remove obstacles in England to the use of § 1782 for English proceedings. Following the decision, applications for injunctions to restrain the use of § 1782 have failed in several cases. Thus, in *Nokia Corp. v. Interdigital Technology Corp.*, an injunction in English patent revocation proceedings to restrain Nokia from pursuing § 1782 applications in Texas for documents and other evidence from Ericsson and Sony-Ericsson Mobile was refused.²¹ The documents had been generated in a lengthy litigation in the United States between the defendants and Ericsson in relation to patents that were the counterpart of Nokia's patents. The English court found that there had been no abusive behavior of the part of Nokia which had prejudiced the defendants. It was unlikely, but possible, that the evidence obtained would be useful in the English proceedings. After detailed consideration of the principles set out by the U.S. Supreme Court in *Intel v. AMD*,²² the court noted that the § 1782 jurisdiction would be exercised having regard to the attitude that the foreign court will take to the material produced by the § 1782 request. Although the attitude of the English court towards disclosure was regulated by the English Civil Procedure Rules and the scope of disclosure was essentially circumscribed by the pleaded issues, the court was generally indifferent as to the

in refusing an injunction to restrain the use of § 1782.

21. *Nokia Corp v. Interdigital Technology Corp.* [2004] EWHC 2920 (Pat) (Pumfrey, J.). See also *Royal Bank of Scotland plc. v. Hicks* [2011] EWHC 287 (Ch) (Floyd, J.) (injunction to granted to restrain abusive Texas proceedings to prevent sale of Liverpool Football Club, but § 1782 proceedings allowed to be continued); *Drey Moor Fertilisers Overseas Pte Ltd. v. EuroChem Trading GmbH* [2018] EWHC (Comm) 2267, [2018] 2 CLC 576 (Males, J.) (connected proceedings in Cyprus and BVI, and arbitrations in London: § 1782 proceedings in Tennessee for use in Cyprus and BVI; injunction sought in England in aid of the arbitrations in London to restrain § 1782 proceedings refused: the court did not have a legitimate interest in policing an attempt to obtain documents for use in foreign proceedings: “. . . it would be a serious breach of comity for this court to say that the United States court's conclusions were wrong and that, as a result, an injunction should be granted to prevent enforcement of an order for the production of documents and evidence for use in proceedings in the third country concerned made by that court against an individual resident in and subject to its jurisdiction.” (at [73])).

22. *Intel*, 42 U.S. 241 (2004).

source of admissible material. Consequently, in a patent case, the defendant must uncover at least the possible existence of prior use by the patentee before the defendant can obtain the court's assistance in compelling disclosure from the patentee. On the other hand, if it does obtain evidence of prior use by the patentee, the court is not generally concerned as to how that evidence was obtained, and one possible route is through § 1782. The decision whether or not to restrain § 1782 proceedings was not a mere case management decision, and the jurisdiction of the English court to interfere was based on the need to show that the application was abusive in its context in the English proceedings. The English court should not seek to circumscribe the discretion possessed by the U.S. District Court by imposing its own view as to the appropriateness of the classes of documents sought by reference to the issues in proceedings as they stand. It was legitimate for the requesting party to use the request to ascertain facts and obtain documents of which the requesting party is unaware, but which may be in the future deployed in the English proceedings, if necessary, after appropriate amendment.

Subsequently, a federal court in North Carolina refused to make a § 1782 order in favor of Nokia against Sony-Ericsson.²³ The court said that, although the English court has stated that it would not enjoin Nokia from seeking relief under § 1782 and that it would review any relevant evidence obtained by Nokia in a § 1782 proceeding, the English court was not asking for this information, and had questioned its relevance, Nokia's request concealed an attempt to circumvent foreign proof-gathering restrictions, and the requested discovery sought highly confidential material and was overbroad and unduly burdensome.²⁴

Most recently, in *Soriano v. Forensic News LLC*, the claimant was an Israeli citizen who was suing U.S. entities in London for allegedly defamatory statements that he, *inter alia*, was guilty of multiple homicides, money laundering, and being the middleman for a network of illegal Israeli hackers; the statements also alleged that there were grounds for thinking that he was involved in a conspiracy to interfere with the 2016 U.S. presidential election, involved with the Russian mafia, and in the embezzlement

23. *In re* Nokia Corp., No. 5:04-MC-29, 2005 WL 8159342, at *4 (E.D.N.C. Mar. 16, 2005).

24. *Id.*

of Russian state funds.²⁵ The defendants applied in New York for a § 1782 order requiring HSBC Bank USA NA (HSBC USA) to produce very broad categories of banking documents relating to Mr. Soriano's companies.²⁶ An injunction to restrain the § 1782 proceedings was refused by the Court of Appeal: (1) The apparently undesirable breadth of the order sought in New York was a matter for the New York federal court applying its own principles, although it would realize from the judgment of the Court of Appeal that such a broad order would be unlikely to be granted in England; (2) In *Intel Corp v. Advanced Micro Devices, Inc.*, Justice Ginsburg said specifically that the district court could consider whether the § 1782 request concealed an attempt to circumvent foreign proof-gathering restrictions, that unduly intrusive or burdensome requests may be rejected or trimmed, and that the district court might consider appropriate measures, if needed, to protect the confidentiality of materials²⁷; (3) no reasons had been advanced as to why the New York court was unable to apply these principles appropriately; (4) there was nothing inherently objectionable from a domestic perspective about seeking evidence in an appropriate case from a party's bankers or from the bankers to the corporate entities in which the party has an interest; (5) the general rule was that the defenses of truth and honest opinion form part of the framework by which free speech was protected, and it was important that no unnecessary barriers to the use of these defenses were erected.

C. *Injunctions Granted: Abuse of the Process*

There are two published decisions in which injunctions were granted by the English court to restrain § 1782 proceedings. In *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera*, the plaintiffs, Bankers Trust International plc (BTI), claimed that the defendant owed about \$65 million in relation to transactions in derivatives which the parties had entered into.²⁸ BTI

25. Soriano v. Forensic News LLC [2023] EWCA Civ 223.

26. *In re* Forensic News LLC, No. 22-MC-0229, 2023 WL 2136424 (S.D.N.Y. Feb. 21, 2023).

27. *Intel*, 42 U.S. at 244.

28. *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera* [1996] CLC 252 (Mance, J.); *cf.* *Benfield Holdings Ltd v Richardson* [2007] EWHC 171 (QB) (Langley, J.).

had acted through Bankers Trust Co (BTCo). The defendants counterclaimed for rescission of the transactions, and damages for deceit and negligence, and made interlocutory applications, claiming that BTCo had been fraudulent, which were largely unsuccessful, for discovery in relation to BTI's transactions with other clients. The trial of the claim and counterclaim took place in July 1995 and judgment was reserved. In the next month, the defendants obtained a copy of an article published in the Washington Post relating to an action in the United States against BTCo and BTI. The defendants said that it showed that a fraudulent system had been operated by BTCo in relation other clients as well as themselves. They applied, unsuccessfully, to the trial judge for leave to amend its pleadings to include a claim of systematic fraud, and then applied, successfully, to the U.S. District Court for an *ex parte* order under § 1782 for disclosure directed to BTCo and its parent and associated company.²⁹

BTI and BTCo obtained from the English court an order that the defendants apply to the U.S. District Court to discontinue the proceedings there and for the setting aside of the U.S. District Court's orders. The reasons were these: (1) the English court was better placed to assess the background, implications and propriety of the present § 1782 proceedings than is any U.S. court; (2) whether the New York proceedings were abusive or oppressive was a matter for the English court to judge, and, if they were, intervention by the English court would avoid any future problem; (3) the applications made under § 1782 were abusive and oppressive; (4) there must be some end to litigation, and the trial in the action had taken place; (5) what was proposed by the defendants included compulsory examination of large numbers of the plaintiffs and their associate companies' officers, in respect of a large number of other cases, which had hitherto played no significant part in the trial; (6) volumes of documents were sought, many of which, would seem to be capable of bearing only the most indirect relationship to any suggestion of any systematic conduct which the defendants might hope to establish by anyone; (7) the New York application would represent a large scale investigation of the general conduct of the plaintiffs' derivatives business conducted on a speculative basis with a view to discovering material to enable or support allegations which, if they could properly be made at

29. *Id.*

all, would doubtless be highly contentious, would require the reopening of the trial and would involve examination of other transactions entered into with other clients; (8) the new material constituted a wholly inadequate foundation for the course of conduct proposed at the then stage in these proceedings.³⁰

Another case in which an injunction was granted to restrain § 1782 proceedings was *Omega Group Holdings Ltd v. Kozeny*.³¹ The English litigation involved allegations of fraudulent misrepresentation in connection with an investment in the privatization process in Azerbaijan. The claimant intended to produce witness statements from certain individuals and to call them to give oral evidence at the trial of the English proceedings. The defendant obtained orders under § 1782 in District Courts in New York and Connecticut that the same individuals be deposed and produce documents. The § 1782 applications and orders were made without prior warning to the witnesses or the claimants. The claimant applied for an injunction to prevent the defendant from deposing witnesses and obtaining documents from them in the § 1782 proceedings. In general, the English court leaves it to the parties to obtain the evidence they think necessary for the advancement of their case by the means of their choosing, provided such means are lawful in the country where they are deployed. The fact that a party to English litigation is able to obtain evidence by means of a right available in a foreign country significantly different from that available in the English system does not, by itself, constitute unconscionable conduct. But the injunction was granted because the witnesses would be subjected to unwarranted double cross-examination and the trial would suffer from unnecessary duplication. There was also a risk of interference with the trial itself since the witnesses, if deposed in the United States, might be discouraged from attending the trial in England and facing further cross examination. The defendant would suffer no disadvantage since there was no issue which might be covered in the deposition proceedings which could not be dealt with by cross examination at the trial.

30. See *Khrapunov v. Prosyankin*, 931 F.2d 922 (9th Cir. 2019) for an attempt to use § 1782 to overturn a freezing order in England.

31. *Omega Group Holdings Ltd. v. Kozeny* [2002] CLC 132 (Peter Gross, QC).

IV. CONCLUSION

There is no need for a formal conclusion since, it is hoped, this piece has given a comprehensive account of the issues involved in cross-border litigation between the United States and England involving the use of § 1782 proceedings. One question the cases do not answer is the practical utility of resort to § 1782. It has been seen that there have been cases in which evidence obtained under it has been introduced without objection. But there may be a question whether those cases in which there has been a contest over its use have justified what will inevitably in modern conditions be very substantial costs.

This writer has been involved (in different capacities) in international litigation for over fifty years. He has seen the enormous increase in the number and size of international cases, and the knowledge and sophistication of practitioners and academics. In particular, he has learned much from Professor Linda Silberman, with whom he had the honor to teach, and it has been his privilege to make this contribution in honor of (as indicated at the outset of this paper) a fine scholar and loyal friend.