The Age of Discovery in the United States

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In 1492, when Columbus sailed the ocean blue, the Age of Discovery was in full swing. Today, the vehicle for foreign discovery in America is no longer the caravel, but 28 U.S.C. §1782(a) (quoted in pertinent part):

Assistance to foreign and international tribunals and to litigants before such tribunals.

> (a) 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 the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

Congress has steadily liberalized the statute to promote two underlying policies: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts. See, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 252, 124 S. Ct. 2466 (2004). Consequently, objecting to an application for an order under this statute is a difficult business at best.

In the first instance, jurisdiction is easily obtained as the statute only requires that the subject be "found" in the district. While a letter rogatory is permitted, a simple petition is all that is required.

The term "proceeding in a foreign… tribunal" provides a very narrow restriction. There need not be a formal case pending in a foreign court in order to find a "proceeding", just that "a dispositive ruling by adjudicative tribunal, reviewable by courts, be within reasonable contemplation." *Intel Corp. v. Advanced Micro Devices, Inc.*, Id. at 254. "Tribunals" include "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Id, at. 258. Not included, however, are purely private arbitrations. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 184 (1999 CA2 NY). It is not yet clear whether arbitrations held under authority of international trade agreements constitute private arbitrations or ones subject to the statue.

Whether the discovery would be discoverable or admissible in the foreign tribunal is not a factor to consider. *Fleischmann v. McDonald's Corp.*, 466 F. Supp. 2d 1020 (N.D. Ill. 2006). See also, *In re Bayer AG*, 146 F.3d 188 (3rd Cir. 1988). Instead, the scope of discovery "may be as broad and liberal as the Federal Rules allow…that means discovery that is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action." Unlike the Federal Rules, however, the discovery does need to appear reasonably calculated to lead to the discovery of admissible evidence. *Fleischmann*, id. at 1029.

However, granting discovery is still a matter of the court's discretion. The *Fleischmann* court notes three factors bearing on their discretion: 1) whether the person from whom the discovery is sought is a participant in the proceeding (if not, the need to use the statute to get information is actually greater); 2) the nature of the foreign tribunal, and…nature of the proceedings underway abroad (i.e. no requirement that our courts assist in a process that falls below our standards of justice and due process); and 3) the receptivity of the foreign government or agency abroad to U.S. federal court assistance (that is, whether the party seeking the discovery is attempting an "end run" around some proof-gathering or other policy based restriction in the foreign tribunal). *Fleischmann*, at 1030.

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