Once More Unto the Breach of Extraterritorial Discovery under Section 1782

We've discussed on this site in the past the various nuances and pervasive disagreements among the U.S. federal courts regarding the scope of discovery in aid of foreign tribunals under 28 U.S.C. § 1782. The longest-running dispute is whether that statute can be used in aid of arbitral tribunals, and the scholarship on this question is rich. (See here, and here.). Another disagreement, however, just won't go away, but hasn't garnered nearly as much public attention: that is, whether the statute can reach documents held outside the United States.

Before the holidays, the Southern District of New York decided *In re Application of Kreke Immobilien KG* (S.D.N.Y. 2013), a case brought in U.S. court under § 1782 to obtain documents from Deutsche Bank for use in a German litigation. Deutsche Bank argued that the court had to deny the application because the documents in question were not kept in the United States. To be sure, the statute does not impose such a limitation, but citing Judge Rakoff's decision in *In re Godfrey*, 526 F. Supp. 2d 417 (S.D.N.Y. 2007), Judge Buchwald held that the statute does indeed bar extraterritorial discovery. She therefore denied the application.

Judge Rakoff decided five years ago that the Supreme Court in Intel "implicitly assumed that evidence discoverable under § 1782(a) would be located in the United States." But the evidence of that implicit assumption is merely dictum: "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, *available in the United States*, may be unobtainable absent § 1782(a) aid." (emphasis added). "Available in the United States," however, could mean simply that the evidence

is obtainable via legal process in the United States; it need not mean that the evidence is physically located in the United States. And this seems the better reading given the metaphysical problem of determining exactly where a document is "located." I'm not the only one to espouse that view; Ted Folkman's recent post on the Kreke Immobilien decision seems to agree.

As Judge Buchwald noted, the federal courts are deeply split on this issue. Some courts have followed Judge Rakoff's decision in *Godfrey* and read § 1782 narrowly. *See, e.g., In re Sarrio S.A.*, No. 9-372, 1995 WL 598988 (S.D.N.Y. Oct. 11, 1995); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194, fn. 5 (S.D.N.Y. 2006); *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45 (D.D.C. 2005). Other courts, however, read the statute more naturally, and hold that a court's power under § 1782 is coextensive with the Federal Rules. Indeed, this is what the penultimate sentence of § 1782(a) says (stating that discovery should generally proceed "in accordance with the Federal Rules of Civil Procedure"). Under those Rules, a person under subpoena in the United States can be compelled to produce all documents within his "possession, custody or control," *see* Fed. R. Civ. P. 45(a)(1)(A)(iii), "even if the documents are located abroad," *Tequila Centinela, S.A. de C.V. v. Bacardi & Co. Ltd.*, 242 F.R.D. 1, 12 (D.D.C. 2007) (emphasis added); *see also Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 920 (S.D.N.Y. 1984). On this basis, a number of federal courts in recent years have ordered Section 1782 discovery of documents located outside the United States when the person is found there. *See, e.g, In re Eli Lilly & Co.*, No. 3:09MC296 (AWT), 2010 WL 2509133, at *4 (D. Conn. June 15, 2010); *In re Gemeinshcaftspraxis Dr. Med. Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464, at *5 (S.D.N.Y. Dec. 29, 2006); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 951, 957 n.3 (D. Minn. 2007); *In re Minatec Fin. S.À.R.L.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 n.8 (N.D.N.Y. Aug. 18, 2008).

Even courts who have come down between this split of authority have still applied Section 1782 and Rule 45 to reach electronically stored information accessible from within this District. In *In re Veiga II*, 746 F. Supp. 2d 8, 25 (D.D.C. 2010), Judge Kollar-Kotelly (who also decided Norex five years earlier) outlined the "split of authority" on the geographic scope of Section 1782; "assum[ed] there is no absolute bar to the discovery of documents located outside the United States"; but nevertheless "exercise[d] [her] discretion to decline to order the production of [physical] documents abroad." When she did so, however, she still required the Respondent to produce all materials "located within the United States, a category that includes electronically stored information accessible from within this District." *Id*. at 26 (emphasis added). Decisions like this prudently avoid the metaphysical question of where electronic materials are "located," and still give effect to the complementary reach of Rule 45 and Section 1782.

Ultimately, this may be a question for the Supreme Court; but until then, it illustrates the sometimes-difficult intersection of judicial restraint and liberal statutory intent when it comes to extraterritorial issues.