

U.S. discovery for use in Dutch civil proceedings

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1 Introduction

In this article, I will discuss the possibilities of discovery in the United States as a method of obtaining evidence for use in civil proceedings in the Netherlands.

Discovery can be defined as the pre-trial phase in a lawsuit in which litigant parties can obtain information from the opposing party. Through the process of discovery, litigant parties can request documents and other evidence from the opposing party, or compel the opposing party to produce such evidence by using subpoenas¹ or depositions.² The purpose of discovery is to clarify the disputed issues between parties and to ascertain the facts relevant to these issues. Discovery facilitates evaluation on both sides of the case and, therefore, is a powerful tool to promote equitable settlements.³

Section 1782 of Title 28 of the United States Code authorizes U.S. district courts to order discovery for use in foreign or international proceedings. Discovery is primarily a common law concept, which is unknown under Dutch law. The question arises whether Dutch litigant parties may use U.S. discovery as a tool for obtaining evidence for use in a Dutch civil proceeding.

In paragraph 2, I will discuss the U.S. rules of discovery in foreign or international proceedings. I will give a brief background on the key provision, Section 28 U.S.C. § 1782 and, subsequently, elaborate on its scope and basic requirements. In paragraph 3, I will turn to the issues of Dutch law. More specifically, I will discuss (1) whether U.S. discovery can be used as a method of obtaining evidence, (2) whether evidence obtained in U.S. discovery is admissible evidence in Dutch civil proceedings, and (3) how such evidence should be valued.

2 U.S. discovery for use in foreign or international proceedings

2.1 Section 28 U.S.C. § 1782

Section 28 U.S.C. § 1782 with the heading 'Assistance to foreign and international tribunals and to litigants before such tribunals' is the federal statute that permits parties to use U.S. discovery mechanisms to obtain evidence for use in foreign and international proceedings.

§ 1782 (a) states, in short:

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 pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.⁴

The purpose of the statute is to provide efficient assistance to participants in foreign or international litigation, and to encourage foreign countries by example to provide similar assistance to U.S. courts. The origins of § 1782 date back to the mid-19th Century, at which time aid to foreign tribunals was extremely limited. Over the years, U.S. Congress substantially expanded the reach of the provision. For example, the 1964 Act replaced the wording 'judicial proceeding pending in any court in a foreign country' by the current 'proceeding in a foreign or international tribunal'. U.S. Congress understood this change to broaden the reach of judicial assistance to all bodies of adjudicatory functions.

Similarly, U.S. courts have liberally interpreted § 1782. In 2004, the U.S. Supreme Court issued a landmark decision in the case of *Intel v. AMD*, in which it construed the language of § 1782 liberally in favor of allowing discovery.⁵ As a result, U.S. courts have broad authority to order the production of evidence for use in foreign or international proceedings.

2.2 Procedure for obtaining § 1782 discovery

The procedure for obtaining § 1782 discovery is relatively straight-forward. A foreign or international tribunal can request U.S. discovery by issuing a letter of request or letter rogatory to a federal district court.⁶ An interested party seeking discovery can file an application directly with a federal district court requesting

1. A 'subpoena' is a command, issued under a court's authority, to a witness to appear and give testimony. A 'subpoena duces tecum' is a command to a witness to appear and produce documents.
2. A 'deposition' is an oral statement made before an officer authorized by law to administer oaths. Such statements are often taken to examine potential witnesses, to obtain discovery, or to be used later in trial.
3. Moore's Manual, Federal Practice and Procedure, Matthew Bender & Company, Inc., Part V, § 15.01.
4. For the complete text of Section 28 United States Code § 1728, please refer to <<http://uscode.house.gov>>.
5. *Intel v. Advance Micro Devices Inc.*, U.S. Supreme Court, 21 June 2004, 542 US 241.
6. Applications and requests for discovery are made pursuant to the Federal Rules of Civil Procedure. For the Federal Rules, please refer to: <www.uscourts.gov/rules>. A request by a foreign or international tribunal may be made pursuant to an applicable treaty or convention.

authorization to issue subpoenas for documents, deposition testimony or both.

Although the statute does not specify how such request or application is to be made, it is generally accepted that an application for discovery can be made *ex parte*, i.e. without notice to the opposing party.⁷ However, a court may in its discretion require that notice be given to all other interested parties before acting on a § 1782 application.⁸

For the avoidance of doubt, it should be noted that a interested person does not need the permission of a foreign or international tribunal to make a § 1782 application. A party to a foreign or international proceeding can file an application for discovery with a U.S. district court without first having to seek the permission of the foreign court before which the case is pending.

If a U.S. district court grants an order pursuant to § 1782, the evidence is typically requested by serving subpoenas on the persons or entities within the federal district. Unless the court order specifies alternative procedures, the production of evidence and the depositions will be conducted pursuant to the Federal Rules of Civil Procedure.⁹ Notice of the court order and copies of the subpoenas should be served on the other parties in the foreign or international proceeding so that they have the opportunity to move to repeal the subpoenas and to vacate the §1782 court order.¹⁰ It should be noted that a dispute over §1782 discovery, if it occurs at all, will take place not when the application is made, but when a party from whom discovery is sought moves for a protective order or repeal of the subpoena.¹¹

Under the Federal Rules of Civil Procedure, appeals are generally not permitted from court orders granting or denying discovery, because such orders are by themselves not 'final' as required for appellate review. One of the exceptions to this rule is that a court order in a proceeding, in which discovery is the only relief sought, is considered 'final' for purposes of appeal. It is uncertain, however, whether a §1782 court order falls under this exception and whether such court order is, as a result, directly appealable. Notwithstanding the above, a party from whom discovery is sought may choose to disobey the discovery order. Once sanctions have been imposed by the relevant U.S. district court¹², the order is final and immediately appealable. On appeal, the party may then also assert any legal flaws in the underlying discovery order.¹³

2.3 Threshold Requirements

In order to satisfy the threshold requirements of § 1782, an applicant for a court order must show that:

1. the person from whom discovery is sought resides or is found to be in the district of the district court to which the application is made;
2. the application is made for use in a proceeding before a foreign or international tribunal; and
3. the application is made by a foreign or international tribunal or an interested person.

Section 1782 does not define the terms 'person', 'resides or is found', 'foreign or international tribunal', and 'interested person'. These terms have been worked out by the U.S. courts. In the next

paragraph, I will discuss these requirements with reference to relevant U.S. case law.¹⁴

2.3.1 Location or residence

Section 1782 requires that the 'person' from whom discovery is sought resides or 'is found' in the district of the district court. 'District' refers to the relevant geographic region in which a particular federal court may properly exercise jurisdiction. The term 'person' applies to individuals, corporations, companies and other entities.¹⁵ However, it does not include the U.S. government or governmental bodies. For example, the CIA is not a 'person' within the meaning of § 1782.¹⁶

As long as the target of the discovery request can be found in the district of the U.S. district court where the application is filed, this requirement will be satisfied. There is no requirement that presence in the district be permanent or continuous.¹⁷ An individual is found in the United States if he or she is physically present at the time he or she is served with a subpoena authorized by § 1782.¹⁸ A corporation is 'found' in the district if it has its principal place of business in the district, even though its primary corporate representatives may be overseas.¹⁹

7. E.g. In re application of Ishihara Chemical Co. Ltd., U.S. District Court for the Eastern District of New York, 16 November 2000, 121 F. Supp.2d 209.; and In re Supreme Court of Hong Kong, 138 F.R.D. 27, 32 n.6. Section 1782 applications are "customarily received and appropriate action taken with respect thereto ex parte". Such ex parte applications are typically justified by the fact that the parties will be given adequate notice of any discovery taken by the request and will then have the opportunity to move to quash the discovery or the participate in it.
8. In re application of Merck & Co, Inc., U.S. District Court for the Middle District of North Carolina, 28 April 2000, 197 F.R.D. 267.
9. Rule 26 through 37 Federal Rules of Civil Procedure. In re Application of Sumar, (1988, SD NY) 123 FRD 467.
10. In re Edelman, Second Circuit, 1 July 2002, 295 F.3d 171.
11. J. Fellas, Using Section 1782 in International Arbitration, Mealy's International Arbitration Report, February 2007, p. 42.
12. Under the Federal Rules of Civil Procedure, courts may impose certain sanctions on parties failing to obey a discovery order. Please refer to: Rule 37 Federal Rules of Civil Procedure.
13. See: Moore's Manual, Federal Practice and Procedure, Matthew Bender & Company, Inc., Part V, § 15.01 (4).
14. J. Wessel and P.J. Eyre, US Discovery in Aid of Foreign or International Proceedings: the Rise of 28 USC, s 1782, Dispute Resolutions International, June 2007, p. 23-35; J. Fellas, Using Section 1782 in International Arbitration, Mealy's International Arbitration Report, February 2007. See also: D. van Engelen, Bewijsvergaring in de Verenigde Staten, Advocatenblad 1998/11, p. 589-593; and T. Claassens, Discovery in de VS voor procedures in Nederland, Advocatenblad 2004/17, p. 754-760.
15. Intel v. AMD (542 US 241); In re Application of Procter & Gamble Co., U.S. District Court for the Eastern District of Wisconsin, 1 September 2004, 334 F. Supp. 2d 1112; Wessel & Eyre 2007, p. 26.
16. In re Al Fayed, App. DC, 6 September 2000, 229 F.3d 272.
17. In re Oxus Gold, U.S. District Court for the District of New Jersey, 10 October 2006, U.S. Dist. LEXIS 8876.
18. In re Edelman, Second Circuit, 1 July 2002, 295 F.3d 171. The Second Circuit held that a person was 'found' in the district even though he arrived there only after the § 1782 order was issued.
19. In re Michael Wilson & Partners, U.S. District Court for the District of Colorado, 27 July 2007, Ltd., 2007 U.S. Dist. LEXIS 54624.

2.3.2 For use in a proceeding before a foreign or international tribunal

The statute requires that the documents or deposition testimony received through a § 1782 application must be 'for use' in a proceeding before a 'foreign or international tribunal'.

As stated above, since 1964, the present statutory language of § 1782 no longer appears to include any limitation as to the type of 'tribunal'. The U.S. Supreme Court interpreted the revision of the language of § 1782 to 'tribunal' as a recognition that judicial assistance would be available whether the foreign or international proceeding or investigation is of criminal, civil, administrative, or other nature. Legislative reports show that the word 'tribunal' is used to make clear that assistance is not limited to proceedings before conventional courts, but also extends to 'administrative and quasi-judicial proceedings abroad'.²⁰

It is generally accepted that foreign courts are 'tribunals' for § 1782 purposes. In *Intel v. AMD*, the U.S. Supreme Court ruled that the European Commission is a 'tribunal', as it acts as the 'first-instance decision maker' in the antitrust context.²¹ In addition, courts have generally held arbitral tribunals established by governmental entities fall within the scope of § 1782.²² In recent cases, courts have interpreted 'tribunal' to also encompass private commercial arbitral tribunals, such as an arbitral tribunal convened under a bilateral investment treaty under UNCITRAL Rules,²³ and a private commercial arbitration tribunal at the International Arbitration Centre for the Austrian Federal Economic Chamber in Vienna.²⁴

Courts have generally interpreted the 'for use' requirement quite broadly. It is not required that the discovery sought will be definitely used in the foreign proceeding. In *Fleischman v. McDonald's Corp.*, the U.S. District Court for the Northern District of Georgia held that the fact that § 1782 makes specific reference to the U.S. Federal Rules of Civil Procedure suggests that a court should grant the § 1782 application whenever such discovery 'is relevant to the claim or defense of any party, or for good cause' or if it relates to 'any matter relevant to the subject matter involved in the foreign action'.²⁵ Moreover, an applicant is not required to show that the discovery is reasonably calculated to lead to admissible evidence in the foreign proceeding.²⁶ Therefore, an applicant for a § 1782 order needs only to demonstrate that the discovery sought is relevant – even though it may not be admissible – in order to meet the 'for use' requirement.

In relation to the above, it should be noted that the proceeding in the foreign country, for which discovery is sought, does not need to be imminent or pending. The U.S. Supreme Court held that a proceeding is 'within reasonable contemplation'.²⁷

2.3.3 Interested Person

A § 1782 order may be made by letter rogatory issued or request made by a foreign or international tribunal or upon the application of any interested person. An 'interested person' is an entity with a 'reasonable interest in obtaining judicial assistance'.²⁸

The U.S. Supreme Court held in *Intel v. AMD* that any entity with 'participation rights' in a foreign proceeding has a 'reasonable interest in obtaining judicial assistance' under § 1782 and therefore qualifies as an interested person 'within a fair construction of that term. A party to a foreign or international

proceeding, whether directly or indirectly involved, clearly meets this threshold requirement. Also foreign and international officials may qualify as 'interested person'.²⁹

2.4 In what circumstances will courts grant § 1782 discovery applications?

If a federal court concludes that the applicant meets the threshold requirements as described in paragraph 2.3, it must determine whether it should exercise discretion to order discovery.³⁰ Courts have considerable discretion to order discovery under § 1782, although it should be exercised in the light of the overriding purposes of § 1782, i.e. 'providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to [U.S.] courts'.³¹

2.4.1 Intel v. AMD factors

In *Intel v. AMD*, the U.S. Supreme Court set forth a number of non-exhaustive considerations to guide courts in deciding whether to exercise their discretion, which will be discussed below.³² In addition, courts need to consider other factors, such as timing of the application and the location of the documents sought.

I Whether or not the person from whom discovery is sought is a participant in the foreign proceeding

The U.S. Supreme Court noted that if the person from whom discovery is sought is party to the foreign proceeding 'the need for [§ 1782] aid is generally not as apparent as it ordinarily is when

20. *Intel v. AMD* (542 US 241). The U.S. Supreme Court quotes Prof. Hans Smit, one of the primary drafters of the current § 1782: 'the term "tribunal" includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts'.

21. *Intel v. AMD* (542 US 241).

22. *National Broad Co. Inc. v. Bear Stearns & Co Inc.*, Second Circuit 1999, 165 F.3d 184; *Republic of Kazakhstan v. Biedermann Int'l.*, Fifth Circuit 1999, 168 F.3d 880; *Intel v. AMD* (542 US 241).

23. *In re Oxus Gold* (2006 U.S. Dist. LEXIS 8876).

24. *In re Application of Roz Trading Ltd.*, U.S. District Court for the Northern District of Georgia, Atlanta Division, 19 December 2006, 49 F. Supp. 2d 1221.

25. *Fleischman v. McDonald's Corp.*, U.S. District Court for the Northern District of Illinois, Eastern Division, 6 December 2006, F. Supp. 2d 1020.

26. *Fleischman v. McDonald's Corp.* (F. Supp. 2d 1020); *Wessel & Eyre* 2007, p. 27.

27. *Intel v. AMD* (542 US 241).

28. An 'interested person' could also be a person with a reasonable interest in obtaining judicial assistance in relation to a foreign or international proceeding which is not imminent or pending. However, for the purposes of this article, I will limit the discussion to the situation in which a party to the foreign or international proceeding applies for § 1782 discovery.

29. For example, the Minister of Legal Affairs of Trinidad and Tobago and the U.K. Crown Prosecution Service were deemed competent to request U.S. discovery. *In re request for assistance from Ministry of Legal Affairs, Eleventh Circuit*, 7 July 1988, 848 F.2d 1151; respectively *In re Letter of Request from Crown Prosecution Service*, App DC, 17 March 1989, 870 F.2d 686.

30. Section 1782 'authorizes but does not require' U.S. district courts to provide assistance to interested persons in foreign or international proceedings. *Intel v. AMD* (542 US 241); and e.g. *Four Pillars Enters. Co. v. Avery Dennison Corp.*, Ninth Circuit 2002, 308 F3d 1075.

31. *Intel v. AMD* (542 US 241).

32. See also: *Wessel & Eyre* 2007, p. 30; *Fellas* 2007, p. 41-42.

evidence is sought from a non-participant in the matter arising abroad'. The reasoning is that in such cases the foreign tribunal has the ability to order parties to produce evidence. Nevertheless, courts have issued § 1782 orders when evidence was sought from a party to foreign proceedings and other factors indicated that it was appropriate.³³

2 The nature of the foreign tribunal and whether the foreign tribunal would be receptive to U.S. federal court judicial assistance

The issue is whether a foreign tribunal is 'receptive' to evidence obtained with the aid of § 1782. A powerful argument against a § 1782 order is that U.S. court assistance will be futile, because the foreign tribunal will not consider the evidence. The mere fact that the foreign tribunal itself provides for only limited discovery is insufficient basis for rejecting a § 1782 application. It is generally accepted that federal courts will deem § 1782 relief appropriate, unless it is presented with authoritative and affirmative proof that the foreign tribunal would reject evidence obtained with the aid of § 1782.³⁴

3 Whether the § 1782 request is an attempt to circumvent foreign restrictions on obtaining evidence or other U.S. or foreign country policies

This third discretionary factor aims to protect against abuse of § 1782 as a vehicle to circumvent foreign proof-gathering restrictions or other foreign policies. As will be discussed in the next paragraph, the U.S. Supreme court has rejected a foreign discoverability requirement. This means that the fact that discovery is unavailable under the foreign law is not reason to deny a § 1782 application. However, district courts will deny discovery when it would undermine a specific policy of a foreign country or the United States.

In *In re Application of Procter & Gamble*, a discovery request was made in connection with a series of patent infringement suits commencing in the UK, France, Germany, Japan and the Netherlands. The laws of most of these countries, including the Netherlands, allow no or only limited pre-trial discovery. The U.S. District Court for the Eastern District of Wisconsin ruled that the § 1782 request was not an attempt to circumvent the policies of any of the countries involved.³⁵ In short, the Court held that granting § 1782 discovery would not undermine the policies of foreign governments in favor of low discovery costs, as § 1782 would not impose any costs on such governments. Further, the Court held that foreign courts are not obliged to consider evidence obtained pursuant to § 1782, and will, therefore, not be burdened with evidence that they deem irrelevant.

In contrast, in *Schmitz v. Bernstein Leibhard & Lifshitz*, a § 1782 application was denied at the explicit request of German Minister of Justice on the ground that U.S. discovery would interfere with an ongoing criminal investigation in Germany.³⁶

4 Whether the § 1782 request is unduly intrusive or burdensome

A § 1782 application may be rejected or modified if it is 'unduly

intrusive or burdensome'. Although this considerations has not been used as a ground for rejection, courts have frequently ordered parties to modify discovery request to make them less burdensome.

2.5 What materials are discoverable?

Section 1782 is limited on its face to an order that a person 'give his testimony or statement' or 'to produce a document or other thing'. Thus, it permits the taking of pre-hearing depositions from persons who 'reside or are found' within a U.S. district, as well as the production of documents and other evidence³⁷ by a person in a U.S. district. § 1782 does not permit the use of other discovery devices common in U.S. litigation, such as interrogatories or requests for admissions.³⁸

2.5.1 Discoverability requirement

In order to understand the notion of a 'discoverability requirement', it is important to point out that the United States permits far more extensive pre-trial discovery than other countries do, in particular civil law countries.³⁹ As a result, U.S. courts were confronted with discovery requests for material that would not be discoverable under the rules of the foreign jurisdiction in which it is to be used.

On its face, § 1782 does not contain a discoverability requirement. However, U.S. courts have been divided on this point. The First and Eleventh Circuits adopted the discoverability requirement on the following two grounds. First, that it would be offensive to a foreign court to permit a litigant before it to obtain evidence in the United States that the foreign court itself could not grant,⁴⁰ and second, that, without a discoverability requirement, a U.S. litigant before a foreign court would be disadvantaged relative to its foreign opponent.

In *Intel v. AMD*, the U.S. Supreme Court rejected a categorical foreign discoverability requirement. The U.S. Supreme Court ruled that the fact that certain foreign jurisdiction permit more limited discovery than is authorized under §1782, does not mean that foreign courts would be offended by its use. In respect of a relative disadvantage to U.S. parties, the Court ruled that the

33. Wessel & Eyre 2007, p. 31; Fellas 2007, p. 42.

34. For example, the European Commission has made affirmative representations that it will not consider any evidence obtained through discovery ex § 1782. Wessel & Eyre 2007, p. 31.

35. *In re Application of Procter & Gamble Co.*, U.S. District Court for the Eastern District of Wisconsin, 1 September 2004, 334 F. Supp. 2d 1112.

36. *Schmitz v. Bernstein Leibhard & Lifshitz*, Second Circuit, 20 July 2004, 376 F.3d 1151.

37. Legislative history of § 1782 indicates that U.S. Congress intended the statute to be applied in cases where the evidentiary request goes beyond traditional requests for testimony. Thus, a request from a foreign court that a blood test be taken is not excluded. *In re Letter Rogatory from Local Court*, 154 FRD 196; *In re Letter of Request from Local Court of Pforzheim*, 130 FRD 363.

38. *In re Ishihara Chem. Co.*, 121 F. Supp. 2d 221; Fellas 2007, p. 41.

39. In civil law countries, the gathering of evidence is generally overseen by the court and not by the parties.

40. The First Circuit noted that in civil law countries, discovery American-style is often considered an affront to the nation's judicial sovereignty. *Boleri v. Fiat S.p.A.*, First Circuit, 763 f.2d 17.

district court could deal with this concern by conditioning the order for discovery upon the foreign party's reciprocal exchange for information.⁴¹

This means that an order for U.S. discovery may be granted, even though such evidence cannot be obtained under to the laws of the foreign tribunal. In relation thereto, U.S. courts do not need to examine whether a discovery request is in compliance with the laws of the foreign tribunal.⁴²

2.5.2 Location of the documents

Discovery under § 1782 can be sought from the party who resides or is found to be within the district. The question is whether the documents and materials sought to be discovered may be located outside of the district, and even outside of the United States. Since *Intel v. AMD*, two cases have expressly addressed this issue.

In *Norex Petroleum Ltd. v. Chubbs Ins. Co. of Canada*, the U.S. District Court for the District of Columbia denied a § 1782 application 'where the documents at issue are held in a foreign country by the non-party's foreign parent corporation'.⁴³ It should be noted that the fact pattern of this case is rather extreme: the documents were outside the United States, and the party from whom discovery was sought was not even in control of the documents.

However, in December 2006, the U.S. District Court for the Southern District of New York rejected the notion that § 1782 discovery is inappropriate when documents are located outside the United States. The court ordered the party from whom discovery was sought to produce documents, even though these were located in Germany. The court reasoned that the statute does not contain an express limitation as to the location of the documents or materials, and it would defeat the purpose of the statute to allow a party with full control over the documents to avoid production and discovery simply because the documents were outside the district.⁴⁴ Moreover, as the statute refers to the U.S. Federal Rules of Civil Procedure, it is logical to insist that an entity produce all documents and materials in its 'possession, custody, or control'.⁴⁵

2.6 Section 1782 in relation to the Hague Convention

The Netherlands and the United States are party to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter: the 'Hague Convention').⁴⁶ The Hague Convention provides for several formal methods of obtaining evidence abroad, such as letters of requests (*rogatoire commissies*) and the taking of evidence by diplomatic officers, consular agents and commissioners. It should be noted that the Netherlands have made a reservation pursuant to Article 23 of the Hague Convention that Dutch courts will not execute letters of requests issued for the purpose of obtaining pre-trial discovery of documents as known in common law countries.

Under the Hague Convention, the methods and procedures for the taking of evidence are governed by the law of the judicial authority that executes a letter of request.⁴⁷ Therefore, in the event that U.S. court executes a letter of request, U.S. law applies. The question is, however, whether from a U.S. perspective the Hague Convention is an exclusive method of obtaining evidence between countries that are party to the Convention.

In 1987, the U.S. Supreme court ruled on the status of the Hague Convention in the *Aerospatiale* case.⁴⁸ The fact pattern of *Aerospatiale* was, in short, as follows: an airplane built by French corporations crashed in Iowa. Victims of the crash filed suits in federal district court and claimed damages for personal injury from the French corporations as designers, manufacturers, and marketers of the airplane. Claimants applied for discovery pursuant to the U.S. Federal Rules of Civil Procedure, and *inter alia* requested the production of documents. The corporations filed for a protective order, and argued that (1) because they were French corporations and the documents sought through discovery could only be found in France, the exclusive procedure for such discovery was dictated by the Hague Convention, and (2) under a French penal statute (a 'blocking statute'), the corporations could not respond to discovery requests that did not comply with the Hague Convention.⁴⁹

The U.S. Supreme Court held that the Hague Convention does not provide exclusive or mandatory procedures for obtaining documents and information located in a foreign signatory's territory.⁵⁰ Litigants are not required to resort first to the procedures of the Hague Convention before using the normal discovery methods of the Federal Rules of Civil Procedure. The Court considered that, under the principle of international comity, the Hague Convention is an undertaking among sovereigns to provide optional procedures to facilitate discovery to which a district court should resort when it deems that course of action appropriate. In such a case, a district court should scrutinize the particular facts, sovereign interests, and likelihood that resort to Hague Convention procedures will prove effective. In relation thereto, a district court must also consider any foreign blocking statute.

To recapitulate, from U.S. perspective, the Hague Convention provides for an optional procedure of obtaining evidence. It should be noted, however, that in *Aerospatiale*, the evidence sought to be discovered was located outside the United States, and the discovery request was based on the U.S. Federal Rules of Civil Procedure. Consequently, *Aerospatiale* does not provide us

41. *Intel v. AMD* (542 US 241).

42. *In re Bayer AG*, Third Circuit 12 April 1999, 146 F. 3d 188.

43. *Norex Petroleum Ltd. v. Chubbs Ins. Co. of Canada*, U.S. District Court for District of Columbia, 23 May 2005, 384 F. Supp. 2d 45, 46.

44. *In re Application of Gemeinschaftspraxis Dr. Med. Schottdorf*, U.S. District Court for the Southern District of New York, 29 December 2006, 2006 U.S. Dist. Lexis 94161; Wessel & Eyre 2007, p. 33.

45. Rule 34 Federal Rules of Civil Procedure.

46. *Convention on the Taking of Evidence Abroad in Civil or Commercial Matters* dated 18 March 1970, 23 U.S.T. 2555 and Trb. 1979, 38.

47. Article 9 Hague Convention.

48. *Societe Nationale Industrielle Aerospatiale et. al. v. United District Court for the Southern District of Iowa*, U.S. Supreme Court, 15 June 1987, 482 U.S. 522.

49. *Aerospatiale* (482 U.S. 522), sub 1-3.

50. In the words of the U.S. Supreme Court: 'the Hague Convention was a permissive supplement, not a pre-emptive replacement for other methods of obtaining evidence located abroad' and 'the Convention does not prevent a contracting state from using more liberal methods of rendering evidence than those authorized by the Convention'. *Aerospatiale* (482 U.S. 522), sub 19.

with a clear precedent as to the relation of the Hague Convention and § 1782. However, the U.S. Supreme Court decision does provide a basis for the conclusion that the Hague Convention will not prevent U.S. district courts from granting § 1782 discovery requests in respect of evidence located in the United States for use in proceedings in foreign countries that are party to the Hague Convention, such as the Netherlands.

3 Use of evidence obtained with U.S. discovery in Dutch civil proceedings

U.S. discovery can be a useful means of obtaining evidence in relation to Dutch civil proceedings, in which relevant documents or persons are located in the United States. Such a situation is not hard to imagine. It could, for example, be the case when (1) one of the litigant parties is a U.S. resident or a U.S. corporation, partnership or other entity (2) a party to a Dutch proceeding is closely affiliated with a U.S. person or entity, such as a parent company, subsidiary, group member, or joint-venture partner, or (3) a U.S. resident is director of a Dutch company involved in a Dutch proceeding. In such circumstances, § 1782 discovery does not only provide a practical tool to obtain evidence located in the United States, it also provides for broader procedural instruments to obtain evidence than are available under Dutch law. In addition, § 1782 discovery is not as costly and time-consuming as letter of request procedure under the Hague Convention.

In the preceding paragraphs, I have discussed the U.S. rules of discovery for use in foreign or international proceedings. We have seen that U.S. district courts have broad authority to order discovery pursuant to § 1782. U.S. district courts may also order discovery for use in civil proceedings in the Netherlands, even though Dutch law does not allow pre-trial discovery and the Netherlands are party to the Hague Convention. From a U.S. law perspective, § 1782 discovery is available in connection with Dutch civil proceedings. The key question, however, is whether evidence obtained through § 1782 discovery can, subsequently, be used in Dutch civil proceedings. This is obviously a matter of Dutch law.

In this paragraph, I will turn to the issues of Dutch law, such as (1) whether U.S. discovery is reconcilable with the Dutch legal system, (2) whether U.S. discovery is an accepted method of obtaining evidence in a Dutch legal proceeding, and (3) how evidence obtained with U.S. discovery may be valued by Dutch courts. First, I will give a brief overview of the Dutch rules of evidence in civil proceedings and the debate on pre-trial discovery in the Netherlands. Second, I will discuss the case of *Convex v. Duizendstraat*, in which the President of the Utrecht District Court (*President Rechtbank Utrecht*) and subsequently by the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) addressed the issue whether § 1782 discovery can be used as a method of obtaining evidence for use in a Dutch civil proceeding.⁵¹ In connection therewith, I will also discuss the case of *Kinetics Technology International v. Mol*.⁵²

3.1 Dutch rules of evidence in civil proceedings

In a Dutch civil proceeding, litigant parties are considered to be autonomous and the court is regarded as 'passive' (*lijdelijk*). This means, in short, that parties are free to determine whether a

legal action is brought or continued, as well as the subject matter of the proceedings. In relation to the latter, parties are free to gather evidence before and during a proceedings and offer such evidence to the court.⁵³

A basic principle of Dutch law of civil procedure is that it has an open system of evidence. Pursuant to Article 152 Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering*), evidence may be offered by all possible means, unless a statute states otherwise.⁵⁴ The valuation of evidence is to be determined by the courts, unless the statute states otherwise.⁵⁵ Courts may exclude evidence on the ground that it is unlawfully obtained. However, Dutch civil courts are not easily inclined to exclude evidence as unlawful.⁵⁶

Dutch law does not allow for extensive pre-trial discovery. Only in very limited circumstances, information can be accessed outside of the hearing process.⁵⁷ In relation thereto, Dutch courts will not execute foreign letters of request issued for the purpose of obtaining pre-trial discovery of documents in the Netherlands.⁵⁸

In Dutch legal writing, pre-trial discovery is generally viewed with considerable scepticism. The main objection to pre-trial discovery is the risk of 'fishing expeditions', i.e. discovery of documents and other evidence for the sole purpose of finding grounds to file a future, not yet existing claim.⁵⁹ Nevertheless, the authors of a recent study on Dutch law of civil proceedings have argued that there is a need for more procedural instruments to discover documents in an early stage of Dutch civil proceedings, as this would prevent the filing of unnecessary legal actions and promote early settlements.⁶⁰ The authors recommend that a broad provision is introduced in Dutch law of civil proceedings, on the basis of which disclosure of documents can be requested from

51. Pres. Rb. Utrecht 9 April 1996, KG 1996, 158; and Amsterdam Court of Appeal 24 October 1996, rolnr. 490/96 SKG, NIPR 1997/120.

52. HR 6 February 1998, NJ 1999, 479.

53. H.J. Snijders, C.J.M. Klaassen and G.J. Meijer, *Nederlands burgerlijk procesrecht*, Deventer: Kluwer 2007, p. 212-213 and 244; R. Hidma and G.R. Rutgers, *Bewijs*, Deventer: Kluwer 2004, p. 8-9; and W. Hugenholtz en W.H. Heemskerk, *Hoofdlijnen van Nederlands burgerlijk procesrecht*, Den Haag: Elsevier juridisch 2006, p. 10-11.

54. Exceptions to the rule that evidence may be offered by all possible means are for example: Article 1:130 Dutch Civil Code and Article 1021 Dutch Code of Civil Procedure ('DCCP'). See also: Hidma/Rutgers 2004, p. 63-64.

55. Article 152 section 2 DCCP.

56. Snijders, Klaassen & Meijer 2007, p. 229-230; J.M. Hebly, *Verkrijging van getuigenbewijs in het buitenland*, Arnhem: Gouda Quint 1994, p. 197-199; See also: M. Kremer, *Onrechtmatig verkregen bewijs in civiele zaken*, Deventer: WEJ Tjeenk Willink 1999.

57. Article 843a-b DCCP. See also: Article 21 and 22 DCCP (general provisions of disclosure), Article 186-193 (preliminary examination of witnesses) and Article 202-207 (preliminary expert opinion and on-site investigation). Snijders, Klaassen & Meijer 2007, p. 213-214 and 246-249; J.R. Sijmonsma, Art. 843a Wetboek van Rechtsvordering ont(k)leed, Nijmegen: Ars Aequi 2007.

58. Article 23 Hague Convention.

59. S. Hoogeveen, *Fishing expeditions versus exhibitieplicht*, *Advocatenblad* 2005/15, p. 680; Sijmonsma 2007, p. 28-29; See also: Explanatory Memorandum, 26855, nr. 3, p. 54 and 188.

60. W.D.H. Asser, H.A. Groen, J.B.M. Vranken and I.N. Tzankova, *Uitgebalanceerd. Eindrapport Fundamentele herbezinning Nederlands burgerlijk procesrecht*, Den Haag: Boom Juridische uitgevers 2006, p. 73-76. In respect of the discovery rationale, please compare: Moore's Manual, Federal Practice and Procedure, Matthew Bender & Company, Inc., Part V, § 15.01.

litigant parties as well as third parties and, if necessary, under supervision of the courts.⁶¹

It should be noted that the debate above is primarily focused on pre-trial discovery in the Netherlands for use in Dutch and/or foreign proceedings. It should be distinguished from the issue discussed in this article, namely whether evidence obtained by way of a foreign proceeding, which provides for certain procedural instruments to obtain evidence not available under Dutch law of civil proceedings – such as U.S. discovery – can be used in Dutch civil proceedings.⁶²

3.2 *Convex v. Duizendstraal: fact pattern*

The facts of this case were, in short, as follows: Convex B.V. was a fully-owned subsidiary of Convex Corporation, a large listed U.S. corporation with its registered office in Dallas, Texas. Convex B.V. *et alii* had sued one of its former directors, G. Duizendstraal, on the basis of improper fulfillment of duties, director liability and tort (*onrechtmatige daad*). In order to gather evidence for the defense, Duizendstraal filed an application for pre-trial discovery pursuant to § 1782 with the U.S. District Court for the Northern District of Texas. The District Court issued a court order for discovery of documents and depositions in respect of Convex Corporation and others (hereinafter: 'Convex'). Subsequently, the Court denied Convex' motion for a protective order, and dismissed Convex' motion on appeal.

In relation to the above, Convex initiated summary proceedings (*kort geding*) in the Netherlands. Convex requested that the President of the Utrecht District Court to order Duizendstraal to refrain from making any use of the U.S. court order allowing the discovery. Convex based its claim on the argument that, by using U.S. discovery as a method of gathering evidence, Duizendstraal acted wrongfully and in direct violation of the fundamental principles of Dutch law of civil procedure.

The President of the Utrecht District Court denied Convex' motion, which decision was affirmed by the Amsterdam Court of Appeal. The basis for both decisions will be discussed below.⁶³

3.3 *U.S. discovery is a 'informal method' of obtaining evidence*

The President of the Utrecht District Court noted that in this case the principal proceedings were Dutch civil actions, and, as a result, the production of evidence and the assessment of the evidentiary value were governed by the rules of Dutch civil procedure. Dutch law has an open system of evidence, i.e. evidence may, in principle, be offered by all possible means.⁶⁴ It is also a basic principle of Dutch civil procedure that the litigant parties themselves – whether of not before the start of the legal proceedings – gather evidence to substantiate their claims. In relation thereto, parties may request the assistance of Dutch courts, but they are free to obtain evidence in an informal way. For example, they can seek written statements of witnesses, take photos, obtain expert opinions, or try to obtain relevant documents.⁶⁵

The President of the Utrecht District Court noted that Duizendstraal pursued an informal method (*een informele gerechtelijke weg*) by applying for § 1782 discovery, including the deposing of and obtaining documents from Convex. Such request can be made without involvement of the Dutch courts.⁶⁶

3.4 *U.S. discovery is not irreconcilable with the Dutch legal system*

Convex argued that the § 1782 discovery proceeding was irreconcilable with the Dutch legal system and that it violated the general principles of Dutch civil procedure.⁶⁷ The President of the Utrecht District Court and the Amsterdam Court of Appeal rejected this proposition and held that the fact that the concept of pre-trial discovery is not known to the Dutch law of civil procedure does not mean that this concept conflicts with the fundamental principles of Dutch civil procedure.⁶⁸

In addition, Convex argued that that discovery conflicted with the Hague Convention and the reservation made by the Netherlands pursuant to Article 23 of the Hague Convention. Both courts ruled that the fact that the Netherlands have made a reservation that its courts will not execute requests for discovery does not have its founding in fundamental objections against the concept of discovery, but in arguments of a practical nature.⁶⁹ In addition, the Court of Appeal held that the fact that Duizendstraal could use U.S. discovery as a method of obtaining evidence and Convex could not use a similar method in the Netherlands did not lead to a legally unacceptable inequality of arms.⁷⁰

In *Kinetics Technology International v. Mol*, the Dutch Supreme Court (*Hoge Raad*) reached a similar conclusion.⁷¹ The facts of this case were, in short as follows: Kinetics sued its former employee Mol on grounds of copyright infringement in respect of certain computer programs. Kinetics had obtained evidence by way of pre-trial discovery in the United States. In order to guarantee confidentiality, the U.S. court issued a protective order in respect of the produced evidence. Subsequently, the U.S. court lifted the protective order in respect of Kinetics – but not in respect of Mol – to allow Kinetics to use the evidence in a Dutch civil

61. In order to prevent 'fishing expeditions', such provision should require that parties requesting disclosure of documents demonstrate that (i) a reasonable claim can be filed against the party from whom disclosure is sought and (ii) that the disclosure is necessary to establish whether there are sufficient grounds to file legal action and/or whether there is a basis for settlement. Asser, Groen, Vranken & Tzankova 2006, p. 71-76. See also: Dutch Minister of Justice, *Visie op het civiele proces: reactie fundamentele herbezinning burgerlijk procesrecht*, p. 19-20.

62. Please note that the discussion of discovery and the disclosure of documents under Dutch law for use in Dutch and foreign proceedings falls outside the scope of this article. Please refer to: Asser, Groen, Vranken & Tzankova 2006, p. 71-76; Sijmonsma 2007, p. 27-29; and P.J. van der Korst, *Bedrijfsgeheimen en transparantieplichten*, Deventer: Kluwer 2007, p. 87-108.

63. See also: H.M. Vletter-van Dort, *Gelijke behandeling van beleggers bij informatieverstreking*, Deventer: Kluwer 2001, p. 253-254; Van der Korst 2007, p. 121-123; and Van Engelen 1998, p. 593.

64. Pres. Rb. Utrecht, r.o. 4.1.

65. In order to rely on a document in court, a party must be able to produce it. Pres. Rb. Utrecht, r.o. 4.2.

66. Pres. Rb. Utrecht, r.o. 4.3.

67. Convex claimed that its right to be heard (*hoor en wederhoor*) was violated. The President of the Utrecht District Court rejected this proposition on the ground that Duizendstraal's application for U.S. discovery did not deprive Convex of its fundamental rights.

68. The President of the Utrecht District Court continued by noting that the aim of § 1782 is to ascertain the truth, which is also one of the basic principles of Dutch civil procedure. Pres. Rb. Utrecht, r.o. 4.7.

69. Pres. Rb. Utrecht, r.o. 4.6; Amsterdam Court of Appeal, r.o. 4.5.

70. Amsterdam Court of Appeal, r.o. 4.16.

71. HR 6 February 1998, NJ 1999, 479.

proceeding. In the Dutch proceeding, Mol argued that the use of the evidence by Kinetics violated the fundamental principles of 'fair trail' and 'equality of arms', because it resulted in a disparity between parties, as Mol could not access or use the same evidence since he was still restricted by the protective order.⁷²

The Dutch Supreme Court held that test of 'fair trail' is whether a proceeding on the whole can be considered fair. In relation to the use of evidence, the decisive factor is whether one of the parties has an unacceptable advantage over its counterparty (*een ongeoorloofde voorsprong met betrekking tot het gebruik van bewijsmateriaal*). The Court confirmed the judgment of the Court of Appeal that Kinetics did not have an unacceptable advantage over Mol. This judgment was, in short, based on following circumstances: (1) Mol could examine all documentary evidence used by Kinetics in the Dutch proceeding, (2) the protective order did not preclude Mol from making use of evidence originating from him, and (3) insofar Mol wanted to access and examine evidence not originating from him, he had not exhausted all possibilities under Dutch law of civil proceedings.⁷³

To recapitulate, the use of U.S. discovery is not irreconcilable with the Dutch legal system. The use of evidence obtained through U.S. discovery does, in itself, not violate the fundamental principles of 'fair trail' and 'equality of arms'. Although there may be a disparity between parties in respect of access to evidence, evidence obtained through U.S. discovery can be used in Dutch civil proceedings, as long as there is no unacceptable disparity. As demonstrated by *Kinetics Technology International v. Mol*, Dutch courts are not easily inclined to consider a disparity in respect of evidence unacceptable.

3.5 Pursuing U.S. discovery is not wrongful

The Amsterdam Court of Appeal held that Duizendstraal did not act wrongfully by applying for discovery in the United States. Neither the potential delay in the proceeding, the slow conducting of the case by Duizendstraal, nor the fact that Duizendstraal had failed to pursue a preliminary hearing of witnesses (*voorlopig getuigenverhoor*) in the Netherlands or a letter of request (*rogatoire commissie*) under the Hague Convention, makes the application for § 1782 discovery wrongful.⁷⁴

In addition, it is not feasible that Duizendstraal pursued the U.S. discovery in order to deprive Convex of its privileges under Dutch law. In the U.S. discovery proceedings, Convex could invoke privileges (*verschoningsrechten*) under U.S. law as well as under Dutch law, in particular privileges which are afforded to party-witnesses.⁷⁵ The Court continued that the fact that the scope of and possibilities of posing questions in a U.S. discovery are broader than under Dutch law⁷⁶ does not make a request for U.S. discovery wrongful. In a court order, a U.S. district court may impose limitations on the scope and methods of discovery. This provided Convex with ample protection against unlimited questioning.⁷⁷ Moreover, the pre-trial discovery request at hand concerned information relevant to the principal proceeding in the Netherlands and could, therefore, not be regarded as an endless expedition.

Convex had also argued that it was burdened with additional costs in relation to the U.S. discovery. This argument was also

rejected by the Amsterdam Court of Appeal. Even if U.S. discovery would cause additional costs and expenses, this alone would not make pursuing it wrongful.⁷⁸

The fact that in the U.S. discovery proceeding, Duizendstraal had requested discovery of documents, which partially or exclusively concerned the Dutch Convex subsidiary and which were also located in the Netherlands, did not infringe sovereignty of the Netherlands. The Court held that, because Convex Corporation was the parent company of the Convex group, it might be assumed that all documents and correspondence, which Duizendstraal sought to discover, could be found in their most complete form at Convex Corporation's offices. The fact that these documents also concerned the Dutch group company and could also be found in the Netherlands, did not make the U.S. discovery unlawful.⁷⁹

3.6 Admissibility and valuation of evidence

As discussed above, the Courts in *Convex v. Duizendstraal* held that the evidence obtained by way of U.S. discovery was admissible and did not constitute illegally obtained evidence. Although the issue of admissibility of evidence as such was not raised in *Kinetics Technology International v. Mol*, the Advocate-General noted in his opinion that the fact that evidence is obtained by way of a foreign proceeding, which provides for certain procedural instruments to obtain evidence not available under Dutch law of civil proceedings, does in itself not make such evidence inadmissible in a subsequent Dutch civil proceeding.⁸⁰

In *Convex v. Duizendstraal*, Convex also argued that Duizendstraal had insufficient interest to hold depositions in the United States, because the testimonies resulting from these depositions would not constitute valid evidence by witnesses in the Netherlands. This argument was rejected as well. The Amsterdam Court of Appeal held that, in principle, testimonies resulting from depositions in a U.S. discovery proceeding constitute written evidence in a Dutch civil proceeding.⁸¹

72. HR 6 February 1998, NJ 1999, 479, r.o. 3.1-3.2.

73. HR 6 February 1998, NJ 1999, 479, r.o. 5.2.

74. Amsterdam Court of Appeal, r.o. 4.8.

75. The last sentence of § 1782 (a) states that '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'.

76. The President of the Utrecht District Court had noted that, in the United States, the hearing of a witness is often performed by lawyers in the presence of a court reporter, unless a special hearing by a judge is required. The U.S. style of hearing a witness, including the concepts of cross examination and leading questions, is not as such in conflict with the fundamental principles of Dutch civil procedure. Pres. Rb. Utrecht, r.o. 4.13.

77. Amsterdam Court of Appeal, r.o. 4.10.

78. This could be different if the discovery request is made entirely or in part for the purposes of burdening the opposing party with costs and expenses. Amsterdam Court of Appeal, r.o. 4.14.

79. Amsterdam Court of Appeal, r.o. 4.15. In respect of email correspondence, the Court noted that all email correspondence was routed via the central computer in Dallas, Texas, and was (or should have been) archived in some form there.

80. This follows from the principle laid down in Article 152 DCCP in connection with Dutch case law on the admissibility of unlawfully obtained evidence. HR 6 February 1998, NJ 1999, 479, Conclusion Solicitor-General, sub. 15.

81. Amsterdam Court of Appeal, r.o. 4.12.

4 Conclusion

In this article, I have discussed the rules of discovery in the United States for use in foreign or international proceedings. We have seen that U.S. district courts have broad authority to order discovery pursuant to Section 28 USC § 1782. Under this statute, U.S. courts may similarly order discovery in relation to Dutch civil proceedings.

The statute does not contain a discovery requirement, i.e. the fact that Dutch law does not allow for extensive U.S.-style discovery, does not prevent U.S. courts from ordering discovery pursuant to § 1782. Moreover, a request for § 1782 discovery is unlikely to be considered an attempt to circumvent Dutch policies, as the discovery does not impose costs on the Dutch government and Dutch courts are not obliged to consider evidence obtained in discovery. The fact that the Netherlands and the United States are party to the Hague Convention does also not preclude discovery under § 1782, as the U.S. Supreme Court has ruled that the Hague Convention provides an optional procedure for obtaining evidence in an international context.

Evidence obtained through U.S. discovery can, subsequently, be used in a Dutch civil proceeding. This has been confirmed by the President of the Utrecht District Court and the Amsterdam Court of Appeal in *Convex v. Duizendstraal*. Both courts held that U.S. discovery should be considered an informal method of obtaining evidence, which is neither irreconcilable with the Dutch legal system nor wrongful.

This brings me to the following practical considerations:⁸²

- Before considering whether § 1782 discovery can be used in a particular proceeding, it is useful to identify likely targets of a discovery application. As noted, discovery may be sought from a person (an individual, corporation, partnership, or other entity) who resides or is found to be in the United States and is either a party or a non-party to the Dutch proceeding. Thus, a § 1782 application would most likely be directed against a person who is a U.S. resident or a U.S. based corporation, partnership or other entity that is either a party to the Dutch proceeding or a U.S. based non-party that is affiliated with a Dutch litigant party, such as a parent company, subsidiary, or joint-venture partner.
- Dutch parties that have entered into contacts with U.S. parties (or with Dutch parties affiliated with a U.S. entity), are thus likely to be able to benefit from § 1782 discovery. They may apply for discovery in relation to either a pending Dutch civil proceeding or a proceeding which is ‘within reasonable contemplation’. As a result, they can use U.S.-style pre-trial discovery both for the purpose of developing their case and to put settlement pressure on their opposing party.
- In a Dutch proceeding between a Dutch party and a U.S. party (or a Dutch party affiliated with a U.S. entity), § 1782 discovery presents a relative disadvantage to the U.S. party (or the Dutch party affiliated with a U.S. entity). Such entities may themselves be subject to a § 1782 application but cannot invoke § 1782 or a similar provision under Dutch law to discover evidence from their Dutch counterparty. Although the U.S. Supreme Court has rejected a foreign discoverability requirement in respect of § 1782, U.S. courts are sensitive to the fact that the use of § 1782 can result in a disparity

of access to evidence. As a result, in considering discovery applications from Dutch parties, U.S. courts could require that the Dutch parties provide evidence to the U.S. party similar to that which they requested.

To recapitulate, U.S. discovery can be a powerful tool for obtaining evidence in pending or potential Dutch civil proceeding between a Dutch party and a U.S. party (or a non-U.S. party affiliated with a U.S. entity). However, as Dutch law of civil proceedings does not allow for extensive pre-trial discovery, one should consider the potential comparative disadvantage of U.S. parties subject to § 1782 discovery. As a final point, it should be noted that the main issue remains the receptiveness of Dutch courts to and their valuation of evidence obtained through U.S. discovery.

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82. See in respect of arbitral proceedings: Fellas 2007, p. 43-44.