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American (Discovery) Abroad: 28 U.S.C. § 1782

Section 1782 serves as a powerful mechanism for coercing American-style discovery in foreign proceedings.

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Business frequently crosses international borders and occasionally results in disputes in foreign tribunals where relevant documents or witnesses are located in the United States. 28 U.S.C. § 1782 provides a mechanism to compel Americans to produce American-style discovery for use in foreign proceedings. Filing a section 1782 application can allow an interested party to a foreign proceeding to obtain documents, admissions, interrogatory responses or sworn testimony for use in the foreign proceeding from any person or entity who resides or is found in the United States.

Under section 1782, any party or interested person involved in proceedings before a foreign or international tribunal may request a district court to order discovery from a person who 'resides' in the judicial district. The discovery available spans document production to interrogatories to depositions and may also be used in future domestic litigation. *Glock v. Glock, Inc.*, 797 F.3d 1002 (11th Cir. 2015) (permitting the use of discovery obtained thru § 1782 in distinct proceedings over a year later).

Section 1782 requires that: (1) the requestor be an "interested person," (2) the respondent "reside" or is "found" in the district, and (3) the discovery be "for use in a proceeding in a foreign or international tribunal." In *Intel Corp. v. Advanced Micro Devices Inc.*, 542 U.S. 241, 242 (2004), the court held that "interested person" includes not only litigants, but anyone with "significant participation rights" in the litigation. Indeed, even a foreign sovereign can qualify as an "interested person." *In re Republic of Kazakhstan*, 110 F. Supp. 3d 512, 516 (S.D.N.Y. 2015).

The requirement that the target "reside" or be "found" in the district is only slightly less straightforward. Section 1782 does not define "found" in the district, but if the respondent is "at home" in the district, that will certainly suffice. The Second Circuit has held that if the target is not subject to the court's general jurisdiction, the materials sought must have a causal connection to the target's "in-forum conduct." *In re del Valle Ruiz*, 939 F.3d 520, 531 (2d Cir. 2019). Corporations are generally "found" in the district where incorporated or headquartered. *In re Application of Masters for an Ord. Pursuant to 28 U.S.C. §1782 to Conduct Discovery for Use in a Foreign Proc.*, 315 F. Supp. 3d 269, 274 (D.D.C. 2018); *see also In re Inmobiliaria Tova, S.A.*, No. 20-24981-MC, 2021 WL 925517 (S.D. Fla. Mar. 10, 2021).

The requirement that the discovery be used in a foreign proceeding has also been broadly construed. Indeed, the foreign action does not even need to have been commenced for section 1782 to apply. *In re Consorcio Ecuatoriano De Telecomunicaciones S.A.*, 685 F.3d 987, 992 (11th Cir. 2012), *opinion vacated and superseded sub nom*. 747 F.3d 1262 (11th Cir. 2014). Similarly, it is not necessary for the discovery to be outcome-determinative; all that is required is that the discovery will be used at any stage of a foreign proceeding. *Mees v. Buiter*, 793 F.3d 291, 295 (2d Cir. 2015).

There are some potential limitations. A district court need not grant the request if it runs afoul of any of the so-called "discretionary" factors announced by the Supreme Court, including whether: (1) the person from whom discovery is sought is

participating in the foreign proceeding, (2) the foreign tribunal is receptive to U.S. judicial assistance, (3) the discovery request is an attempt to circumvent foreign proof-gathering restrictions, or (4) the request is "unduly intrusive or burdensome." *Intel Corp*., 542 U.S. at 264–65.

One open question is whether section 1782 allows for discovery in connection with international commercial arbitration. The Second, Fifth, and Seventh Circuits have held that the language "foreign or international tribunal" does not include foreign, private commercial arbitrations, while the Fourth and Sixth Circuits have found precisely the opposite. The Supreme Court recently granted the petition for a writ of certiorari in *Servotronics Inc. v. Rolls-Royce PLC et al.*, No. 19-1847 (7th Cir. Mar. 21, 2021), to resolve the split. The Court's decision will be one to watch both for signals on the current Court's view on the scope of section 1782 as well as whether it will be extended to foreign arbitrations.

Section 1782 thus serves as a powerful mechanism for coercing American-style discovery in foreign proceedings. Litigators of international business disputes should be aware of the powerful discovery assistance it can provide in resolving disputes in venues abroad.

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