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Section 1782: Discovery in Support of a Foreign Proceeding

Authored by Benjamin M. Daniels and Jenna M. Scoville

This will be the first in a series of Legal Updates about international discovery and cross-border litigation. Robinson+Cole has broad experience representing international clients and their U.S. subsidiaries in both domestic and international disputes. If you have any questions about this article or cross-border litigation, please contact the attorneys listed below.

Companies embroiled in foreign litigation often forget about a powerful tool available in the United States. Recognizing that foreign tribunals can lack the power or desire to order broad discovery, Congress passed 28 U.S.C. § 1782, which permits any party "interested" in a foreign proceeding to apply for U.S.-style discovery from any entity "found" in the United States. If the application is granted—which it usually is—the applicant can get U.S.-style discovery.

This broad discovery can be a gamechanger, giving one party a decided informational advantage. Moreover, the statute can be used to support "contemplated" proceedings, meaning that a company can get discovery before it has even filed a lawsuit. Given the power of this tool, it is important to understand the basics of Section 1782 and how it operates.

What is Section 1782?

Section 1782 enables an applicant to apply to a U.S. federal court for discovery "for use in" a foreign proceeding. The statute provides: "[t]he 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."

Section 1782 has two aims. First, it provides "equitable and efficacious" discovery "for the benefit of tribunals and litigants involved in litigation with international aspects."[1] Second, it "encourage[s] foreign countries by example to provide similar means of assistance to our courts."[2] Courts try to promote these twin goals by giving the statute "increasingly broad applicability."[3]

Who Can Obtain Section 1782 Discovery?

Any "interested person" in a foreign proceeding can use Section 1782. This is not limited to the parties to a pending proceeding—it may include entities that initiate an investigation or simply have a right to submit information in a legal case or controversy. For example, a company that complained to the European Commission about anti-competitive behavior was an "interested person" because the company could submit evidence during the Commission's investigation and had a right to appeal.[4]

Moreover, the proceeding does not have to be traditional civil litigation—courts have granted Section 1782 discovery in support of contemplated litigation, criminal proceedings, proceedings before administrative bodies, and some arbitrations.[5]

Where Should a Section 1782 Application Be Filed?

An applicant must file a Section 1782 petition in the U.S. federal district court where the target, the person or entity from which information is sought, resides or is found. Although Section 1782 does not define

"resides" or "found," courts agree that this is at least where the company is incorporated or has its principal place of business.[6]

Alternatively, a petition can be filed where the target has a substantial and systematic presence.[7] More specifically, Section 1782 discovery is also available "where the discovery material sought proximately resulted from the [target's] forum contacts" or where "the [target] having purposefully availed itself of the forum [is] the primary or proximate reason that the evidence sought is available at all."[8]

When Can a Section 1782 Application Be Filed?

Section 1782 discovery is available even if a foreign "proceeding" is not "pending" or "imminent."[9] The sole requirement is that the proceeding be reasonably "contemplated," which means an applicant can receive Section 1782 discovery without suing. The courts are split on whether this rule also applies to anticipated arbitrations.[10]

What Factors Do Courts Consider?

Courts use both statutory and discretionary factors to evaluate an application for Section 1782 discovery. The statute has three requirements: (1) the target must reside in or be found in the district where the application is made; (2) the discovery must be "for use in" a proceeding before a foreign tribunal; and (3) the applicant must be an "interested person."[11] Well-counseled applicants rarely have trouble meeting the statutory factors.

But courts also consider discretionary factors first set out in the landmark case *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). The *Intel* factors include: whether the foreign tribunal has the power to order the same discovery; whether the foreign tribunal would be receptive to the discovery; whether the request seeks to circumvent foreign proof-gathering restrictions; and whether the request is "unduly burdensome."[12]

Challenges often focus on the discretionary factors, particularly whether the foreign tribunal could order production of the documents, would accept the evidence, and whether the request is unduly burdensome. Counterintuitively, courts often are *more* likely to allow third-party discovery because discovery against parties is often available against parties, but not available against third parties.

What Type of Evidence is Available?

If the Section 1782 application is granted, the discovery proceeds under the standard U.S. discovery rules. This means companies can serve document requests, take depositions, and ask for any relevant evidence in support of a foreign proceeding. The evidence need not be admissible in the foreign jurisdiction; the question is whether it is reasonably related to the foreign proceeding as viewed through the broad lens of relevance under Federal Rules of Civil Procedure Rule 26.[13]

Conclusion

Section 1782 provides parties to a foreign proceeding with a powerful tool to gather information in support of their case. They can gather an immense amount of evidence that would not otherwise be available, both from their opponent and from third parties. Parties to a Section 1782 proceeding—whether an applicant or defending against an application—need to be aware of these basics.

FOR MORE INFORMATION

For more information contact any of the Robinson+Cole team members listed below:

Benjamin M. Daniels

Jenna M. Scoville

Edward J. Heath

Jeffrey J. White

ENDNOTES

[1] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004) (providing brief history of the statute).

[2] Brandi-Dohrn v. IKB Deutsch Industriebank, AG, 673 F.3d 76, 80 (2d Cir. 2012).

[3] Id. at 80.

[4] Intel, 542 U.S. at 256–57.

[5] Intel, 542 U.S. at 259.

[6] See, e.g., In re BNP Paribas Jersey Tr. Corp., 2018 WL 895675, at *3 (S.D.N.Y. Feb. 14, 2018) (Target "resides or is found in this district because it has a principal of business" in the district); LEG Q LLC v. RSR Corp., 2017 WL 3780213, at *6 (N.D. Tex. Aug. 31, 2017) (Applicant had shown target "reside[d] or may be found in the Northern District of Texas because they are all headquartered and maintain their principal places of business in Dallas."); HRC-Hainan Holding Co., LLC v. Yihan Hu, 2020 WL 906719, at *4 (N.D. Cal. Feb. 25, 2020) ("A business entity is 'found' in the judicial district where it has its principal place of business.").

[7] In re del Valle Ruiz, 939 F.3d 520, 528 (2d Cir. 2019) ("§ 1782's 'resides or is found' language extends to the limits of personal jurisdiction consistent with due process.").

[8] Id. at 530.

[9] Id. at 259.

[10] Compare In re Clerici, 481 F.3d 1324, 1332–1333 (11th Cir. 2007) ("[N]othing in the plain language of § 1782 requires that the proceeding be adjudicative in nature") with Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24, 27–28 (2d Cir. 1998) ("In analyzing the second element of" § 1782, the court must ask "whether a foreign proceeding is adjudicative in nature.").

[11] Id.

[12] Intel, 542 U.S. at 264–65.

[13] See, e.g., Brandi-Dohrn, 673 F.3d at 82.