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COMMERCIAL DISPUTES

This BNA Insights article by Duane Loft and Joshua Libling of Boies, Schiller & Flexner LLP in New York examines complex commercial disputes in today's economy, which are rarely confined to one country. The authors look at ''a powerful device'' in this type of litigation: U.S. Code Section 1782, which permits parties to apply to the U.S. federal courts for the production of documents and testimony for use in foreign or international tribunals. The authors point to two recent decisions by the U.S. Court of Appeals for the Second Circuit which highlight both the expansive application of Section 1782 and also an important limitation.

U.S. Discovery in Aid of International Proceedings: Recent Developments in Section 1782

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In today's global economy, complex commercial disputes are rarely confined to one country. More often, they involve evidence, witnesses, and assets in multiple territories, subject to different legal systems. Your adversary in England, for example, may have a corporate affiliate in the U.S. holding documents and employees crucial to your dispute in the United Kingdom. In these situations, it is important to remember a powerful device in your litigation arsenal: U.S. Code Section 1782.

Broadened in 1964 based on the ''growth of international commerce,'' Section 1782 permits parties to apply to the U.S. federal courts for the production of documents and testimony for use in foreign or international

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tribunals. The U.S. offers one of the broadest litigation discovery regimes in the world. Section 1782 thus may allow for wide discovery of non-parties in the U.S.—often wider than would be available if ordered by the local tribunal.

Two recent decisions by the U.S. Court of Appeals for the Second Circuit highlight both the expansive application of Section 1782 and also an important limitation. In *Mees v. Buiter*, 2d Cir., No. 14-1866, 7/17/15 (''Mees''), the Second Circuit permitted discovery to take place even before any foreign proceeding had been commenced. (Boies, Schiller & Flexner LLP was counsel to Ms. Mees before the Second Circuit.) Just one month later, the Second Circuit clarified in *Certain Funds, Accounts and/or Inv. Vehicles Managed by Affiliates of Fortress Inv. Grp. LLC v. KPMG, LLP*, 2d Cir., No. 14-2838, 8/20/15 (''Certain Funds''), that, although such pre-action discovery is permitted under Section 1782, the foreign proceeding must be reasonably contemplated. These two Second Circuit decisions bring important clarity to the contours of Section 1782.

Statutory Requirements for Discovery Under Section 1782. Section 1782 contains three basic requirements:

1. The person from whom discovery is sought must reside or be found in the U.S. federal district where the application is made.

2. The information sought must be ''for use in a proceeding in a foreign or international tribunal.''

3. The petitioner must be an ''interested person'' in the foreign proceeding.

Once these elements are met, the court may consider discretionary factors, including

(i) whether the person from whom discovery is sought is a participant in the foreign proceeding (because the need for Section 1782 is not as apparent when the local court can order the discovery itself);

(ii) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign tribunal to U.S. judicial assistance;

(iii) whether the request is an attempt to circumvent proof-gathering restrictions or policies in the foreign jurisdiction where the litigation is pending; and

(iv) whether the request is unduly intrusive or burdensome.

The U.S. courts tend to apply this statute broadly, so that it serves its twin legislative goals of ''providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts.'' Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995). Although it is not *per se* impermissible for a court to deny discovery based on the discretionary factors, the Second Circuit made it clear in *Mees* that ''it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright.''

The use of Section 1782 has become particularly common in support of U.K. proceedings. ''District courts routinely allow applicants to obtain third-party Section 1782 discovery related to litigation pending in the United Kingdom.'' *In re IKB Deutsche Industriebank AG*, No. 09-cv-7852 (N.D. Ill. Apr. 8, 2010).

The Scope of Discovery Permitted Under Section 1782. Section 1782 discovery is subject to the U.S. Federal Rules of Civil Procedure, under which ''Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.'' As stated in *Mees*, this means that the discovery sought ''need not be necessary for the party to prevail in the foreign proceeding'' so long as it ''will be employed with some advantage or serve some use in the proceeding.''

After the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), there is no ''foreign discoverability'' requirement mandating that the materials sought under Section 1782 also be discoverable in the foreign jurisdiction if they were located there. Nor are litigants first required to seek the information through the foreign tribunal before seeking it in the U.S. Indeed, there is not even a requirement that the evidence be admissible before the foreign tribunal.

In addition to documentary evidence, Section 1782 permits the taking of ''depositions''—up to a full day of testimony from a witness under oath, transcribed by a court reporter.

Persons Entitled to Discovery Under Section 1782. Section 1782 allows any ''interested person'' to apply for discovery, and the Supreme Court has applied this term broadly. To be an ''interested person,'' the applicant under Section 1782 need not be a litigant in the foreign proceeding. In *Intel*, for example, the Supreme Court found that a complainant in a European Commission competition investigation, even if not a party to the proceeding, was an ''interested person'' for purposes of Section 1782, given the complainant's ''significant role'' in the proceedings and ''reasonable interest in obtaining judicial assistance.''

When Section 1782 Discovery May Be Obtained. Section 1782 discovery may be deemed ''for use'' in a foreign proceeding even when that proceeding has not yet been commenced. Thus, Section 1782 discovery may be available even where the applicant had not yet identified proposed claims, legal theories, or the proceedings in which it planned to bring such claims.

In two recent decisions, the Second Circuit has further clarified when discovery is available under the ''for use'' requirement. *Mees* and *Certain Funds* were both penned by Judge Gerard E. Lynch and together represent the closest analysis of Section 1782 conducted by the Second Circuit in many years. In *Mees*, the Second Circuit held first that ''an applicant may satisfy the statute's 'for use' requirement even if the discovery she seeks is not necessary for her to succeed in the foreign proceeding'' and, second, that ''the discovery need not be sought for the purpose of commencing a foreign proceeding in order to be 'for use' in that proceeding.''

Taken together, these two holdings mean that even before litigation is commenced outside the U.S., a potential litigant can seek discovery in the U.S. that would be useful at any stage of the contemplated international proceeding, without needing to establish that such discovery is necessary to commence the foreign proceedings. Thus, Section 1782 creates a broad license for federal courts to assist in reasonably contemplated foreign proceedings.

However, in *Certain Funds*, the Second Circuit established that such pre-action discovery is not without limits. In that case, the court affirmed a lower court's de-

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termination that Section 1782 discovery was not permitted because the relevant foreign proceeding was not ''within reasonable contemplation'' at the time.

A brief summary of the facts is essential to understanding the court's holding. The applicants in *Certain Funds* held interests in Saudi Arabian conglomerates. In 2009, financial problems in one of the conglomerates were ''traced to fraud and embezzlement,'' and various legal actions were instituted in several countries in the wake of the conglomerates' default. Five years later, the applicants sought discovery pursuant to Section 1782 in aid of these foreign proceedings and also because they planned to initiate new actions.

The lessons from *Mees* and *Certain Funds* are that an application for Section 1782 discovery should be careful to establish how the discovery will be "used" in the foreign proceeding and also provide the court with objective indicia that the foreign proceeding is contemplated (if it has not already commenced).

However, because the applicants were not parties to the already-commenced litigations, the Second Circuit held that the applicants had not met the ''for use'' requirement of Section 1782. The applicants were ''not in a position to direct the [party in the litigation] to consider their evidence or submit that evidence to the tribunal,'' and could at most ''furnish information in the hope that it might be used.'' Thus, the court ruled, the applicants could not establish that they would ''be able to use the information'' in any foreign proceeding. As to the possibility of future litigation, the court concluded that retaining counsel and ''discussing the possibility of initiating litigation'' was insufficient to support a preaction demand for discovery. Instead, the Court required ''some objective indicium that the action is being contemplated.''

The lessons from *Mees* and *Certain Funds* are that an application for Section 1782 discovery should be careful to establish how the discovery will be ''used'' in the foreign proceeding and also provide the court with objective indicia that the foreign proceeding is contemplated (if it has not already commenced). Factors likely to support this second requirement include facts showing a need or reason for imminent litigation, prelitigation correspondence or posturing, facts demonstrating a ripening dispute, or the near-term expiration of a limitations period.

Foreign Tribunals Where Section 1782 Discovery May Be Used. The ''foreign and international tribunals'' where Section 1782 discovery may be used are not limited to traditional courts of law. In *Intel*, for example, Section 1782 discovery was permitted for use in an investigation by the European Commission's Directorate-General for Competition. The European Competition authority, in the Supreme Court's view, was a ''tribunal'' so long as it acted as a ''first-instance decision-maker.''

Following *Intel*, there remains some uncertainty about whether Section 1782 may be deployed in aid of private commercial arbitration. In 2009, the U.S. Court of Appeals for the Fifth Circuit (which encompasses the federal courts of Texas, Louisiana, and Mississippi) ruled in an unreported decision that arbitration was not a tribunal for which Section 1782 discovery could be used. *See El Paso Corp. v. La Comisión Ejecutiva, Hidroéclectrica Del Rio Lempa*, , 341 F. App'x 31 (5th Cir. 2009). By contrast, the U.S. Court of Appeals for the Eleventh Circuit (which encompasses the federal courts of Florida, Alabama, and Georgia) held in 2012 that proceedings before the Ecuadorian arbitral tribunal qualified as a ''proceeding in a foreign or international tribunal'' for purposes of Section 1782. *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012).

Despite this uncertainty, Section 1782 should be strongly considered in situations where U.S. discovery could be of assistance to a foreign arbitral tribunal.

Filing Mechanics and Timing. Lastly, we review briefly the procedure associated with invoking Section 1782 in the U.S. courts.

Filing requirements.

An application under Section 1782 typically involves:

- An *ex parte* application with the court, accompanied by a supporting brief establishing legal entitlement to the discovery sought, including a description of foreign proceeding and the relevance of the proposed discovery to that proceeding.
- A supporting factual declaration attesting to the existence, nature, and status of the foreign proceedings.
- A proposed subpoena setting out the discovery sought from the respondents.

Procedure/Timing.

- Once the application is submitted, the court will decide, on an *ex parte* basis, whether to issue the subpoena. There is no prescribed timeline for this decision, but courts often rule on such applications within a matter of days because the application is ready for disposition as soon as it is filed.
- If granted, the subpoena would issue, and the respondents would have to provide the requested documents and testimony within the time frame set by the issuing court. This is typically a 30 day period, but the court may lengthen this period if it considers the requests to be particularly broad or difficult to answer.
- In the interim, the respondents may raise objections to the scope of the subpoena or ask the court to reject (or ''quash'') the subpoena in its entirety. Unless otherwise specified in the court's order, the respondents have 14 days after service of the subpoena to raise objections. The deadline for moving to quash the subpoena would be the same as the court's deadline for complying with the subpoena—typically 30 days.

Costs.

The party seeking discovery generally is not required to cover the other side's costs in producing responsive material and/or testimony. However, respondents to a Section 1782 subpoena generally are protected against incurring ''significant expense.'' Accordingly, the court, in its discretion, may take various measures to mitigate

the burden of responding, including by narrowing the requests for discovery or, in the appropriate circumstances, ''by requiring that the incurred costs be borne by the requesting party.'' *In re Application of Michael Wilson & Partners, Ltd., for Judicial Assistance Pursuant to 28 U.S.C. § 1782,* No. 06-CV-02575 (D. Colo. May 24, 2012).

There have been instances where U.S. courts have required the requesting party to bear the full costs of the discovery. However, in our experience, this is not the norm.

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