

Client Alert

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Gaining the Upper Hand in Litigation Abroad Using 28 U.S.C. § 1782

Deal-making is often a global affair. When an international transaction becomes the subject of a dispute, significant evidence is often in the hands of nonparties in the United States—such as investment banks, accounting firms, executives and board members. To bolster their strategic positions, parties to offshore commercial disputes are increasingly turning to 28 U.S.C. § 1782 (“Section 1782”) to gather documents and testimony in the United States that might not otherwise be discoverable.

Olshan recently obtained victories in the District Court for the Northern District of California and the District of Delaware that underscore the broad reach of Section 1782.¹ In these parallel proceedings, two federal courts issued orders granting access to crucial discovery for use in an appraisal action pending in Japan. In Delaware, the Court ordered Bank of America Corporation to produce documents held by its Japanese subsidiary that served as an advisor in the going-private transaction at issue in the Japanese appraisal proceeding. And in California, the Court held that a U.S.-based director who served on the Japanese company’s Special Committee was required to produce evidence concerning the transaction in his possession.

The opinions are important because, in each instance, many of the corporate records that the Courts ordered the targets to produce were held abroad in Japan. In this regard, the decisions confirm that Section 1782 discovery extends to evidence located extraterritorially. These decisions further reflect the increasingly expansive interpretation that courts have been applying to Section 1782, and foretell a likely increase in the role Section 1782 proceedings will play in major international financial disputes moving forward.

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¹ *In re The Liverpool Ltd. P’ship*, Case No. 21-mc-86-CFC (D. Del. Aug. 26, 2021); *In re The Liverpool Limited P’ship*, No. 21-mc-80031-SVK (N.D. Cal. 2021).

What is Section 1782?

28 U.S.C. § 1782 is a federal statute that allows U.S. district courts to compel a person or entity “found” in the United States to produce documents and testimony in connection with a pending or “reasonably contempla[ted]” foreign proceeding.² Section 1782 was substantially amended in 1964 to allow U.S. courts to order the production of both documents and testimony with the stated goal of encouraging international cooperation in litigation.³

A court analyzes a Section 1782 application in two phases. An applicant must first satisfy three statutory prerequisites: (1) the discovery must be sought from a person or entity residing in the district of the federal district court to which the application is made;⁴ (2) the discovery must be “for use” in a foreign litigation—meaning that the evidence can be submitted to the foreign court; and (3) the applicant needs to be an “interested party” to the foreign case—typically a party in the non-U.S. matter.⁵

If the statutory prerequisites are met, the court then weighs four discretionary factors, referred to as the *Intel* factors: (1) whether the person from whom discovery is sought is a “nonparticipant in the matter arising abroad;” (2) whether the foreign court is likely to be receptive to U.S. judicial assistance, considering “the nature of the foreign tribunal, [and] the character of the proceedings underway abroad;” (3) whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions;” and (4) whether the request is “unduly intrusive or burdensome.”⁶

Once a Section 1782 application is granted, the applicant may serve a subpoena on the target recipient and seek discovery in the ordinary course under Rule 45 of the Federal Rules of Civil Procedure.⁷

The Delaware and California Rulings

Olshan commenced parallel Section 1782 applications in Delaware and California seeking discovery for use in an appraisal proceeding pending in Japan for Japanese technology company LINE Corporation (“LINE” or the “Company”). LINE operated the most popular messaging app in Japan and

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² *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 246, 259 (2004).

³ S. REP. NO. 88-1580 (1964), reprinted in 1964 U.S.C.C.A.N. 3782.

Section 1782 and its predecessor statutes have been on the books since 1855.

⁴ In interpreting the residency requirement of Section 1782, U.S. courts have noted that due process protections apply and thus employ traditional jurisdiction analyses. *See In re Del Valle Ruiz*, 342 F. Supp. 3d 448, 453 (S.D.N.Y. 2018).

⁵ 28 U.S.C. § 1782 (a); *Intel*, 542 U.S. at 260; *Certain Funds, Accounts and/or Investment Vehicles v. KPMG, L.L.P.*, 798 F.3d 113, 118 (2d Cir. 2015).

⁶ *Intel*, 542 U.S. at 264-65 (2004).

⁷ *Mees v. Buiter*, 793 F.3d 291 (2d Cir. 2015).

was publicly traded on the Tokyo and New York Stock Exchanges until December 29, 2020. The Company was privatized through a tender offer and share consolidation orchestrated by LINE’s controlling shareholders. As a result of this going-private transaction, LINE’s former shareholders were cashed out at a fixed tender offer price of \$51.06 per share. Several LINE shareholders, including Olshan’s client, believed the tender offer and share consolidation were fundamentally unfair to minority shareholders, both with respect to the tender offer price, which they believed significantly undervalued LINE shares, and the process undertaken to approve the transactions. The shareholders therefore commenced appraisal proceedings in Japan to have a court determine the fair value of their shares.

In Delaware, Olshan filed a Section 1782 application against Bank of America Corporation (“BAC”) seeking discovery relating to the work that BAC’s foreign subsidiary, BofA Securities Japan Co., Ltd. (“BofA Securities”) performed as financial advisor to LINE’s Special Committee in connection with the tender offer. Olshan sought evidence in a range of categories related to the Company’s value and the process through which the Special Committee approved the deal to take LINE private.

BAC opposed the Section 1782 application, arguing, among other things, that it did not meet the first statutory prong (i.e., that the discovery must be sought from a person or entity that resides in the district where the application is made) because the documents at issue resided in Japan with BofA Securities. BAC further argued that it lacked custody or control over discovery in the hands of its foreign subsidiary.

The Delaware District Court decisively rejected BAC’s arguments. With respect to the first statutory prong, the Court stated: this application “seeks to serve the subpoena on BAC, not BofA Securities; and BAC is a Delaware corporation and therefore it resides and is found in this District. Accordingly, the first condition of § 1782 is satisfied here.”

The Court then swiftly disposed of BAC’s second argument:

To be clear, and so there is no doubt about how to interpret this Memorandum Order, **because BAC is a Delaware corporation and the parent of BofA Securities, documents that “reside” with BofA Securities are nonetheless in BAC’s possession, custody, and control.** [emphasis added]

The Court’s decision makes clear that although the documents at issue “resided” in Japan, they were properly sought through a Section 1782 application from BAC, a U.S. corporation. The Court reiterated this point again later in the decision, stating: “BAC’s assertion that the subpoena

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‘request[s] documents that BAC neither possesses nor controls’ is, as noted above, wrong as a matter of law.” In so ruling, the Court relied upon the legal principle that a parent corporation must produce documents of its wholly-owned subsidiary under the Federal Rules of Civil Procedure.

In a parallel Section 1782 action filed in California, Olshan sought discovery from Mr. Rehito Hatoyama, a member of LINE’s board and one of only three purportedly disinterested members of the Special Committee that approved the going-private transaction. In the subpoena to Mr. Hatoyama, Olshan requested documents and deposition testimony concerning the Special Committee’s work, and LINE’s financial projections and valuation.

Mr. Hatoyama objected to the subpoena. He argued, among other things, that the first *Intel* factor (i.e., whether the person from whom discovery is sought is a nonparticipant in the foreign proceeding) was not met because the evidence sought was within LINE’s corporate custody, and thus the “real target” was LINE. Though this argument was slightly different than BAC’s corresponding argument in Delaware, the underlying concept was similar—that the discovery sought resided abroad and thus should not be obtainable in the United States.

As in Delaware, the California Court rejected this argument. The Court agreed with Olshan that, as a director, Mr. Hatoyama’s own documents and knowledge were “squarely responsive and highly relevant, separate and apart from what LINE may possess.” The Court also rejected Mr. Hatoyama’s contention that the application circumvented Japanese discovery restrictions because the petitioner should have first tried to obtain the evidence from LINE in Japan. The Court held, consistent with the majority view, that “[t]here is no requirement that the party seeking discovery pursuant to section 1782 must first request discovery from the foreign tribunal.”

Key Takeaways

The Delaware and California holdings illustrate Section 1782’s broad reach and add to a growing body of law favoring an expansive view of Section 1782 discovery. Indeed, these decisions cement the Second Circuit’s recent decision in *In re Del Valle Ruitz*, wherein the Second Circuit expressly stated that Section 1782 “allows extraterritorial discovery,” and affirmed the lower court’s order directing a U.S. bank to produce documents from its foreign subsidiary.⁸ The Court’s ruling in Delaware is particularly noteworthy because it is the first decision from a federal court in the Third Circuit finding that a Section 1782 applicant can

⁸ 939 F.3d 520, 533-34 (2d Cir. 2019) (affirming ruling that it was not overly burdensome to require a bank to produce documents from its foreign subsidiary under Section 1782).

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compel the production of documents from a foreign subsidiary through its Delaware parent corporation. The California decision is also notable because it shows how critical evidence and testimony that may not be available abroad can be obtained from individual board members who live in the United States.

Clients litigating disputes abroad should be aware that Section 1782 is a powerful tool to obtain broad discovery in the United States for use in foreign litigation. Once obtained, the evidence can then be successfully deployed in the foreign dispute, even where the foreign court has significantly more restrictive discovery procedures—providing a decisive advantage.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys below if you would like to discuss further or have questions.

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