SECTION 1782:

The Little-Known Superpower Used in U.S. Courts to Help Win Foreign Litigations

BY LORI MARKS-ESTERMAN

BEING TRUE TO THE FOREIGN COURT'S HOLDING AND TAILORING THE PROPOSED SUBPOENAS NARROWLY TO THE ISSUES RELEVANT TO THE FOREIGN PROCEEDING ARE CRITICAL TO SUCCESS.

28 U.S.C. § 1782 (Section 1782) permits production of documents and testimony in the United States for use in foreign litigation. Once granted, Section 1782 subpoenas have the full scope and authority of domestic discovery, providing a powerful tool in foreign litigation.

While the statute is seemingly straightforward, navigating the legal landscape of Section 1782 can be challenging. Recent decisions denying Section 1782 applications show the pitfalls applicants often get tripped up on. This article lays out legal hurdles and how to overcome them.

THE STATUTE EXPLAINED

Section 1782 is a federal statute that allows U.S. district courts to compel a person or entity "found" in the U.S. to produce discovery in connection with a foreign proceeding. A court analyzes a Section 1782 application in two phases.

First, there are three statutory prerequisites:

1. The discovery must be sought from a person or entity that resides in the district where the application is made.
2. The discovery must be "for use" in a foreign litigation.
3. The applicant needs to be an "interested party" to the foreign case.

Next, the court weighs four discretionary factors:

1. Whether the discovery is sought from a "nonparticipant in the matter arising abroad."
2. Whether the foreign court is likely to be receptive to U.S. judicial assistance,
3. Whether the request attempts to "circumvent foreign proof-gathering restrictions"
4. Whether the request is "unduly intrusive or burdensome."

THE POTENTIAL PITFALLS – AND HOW TO AVOID THEM

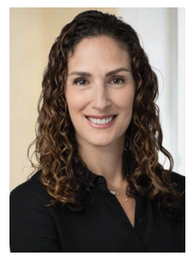
Among the three statutory factors, the "for use" requirement is most frequently challenged by discovery targets in the United States. Targets frequently argue that the discovery is not "for use" in the foreign proceeding if the petitioner cannot demonstrate specifically how the evidence will be used in the foreign proceeding, or that the evidence will be admissible in the foreign court. However, the caselaw is clear that the "for use" requirement should be interpreted broadly, and is satisfied where the materials sought are "to be used at some stage of a foreign proceeding."

A Section 1782 applicant does not need to prove that the discovery sought is discoverable or even admissible in the foreign court. *See, e.g., In re Kingstown Partners Master Ltd.*

Of the discretionary factors, the third and fourth factors are most vulnerable to attack. The third factor examines whether the application seeks to circumvent foreign law. U.S. targets often assert that the Section 1782 application is improper if it is brought before party discovery in the foreign proceeding has concluded. This argument is usually unsuccessful, however, as there are no requirements that an applicant must wait to issue third-party subpoenas until a particular moment in the underlying proceeding. *In re Alpine Partners*, 635 F. Supp. 3d at 911¬-12.

Where U.S. targets have been more successful in showing that a 1782 application circumvents foreign law is where they can demonstrate that foreign discovery rules prohibit the discovery being sought. Many courts have recognized that "[a] perception that an applicant has side-stepped less than-favorable discovery rules by resorting immediately to § 1782 can be a factor in a court's analysis." *In re Varian Med. Sys. Int'l AG.* Thus, where the U.S. target can show that the foreign court has specifically rejected the type of evidence sought, the court may deny the Section 1782 application. *In re Quadre Invs., L.P.*

Finally, targets almost always raise the fourth factor, and assert that the proposed subpoenas are "overly burdensome." On this point it is important to note that while Section 1782 authorizes discovery to the full extent permitted by the federal rules of civil procedure, a 1782 application is discretionary. Thus, tailoring the subpoenas carefully is necessary. Where the subpoenas are tailored to collect relevant discovery and are targeted to elicit that evidence, the application will usually be granted. *See, e.g., In re Liverpool Ltd. P'ship.* On the other hand, where the proposed subpoenas are "very broad" and considered to be a "fishing expedition," the application will frequently be denied. *In re Mun, 2023 WL 7074016, at *5.*



TAKEAWAYS

Recent holdings provide valuable guidance on several best practices to successfully launch a Section 1782 application, and where the pitfalls are and how to avoid them:

Diligence. Detailed research into the potential discovery targets—including their role in the underlying transaction and where they are subject to jurisdiction —are critical steps to take before filing a Section 1782 application.

Preparation. It is equally important to do a deep dive into the nature of the claims in the foreign court, and any rulings both in the foreign proceeding and the foreign jurisdiction more broadly, to understand the foreign court's rules, practices and procedures.

Discretion. Strategy and credibility weigh into any court's decision, but this is especially true in a Section 1782 application, where the court has broad deference in weighing the discretionary factors. Being true to the foreign court's holding and tailoring the proposed subpoenas narrowly to the issues relevant to the foreign proceeding are critical to success.

Section 1782 may help foreign litigants obtain valuable information from U.S. companies and individuals. However, the complexities of the statute require careful planning and execution for a successful court outcome when utilizing Section 1782.

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