

## Use of 28 U.S.C. §1782 in US Courts to Obtain Discovery for use in Enforcement and Collection Proceedings Worldwide

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28 U.S.C. § 1782 (“Section 1782”) is a tool to obtain discovery for use in foreign (non-US) proceedings. As discussed in this [client alert](#), petitioners all over the world have successfully used Section 1782 to obtain discovery from a variety of entities who are in the United States in support of non-US regulatory and civil litigation proceedings.

Section 1782 may also be used to obtain evidence from parties found in the United States in support of judicial efforts by judgment and award creditors to satisfy unpaid judgments and awards through collection proceedings taking place in courts all over the world outside the United States. Section 1782 is, therefore, a powerful tool that a judgment or award creditor may be able to use to identify assets of the judgment or award debtor on a global scale, such that the creditor may pursue execution proceedings in only those jurisdictions where the debtor’s assets lie.

US courts have ordered discovery through Section 1782 for use in post-judgment collection proceedings taking place outside the United States. Just last year, in *In re China Construction Bank (Asia) Corporation Limited*, the District Court for the Southern District of New York denied a motion to quash subpoenas seeking discovery for use in post-judgment proceedings.<sup>1</sup> China Construction Bank (Asia) Corporation (“CCBA”) had filed an ex parte application seeking discovery from a judgment debtor Zhang Kangyang pursuant to Section 1782, which it intended to use to enforce a Hong Kong judgment against Zhang.<sup>2</sup> CCBA’s ex parte application also sought discovery from Suning Sports International Limited, a subsidiary of Suning Holdings Group Co., Ltd. of which Mr. Zhang was the chairman, on the basis that the entity could have relevant information regarding the enforcement proceedings against Zhang. Zhang and Suning Sports International Limited argued that the discovery CCBA sought was not “for use” in a foreign proceeding for purposes of Section 1782. However, the Court held that the Hong Kong debtor examination was an “adjudicative” proceeding for purposes of Section 1782 as “the debtor examination would involve factual finding[s]”.<sup>3</sup> The information revealed in the debtor examination could have resulted in the Hong Kong court imprisoning Zhang if the court decided that he had failed to comply with the underlying judgment or had made insufficient disclosures to the court regarding his assets that could be used to satisfy the judgment.<sup>4</sup>

This approach of using Section 1782 discovery in aid of collection efforts for unpaid awards and judgments taking place outside the United States has been affirmed by other courts, including the Eleventh Circuit, which held that district courts had the authority to grant discovery requests regarding assets and property transfers of residents for use in post-judgment proceedings.<sup>5</sup> In *In re Clerici*, Clerici, a Panamanian citizen, had initiated a civil lawsuit against NoName Corporation (“NoName”) in Panamanian courts, in which he

<sup>1</sup> *In re China Constr. Bank (Asia) Corp. Ltd.*, No. 23-MC-17 (JMF), 2023 WL 3791711, at \*1 (S.D.N.Y. June 2, 2023).

<sup>2</sup> *Id.* at \*1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *In re Clerici*, 481 F.3d 1324, 1333 (11th Cir. 2007).

sought to attach NoName’s property. NoName succeeded on a motion to dismiss Clerici’s lawsuit on the basis that Clerici had failed to prosecute the civil suit. Accordingly, the Panamanian court vacated the property attachment. NoName then succeeded in a civil lawsuit that it filed against Clerici for monetary damages arising from his unsuccessful lawsuit against NoName. As part of that lawsuit, NoName submitted a list of questions regarding Clerici’s assets and financial matters both within and outside Panama.<sup>6</sup> As Clerici lived in the US, the Panamanian Court issued a letter rogatory to the “Judicial Authorities in the City of Miami” requesting assistance, which led the then-United States Attorney for the Southern District of Florida, R. Alexander Acosta, to file an ex parte application for discovery pursuant to Section 1782 on behalf of the United States Government to the United States District Court of Southern Florida, which is where Clerici resided.<sup>7</sup> The District Court granted the government’s application. Clerici filed a memorandum in opposition, asserting that the application should be denied because Section 1782 was being used to enforce a foreign judgment in the United States. However, the Eleventh Circuit disagreed, stating that because “the Panamanian Court asked for assistance in obtaining only Clerici’s sworn answers to questions regarding his assets and other financial matters”, the Panamanian Court was not attempting to enforce a Panamanian court judgment against Clerici in the United States through a Section 1782 request.<sup>8</sup> Rather, the Panamanian Court was simply trying to obtain evidence for use in its own enforcement proceedings.<sup>9</sup>

Similarly, the District Court for the Northern District of Ohio also found no fault in Section 1782 requests aimed at uncovering assets in foreign court proceedings over damages owed to the successful litigant. In *In re Application for Discovery Pursuant to 28 U.S.C. § 1782*, the applicants filed an ex parte application for discovery pursuant to Section 1782 to obtain testamentary subpoenas on Francesco and Anna Poggi, the foreign defendants.<sup>10</sup> The court accepted the applicant’s arguments that 1) the foreign proceeding was not concluded because it was in its executory phase or 2) even if the proceedings were already concluded, the discovery sought was for use in a post-judgment proceeding that was “reasonably contemplated.”<sup>11</sup>

Section 1782 post-judgment proceedings discovery requests should still be valid for use in collection proceedings regarding unpaid arbitral awards. The US Supreme Court narrowed the scope of application of Section 1782 in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, holding that the proceedings in a “foreign or international tribunal” requirement meant adjudicatory bodies that were governmental or intergovernmental<sup>12</sup> and not private commercial arbitrations. This ruling should not, in principle, exclude collection and execution proceedings taking place in the courts of foreign (non-US) jurisdictions regarding unpaid arbitral awards. Thus, while Section 1782 may no longer be used to obtain discovery in aid of private commercial arbitrations seated outside the United States, it may still prove a useful discovery vehicle for discovery in aid of post-award enforcement proceedings taking place in courts outside the United States.

In sum, Section 1782 is a powerful discovery tool that may help judgment or award creditors obtain information from entities or persons in the United States regarding assets located not just in the United States but all over the world that may be used to satisfy unpaid judgments or awards.

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Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any member of our International Arbitration Group.

<sup>6</sup> *Id.* at \*1328.

<sup>7</sup> *Id.* at \*1329.

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Id.* at \*1330.

<sup>10</sup> *In re Application for Discovery Pursuant to 28 U.S.C. § 1782*, No. 1:19-MC-0102, 2020 WL 364222, at \*1 (N.D. Ohio Jan. 22, 2020).

<sup>11</sup> *Id.* at \*2 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241, 259 (2004)).

<sup>12</sup> *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 596 US 619, 633 (2022).

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