

28 U.S.C. § 1782: Powerful Tool in the US to Obtain Discovery for Use in Foreign Proceedings

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Contact

Viren Mascarenhas, Partner
+1 212.530.5502
vmascarenhas@milbank.com

Mariella Montplaisir-Bazan, Associate
+1 212.530.5104
mmontplaisir@milbank.com

Executive Summary

- The scope of disclosure of evidence usually is very limited in civil law jurisdictions in comparison to disclosure in common law jurisdictions, such as the United States. Parties typically seek extensive disclosure from each other in US civil litigation, and the relevant US rules of evidence require parties to disclose relevant documents in litigation even if those documents contain information that may be disadvantageous to the disclosing party.
- 28 U.S.C. Section 1782 (Section 1782) is a US federal statute that authorizes US courts to order discovery from a person or entity in the US for use in proceedings before foreign (non-US) and international tribunals.
- Petitioners from all over the world have successfully used Section 1782 to obtain discovery from a variety of entities who are in the US. Such evidence has been gathered in support of regulatory proceedings before foreign (non-US) securities and exchange commissions (such as the *Comissão de Valores Mobiliários* in Brazil), antitrust investigations and proceedings, and insolvency proceedings in foreign courts. Additionally, petitioners have successfully used Section 1782 to obtain discovery in aid of private civil litigation taking place in non-US courts. The target entities in the US who were ordered to produce discovery in aid of these proceedings include US banks; foreign (non-US) banks with presence in the US; US companies owning and managing assets of foreign debt guarantors; clearing houses for wire transfers that are based in the US; US accounting firms; and US technology and social media companies.
- Several statutory factors must be met for a court to order discovery in support of foreign proceedings.
 - a. The person or entity from whom discovery is sought must be “found” in the US. Mere physical presence, even if temporary, satisfies this requirement.
 - b. The requested discovery must be “for use” in a foreign proceeding that is either already underway or “within reasonable contemplation” of being initiated.
 - c. The foreign proceeding should be before a foreign court, administrative or regulatory body, or an international tribunal.
 - d. The application must be made by either the foreign or international tribunal directly or by an interested person (such as a party to the foreign proceeding).

- Petitioners should consider whether US-based discovery may be of use to them in civil and regulatory proceedings taking place in proceedings outside the US.

Production of Evidence Obtained Voluntarily or Compelled

28 U.S.C. Section 1782 is a US federal law that was enacted to provide discovery assistance to foreign and international tribunals and to interested persons appearing before such tribunals. Under this provision, the production of evidence for use in a proceeding in a foreign or international tribunal may be compelled (Section 1782(a)) or it may be obtained voluntarily (Section 1782(b)).

Section 1782 does not dictate any formal procedure or approval for the provision of evidence on a voluntary basis. However, it provides guidance to US federal district courts to exercise their discretion in determining whether to compel discovery in aid of foreign proceedings when the evidence cannot be obtained voluntarily.

When deciding whether to grant a request for production of evidence under Section 1782(a), US federal courts will consider (A) statutory prerequisites under Section 1782(a), (B) discretionary factors considered by courts when deciding whether to grant discovery, and (C) the US Federal Rules of Civil Procedure (FRCP).

A. Statutory Prerequisites of Section 1782(a)

(1) A person or entity may only be compelled to produce testimony or documents if the person or entity “resides” or is “found” in the district of the court to which the discovery request or application is made.

- “Nothing more than physical presence” in the district, even if temporary, has been found to be enough to satisfy this requirement for the purpose of compelling testimony.¹
 - a. For example, if a foreign national visiting New York on business is personally served with a subpoena while physically present in the Southern District of New York, she will be “found” within this district for purposes of Section 1782 and may be compelled to testify.
 - b. For example, a US federal court held that a foreign bank was “found” in its district because the bank maintained a registered agent located in this district who could accept service of process and the registered agent was served with a subpoena while in this district.²
- Even when a business is incorporated and has its principal place of business outside the US, it can be “found” in a district for purposes of Section 1782 if (1) it has purposefully directed its activities at the forum and (2) the discovery materials sought relate to those activities.
 - a. For example, a US federal district court held that a foreign bank was “found” in the district because the documents sought by the application pursuant to Section 1782 were generated from the correspondent banking services the foreign bank provided from New York.³
- When documents are in the possession of affiliates or parents not “found” or not “residing” in the US, courts have generally refused, on discretionary grounds, to compel entities based in the US to produce the requested documents. This is because under both Section 1782 and the applicable Federal Rules of Civil Procedure, the distinction between the parent company and its subsidiaries prevents the discovery of the foreign parent’s documents simply by serving the subsidiary company in the US.⁴

(2) The requested material is ‘for use’ in a proceeding before a foreign or international tribunal:

¹ *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002).

² *In re Kurbatova*, 2019 WL 2180704, at *2 (S.D. Fla. May 20, 2019).

³ *In re SPS I Fundo de Investimento de Acoes – Investimento no Exterior*, 2024 WL 917236, at *3 (S.D. NY. March. 4, 2024).

⁴ *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45, 52 (D.D.C. 2005).

- For Use:
 - a. To satisfy the requirement that discovery be “for use” in a proceeding, the applicant must generally show that the requested discovery is to be used “at some stage of a foreign proceeding.”⁵
 - b. The “proceeding” for which discovery is sought under Section 1782(a) must be “within reasonable contemplation;” it does not need to have been initiated or be “pending” or “imminent.”
- Foreign or International Tribunal:
 - a. A foreign tribunal is one that exercises governmental authority conferred by a single nation. This includes judicial courts as well as administrative and regulatory bodies.
 - b. An international tribunal is one that exercises governmental authority conferred by multiple nations.
 - i. The US Supreme Court has yet to provide guidance for lower courts to follow in determining whether an international tribunal is imbued with government authority by multiple nations.
 - c. The US Supreme Court recently held in *ZF Auto. US, Inc. v. Luxshare, Ltd.* that Section 1782(a) does not allow US district courts to order discovery for use in investment treaty arbitrations or private international commercial arbitrations unless the relevant nations authorize the arbitral panels to exercise governmental authority.
 - i. Private adjudicatory bodies that administer alternative dispute resolution, such as commercial arbitrations, do not constitute an international tribunal under Section 1782.

(3) The application is made by a foreign or international tribunal or any interested person:

- Interested Person:
 - a. An “interested person” includes litigants before foreign or international tribunals, foreign and international officials, and any other person who has a “reasonable interest” in obtaining judicial assistance.
 - i. For example, a complainant who triggered a European Commission investigation was found to possess a reasonable interest in obtaining judicial assistance from US courts and therefore qualified as an “interested person” under section 1782(a) given the complainant’s significant role in the European process (the complainant prompted the antitrust investigation, had the right to submit information for consideration by the Directorate-General, and could proceed to court if the European Commission discontinued or dismissed the complaint).

B. Discretionary Factors Considered by Courts

A district court is not required to grant a Section 1782(a) discovery application simply because it has the authority to do so. Even where the statutory prerequisites of Section 1782 are satisfied, the court has “wide discretion” to grant or to deny discovery.⁶ The Court’s exercise of discretion is guided by four nonexclusive factors that the US Supreme Court articulated in *Intel Corp. v. Advanced Micro Devices, Inc.*

(1) Is the person from whom discovery is sought a participant in the foreign proceeding?

- There is a stronger case that aid is needed to obtain evidence if the person from whom it is sought is not a participant in the foreign proceedings (or an affiliate or agent of the participants) because

⁵ *Mees v. Buiter*, (793 F.3d 291) at *295 (2d Cir. 2015).

⁶ See *Al Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000).

in such cases it is more likely that the foreign court will not have the power itself to order the production of the evidence sought.

- However, even in cases where the person from whom the evidence is sought is not a participant, US courts have found that this factor favored denying the application when it was shown that the person from whom the evidence was sought did not possess any discovery that the petitioner could not obtain from the foreign tribunal in the event a non-US proceeding was filed.⁷

(2) What is the nature of the foreign tribunal, the character of the proceedings underway abroad, and how receptive will the foreign authority be to US federal court assistance?

- If the foreign tribunal has expressly objected to the use of Section 1782(a) to obtain evidence, it is likely that a US federal court would not grant a request to compel discovery.⁸
- Section 1782(a) does not require district courts to consider the admissibility of evidence in the foreign proceeding in ruling on a Section 1782 application.

(3) Is the request made under Section 1782(a) to conceal an attempt to circumvent otherwise applicable discovery restrictions or policies of the foreign jurisdiction or the United States?

- Section 1782(a) does not require the applicant to exhaust its discovery options in the foreign jurisdiction before applying to a district court.⁹
- Reasonable efforts to address technical discovery limitations in the foreign jurisdiction is generally not viewed as an attempt to circumvent foreign proof-gathering policies and procedures.¹⁰

(4) Is the request made under Section 1782(a) unduly intrusive or burdensome?

- Unduly intrusive or burdensome requests may be rejected or trimmed by the US court.
- Concerns that the requested discovery would be unduly intrusive may be overcome by an appropriate confidentiality agreement.¹¹
- Discovery requests must be adequately tailored to the foreign proceeding for which production is sought.¹²

C. Compliance with FRCP

- Where a request for discovery in the US for use in a foreign proceeding is found to meet the requirements of Section 1782(a), the discovery process is generally guided by the US Federal Rules of Civil Procedure (FRCP).¹³
- For example:
 - a. Even if an entity is found to be in the district, it may not be compelled to turn over documents, when these documents are not in its “possession, custody, or control.”¹⁴

⁷ See *In re Atvos Agroindustrial Investimentos S.A.*, 481 F. Supp. 3d 166, (S.D.N.Y. 2020) at *176; *Pereira v. Nucor Corporation*, 2023 WL 4143229 (W.D. NC June 22, 2023) at *3: the company from whom evidence was sought established that it did not possess any discovery that the petitioner could not obtain from the Brazilian entities who would be litigants in the event a proceeding was filed before Brazilian courts.

⁸ *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004).

⁹ *In re Almeida Michelen*, 2021 WL 2414077, at *3 (S.D. Fla. June 14, 2021).

¹⁰ *In re Imanagement Servs.*, 2005 WL 1959702, at *5 (E.D.N.Y. Aug. 16, 2005).

¹¹ *In re Imanagement Servs.*, 2005 WL 1959702 at *6 (E.D.N.Y. Aug. 16, 2015)

¹² *Shueisha Inc. v. Paypal Holdings, Inc.*, 2023 WL 2277102, at *6 (N.D. Cal. Feb. 27, 2023).

¹³ *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, at *191(3d Cir. 1999); *Heracus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, at *595 (7th Cir. 2011).

¹⁴ See *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019); FRCP 45(a)(1)(iii) and FRCP 34(a).

- b. Even if the “resides or is found” requirement is met, if a person who is not a party or an officer of a party would have to travel more than 100 miles from where that person resides, FRCP 45(c)(3)(A)(ii) may prevent the taking of a deposition under Section 1782.¹⁵

Select Application of Section 1782(a) to Discoveries for use in Foreign Proceedings

- US and foreign banks believed to be in possession of evidence of an alleged international corruption scheme led by the controlling shareholders of a Brazilian corporation.
 - a. A Brazilian petitioner successfully obtained an order from a US district court enjoining US and foreign banks to comply with the subpoenas and produce the discovery requested for use in a complaint to be filed with Brazil's securities and exchange commission (the *Comissão de Valores Mobiliários*).¹⁶
- US companies owning and managing US assets of Brazilian debt guarantors.
 - a. Brazilian petitioners successfully obtained the issuance of an order permitting them to obtain documentary and testimonial discovery from a limited liability company and a condominium association in which the foreign debtor owned an interest that was not disclosed in pending bankruptcy proceedings in Brazil.¹⁷
- Nine banks and a clearing house that maintained offices and did business within the Southern District of New York.¹⁸
- Entities compelled to produce evidence for civil proceedings in Hong Kong have recently included:
 - a. US companies as non-parties to civil proceedings in Hong Kong.
 - i. Hong Kong-based petitioner successfully obtained the issuance of an order permitting petitioner to obtain documentary discovery from technology companies for IP addresses associated with email and social media accounts alleged to have harassed petitioner online for use in Hong Kong defamation action.¹⁹
 - b. Foreign companies and individuals subject to debtor proceedings in Hong Kong.
 - i. China-based petitioner successfully obtained the issuance of an order permitting petitioner to issue subpoenas seeking documentary evidence from affiliates of debtor in connection with debtor examination and committal proceeding against the debtor in Hong Kong.²⁰
- Entities compelled to produce evidence for civil proceedings in Japan have recently included:
 - a. US companies as non-parties to civil proceedings in Japan.
 - i. Japanese petitioner successfully obtained the issuance of an order permitting it to issue a documentary subpoena to a technology company for IP addresses related to social media accounts alleged to have made defamatory statements about petitioner in connection with contemplated civil proceeding in Japan.²¹
- Entities compelled to produce evidence for civil proceedings in Singapore have recently included:

¹⁵ *Edelman*, 295 F.3d at 178.

¹⁶ *In re SPS I Fundo de Investimento de Acoes – Investimento no Exterior*, 2024 WL 917236 (S.D. NY. March. 4, 2024).

¹⁷ *In re Travessia Securitizadora de Créditos Financeiros X S.A.*, 2024 WL 356533 (S.D. SC. Jan. 19, 2024).

¹⁸ *In re Ernesto Andrade Group*, 2024 WL 195568 (S.D. NY. Jan. 18, 2024).

¹⁹ *In re Barney*, 2022 WL 17813142 (N.D. Cal. Dec. 19, 2022).

²⁰ *In re China Construction Bank (Asia) Corp. Ltd.*, 2023 WL 3791711, at *1-2 (S.D.N.Y. June 2, 2023).

²¹ *In re Medical Incorporated Ass'n Takeuchi Dental Clinic*, 2022 WL 10177653 (N.D. Cal. Oct. 17, 2022); see also *In re Shiga*, 2023 WL 6450520 (N.D. Cal. Oct. 2, 2023).

- a. US entities and individuals believed to be in possession of evidence of an alleged international fraudulent scheme:
 - i. An Australia-based company successfully obtained an order permitting the company to issue subpoenas to five individuals and entities residing in the US to produce documentary discovery for use in, among other foreign proceedings, pre-suit discovery in Singapore.²²
- b. US individual affiliated with company headquartered in New York and Singapore in connection with Singapore proceeding to enforce arbitration award.
 - i. Canadian petitioner successfully obtained the issuance of an order permitting it to issue documentary and testimonial subpoenas to individual residing in US who served as officer for company alleged to have engaged in fraudulent transfers in connection with Singapore action seeking to enforce award from an arbitration panel of the London Maritime Arbitrators Association.²³
- Entities compelled to produce evidence for civil proceedings in South Korea have recently included:
 - a. US companies as non-parties to civil proceedings in South Korea.
 - i. Court granted Assistant United States Attorney's request for a subpoena—pursuant to a Letter of Request from judicial authorities in South Korea—for documents from social media company for use in civil proceeding involving allegations of harassment from anonymous social media users.²⁴

Practice/Group Contacts

New York | 55 Hudson Yards New York, NY 10001

Viren Mascarenhas vmascarenhas@milbank.com +1 212.530.5502

Mariella Montplaisir-Bazan mmontplaisir@milbank.com +1 212.530.5104

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²² *In re ANZ Commodity Trading Pty Ltd.*, 2017 U.S. Dist. LEXIS 123735 (N.D. Cal. Aug. 4, 2017).

²³ *In re Third Eye Capital Corp.*, 2022 U.S. Dist. LEXIS 42502 (D.N.J. March 10, 2022).

²⁴ *Ahin Park v. Unknown (In re Request for Jud. Assistance)*, 2023 WL 2394545 (N.D. Cal. March 7, 2023); *see also United States v. Google LLC*, 2023 U.S. Dist. LEXIS 156584 (N.D. Cal. Sept. 5, 2022); *United States v. Meta Platforms, Inc.*, 2023 U.S. Dist. LEXIS 216533 (N.D. Cal. Dec. 5, 2023).