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Utilizing Section 1782 Discovery in Foreign Proceedings

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1 Introduction

Discovery in U.S. litigation is well known for its exceptionally broad scope. Yet the fact that this powerful mechanism can be used not only in domestic U.S. litigation but also in proceedings pending abroad is not always fully appreciated.

This article focuses on so-called "Section 1782 discovery" provided under Title 28 of the United States Code, explaining the framework and practical considerations for its use.

2 Overview of Section 1782 Discovery

Section 1782 discovery allows an applicant to petition a U.S. federal district court to order an individual or entity "residing or found" within the court's district to produce evidence for use in a foreign court or quasi-judicial proceeding. Applications may be made not only by parties to the foreign litigation, but also by interested persons or foreign governments.

In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), the U.S. Supreme Court held that Section 1782 applies only to "foreign or international tribunals" established by governments or intergovernmental bodies, and excludes private international commercial arbitration institutions. Accordingly, Section 1782 discovery cannot be used to obtain evidence for private arbitration such as ICC arbitration.

Under Section 1782, document requests and depositions are available, and these may be compelled by subpoena in the same manner as in U.S. litigation. By contrast, interrogatories and requests for admissions are not available.

A distinctive feature of this procedure is that disclosure may be ordered at the discretion of a U.S. court even if the foreign legal system in question does not itself provide for U.S.-style discovery. In practice, it is often used by foreign litigants to obtain evidence from U.S. subsidiaries, former employees, or agents in connection with foreign proceedings.

3 Statutory Requirements and Discretionary Factors

For Section 1782 discovery to be granted, three statutory requirements must be met:

1. **Respondent's presence:** The person or entity from whom discovery is sought must reside or be found within the district of the court.
2. **Use in foreign proceedings:** The evidence sought must be "for use" in a foreign or international court or

administrative proceeding.

3. **Applicant's status:** The applicant must be a party to the foreign proceeding, an interested person, or a foreign government.

Even if these statutory requirements are satisfied, discovery is not automatically granted. In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the Supreme Court identified factors for courts to consider when exercising discretion:

1. **Party vs. non-party status of the respondent:** If the respondent is a party to the foreign proceeding, the foreign tribunal may order production directly, and the need for U.S. court intervention is less compelling. Conversely, if the respondent is a third party, the foreign tribunal may lack jurisdiction over them, and the role of the U.S. court is more significant.
2. **Receptivity of the foreign tribunal:** Courts consider whether the foreign tribunal is likely to accept evidence obtained through Section 1782. If the foreign tribunal has expressly indicated it will not, U.S. courts are more likely to deny the application. If the position is unclear, U.S. courts tend to allow discovery.
3. **Avoidance of foreign proof-gathering restrictions:** Courts examine whether the request seeks to circumvent restrictions or policies of the foreign legal system. For example, if a foreign tribunal has already denied a discovery request, re-litigating the issue in the U.S. may be deemed abusive. However, the mere absence of a discovery procedure in the foreign jurisdiction is not itself grounds for denial.
4. **Undue burden on the respondent:** If the request would impose excessive burdens—such as disclosure of massive amounts of electronic data or sensitive trade secrets—U.S. courts often limit the scope or manner of discovery through protective orders.

Ultimately, these factors are weighed together, and the decision rests with the court's discretion.

4 Features of Discovery and Practical Considerations

U.S. discovery is characterized by its broad scope: any non-privileged information relevant to a party's claim or defense may be subject to disclosure under Federal Rule of Civil Procedure 26(b)(1). This includes internal documents and trade secrets, making discovery substantially more burdensome compared to most other jurisdictions.

Recent case law has clarified that data stored outside the United States may still be subject to production if deemed within the "possession, custody, or control" of a respondent located in the U.S. For example, in litigation arising from the collapse of a Spanish bank, investors sought contracts, financial records, and emails from U.S.-based entities. The Second Circuit held that documents stored abroad could nevertheless be reached under Section 1782 if the U.S. respondent had control over them.[1] This reflects how, in today's environment of cloud-based and cross-border data management, Section 1782 discovery can transcend national boundaries.

[1] *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019).

With respect to Japan, Section 1782 was invoked to obtain R&D records and internal communications from a U.S. third party for use in invalidation proceedings before the Japan Patent Office. The Ninth Circuit held that the JPO's Trial and Appeal Department qualifies as a "foreign or international tribunal" under Section 1782, thereby permitting discovery.[2]

There have also been cases in which discovery was sought in aid of civil litigation pending in Japan.[3]

5 Conclusion

Section 1782 discovery is a powerful tool that enables broad evidence-gathering not available in many jurisdictions. For parties involved in international disputes, it is essential to recognize both sides of Section 1782: as a proactive "sword" to obtain valuable evidence, and as a defensive concern requiring preparedness against unexpected petitions.

(September 2025)

[2] *In re Application of Akebia Therapeutics, Inc.*, 793 F.3d 1108 (9th Cir. 2015).
[3] *In re Application of O'Keeffe*, 650 F. App'x 83 (2d Cir. 2016).

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