

Introduction to 28 U.S.C. § 1782--the federal procedure for obtaining evidence in the United States for use in foreign proceedings

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A. The Rule

Succinctly stated:

"Section 1782 allows an interested party to a foreign proceeding to apply to a United States district court in order to obtain discovery related to the foreign proceeding where the source of discovery is not a party to the foreign proceeding and can be found within the jurisdiction of the district court."¹

B. Types of Permissible Discovery

Section 1782 allows for discovery of documents as well as for testimony from witnesses.² Absent something contrary in the district court's order, the default is for Section 1782 discovery to take place in the same manner as if in a civil action proceeding under the Federal Rules of Civil Procedure.³ Section 1782's threshold inquiry is whether the foreign litigant ought to be allowed discovery in U.S. courts under the federal rules.⁴

C. The Procedures

Section 1782 relief is discretionary, not mandatory, as the statute expressly states that a district court *may* order discovery. Applications under Section 1782 are made *ex parte*, and discovery under Section 1782 is liberal.⁵ Some courts have noted that the policies underlying Section 1782

¹ *Texas Keystone, Inc. v. Prime Nat. Res., Inc.*, 694 F.3d 548, 553 (5th Cir. 2012).

² *Phillips v. Beierwaltes*, 466 F.3d 1217, 1220 (10th Cir. 2006) (quoting 28 U.S.C. § 1782(a)).

³ *Texas Keystone*, 694 F.3d at 553.

⁴ *Texas Keystone*, 694 F.3d at 554, citing *Gov't of Ghana v. ProEnergy Servs, LLC*, 677 F.3d 340, 348 (8th Cir. 2012).

⁵ See *In re Letter of Request from Supreme Court of Hong Kong*, 138 F.R.D. 27, 32 n.6 (S.D.N.Y. 1991); *Fleischmann v. McDonald's Corp.*, 466 F. Supp. 2d 1020, 1029 (N.D. Ill. 2006)

“counsel heavily in favor of generous federal court assistance.”⁶

Textually, Section 1782 requires only a minimal showing to authorize discovery, namely, that:

- (1) the target of discovery resides or “is found” in the district where the petition has been filed;
- (2) the discovery sought is for use in a proceeding before a foreign or international tribunal; and
- (3) the applicant is an “interested person.”⁷

The Supreme Court has directed courts to consider four other factors in exercising their discretion to grant a Section 1782 petition:

- (1) whether the person from whom discovery is sought is a participant in the foreign proceeding;
- (2) the receptivity of the foreign tribunal to federal-court assistance;
- (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions; and
- (4) whether the request is unduly intrusive or burdensome.

Intel Corp., 542 U.S. at 265.

Once discovery has been authorized by court order, the target of the discovery may move to quash or for protection from the issuing court, but notice must be provided to the Section 1782 discovery-seeking party before the court may rule or modify its prior order.⁸

⁶ *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf (In re Schottdorf)*, No. Civ. M19-88 (BSJ), 2006 U.S. Dist. LEXIS 94161, at *13 (S.D.N.Y. Dec. 29, 2006).

⁷ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 249, 254-56 (2004).

⁸ *Texas Keystone*, 694 F.3d at 556 (“we hold that the district court abused its discretion by failing to provide Texas Keystone an opportunity to respond to the Motion to Quash.”).

D. Examples of Section 1782 discovery

Comity and reciprocity are considerations in international or cross-border litigation.⁹ Without question, Section 1782 has been used to provide discovery for matters such as the Lago Agrio Litigation in Ecuadorian courts.¹⁰

E. Circuits are split on whether Section 1782 applies to arbitration

Whether Section 1782 discovery is available to parties in foreign arbitral proceedings as well as foreign litigants remains a complicated question. Federal circuits are currently split, with the Fifth and Second Circuits ruling that Section 1782 does not apply to foreign arbitration proceedings while the Eleventh Circuit has ruled that Section 1782 does apply to foreign arbitration proceedings.¹¹ The reasoning for finding Section 1782 inapplicable is premised on arbitration proceedings not being "foreign tribunals" under the statute.

In some instances, Section 1782 discovery has been authorized in UNCITRAL international arbitration proceedings.¹² The *Oxus Gold* court found the international arbitration under UNCITRAL, a body operating under the United Nations, to constitute a "foreign proceeding" subject to Section 1782. *Id.* at *14-16.

⁹ See e.g., *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895); *Intel Corp.*, 542 U.S. at 265.

¹⁰ See *In the Matter of Compania Chilena de Navegacion Interoceanica S.A.*, No. 03 CV 5382 (ERK), 2004 U.S. Dist. LEXIS 6408 (E.D.N.Y. Jan. 29, 2004) (ordering depositions and production of evidence to assist in the Ecuadorian proceeding); *In re Application of Noboa*, Nos. M18-302, M19-111, 1995 U.S. Dist. LEXIS 14402 (S.D.N.Y. Oct. 3, 1995) (ordering depositions to assist in Ecuadorian probate proceeding).

¹¹ Compare *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, 881 (5th Cir. 1999) reaffirmed in *El Paso Corp. v. La Comisión Ejecutiva, Hidroeléctrica Del Rio Lempa*, 341 Fed. Appx. 31 (5th Cir. 2009)(unpublished), and *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 185-90 (2d Cir. 1999) with *Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012).

¹² *In re Oxus Gold PLC*, No. MISC 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 **14-16, 20-21 (D.N.J. Apr. 2, 2007) (Section 1782 applies to UNCITRAL arbitrations); *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265 (JBA), 2009 U.S. Dist. LEXIS 109492 (D. Conn. Aug. 27, 2009) (same); *Norfolk S. Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882 (N.D. Ill. 2009) (same, distinguishing UNCITRAL arbitrations from purely private arbitrations).

F. Conclusion

In instances where foreign proceedings may require or benefit from the preservation of documentary or witness testimony located in the United States, 28 U.S.C. § 1782 provides an efficient and effective procedural mechanism to assist foreign litigants.