ALM | LAW.COM

New York Law Journal

Section 1782 is a Little-Known Superpower for Foreign Litigants

By Lori Marks-Esterman

March 7, 2024

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

While the statute is seemingly straightforward, navigating the legal landscape of Section 1782 can pose challenges and the application is discretionary. Recent decisions denying Section 1782 applications show the pitfalls applicants often get tripped up on.

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, the applicant must meet three statutory prerequisites: (i) the discovery must be sought from a person or entity that resides in the district where the application is made; (ii) the discovery must be "for use" in a foreign litigation; and (iii) the applicant needs to be an "interested party" to the foreign case.

Next, the court weighs four discretionary factors: (i) whether the discovery is sought from a "nonparticipant in the matter arising abroad"; (ii) whether the foreign court is likely to be receptive to U.S. judicial

assistance; (iii) whether the request attempts to "circumvent foreign proof-gathering restrictions"; and (iv) whether the request is "unduly intrusive or burdensome."

Avoiding Potential Difficulties

Among the three statutory factors, the 'for use' requirement is most frequently subject to challenge.

Often, an applicant seeks Section 1782 discovery before the foreign proceeding has been filed. While the foreign litigation does not need to be pending at the time the 1782 application is filed, the foreign litigation must be "within reasonable contemplation." Applicants who contend that they will commence foreign litigation *if* the evidence obtained through Section 1782 is fruitful, are typically unsuccessful.

Targets also argue that the discovery is not "for use" in the foreign proceeding if the petitioner cannot demonstrate how the evidence will be used in

the foreign proceeding, or that the evidence will be admissible in the foreign court. However, the case law is clear that the "for use" requirement 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 proceeding.

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.

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." Thus, where the target can show that the foreign court has specifically rejected the type of evidence sought, the court may deny the Section 1782 application.

Targets routinely raise the fourth factor, and assert that the proposed subpoenas are "overly burdensome." Because a 1782 application is discretionary, a careful review of the subpoenas is necessary. Subpoenas tailored to collect relevant discovery and that are targeted to elicit that evidence typically find success. On the other hand, where the proposed subpoenas are "very broad" and considered to be a "fishing expedition," the application will frequently be denied.

Finally, applicants often seek—and targets almost always oppose—a deposition of the discovery target. Chances of success increase when one can show that the deponent possesses unique information and is located within the Court's jurisdiction.

Takeaways

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

• **Timing**. Determining when to commence a Section 1782 can be challenging, as the U.S. Court will review the status of the foreign proceeding. However, recent decisions confirm the importance of filing at the earliest opportunity.

• **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.

• 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; 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.

Lori Marks-Esterman is the Litigation Practice Chair at Olshan Frome Wolosky LLP. She may be reached at lmarksesterman@olshanlaw.com.

OLSHAN

OLSHAN FROME WOLOSKY LLP