# Assistance to Foreign Tribunals Under 28 U.S.C. § 1782

Many foreign businesses (and their lawyers) express concern about litigation in the United States, and in particular about U.S. discovery practices. But these same practices can also provide overseas litigants with an opportunity. Any business involved in a dispute that touches the U.S.—wherever that dispute is being heard—should be aware of Section 1782.

28 U.S.C. § 1782 gives U.S. courts broad authority to assist foreign tribunals by ordering discovery in the U.S. This can be a powerful tool for parties involved in foreign litigation, especially in jurisdictions with limited tools for discovering evidence.

The core of the statute is this:

> **The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.**

Key terms regarding the scope of the statute are not clearly defined, however, and the courts have sometimes struggled with their application. This makes its application somewhat unpredictable.

Two specific questions that U.S. courts have struggled with are: (1) what constitutes "a foreign or international tribunal"; and (2) where a "person resides or is found."

## What is a "proceeding in a foreign or international tribunal"?

In *Abdul Latif Transportation Company Limited v. FedEx Corporation*, 939 F.3d 710 (6th Cir. 2019), the Sixth Circuit examined the question of whether a foreign arbitration constitutes "a foreign or international tribunal," and concluded that it does.

In *Abdul Latif*, the applicant sought discovery in Tennessee for use in a proceeding in Dubai before the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA"). The Court of Appeals was asked "whether the DIFC-LCIA Arbitration panel qualifies as a § 1782(a) 'foreign or international tribunal.'" The District Court had concluded that it did not and refused the application. The Sixth Circuit reversed, concluding that "the DIFC-LCIA Arbitration panel is a 'foreign or international tribunal,' and the district court may order § 1782(a) discovery for use in the proceeding before that panel."

Note, however, the "may." The Court concluded only that the statute *permitted* such discovery, not that it required it. It therefore remanded the case to the lower court to consider the various factors that apply to such an application, something we discuss briefly below.

The Sixth Circuit decision is in conflict with older decisions in the Second and Fifth Circuits, so whether applicants involved in arbitration can use Section 1782 may depend on geography. It remains to be seen whether the Supreme Court will step in to resolve the split.

## What is "the district in which a person resides or is found"?

The Second Circuit, in *In re Del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019), looked at the scope of a District Court's power under the "resides or is found" language and gave it an expansive interpretation.

In that case, the applicants commenced a number of foreign proceedings in relation to the government-forced sale of Banco Popular Español, S.A., to Banco Santander S.A. The petitioners sought discovery in New York from both Santander and Santander's New York-based affiliate, Santander Investment Securities ("SIS").

The District Court held that it lacked personal jurisdiction over Santander S.A., and the Second Circuit agreed. The Court did however "hold that this [resides or is found] language extends § 1782's reach to the limits of personal jurisdiction consistent with due process." This holding helps expand the scope of the statute.

SIS, the New York affiliate, *was* subject to the District Court's jurisdiction. The question as to SAS was "whether § 1782 may be used to reach documents located outside of the United

States." The Court expressly held "that there is no *per se* bar to the extraterritorial application of §1782, and the district court may exercise its discretion as to whether to allow such discovery."

## Analysis

These two decisions likely give new potential to what was already a potent tool for foreign litigants.

At least in the Sixth Circuit and the courts that follow its reasoning, litigants in foreign arbitrations can use Section 1782 to obtain documents for use in their proceedings. This means that parties can potentially obtain broad discovery by applying directly to the U.S. District Courts for orders compelling disclosure of documents or even for the examination of witnesses.

Perhaps more significantly, under the Second Circuit's decision, as long as the District Court has personal jurisdiction over the target for discovery, it may be compelled to produce documents over which it has control wherever they happen to be located. Once U.S. jurisdiction is established, Section 1782 can therefore be a powerful tool to obtain documents *outside* the U.S.

## Conclusion

These cases emphasize and reinvigorate an already valuable tool in cross-border disputes. It is important to remember that Section 1782 is permissive—courts "may" permit discovery, they are not obligated to do so. Applications under Section 1782 must still satisfy the factors provided by the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004). This means that discovery is certainly possible, but good lawyering will still be necessary to persuade a court of its propriety.

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