GAR Global Arbitration Review

The Arbitration Review of the Americas

2023

Section 1782: can arbitration parties come to the US to obtain information located abroad?

The Arbitration Review of the Americas

2023

The Arbitration Review of the Americas 2023 contains insight and thought leadership from 38 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Latin America's more interesting seats. This edition also contains an interesting think piece on concurrent delay as well as an excellent pair of reviews of decisions in the US and Canadian courts.

Generated: March 7, 2024

Section 1782: can arbitration parties come to the US to obtain information located abroad?

Anthony B Ullman and **Diora M Ziyaeva**

Dentons

Summary

In summary

This article examines different approaches adopted by US courts to petitions for discovery of documents or testimony found outside the US for use in non-US proceedings. The availability of extraterritorial discovery has led to a growing interest in section 1782 petitions among parties to foreign court and arbitration proceedings. The article analyses the benefits of section 1782, and the criticisms levelled against its use. (***Note: this article was written before the US Supreme Court's decision in*** ZF Auto ***unanimously holding that section 1782 cannot be used in aid of international arbitration.***)

Discussion points

- Availability of extraterritorial discovery in the US
- Divergence among US courts' approaches to the extraterritorial application of section 1782
- Potential benefits of section 1782 to international arbitration parties

Referenced in this article

- 28 USC 1782
- *Sergeeva v Tripleton Int'l Limited*
- *In re del Valle Ruiz*
- *Norex Petroleum Ltd v Chubb Ins Co of Canada*

Introduction

In recent years, a growing number of US courts has weighed in on litigants' attempts to expand the territorial reach of 28 USC § 1782.[1] As a result, section 1782 has become an increasingly popular tool for foreign parties engaged in court or arbitral proceedings located outside the United States that wish to take advantage of broad US discovery procedures.

The ambiguity of the statute's language has led to much debate concerning its scope. Currently, the two most salient questions concerning section 1782 are whether it extends to private commercial arbitrations and whether a US court can order the production of documents located outside the US. This article addresses the second of these questions, and examines the impact of the current legal landscape on international arbitration.[2]

Section 1782

Section 1782 allows a US federal court to grant discovery 'for use in a proceeding in a foreign or international tribunal'.[3] A request for discovery can be made by a foreign or international tribunal, or by any other 'interested party'.[4] It is within the court's discretion whether to grant the request. A court may order the production of documents and testimony from any party over which it has personal jurisdiction.

Currently, to obtain assistance from a district court under section 1782, a party must show that: the party from whom discovery is sought 'resides or is found' within that court's district; the discovery is 'for use in a proceeding before a foreign or international tribunal'; and the application is made by an 'interested person'.[5]

While section 1782 states that the party from which discovery is sought must 'reside[]' or be 'found' within the federal district in which the application is filed, the language of the statute does not specify whether the sought-after documents or witnesses must be physically present in the district. This has given rise to the question whether section 1782 may be applied extraterritorially, namely used to obtain discovery of documents or witnesses located outside the district — including, in particular, overseas. Different courts have reached different conclusions.

Current legal framework

The Court of Appeals for the Eleventh Circuit was the first circuit court to find that section 1782 allows for extraterritorial discovery, which it did in the 2016 decision ***Sergeeva v Tripleton Int'l Limited***.[6] The case arose in the context of an acrimonious divorce in Russia, during the division of assets, Sergeeva claimed that her ex-husband concealed marital assets through offshore companies around the world. In the US, Sergeeva sought information from Gabriella Pugh and Pugh's employer Trident, which she expected would show her ex-husband's beneficial ownership of a Bahamian corporation. She filed a 1782 action in federal district court in the state of Georgia, requesting the issuance of subpoenas seeking documents from Trident entities, including those located in the Bahamas. In response, Trident objected on numerous grounds, including that the subpoena sought documents located outside the United States and from parties other than the original Trident entity. The district court rejected that argument and ruled against Trident.

On appeal, the Eleventh Circuit affirmed the decision, and confirmed the lower court's approach to the extraterritoriality question. The court noted that the Federal Rules of Civil Procedure, which govern discovery pursuant to section 1782, are 'broad' and cover 'materials located outside of the United States'.[7] In the court's view, placing limits on section 1782 discovery not expressly found in the statute 'would categorically restrict the discretion Congress afforded federal courts'.[8] Thus, the Eleventh Circuit concluded, 'the only geographical limitation' concerned 'the location for the act of production – not the location of the documents or information to be produced'.[9]

The one further restriction on section 1782 discovery, as stated by the Eleventh Circuit, is that a party can only be ordered to produce documents in its 'possession, custody, and control'.[10] In the case of Trident, this extended to any documents within the possession of its Bahamian entities, which, as a result of the section 1782 orders, now had to be produced in Georgia.

The same approach was adopted by the Second Circuit in late 2019. The court ruled on the issue of the extraterritorial application of section 1782 in ***In re del Valle Ruiz***.[11] That case stemmed from the acquisition of Banco Popular Español (BPE) by Banco Santander. A group of 55 Mexican investors and two investment and asset-management firms contested the legality of the acquisition in several foreign proceedings, including an international arbitration in Spain. They then filed two section 1782 applications in the District Court for the Southern District of New York seeking documents related to BPE's liquidity, the acquisition, and communications with regulators, from Santander and several affiliates. While the district court found that it lacked personal jurisdiction over all but one Santander entity, it concluded that producing documents located abroad was permissible under the statute. The cases were consolidated on appeal, and the district court's finding was affirmed.

First, the Second Circuit addressed the meaning of the word 'found' in the statute, stating that it extends 'to the limits of personal jurisdiction consistent with due process'.[12] As a result, the court found that the application of section 1782 is not limited to companies that systematically and continuously do business in the district such that they are considered to be generally 'present' in it. Instead, the court wrote, 'where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery'.[13] This reading of section 1782 allows the court to exercise personal jurisdiction in a more expansive manner than the limits of a district court's general jurisdiction would allow.

Second, the Second Circuit explicitly stated that 'there is no per se bar to the extraterritorial application of § 1782'.[14] In effect, the petitioners could seek any documents that were within the 'possession, custody or control' of the Santander entity, whether located in the US or abroad, subject only to the district court's discretion in granting or rejecting its discovery requests.[15]

While other circuit courts have not ruled on this issue, a number of federal district courts have allowed extraterritorial discovery under section 1782.[16]

However, there has been some opposition to this trend. In particular, the District Court for the District of Columbia has expressly found that section 1782 does not apply extraterritorially. In ***Norex Petroleum Ltd v Chubb Ins Co of Canada***,[17] Norex sued several insurance companies in Canadian court for insurance coverage and losses related to oilfield equipment. Norex claimed that a Russian company had orchestrated a scheme to seize its equipment in Russia, and argued that BP America had been subjected to similar treatment. It sought evidence of this from BP before the district court. BP claimed that the relevant documents were in the possession of its UK affiliate.

The magistrate judge granted the section 1782 application, but the district court overturned this decision. The court emphasised that while 'a district court has the authority to grant a discovery request under § 1782, the court then considers whether to exercise its discretion to do so'.[18] The court reiterated the discretionary factors outlined by the Supreme Court in its ***Intel*** decision: (i) whether the party from whom discovery is sought is a participant in the foreign proceeding; (ii) the nature of the foreign tribunal, the character of the proceedings and the receptivity of the foreign court to US assistance; (iii) whether the petition is an attempt to circumvent foreign proof-gathering restrictions or policies; and (iv) whether the request is unduly intrusive or burdensome.[19]

The court then examined the existing case law, which at the time preceded the ***In re del Valle Ruiz*** decision. That case law discussion, while in many instances dicta, was generally against affording section 1782 extraterritorial application, based largely on: (i) legislative history indicating that section 1782 was intended 'to clarify and liberalize existing US procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence ***in the United States***',[20] and (ii) an article written by Professor Hans Smit, one of the drafters of the statute, who stated that 'the purpose of the statute is only to provide evidence from witnesses and documents located in the United States'.[21] Based on this, it found: 'This body of caselaw suggests that § 1782 is not properly used to seek documents held outside the United States as a general matter.'[22] According to the court, this 'would not be in keeping with the aims of the statute'.[23] To further strengthen its rejection of the petition, the court also reiterated that Norex never suggested that piercing the corporate veil between BP and its UK entity was merited. Therefore, it rejected Norex's petition.

Several district courts since have adopted similar positions.[24] Circuit courts have generally avoided the issue. For example, the Ninth Circuit affirmed the almost complete denial of discovery requests under section 1782 made by a Taiwanese corporation.[25] The case concerned a joint venture in Asia, that ended in a highly adversarial relationship and litigation in US, Chinese and Taiwanese courts. The petitioner sought documents for use in the foreign litigations. In regards to requests targeting documents found in Asia, the lower court found that the purpose of section 1782 did not encompass 'the discovery of material located in foreign countries'.[26] Instead of addressing this question, the Ninth Circuit stated that it 'need not rule, however, on the question whether § 1782 can ever support discovery of materials outside the United States'.[27] The court found that in the case at hand, Chinese courts were 'well situated to determine whether such material is subject to discovery',[28] and thus it did not address the question of extraterritoriality. As of today, the question remains unanswered by any circuit court outside the Second and Eleventh Circuits, and as such continues to be open to debate.

Consequences for international arbitration

Although section 1782 has been a largely ignored 'tool' in the international arbitration toolbox, for better or worse this appears to be changing. In recent years, an increasing number of section 1782 petitions have come from interested parties in private international commercial arbitrations located outside the US, seeking to rely on the US discovery system in aid of their cases.

With respect to the extraterritorial application of section 1782, while the ability to use the statute may allow for the discovery of information that would not otherwise be obtainable, it is also important to understand the implications of such discovery specifically within the context of arbitration.

As is well-known, arbitration is intended to be a process less onerous than litigation, with rights to discovery generally limited to what is allowed by the chosen arbitration rules or by the law of the arbitral seat, which, in international arbitrations, is most often a locale outside the United States. By using section 1782 as a mechanism to obtain discovery located overseas, a party can potentially broaden the scope of available discovery substantially beyond that provided for in the governing arbitration rules or allowable under the law of the arbitral seat. While the court hearing the section 1782 application can consider the

availability of discovery in the arbitration forum, the fact that the requested discovery cannot be obtained in that forum is not dispositive.

The potential consequences to international arbitration are significant. In districts that allow extraterritorial discovery under section 1782, companies that are subject to jurisdiction there can potentially be compelled to produce documents belonging to their affiliates in unrelated jurisdictions, and be forced to produce documents that would be wholly inaccessible for use in the arbitration under other circumstances. Likewise, with extraterritorial application, section 1782 could be used to compel testimony from witnesses, including third-party witnesses, whose testimony otherwise would not be introduced or taken.

In this regard, it is often said that arbitration is a creature of contract. Parties agree on the decision to arbitrate and, typically through their selection of institutional rules and the location of the arbitral seat, agree on the general range and scope of discovery. Parties, however, do not agree to section 1782 – it operates independently of the arbitration agreement, and non-US entities entering into agreements that call for arbitration may not even be aware of the section's existence at the time the arbitration agreement is signed. Some commentators have therefore argued that unilateral applications under section 1782 could amount to a violation of the arbitration agreement.[29]

Unsurprisingly, the potential uses of section 1782 have been the target of much criticism. Courts that have denied such applications are wary of the potential abuses, in particular of the potential for 'forum shopping' to gain information in disputes that have no real connection with the United States. Commentators have also pointed out that more expansive use of section 1782 in foreign arbitrations could lead to potentially controversial results. For instance, while pre-hearing discovery in aid of an arbitration located in the US is not permitted under the Federal Arbitration Act, a successful section 1782 petition would allow such discovery for an arbitration seated abroad.[30] In practice, this means that limitations placed on domestic parties could be inapplicable to foreign ones, and, as pointed out by Professor Peter Rutledge, could create 'asymmetrical discovery rights'.[31]

Further, commentators have also suggested that extraterritorial discovery of internal documents of non-US entities through the extension of jurisdiction over their US affiliates may have far-reaching consequences.[32] This was raised as a particular concern in the Chevron-Ecuador saga, in which both the investor and the state used section 1782 petitions to obtain information unavailable in the arbitration.[33] Chevron continued to rely on section 1782 in its litigation against Steven Donziger, serving expansive subpoenas on Google and Yahoo in California to obtain data on 68 email accounts.[34] As Robert Bradshaw noted, 'the prospect of section 1782 orders against email hosts and servers has been described as "a powerful as well as dangerous tool in international arbitration".'[35]

While US policymakers may have hoped that foreign jurisdictions would enact similar mechanisms, this has not been the case. In fact, some foreign judicial bodies have expressed their discomfort about the use of section 1782. For instance, English courts have been reluctant to restrain section 1782 discovery. In 2018 the English Commercial Court was asked by Dreymoor, a Singaporean company, to enjoin a Swiss company and its Russian affiliate from enforcing a discovery order granted by a US court.[36] The order compelled a former Dreywood executive to provide testimony and documents for use in BVI and Cyprus actions. The English court refused to grant the injunction, stating that while section 1782 proceedings could in some circumstances amount to unconscionable conduct, it would not 'police' a party's attempts to obtain documents for use in foreign proceedings. It considered

that it would be a 'serious breach of comity' to find that the US court's order was erroneous.[37] Nevertheless, the court acknowledged that multiple courts had issued injunctions against section 1782 orders where pretrial depositions would disrupt pending English proceedings.-[38]

However, tribunals and courts outside the US have generally expressed their receptiveness to evidence obtained through section 1782 petitions – within certain limits. For instance, in the ICSID arbitration between Cascade Investments NV and the Republic of Turkey, the state asked the district court in New Jersey to compel the testimony of a resident Turkish businessman in the arbitration.[39] The tribunal confirmed that it was receptive to this evidence in principle, but stated that the admissibility of particular evidence would need further analysis.

Conclusion

The authors acknowledge the legislative history and statement by Professor Smit cited by the ***Norex Petroleum*** court and discussed above. Nonetheless, section 1782 provides that, to the extent the court does not otherwise prescribe, evidence shall be taken or produced 'in accordance with the Federal Rules of Civil Procedure'. As the Federal Rules of Civil Procedure clearly provide for a party subject to the court's jurisdiction to be compelled to produce discovery material that is in its possession, and indeed do not distinguish between documents and witnesses that are located in the US and those that are not, it is understandable that courts most often do not interpret bits of legislative history to categorically preclude the extraterritorial application of discovery. Moreover, in some instances, an application under section 1782 may be the most efficient way to obtain the information at issue.

At the same time, the authors are mindful of the arguably anomalous and unexpected results that can occur if section 1782 is applied to allow a party to an international arbitration to obtain evidence that is located overseas. Therefore, as section 1782 expressly allows a court to prescribe limits on the operation of the Federal Rules of Civil Procedure, the authors believe that courts should be mindful of those potential results and consider ways to limit requests for extraterritorial discovery to remain consistent, to the extent possible, with the scope of discovery that would be available under the applicable arbitration rules and the law of the seat of the arbitral forum. The Supreme Court's ruling in ***ZF Auto*** – issued after this article was drafted – has markedly narrowed the scope for extraterritorial discovery by barring its use in international arbitration.

The authors gratefully acknowledge the assistance of Julia Grabowska, Dentons US LLP.

Footnotes

[1] Section 1782 provides, in relevant part: '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 . . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.' See 28 USCA § 1782.

[2] This article was drafted before the US Supreme Court's ruling in ***ZF Automotive US, Inc v Luxshare Ltd***, 21-401, 2022 WL 2111355 (US 13 June 2022), which held unanimously that section 1782 could not be used in aid of international commercial arbitration or investor–state dispute settlement.

[3] 28 USCA § 1782 (a).

[4] Id.

[5] See, eg, In re ***EWE Gasspeicher GmbH***, No. CV 19-MC-109-RGA, 2020 WL 1272612, at *1 (D Del 17 March 2020) ('The district court has authority to grant an application under 28 USC § 1782 when three statutory conditions are met: (1) the person from whom discovery is sought "resides or is found" within the district; (2) the discovery is "for use in a proceeding before a foreign or international tribunal"; and (3) the application is made by an "interested person". 28 USC § 1782(a); see also ***In re Bayer AG***, 146 F3d 188, 193 (3d Cir 1998).'); ***Schmitz v Bernstein Liebhard & Lifshitz, LLP***, 376 F.3d 79, 83 (2d Cir 2004).

[6] ***Sergeeva v Tripleton Int'l Ltd***, 834 F3d 1194 (11th Cir 2016).

[7] Id, at 1200.

[8] Id.

[9] Id.

[10] Id.

[11] ***In re del Valle Ruiz***, 939 F3d 520 (2d Cir 2019).

[12] Id, at 523.

[13] Id, at 530.

[14] Id, at 524.

[15] Id, at 533.

[16] ***In re Application of HydroDive Nigeria, Ltd***, No. 13-MC-0477, 2013 WL 12155021 (SDTex 29 May 2013); I***n re Barnwell Enterprises Ltd***, 265 F Supp 3d 1, 16 (DDC 2017); ***De Leon v Clorox Co***, No. 19-MC-80296-DMR, 2020 WL 4584204 (ND Cal 10 August 2020); ***Matter of De Leon***, No. 1:19-MC-15, 2020 WL 1180729 (SD Ohio 12 March 2020); ***In re Application of Polygon Glob Partners LLP for an Ord Pursuant to 28 USC § 1782 to Conduct Discovery for Use in a Foreign Proceeding***, No. 21-MC-007 WES, 2021 WL 1894733 (DRI 11 May 2021).

[17] ***Norex Petroleum Ltd v Chubb Ins Co of Canada***, 384 F Supp 2d 45 (DDC 2005).

[18] Id, at 49.

[19] Id.

[20] Id, at 50 (citing ***In re Sarrio SA***, No. 9–372, 1995 WL 598988, at *2 (SDNY 11 October 1995), quoting S Rep No. 1580, 88th Congress, 2nd Sess (1964), US Code Cong Admin News 1964, p. 3782) (emphasis added).

[21] Id. Professor Smit went on to write that 'if Section 1782 could be used to obtain discovery [of] evidence located in a foreign country it would become an instrument for interfering with the regular court procedures of the foreign country', and that such an approach would

encourage 'a heavy influx of discovery applications under Section 1782'. See ***In re Sarrio SA***, No. 9–372, 1995 WL 598988, at *2 (SDNY 11 October 1995).

[22] ***Norex Petrole***um, at 53.

[23] Id, at 55.

[24] See eg, ***In re Ex Parte Application of Qualcomm Inc***, 162 F Supp 3d 1029, 1045 (ND Cal 2016); ***In re Veiga***, 746 F Supp 2d 8, 26 (DDC 2010).

[25] ***Four Pillars Enterprises Co v Avery Dennison Corp***, 308 F3d 1075 (9th Cir 2002).

[26] Id, at 1079.

[27] Id, at 1080.

[28] Id.

[29] Franz T Schwarz & Christian W Konrad, ***The Vienna Rules: A Commentary on International Arbitration in Austria***, para. 20-256, n. 521.

[30] Hagit Muriel Elul and Rebeca E Mosquera, '28 USC Section 1782: US Discovery in Aid of International Arbitration Proceedings', in ***International Arbitration in the United States*** (Laurence Shore, Tai-Heng Cheng et al, eds, 2017), 393, 410-11.

[31] Peter B Rutledge, 'Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving US Entities?', 25 J Int'l Arb 171, 177–78 (2008).

[32] Christoph Guibert de Bruet & Johannes Landbrecht,'Cloud Computing and US-Style Discovery: New Challenges for European Companies', 32 Arb Int'l 297, 309 (2016).

[33] See Abby Cohen Smutny, Lee A Steven, and Lauren Mandell, 'California District Court grants 28 USC § 1782 application in Ecuador matter', (29 September 2010), https://ca.practicallaw.thomsonreuters.com/0-503-4735?__lrTS=20220524161701436.

[34] See ***Chevron Corp v Donziger***, No. 12-MC-80237 CRB (NC), 2013 WL 4536808, at *1 (ND Cal 22 August 2013).

[35] Robert Bradshaw, 'How to Obtain Evidence from Third Parties: A Comparative View', 36 J Int'l Arb 629, 645 (2019).

[36] ***Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH*** [2018] EWHC 2267 (Comm) (England and Wales High Court).

[37] 'English court won't halt US discovery in fertiliser "bribe" dispute', (29 August 2018), https://globalarbitrationreview.com/article/english-court-wont-halt-us-discovery-in-fertiliser-bribe-dispute.

[38] ***Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH*** [2018] EWHC 2267 (Comm) (England and Wales High Court); see also Robert Bradshaw, 'How to Obtain Evidence from Third Parties: A Comparative View', 36 J Int'l Arb 629, 647-48 (2019).

[39] ***In re Ex Parte Petition of the Republic of Turkey for an Order Directing Discovery From Hamit Çiçek Pursuant to 28 USC*** § 1782, No. 2:19-CV-20107-ES-SCM (DNJ 18 May 2020).

IN SUMMARY

This article examines different approaches adopted by US courts to petitions for discovery of documents or testimony found outside the US for use in non-US proceedings. The availability of extraterritorial discovery has led to a growing interest in section 1782 petitions among parties to foreign court and arbitration proceedings. The article analyses the benefits of section 1782, and the criticisms levelled against its use. (***Note: this article was written before the US Supreme Court's decision in*** ZF Auto ***unanimously holding that section 1782 cannot be used in aid of international arbitration.***)

DISCUSSION POINTS

- Availability of extraterritorial discovery in the US
- Divergence among US courts' approaches to the extraterritorial application of section 1782
- Potential benefits of section 1782 to international arbitration parties

---

REFERENCED IN THIS ARTICLE

- 28 USC 1782
- *Sergeeva v Tripleton Int'l Limited*
- *In re del Valle Ruiz*
- *Norex Petroleum Ltd v Chubb Ins Co of Canada*

INTRODUCTION

In recent years, a growing number of US courts has weighed in on litigants' attempts to expand the territorial reach of 28 USC § 1782.[1] As a result, section 1782 has become an increasingly popular tool for foreign parties engaged in court or arbitral proceedings located outside the United States that wish to take advantage of broad US discovery procedures.

The ambiguity of the statute's language has led to much debate concerning its scope. Currently, the two most salient questions concerning section 1782 are whether it extends to private commercial arbitrations and whether a US court can order the production of documents located outside the US. This article addresses the second of these questions, and examines the impact of the current legal landscape on international arbitration.[2]

SECTION 1782

Section 1782 allows a US federal court to grant discovery 'for use in a proceeding in a foreign or international tribunal'.[3] A request for discovery can be made by a foreign or international tribunal, or by any other 'interested party'.[4] It is within the court's discretion whether to grant the request. A court may order the production of documents and testimony from any party over which it has personal jurisdiction.

Currently, to obtain assistance from a district court under section 1782, a party must show that: the party from whom discovery is sought 'resides or is found' within that court's district; the discovery is 'for use in a proceeding before a foreign or international tribunal'; and the application is made by an 'interested person'.[5]

While section 1782 states that the party from which discovery is sought must 'reside[]' or be 'found' within the federal district in which the application is filed, the language of the statute does not specify whether the sought-after documents or witnesses must be physically present in the district. This has given rise to the question whether section 1782 may be applied extraterritorially, namely used to obtain discovery of documents or witnesses located outside the district — including, in particular, overseas. Different courts have reached different conclusions.

CURRENT LEGAL FRAMEWORK

The Court of Appeals for the Eleventh Circuit was the first circuit court to find that section 1782 allows for extraterritorial discovery, which it did in the 2016 decision ***Sergeeva v Tripleton Int'l Limited***.[6] The case arose in the context of an acrimonious divorce in Russia, during the division of assets, Sergeeva claimed that her ex-husband concealed marital assets through offshore companies around the world. In the US, Sergeeva sought information from Gabriella Pugh and Pugh's employer Trident, which she expected would show her ex-husband's beneficial ownership of a Bahamian corporation. She filed a 1782 action in federal district court in the state of Georgia, requesting the issuance of subpoenas seeking documents from Trident entities, including those located in the Bahamas. In response, Trident objected on numerous grounds, including that the subpoena sought documents located outside the United States and from parties other than the original Trident entity. The district court rejected that argument and ruled against Trident.

On appeal, the Eleventh Circuit affirmed the decision, and confirmed the lower court's approach to the extraterritoriality question. The court noted that the Federal Rules of Civil Procedure, which govern discovery pursuant to section 1782, are 'broad' and cover 'materials located outside of the United States'.[7] In the court's view, placing limits on section 1782 discovery not expressly found in the statute 'would categorically restrict the discretion Congress afforded federal courts'.[8] Thus, the Eleventh Circuit concluded, 'the only geographical limitation' concerned 'the location for the act of production – not the location of the documents or information to be produced'.[9]

The one further restriction on section 1782 discovery, as stated by the Eleventh Circuit, is that a party can only be ordered to produce documents in its 'possession, custody, and control'.[10] In the case of Trident, this extended to any documents within the possession of its Bahamian entities, which, as a result of the section 1782 orders, now had to be produced in Georgia.

The same approach was adopted by the Second Circuit in late 2019. The court ruled on the issue of the extraterritorial application of section 1782 in ***In re del Valle Ruiz***.[11] That case stemmed from the acquisition of Banco Popular Español (BPE) by Banco Santander. A group of 55 Mexican investors and two investment and asset-management firms contested the legality of the acquisition in several foreign proceedings, including an international arbitration in Spain. They then filed two section 1782 applications in the District Court for the Southern District of New York seeking documents related to BPE's liquidity, the acquisition, and communications with regulators, from Santander and several affiliates. While the district court found that it lacked personal jurisdiction over all but one Santander entity, it concluded that producing documents located abroad was permissible under the statute. The cases were consolidated on appeal, and the district court's finding was affirmed.

First, the Second Circuit addressed the meaning of the word 'found' in the statute, stating that it extends 'to the limits of personal jurisdiction consistent with due process'.[12] As a

result, the court found that the application of section 1782 is not limited to companies that systematically and continuously do business in the district such that they are considered to be generally 'present' in it. Instead, the court wrote, 'where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery'.[13] This reading of section 1782 allows the court to exercise personal jurisdiction in a more expansive manner than the limits of a district court's general jurisdiction would allow.

Second, the Second Circuit explicitly stated that 'there is no per se bar to the extraterritorial application of § 1782'.[14] In effect, the petitioners could seek any documents that were within the 'possession, custody or control' of the Santander entity, whether located in the US or abroad, subject only to the district court's discretion in granting or rejecting its discovery requests.[15]

While other circuit courts have not ruled on this issue, a number of federal district courts have allowed extraterritorial discovery under section 1782.[16]

However, there has been some opposition to this trend. In particular, the District Court for the District of Columbia has expressly found that section 1782 does not apply extraterritorially. In *Norex Petroleum Ltd v Chubb Ins Co of Canada*,[17] Norex sued several insurance companies in Canadian court for insurance coverage and losses related to oilfield equipment. Norex claimed that a Russian company had orchestrated a scheme to seize its equipment in Russia, and argued that BP America had been subjected to similar treatment. It sought evidence of this from BP before the district court. BP claimed that the relevant documents were in the possession of its UK affiliate.

The magistrate judge granted the section 1782 application, but the district court overturned this decision. The court emphasised that while 'a district court has the authority to grant a discovery request under § 1782, the court then considers whether to exercise its discretion to do so'.[18] The court reiterated the discretionary factors outlined by the Supreme Court in its *Intel* decision: (i) whether the party from whom discovery is sought is a participant in the foreign proceeding; (ii) the nature of the foreign tribunal, the character of the proceedings and the receptivity of the foreign court to US assistance; (iii) whether the petition is an attempt to circumvent foreign proof-gathering restrictions or policies; and (iv) whether the request is unduly intrusive or burdensome.[19]

The court then examined the existing case law, which at the time preceded the *In re del Valle Ruiz* decision. That case law discussion, while in many instances dicta, was generally against affording section 1782 extraterritorial application, based largely on: (i) legislative history indicating that section 1782 was intended 'to clarify and liberalize existing US procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence *in the United States*',[20] and (ii) an article written by Professor Hans Smit, one of the drafters of the statute, who stated that 'the purpose of the statute is only to provide evidence from witnesses and documents located in the United States'.[21] Based on this, it found: 'This body of caselaw suggests that § 1782 is not properly used to seek documents held outside the United States as a general matter.'[22] According to the court, this 'would not be in keeping with the aims of the statute'.[23] To further strengthen its rejection of the petition, the court also reiterated that Norex never suggested that piercing the corporate veil between BP and its UK entity was merited. Therefore, it rejected Norex's petition.

Several district courts since have adopted similar positions.[24] Circuit courts have generally avoided the issue. For example, the Ninth Circuit affirmed the almost complete denial of discovery requests under section 1782 made by a Taiwanese corporation.[25] The case concerned a joint venture in Asia, that ended in a highly adversarial relationship and litigation in US, Chinese and Taiwanese courts. The petitioner sought documents for use in the foreign litigations. In regards to requests targeting documents found in Asia, the lower court found that the purpose of section 1782 did not encompass 'the discovery of material located in foreign countries'.[26] Instead of addressing this question, the Ninth Circuit stated that it 'need not rule, however, on the question whether § 1782 can ever support discovery of materials outside the United States'.[27] The court found that in the case at hand, Chinese courts were 'well situated to determine whether such material is subject to discovery',[28] and thus it did not address the question of extraterritoriality. As of today, the question remains unanswered by any circuit court outside the Second and Eleventh Circuits, and as such continues to be open to debate.

CONSEQUENCES FOR INTERNATIONAL ARBITRATION

Although section 1782 has been a largely ignored 'tool' in the international arbitration toolbox, for better or worse this appears to be changing. In recent years, an increasing number of section 1782 petitions have come from interested parties in private international commercial arbitrations located outside the US, seeking to rely on the US discovery system in aid of their cases.

With respect to the extraterritorial application of section 1782, while the ability to use the statute may allow for the discovery of information that would not otherwise be obtainable, it is also important to understand the implications of such discovery specifically within the context of arbitration.

As is well-known, arbitration is intended to be a process less onerous than litigation, with rights to discovery generally limited to what is allowed by the chosen arbitration rules or by the law of the arbitral seat, which, in international arbitrations, is most often a locale outside the United States. By using section 1782 as a mechanism to obtain discovery located overseas, a party can potentially broaden the scope of available discovery substantially beyond that provided for in the governing arbitration rules or allowable under the law of the arbitral seat. While the court hearing the section 1782 application can consider the availability of discovery in the arbitration forum, the fact that the requested discovery cannot be obtained in that forum is not dispositive.

The potential consequences to international arbitration are significant. In districts that allow extraterritorial discovery under section 1782, companies that are subject to jurisdiction there can potentially be compelled to produce documents belonging to their affiliates in unrelated jurisdictions, and be forced to produce documents that would be wholly inaccessible for use in the arbitration under other circumstances. Likewise, with extraterritorial application, section 1782 could be used to compel testimony from witnesses, including third-party witnesses, whose testimony otherwise would not be introduced or taken.

In this regard, it is often said that arbitration is a creature of contract. Parties agree on the decision to arbitrate and, typically through their selection of institutional rules and the location of the arbitral seat, agree on the general range and scope of discovery. Parties, however, do not agree to section 1782 – it operates independently of the arbitration agreement, and non-US entities entering into agreements that call for arbitration may not

even be aware of the section's existence at the time the arbitration agreement is signed. Some commentators have therefore argued that unilateral applications under section 1782 could amount to a violation of the arbitration agreement.[29]

Unsurprisingly, the potential uses of section 1782 have been the target of much criticism. Courts that have denied such applications are wary of the potential abuses, in particular of the potential for 'forum shopping' to gain information in disputes that have no real connection with the United States. Commentators have also pointed out that more expansive use of section 1782 in foreign arbitrations could lead to potentially controversial results. For instance, while pre-hearing discovery in aid of an arbitration located in the US is not permitted under the Federal Arbitration Act, a successful section 1782 petition would allow such discovery for an arbitration seated abroad.[30] In practice, this means that limitations placed on domestic parties could be inapplicable to foreign ones, and, as pointed out by Professor Peter Rutledge, could create 'asymmetrical discovery rights'.[31]

Further, commentators have also suggested that extraterritorial discovery of internal documents of non-US entities through the extension of jurisdiction over their US affiliates may have far-reaching consequences.[32] This was raised as a particular concern in the Chevron-Ecuador saga, in which both the investor and the state used section 1782 petitions to obtain information unavailable in the arbitration.[33] Chevron continued to rely on section 1782 in its litigation against Steven Donziger, serving expansive subpoenas on Google and Yahoo in California to obtain data on 68 email accounts.[34] As Robert Bradshaw noted, 'the prospect of section 1782 orders against email hosts and servers has been described as "a powerful as well as dangerous tool in international arbitration".'[35]

While US policymakers may have hoped that foreign jurisdictions would enact similar mechanisms, this has not been the case. In fact, some foreign judicial bodies have expressed their discomfort about the use of section 1782. For instance, English courts have been reluctant to restrain section 1782 discovery. In 2018 the English Commercial Court was asked by Dreymoor, a Singaporean company, to enjoin a Swiss company and its Russian affiliate from enforcing a discovery order granted by a US court.[36] The order compelled a former Dreywood executive to provide testimony and documents for use in BVI and Cyprus actions. The English court refused to grant the injunction, stating that while section 1782 proceedings could in some circumstances amount to unconscionable conduct, it would not 'police' a party's attempts to obtain documents for use in foreign proceedings. It considered that it would be a 'serious breach of comity' to find that the US court's order was erroneous.[37] Nevertheless, the court acknowledged that multiple courts had issued injunctions against section 1782 orders where pretrial depositions would disrupt pending English proceedings.-[38]

However, tribunals and courts outside the US have generally expressed their receptiveness to evidence obtained through section 1782 petitions – within certain limits. For instance, in the ICSID arbitration between Cascade Investments NV and the Republic of Turkey, the state asked the district court in New Jersey to compel the testimony of a resident Turkish businessman in the arbitration.[39] The tribunal confirmed that it was receptive to this evidence in principle, but stated that the admissibility of particular evidence would need further analysis.

CONCLUSION

The authors acknowledge the legislative history and statement by Professor Smit cited by the *Norex Petroleum* court and discussed above. Nonetheless, section 1782 provides that, to the extent the court does not otherwise prescribe, evidence shall be taken or produced 'in accordance with the Federal Rules of Civil Procedure'. As the Federal Rules of Civil Procedure clearly provide for a party subject to the court's jurisdiction to be compelled to produce discovery material that is in its possession, and indeed do not distinguish between documents and witnesses that are located in the US and those that are not, it is understandable that courts most often do not interpret bits of legislative history to categorically preclude the extraterritorial application of discovery. Moreover, in some instances, an application under section 1782 may be the most efficient way to obtain the information at issue.

At the same time, the authors are mindful of the arguably anomalous and unexpected results that can occur if section 1782 is applied to allow a party to an international arbitration to obtain evidence that is located overseas. Therefore, as section 1782 expressly allows a court to prescribe limits on the operation of the Federal Rules of Civil Procedure, the authors believe that courts should be mindful of those potential results and consider ways to limit requests for extraterritorial discovery to remain consistent, to the extent possible, with the scope of discovery that would be available under the applicable arbitration rules and the law of the seat of the arbitral forum. The Supreme Court's ruling in *ZF Auto* – issued after this article was drafted – has markedly narrowed the scope for extraterritorial discovery by barring its use in international arbitration.

The authors gratefully acknowledge the assistance of Julia Grabowska, Dentons US LLP.

Endnotes

1 Section 1782 provides, in relevant part: '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 . . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.' See 28 USCA § 1782. ^ Back to section

2 This article was drafted before the US Supreme Court's ruling in*ZF Automotive US, Inc v Luxshare Ltd*, 21-401, 2022 WL 2111355 (US 13 June 2022), which held unanimously that section 1782 could not be used in aid of international commercial arbitration or investor–state dispute settlement. ^ Back to section

3 28 USCA § 1782 (a). ^ Back to section

4 Id. ^ Back to section

5 See, eg, In re*EWE Gasspeicher GmbH*, No. CV 19-MC-109-RGA, 2020 WL 1272612, at *1 (D Del 17 March 2020) ('The district court has authority to grant an application under 28 USC § 1782 when three statutory conditions are met: (1) the person from whom discovery is sought "resides or is found" within the district; (2) the discovery is "for use in a proceeding before a foreign or international tribunal"; and (3) the application is made by an "interested person". 28 USC § 1782(a); see also ***In re Bayer AG***, 146 F3d 188, 193 (3d Cir 1998).'); ***Schmitz v Bernstein Liebhard & Lifshitz, LLP***, 376 F.3d 79, 83 (2d Cir 2004). ^ Back to section

6 ***Sergeeva v Tripleton Int'l Ltd***, 834 F3d 1194 (11th Cir 2016). ^ Back to section

7 Id, at 1200. ^ Back to section

8 Id. ^ Back to section

9 Id. ^ Back to section

10 Id. ^ Back to section

11 ***In re del Valle Ruiz***, 939 F3d 520 (2d Cir 2019). ^ Back to section

12 Id, at 523. ^ Back to section

13 Id, at 530. ^ Back to section

14 Id, at 524. ^ Back to section

15 Id, at 533. ^ Back to section

16 ***In re Application of HydroDive Nigeria, Ltd***, No. 13-MC-0477, 2013 WL 12155021 (SDTex 29 May 2013); I***n re Barnwell Enterprises Ltd***, 265 F Supp 3d 1, 16 (DDC 2017); ***De Leon v Clorox Co***, No. 19-MC-80296-DMR, 2020 WL 4584204 (ND Cal 10 August 2020); ***Matter of De Leon***, No. 1:19-MC-15, 2020 WL 1180729 (SD Ohio 12 March 2020); ***In re Application of Polygon Glob Partners LLP for an Ord Pursuant to 28 USC § 1782 to Conduct Discovery for Use in a Foreign Proceeding***, No. 21-MC-007 WES, 2021 WL 1894733 (DRI 11 May 2021). ^ Back to section

17 ***Norex Petroleum Ltd v Chubb Ins Co of Canada***, 384 F Supp 2d 45 (DDC 2005). ^ Back to section

18 Id, at 49. ^ Back to section

19 Id. ^ Back to section

20 Id, at 50 (citing*In re Sarrio SA*, No. 9–372, 1995 WL 598988, at *2 (SDNY 11 October 1995), quoting S Rep No. 1580, 88th Congress, 2nd Sess (1964), US Code Cong Admin News 1964, p. 3782) (emphasis added). Back to section

21 Id. Professor Smit went on to write that 'if Section 1782 could be used to obtain discovery [of] evidence located in a foreign country it would become an instrument for interfering with the regular court procedures of the foreign country', and that such an approach would encourage 'a heavy influx of discovery applications under Section 1782'. See*In re Sarrio SA*, No. 9–372, 1995 WL 598988, at *2 (SDNY 11 October 1995). Back to section

22 *Norex Petrole*um, at 53. Back to section

23 Id, at 55. Back to section

24 See eg,*In re Ex Parte Application of Qualcomm Inc*, 162 F Supp 3d 1029, 1045 (ND Cal 2016); *In re Veiga*, 746 F Supp 2d 8, 26 (DDC 2010). Back to section

25 *Four Pillars Enterprises Co v Avery Dennison Corp*, 308 F3d 1075 (9th Cir 2002). Back to section

26 Id, at 1079. Back to section

27 Id, at 1080. Back to section

28 Id. Back to section

29 Franz T Schwarz & Christian W Konrad,*The Vienna Rules: A Commentary on International Arbitration in Austria*, para. 20-256, n. 521. Back to section

30 Hagit Muriel Elul and Rebeca E Mosquera, '28 USC Section 1782: US Discovery in Aid of International Arbitration Proceedings', in*International Arbitration in the United States* (Laurence Shore, Tai-Heng Cheng et al, eds, 2017), 393, 410-11. Back to section

31 Peter B Rutledge, 'Discovery, Judicial Assistance and Arbitration: A New Tool for Cases Involving US Entities?', 25 J Int'l Arb 171, 177–78 (2008). Back to section

32 Christoph Guibert de Bruet & Johannes Landbrecht,'Cloud Computing and US-Style Discovery: New Challenges for European Companies', 32 Arb Int'l 297, 309 (2016). Back to section

33 See Abby Cohen Smutny, Lee A Steven, and Lauren Mandell, 'California District Court grants 28 USC § 1782 application in Ecuador matter', (29 September 2010), https://ca.practicallaw.thomsonreuters.com/0-503-4735?__lrTS=20220524161701436. Back to section

34 See*Chevron Corp v Donziger*, No. 12-MC-80237 CRB (NC), 2013 WL 4536808, at *1 (ND Cal 22 August 2013). Back to section

35 Robert Bradshaw, 'How to Obtain Evidence from Third Parties: A Comparative View', 36 J Int'l Arb 629, 645 (2019). Back to section

36 *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH* [2018] EWHC 2267 (Comm) (England and Wales High Court). Back to section

37 'English court won't halt US discovery in fertiliser "bribe" dispute', (29 August 2018), https://globalarbitrationreview.com/article/english-court-wont-halt-us-discovery-in-fertiliser-bribe-dispute. Back to section

38 *Dreymoor Fertilisers Overseas Pte Ltd v Eurochem Trading GmbH* [2018] EWHC 2267 (Comm) (England and Wales High Court); see also Robert Bradshaw, 'How to Obtain Evidence from Third Parties: A Comparative View', 36 J Int'l Arb 629, 647-48 (2019). Back to section

39 *In re Ex Parte Petition of the Republic of Turkey for an Order Directing Discovery From Hamit Çiçek Pursuant to 28 USC* § 1782, No. 2:19-CV-20107-ES-SCM (DNJ 18 May 2020). Back to section

Thurn-und-Taxis-Platz 6,60313 Frankfurt,Germany

Tel: +49 69 4500 12 290

http://www.dentons.com