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Burdens and Benefits of Domestic Discovery in International Proceedings



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Today's Program

- Overview of 28 U.S.C § 1782
- Strategies for defending against § 1782 orders
- Offensive use of § 1782 orders
- Questions and discussion

What is 28 U.S.C. §1782?

§ 1782 gives U.S. District Courts **discretion** to grant an **interested person** an order authorizing issuance of a subpoena to a **person** who resides or may be **found** in the relevant court's district, compelling production of documents or testimony in aid of foreign and international legal **proceedings**.

Text of 28 U.S.C. § 1782

- “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 . . .*”
- “A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.”

28 U.S.C. §1782(a).

What is the *purpose* of 28 U.S.C §1782?

- Equitable and efficacious process - discovery procedures in the US for district courts to assist foreign tribunals and litigants involved in disputes and litigation with international aspects.
- Encourage foreign countries to do the same.

See *Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38 (2nd Cir. 1995) (citing S.Rep. No. 1580, 88th Cong., 2d Sess. 2 (1964)).

When is a 28 U.S.C. § 1782 order available?

- Does the Court have the **authority** to order discovery?
 - 3 Statutory Prerequisites
- Should the Court exercise its **discretion** to order discovery?
 - 4 *Intel* Factors

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 259 (2004).

Statutory Authority to Issue 28 U.S.C. § 1782 Order

- (1) Person from whom discovery is sought must be found in the district.
 - Person
 - Natural person or corporation
 - Government is not a “person”
 - Found
 - Expansive jurisdictional reach
 - Anywhere the discovery recipient can be served

Statutory Authority to Issue 28 U.S.C. § 1782 Order

- **(2) Discovery sought for use in a foreign proceeding – reasonable contemplation standard**
 - “proceeding need only be ‘within **reasonable contemplation**,’ not pending or imminent.” *Intel*, 542 U.S. at 259.
 - Mere intention to file criminal complaint for damages sufficed because doing so would trigger a criminal investigation. *Application of Furstenberg Finance SAS v. Litai Assets*, 877 F.3d 1031, 1034 (11th Cir. 2017).
 - Seeking to bolster a defamation complaint sufficed — discovery need not be *necessary* to claim; may be incident to investigation. *Mees v. Buiter*, 793 F.3d 291, 298-301 (2d Cir. 2015).

Increasing Breadth of Statutory Authority

- 1964 – Breadth increased from “any **judicial proceeding** pending in any court in a foreign country” to “a **proceeding** in a foreign or international tribunal.”
- 1996 – Addition of “including **criminal investigations** conducted before formal accusation.”
- 2004 – US Supreme Court rules in *Intel Corp.* that proceedings need be only “within **reasonable contemplation**” as distinct from “pending” or “imminent.”

Statutory Authority to Issue 28 U.S.C. § 1782 Order

- **(3) Application made by foreign or international tribunal or any interested person**
 - Interested person need not be a party
 - Examples of “interested parties”:
 - Minority shareholder in a foreign corporation to discover ownership in contemplation of suit or criminal complaint
 - Brother of deceased claimant in foreign proceedings
 - Foreign prosecutor
 - Investigation of facts to support yet to be filed fraud claim

Statutory Authority to Issue 28 U.S.C. § 1782 Order

- **All applicable privileges apply**
 - Attorney client
 - Work product
 - Proprietary confidentiality
 - Fifth amendment
 - First amendment
 - Qualified immunity

See In re Application of Louis Bacon, Civ. No. 17-mc-00192-KLM, 2-18 WL 4467182 (D. Col. Sept. 17, 2018) (granting in part and denying in part motion to quash § 1782 subpoena and applying U.S. law on reporter's privilege under First Amendment).

Discretion to issue 28 U.S.C. § 1782 order

Intel Factor 1

- Whether “the person from whom the discovery is sought is a participant in the foreign proceeding,” in which case, “the need for § 1782(a) aid generally is not as apparent as when evidence is sought from a nonparticipant in the matter arising abroad.”



Intel, 542 U.S. at 264; *HT S.R.L. v. Velasco*, 125 F. Supp. 3d 211, 223-24 (D.D.C. 2015).

Discretion to issue 28 U.S.C. § 1782 order

Intel Factor 2

- “[T]he nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court judicial assistance.”
 - Nature: Did the party seeking discovery have “options in selecting the forum for the foreign proceedings”?
 - Character: Is the foreign suit far along in the discovery process?
 - Receptivity: Is there “authoritative proof” that the foreign tribunal would reject any evidence obtained?

Intel, 542 U.S. at 264; see also *Velasco*, 125 F. Supp. 3d at 223-24.

Discretion to issue 28 U.S.C. § 1782 order

Intel Factor 3

- Whether the request “conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”



Intel, 542 U.S. at 265; *Velasco*, 125 F. Supp. 3d at 225.

Discretion to issue 28 U.S.C. § 1782 order

Intel Factor 4

- Whether the discovery requested is unduly intrusive or burdensome, or should be scaled back.



Intel, 542 U.S. at 265; *Velasco*, 125 F. Supp. 3d at 227-28.

Defending Against 28 U.S.C § 1782 Orders

- Motion to quash/vacate – failure of authority or discretion
 - Foreign proceeding not within reasonable contemplation
 - Applicant not interested person
 - Failure to satisfy 4 *Intel* factors for discretion

Defending Against 28 U.S.C. § 1782 Orders

- Motion to quash – ordinary subpoena defenses
- Motion to stay enforcement
- Motion for reconsideration / objections to magistrate ruling
- Injunction in foreign tribunal
 - *Dreymoor Fertilisers Overseas PTE Ltd. v. Eurochem Trading GmbH* ([2018] EWHC 2267 (Comm.))
- Appeal and stay pending appeal

Defending Against 28 U.S.C. § 1782 Orders

Practice Tips

- Educate foreign legal counterparts about risks of § 1782.
- Educate domestic employees/leaders about risks of their commentary being subject to discovery in foreign proceedings.
- Identify likely § 1782 targets early and prepare in advance:
 - Preliminary document harvesting and assessment.
 - Research foreign proceedings underlying application for procedural issues that may impact § 1782 defenses.
 - Conduct volume/man-hour cost assessments in preparation for burdensome argument and fee shifting negotiations.

Offensive Use of 28 U.S.C. § 1782

- Rising number of international commercial disputes in an increasingly global economy.
- Enables litigants to use broad American discovery process to obtain evidence otherwise unavailable.
- US litigants have found success in utilizing the statute to obtain discovery for overseas proceedings.

Offensive use of 28 U.S.C. § 1782

- **How to do it?**
 - *Ex parte* application
 - Affidavit re reasonable contemplation
 - Affidavit re matters of foreign law or procedure



Offensive use of 28 U.S.C. § 1782

Case Study

Chevron Litigation

- Since 2010, the *Chevron* litigation has generated more than 50 orders and opinions involving § 1782.
- Chevron was sued in Ecuador by a class of indigenous people asserting water supply pollution personal injury claims.
 - \$19 billion damages judgment entered against Chevron by Ecuadorian court.
 - Plaintiffs' lawyer engaged U.S. filmmaker to follow him and the litigation and produce a documentary.
- Chevron brought at least 23 actions pursuant to § 1782 which exposed a conspiracy of collusion among the Plaintiffs' lawyer, experts, and Ecuadoran government officials to secure the judgment against Chevron.
- § 1782 discovery exposed fraud through evidence such as:
 - Documentary film outtakes showing Plaintiffs' lawyer describing pressure tactics he used to influence an Ecuadorian judge, saying, "This is something you would never do in the United States, but Ecuador, you know, this is how the game is played, it's dirty." *In re Application of Chevron Corp.*, 709 F. Supp.2d 283, 289 (S.D.N.Y. 2010).
 - Plaintiffs' attorney's computer, hard drive and documents
 - Internal documents and correspondence of Plaintiffs' experts
 - Bank account information for the Plaintiffs' attorney's foreign account
 - Testimony of insiders
- In March 2014, Chevron won bench trial in S.D.N.Y. awarding \$96 million to Chevron against Ecuadorian government and enjoining enforcement of Ecuadorian judgment.
- August 30, 2018 Hague appeals court cancelled Ecuadorian judgment.

Takeaways Re 28 U.S.C. § 1782

- § 1782 allows much broader discovery from U.S. companies and persons than clients may expect.
- § 1782 orders can take clients by surprised, so its imperative for counsel to be familiar with the strategy and ways to defend against intrusive and unwanted discovery subpoenas.
- § 1782 can be a powerful strategic tool for an advocate – lawyers handling foreign disputes should take advantage of this statute to investigate claims and bolster evidentiary discovery in foreign proceedings.

Questions/Discussion

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