

# How to obtain section 1782 discovery: a step-by-step guide - Litigation Committee newsletter article, April 2020

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United States discovery mechanisms are document requests and depositions of key witnesses or entities, among others, and are powerful tools for proving your case. Discovery requests can cover a broad array of subject matter. So long as the discovery sought is not covered by privilege and is 'relevant' to the party's claim or defence, it is fair game. It is no wonder that lawyers outside of the US, particularly on the plaintiff or claimant-side, often wish they had similar tools at their disposal.

Section 1782 of title 28 of the United States Code grants that wish. It authorises US federal district courts (ie, a federal trial courts) to order a person or entity that 'resides' within the court's jurisdiction '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.' This article provides a guide for foreign lawyers interested in section 1782 discovery.

## Use of section 1782 discovery for proceedings around the globe

Section 1782 has been used to obtain discovery for a range of proceedings all around the world: from labour cases in Brazil to probate disputes in Hong Kong and maritime law arbitrations in London, as well as many other cases in between.

In *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labour Court of Brazil*, for example, a federal trial court in the Northern District of Illinois (in Chicago) granted a petition seeking section 1782 discovery for use in proceedings in the 68th and 72nd Labour Courts of São Paulo. That case concerned a wrongful termination suit by the former CEO and former Financial Director of McDonald's Comercio de Alimentos Ltda, a Brazilian subsidiary of McDonald's Corporation. The officers sought very broad discovery: interrogatories, documents, and depositions of McDonald's employees, covering a wide-range of subjects, including personnel files, the decision to dismiss the employees, McDonald's termination policies, franchise issues, tax issues, employee benefits, compliance with US laws, accounting audits, insurance claims, and other topics. The US court granted the discovery, with only a few, specific limitations.

United States courts have also ordered section 1782 discovery for use in probate disputes. For example, in *Application of Esses*, the US Court of Appeals for the Second Circuit, which covers New York among other states, affirmed a trial court's order granting a section 1782 petition that sought discovery for use in judicial proceedings in Hong Kong to determine the administrator of an estate of an individual who died intestate. The case arose from a dispute between the deceased's brother and sister before the Hong Kong courts regarding who should be appointed as administrator of the estate. The brother, who lived in Argentina, filed a section 1782 petition with the United States District Court for the Southern District of New York (in New York City), seeking information he claimed would show he was entitled to be appointed administrator. The application was successful.

Section 1782 discovery has also been granted for use in family law cases. In *In re Solines*, for example, a federal court in Louisiana granted a section 1782 petition seeking documents for use in an Ecuadorian child support dispute. Ms Solines sought documents concerning her ex-husband's compensation: a critical point of contention in the child support dispute. The court granted the petition, allowing the plaintiff to obtain discovery from her ex-husband's employer, a hospital located in the US.

Petitions seeking discovery under section 1782 have also been authorised for maritime law proceedings. In *In re Ex Parte Application of Kleimar NV*, the US District Court for the Southern District of New York granted an ex parte section 1782 application seeking discovery for use in arbitrations before the London Maritime Arbitration Association. The court granted the application, authorising discovery regarding pricing and other information relevant to the London proceedings.

Courts have also granted discovery under section 1782 for use in criminal proceedings. For example, in *Super Vitaminas, SA*, a company filed a section 1782 petition seeking discovery for use in criminal proceedings in Guatemala relating to the company's alleged non-payment of import taxes. The company believed that certain emails to which it no longer had access would prove its innocence. Using section 1782, the company obtained a subpoena requiring Microsoft and Google to turn over the exonerating emails.

## How to conduct Discovery under section 1782

A section 1782 petition must show that:

- the target of the discovery either resides or is found in the US jurisdiction where the motion was filed;
- the discovery sought is for use in foreign 'proceeding(s)'; and
- the party seeking discovery is an 'interested person'.

### *Step one: Identify the US jurisdiction where the party with the discovery resides*

Determining whether a person or entity 'resides or is found' in the US is very similar to determining whether a court has personal jurisdiction over a certain individual or entity. For a natural person, residence is usually the person's domicile, ie, where that person lives. For corporations and other entities, the inquiry is a little more complicated, but their residence is typically the jurisdiction where they are incorporated or maintain their principal place of business.

Filing the section 1782 application in the jurisdiction where the target resides satisfies that residence requirement. But sometimes it is not that simple.

In *In re Escallón*, for example, the petitioner, Arturo Escallón, sought deposition testimony and document discovery from two individuals, Patricia and Carlos Ardila, for use in contemplated proceedings in Colombia. The court denied the petition, in part because Escallón had not shown that the Ardilas resided in the Southern District of New York, meaning that the district was their permanent residence, merely by showing that they maintained an apartment in New York City. Additionally, the court determined the Ardilas were not 'found in' the district because they were not physically present in the district when served with process.

Similarly, in *In re Application of Fernando Celso De Aquino Chad*, a judicial administrator of a bankruptcy proceeding in Brazil filed a request under section 1782 to compel certain US banks to produce transaction records, which, he argued, would provide proof that the entities had dissipated assets in anticipation of their bankruptcy filing. The court granted the petition, but limited it to banks that were headquartered in New York, where the petition was filed. Jurisdiction could not be exercised over the other banks, the court explained, because, although they operated in New York, none of their alleged conduct in New York was connected to the dissipation of assets that formed the basis for the 1782 petition.

### *Step two: Establish that the discovery is 'for use in' a foreign or international proceeding*

The party seeking discovery must also establish that the documents or testimony sought are ‘for use in a proceeding in a foreign or international tribunal’. Note that the statute does not say anything about the proceeding being ongoing or already initiated. The party must only identify objective indicia suggesting that the filing or initiation is being contemplated if the proceeding is not yet underway.

Some courts, including the US Court of Appeals for the Second Circuit, have held that to count as a ‘proceeding’, there must be some dispute regarding liability that the foreign or international tribunal must resolve, imposing a requirement that the proceedings be ‘adjudicative’ in nature. Other courts, however, have disagreed. The US Court of Appeals for the Eleventh Circuit, which covers Florida, among other states, has held that section 1782 authorises discovery, for example, for use in post-judgment proceedings where liability has already been established.

Another significant unresolved question regarding the ‘proceeding’ requirement is whether private foreign arbitrations count as ‘proceeding[s] *in a foreign or international tribunal*.’ At least the Second and Fifth Circuit Court of Appeals (covering, most significantly, New York and Texas) have held that they do not. Other courts, including the US Court of Appeals for the Sixth Circuit, have disagreed. In *Abdul Latif Jameel Transportation Company Ltd v FedEx Corp*, that court ruled that section 1782 authorises discovery in private commercial arbitrations. The issue is currently pending in *Servotronics, Inc v Rolls-Royce PLC*, before the US Court of Appeals for the Seventh Circuit, which covers Illinois, among other states.

Apart from showing that the proceeding actually counts as a ‘proceeding’, the party seeking section 1782 discovery must also show that the documents or testimony can actually *be used* in the foreign or international proceeding. The party does not have to show that it will in fact use the discovery. The party must simply show the *ability* to use the discovery. Therefore, if the documents or testimony are subject to exclusion under a foreign rule or privilege, the section 1782 motion may not be successful.

### ***Step three: Show that the party seeking discovery is an ‘interested person’***

A party to a foreign or international proceeding is clearly an ‘interested person’ under section 1782. But a person or entity with a mere financial or ideological stake in the proceeding is not.

The space between those two extremes, however, is somewhat unclear. Where a non-party is seeking section 1782 discovery, courts typically assess whether the person has a right to provide evidence, whether the person has an established relationship (ie, agent-principal or employee-employer) with a party, or whether the person is a creditor.

### ***Step four: Overcome discretionary factors***

Even where a party has met all three statutory requirements, whether to grant the section 1782 application is left to the district court’s discretion.

In deciding whether to exercise discretion to grant a section 1782 application courts typically consider whether the foreign or international tribunal could order the discovery itself, the nature of the tribunal, the character of the foreign or international proceedings, whether the tribunal would be receptive to US-court assistance, whether the party seeking discovery is attempting to circumvent proof-gathering restrictions imposed by the foreign country or international body, and whether the request is unduly burdensome. The party opposing discovery bears the burden of showing that any of those discretionary factors (or other factors) warrant denial of the motion.

It is therefore critically important that section 1782 applications not only satisfy the statutory requirements but also provide the court comfort that the discovery sought is appropriate for the proceedings in which it will be used and is not overly broad.

In fact

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Section 1782 discovery requests, if crafted appropriately, can be of enormous assistance to non-US lawyers looking to bolster their discovery efforts and chances of success in their home courts.

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