



the global voice of  
the legal profession®

# International Litigation News

Publication of the International Bar Association Legal Practice Division

**MAY 2018**



Ava Borrasso  
FCI Arb

Ava J Borrasso, Miami  
ajb@ajborrassolaw.com

# Overview of recent developments in Section 1782 of Title 28 of the United States Code

The significance of Section 1782 of Title 28 of the United States Code ('28 USC §1782') as a tool to discover evidence for proceedings abroad has been much heralded and the subject of considerable discourse. The evolution of discovery available through Section 1782 has recently expanded. Arguably, the most impactful decision in the area applied Section 1782 extraterritorially and to affiliated entities. Discovery originally obtained through the statute has also been held available for use in subsequent US and foreign proceedings. Finally, the flexibility of the statute has permitted discovery of a variety of evidence – all as further discussed below.

This brief overview highlights recent developments in Section 1782 that underscore the breadth and significance of the statute.

## Extraterritorial application and extension to affiliates

In a case of first impression, the Eleventh Circuit Court of Appeal in *Sergeeva v Tripleton Int'l Ltd*, held that Section 1782 applied *extraterritorially* and to *affiliates* in line with federal court practice.<sup>1</sup> By granting extraterritorial discovery in support of an asset recovery case, the Court clarified that the reach of Section 1782 extends to those subject to the jurisdiction of US courts. It also confirmed that access to documents beyond US shores includes documents within the 'possession, custody or control' of those subject to the federal subpoena power.<sup>2</sup> In short, *Sergeeva* determined that Section 1782 applies extraterritorially and to parties within the control of those subject to the subpoena power of US courts, including affiliated entities in proper circumstances. That finding is consistent with the Federal Rules of Civil Procedure as expressly incorporated into Section 1782. The extraterritorial reach of Section 1782 was subsequently re-affirmed by

the Court in *Fuhr v Credit Suisse AG*, 687 Fed Appx 810 (11th Cir 2017) (unpublished).

By contrast, the Second Circuit, as of yet, has not decided the precise issue of extraterritorial application of Section 1782. In *Bouvier v Adelson (In re Accent Delight Int'l Ltd)*, 696 Fed Appx 537 (2d Cir. 2017) the Court declined to address the issue noting the absence of a factual record demonstrating that the documents sought were located on foreign soil. The issue is one of historical division of the circuit.<sup>3</sup> As a result, the Eleventh Circuit is currently at the forefront on the issue of extraterritorial application of Section 1782.

## Use of Section 1782 discovery in subsequent proceedings – domestic and foreign

A year before *Sergeeva*, the Eleventh Circuit decided another issue of first impression – whether information obtained via Section 1782 could be used in subsequent proceedings *within the US*. In *Glock v Glock*,<sup>4</sup> the court permitted a former wife to use evidence she obtained through a Section 1782 petition in a subsequent case under the Racketeer Influenced and Corrupt Organizations (RICO) Act she filed against her former husband. The Court addressed the implicit recognition that evidence secured by Section 1782 cannot be used for US proceedings (given its requirement to support a foreign proceeding) but went on to analyse the statute itself which is silent on the precise issue of *subsequent use*.

After reviewing the legislative history, policy rationales and principles of statutory construction that expressly incorporated the Federal Rules of Civil Procedure, the Court held subsequent use was permitted. Notably, in the underlying Section 1782 action, a protective order was in place that required the parties to revert to the issuing court for

any further use of the evidence. Once the former wife satisfied that requirement, the Court held she could use the evidence in the subsequent US RICO case and was not required to initiate new discovery in order to obtain documents already in her possession.

Similarly, in another issue of first impression, the Second Circuit held that discovery obtained through Section 1782 in connection with a foreign proceeding could be used subsequently in *other* foreign proceedings – again, subject to the discretion of the district court. In *Bovvier v Adelson (In re Accent Delight Int'l Ltd)*, 869 F3d 121 (2d Cir 2017), the petitioner sought discovery in connection with three foreign proceedings in France, Monaco and Singapore involving fraud allegations arising from the purchase and sale of original art. The application was ultimately granted with respect to the Monégasque proceeding with a protective order requiring the petitioner to seek permission of the court to use the discovery in any other proceeding.

The intervenor/respondent appealed the protective order arguing that the petitioner should be required to meet the legal requirements of the statute separately for each proceeding. The Second Circuit addressed the issue of first impression, relying, in part, on the Eleventh Circuit's holding in *Glock* that discovery obtained through Section 1782 could be used in subsequent US litigation noting 'the Federal Rules of Civil Procedure do not regulate what litigants may do with discovery after it lawfully has been obtained.' The Court decided the paramount aim of the statute is to place discretion in the district court to determine the discovery issues and saw 'no reason why the number or identity of the foreign proceedings in which a successful applicant may use discovery produced pursuant to the statute would fall outside that discretionary grant.'

### Finality

In *Fuhr v Credit Suisse AG*, 687 Fed Appx 810 (11th Cir 2017) (unpublished), the Eleventh Circuit vacated and remanded an order granting a Section 1782 application on a disputed factual issue. In doing so, the Court decided an issue of first impression for the Circuit in line with the holdings of courts from several other circuits. Although discovery orders are typically not subject to appeal, the Court held that it had jurisdiction to review the denial of a motion

to quash a subpoena issued pursuant to 28 USC §1782. Given that the denial of such relief effectively resolves the case, the Court held that the finality requirement for appeal was satisfied. The Court subsequently affirmed this holding in a published opinion, *Furstenberg Fin SAS v Litai Assets LLC*, 877 F3d 1031 (11th Cir 2017).

### Interesting applications

The flexibility of 28 USC §1782 permits its use in a variety of circumstances. For instance, a US district court recently granted a US Attorney's application to act as a commissioner to obtain evidence from a non-party financial services company for a case pending in Argentina.<sup>5</sup> The request was issued by the Federal Tax Court of Argentina through letters rogatory. The Court granted the request, in part, to promote the twin aims of Section 1782 as 'an efficient means of assistance to foreign countries' and to encourage 'foreign countries by example to provide similar means of assistance to our courts.'

A California district court recently granted a Section 1782 application from another US Attorney to obtain DNA evidence from an American citizen for use in a German paternity proceeding.<sup>6</sup> The German court originally sought letters of request pursuant to The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. Three requests for voluntary compliance from the German court were rejected by the defendant, a participant in the German case. The court addressed the mandatory and discretionary factors to obtain relief by Section 1782 and determined, notably, that the request for DNA was not unduly intrusive or burdensome. The decision is consistent with an earlier ruling by the US District Court for the Southern District of Florida granting similar relief.<sup>7</sup>

Finally, in *In re Stati*,<sup>8</sup> the court rejected the argument that 28 USC §1782 could not be used to support a proceeding to enforce an arbitral award. After rejecting challenges to set aside a \$500m award against the Republic of Kazakhstan in an investment dispute, various proceedings were filed to enforce the final award in Sweden, Luxembourg and Belgium. The petitioners sought discovery through 28 USC §1782 of related bank accounts held by or for the National Bank of Kazakhstan as well as assets owned by or for the Republic of Kazakhstan.

The respondents first opposed discovery on the grounds that the ongoing collection proceedings were not ‘adjudicatory’ in nature and, therefore, not subject to discovery pursuant to the statute. The district court first noted that Section 1782 does not impose an adjudicatory requirement. However, because the argument was not directly contested, the court nonetheless decided the case assuming that such a requirement was imposed. The court handily rejected the notion that the ongoing enforcement actions were not adjudicatory because they involved material factual issues. As a result, the court decided ‘petitioners need the discovery concerning ownership of assets and the interrelationship of the foregoing entities for use in these ongoing, contested, and adjudicatory foreign proceedings.’<sup>9</sup>

The respondents next argued the petitioners could not obtain information located in their London based subsidiaries through Section 1782. The court noted that the argument did not pertain to the pending Fed R Civ P 30(b) (6) deposition for testimony and documents but the petitioners’ failure to comply with the subpoena requirements of Fed R Civ P 45 rendered relief premature. As a result, *Stati* addressed the split of authority discussed above with respect to extraterritorial application of Section 1782 but sidestepped the issue by resorting to the ‘possession, custody or control’ requirement of the federal subpoena power to determine whether the documents would be subject to production. The court granted the subpoena for the corporate representative deposition with documents and denied without prejudice the document subpoena pending proper service and additional information as to whether sufficient control existed over the subsidiaries so as to warrant the application.

## Summary

In the midst of an overall global trend toward greater transparency and access to information, the use of 28 USC §1782 is likely to expand as a vehicle to obtain evidence to support foreign proceedings. Extraterritorial application of the statute appears to rest on solid ground. Coupled with the district court’s discretion to compel production of evidence by a party located before it of documents within that party’s ‘possession, custody or control’ (or those of its affiliates under proper circumstances), the use of this critical vehicle to obtain evidence is likely to increase.

## Notes

- 1 834 F3d 1194 (11th Cir 2016). Both *Sergeeva* and *Glock*, discussed infra, are the subject of greater analysis in my recent article *Significant Developments in International Litigation By Way of 28 USC §1782* (Young Arbitration Review, Spring 2017).
- 2 Fed R Civ P 45(a) (iii).
- 3 Compare *In re Application of Godfrey*, 526 F Supp 2d 417 (SDNY 2007) (documents located outside US not subject to discovery pursuant to Section 1782), with *In re Application of Gemeinschaftspraxis Dr Med. Schottdorf*, No M19-88 (BSJ), 2006 US Dist LEXIS 94161, 2006 WL 3844464 (SDNY 29 Dec 2006) (opposite result).
- 4 797 F3d 1002 (11th Cir 2015).
- 5 *In re Letter of Request*, 2017 US Dist LEXIS 149976 (MD Fla, 15 Sept 2017).
- 6 *HUTG v Nomura*, 2017 US Dist LEXIS 212101 (ED Cal, 26 Dec 2017).
- 7 *In re Letter of Request*, No 10-60445-MC, 2010 US Dist LEXIS 49241, 2010 WL 1655823 (SD Fla, 23 April 2010).
- 8 Case No 15-MC-91059-LTS, 2018 US Dist LEXIS 8111, 2018 WL 474999 (D Mass, 18 Jan 2018)
- 9 But see, *Hulley Enters v Baker Botts LLP* (*In re* application for an Order Pursuant to 28 USC §1782 to Conduct Discovery for Use in a Foreign Proceeding), Misc Case No 17-1466 (BAH), 2017 US Dist LEXIS 203066 (DDC, 9 Dec 2017) (rejecting 28 USC §1782 application seeking information from law firm to support unclean hands defence against related entities in foreign proceedings arising from Yukos-related dispute because information was tenuous to claims asserted and protected by attorney-client and work-product privileges).