Using the U.S. Courts to Obtain Discovery Here and Abroad for Foreign and International Proceedings

By Frederick A. Acomb and James L. Woolard

A Chinese company retains you to file suit in the United States to compel the production of documents that belong to a company located in Michigan. Your client needs the documents to support its claims in a dispute with a Dutch manufacturer. But there are two wrinkles: the dispute is in an arbitration seated in France, and the documents are in a warehouse in Mexico. What are your chances of obtaining the documents?

28 USC 1782 authorizes U.S. district courts to order discovery for use in certain foreign or international proceedings. The statute serves two related goals: providing an efficient means of assisting participants in such proceedings, and encouraging foreign countries to reciprocate by providing similar means of assistance to U.S. courts.

The hypothetical scenario above highlights two questions that repeatedly arise: Does Section 1782 permit discovery of documents located outside the U.S.? And does Section 1782 permit discovery of documents for use in private commercial arbitrations? Two recent U.S. Court of Appeals decisions answer those questions in the affirmative. In *In re del Valle Ruiz*, the Second Circuit affirmed a trend among district courts toward holding that Section 1782, at a minimum, does not categorically bar discovery of documents located abroad.[1] And in *Abdul Latif Jameel Transp Co Ltd v FedEx Corp*, the Sixth Circuit broke with the Second and Fifth circuits in holding that Section 1782 permits, at least in some instances, the discovery of documents for use in private commercial arbitral proceedings.[2]

At a Glance

Under 28 USC 1782, you can ask a federal district court to order the production of documents you need for use in a foreign or international proceeding.

You can obtain documents that are located abroad, and use them in a foreign or international private arbitration.

Obtaining the documents is not automatic, however. The district court has discretion in deciding whether to order their production, so your request should be narrowly tailored and should not try to circumvent any proof-gathering restrictions applicable to the proceeding in which you want to use the documents.

Requirements of Section 1782

28 USC 1782 establishes three requirements for obtaining discovery: (1) the person from whom the discovery is sought must "reside" or be "found" in the U.S. judicial district where the application is made, (2) the discovery sought must be "for use in a proceeding in a foreign or international tribunal," and (3) the application must be made either by a foreign or international tribunal or by an "interested person."

Even if those factors are met, the district court is not required to order the discovery but has discretion whether to do so. The court is expressly authorized to prescribe the practice and procedures for conducting the discovery; otherwise, by default, the Federal Rules of Civil Procedure govern. In *Intel Corp v Advanced Micro Devices, Inc*,[3] the United States Supreme Court described the factors that should guide the district court's exercise of discretion: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, character of the proceedings, and receptivity of the foreign government or court to U.S. judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other foreign or U.S. policy; and (4) whether the discovery request is unduly intrusive or burdensome.[4]

Discovery of documents located outside the U.S.

On its face, 28 USC 1782 says nothing about the location of discoverable documents and things. And the Federal Rules of Civil Procedure permit discovery of documents and things located abroad. Nonetheless, district courts long disagreed on the issue, with no clear weight of authority on either side.[5] In essence, district courts have fallen into two camps: some focus on the language of Section 1782, which contains no geographic limitation and cites the Federal Rules;[6] others focus on the legislative history of Section 1782, which may suggest that Congress intended to cover only discovery within the U.S.[7]

The confusion was partly the result of a lack of clear guidance from the United States Court of Appeals and Supreme Court. In a 1997 decision, the Second Circuit noted, in dicta, the absence of a geographical restriction in Section 1782, but still opined that "there is reason to think Congress intended to reach only evidence located within the United States."[8] Until 2016, however, no circuit court had directly addressed the issue. Then, in *Sergeeva v Tripleton Int'l Ltd*, the Eleventh Circuit reviewed a district court decision ordering third-party discovery under Section 1782.[9] *Sergeeva* concerned litigation in Russia over the division of marital assets following a divorce. The plaintiff alleged that her ex-husband "was concealing and dissipating marital assets through and with the assistance of offshore companies around the world," and she accordingly sought discovery of supporting documents, including from third party Trident Corporate Services, Inc., located in Atlanta, Georgia.[10] Sergeeva "expected [the documents] would reveal [her] Ex-Husband's beneficial ownership of [a] Bahamian corporation, Tripleton International Limited."[11] Trident argued that Section 1782 did not apply to certain documents located in the Bahamas.[12]

The Eleventh Circuit disagreed, noting that Section 1782 permits discovery in accordance with the Federal Rules and that Rule 45, which governs third-party document subpoenas, sets geographical limits on the location of *production* but not on the location of the *documents themselves*. The court concluded that "the location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a per se bar to discovery under § 1782."[13]

District courts remained somewhat divided on the issue after *Sergeeva*, but that will likely change with the Second Circuit's confirmation in *In re del Valle Ruiz* that "a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad."[14] *In re del Valle Ruiz* concerned two petitions under Section 1782 for discovery related to the forced sale of a failing bank by the Spanish government. The bank, Banco Popular Español, S.A. (BPE), had formerly been Spain's sixth-largest bank, with assets valued at 147 billion Euros.[15] The petitioners were investors who had lost substantial investments when Banco Santander, S.A. (Santander) acquired BPE for one Euro.[16] The petitioners sought documents from Santander and several of its affiliates, including New York–based Santander Investment Securities, Inc. (SIS) for use in several foreign proceedings challenging BPE's sale.[17] Santander argued that Section 1782 imposed a categorical bar against obtaining documents from SIS that were located outside the U.S.[18] In holding that Section 1782 does *not* bar the discovery of evidence located outside

the U.S., the Second Circuit rejected its prior dicta in *In re Application of Sarrio, S.A.* and expressly adopted the rationale in *Sergeeva*, focusing on the plain meaning of the statutory text. The court advised, however, that "a [district] court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery."[19]

The Second Circuit's substantial influence in this area of the law means that other circuits are likely to follow suit. Moreover, the approach in *del Valle Ruiz* reflects not only plain statutory language, but also current realities: the prevalence of electronic information and storage calls into question the significance of the documents' physical location. Arguments about *control* rather than *location* thus seem likely to carry more weight—as, for example, in *In re Stati*, in which the district court declined to take a position on the geographical scope of Section 1782 and opted instead to "apply the possession, custody, or control of documents requirements in Rule 45(a)(1)."[20]

Documents sought for use in proceedings in private arbitral tribunals

Only discovery "for use in a proceeding in a foreign or international tribunal" can be obtained under 28 USC 1782. But how is a "foreign or international tribunal" defined? A private commercial arbitration does not meet the definition according to two 1999 decisions, one from the Second Circuit and one from the Fifth Circuit.[21] Both courts relied primarily on an interpretation of Section 1782's legislative history in concluding that Congress meant to limit "foreign or international tribunal" to governmental bodies; both courts also expressed concern that a broader reading would conflict with the more restricted discovery in domestic arbitrations under the Federal Arbitration Act.[22]

But district courts have questioned that analysis in the wake of *Intel Corp v Advanced Micro Devices, Inc*.[23] Although *Intel* involved a governmental commission and not a private arbitral body, the United States Supreme Court rejected both the interpretation of Section 1782's legislative history and the concern about the scope of discovery under the FAA expressed by the Second and Fifth circuits.[24]

The issue came before the Sixth Circuit for the first time last year in *Abdul Latif Jameel Transp Co Ltd v FedEx Corp*.[25] The underlying dispute concerned two contracts between Abdul Latif Jameel Transportation Company, Ltd. (ALJ) and FedEx International Incorporated (FedEx International) to provide delivery services in Saudi Arabia. The contracts required the parties to resolve their dispute through arbitration in Dubai and Saudi Arabia, respectively. ALJ sought documents under Section 1782 from FedEx Corporation (FedEx), a U.S.-based affiliate of FedEx International that was not a party to either arbitration. The district court denied the application on the grounds that neither arbitral body was a "foreign or international tribunal."[26] The Sixth Circuit, however, "upon careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history of § 1782(a)," held that Section 1782 "permits discovery for use in the private arbitration at issue."[27] The court found support in the *Intel* decision, which had "determined that § 1782(a) provides for discovery assistance in non-judicial proceedings."[28] The court did not, however, go so far as to rule that ALJ was entitled to the documents; that decision was for the district court to make by applying the four *Intel* factors discussed above.[29]

The Fourth Circuit recently agreed with the Sixth Circuit and held that Section 1782 permits discovery for use in a proceeding before a private arbitral tribunal in England under the rules of the Chartered Institute of Arbitrators.[30] The court noted that Section 1782 had formerly permitted the use of documents "in any *judicial* proceeding pending *in any court* in a foreign country," but that in 1964, Congress had amended the language to permit their use "in a proceeding in a foreign or international *tribunal*."[31] The court further noted that both the U.S. and the U.K. strongly favored arbitration as a matter of public policy, and addressed concerns about the scope of document discovery for use in private arbitrations by explaining that "[i]n serving the role given under § 1782(a), a district court functions *effectively as a surrogate* for a foreign tribunal by taking testimony and statements *for use* in the foreign proceeding."[32]

The parties in *Abdul Latif Jameel* settled before the district court could undertake the *Intel* analysis,[33] but the *Intel* factors appeared to weigh in favor of allowing the discovery. FedEx—the entity from which discovery was sought—was not a participant in the arbitrations, so the first *Intel* factor was not met. The Sixth Circuit suggested the second factor weighed in favor of permitting the discovery, concluding that the arbitration, which was conducted under the rules of the Dubai International Financial Centre–London Court of International Arbitration, "easily passes" any test based on whether an arbitral award is subject to judicial review.[34] There was no indication

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that ALJ's request concealed an attempt to circumvent foreign proof-gathering restrictions (the third *Intel* factor), and ALJ's document requests appeared to have been narrowly tailored (the fourth *Intel* factor). ALJ sought documents concerning the negotiations of the agreements between FedEx or FedEx International and ALJ, and documents reflecting (1) representations by FedEx or FedEx International to ALJ about the length of the relationship with ALJ or (2) FedEx or FedEx International's knowledge that ALJ would have to make investments to provide services to FedEx International.[35]

What does this mean for our hypothetical scenario? First, it means that you are likely to win arguments for discovery based on the location of the documents in Mexico and on the private, arbitral nature of the tribunal deciding the parties' dispute. But you cannot stop there: you should also be prepared to justify the breadth of your requests and to make the case that the Mexican documents are in the control of the party from which you are seeking them. As in typical state and federal court litigation, your discovery requests should be as narrowly tailored as possible to counter any objection that they are unduly intrusive or burdensome. You should also carefully review the rules of the institution administering the arbitration as well as any applicable procedural orders in the arbitration, and then be prepared to argue that your requests do not run afoul of any proof-gathering restrictions in those rules or orders. Finally, you should emphasize aspects of the arbitral tribunal or nature of the proceedings that are similar to U.S. court proceedings. For example, you should indicate whether an arbitral award will be subject to judicial review or if the arbitration is being administered by one of the major established arbitral institutions, such as the International Chamber of Commerce or the International Centre for Dispute Resolution. Taking these steps will give you a good chance of obtaining the documents your client needs. ■

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ENDNOTES

1. *In re del Valle Ruiz*, 939 F3d 520, 533 (CA 2, 2019).
2. *Abdul Latif Jameel Transp Co Ltd v FedEx Corp*, 939 F3d 710 (CA 6, 2019).
3. *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241; 124 S Ct 2466; 159 L Ed 2d 355 (2004).
4. *Id.* at 264–265.
5. See, e.g., *In re del Valle Ruiz*, 939 F3d at 532 (noting that "lower courts in this Circuit have split on whether § 1782 can be used to reach documents stored overseas" and citing district court decisions on both sides of the issue).
6. E.g., *In re Application of Gemeinshcaftspraxis Dr. Med. Schottdorf*, unpublished opinion of the United States District Court for the Southern District of New York, issued December 29, 2006 (Case No. M19-88), p 5 (noting that "Section 1782 requires only that the *party* from whom discovery is sought be 'found' here; not that the *documents* be found here.").
7. E.g., *In re Godfrey*, 526 F Supp 2d 417, 423 (SD NY, 2007) (examining legislative history of Section 1782 and concluding that the statute was "not intended to provide discovery of evidence maintain within a foreign jurisdiction").
8. *In re Application of Sarrio, S.A.*, 119 F3d 143, 147 (CA 2, 1997).
9. *Sergeeva v Tripleton Int'l Ltd*, 834 F3d 1194 (CA 11, 2016).
10. *Id.* at 1196.
11. *Id.*
12. *Id.* at 1197.
13. *Id.* at 1200.
14. *In re del Valle Ruiz*, 939 F3d at 533.
15. *Id.* at 524.
16. *Id.* at 524–525.
17. *Id.* at 525.
18. *Id.* at 531.
19. *Id.* at 533.
20. *In re Stati*, unpublished memorandum and order of the United States District Court for Massachusetts, filed January 18, 2018 (No. 15-MC-91059-LTS), p 6.
21. *Nat'l Broadcasting Co v Bear Stearns & Co*, 165 F3d 184, 191 (CA 2, 1999) and *Republic of Kazakhstan v Biedermann Int'l*, 168 F3d 880, 883 (CA 5, 1999).
22. *Nat'l Broadcasting Co*, 165 F3d at 187 and *Republic of Kazakhstan*, 168 F3d at 882–883.
23. *Intel Corp v Advanced Micro Devices, Inc*, 542 US 241; 124 S Ct 2466; 159 L Ed 2d 355 (2004). See, e.g., *In re Children's Investment Fund Foundation (UK)*, 363 F Supp 3d 361, 368–370 (SD NY, 2019).
24. *Intel Corp*, 542 US at 258, 263.
25. *Abdul Latif Jameel Transp Co Ltd v FedEx Corp*, 939 F3d 710 (CA 6, 2019). In *Servotronics, Inc v Boeing Co*, 954 F3d 209 (CA 4, 2020), the Fourth Circuit recently agreed with the Sixth Circuit's interpretation and held that Section 1782 permits discovery for use in a proceeding conducted before a private arbitral tribunal in England under the rules of the Chartered Institute of Arbitrators.
26. *Abdul Latif Jameel Transp Co Ltd*, 939 F3d at 716.
27. *Id.* at 714.
28. *Id.* at 723.
29. *Id.* at 731–732.
30. *Servotronics, Inc v Boeing Co*, 954 F3d 209, 216 (CA 4, 2020).
31. *Id.* at 213.
32. *Id.* at 215.
33. *In Re: Application to Obtain Discovery for Use in Foreign Proceedings*, No. 2:18-mc-00021-JPM-cgc (WD Tenn, May 14, 2018), ECF No. 54 (Notice of Settlement), ECF No. 55 (Stipulation of Dismissal), ECF No. 56 (Order of Dismissal), and ECF No. 57 (Judgment).
34. *Abdul Latif Jameel Transp Co Ltd*, 939 F3d at 730 n 11.
35. *Id.* at 716.