US courts affirm expansive discovery under 28 U.S.C. § 1782

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By: Harout J. Samra

International litigants continue to rely on 28 U.S.C. § 1782 in disputes with US-based parties. While the statute was considered relatively obscure not long ago, it is now an important and frequently-used tool to obtain critical discovery – including the production of documents, interrogatories and even depositions – in support of foreign proceedings.

As previously addressed here, courts in the United States have struggled with whether § 1782 discovery is available in connection with international commercial arbitration proceedings. However, apart from this enduring controversy, the statute has been interpreted broadly and can represent a significant strategic advantage to non-US parties attempting to obtain discovery from a US party and/or its affiliates. Despite the controversy, it also remains of interest to parties to international arbitrations involving US entities as a viable strategic option.

Two recent cases addressed the statute's scope, including whether a sovereign state may request discovery under § 1782, and whether evidence obtained through the statute may be used by parties in subsequent civil litigation in the United States.

Legal background

28 U.S.C. § 1782 permits any party or other interested person involved in proceedings taking place before a foreign or international tribunal (including proceedings not yet under way, but rather in “reasonable contemplation”), or the international tribunal itself, to make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits.

Evidence obtained through § 1782 may be used in subsequent cases

In Glock v. Glock Inc., et al., Case No. 14-15701 (11th Cir. August 17, 2015), the Eleventh Circuit Court of Appeals addressed the question of “whether § 1782 precludes the use, in civil litigation in the United States, of evidence previously obtained under the statute.”

The documents obtained through § 1782 were initially to be used in a divorce proceeding in Austria. However, just two years after the § 1782 petition, the party that filed the request initiated separate proceedings in the United States and sought to introduce the same documents. The defendants in the U.S. litigation objected, arguing that “documents obtained under § 1782 may not be used in domestic litigation.”

Focusing on the statute’s language and legislative history, the court rejected the defendant’s arguments, explaining that “[n]o Congress intended to restrict the use of evidence previously obtained under § 1782 to proceedings in
foreign or international tribunals, it easily could have expressed that intention in any number of ways.” “As a general rule,” the court held, “parties may use any evidence they lawfully possess.”

**Sovereign states may request discovery under § 1782**

In *In re: Application of the Republic of Kazakhstan*, Case No. 15-Misc.-0081 (S.D.N.Y. June 22, 2015), the court addressed the issue of whether a sovereign state is an “interested person” eligible to request discovery under the statute.

While recognizing some disagreement among the courts as to whether a sovereign state may be *ordered* to produce documents under § 1782, the court concluded that no such controversy exists when the sovereign state is *requesting* discovery. The court grounded this conclusion on the statute’s language, history and underlying policies, explaining that the language of the statute “was intended to broaden rather than narrow ‘the scope of those who could seek judicial assistance.’”

*In re: Application of the Republic of Kazakhstan* follows other precedent in which US courts have permitted discovery under § 1782 in investor-state arbitration (as distinct from commercial arbitration) and illustrates the increased awareness among state parties of the strategic advantages it offers. This case is also notable because the discovery requests arose from a challenge to an arbitration award in Sweden.

**Conclusions: ignore § 1782 at your peril**

Parties ignore § 1782 at their peril. Many commentators focus on the controversy generated by high-profile cases involving the statute, but this ignores the increasingly clear consensus among US courts giving § 1782 expansive reach. Parties to international arbitrations against US counterparties should continue to give careful consideration to the strategic value of a § 1782 request.

Find out more about the reach of § 1782 by contacting the author.

**AUTHORS**

![Harout J. Samra](image)

**Harout J. Samra**
Associate
Miami | T: +1 305 423 8500
harout.samra@dlapiper.com