International Discovery Tool Kit Aims to Facilitate Discovery in Both Domestic and Foreign Litigation

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Abstract: *Business knows no borders. Every year companies increase their global reach and open new offices both domestically and abroad. The COVID-19 pandemic accelerated this process—remote employees spread documents and witnesses from Chicago to Shanghai to Sumatra. This has made litigation—especially discovery—more complex. Navigating this environment requires a tool kit of resources to secure discovery in support of both domestic and foreign litigation. This article discusses those tools and several traps for the unwary practitioner facing cross-border discovery to anticipate to effectively use those tools to their benefit.*

Section 1782: Compelling U.S. Discovery in Support of a Foreign Proceeding

Foreign courts famously disdain U.S.-style discovery. In most countries, such as Germany and France, the parties simply submit the evidence already in hand, without the full benefit of depositions, interrogatories, or document requests. In others, such as Switzerland, courts will arrest foreign lawyers who try to take a deposition. Seemingly, if you litigate in a foreign court, discovery, as it is known in the United States, is not going to happen.

But parties often forget a powerful tool to get around those restrictions and obtain U.S.-style discovery from companies with a connection to the United States. Under 28 U.S.C. § 1782, an "interested person" can get discovery from a person "found in"

Journal of Emerging Issues in Litigation / Fall 2023, Vol. 3, No. 4, pp. 323–330.

ISSN 2835-5040 (print) /ISSN 2835-5059 (online).

the United States "for use" in a "proceeding in a foreign or international tribunal."

The statute is far-reaching. To begin with, an "interested person" is much broader than most expect. This is not just a party to the proceeding, but can include persons who are third parties, interested parties, or even just investigating a claim. And the "proceeding in a foreign or international tribunal" does not just mean a court case. Discovery can be for contemplated litigation, criminal proceedings, and proceedings before administrative bodies.

But the U.S. Supreme Court recently held that § 1782 does not extend to private international arbitrations.[1] In reaching its holding, the U.S. Supreme Court reasoned a "foreign tribunal" refers to a tribunal belonging to a foreign nation, which must possess sovereign authority conferred by that nation.[2] As for the word "international," the court relied on the dictionary definition for the term—"involving of two or more nations"—to determine that an "international tribunal" is one involving two or more nations that have imbued the tribunal with official power to adjudicate disputes.[3] Put differently, a "foreign tribunal" refers to a governmental body of one foreign nation whereas an "international tribunal" means any tribunal that two or more nations have imbued with governmental authority.

At a time when litigants have increasingly relied on U.S. federal courts to obtain otherwise unobtainable evidence from entities located within the United States, the U.S. Supreme Court has decisively closed the door to U.S.-style discovery in private arbitrations abroad. That means U.S. companies will no longer face the time, exposure, and expense of U.S.-style discovery that § 1782 had injected into those proceedings. The Supreme Court's decision also ensures participants located in foreign countries cannot obtain an advantage over participants located within the United States.

Additionally, in certain jurisdictions, a § 1782 petition can be filed anywhere the company has a substantial and systematic presence.[4] In those jurisdictions, a company has a substantial and systematic presence "where the discovery material sought proximately resulted from the [company's] forum contacts" or where "the [company] having purposefully availed itself of the forum [is] the primary or proximate reason that the evidence sought is available at all."[5]

But a recent decision from the U.S. Court of Appeals for the Fourth Circuit has required proof that the company has a physical presence in the forum.[6] This holding has created a circuit split and could lead to forum shopping or resolution by the U.S. Supreme Court. Courts in the Second and Fourth Circuits will now apply vastly different tests. Jurisdictions like the Second Circuit require proof of minimum contacts and that the requests are tied to the target's forum contacts. This could mean companies—both foreign and domestic—could be subject to § 1782 in jurisdictions far from their principal places of business. By contrast, the Fourth Circuit requires physical presence in the forum.

The upshot is that we likely will see forum shopping until the circuit split is resolved. Foreign litigants can carefully select where and when they issue § 1782 applications. In particular, foreign litigants with no contacts with a particular forum may choose to file an application in a jurisdiction that has adopted the Second Circuit's expansive approach. By contrast, foreign litigants with more expansive contacts may choose a jurisdiction where the target resides, to minimize the chance they will be served a counter application under § 1782.

Meeting § 1782's requirements, however, does not guarantee a court will grant the petition and order discovery; satisfying those requirements merely authorizes the court to order § 1782 discovery in its discretion. Courts have also considered certain prudential restrictions when deciding whether to exercise their discretion to order § 1782 discovery. These include whether (1) the foreign tribunal has the power to order the same discovery, (2) the foreign tribunal would be receptive to the discovery, (3) the request seeks to circumvent foreign proof-gathering restrictions, and (4) the request is "unduly burdensome."[7]

If the court grants the § 1782 application, the applicant is entitled to U.S.-style discovery. This includes document requests, interrogatories, requests to admit, and depositions. The evidence has to be relevant, but it does not have to be admissible in the foreign jurisdiction as long as it is reasonably related to the foreign proceeding.

In sum, § 1782 is a powerful tool for use in foreign proceedings. If done correctly, parties can gather evidence in the United States, both from their opponent and from third parties.

Cross-Border Evidence for Use in a Domestic Proceeding

Gathering discovery in foreign countries is challenging. This is even more true when a litigant is trying to get discovery for use in a U.S. litigation. But the situation is not hopeless. Below, we describe two tools that can assist in cross-border discovery: the Walsh Act and the Hague Convention.

The Walsh Act: Seeking Discovery from a Nonparty U.S. National or Resident

Few people know about the Walsh Act, 28 U.S.C. § 1783, which provides federal courts with the power to subpoena U.S. citizens or residents in a foreign country. The court even has the power to recall the citizen to the United States to provide documents or testimony.

The Walsh Act is nearly 100 years old. It was enacted in reaction to the Teapot Dome scandal, where top White House officials tried to secretly lease federal oil fields in the 1920s. The perpetrators fled the country rather than face charges or give evidence. But Congress passed the Walsh Act, which recognized the U.S.'s power to recall its citizens in the public interest, and to punish citizens who refuse to return.[8] The Act is broad and flexible, and courts have applied it in both criminal and civil cases to compel testimony and the production of documents.

Several requirements must be met before a court will issue a Walsh Act subpoena. The applicant for the subpoena must show the discovery is "necessary to the interests of justice" and "cannot be obtained by other means." 28 U.S.C. § 1783(a). Courts disagree on what "necessary to the interests of justice" means,[9] but generally agree that it requires a showing that the evidence goes to a core issue in the litigation. Whether information "cannot be obtained by other means" suggests that it merely be impractical to obtain the information in another way.[10] "Sheer impossibility is not required."[11]

Once the court issues the subpoena, it must be served in the foreign country. There are four options: (1) any method of service recognized by international law, such as the Hague Convention;

(2) any method of service used by the foreign country in which the absentee citizen or resident is currently located; (3) unless prohibited by the foreign country's laws, through personal service or certified mail; or (4) any method ordered by the court that does not violate the laws of the foreign country. Fed. R. Civ. P. 4(a). Practically speaking, parties frequently serve Walsh Act subpoenas through the Hague Service Convention because those subpoenas are often issued to individuals located in countries that have signed that Convention.

The Walsh Act offers U.S.-style discovery with no foreign discovery restrictions. Once the subpoena is served, courts apply the Federal Rules of Civil Procedure. The subpoena recipient can object in a U.S. court or must return to the United States and provide the documents and any testimony requested. If the recipient refuses to participate, the U.S. court has the inherent power to impose contempt sanctions including, but not limited to, monetary sanctions.

The Hague Evidence Convention: Gathering Discovery Abroad

The words "Hague Evidence Convention" conjure nightmares of endless bureaucracy and fruitless discovery misadventures. Officially entitled the "Convention on the Taking of Evidence Abroad in Civil or Commercial Matters," the Hague Evidence Convention is a 1972 multilateral treaty that allows U.S. litigants to gather discovery from nonparties in certain foreign countries. This treaty has long had a reputation as a mysterious, inefficient, costly, and unending process that yields little or no information. That is only partly true.

Any U.S. litigant can use the Hague Evidence Convention to collect evidence from a nonparty in any signatory country.[12] The rules are not uniform, however, because each country can add, modify, or "opt out" of certain parts of the Convention through "Declarations/Reservations/Notifications" (D/R/N). Most critically, under Article 23, countries can object to allowing litigants to "obtain[] pre-trial discovery of documents as known in Common Law countries." This is a huge carveout—so far 26 countries have objected fully and excluded pretrial discovery and 17 others have restricted its availability.

If discovery is permitted, the party seeking discovery can use a consular office, designate a private commissioner, or issue a letter of request. Most U.S. litigants choose the last option, moving under Rule 28(b)(1)(B) of the Rules of Civil Procedure for the court to issue a "letter of request." If litigation is pending in a state court, then parties may be able to file a miscellaneous action through the appropriate U.S. District Court to make the request.

When evaluating whether to allow a party to use the Hague Evidence Convention, courts consider several factors, including:

- the importance of the documents or information to the case,
- the specificity of the request,
- whether the information originated in the United States,
- the availability of other ways to secure the information, and
- whether compliance with the request would undermine important interests of the United States or the foreign country.[13]

Be sure to check local rules about the motion papers required for a letter of request. District courts will often require the moving party to submit a proposed letter of request. If the court grants the motion, then it will sign the proposed letter of request or issue its own letter of request. The District Court will then send the letter of request to the central authority in the targeted country/territory.

The Hague Evidence Convention requires every signatory state to designate a central authority to receive letters of request. The central authority transmits the request to the appropriate judicial authority for a response. If the central authority does not believe the letter of request complies with the Hague Evidence Convention, it must promptly notify in writing the requesting country of any objections. The central authority can deny, approve, or "blue pencil" the request by striking requests that are objectionable/unreasonable. Upon modifying or approving the request, the judicial authority in the foreign country then delivers the letter of request to the appropriate party.

The type of evidence available through the Hague Evidence Convention and the manner of collection depends on the limitations

imposed by the country in which the evidence is located. Many countries do not permit the type of broad pretrial discovery that is common in U.S. courts. Specificity is key in these jurisdictions as they will not permit requesting parties to engage in fishing expeditions. A requesting party should make narrow and specific discovery demands, identifying appropriate information and facts causing the requesting party to believe that the requested documents are or were in the possession, control, custody of, or are known to the person from whom the documents are requested.

Conclusion

Parties involved in cross-border disputes should remember the powerful international discovery methods available to them, and anticipate problems they will need to address with the court to use those methods to their advantage.

Notes

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1. ZF Auto. U.S., Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (2022).
2. ZF Automotive US, Inc. v. Luxshare, 142 S. Ct. 2078, 2086–87 (2022).
3. *Id.* at 2087.
4. In re del Valle Ruiz, 939 F.3d 520, 528 (2d Cir. 2019) ("§ 1782's 'resides or is found' language extends to the limits of personal jurisdiction consistent with due process.").

5. *Id.* at 530.

6. In re Eli Lilly and Co., 37 F.4th 160 (4th Cir. 2022).

7. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264-65 (2004).

8. *See* Blackmer v. United States, 284 U.S. 421, 438 (1932); United States v. Lansky, 496 F.2d 1063 (5th Cir. 1974).

9. Some courts say an applicant must show that "a 'compelling reason' exists" to order production of evidence. Est. of Ungar, 412 F. Supp. 2d 328, 334 (S.D.N.Y. 2006). Other courts describe the element requiring only proof that the evidence would be "relevant" under Rule 26 of the Federal Rules of Civil Procedure 26. *See* Balk v. New York Inst. of Tech., 974 F. Supp. 2d 147 (E.D.N.Y. 2013).

10. Balk, 974 F. Supp. 2d at 156.

11. *Id.*

12. The Hague Conference on Private International Law's status table lists the nations that have ratified the Hague Evidence Convention, as well as the D/N/R's for its provisions. *See* https://www.hcch.net/en/instruments/conventions/status-table/?cid=82.

13. Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522, 543-44 n.28 (1987).