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Current Developments in Cross-Border Litigation | Discovery for Use in Foreign Proceeding Under Section 1782

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28 USC Section 1782 allows an interested party for use in a pending or contemplated foreign proceeding to seek discovery in the US under certain factors outlined by the US Supreme Court.

In *In re Ex Parte Saul Klein*, 2023 WL 8827847 (S.D.N.Y. Dec. 21, 2023), an application for discovery in aid of foreign proceeding involving alleged mismanagement of the estate of a family patriarch, who was a Brazilian domiciliary. Petitioner alleged his brother, as administrator of the estate, had deceived him as to the value of the father's offshore assets to deprive him of his inheritance. Petitioner sought an ex parte application for records since 2013 from twelve financial institutions. The court quashed the subpoenas because four entities were not subject to jurisdiction in the Southern District of New York. Further, although Petitioner had subpoenaed non-parties, in substance, he was seeking records from parties to the foreign proceeding—bank records, which as account holders, they could access and have provided in the Brazilian proceedings. Finally, the subpoenas sought records from twelve financial institutions relating to twenty-six entities and covering an eleven-year period. The court concluded that the subpoenas pursued material with little apparent or likely relevance to the subject matter of the foreign proceeding and ran the greater risk of being found overbroad and unreasonable.

In *In re DNG FZE*, 2024 WL 124694 (S.D.N.Y. Jan. 11, 2024) Plaintiff sued a company in Singapore and brought an application for discovery to depose PayPal's senior manager of special investigations who was scheduled to testify at trial and had submitted an affidavit detailing his direct testimony. The application was denied. The court found that the applicant had not cited any authority that a litigant's interest in acquiring more information from its adversary in advance of a foreign proceeding is sufficient. And the applicant did not argue that the deposition would be admissible. In fact, Singapore has procedures for taking foreign depositions that the applicant did not pursue.

In *In re BonSorg.org*, 95 F.4th 75 (2d Cir. 2024), the applicant filed an action in France challenging the legality of an agreement by which the European Commission contracted with Pfizer and BioTech for development and supply of a COVID-19 vaccine. The French court dismissed the action due to a choice of forum clause to enforce any claims in Belgium. BonSorg appealed and while the appeal was pending applied for discovery in New York seeking communications between Pfizer CEO and the EC's President concerning the vaccine contract.

The appeal was denied while the application was pending. The Second Circuit reasoned that the evidence could not be for use in a foreign proceeding because none was pending. Therefore, the District Court's denial of the application was affirmed.

In *In re Frasers Group PLC v. Stanley*, 95 F.4th 54 (2d Cir. 2024), the applicant sought documents and a deposition from Morgan Stanley's former CEO to use in applicant's lawsuit arising from margin calls filed in England against an English Morgan Stanley subsidiary. Morgan Stanley promised that its English subsidiary would produce documents and would agree to produce as if the documents were held in the US. This meant the English court had the ability to direct production of these documents in England and also meant that the documents being sought in the US via Section 1782 would be equally available in England. Therefore, the discovery obligation would be governed by English discovery rules. The application was therefore denied, and the appeal affirmed the denial.

The takeaway is that in cases involving common law countries such as Canada, the UK or Australia, the applicants seeking the evidence under Section 1782 should focus on what cannot be obtained in the foreign country.

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