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Recent Developments as to Discovery Applications under 28 U.S. C. Section 1782

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Section 1782 is a federal statute that authorizes U. S. district courts to order discovery from a person or entity located in the U.S. for use in proceedings before foreign tribunals. Two recent decisions have shed light on the scope of such discovery allowed.

In *Banoka S.A.R. L. v. Elliott Management Corp.*, 2025 WL 2166397 (2d Cir. 2025), the Second Circuit considered a petition that sought discovery for use in a contemplated suit in the English courts that would bring fraud claims against a non-party real estate development group whose deal with petitioner had fallen through. The proposed investment involved an exclusive agreement with petitioner which provided, in part, that the courts of England and Wales would have exclusive jurisdiction in relation to any dispute arising out of or in relation to the agreement. The U.S. Supreme Court in *Intel Corp v. Advanced Micro Devices Inc.*, 542 U.S. 241, 252 (2004), identified several factors to guide district courts in deciding whether a Section 1782 petition should be granted. One of those factors is whether the request conceals an attempt to circumvent foreign proof-gathering. The Second Circuit decided that considering the forum-selection clause was a proper factor to weigh against granting discovery.

Hence, a forum-selection clause can risk the ability to get discovery in the U.S. under Section 1782.

In *Novalpina Capital Partners I G.P. S.A.R.L. v. Treo Asset Management LLC*, 2025 WL 2315896 (9th Cir. 2025), the litigation involved a bitter breakup between a Luxembourg-based investment fund and its former General Partner. Under Section 1782, U.S. courts may grant discovery “for use” in foreign proceedings in which the discovery will be used. The petitioner sought documents for use in defense of a foreign civil proceeding and for a contemplated claim to be filed in the same court against others who were believed to have assisted in the fraud. The threshold question was can documents produced for use in a specific proceeding under Section 1782 be used in proceedings other than those identified in the petition. The 9th Circuit recognized that there is nothing in the language of Section 1782 that limits use of discovery produced under Section 1782 to only identified proceedings. The text of Section 1782 and legislative materials merely set out basic requirements and leave the procedure for obtaining the discovery to the district courts. The court further opined that like Section 1782, the Federal Rules of Civil Procedure do not expressly restrict discovery obtained from a defendant in one case from being used in a separate lawsuit. The court thus ruled that documents obtained “for use” in certain proceedings under Section 1782 can be used in other proceedings not identified in the petition.

The 9th Circuit's ruling may significantly expand the utility of Section 1782 petitions.

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