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The Dark Side of 1782: Defending Against Aggressive U.S. Discovery Actions

Section 1782 of the United States Code is a federal statute that allows participants of foreign proceedings to apply to a U.S. court to obtain evidence. Its scope is potentially far-reaching, making it attractive for those aiming to use it for goals completely unrelated to ongoing proceedings. Fortunately, there are creative cross-border strategies available that can undermine the request, raise the costs for the adversary and limit the overall damage.

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Section 1782 discovery in the United States can be a powerful tool for non-U.S. litigants to acquire an edge in their proceedings by opening the door for them to gain access to previously unobtainable information.

On the other hand, however, there is a darker side to this tool. The power of Section 1782 can also embolden parties to try to use U.S. discovery to clandestinely achieve extraneous or unrelated goals in cross-border litigation, such as negative PR campaigns, pre-action discovery in aid of U.S. litigation or simply increasing litigation costs. Judges often easily grant these requests, and the uninvited intrusion this brings can cause enough trouble to hurt an individual or company's reputation, business and ultimately their bottom line.

When 1782s are being weaponized against you, effectively fighting back requires creative legal approaches within the U.S. and a global strategy based on close, cross-border coordination between teams in all relevant jurisdictions.

Focus on the non-U.S. tribunal.

When U.S. courts decide whether to allow Section 1782 discovery, one of the main areas of focus will be the nature of the foreign proceeding. Cross-border disputes often spawn a variety of proceedings, but not all of them may qualify for Section 1782 discovery. For instance, U.S. courts remain divided as to whether parties can use Section 1782 to seek discovery for use in private commercial arbitrations.

Given this evolving landscape, one defense that might defeat a 1782 request swiftly is for respondents to note what type of proceeding is underway or may soon commence, since some proceedings are in the legal gray area where 1782 discovery does not apply. Even if discovery is appropriate for some proceedings, U.S. courts can impose protective orders that prevent an applicant from using discovery for other undisclosed and more nefarious purposes.

Respondents can also make arguments to the foreign tribunal itself, such as raising concerns that the U.S. discovery may improperly interfere with the original proceedings, or that it violates their domestic laws and privileges, including data privacy or bank secrecy laws. If the foreign tribunal indicates that U.S. discovery would be unwelcome, U.S. courts will often take that into account.

Ask for equal treatment.

When an adversary appears in a U.S. court to seek discovery, this may also present an unexpected opportunity to strike back. In some cases, U.S. courts will require the applicant to provide U.S.-style discovery as a condition of granting the request. When one company requests discovery from a third party in the United States, the adversary can ask the court to order the applicant to provide discovery themselves. This can provide an opportunity to reach the applicant's own previously unreachable documents and evidence as a reciprocal condition for discovery.

By asking for reciprocal discovery, you can turn your adversary's disruptive discovery efforts into an opportunity to develop your own arguments for use in the non-U.S. proceedings, perhaps even gaining an upper hand that can deter the adversary's campaign and protects your interests and bottom line.

Limit the scope of discovery.

Sometimes adversaries will use legitimate discovery requests as a cover for inappropriate discovery, as a sly way to dig up “dirt,” uncover trade secrets or undercut legal cases. Fortunately, even though U.S. courts routinely grant Section 1782 applications, they may be willing to narrow the scope of discovery to ensure that the statute is used properly, limiting and controlling the intrusion to a more manageable level.

Not only do U.S. courts have broad discretion to narrow the discovery requests, but they also have broad discretion to impose protective orders as well. These can be used to ensure that adversaries only use evidence for the purposes stated in the application, and to require the applicant to treat the evidence confidentially to protect a confidential business or personal information, cutting short an adversary’s disruptive campaign early.

U.S. courts often grant even aggressive Section 1782 discovery requests, burdening the targets of U.S discovery with intrusive demands, potentially disadvantaging them in other proceedings and sometimes threatening their business. To fight these oft-granted applications effectively, an aggressive, cross-border counter-strategy can undermine the request, raise the costs of pursuing it and limit the overall risks it can pose.

About Kobre & Kim's Claim Monetization & Dilution Team

Kobre & Kim is a conflict-free Am Law 200 law firm focused on disputes and investigations, often involving fraud and misconduct.

The firm’s claim monetization and claim dilution team has significant experience acting on behalf of judgment and arbitration award creditors to develop and implement enforcement and asset tracing and recovery strategies to monetize high-value judgments, and is guided by an in-depth understanding of the latest asset structuring techniques and defensive litigation strategies that judgment/award debtors can deploy.

Many of our cases involve closely coordinated cross-border proceedings, and we are able to either advocate directly or to work cooperatively with local counsel, in jurisdictions in the U.S., UK, EMEA, Asia, Latin America and key offshore financial centers.