

Section 1782 – Update

US Discovery in Aid of Foreign Proceedings

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Background

We have written previously about 28 U.S.C. §1782, a little known but powerful US statute that permits foreign litigants outside the US to obtain discovery in the US for use in “foreign legal proceedings;” this includes litigation *as well as arbitration*.

The evidence obtained under Section 1782 (intended to aid foreign tribunals) is ordered by a US federal judge by federal court subpoena, and obtained under penalty of perjury.¹

Expanded Reach

Previously, discovery under Section 1782 was limited to the US. But more recently, in late 2016, the 11th Circuit Court of Appeals concluded that the subpoena powers built into the statute allows discovery of offshore documents as long as they are in the “possession, custody or control” of a party within its jurisdiction. *Sergeeva v. Tripleton International, Ltd.*

This means Section 1782 has an expanded reach, and can be used to obtain documents located in a foreign country from a party within the US.²

Note:

This extraterritorial reach by US federal courts is significant – Section 1782 should be considered by international lawyers with cross-border practices if there is a US jurisdictional connection, even if the documents are located outside the US but may arguably be in the “possession, custody or control” of a person or entity within the US.

¹*Ex parte* application filed in federal court where entity or person is located, based on the following: (1) does the person or entity reside in the district where the action was filed; (2) does the discovery relate to evidence in the form of testimony or production of things; (3) is discovery for use in a proceeding before a foreign tribunal; and (4) is the application by a foreign tribunal or “any interested person?”

²The court did not decide the issue of whether a target defendant is obligated to produce witnesses for deposition, if the witnesses are outside the US but under the control of such defendant. But we see no reason why the rationale adopted by the 11th Circuit in *Sergeeva* should not apply to witnesses within the jurisdiction of the court for deposition (e.g. the deposition could be conducted by video conferencing to lessen any travel burden on the witness).

Case Report

Sergeeva involved a marriage dissolution action in Russia, in which Anna *Sergeeva* alleged her ex-husband concealed and dissipated assets worldwide using off-shore companies. The action spilled over into other countries as she sought to locate assets.

Anna filed a Section 1782 application in a Georgia federal court, seeking information from Trident Corporate Services, Inc. (an Atlanta, Georgia company) about her ex-husband's ownership interest in a Bahamian entity. She obtained a subpoena that referenced the Bahamian entity and several of its trust companies, and Trident was directed to produce all responsive documents in its "possession, custody and control," regardless of whether held directly by Trident or through its agents.

Trident refused to comply with the subpoena, and filed an appeal before the 11th Circuit. It argued the requested documents were outside the US, it was required to obtain documents from third party foreign entities, and that US courts should not serve as clearinghouses for discovery all over the world.

The 11th Circuit disagreed, noting Section 1782 gave courts broad power over discovery of documents outside the US as long they were in the subpoenaed party's possession, custody or control. The court held Trident had "control" over subpoenaed documents in the physical possession or custody of the Bahamian trust companies: control was established because those trust companies were Trident's affiliated corporate entities and it was demonstrated to the court they had shared documents in the normal course of business.

When Trident failed/refused to produce most of the documents responsive to the subpoena, the lower federal court entered a contempt order and judgment of nearly \$250K in sanctions in favor of the wife, which was affirmed by the 11th Circuit.

Going Forward after *Sergeeva*

Sergeeva adds appellate weight to a developing line of cases which hold that Section 1782 does **not** impose geographical limits on US discovery for foreign litigants. It creates binding precedent for district courts within the 11th Circuit (Florida, Georgia and Alabama) and persuasive authority for other districts in the US.

Foreign lawyers and their clients now have an even more valuable tool under Section 1782 for cross border litigation or arbitration: a method to obtain documents and deposition testimony – made more helpful if the foreign lawyer is present at deposition to assist the US lawyer – located outside the US but in the possession, custody or control of someone within the US court's jurisdiction.

Sergeeva in Context of Prior Section 1782 Decisions

The geographical scope of Section 1782 has not been the subject of many reported decisions, likely because it is more commonly used to obtain evidence (documents & depositions) within the US. Further, because Section 1782 authorizes but does not require trial courts to provide assistance with discovery for a foreign proceeding, they are vested with discretion to grant or deny an application.

The lack of case law pre-*Sergeeva*, coupled with the court's discretionary power, produced a split of opinion on whether Section 1782 permitted production of documents located abroad.

The split was evident even within specific federal circuits: for example, in the 2nd Circuit (New York, Connecticut and Vermont), some courts in New York rejected extraterritorial reach but another court held the statute could reach documents located abroad, and at least one court in Connecticut accepted the statute's broader reach.

But with *Sergeeva*, a respected federal court of appeals has sided with legal authority that embraces a broader approach to discovery in aid of foreign proceedings. Its holding reaffirms that Section 1782 has extraterritorial reach as long as the US target entity has "custody or control" over evidence in another country. What constitutes "adequate" custody or control will most likely be decided on a case-by-case basis.