Discovery in the USA for use in an Australian court

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US law provides the possibility of obtaining assistance from a US District Court in discovering documents for use in other jurisdictions.

IMAGINE YOU ARE DEFENDING A Sydney-based company in the District Court of NSW against breach of contract and fraud claims. There is a third-party witness, a California corporation, a competitor of the plaintiff, which is in possession of non-privileged documentary evidence that is the key to your client's defence.

An obstacle is that the California corporation has its primary place of business in Los Angeles and no presence in Australia. The documents are in Los Angeles. The question is how to get the documents from the company in Los Angeles.

Your solution may be found in United States Code (USC) Title 28 §(section) 1782, which governs assistance from US District Courts (USDC) to foreign and international tribunals and the litigants appearing in those tribunals.

By way of background, the USDCs are the trial courts of the federal court system in the US. There are 94 federal districts including at least one district in each state, the District of Columbia and Puerto Rico (with Guam, the Virgin Islands and the Northern Mariana Islands each having a federal district covering each of those localities). In turn, the 94 federal districts are organised into 12 regional appellate circuits, each of which has a US Court of Appeals (USCA).

The section

Section 1782 of Title 28 USC provides that the USDC "of the district in which a person resides or is found may *order* him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal ...The order may be made ... *upon the application of any interested person* and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court ... The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege ...." (emphasis added).

Hypothetical case

The scenario framed has a third-party witness, a California corporation, located in Los Angeles with documents at its LA corporate office that are material to your client's defence. The 28 USC §1782 petition would be filed with the USDC for the Central District of California which is the USDC covering Los Angeles.

The Supreme Court of the US, in *Intel Corp v Advanced Micro Devices, Inc* 542 US 241, 254 (2004), addressed the factors to be considered by USDCs in connection with §1782 petitions. In addition, a number of USDCs and USCAs have recently analysed the factors to be considered on a §1782 petition in light of *Intel.*

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These precedents provide guidance for you to assist a client in building the evidentiary record for a successful §1782 petition.

In addressing your client's §1782 petition, the USDC will start from the proposition that §1782 codifies the "twin aims of providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to our courts ..."(*Intel*). Your client may take as an encouraging sign the fact that 28 USC §1782 has been engineered as "a one-way street. It grants wide assistance to others, but demands nothing in return" (see *In re Application of Malev Hungarian Airlines*, 964 F2d 97, 100-101 (2d Cir 1992)).

In addressing your client's §1782 petition, the USDC will focus on the following issues to determine whether your client's petition meets the predicate statutory requirements.

Is the application being made by an interested person?

You'd be able to answer this question in the affirmative under our scenario, given that your client is a litigant in a civil case pending in the NSW District Court. Per *Intel*, "litigants are included among, and may be the most common example of, the 'interested person[s]' who may invoke §1782" (*Intel* 542 US at 255-257). See also *In re Application of Esses*, 101 F3d 876 (2d Cir 1996), which held that a petitioner seeking appointment as administrator over a decedent's estate in a Hong Kong court proceeding was an "interested

person" within the ambit of §1782.

Is the person (an individual or an entity) from whom discovery is sought residing or otherwise to be found in the district of the USDC to which the application is made?

You'd be able to answer this question also in the affirmative under our scenario, given that the third-party witness is a California corporation with its primary place of business in Los Angeles which is within the USDC's district (the Central District of California) and the documents are also located in the district.

From an evidentiary perspective, your client will want to support its petition with a certified copy of the California corporation's Statement of Information from the California Secretary of State which, in turn, will support your client's request that the USDC take judicial notice of the California corporation's identity and location pursuant to Rule 201 of the Federal Rules of Evidence.

The case law provides guidance on the facts your client will need to establish regarding the location of the third-party witness and the documents that are the subject of your client's petition. See *In re Godfrey*, 526 FSupp2d 417, 423 (SDNY 2007) (which held that a "witness cannot be compelled to produce documents located outside of the United States"); *In re Microsoft Corp*, 428 FSupp2d 188, 194 n5 (SDNY 2006) (which held that "§1782 does not authorise discovery of documents held abroad"); *Norex Petroleum Ltd v Chubb Ins Co of Canada*, 384 FSupp2d 45 (D DC 2005) (which held that a petitioner was not entitled to order requiring American company, which was not a party to the foreign civil litigation, to produce documents located outside the US belonging to the American company's UK-based corporate parent); *Kestrel Coal Pty Ltd v Joy Global Inc*, 362 F3d 401 (7th Cir 2004) (which held that the purpose of §1782 is to permit discovery of materials located in the US); *Ratliff v Davis, Polk & Wardwell*, 354 F3d 165 (2d Cir 2003) (which held that documents located in USDC's district – New York – were subject to production under petition); *Four Pillars Enterprises v Avery Dennison Corp*, 308 F3d 1075 (9th Cir 2002) (which held that the US company's documents situated in the People's Republic of China (China) were not discoverable by petition given that the documents were located in China, which was where the foreign proceeding was pending, such that the Chinese court could address with the American company and the other parties the discovery issues related to those documents); *In re Sarrio*, 19 F3d 143, 147 (2d Cir 1997) (which held that while §1782 "on its face ... does not limit its discovery power to documents located in the United States ... there is reason to think that Congress intended to reach only evidence located within the United States").

"The House of Lords ruled that non-discoverability under English law did not bar litigants in English proceedings from seeking assistance from USDC under §1782."

Under the scenario outlined here, the documents are in Los Angeles, and thus, are within the district of the USDC for the Central District of California.

Is the discovery for use in a proceeding before a foreign tribunal?

While you'd be able to answer this question in the affirmative under our scenario, given that the requested documents are for use in a "proceeding" in a "foreign tribunal" (that is, pending civil litigation in the NSW District Court), you'd need to define the scope of the petition with some specificity and present an evidentiary record to assist the USDC in determining that the discovery is necessary and fair and that the equities favour your client. It is worth noting that the issue of whether the discovery is *for use* in a proceeding before a foreign tribunal is one of the more heavily-litigated issues on petitions.

As a threshold matter, §1782, per *Intel*, does not impose a "foreign discoverability" requirement as a condition for granting a petition. Under *Intel*: "Section 1782 is a provision for assistance to tribunals abroad. It does not direct US courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger." (*Intel* 542 US at 259-262). Thus, the USDC's analysis under our scenario would not turn on whether the evidence addressed by your client's petition is discoverable under the laws of NSW.

Further, there is precedent to support the argument that §1782 does not impose a "foreign admissibility" requirement as a condition for granting a petition. Thus, the USDC's analysis under our scenario would not turn on whether the evidence addressed by your client's petition will be admissible in evidence under the laws of NSW. The NSW District Court will adjudicate the issue of admissibility. Finally, there is precedent to support the argument that your client is not required to demonstrate that it somehow has "exhausted" its discovery remedies under the laws of NSW, such that the petition is its "last recourse" (*In re Application for an Order for Judicial Assistance in a Foreign Proceeding in the Labor Court of Brazil*, 466 FSupp2d 1020 (ND Ill 2006); see also *Malev Hungarian Airlines*, 964 F2d 97 at 100-101).

Notwithstanding the above observations on "foreign discoverability," "foreign admissibility" and the "exhaustion of foreign discovery remedies", your client's petition, as a practical matter, will be strengthened if your client can demonstrate, by reference to the pleadings and applicable NSW law, that the requested evidence in fact is material to your client's defence.

From an evidentiary perspective, attaching certified copies of the pleadings from the NSW District Court proceeding

and authenticated copies of relevant NSW statutes and precedents to a declaration under penalty of perjury under US law will bolster your request for judicial notice of these facts under Rule 201 of the Federal Rules of Evidence.

Your client's petition, supported by the foregoing evidence, will have some traction with the USDC as it considers the scope of a properly tailored discovery request given that the USDC (per *Intel*) has the authority to define the scope of the requested discovery, and otherwise ensure that the requested discovery is consistent with Rule 26(b)(1) of the Federal Rules of Civil Procedure (FRCP) which provides as follows: "Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."

In addition to addressing the foregoing statutory requirements for a petition, your client's petition also will need to address the following issues raised by *Intel* which factor into the USDC's exercise of its discretion.

Is the person from whom discovery is sought a participant in the foreign proceeding?

In our scenario, the California corporation is not a litigant and the NSW District Court does not have jurisdiction over the California corporation as a third-party witness. This fact mitigates in favour of the USDC extending assistance under §1782. Per *Intel*, if "the person from whom discovery is sought is a participant in the foreign proceeding ... the need for §1782(a) aid generally is not as apparent" as when evidence is sought from a non-participant, given that the foreign court itself can order the production of the evidence at issue (*Intel* 542 US at 264).

By way of contrast, if the person from whom discovery is sought is a party to the foreign proceeding, then the USDC could conclude that assistance under §1782 is not warranted. For example, the American company that was the target of the petition in *Four Pillars* was a party to the civil proceeding in China, which fact mitigated in favour of the USDC declining to grant the petition, at least as to the documents situated in China. See also *Schmitz v Bernstein, Liebhard & Lifshitz, LLP*, 376 F3d 79 (2d Cir 2004), which held that the corporate documents that were the subject of the petition already were in the possession of the German corporation that was a party to the civil securities litigation in Germany, such that the need for assistance from the USDC under §1782 was not as "apparent", given that the documents addressed by the petition already were in Germany in the possession of a party to the German litigation.

"In Kestrel Coal, the USCA found it probative that the foreign tribunal (the Queensland Supreme Court) had already rejected a similar discovery request previously pursued by the petitioner."

See also *Re Application of Roz Trading*, 469 FSupp2d 1221 NDGa 2006, where a petitioner sought documents from American parent corporation whose subsidiary was party to an arbitration pending before an arbitral panel in Vienna – §1782 assistance was appropriate in part because the American parent corporation was not a party to the arbitration.

Is the foreign court receptive?

Has the foreign court (or government) indicated that it is not receptive to assistance from the USDC under §1782?

In *Schmitz*, the USCA for the Second Circuit affirmed the USDC's denial of the petition, due in large part to the fact that the USDC's record included letters from the German prosecutorial authorities in Bonn stating that the USDC would compromise a pending criminal investigation and the criminal defendants' rights in that investigation, and otherwise compromise Germany's sovereign rights if the USDC granted the petition.

This is the type of evidence that a USDC may consider in determining whether to exercise its discretion. However, without clear pronouncements from the foreign jurisdiction, a USDC is not entitled to make its own forays into foreign law to determine the attitude of the foreign jurisdiction to discovery assistance under §1782.

See also *In re Application of Euromepa SA*, 51 F3d 1095, 1099-1100 (2d Cir 1995), which held that USDC "should consider only authoritative proof that a foreign tribunal would reject evidence obtained with the aid of section 1782. Such proof, as embodied in a forum country's judicial, executive or legislative declarations that specifically address the use of evidence gathered under foreign procedures, would provide helpful and appropriate guidance to a district court ...".

What is the nature of the foreign tribunal and what is the character of the proceedings underway in that tribunal?

Intel makes clear that a USDC may consider the equities in connection with a petition: "Comity and parity concerns may be legitimate touchstones for a district court's exercise of discretion in particular cases ..." (*Intel* 542 US at 259-262). Thus, your client will need to tailor its petition in a manner that demonstrates that the discovery does not give your client an unfair advantage over the plaintiff in the NSW District Court proceedings.

Your client will need to demonstrate that the proceeding in the NSW District Court is a fair adjudicative proceeding based on due process (see *John Deere Ltd v Sperry Corp* 754 F2d 132, 136, n3 (3d Cir 1985), which held that §1782 authorises USDC "to scrutinise the underlying fairness of the foreign proceedings to insure they comply with notions of due process". Along these same lines, *Intel* specifically noted that "when information is sought by an 'interested person', a district court can condition relief upon reciprocal information exchange. Moreover, the foreign tribunal can place conditions on its acceptance of information, thereby maintaining whatever measure of parity it deems appropriate" (*Intel* 542 US at 262). Per *Intel*, your client should be prepared to propose (or at least accept) measures that ensure parity and reciprocity with respect to the discovery addressed by the petition.

Does the petition represent an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the US?

Intel establishes that a USDC may inquire into whether the petition "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States" (*Intel* 542 US at 254-255). Thus, your client should be prepared to demonstrate that it is not attempting to circumvent NSW discovery laws by seeking from the USDC that which it is flatly prohibited from seeking in the NSW District Court. See *In re Application of Aldunate*, 3 F3d 54, 59 (2d Cir 1993), which held that USDC may consider whether the petition represents an attempt to "circumvent" foreign jurisdic-

tion's discovery rules or that granting the same would otherwise be an "affront" to foreign jurisdiction.

Kestrel Coal provides some further illumination on this point. In *Kestrel Coal*, the USCA found it probative that the foreign tribunal (the Queensland Supreme Court) had already rejected a similar discovery request previously pursued by the petitioner, noting that "no purpose would be served" by granting the petition in light of the Queensland Supreme Court's previous ruling.

The lesson from *Kestrel Coal* under our scenario is that if the NSW District Court already has rejected on relevance or public policy grounds a previous discovery request from your client that is now the subject of its petition (or if there otherwise is opposition from NSW authorities), then counsel should be prepared to address the NSW District Court's previous ruling (or the nature of the NSW authorities' opposition) with the USDC to explain why your client nevertheless is filing a petition.

The issue is by no means insurmountable given *Intel's* observation that "a foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions; such reasons do not necessarily signal objection to aid from US federal courts. A foreign tribunal's reluctance to order production of materials present in the US similarly may signal no resistance to the receipt of evidence gathered pursuant to §1782(a)" (*Intel* 542 US at 261-262). See *South Carolina Ins Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] 1 App Cas 24, where the House of Lords ruled that non-discoverability under English law did not bar litigants in English proceedings from seeking assistance from USDC under §1782.

In any event, assuming you would not be violating the laws of NSW, it may be prudent to proceed with a petition *before* seeking similar discovery in the NSW District Court in order to avoid any arguments on this issue. At the end of the day, you still will have to persuade the NSW District Court to admit the documents as probative evidence.

Is the discovery request unduly intrusive or burdensome?

Intel holds that "unduly intrusive or burdensome requests may be rejected or trimmed" by the USDC (*Intel* 542 US at 262). Thus your client's petition should have a tight focus in terms of the time period and the topics to be addressed, in order to comply with FRCP 26(b)(2) and thereby avoid objections that the petition seeks discovery that "is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive ...". See *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F2d 1151, 1156 (11th Cir 1988), which held that USDC may address whether petition is a "fishing expedition" or is being pursued in an attempt to harass in which case USDC may exercise discretion to deny petition; and *In re Application of Euromepa SA* 51 F3d 1095, 1099-1100 (2d Cir 1995), which held that USDC may issue "a closely tailored discovery order" based on "misgivings ... about the impact of its participation in the foreign litigation ...".

Outcome

Your client, having addressed §1782's requirements for a petition, should be well-situated under our scenario to seek and receive assistance from the USDC for the Central District of California via an order directing the Los Angeles-based third-party witness to produce the documents requested in the petition.

Having obtained properly authenticated documents, your next task (as you are no doubt aware) will be to have these documents admitted as probative evidence in the NSW District Court, thereby hopefully paving the way for a defence judgment in favour of your client on the breach of contract and fraud claims using the key evidence your client obtained under §1782. ❑

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