

28 U.S.C. § 1782: Powerful Tool in the US to Obtain Discovery for Use in Foreign Proceedings

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Executive Summary

- The scope of disclosure of evidence in Brazilian judicial proceedings is very limited in comparison to disclosure in common law jurisdiction, such as the United States. Parties typically seek extensive disclosure from each other in US civil litigation, and the relevant US rules of evidence require parties to disclose relevant documents in the litigation even if those documents contain information that is harmful to the disclosing party.
- Brazilian parties increasingly are exploring whether they can avail of discovery from the US that could be used in support of local Brazilian civil litigation or regulatory proceedings.
- 28 U.S.C. Section 1782 (Section 1782) is a US federal law that authorizes US courts to order discovery from a person or entity in the US for use in proceedings before foreign (non-US) and international tribunals.
- Brazilian petitioners successfully have used Section 1782 to obtain discovery from a variety of entities who are in the US. Such evidence has been gathered in support of proceedings before the Brazilian securities and exchange commission (the Comissão de Valores Mobiliários); Brazilian insolvency proceedings; and Brazilian civil litigation between private parties. The target entities in the US who were ordered to produce discovery in aid of these Brazilian proceedings include US banks; foreign (non-US) banks with presence in the US; US companies owning and managing US assets of Brazilian debt guarantors; and clearing houses for wire transfers that are based in the US.
- Several statutory factors must be met for a court to order discovery in support of a Brazilian proceeding.
 - a. The person or entity from whom discovery is sought must be “found” in the US. Mere physical presence, even if temporary, satisfies this requirement.
 - b. The requested discovery must be “for use” in a foreign proceeding that is either already underway or “within reasonable contemplation” of being initiated.

- c. The foreign proceeding should be before a foreign court (i.e., Brazilian court), administrative or regulatory body, or an international tribunal.
 - d. The application must be made by either the foreign or international tribunal directly or by an interested person (such as a party to the foreign proceeding).
- Brazilian petitioners should consider whether US-based discovery may be of use to them in civil and regulatory proceedings taking place in Brazil. This could be a powerful tool to obtain evidence that might not be available through evidentiary practice and procedure in Brazil.

Production of Evidence Obtained Voluntarily or Compelled

28 U.S.C. Section 1782 is a US federal law that was enacted to provide discovery assistance to foreign and international tribunals and to interested persons appearing before such tribunals. Under this provision, the production of evidence for use in a proceeding in a foreign or international tribunal may be compelled (Section 1782(a)) or it may be obtained voluntarily (Section 1782(b)).

Section 1782 does not dictate any formal procedure or approval for the provision of evidence on a voluntary basis. However, it provides guidance to US federal district courts to exercise their discretion in determining whether to compel discovery in aid of foreign proceedings when the evidence cannot be obtained voluntarily.

When deciding whether to grant a request for production of evidence under Section 1782(a), US federal courts will consider (A) statutory prerequisites under Section 1782(a), (B) discretionary factors considered by courts when deciding whether to grant discovery, and (C) the US Federal Rules of Civil Procedure (FRCP).

A. Statutory Prerequisites of Section 1782(a)

(1) A person or entity may only be compelled to produce testimony or documents if the person or entity “resides” or is “found” in the district of the court to which the discovery request or application is made.

- “Nothing more than physical presence” in the district, even if temporary, has been found to be enough to satisfy this requirement for the purpose of compelling testimony.¹
 - a. For example, if a Brazilian national visiting New York on business is personally served with a subpoena while physically present in the Southern District of New York, she will be “found” within this district for purposes of Section 1782 and may be compelled to produce testimony.
 - b. For example, a US federal court held that a foreign bank was “found” in its district because the bank maintained a registered agent located in this district who could accept service of process and the registered agent was served with a subpoena while in this district.²
- Even when a business is incorporated and has its principal place of business outside the US, it can be “found” in a district for purposes of Section 1782 if (1) it has purposefully directed its activities at the forum and (2) the discovery materials sought relate to those activities.
 - a. For example, a US federal district court held that a foreign bank was “found” in the district because the documents sought by the application pursuant to Section 1782 resulted from the correspondent banking services the foreign bank provides from New York.³
- When documents are in the possession of affiliates or parents not “found” or not “residing” in the US, courts have generally refused, on discretionary grounds, to compel entities based in the US to produce the requested documents. This is because under both Section 1782 and the applicable Federal Rules of Civil Procedure, the distinction between the parent company and its subsidiaries

¹ *In re Edelman*, 295 F.3d 171, 179 (2d Cir. 2002).

² *In re Kurbatova*, 2019 WL 2180704, at *2 (S.D. Fla. May 20, 2019).

³ *In re SPS I Fundo de Investimento de Acoes – Investimento no Exterior*, 2024 WL 917236, at *3 (S.D. NY. March. 4, 2024).

prevents the discovery of the foreign parent's documents simply by serving the subsidiary company in the US.⁴

(2) The requested material is 'for use' in a proceeding before a foreign or international tribunal:

- For Use:
 - a. To satisfy the requirement that discovery be "for use" in a proceeding, the applicant must generally show that the requested discovery is to be used "at some stage of a foreign proceeding."⁵
 - b. The "proceeding" for which discovery is sought under Section 1782(a) must be "within reasonable contemplation;" it does not need to have been initiated or be "pending" or "imminent."
- Foreign or International Tribunal:
 - a. A foreign tribunal is one that exercises governmental authority conferred by a single nation. This includes judicial courts as well as administrative and regulatory bodies.
 - i. For example, Brazil's securities and exchange commission (the *Comissão de Valores Mobiliários*) has been found to be a foreign tribunal for the purposes of Section 1782.⁶
 - b. An international tribunal is one that exercises governmental authority conferred by multiple nations.
 - i. The US Supreme Court has yet to provide guidance for lower courts to follow in determining whether an international tribunal is imbued with government authority by multiple nations, but an international tribunal for the purposes of Section 1782(a).
 - c. The US Supreme Court recently held in *ZF Auto. US, Inc. v. Luxshare, Ltd.* that Section 1782(a) does not allow US district courts to order discovery for use in investment treaty arbitrations or private international commercial arbitrations unless the relevant nations authorize the arbitral panels to exercise governmental authority.
 - i. Private adjudicatory bodies that administer alternative dispute resolution, like The Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), do not constitute an international tribunal under Section 1782.⁷

(3) The application is made by a foreign or international tribunal or any interested person:

- Interested Person:
 - a. An "interested person" includes litigants before foreign or international tribunals, foreign and international officials, and any other person who has a "reasonable interest" in obtaining judicial assistance.
 - i. For example, a complainant who triggered a European Commission investigation was found to possess a reasonable interest in obtaining judicial assistance from US courts and therefore qualified as an "interested person" under section 1782(a) given the complainant's significant role in the European process (the complainant prompted the antitrust investigation, had the right to

⁴ *Norex Petroleum Ltd. v. Chubb Ins. Co. of Can.*, 384 F. Supp. 2d 45, 52 (D.D.C. 2005).

⁵ *Mees v. Buitter*, (793 F.3d 291) at *295 (2d Cir. 2015).

⁶ *In re SPS I Fundo de Investimento de Acoes – Investimento no Exterior*, 2022 WL 17553067, at *4-5 (S.D. NY. December 9, 2022).

⁷ *Pereira v. Nucor Corporation* 2023 WL 4143229 (W.D. NC June 22, 2023) where a Brazilian company's bylaws included a mandatory arbitration provision providing that "any and all disputes or claims that may occur between Company, its shareholders, managers and Fiscal Council members [...] shall be resolved by arbitration submitted to the CAM-CCBC [...]." The court found that it was "apparent from the plain language of the arbitration provision" that it applied to the proceedings reasonably contemplated by the petitioner. The court held that the CAM-CCBC is not a "foreign or international tribunal" under section 1782; thus, the Brazilian petitioner cannot invoke section 1782 to obtain evidence for use in its private arbitration proceeding.

submit information for the Directorate- General's consideration, and could proceed to court if the Commission discontinued or dismissed the complaint).

B. Discretionary Factors Considered by Courts

A district court is not required to grant a Section 1782(a) discovery application simply because it has the authority to do so. Even where the statutory prerequisites of Section 1782 are satisfied, the court has “wide discretion” to grant or deny discovery.⁸ The Court's exercise of discretion is guided by four nonexclusive factors that the US Supreme Court articulated in *Intel Corp. v. Advanced Micro Devices, Inc.*

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

- There is a stronger case that aid is needed to obtain evidence if the person from whom it is sought is not a participant in the foreign proceedings (or an affiliate or agent of the participants, because in such case it is more likely that the foreign court will not have the power to order the production of the evidence sought.
- However, even in cases where the person from whom the evidence is sought is not a participant, US courts have found that this factor favored denying the application when it was shown that the person from whom the evidence was sought did not possess any discovery that the petitioner could not obtain from the foreign tribunal in the event a non-US proceeding was filed.⁹

(2) What is the nature of the foreign tribunal, the character of the proceedings underway abroad, and how receptive will the foreign authority be to US federal court assistance?

- If the foreign tribunal has expressly objected to the use of Section 1782(a) to obtain evidence, it is likely that a US federal court would not grant a request to compel discovery.¹⁰
- Section 1782(a) does not require district courts to consider the admissibility of evidence in the foreign proceeding in ruling on a section 1782 application.

(3) Is the request made under Section 1782(a) concealing an attempt to circumvent otherwise applicable discovery restrictions or policies of the foreign jurisdiction or the United States?

- Section 1782(a) does not require the applicant to exhaust its discovery options in the foreign jurisdiction before applying to a district court.¹¹
- Reasonable efforts to address technical discovery limitations in the foreign jurisdiction is generally not viewed as an attempt to circumvent foreign proof-gathering policies and procedures.¹²
- Where the opportunity to obtain pretrial discovery is limited, like in Brazil, courts have found the petitioner's tactical decision to seek discovery (through Section 1782) from its opponents in the Brazilian lawsuit to be an attempt to circumvent proof-gathering restrictions in Brazil.¹³

(4) Is the request made under Section 1782(a) unduly intrusive or burdensome?

- Unduly intrusive or burdensome requests may be rejected or trimmed by the US court.
- Concerns that the requested discovery would be unduly intrusive may be overcome by an appropriate confidentiality agreement.¹⁴

⁸ See *Al Fayed v. United States*, 210 F.3d 421, 424 (4th Cir. 2000).

⁹ See *In re Atvos Agroindustrial Investimentos S.A.*, 481 F. Supp. 3d 166, (S.D.N.Y. 2020) at *176; *Pereira v. Nucor Corporation*, 2023 WL 4143229 (W.D. NC June 22, 2023) at *3: the company from whom evidence was sought established that it did not possess any discovery that the petitioner could not obtain from the Brazilian entities who would be litigants in the event a proceeding was filed before Brazilian courts.

¹⁰ *Schmitz v. Bernstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 84 (2d Cir. 2004).

¹¹ *In re Almeida Michelena*, 2021 WL 2414077, at *3 (S.D. Fla. June 14, 2021).

¹² *In re Imanagement Servs.*, 2005 WL 1959702, at *5 (E.D.N.Y. Aug. 16, 2005).

¹³ *In re Atvos Agroindustrial Investimentos S.A.*, 481 F. Supp. 3d 166, at *177 (S.D.N.Y. 2020); *Pereira v. Nucor Corporation*, 2023 WL 4143229, at *5 (W.D. NC June 22, 2023).

¹⁴ *In re Imanagement Servs.*, 2005 WL 1959702 at *6 (E.D.N.Y. Aug. 16, 2015)

- Discovery requests must be adequately tailored to the foreign proceeding for which production is sought.¹⁵

C. Compliance with FRCP

- Where a request for discovery in the US for use in a foreign proceeding is found to meet the requirements of Section 1782(a), the discovery process is generally guided by the US Federal Rules of Civil Procedure (FRCP).¹⁶
- For example:
 - a. Even if an entity is found to be in the district, it may not be compelled to turn over documents, when these documents are not in its “possession, custody, or control.”¹⁷
 - b. Even if the “resides or is found” requirement is met, if a person who is not a party or an officer of a party would have to travel more than 100 miles from where that person resides, FRCP 45(c)(3)(A)(ii) may prevent the taking of a deposition under Section 1782.¹⁸

Application of Section 1782(a) to Discoveries for use in Proceedings in Brazil

Entities compelled to produce evidence for civil and administrative proceedings in Brazil have recently included:

- US and foreign banks believed to be in possession of evidence of an alleged international corruption scheme led by the controlling shareholders of a Brazilian corporation.
 - a. A Brazilian petitioner successfully obtained an order from a US district court enjoining US and foreign banks to comply with the subpoenas and produce the discovery requested for use in a complaint to be filed with Brazil's securities and exchange commission (the *Comissão de Valores Mobiliários*).¹⁹
- US companies owning and managing US assets of Brazilian debt guarantors.
 - a. Brazilian petitioners successfully obtained the issuance of an order permitting them to obtain documentary and testimonial discovery from a limited liability company and a condominium association in which the foreign debtor owned an interest that was not disclosed in pending bankruptcy proceedings in Brazil.²⁰
- Nine banks and a clearing house that maintained offices and did business within the Southern District of New York.²¹
 - a. A Brazilian petitioner sought discovery relating to wire transfers routed through nine banks and a clearing house in New York City for use in pending civil proceeding in Brazil in which the petitioner alleged that another Brazilian national fraudulently concealed his assets to evade payment to the petitioner.

¹⁵ *Shueisha Inc. v. Paypal Holdings, Inc.*, 2023 WL 2277102, at *6 (N.D. Cal. Feb. 27, 2023).

¹⁶ *Bayer AG v. Betachem, Inc.*, 173 F.3d 188, at *191(3d Cir. 1999); *Heraeus Kulzer, GmbH v. Biomet, Inc.*, 633 F.3d 591, at *595 (7th Cir. 2011).

¹⁷ See *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019); FRCP 45(a)(1)(iii) and FRCP 34(a).

¹⁸ *Edelman*, 295 F.3d at 178.

¹⁹ *In re SPS I Fundo de Investimento de Acoes – Investimento no Exterior*, 2024 WL 917236 (S.D. NY. March. 4, 2024).

²⁰ *In re Travessia Securitizadora de Creditos Financeiros X S.A.*, 2024 WL 356533 (S.D. SC. Jan. 19, 2024).

²¹ *In re Ernesto Andrade Group*, 2024 WL 195568 (S.D. NY. Jan. 18, 2024).

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