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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

The Limits of Obtaining Discovery for Use in Foreign Proceedings

By **Edward M. Spiro**

And **Christopher B. Harwood**

Parties to pending or contemplated foreign proceedings potentially can use 28 U.S.C. §1782 to obtain broad discovery from U.S. persons for use in their foreign proceedings. Although the statute gives courts ultimate discretion regarding whether to allow such discovery—because it "authorizes, but does not require, a federal district court" to compel the discovery that a petitioner seeks, *Intel v. Advanced Micro Devices*, 542 U.S. 241, 255 (2004)—courts tend to exercise their discretion liberally in favor of granting §1782 discovery.

Courts will deny §1782 discovery, however, if the petitioner fails to establish that it satisfies certain mandatory requirements found in the language of the statute, including that (1) the person from whom discovery is sought "resides or is found" in the district where the petition is filed, and (2) the discovery is for use in a proceeding before "a foreign or international tribunal." 28 U.S.C. §1782.

EDWARD M. SPIRO *and* CHRISTOPHER B. HARWOOD *are principals of Morvillo Abramowitz Grand Iason & Anello P.C. Mr. Spiro is the co-author of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2018), and Mr. Harwood is the former Co-Chief of the Civil Frauds Unit at the U.S. Attorney's Office for the Southern District of New York. Mr. Spiro represented a defendant in In re Petrobas Securities Litigation and opposed Cornell University's §1782 application.*

U.S. District Judge Jed S. Rakoff for the Southern District of New York recently demonstrated as much in *In re Petrobras Securities Litigation*, 2019 WL 3403281 (S.D.N.Y. July 29, 2019), when he denied a petition by Cornell University seeking §1782 discovery for failure to satisfy these statutory requirements.

'Petrobras'

Cornell was a member of a class of plaintiffs suing Petrobras for allegedly making materially false statements in connection with the sale of American Depository Receipts (ADRs) on the New York Stock Exchange. On July 2, 2018, Judge Rakoff entered a final judgment approving a settlement of the class action.

In addition to the ADRs, Cornell also purchased other Petrobras securities that traded on the Sao Paolo stock exchange (in Brazil) called the Bovespa. On July 30, 2015, Judge Rakoff dismissed the class members' claims arising from securities purchased on the Bovespa, holding that an arbitration clause in Petrobras's bylaws required that such claims be arbitrated in Brazil.

In response, Cornell elected to proceed against Petrobras before the Bovespa's Market Arbitration Chamber (the CAM), claiming that the same allegedly fraudulent statements underlying the U.S. class action also caused Cornell to incur losses on the Petrobras securities that Cornell purchased on the Bovespa. Cornell believed that certain documents that Petrobras produced during discovery in the U.S. action (the Petrobras Documents) would strengthen its case before the CAM. The Petrobras Documents, however, were filed under seal pursuant to a protective order. Accordingly, Cornell moved to obtain access to the Petrobras Documents for use in the CAM arbitration, arguing in the alternative that it was entitled to (1) an order compelling discovery of the Petrobras Documents for use in a foreign proceeding under §1782, or

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(2) an order unsealing the Petrobras Documents.

Legal Framework Governing §1782

In addressing whether Cornell was entitled to the sealed Petrobras Documents pursuant to §1782, Judge Rakoff observed that the statute authorizes "'the district court of the district in which a person resides or is found [to] 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.'" *Petrobras*, 2019 WL 3403281, at *1 (quoting 28 U.S.C. §1782). Under the statute, "[e]ither the foreign tribunal itself or 'any interested person' may move the court to compel discovery." Id.

Judge Rakoff further observed that a district court's power to compel discovery under §1782 is discretionary. Id. at *2. Before deciding to exercise its discretion to compel discovery, however, Judge Rakoff noted that a "district court must first conclude that the petition satisfies three mandatory requirements found in the language of the statute":

> first, the person from whom the applicant seeks to compel discovery must "reside[] or [be] found" in the district in which the court sits; second the discovery must be "for use in a foreign proceeding before a foreign or international tribunal"; and third, the moving party must be the foreign or international tribunal itself or "any interested person."

Id. (quoting 28 U.S.C. §1782; *Mees v. Buiter*, 793 F.3d 291, 297 (2d Cir. 2015)).

Judge Rakoff further explained that if a district court finds that the petition satisfies the three statutory requirements, it must then consider four additional discretionary factors "when deciding whether to exercise its discretion to compel discovery":

> first, whether the party from whom the petitioner seeks discovery is a participant in the foreign proceeding; second, "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; third, whether the motion "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and fourth, whether the discovery request is "unduly intrusive or burdensome."

Id. at *2 & n.2 (quoting *Intel*, 542 U.S. at 264-65).

In *Petrobras*, Judge Rakoff found that Cornell's petition failed to satisfy §1782's first and second statutory requirements, and he therefore did not reach the four discretionary factors. Specifically, he concluded that Petrobras was not "found" in the Southern District of New York (SDNY) for purposes of the §1782 petition, and the CAM was not a "foreign or international tribunal." Id. at *2.

Petrobras Was Not 'Found' in The SDNY for §1782 Purposes

In analyzing whether Petrobras was "found" in the SDNY, Judge Rakoff first addressed a threshold question for which there was no binding Second Circuit authority: whether the "resides or found" language in §1782 means that a court must have personal jurisdiction over the party from whom the movant seeks discovery. Id. at *3-*4. After observing that (1) "the great weight of authority suggests that at [a] minimum … compelling an entity to provide discovery under §1782 must comport with constitutional due process," and (2) the Second Circuit has held in an analogous context that "'[a] district court … must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request under Federal Rule of Civil Procedure 45,'" Judge Rakoff concluded that he "should apply a personal jurisdiction analysis to determine whether Petrobras is 'found' in the [SDNY]." Id. (quoting *Gucci Am. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014)).

In conducting the jurisdictional analysis, Judge Rakoff considered whether there was either general personal jurisdiction or specific personal jurisdiction (with respect to the claims underlying Cornell's §1782 petition) over Petrobras in the SDNY. He found that general personal jurisdiction was lacking because Petrobras was not incorporated in the SDNY, did not have its principal place of business in the SDNY, and its contacts with the SDNY were not "'so continuous and systematic as to render [it] essentially at home'" in the SDNY. Id. at *4 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 138-39 & n.19 (2014)). The fact that Petrobras "maintained an office in Manhattan … and sells ADRs on the New York Stock Exchange" was, according to Judge Rakoff, "far from sufficient to subject Petrobras to the general personal jurisdiction of courts in New York." Id.

With respect to specific personal jurisdiction, Judge Rakoff first observed that "[c]ourts in the Second Circuit employ a two-step analysis to determine whether they have specific jurisdiction": "[f]irst, the court must decide if the defendant has purposefully directed [its] activities at … the forum and [if] the litigation … arise[s] out of or relate[s] to those activities," and "[s]econd, … [the court must determine] whether the assertion of

personal jurisdiction would comport with fair play and substantial justice." Id. (citations omitted). Judge Rakoff then concluded that "[t]he test for [specific] personal jurisdiction … fail[ed] at the first step," because the "allege[d] misconduct by Petrobras [relevant to the CAM arbitration] occurred entirely in Brazil," and therefore "Petrobras did not purposefully direct[] [its] activities relevant to the CAM arbitration at the [SDNY]." Id. at *5 (citation omitted). Accordingly, Judge Rakoff concluded that Petrobras was not "found" in the SDNY for purposes of §1782. Id.

The CAM Is Not a 'Foreign Or International Tribunal' Under §1782

Although Judge Rakoff's finding that Petrobras was not "found" in the SDNY was itself fatal to Cornell's §1782 petition, Judge Rakoff went on to consider whether the CAM constitutes a "foreign or international tribunal" under the statute. Id. at *6-*7. He found that it does not, because (1) the CAM is an arbitral body established by private parties, and (2) in *NBC v. Bear Stearns*, 165 F.3d 184, 191 (2d Cir. 1999), the Second Circuit held that such an arbitral body—i.e., one established by private parties—was not a "foreign tribunal" for purposes of §1782. Id. at *6. Judge Rakoff accordingly "further denie[d] Cornell's §1782 motion on the independent ground that … the statutory term 'foreign or international tribunal' does not include an arbitration chamber created by private parties." Id. at *7.

In doing so, Judge Rakoff rejected Cornell's argument that the Supreme Court had abrogated *NBC* through dicta in *Intel*, 542 U.S. at 241, in which it quoted the following language from a law review article: "'[t]he term 'tribunal' … includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.'" Id. at *6. (citation omitted). As an initial matter, Judge Rakoff found it "doubtful that a passing dictum in a Supreme Court opinion … is sufficient to abrogate an extensively-reasoned and directly on-point Second Circuit precedent." Id. at *7. More importantly, Judge Rakoff observed that "it is far from clear that the quotation referencing arbitral tribunals in *Intel* even casts doubt on the holding of *NBC*." Id. He noted that the quotation "simply says that 'arbitral tribunals' are within the scope of §1782, not that *private* arbitral tribunals are." Id. Judge Rakoff reasoned that the author of the law review article "may only have been referring to arbitral tribunals created by governments and intergovernmental agreements," and that, given the author's other writings on the topic, that "is in fact probably what he meant." Id.

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Cornell's Alternative Motion To Unseal Judicial Documents

After denying Cornell access to the Petrobras Documents pursuant to §1782, Judge Rakoff considered—and granted in part—Cornell's motion to unseal those Petrobras Documents that had previously been filed under seal in the U.S. class action in connection with summary judgment motion practice. Id. at *8. Judge Rakoff reasoned that "[s]ince the documents related to [his] ruling on summary judgment, they were judicial documents, and there is a strong presumption in favor of public disclosure of judicial documents." Id. Accordingly, he ordered the parties to the U.S. action to review them, and "mindful of the Court's doubt that confidentiality is still required in most cases," produce to Cornell all of the previously sealed documents that they believe can be unsealed, as well as a list of any documents that they believe should remain under seal. Id. Judge Rakoff stated that Cornell would then have an opportunity to object to any remaining sealings, and if it does, Judge Rakoff would review the documents underlying the objections *in camera* and make a final sealing determination. Id.

Conclusion

Section 1782 provides a powerful mechanism for parties to foreign proceedings to obtain discovery from U.S. persons for use in their foreign proceedings. *Petrobras* indicates, however, that before a court will allow such discovery, it will need to (among other things) conduct a personal jurisdiction analysis to determine whether the party from whom discovery is sought "resides or is found" in the district.