How A US Discovery Statute Can Affect Cayman Litigation

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Section 1782 of Title 28 of the U.S. Code is increasingly being used by parties in Cayman Islands litigation as an additional tool to obtain court-ordered discovery from parties in the United States. Given the regular involvement of entities resident in the U.S. in Cayman litigation, the option to use the statute as an "offensive" weapon in such litigation may appeal to litigants, particularly those concerned that discovery through the Cayman proceedings will not yield particular, or wide-ranging, documents or information.

This article features a practical examination of Section 1782 and includes a focus on its impact on Cayman litigation, a consideration of the timing of such applications and a look at the attitude of the Cayman judiciary to such applications to date.

The Statute

Section 1782 allows the relevant court in the U.S. to make an order against an individual or entity in the United States for production of records (or to be deposed) for use in a foreign proceeding.

It has been said that Section 1782 serves the noble twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance" to U.S. courts.[1]

To satisfy the threshold requirements of Section 1782:

- The persons from whom discovery is sought must reside or be found in the district — mere physical presence, even if temporary, is enough to satisfy this requirement;

- The discovery must be for use in a proceeding in a foreign tribunal;

- The applicant must establish that it is an 'interested person' in the foreign proceeding. However, standing is not limited to actual applicants and includes anyone with a reasonable interest in obtaining assistance;[2] and

- The application must not require disclosure of privileged materials.[3]

In addition to the statutory prerequisites, the U.S. Supreme Court listed four factors the district court should consider when determining whether to grant an order pursuant to a Section 1782 application in the case of Intel Corp. v. Advanced Micro Devices Inc.,[4] namely:

- Whether the person from whom discovery is sought is a party to the foreign proceeding;

- The nature of the foreign tribunal, the character of the foreign proceeding and the receptivity of the foreign tribunal to the U.S. court's assistance. The U.S. court will most likely refuse a request where the non-U.S. tribunal has expressly objected to the use of Section 1782[5];

- Whether the applicant is attempting to circumvent the proof-gathering restrictions or policies of the foreign tribunal. District Courts will look more favorably on requests that reflect reasonable efforts to overcome technical discovery limitations or to obtain evidence beyond the reach of the foreign tribunal[6]; and

- Whether the discovery requested is unduly intrusive or burdensome.

Although Intel provides the framework for analyzing Section 1782 applications, the Supreme Court's reasoning and certain ambiguities in the statute have resulted in differing judicial interpretations of its scope, particularly as this relates to extraterritorial reach.

Section 1782 was rarely used for many years, but this is no longer the case particularly

following the plethora of applications made during the dispute between Chevron (Ecuador) and certain indigenous peoples who lived near oil fields in the Amazon. Since that case, requests for this assistance are being submitted with regularity and, as a general rule, have been largely successful.

From a practical perspective, it seems clear that Section 1782 allows litigants to obtain an order for a broader scope of discovery than that available in the Cayman Islands.

Section 1782 in the Cayman Islands

The Grand Court of Cayman has been generally receptive to the evidence obtained by Section 1782 applications in recent times.

The key decision in this jurisdiction came in the 2009 case of Phoenix Meridian Equity Ltd.v. Lyxor Asset Management SA[7] where the Court of Appeal specifically allowed a party to obtain discovery in the U.S. for use in a Grand Court proceeding. At the time, the decision departed from the trend in most common law jurisdictions whereby the courts had been reluctant to allow depositions of future witnesses with numerous decisions indicating that anti-suit proceedings would be granted to restrain Section 1782 depositions on the basis that they would constitute unwarranted double cross-examination[8].

In Lyxor, the plaintiff sought Section 1782 dispositions in New York from two officers of a U.S. company connected to the defendant. Importantly, the plaintiff argued persuasively that there would be a substantial litigation benefit in the proposed oral examination to assist its trial preparation in Cayman, and that this would lead to savings of both time and costs.

The defendant sought to restrain the depositions on the basis of unwarranted double cross-examination, the alleged adverse impact on the Cayman trial due to duplication and the overly intrusive topics included in the Section 1782 notice.

At first instance, the Grand Court relied upon the robust “unconscionability” test outlined by the House of Lords in South Carolina Insurance Co v. Assurantie Maatschappij ‘De Zeven Provincien NV,[9] i.e., if the pursuance of a Sec. 1782 order amounted to unconscionable conduct, the courts should resist it. In its decision, the House of Lords did not define “unconscionable conduct” but stated that it included conduct which is oppressive or vexatious or which interferes with the due process of the court.

In its analysis of the double cross-examination argument, the court noted that Cayman law provides for oral discovery through the right to seek pretrial cross-examination of individuals who have responded to interrogatories. Accordingly, the prospect of double cross-examination of a future trial witness was not an abuse of process per se.

The Court of Appeal upheld the Grand Court's ruling but added the caveat that no transcript of depositions would be admissible as evidence at trial without an order of the Grand Court.

The caveat in Lyxor underlines the fact that it is open to the Cayman Court (and indeed any non-U.S. tribunal) to place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate or to retain control of its process, such as enjoining the parties from pursuing further discovery or refusing to consider any of the evidence gathered under Section 1782.[10]

Indeed, the Grand Court has shown in recent times that it will not always view Section 1782 applications positively when made while Cayman proceedings are ongoing. In the ongoing Section 238 share valuation case of In the Matter of Nord Anglia Education Inc.,[11] Justice Ian Kawaley was seemingly unimpressed with the repeated Section 1782 applications made by the dissenters, commenting that they had "embarked on a frolic of their own by seeking relief from foreign courts, purportedly in aid of the present proceedings, without any involvement on the part of this court".

The latter comment about "involving" the court indicates that there may be merit in giving the Cayman Court prior notice of the Section 1782 application, unless there are good reasons not to do so (e.g., where the evidence is required to ground an application for urgent injunctive relief, such as a worldwide freezing injunction).

Conclusion

Undoubtedly, the Lyxor decision has served to bolster subsequent applications from litigants in the Cayman Islands seeking to rely upon discovery obtained through Section 1782 orders. However, while the decision has not yet been challenged, there is still likely to be scope for anti-suit injunctions challenging the depositions of future witnesses to be successful particularly in cases where the evidence produced by the defending party is not as persuasive as that put forward by Phoenix.

Furthermore, it is clear that the timing of the Section 1782 application in the context of the foreign proceedings will be important. If the application is made prior to the issuance of any foreign proceedings with a view to gathering evidence to ground a claim, the applicant may be met with an argument that it is embarking on an intrusive “fishing expedition” without first having established any cause of action before a foreign tribunal. It seems such an argument is unlikely to deter a District Court from granting the order absent some other evidence which impacts on the four “Intel factors.”

On the other hand, if the application is made in close proximity to the commencement of a trial, the court may view it as a calculated interference with trial preparation.[12]

If the application is made after the hearing of the trial but pre-judgment, the court will likely view it as abusive and oppressive.[13]

What is clear is that evidence obtained through Section 1782 applications in the U.S. will continue to feature in Cayman proceedings. The extent to which that evidence is admissible, however, will continue to be decided on a case-by-case basis and those parties seeking to rely upon such evidence will need to respect the overriding jurisdiction, independence and integrity of the Cayman Courts.

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[1] Lancaster Factoring Co. Ltd. v. Mangone, 90 F. 3d 38, 41 (2nd Cir. 1996).

[2] In re Letter of Request from the CPS, at 691.

[3] Schlich v. Broad Inst. Inc. (In re Schlich), 893 F.3d 40, 46 (1st Cir. 2018); In re Penner , No. 17-cv-12136-IT, 2017 WL 5632658 (D. Mass. May 7, 2018).

[4] Intel Corp. v. Advanced Micro Devices Inc., 542 US 241 (2004).

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

[6] In re Imanagement Servs., 2005 WL 1959702, at p.3 (E.D.N.Y. Aug. 16, 2005).

[7] Phoenix Meridian Equity Ltd. v. Lyxor Asset Management SA, [2009] CILR 553.

[8] See Omega Group Holding Ltd. v. Kozeny [2002] CLC 132 and Benfield Holdings Ltd. v. Richardson [2007] EWHC 171 (QB).

[9] South Carolina Insurance Co v. Assurantie Maatschappij 'De Zeven Provincien NV [1987] AC 24, HL

[0] Euromepa SA v. R. Esmerian Inc., 51 F.3d 1095, 1101 (2d Cir. 1995).

[1] In the Matter of Nord Anglia Education Inc., FSD 235 of 2017 (IKJ).

[2] Benfield Holdings Ltd. v. Richardson [2007] EWHC 171 (QB).

[3] Bankers Trust International v. PT Dharmala Sakti Sejahtera [1996] CLC 252.