Getting Evidence in the US Before Commencing Litigation in Other Countries: Flexible Use of 28 USC § 1782

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It is no secret that the United States permits far broader pretrial discovery than most – probably ***all*** – other countries. True, other common law countries do provide some degree of pretrial discovery, usually by requiring production of documents and often providing for other methods as well. But discovery even in other common law countries tends to be less expansive (and less expensive) than in the US. Civil law countries are even more restrictive. Typically, there is no general pretrial discovery. Parties develop evidence on their own and usually have almost no pretrial access to the adversary's information.

In recent years, though, American discovery has been playing an increasing role in disputes in other countries. Under 28 USC § 1782, a person with an interest in a proceeding overseas can make its own request to an American district court for leave to obtain evidence in the United States. Section 1782 permits an applicant to request documents or testimony, or both.

One issue that has gained increasing focus is pre-litigation discovery. An applicant who meets the statutory thresholds for § 1782[1] may seek evidence in the US even if no actual proceeding abroad has been filed yet. This issue takes on special importance in civil law countries, where procedural rules often require that the document initiating a lawsuit must annex at least some of the evidence the plaintiff relies on. Sometimes a plaintiff may have a valid claim, but to support that claim, will need a document it does not have. So § 1782 may be an option in that situation – but the Supreme Court has cautioned that § 1782 is available only if the foreign lawsuit is within "reasonable contemplation."[2] What does that mean? How far down the road to an actual lawsuit does a dispute have to be before an American court will be satisfied that litigation is within reasonable contemplation?

A. What kind of contemplation is reasonable?

This issue has taken on extra significance as the volume of § 1782 applications has grown in recent years. And as the issue comes up more often, the case law is steadily developing guidelines to tell us what it means to have a lawsuit within reasonable contemplation.

It definitely ***does not*** mean a foreign would-be litigant can seek § 1782 evidence to help him decide whether he has a claim or not, or that he need only consider or discuss the possibility of commencing proceedings.[3] Americans cannot do that for domestic lawsuits and there is no reason to believe Congress wanted to allow foreigners to do it either.

On the other hand, the Supreme Court in *Intel* also made clear that the foreign case need not be imminent. The lower courts in the succeeding years have come up with a new test that is easy to articulate, but not so easy to define. Some patterns do emerge, though.

The Second and Eleventh Circuits both require the applicant to provide facts showing a lawsuit is in prospect. As the Eleventh Circuit put it, "a district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time."[4] The Second Circuit's test, enunciated in the 2015 case *Certain Funds v. KPMG, LLC*[5] is substantively similar:

> [T]he applicant must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that the action is being contemplated. . . .

[1] The statutory requirements are as follows: "(1) the person from whom discovery is sought reside[s] (or [is] found) in the district of the district court to which the application is made, (2) the discovery [is] for use in a proceeding before a foreign tribunal, and (3) the application [is] made by a foreign or international tribunal or 'any interested person.'" *In re Guo,* 965 F.3d 96, 102 (2d Cir. 2020). *See also In re Furstenberg Finance SAS*, 877 F.3d 1031, 1034 (11th Cir. 2017), *citing In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).

[2] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004).

[3] *Certain Funds v. KPMG, LLC*, 798 F.3d 113, 124-25 (2d Cir. 2015); *In re Sabag*, 2020 WL 4904811, case no. 19-mc-00084, slip op. at 4 (S.D. Ind. Aug. 18, 2020); *In re Wei*, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018); *In re Gulf Investment Corp.*, 2020 WL 7043502, case 19-mc-593 (VSB), slip op. at 4 (S.D.N.Y. Nov. 30, 2020). *See also Leutheusser-Schnarrenberger v. Kogan*, 2018 WL 5095133, case no. 18- mc-80171, slip op. at 3-4 (N.D.Cal. Oct. 17, 2018)

[4] *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014).

[5] 798 F.3d 113, 123-24 (2d Cir. 2015).

> [T]he Supreme Court's inclusion of the word "reasonable" in the "within reasonable contemplation" formulation indicates that the proceedings cannot be merely speculative. At a minimum, a § 1782 applicant must present to the district court some concrete basis from which it can determine that the contemplated proceeding is more than just a twinkle in counsel's eye. "Reliable indications," "objective indicium" and "concrete basis" all mean the applicant must show facts. The Second Circuit confirmed this in so many words in late 2020, by referring to "the fact-specific nature of the inquiry."[6]

But neither court specified which facts are necessary and sufficient to provide a "concrete basis" or "reliable indication." The Second Circuit explicitly declined to provide a formula in 2015 and again in 2020.[7] Because this is a factual issue, the court apparently believed that providing a checklist would make the analysis less flexible and less attuned to the nuances of a particular case. That leaves us to divine from the facts of individual cases what sorts of scenarios can suffice.

1. Don't apply too early

First we look at what does ***not*** suffice. *Certain Funds* denied an application that sought discovery for use in anticipated proceedings in Saudi Arabia and England. When the investors first applied for §1782 discovery, all they had done is retained counsel and "discuss[ed] the possibility of initiating litigation."[8] That was not enough even though, by the time the appeal was argued, they had actually commenced a proceeding in England. Whether a proceeding is within reasonable contemplation is measured as of the date of the §1782 application.[9] The lesson, of course, is not to jump the gun – be sure to have your facts in place ***before*** you make your application.

It should also come as no surprise that the Second Circuit held in November 2020, in *Mangouras v. Squire Patton Boggs*,[10] that a §1782 application should not have been granted where the allegations of wrongdoing abroad were conclusory and unelaborated. Vagueness is not a "reliable indication."

A subjective intention to launch a proceeding, coupled with little more than an explanation of how such proceedings work, is not a "concrete basis."[11] Listing possible venues and legal theories, without connecting them to facts or to the foreign country's law, likewise is not enough – especially if the applicant has not even engaged counsel in the foreign country.[12] If the applicant "d[oes] not provide any detail as to the potential form of litigation it intended to pursue, nor does it provide legal theories under which it intended to rely in such litigation," then it has failed to show that a lawsuit was reasonably contemplated.[13]

Especially fatal to an application is anything that suggests the applicant is using §1782 to help decide whether to sue. Use of "whether" or "possibly" is often a giveaway. It certainly was in *Mangouras*, in which the applicant was hoping to prove that certain persons had lied in earlier proceedings. In deciding that the application should not have been granted, the court italicized the key words when it quoted Mangouras's attorney: "discovery is going to help us determine *whether or not* these individuals knew what they were testifying to was false."[14]

The lower courts likewise have turned away applicants who appear to need the evidence to decide whether to sue and for what. That is a sure indicator that the future lawsuit is a matter of speculation and not within reasonable contemplation.[15] "Courts must guard against the specter that parties may use §1782 to investigate whether litigation is possible before launching it."[16]

2. Make a record: hire counsel and develop a case

The leading case on what suffices to show litigation

[6] *Mangouras v. Squire Patton Boggs,* 980 F.3d 88, 102 (2020)
[7] *Certain Funds*, 798 F.3d at 123-24; *Mangouras, supra,* 980 F.3d at 102.
[8] *Certain Funds* at 124.
[9] *Id.*
[10] 980 F.3d 88 (2d Cir. 2020).
[11] *In re Sabag*, 2020 WL 4904811, case no. 19-mc-00084, slip op. at 4 (S.D. Ind. Aug. 18, 2020).
[12] *In re Wei*, 2018 WL 5268125, case no. 18-mc-117, slip op. at 2 (D.Del. Oct. 23, 2018).
[13] *In re Gulf Investment Corp.*, 2020 WL 7043502, case 19-mc-593 (VSB), slip op. at 4 (S.D.N.Y. Nov. 30, 2020). *See also In re Pilatus Bank PLC*, 2021 WL 1890752, case no. 20-mc-94-JD, slip op. at 9 (D.N.H. May 11, 2021); *Leutheusser-Schnarrenberger v. Kogan*, 2018 WL 5095133, case no. 18- mc-80171, slip op. at 3-4 (N.D.Cal. Oct. 17, 2018).
[14] *Mangouras, supra,* 980 F.3d at 101. *Accord In re Pilatus Bank PLC*, 2021 WL 1890752, case no. 20-mc-94-JD, slip op. at 9 (D.N.H. May 11, 2021).
[15] *In re Sargeant*, 278 F. Supp.3d 814, 823 (S.D.N.Y. 2017). *See also In re Rendon*, 519 F. Supp.3d 1151 (S.D.Fla. 2021); *In re Newbrook Shipping Corp.*, 2020 WL 6451939, case no 20-misc-150, slip op. at 5 n.2 (D.Md. Nov. 3, 2020); *In re Asia Maritime Pacific Ltd.*, 253 F. Supp.3d 701, 707-08 (S.D.N.Y. 2015).
[16] *Sargeant, supra,* 278 F. Supp.3d at 823.

is "reasonably contemplated" is the same Eleventh Circuit decision that formulated the "reliable indications" test – *Consorcio Ecuatoriano*, decided in 2014.[17] In that case, the applicant CONECEL had conducted an internal investigation and audit that found certain former employees likely had engaged in fraud. CONECEL contemplated a civil, and later criminal, action in Ecuador. The reason CONECEL had not yet sued is that Ecuadorian law requires the plaintiff to annex its evidence to its pleading – evidence it did not have, but was seeking in the §1782 application. So the combination of an applicant's "facially legitimate and detailed explanation of its ongoing investigation, its intent to commence a civil action against its former employees, and the valid reasons for CONECEL to obtain the requested discovery under the instant section 1782 application before commencing suit" together sufficed to show "reasonable contemplation."

Note the importance that *Consorcio Ecuatoriano* placed on the factual investigation. The applicant had flushed out the key facts, explained the basis for liability and identified the court in which the action would be commenced.

The cases that grant pre-litigation §1782 applications tend to focus on the applicant having actually developed the basis for the foreign case. There is some case-to-case variation, but speaking generally, the court will consider persuasive a combination of most or all of these elements: the applicant has hired counsel, determined the facts, identified legal theories for the prospective lawsuit and represented its intention to litigate.

According to the Second Circuit, an application containing "well-documented assertions" of the basis for the claim, with sworn declarations of the applicant's intent to proceed, is enough to demonstrate that litigation was within reasonable contemplation.[18] District courts have come to similar conclusions.[19] Having previously commenced prior related litigation is an evidentiary point in favor of the applicant as well.[20]

The Fifth Circuit likewise relied on factual detail from the applicant. In *Bravo Express v. Total Petrochemicals & Refining U.S.*,[21] the Fifth Circuit stressed several factors: the applicant "la[id] out, in great detail, the facts that give rise to the prospective lawsuit;" its counsel "attested that Bravo had already prepared its 'claim of particulars' against [the prospective defendant] and was "intending of filing [*sic*] it in October of this year before the UK courts, the commercial division, the High Court of London" and "had requested and received extensions of time to file from the prospective defendant."[22]

Filing a provisional pleading abroad for purposes of interrupting the prescription period indicates that litigation is reasonably contemplated, at least where the applicant sets forth the factual basis for its claims.[23] A regulatory complaint, if still pending, also may be a reliable indicator that litigation is reasonably contemplated.[24]

The bottom line is that the closer the applicant is to having the case ready to file, the more likely it is that an American court will agree the case is within reasonable contemplation for purposes of §1782. Facts plus legal theories plus declarations of intention often equal "reasonable contemplation."

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[17] 747 F.3d 1262, 1270 (11th Cir. 2014).
[18] *In re Furstenberg Finance SAS*, 785 Fed. App'x 882, 885 (2d Cir. 2019. The Eleventh Circuit had earlier come to a similar conclusion in the same dispute. *Application of Furstenberg Finance SAS*, 877 F.3d 1031, 1035 (11th Cir. 2017) (statement of intention coupled with "specific evidence" is sufficient).
[19] *See, e.g.*, *In re Hansainvest Hanseatische Investment-GmbH*, 364 F. Supp.3d 243, 249 (S.D.N.Y. 2018) ("hiring German litigation counsel, retaining experts and sending a detailed demand letter," plus representing on the record intent to file by year-end suffice); *In re Top Matrix Holdings, Ltd.*, 2020 WL 248716, case no. 18-mc-465, slip op. at 4-5 (S.D.N.Y. Jan. 16, 2020) (sworn statement of intention plus description of legal theories).
[20] *In re Hornbeam*, 722 Fed. App'x 7, 9 (2d Cir. 2018).
[21] 613 Fed. App'x 319, 323 (5th Cir. 2015).
[22] *Id.*
[23] *California State Teachers Retirement Sys. v. Novo Nordisk, Inc.*, 2020 WL 6336199, case no. 19- 16458 (D.N.J. Oct. 29, 2020).
[24] *Sampedro v. Silver Point Capital, L.P.*, 818 Fed. App'x 14, 19-20 (2d Cir. June 5, 2020).