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SIGNIFICANT DEVELOPMENTS IN INTERNATIONAL LITIGATION BY WAY OF 28 USC § 1782

By Ava J Borrasso



Much has been written about the 28 USC § 1782 as a valuable tool to obtain evidence from U.S. courts for use in proceedings before foreign or international tribunals.¹ The topic of what qualifies as a “tribunal” and, more specifically, whether private international arbitrations constitute tribunals, has been the subject of much recent debate. Although many U.S. district courts have concluded that they do,² at the time of writing this article, no U.S. Circuit Court has yet sustained that view.³ While that determination appears to be forthcoming, that is not the subject of this article.

Instead, this article focuses on two recent decisions by the United States Court of Appeal for the Eleventh Circuit⁴ that address important issues of first impression and appear to have far-reaching ramifications. Most recently, in *Sergeeva v. Tripleton Int’l Ltd.*,⁵ the Court acknowledged that Section 1782 applies extraterritorially, and, under proper circumstances, can be used to compel the production of documents in the possession, custody or control of affiliates abroad. Prior to that, in *Glock v. Glock*,⁶ the Court invalidated as unfounded a long-standing presumption that evidence obtained pursuant to Section 1782

cannot be used subsequently in U.S. litigation. Both cases appear to meaningfully impact this ever-evolving area of international litigation by serving to expand the access to proof for proceedings foreign and domestic.

I. *Sergeeva* & Extraterritorial Discovery

In a case of first impression in the circuit, the Eleventh Circuit affirmed an order granting extraterritorial discovery pursuant to 28 U.S.C. § 1782 to support an asset recovery case.⁷ *Sergeeva* is significant because it recognizes that the scope of discovery available to support a foreign proceeding is not limited to information confined within U.S. borders but also reaches information accessible to those subject to the reach of U.S. courts. In addition, *Sergeeva* highlights the access to documents beyond U.S. shores pursuant to the federal subpoena power by recognizing that “possession, custody or control” extends to information in the hands of affiliated entities under proper circumstances. As such, the significance of *Sergeeva* is two-fold: it resolves the issue, in the Eleventh Circuit, of whether Section 1782 can be applied extraterritorially and it recognizes that subpoenaed documentary evidence also extends to *affiliated*

entities consistent with the Federal Rules of Civil Procedure (as expressly incorporated into Section 1782).⁸

A. Background & Elements of Section 1782

Following marital dissolution proceedings in Russia, a former wife undertook efforts to discover concealed marital assets in multiple jurisdictions including Cyprus, Latvia, Switzerland, the BVI and the Bahamas. She ultimately sought discovery in the United States through 28 U.S.C. § 1782 to support her claim before a presiding Moscow court adjudicating the division of marital assets. The application sought information from third party Trident Atlanta and its employee regarding information related to her former husband's beneficial ownership of a Bahamian company.⁹

The Court first set forth the prima facie requirements to obtain relief pursuant to 28 U.S.C. §1782:

(1) the request must be made “by a foreign or international tribunal,” or by “any interested person”; (2) the request must seek evidence, whether it be the “testimony or statement” of a person or the production of “a document or other thing”; (3) the evidence must be “for use in a proceeding in a foreign or international tribunal”; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.¹⁰

After determining that the predicate factors were met, the Court addressed the discretionary factors as set forth by the United States Supreme Court (the “*Intel* factors”): “(a) whether aid is sought to obtain discovery from a participant in the foreign proceeding (‘First Factor’); (b) ‘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’ (‘Second Factor’); (c) whether the applicant is attempting to use § 1782 to ‘circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States’ (‘Third Factor’); and (d) whether the discovery requests are ‘unduly intrusive or burdensome’ (‘Fourth Factor’).”¹¹

Trident Atlanta took issue with the third factor arguing that Section 1782 does not apply *extraterritorially*.¹² The Court examined Section 1782 and held that it plainly provides for production consistent with the Federal Rules of Civil Procedure. Because Rule 45 (Subpoena) calls for broad production of non-privileged documents, including those located outside of the U.S., the Court determined the only limitation imposed by the rules related to the “location for the *act of production*” not the location of the underlying documents.¹³ Therefore, documents subject to the subpoenaed party's control were subject to production.

While the determination appears rather straightforward, it addresses a conflict in application of Section 1782 dating back to *Intel*. Essentially, there have been two varying views as to whether Section 1782 entitles an applicant to obtain discovery of documents located outside of the U.S. (assuming the remaining

requirements are met). The predominant view was that Section 1782 did not apply extraterritorially while the minority view declined to limit its scope to U.S. borders.

The prevailing view was generally espoused in dicta and relied on language from legislative history¹⁴ and commentary of the one of the statute's chief drafters.¹⁵ For example, arguing against extraterritorial application, Professor Hans Smit argued that (1) the “evident purpose” of Section 1782 is to obtain evidence in the U.S. thereby setting up a “harmonious” international scheme where each jurisdiction determines production of evidence within its own borders; (2) application beyond borders would result in haphazard effects where a party unable to obtain foreign evidence in that jurisdiction obtained access due to the fortuitous presence of a party with information located in the U.S.; (3) extraterritorial application would render U.S. courts clearing houses for litigants from around the world thus substantially burdening U.S. courts; and (4) resulting conflicts would inevitably arise between U.S. and foreign courts.¹⁶

*In re Godfrey*¹⁷ is representative of this view. Declining to grant a Section 1782 application seeking documents located in Russia, the court cited Professor Smit's commentary and “[t]he bulk of authority in this Circuit, with which this Court agrees, hold[ing] that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States.”¹⁸ The court specifically addressed and parted company with the contrary view espoused from a different judge of the same court.¹⁹

That contrary view relies on nothing more than the plain language of Section 1782. Prior to *Sergeeva*, the extraterritoriality issue was squarely addressed in *In re Application of Gemeinschaftspraxis Dr. Med. Schottdorf* (“*Schottdorf*”) in which the court denied a motion to quash production of documents located in Germany.²⁰ The court reasoned:

Section 1782 requires only that the party from whom discovery is sought be “found” here; not that the documents be found here. 28 U.S.C. § 1782(a). For this Court to read an implicit document-locale requirement into § 1782 would be squarely at odds with the Supreme Court's instruction that § 1782 should not be construed to include requirements that are not plainly provided for in the text of the statute.²¹

Described aptly as that “lone dissenting voice that others have declined to follow,”²² the court declined to “supplant the policy expressed by Congress in the plain words of the statute” with legislative history or commentary.²³ Instead, the court concluded, “such considerations should be weighed on a case-by-case basis along with the other discretionary factors.”²⁴

In *Sergeeva*, the Eleventh Circuit Court of Appeals echoed the analysis set forth in *Schottdorf*. Arguing against the production of documents outside of the U.S., Trident Atlanta relied on commentary and legislative history as well as the presumption that U.S. law generally does not apply extraterritorially. The Court, however, declined “to adopt such a provincial view given



that the statutory text authorizes production of documents ‘in accordance with the Federal Rules of Civil Procedure.’²⁵ Further, because those rules place no limit on the location of documents or electronically stored information, only on the location of production, the Court required Trident Atlanta to produce documents within its possession, custody or control noting any other restriction would run afoul of “the discretion Congress accorded federal courts to allow discovery under § 1782 ‘in accordance with the Federal Rules of Civil Procedure.’”²⁶

B. “Possession, Custody, or Control” Extends to Affiliates Located Abroad

Next, Trident Atlanta argued that it lacked control over non-U.S. affiliates in order to obtain the subpoenaed information.²⁷ The Court first recognized that the only limits on Federal Rule of Civil Procedure 45 concern privilege or unduly burdensome material – neither of which was at issue.²⁸ Rejecting Trident Atlanta’s argument that it lacked the legal right to the documents, the Court followed precedent holding that “control” for purposes of discovery meant “the legal right to obtain the documents requested upon demand” and “may be established where affiliated corporate entities - who claim to be providers of complimentary and international financial services - have actually shared responsive information and documents in the normal course of their business dealings.”²⁹

The Court then determined that Trident Atlanta had the requisite control. As part of a group of companies with Trident Bahamas that operated as an international financial planner with production and liaison companies that cross-referred client requests, the Court reasoned that the entities were otherwise incapable of performing “their intended functions

for Trident Group clients” without the ability to exchange such information.³⁰ The Court held that the legal right to obtain information from an affiliated or related business entity with access to the information was sufficient.³¹

Sergeeva relied, in part, on *Costa v. Kerzner Int’l Resorts, Inc.*,³² which addressed document production in the hands of an affiliate. There, the defendants objected to production of documents held by their Bahamian affiliates and argued they did not have control over production and the Plaintiffs should be required to seek the information through the Hague Convention on Taking Evidence Abroad.³³ The court addressed the “possession, custody, or control” aspect of Rule 34 of the Federal Rules of Civil Procedure.³⁴ Noting that the requirement is broadly construed, the court held “control” “does not require that a party have legal ownership or actual physical possession of the documents at issue; indeed, documents have been considered to be under a party’s control (for discovery purposes) when that party has the ‘right, authority, or practical ability to obtain the materials sought on demand.’”³⁵

The court then applied the following analysis:³⁶

In determining whether a party has control over documents and information in the possession of nonparty affiliates, the Court must look to: (1) the corporate structure of the party and the nonparties; (2) the nonparties’ connection to the transaction at issue in the litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation.

Production was compelled because the defendants and affiliates were part of a unified corporate structure and

wholly owned by a single entity, had operational and financial interactions directly related to the transactions at issue, and the parent and subsidiary entities had a direct financial interest in the outcome of the case.³⁷ The court also rejected the argument that Plaintiffs be required to exhaust their efforts through the Hague Convention.³⁸

By contrast, in *SeaRock v. Stripling*,³⁹ the Court held that a ship owner lacked control over unrelated third parties who had invoiced him for work performed on a sunken ship. *See also, In Re Application of Passport Special Opportunities Master Fund, LP*⁴⁰ (denial of application pursuant to 28 U.S.C. § 1782 where movant failed to meet its burden to demonstrate that UK and Delaware Deloitte entities had requisite control over Deloitte affiliate in Pakistan despite change in corporate structure when it was not demonstrated that new conglomerate agreement provided authority or practical ability to obtain documents); *Wiand v. Wells Fargo Bank, NA*⁴¹ (holding bank was not required to produce documents in possession of nonparty affiliates where agency relationship was not established and requisite control was absent).⁴² In short, the determination of whether the requisite “control” exists is fact determinative.

C. Impact of *Sergeeva*

Sergeeva is significant on two counts. It expressly applies Section 1782 *extraterritorially* and it requires production of documents held by affiliates abroad consistent with the Federal Rules of Civil Procedure. The access to documentary evidence beyond U.S. borders under the control of a party located in the U.S. for use of parties involved in foreign proceedings may be invaluable. The decision is straightforward, predicated on the plain meaning of the statute and the Federal Rules of Civil Procedure, and cements the Eleventh Circuit’s role, under proper circumstances, as a key venue to obtain access to evidence to support international legal proceedings.

II. *Glock* & The Use of Documents Obtained By Section 1782 in Subsequent U.S. litigation

In the backdrop of another marital dissolution proceeding, this one pending in Austria, Helga Glock filed a Section 1782 action to discover evidence related to her husband’s creation of the Glock 17 handgun from several Glock entities in the United States.⁴³ Following procedural objections, the subpoenaed parties ultimately agreed to produce the documents subject to a protective order which limited the use of the documents, marked confidential, to cases in which Helga was party but required her to obtain leave of Court prior to using them.⁴⁴ About a year and a half after the Section 1782 case was filed, Helga filed a RICO⁴⁵ action in the U.S. and sought leave of the Court that had issued the original Section 1782 relief to use the documents pursuant to the terms of the protective Order.⁴⁶

The magistrate judge granted the relief but the district court reversed and sustained the objections of the Glock entities to the use of documents obtained by Section 1782 for a subsequent civil suit in the U.S. as “contrary to law,” reasoning, in part, that Helga could seek the documents through discovery in the RICO

action.⁴⁷ On appeal, the Eleventh Circuit reversed noting that none of its sister circuits had yet addressed the issue.⁴⁸

A. Analysis and Rationale

The proposition that evidence obtained in a Section 1782 proceeding cannot be used in subsequent U.S. litigation has been generally presumed despite the fact that the statute is silent on the precise issue.⁴⁹ Given that silence, the Court turned its attention to the near 150 year history and policy behind Section 1782 to “provide efficient means of assistance in our federal courts for litigants involved in international litigation and [to] prompt foreign courts to follow our generous example and provide similar assistance to our court systems.”⁵⁰ In light of the policy and given that the statute itself is silent on subsequent use, the Court then turned its analysis to general evidentiary principles set forth in the Federal Rules of Evidence and Federal Rules of Civil Procedure.⁵¹ Recognizing that a party is not required to “rediscover” documents in subsequent litigation that it already possesses; that requiring additional efforts to obtain documents already in the possession of the party runs afoul the principles of “just, speedy, and inexpensive” determination of disputes encouraged by the Federal Rules of Civil Procedure; and that opposing parties in any case may no longer have possession of the documents; the Court ruled that Section 1782 does not preclude the use of such pre-existing evidence in U.S. litigation.⁵²

The Court also rejected the Defendants’ contention that additional procedural hurdles should be employed before permitting use of documents obtained by Section 1782 in order to avoid attempts to bypass the rules of civil procedure through improper use of Section 1782.⁵³ Defendants essentially argued that permitting subsequent use of documents obtained through Section 1782 in a U.S. proceeding would run afoul of the third discretionary *Intel* factor – that is, concealing “an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”⁵⁴ The Court rejected that argument relying instead on the broad discretion accorded to courts to fashion proper relief in instances where a party improperly attempts to sidestep normal procedures.⁵⁵

The Court held that the limits on the use of evidence obtained by Section 1782 “are simply not supported by statutory text, legislative history, conventional discovery practice, or policy considerations.”⁵⁶ Once the Court determined that Section 1782 did not bar subsequent use of the documents, it addressed the specific requirements of the underlying protective order. The Court determined that those requirements were met by Helga when she returned to the issuing Court to request leave to use the documents.⁵⁷

B. Impact Moving Forward

It is noteworthy that the Section 1782 relief provided in *Glock* contained a confidentiality and protective Order. That Order limited future use of the material to the petitioner (Helga) and required that she return to the Court in order to obtain leave to use the information in a subsequent proceeding.⁵⁸ The limitation may easily not have been imposed had the parties not agreed to it

or had it not been requested of the court.⁵⁹ The opinion sets forth some precautions that a party resisting a Section 1782 petition may seek to enhance or impose. While it is important that a party seeking Section 1782 relief understand that it may not be limited to utilizing the evidence in proceedings outside of the United States, it is also advisable that parties legitimately resisting such relief seek to impose as many reasonably feasible barriers to subsequent use as possible. In *Glock*, the recipient of the information was required to return to the court that originally granted the relief in order to use it. However, absent such a limitation after *Glock*, a recipient of documents obtained by Section 1782 may be free to use the information in U.S. litigation.

III. Conclusion

Recent developments in the applications of Section 1782 demonstrate that it has continued to expand and evolve. *Sergeeva* holds that information in the hands of an entity located in the U.S. but stored abroad, is subject to disclosure and that Section

1782 has extraterritorial application. It also recognizes that documents in the hands of affiliates to a duly subpoenaed entity and subject to its control may be reached – even when those affiliates are outside of U.S. jurisdiction. Given the import and breadth of this development, parties involved in qualified foreign proceedings should consider whether access to information is warranted under the particular facts and circumstances of their dispute. Correspondingly, it is incumbent on parties involved in subsequent litigation in the U.S. to be cognizant of any prior successful efforts to obtain evidence through Section 1782 and to undertake efforts to access and best utilize that information.

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- 1 Portions of this article were originally published: Ava J Borrasso, “*The Eleventh Circuit Affirms Extraterritorial Discovery to Assist International Proceeding & Production of Documents Held by Affiliates Abroad*,” vol. XXXIII, no. 1, Florida Bar ILQ 22 (Winter 2017). By way of context, 28 USC §1782 (titled “Assistance to foreign and international tribunals and to litigants before such tribunals”) appears in the United States Code as part of chapter 28 (addressing Judiciary and Judicial Procedure), at Part V (Procedure) and in Section 117 (Evidence; Depositions). It is surrounded by sections addressing Transmittal of letter rogatory or request (Section 1781); Subpoena of person in a foreign country (Section 1783); Contempt (Section 1784) and Subpoenas in multiparty, multi-forum actions (Section 1785).
- 2 See e.g., *In re Kleimar N.V.* No. 16-mc-355, 2016 U.S. Dist. LEXIS 165297, at *5-6, 2016 WL 6906712 (S.D.N.Y. Nov. 16, 2016) (London Maritime Arbitration Association constitutes “foreign tribunal” for purposes of Section 1782).
- 3 Interestingly, the Eleventh Circuit was also first to hold (temporarily) that private international arbitration tribunals constitute “proceedings” pursuant to Section 1782 but then retracted that finding and ruled on narrower grounds. See, *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 996 (11th Cir. 2012), *vacated sua sponte and replaced*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) (“We decline to answer [whether the private arbitration is a ‘tribunal’] on the sparse record found in this case. . . . Thus we leave the resolution of the matter for another day.”). While two circuits ruled that private arbitrations do not meet the definition of “foreign proceeding” they were decided prior to the United States Supreme Court decision in *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241 (2004) which leaves that door open.
- 4 The Court of Appeal for the Eleventh Circuit presides over cases originating from the district courts of Alabama, Florida and Georgia. It is generally considered one of the more conservative U.S. circuits since its creation in 1981.
- 5 834 F.3d 1194 (11th Cir. 2016).
- 6 797 F.3d 1002 (11th Cir. 2015).
- 7 *Sergeeva v. Tripleton Int’l Ltd. et al.*, 834 F.3d 1194 (11th Cir. 2016).
- 8 28 U.S.C. § 1782(a) provides in pertinent part: “The district court 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, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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 . . .*” (emphasis added).
- 9 *Sergeeva*, 834 F.3d at 1196.
- 10 *Id.* at 1198-99 citing, *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1269 (11th Cir. 2014) (quoting *In re Clerici*, 481 F.3d 1324, 1331 (11th Cir. 2007).
- 11 *Id.* at 1199 citing, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).
- 12 *Id.*
- 13 *Id.* at 1200 (emphasis in original).
- 14 See Tyler B. Robinson, *The Extraterritorial Reach of 28 U.S.C. § 1782 in Aid of Foreign and International Litigation and Arbitration*, 22 The Am. Review of Int’l Arbitration 135 (2011). Robinson’s excellent article specifically sets forth in detail the pros and cons with respect to extraterritorial treatment of 28 USC § 1782. His conclusion that the matter rests within judicial discretion is much in line with the rationale set forth in *Sergeeva* and *Schottdorf* discussed *infra*. Robinson cites the following legislative history relied on by the then prevailing view: S. REP. NO. 88-1580 (1964) reprinted in 1964 U.S.C.C.A.N. 3782, 3788 (“The proposed revision of section 1782, . . . clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence *in the United States*”) (emphasis added). *Id.* at 138, 139 n.12.
- 15 See, e.g., Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 SYRACUSE J. INT’L L. & COM. 1 (1998). Noting that the statute itself “*does not provide explicitly that § 1782 has no extraterritorial effect*,” Professor Smit nonetheless concluded that Section 1782 should not be used to obtain documents beyond U.S. shores. *Id.* at 12 n.52 (emphasis added).
- 16 *Id.* at 11-12.
- 17 526 F. Supp. 2d 417 (S.D.N.Y. 2007).
- 18 *Id.* at 423 citing, *In re Microsoft*, 428 F. Supp. 2d 188 (S.D.N.Y. 2006); *In re Nieri*, 2000 WL 60214 (S.D.N.Y. 2000); *In re Sarrio, S.A.*, 119 F.3d 143 (2d Cir. 1997) (dicta).
- 19 *Schottdorf* discussed *infra*.
- 20 2006 WL 3844464 (S.D.N.Y. 2006) (J. Jones).
- 21 *Id.* at *5.
- 22 Robinson, *supra* note 14, at 141.
- 23 *Schottdorf*, at *9 n.13.

- 24 *Id.*
- 25 *Sergeeva*, 834 F.3d at 1200.
- 26 *Id.*
- 27 *Id.* at 1200-01.
- 28 *Id.* n.5.
- 29 *Id.* at 1201.
- 30 *Id.*
- 31 *Id.* The Court also affirmed a monetary contempt sanction in excess of \$230,000 imposed by the district court on Trident Atlanta for failing to establish a good-faith attempt to comply with the subpoena. *Id.* at 1202.
- 32 277 F.R.D. 468, 470-71 (S.D. Fla. 2011)
- 33 *Id.* at 470.
- 34 Rule 34 and 45 requirements for production both call of documents in the “possession, custody, or control” of the party to whom the request or subpoena is directed. Fed. R. Civ. P. 34(a)(1) & (c); 45(a)(1)(A)(iii).
- 35 *Costa*, 277 F.R.D. at 471 (citations omitted).
- 36 *Id.*
- 37 *Id.* at 472-73.
- 38 *Id.* at 473.
- 39 736 F.2d 650, 653-54 (11th Cir. 1984) (“Under Fed. R. Civ. P. 34, control is the test with regard to the production of documents. Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.”)
- 40 2016 U.S. Dist. LEXIS 25657 (S.D.N.Y. Mar. 1, 2016).
- 41 2013 U.S. Dist. LEXIS 174768 (M.D. Fla. Dec. 13, 2013).
- 42 The Court looked to *Costa* to analyze the control issue between Wells Fargo and its non-party Wachovia affiliates. While the documents requested did impact the affiliates and a connection between the nonparties and Wells Fargo was present, the court determined that the receiver failed to demonstrate the affiliates had an interest in the outcome of the litigation or sufficient commonality in the corporate structure or operations to warrant production. Notably, although the nonparties and Wells Fargo had a common parent, the relationship was not closely-held but related to different subsidiaries at different levels before reaching a common remote publicly-traded parent. The court, therefore, declined to find that Wells Fargo had the requisite control over the affiliates to produce the documents.
- 43 *Glock*, 797 F.3d at 1004-05.
- 44 *Id.* at 1010.
- 45 “RICO” indicates an action brought pursuant to the Racketeer Influenced and Corrupt Organizations Act.
- 46 *Id.* at 1005.
- 47 *Id.*
- 48 *Id.* at 1007.
- 49 The Court reasoned that the statutory language does not expressly allow or prohibit the subsequent use of documents obtained pursuant to Section 1782. *Id.* at 1006-07.
- 50 *Id.* at 1007 quoting, *In the Matter of the Application of Malev Hungarian Airlines*, 964 F.2d 97, 99 (2d Cir. 1992) (citing S. Rep. No. 1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3792094).
- 51 The Court addressed the distinction between the use of evidence and its admission which is clearly a matter for the court presiding over the litigation. *Id.* at 1007.
- 52 *Id.* at 1007-08.
- 53 *Id.* at 1009-10.
- 54 *Id.* at 1009 quoting, *Intel*, 542 U.S. at 264-65.
- 55 *Id.* at 1009-10.
- 56 *Id.* at 1010.
- 57 *Id.* at 1010-11.
- 58 *Id.* at 1004-05.
- 59 *In re POSCO*, 794 F.3d 1372 (Fed. Cir. 2015) is an interesting corollary to *Glock*. There, the Court granted a motion for protective order to bar introduction of evidence obtained through U.S. litigation in a Japanese case and reversed and remanded the case to the district court with directions to apply Section 1782 requirements to its analysis. The U.S. district court had imposed confidentiality on documents produced in a patent infringement and unfair competition case between Nippon Steel and POSCO. Nippon subsequently sought to modify the protective order and lift confidentiality for some of the documents so that it could use them in a Japanese trade secret misappropriation case between the parties. The special master and district court judge applied existing precedent for modification of protective orders and ruled that the evidence could be produced. POSCO sought a writ of mandamus precluding the access. The Court of Appeals determined that other circuit courts had not specifically addressed, post *Intel*, whether Section 1782 applied to protective orders related to use of evidence abroad. The Court determined that the discretionary factors set forth in *Intel* had to be addressed and remanded the case to the district court for consideration. The concurring opinion agreed to issuance of the writ of mandamus based on its view that the district court violated comity principles by imposing restrictions on a foreign court’s use of the materials (by requiring the Japanese court to maintain the information as confidential and restricting access to third parties). However, the concurrence did not agree that Section 1782 should be considered as it “was never intended to apply to situations where the party is already in possession of the documents it seeks to use in the foreign proceeding” and therefore requiring such an analysis violates “the Third Circuit’s well-settled test for modifying protective orders.” Clearly, the impact of Section 1782 on any proceeding involving foreign use of documents obtained in the U.S. will continue to evolve.



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Ava J Borrasso, Principal of Ava J Borrasso, P.A. in Miami, Florida, concentrates her practice on business and international litigation and arbitration. Prior to establishing the firm, she was a shareholder of a highly regarded international law boutique for nine years where she practiced international litigation and arbitration. In over twenty years of practice, she has acted as lead counsel in international litigation and international commercial arbitration matters - frequently involving the prosecution and defense of claims in the tens of millions of dollars. Ms. Borrasso serves as an arbitrator on the commercial panel of the American Arbitration Association and is a member of the ICC Arbitration Committee through the USCIB. She has been recognized by Legal 500 Latin America, Legal Elite & Super Lawyers for international practice and received her law degree from Loyola University of Chicago School of Law where she was a member of Law Review.

