

# Client Alert

February 2019

## Massachusetts Federal Court Provides Another Expansive Reading to 28 U.S.C. § 1782 Discovery

What Happened: On Wednesday, February 6, 2018, a Massachusetts federal court allowed two Peruvian sporting goods companies and their principal to obtain 28 U.S.C. § 1782 discovery despite objections that the underlying Peruvian dispute belonged in arbitration in Massachusetts.

The Bottom Line: In May 2018, two Peruvian sporting goods distributors and their principal petitioned a district court in Massachusetts for discovery against Massachusetts-based New Balance, Inc., pursuant to 28 U.S.C. § 1782—the federal statute providing for evidence-gathering assistance to foreign and international tribunals and litigants. On Wednesday, the court entered an order allowing discovery to move forward, despite arguments that Peruvian courts did not have jurisdiction over the underlying litigation in light of an arbitration provision between two of the parties. Persons located in the United States should therefore be aware of the expansive reach some courts continue to give 28 U.S.C. § 1782.

### The Full Story

28 U.S.C. § 1782 (“Section 1782”) allows participants in foreign legal proceedings to come to the United States and take American-style discovery from people and information sources located in the United States. The grant of discovery under the statute is discretionary. 28 U.S.C. § 1782(a) (“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...”) (emphasis added). One of the factors a district court must consider in deciding whether to grant Section 1782 discovery assistance is whether the evidence sought will be “for use in a proceeding in a foreign or international tribunal.” *Id.*

In *In re: Application of Peruvian Sporting Goods SAC*, Case No. 1:18-mc-91220 (D. Mass.), petitioners Peruvian Sporting Goods S.A.C. (“PSG”), Superdeporte S.A.C. (“Superdeporte”) and Rodrigo Ribadeneira (“Ribadeneira” and, together with PSG and Superdeporte, “Petitioners”) filed a Section 1782 petition in the US District Court for the District of Massachusetts to issue four subpoenas to New Balance and its executives connected with a distribution agreement between Petitioners and New Balance. According to the petition, the basis for their Section 1782 discovery petition is Ribadeneira’s (PSG and Superdeporte’s principal) 2017 lawsuit against New Balance arising out of what Petitioners call an “abrupt and unexplained” cancellation of the parties’ distribution agreement.

According to the petition, PSG and New Balance executed a three-year distribution agreement in 2013 which governed the sale of New Balance products in Peru. In 2015, New Balance allegedly proposed that the parties enter into a *new* agreement, to take effect upon the expiration of the 2013 agreement—this time, asking PSG to create a new Peruvian entity, Superdeporte, to serve as New Balance’s exclusive distributor. According to Petitioners, however, by the time Ribadeneira created Superdeporte, New Balance backed out of the deal to work with another distributor.

Petitioners contend the subpoenas, which seek the production of both documents and testimony, are necessary to further Ribadeneira’s ongoing litigation against New Balance in the Peruvian courts, which courts would be receptive to such evidence. New Balance in turn objected to the petition and moved to quash the subpoenas or stay discovery. According to New Balance, because the 2013 distribution

agreement between PSG and New Balance required that disputes be resolved via arbitration in Massachusetts, Ribadeneira's litigation in Peru, which purportedly arose out of that agreement, was improper. Thus, New Balance contended, the district court should, at a minimum, postpone granting discovery until those forum and venue issues are resolved by the Peruvian courts. By 2019, New Balance had become a party in both the Peruvian proceedings (a factor typically weighing against Section 1782 discovery), as well as a later-filed arbitration proceeding in the United States regarding the same issues. Despite this, the court granted Petitioner's Section 1782 discovery requests over objections that Petitioners would be engaging in one-sided discovery which would unfairly tilt the scales in the Peruvian litigation. See Dkt. 47 at 9; see also *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (noting that a factor favoring discovery is whether the person from whom discovery is sought is *not* a participant in the foreign proceeding and is therefore outside the foreign tribunal's jurisdictional reach).

In rejecting New Balance's argument, the district court reasoned that it "need not await a foreign tribunal's determination that it has jurisdiction before granting an application for a Section 1782 subpoena." See Dkt. 40 at 9. (citing *In re Republic of Ecuador*, No. C 11-80171 CRB, 2011 WL 4434816, at \*6 (N.D. Cal. Sept. 23, 2011)). In reaching its conclusion, the court noted, "The parties have represented that they do not know when the Peruvian courts will rule on the jurisdictional issue. Accordingly, this Court declines to enter a stay of unknown, and potentially lengthy, duration." *Id.* at n. 8.

The decision follows a line of cases after the Supreme Court's decision in *Intel*, 542 U.S. at 256, which held that, to fall within the scope of Section 1782(a), a proceeding need not be actual or ongoing, but "within reasonable contemplation." *E.g.*, *In re Veiga*, 746 F. Supp. 2d 8, 23 (D.D.C. 2010) (citing *Intel*, 542 U.S. at 259); see *In re Republic of Ecuador*, 2011 WL 4434816, at \*6.

Hunton Andrews Kurth LLP will continue to monitor any developments in this case, as well as the law surrounding 28 U.S.C. § 1782 in general. In the meantime, please feel free to contact the attorneys listed below for further information.

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