

Section 1782: The *Other* Way To Obtain US Discovery For Use In Non-US Insolvency Proceedings

Office holders (e.g., official liquidators; bankruptcy trustees) have two independent options for accessing broad US discovery powers to assist their efforts in non-US insolvency proceedings. Section 1782, though lesser known, will be the best option in many circumstances, especially in mid- and smaller-sized proceedings.

Chapter 15: the familiar option

Many readers may know that Chapter 15 – the United States’ version of the UNCITRAL Model Law on Cross-Border Insolvency by which proceedings around the world can be recognized and enforced in the US – gives office holders post-recognition authority to gather extensive evidence from persons and entities located in the US. That authority can be an invaluable tool for identifying and collecting debtor assets, verifying or opposing creditor claims, and pursuing clawback and fraud-based actions against those who caused or unduly benefited from the debtor’s demise.

But Chapter 15 is a one-size-fits-all proposition, offering a lone path to recognition for the smallest of liquidations and the largest of restructuring schemes alike. An office holder must follow the same procedures and satisfy the same evidentiary burdens whether its motivation is obtaining US discovery powers exclusively or the entire panoply of rights and protections that become available upon Chapter 15 recognition. For example, when representatives of the Hong Kong and BVI scheme of arrangement proceedings for *China Evergrande Group* recently applied for Chapter 15 recognition, they submitted an application and supporting papers to the New York bankruptcy court totaling more than 2300 pages! An application for a mid- or smaller-sized liquidation would not need to be that robust, but would still require preparation of substantial paperwork and evidentiary proof. Moreover, Chapter 15 recognition cannot be granted until several weeks (and possibly much longer) after the application is submitted, once notice is given to all interested parties and a hearing is held before a US bankruptcy court. As a result, Chapter 15 may not be an effective option for office holders whose ability to benefit from US discovery is highly dependent on proceeding quickly, quietly and at minimal cost to stakeholders in their insolvency proceedings.

Section 1782: the often faster, cheaper, and more discreet alternative

Fortunately, there is an alternative path to obtaining US discovery that will often be a better fit for those circumstances: 28 U.S.C. § 1782. Unlike Chapter 15, Section 1782 is a discovery-only mechanism, designed to enable participants in a wide variety of non-US proceedings – including insolvency proceedings – to compel document productions and testimony from persons and entities located in the US. Because the scope is much narrower, a Section 1782 proceeding generally requires less paperwork, and therefore can be accomplished more cost-effectively than a Chapter 15 proceeding.

Other features of Section 1782 will make it an attractive option for liquidators and bankruptcy trustees seeking hidden debtor assets or conducting forensic analyses of complex finances or fraudulent transactions. With a single Section 1782 application in New York City or South Florida, an applicant can seek correspondent banking and wire transfer details from numerous international banks with a presence in those locations. Moreover, US district courts routinely grant Section 1782 applications permitting discovery that is much broader in scope than what is available in the non-US proceedings for which the discovery is being sought. Thus Section 1782 will be of particular benefit to liquidators and trustees appointed in jurisdictions that afford office holders limited authority to compel disclosures from stakeholders and third parties.

Perhaps the most attractive features of Section 1782 are speed and discretion. Section 1782 applications can be filed *ex parte*, i.e. without prior notice to those from whom discovery is sought and against whom it will be used. US district courts often approve such applications within days of their filing (although it can take longer). Moreover, when discovery is being sought from a third party, such as a bank, the person or entity against whom the applicant intends to use the discovery may not be alerted to the Section 1782 proceeding until after the discovery is obtained. In appropriate circumstances, US district courts may grant an applicant's requests to seal 1782 proceedings and enjoin those from whom discovery is being compelled from informing others.

There are several examples of office holders successfully using Section 1782 to obtain US discovery. For example, US district courts have granted Section 1782 applications by the joint trustees of English bankruptcy proceedings,¹ court-appointed receivers in a Cayman receivership proceeding,² court-appointed liquidator in an Israeli liquidation proceeding,³ court-appointed liquidators in coordinated Hong Kong and Bermuda liquidation proceedings,⁴ and the court-appointed trustee in an Italian bankruptcy proceeding.⁵ Notably, US district courts have also granted Section 1782 applications by individual stakeholders to obtain US discovery for use in various non-US insolvency and insolvency-related proceedings, including a debtor examination in Hong Kong⁶ and Russian bankruptcy proceedings.⁷

Conclusion

Office holders (and other stakeholders) in mid- and smaller-sized insolvency proceedings would do well to consider the benefits of seeking US Discovery through Section 1782.

¹ *Application Of Hellard*, No. 21-MC-864 (GHW) (KHP), 2022 WL 2819408 (S.D.N.Y. July 19, 2022).

² *Application of Dickson*, No. 20-MC-51 (RA), 2020 WL 550271 (S.D.N.Y. Feb. 4, 2020).

³ *Application of Gissin*, 649 F. App'x 27 (2d Cir. 2016).

⁴ *Application of Hill*, No. M19-117 (RJH), 2005 WL 1330769 (S.D.N.Y. June 3, 2005).

⁵ *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38 (2d Cir. 1996).

⁶ *China Constr. Bank (Asia) Corp. Ltd.*, No. 23-MC-17 (JMF), 2023 WL 3791711 (S.D.N.Y. June 2, 2023).

⁷ *Victoria, LLC v. Likhtenfeld*, 791 F. App'x 810, 816 (11th Cir. 2019).

Author



Jeremy C. Hollembeak
Attorney, Baird Holm LLP