

2nd Circ. Appears Open To Post-Judgment Section 1782 Use

By **Jeff Newton** (May 17, 2022, 1:20 PM EDT)

As 21st century disputes take on an increasingly cross-border character, so, too have parties resorted to a powerful tool provided to non-U.S. litigants under American law — petitions to take discovery pursuant to Title 28 of the U.S. Code, Section 1782.

While many have focused on the question of whether private international arbitrations can support Section 1782 petitions, case law has evolved on another question: Can Section 1782 be used by litigants seeking to identify property to satisfy judgments rendered in non-U.S. proceedings?



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Such applications are concentrated in the U.S. District Court for the Southern District of New York — home to the financial institutions which are common targets of Section 1782 subpoenas to identify assets of recalcitrant debtors.

In a Feb. 3 decision — amended Feb. 24 — in *The Federal Republic of Nigeria v. VR Advisory Services Ltd.*, the U.S. Court of Appeals for the Second Circuit clarified its prior case law on this question, signaling increased openness to Section 1782 petitions seeking evidence for use in post-judgment, non-U.S. proceedings.

Indeed, *VR Advisory Services* rejected prior cases holding that Section 1782 can never be used for post-judgment proceedings, providing a powerful tool to judgment creditors.

Courts interpret Second Circuit precedent to bar post-judgment Section 1782 petitions.

First, some basics: Section 1782 grants interested parties in non-U.S. proceedings access to the federal courts to collect evidence for use in "a proceeding in a foreign or international tribunal." When determining whether a proceeding is of the type contemplated by Section 1782, the Second Circuit has asked whether the proceeding is adjudicative in nature.

In *Euromepa SA v. R. Esmerian Inc.* in 1998,^[1] the Second Circuit queried whether proceedings to identify assets of a bankruptcy estate were sufficiently "adjudicative." The court reasoned that the French bankruptcy matter was "not an adjudicative proceeding" because "[t]he merits of the dispute between [the parties had] already been adjudicated and [would] not be considered in the French bankruptcy proceeding."^[2]

In the wake of *Euromepa*, some courts in the Southern District of New York read this passage as a bright-line rule, and denied Section 1782 petitions seeking to identify assets for freezing or seizure in non-U.S. proceedings. In *Jiangsu Steamship Co. v. Success Superior Ltd.* in 2015, the petitioner sought discovery "to bring unspecified 'foreign attachment proceedings' (in unspecified foreign countries) in order to secure or satisfy any award it might receive."^[3]

The court denied the petition, flatly holding that "neither prejudgment attachment nor post-judgment enforcement proceedings are 'adjudicative' in nature."^[4] Similarly in 2015, in *In re: MT Baltic Soul Produktentankschiff-Ahrtsgesellschaft mgH & Co. KG*, the petitioner sought discovery to enforce an English judgment against a counterparty and its alter egos.

Here too, the court — citing *Euromepa* — denied the petition, again holding that requested discovery was only "in relation to a contemplated post-judgment action, which *Euromepa* holds is not a 'foreign proceeding' within the meaning of Section 1782."^[5] Also in 2015, another judge of the Southern District reached a similar conclusion — again as to prejudgment attachment — in the case of *In re: The Petition of Asia Maritime Pacific Ltd.*^[6]

After *Jiangsu Steamship*, *Baltic Soul* and *Asia Maritime*, practitioners could be forgiven for thinking that Section 1782 relief was off the table for litigants seeking discovery into an opponent's assets for purposes of prejudgment attachment or post-judgment enforcement.

Recent decisions in the SDNY revive post-judgment Section 1782 applications.

However, cases in the Southern District in recent years breathed new life into Section 1782 as a tool for the identification of assets. In the 2017 decision of *In re: Accent Delight International Ltd.*,^[7] the Second Circuit explained that the touchstone of the for use in a foreign proceeding analysis is whether the petitioner "has the practical ability to inject the requested information into a foreign proceeding," and clarified that, "it is not fatal to the application that he or she lacks a claim for relief before the foreign tribunal."^[8]

In other words, the Second Circuit placed the focus on whether the party seeking Section 1782 discovery can make use of the requested documents in a non-U.S. court, and de-emphasized *Euromepa*'s focus on the pre- or post-judgment character of the proceedings.

Consistent with this refocusing, judges have granted Section 1782 petitions aimed at identifying assets for the purposes of prejudgment attachment and post-judgment enforcement efforts. In *Union Fenosa Gas SA v. The Depository Trust Company* in 2020,^[9] the court declined to credit the respondent's argument that *Euromepa* introduced "a categorical prohibition" on using Section 1782 in aid of non-U.S. attachment proceedings.^[10]

Instead, the court granted discovery aimed at identifying ownership of funds held by banks that could be subject to a third party debt order for satisfaction of an arbitral award.^[11]

Less than two months later, the court in the case of *In re: Vale SA* granted a Section 1782 petition predicated on a claim under English law permitting arbitration award creditors to trace and recover funds previously paid to the award debtor which had been transferred to third parties.^[12] Overruling the respondent's objection, the court reasoned that the expansion of liability to transferees constituted an adjudicative proceeding.

In December 2020's In re: Arida Management LLC, another Southern District of New York judge largely granted a Section 1782 petition to support claims in a Russian insolvency, stating that "Section 1782 relief may properly be granted to take discovery of assets in order to enforce an existing judgment, provided that ... the materials sought could be employed to some advantage." [13]

Further decisions in 2021 likewise permitted Section 1782 applicants to take discovery focused on the assets of defendants or judgment debtors in non-U.S. proceedings. [14]

For its part, the Second Circuit has explicitly declined to make a clear statement whether "Section 1782 is properly invoked to obtain discovery related not to the merits of an underlying dispute but to asset identification." [15]

VR Advisory Services holds that courts were wrong to impose a categorical bar on post-judgment Section 1782 petitions.

On Feb. 3, however, the Second Circuit issued the opinion in Federal Republic of Nigeria v. VR Advisory Services. [16] VR Advisory Services involved an appeal from a denial of a Section 1782 petition in which the district court reasoned that an English action to recognize an arbitration award was of a similar character to the French bankruptcy proceeding that did not support a Section 1782 petition in Euromepa. [17]

Importantly, the circuit noted that the district court had misread Euromepa "to the extent that it understood that case to hold that the mere completion of an initial adjudication of a dispute categorically disqualifies a foreign proceeding under Section 1782's statutory 'proceeding' requirement."

Instead, the court reasoned that "Euromepa was fundamentally a case about mootness ... [because] the discovery sought in the United States was no longer of any use in the matter for which it was originally sought." [18]

In essence, the decision in VR Advisory Services characterized Euromepa as being a decision about a litigant's practical ability to use the requested documents into the non-U.S. litigation, rather than a decision concerning the essential adjudicative character of the French bankruptcy case.

While this may not be a clear statement that Section 1782 is properly invoked to conduct pure asset-related discovery, it does appear to once and for all discard the bright-line prohibition on post-judgment Section 1782 discovery set out in Jiangsu Steamship and Baltic Soul. Indeed, one Southern District of New York case recognized as much a few weeks after VR Advisory Services was decided. [19]

Following VR Advisory Services, litigants hoping to identify assets flowing through U.S. financial institutions to satisfy a foreign judgment stand on firmer ground, if they can show that a foreign tribunal can take some action based on the information obtained.

While the world grappled with a pandemic, the weight of the case law in the Second Circuit has shifted in favor of litigants in non-U.S. proceedings who may seek U.S. discovery tools to identify assets that could be seized to satisfy judgments abroad. The Second Circuit has now added further support to such applications with its recent decision in VR Advisory Services.

In light of this shift, claimants holding judgments or freezing orders, and who may seek to further litigate

outside the U.S. to apply those orders or judgments to additional assets or parties, would be wise to consider Section 1782 applications as an arrow in their litigation quiver.

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[1] *Euromepa SA v. R. Esmerian Inc.*, 154 F.3d 24 (2d Cir. 1998).

[2] *Id.* at 28.

[3] *Jiangsu Steamship Co. v. Success Superior Ltd.*, 2015 U.S. Dist. LEXIS 18388, at *2-3 (S.D.N.Y. Jan. 6, 2015).

[4] *Id.* at *9.

[5] 2015 U.S. Dist. LEXIS 136080, at *4 (S.D.N.Y. Oct. 6, 2015).

[6] *In Re: The Petition of Asia Maritime Pacific Ltd.*, 253 F. Supp. 3d 701, 707 (S.D.N.Y. 2015) (denying Section 1782 petition where "the information will be used to identify assets to attach as security").

[7] *In re: Accent Delight International Ltd.*, 869 F.3d 121 (2d Cir. 2017).

[8] *Id.* at 132.

[9] *Union Fenosa Gas SA v. The Depository Trust Company*, 2020 U.S. Dist. LEXIS 94910 (S.D.N.Y. May 29, 2020).

[10] *Id.* at *9.

[11] *Id.* at *14.

[12] 2020 U.S. Dist. LEXIS 127433, at *8-9 (S.D.N.Y. July 20, 2020).

[13] *In re: Arida Management LLC*, 2020 U.S. Dist. LEXIS 239397, at *11 (S.D.N.Y. Dec. 21, 2020).

[14] See, e.g., *In re JSC BTA Bank*, 2021 U.S. Dist. LEXIS 245819, at *6-7 (S.D.N.Y. Dec. 27, 2021); *In re Lake Holding & Fin. S.A.*, 2021 U.S. Dist. LEXIS 117277, at *45-46 (S.D.N.Y. June 23, 2021); *Ex parte in re Abdalla*, 2021 U.S. Dist. LEXIS 9615, at *4 (S.D.N.Y. Jan. 19, 2021).

[15] *Gorsoan Ltd. v. Sundlun*, 843 F. App'x 352, 354 (2d Cir. 2021).

[16] 2022 U.S. App. LEXIS 3079. An amended opinion was issued February 24, 2022.

[17] *Id.* at *45.

[18] *Id.*

[19] See *In re YS GM MARFIN II LLC*, 2022 U.S. Dist. LEXIS 38030, at *16 n.8 (S.D.N.Y. Mar. 2, 2022).