

The court answers the question of who can intervene in a 28 u.s.c. § 1782(a) application

In re Da Costa Pinto, No. 21-MC-663 (VEC), 2022 U.S. Dist. LEXIS 160606 (S.D.N.Y. Sep. 6, 2022)

28 U.S.C. § 1782(a) allows an interested person in a foreign proceeding to obtain evidence located in the United States. Generally, the person from whom discovery is sought is not a party in the foreign proceeding. When the Court grants the § 1782(a) application, can the other parties in the foreign proceeding move to vacate the Court's order and to quash the subpoenas if the 1782(a) application does not directly seek discovery from them in the U.S? If their interests are not adequately protected by the third parties, the answer is yes. They can intervene in the U.S. by filing a motion. A motion to intervene must be filed timely to be granted.

The Court confirmed that § 1782(a) cannot not be used in the Second Circuit to seek discovery from attorneys regarding the activities of their clients, who are the petitioner's adversaries in foreign litigation. In contrast, the financial institutions are not protected from discovery and may be compelled to disclose financial records of their clients.

Background

In In re Da Costa Pinto, the Petitioner has introduced a civil claim in Brazil against Defendants. In order to obtain evidence against Defendants, Petitioner applied pursuant to 28 U.S.C. § 1782(a) for discovery from a U.S. law firm, its attorneys ("Respondents") and various financial institutions. The Court granted the application ("Court's Order"). Defendants, also referred to as "Intervenors" based on their role in the 1782(a) case, moved to intervene as the real parties in the case, to vacate the Court's Order, to quash the subpoenas, and to stay discovery.

Discussion

a. Motion to Intervene

The Court granted the motion to intervene based on Federal Rule of Civil Procedure 24(a)(2), which states that:

"A court must permit anyone to intervene who . . . claims an interest relating to the property or



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transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

In order to intervene, either as of right or with permission, an applicant must (1) timely file an application; (2) show an interest in the action; (3) demonstrate that the interest may be impaired by the disposition of the action; and (4) show that the interest is not protected adequately by the parties to the action. Failure to satisfy any one of these four requirements is a sufficient ground to deny the application.

1- The Motion to Intervene was Timely

There are no clear-cut rules regarding deadline to file a motion to intervene. The district judge has great discretion to define it. A court considers (1) the length of time that the applicant knew or should have known of its interest before making the motion; (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness.

In *In re Da Costa Pinto*, the motion was filed five months after the Petitioner's § 1782 application was filed. However, the Intervenor's proclaimed their intention to intervene two months after the application was granted by the Court and within the time set by the Court within which any motion to vacate or quash was to be made. The Court held that the delay was caused by the parties' unsuccessful attempts to resolve the issues. The Court also compared the risk of prejudice to each party and concluded that it would be significant for Intervenor's if the Court were to deny their motion to intervene because their counsel would provide an adversarial party financial transactions and confidential communications with their counsel.

2- Intervenor's had an Interest in the Action that Would be Impaired by Allowing Petitioner to Proceed with Discovery

The interest must be direct, substantial, and legally protected to be cognizable under Rule 24. It was clear that Intervenor's had an interest because, as the parties that engaged in the disputed transaction, they have privacy interests in the financial and legal documents that Petitioner sought to obtain through their 1782(a) application for the use against them in Brazilian legal proceedings.

3- Respondents Did Not Adequately Protect Intervenor's' Interests

The Respondents moved to vacate the Court's Order, to quash the subpoenas, and to stay discovery. Thus, their interests aligned with Intervenor's'. The Court nonetheless found that the



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Respondents did not adequately protect the Intervenor's interests, because Intervenor also sought to quash the subpoenas that would compel various financial institutions to provide information about the Intervenor's financial transactions. Indeed, the Respondents did not make independent arguments regarding those subpoenas but only join the Intervenor's motion.

Accordingly, the Court granted the Intervenor's motion to intervene as of right.

b. Discovery from Attorneys

The first category of discovery sought from Respondents was "all non-privileged documents from [the Intervenor's U.S. attorneys]". The attorneys were not a named party in the Brazilian civil proceeding. However, the Second Circuit refuses to permit a foreign litigant to use § 1782 to seek discovery from attorneys in the United States regarding the activities of their clients, who are the petitioner's adversaries in foreign litigation.

In contrast, the Court held that ordinary bank customers cannot be said to have reasonable expectation of privacy in the financial records kept by their banks. Therefore, Petitioner's subpoena of bank records raised no privilege issues.

Conclusions

The Court respected the Intervenor's rights and protected their interests by having their day in court. However, the right to intervene is not unlimited. If the Respondents had adequately protected the Intervenor's rights, the Court would likely have refused the motion to intervene as a right.

Another important element to remember is that such motion must be filed timely. Even if there is not clear timeline, it is recommended to file the motion to intervene as soon as is possible. In the present case, the Court was lenient to consider the motion as timely since the Intervenor filed their motion to intervene five months after the Petitioner's § 1782 application was filed.

The Second Circuit generally protects attorneys against discovery under § 1782 application but not financial institutions.