

U.K. Lawyers Can Access Broad U.S. Discovery To Win Cases

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Litigants in the U.K. and around the world can utilize the broad civil discovery that is available in the U.S., but few do so. By taking depositions in the U.S. and obtaining documents such as bank records, litigants outside the U.S. can and do gain a significant advantage in their cases.

Recently granted petitions for discovery filed by Malaysian energy companies in the U.S. District Court for the Southern District of New York (SDNY) and the U.S. District Court for the District of Delaware, in *In re: Ex Parte Application of Petronas Azerbaijan (Shah Deniz) SÀRL*, demonstrate the importance and varied uses of U.S. discovery in foreign litigation.¹ The petitioners requested testimony, financial records, communications and other documents in support of several contemplated civil suits in Spain and Luxembourg as well as a potential private prosecution in Spain — all of which arise from a dispute related to an arbitral award of \$14.92 billion against Malaysia. These requests, which were filed *ex parte*, were swiftly granted in November by the respective courts, without limiting the requested scope of the discovery.

An earlier application in the same matter, also filed before the SDNY, was not contested by the subjects of the discovery request, nor the potential adversaries abroad, and was granted by the court.² This is just one example of how U.S. discovery can be leveraged outside of U.S. courts.

A review of requests filed in U.S. district courts reveals that U.K. litigants seek to obtain foreign discovery in the U.S. more than litigants in any other country. Nevertheless, most U.K. litigants don't take advantage of the opportunity to develop evidence in the U.S. — but they should. This article reviews the benefits of gathering evidence in the U.S., and analyzes the success of those efforts.

The Data

Our firm has analyzed more than 450 cases filed in a three-year period in which litigants in foreign proceedings requested the assistance of the U.S. court system to obtain evidence and information not otherwise obtainable in the country where the litigation was pending or contemplated.³ Many of those cases seek banking records and electronic communications, while some also seek to take depositions from individuals located in the U.S., or with U.S. connections such that the U.S. has jurisdiction over them. The country of origin of the largest number of foreign evidence requests — 51 — was the U.K.

¹ See *In re Ex Parte Application of Petronas Azerbaijan (Shah Deniz) SÀRL, et al.*, No. 1:24-cv-00546 (S.D.N.Y. application filed November 21, 2024); *In re Ex Parte Application of Petronas Azerbaijan (Shah Deniz) SÀRL, et al.*, No. 1:24-cv-01283 (D. Del. Application filed Nov. 22, 2024).

² See *In re Petronas Azerbaijan (Shah Deniz) SÀRL, et al.* (S.D.N.Y. application filed May 28, 2024).

³ Applications for foreign discovery are made pursuant to 28 U.S.C. § 1782 (Assistance to foreign and international tribunals and to litigants before such tribunals).



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Vast Majority of Filings Result in Discovery

Of the 278 resolved cases in our sample, approximately 87 percent resulted in a U.S. court granting the requested discovery in whole or in part.⁴ Based on our experience, this statistic may in fact underrepresent the true success rates, as several requests for discovery settle without further litigation, and are voluntarily dismissed by the applicant. Thus, these filings are overwhelmingly successful, and result in valuable evidence and information that can be used both by claimants and defendants in litigation outside the U.S. Sometimes the information obtained also leads to further foreign discovery requests when the party filing the action follows the evidence.

Any type of documentary or testimonial evidence may be permitted by the court, allowing a broad range of discovery requests for use in foreign litigation. Some of the most common include the following.

Bank Records

Bank records are frequently sought — and obtained — through applications for discovery. Bank records can serve various purposes in preparing for and litigating proceedings outside the U.S. that could range from criminal matters to tort litigation.

Communications

In some cases, applicants for discovery seek electronic communications records — such as emails or instant messages — from corporations, messaging services and social media platforms. For instance, in *Application Pursuant to 28 U.S.C. 1782 v. Facebook Inc.*, Facebook records were obtained through a U.S. discovery request made in 2020 for use in an International Court of Justice proceeding.⁵

Depositions

In addition to documentary evidence, foreign discovery requests may also include testimonial evidence, granting the opportunity to take depositions of U.S. persons or persons located in the U.S. Depositions allow foreign counsel to prepare more effectively for litigation, and, in certain circumstances, may also be admitted as evidence.

Additionally, our study shows that foreign discovery requests are contested less than 50 percent of the time. Approximately 53 percent of cases reviewed were uncontested, which correlated to a significantly higher rate of success. Indeed, only one percent of uncontested applications are denied, compared to 13 percent of all applications. This means that those seeking discovery are unopposed half of the time, virtually assuring success.

U.S. Discovery: A Relatively Quick Process

Requests made to U.S. courts for assistance in foreign litigation often commence with an ex parte request to issue a subpoena for documents related to the case pending abroad. As a result, the assistance seeker's adversary in the litigation abroad may not be aware of the request to issue a subpoena. These initial requests are usually granted very quickly — often in a month or two, and sometimes, in a matter of days. For example, in the *Petronas* cases, the requests were granted in just five and 17 days, respectively, after the initial applications.⁶

Upon receiving that approval, the party seeking the documents serves the subpoena on the party with the documents. At this stage too, the adversary in the litigation may be unaware of the effort to obtain the documents, and therefore may not lodge an objection or seek to influence the subpoena recipient, who can ask the court to quash the subpoena.

Where a subpoena seeks personal information concerning the litigation adversary, some courts require that the party serving the subpoena alert the litigation adversary of the subpoena.⁷

⁴ We analyzed over 450 cases. However, many cases were still pending at the time of review or resolved outside of litigation. In total, 278 cases had been resolved on the merits at the time of our review.

⁵ See *Application Pursuant to 28 U.S.C. 1782 v. Facebook Inc.*, No. 1:20-mc-00036 (D.D.C. application filed June 8, 2020).

⁶ See No. 1:24-cv-00546 (application granted November 26, 2024); No. 1:24-cv-01283 (application granted Dec. 9, 2024).

⁷ Some courts have required notice of the subpoena to the affected party pursuant to Federal Rule of Procedure 45.

Even when a subpoena for documents or a deposition is contested by the subpoena recipient, the litigation adversary or both, the matter will be resolved. If the subpoena is granted, the discovery is typically obtained within an average of less than a year. On average, a request for discovery is resolved in about five and a half months. When the request is contested, that figure increases to approximately nine months.

Foreign Evidence Requests Focused in Three Major U.S. Jurisdictions

Two-thirds of all the foreign evidence requests we reviewed were filed in just three U.S. judicial jurisdictions: the U.S. Court of Appeals for the Ninth Circuit (27 percent), the Second Circuit (23 percent), and the Third Circuit (16 percent). These locations make sense when the major states and industries in each jurisdiction are considered. Many tech and media organizations are based in California (in the Ninth Circuit); many banks and corporate headquarters are based in New York (in the Second Circuit); and many companies are incorporated in, and therefore "found," in Delaware (in the Third Circuit).

How Evidence Gathered in the U.S. Can Be a Case Changer

Since the U.S. allows broader discovery than most other jurisdictions, obtaining discovery in the U.S. can have a critical impact on the ultimate resolution of foreign litigation, including litigation in the U.K.

For example, in *Azima v. Insight Analysis and Research LLC*, the U.S. District Court for the Southern District of Florida in 2022 granted a request for the deposition of an accused hacker. After a two-day deposition, foreign counsel obtained significant, relevant evidence for U.K. litigation.⁸ Additionally, the accused hacker was also later indicted for the same conduct, in part based on the content of the deposition.

In another 2022 case, *Azima v. JPMorgan Chase & Co.*, the SDNY granted an application to obtain bank records from JPMorgan, which assisted in the development of evidence of a money laundering scheme.⁹

Lastly, although social media platforms often contest applications for discovery to be used in foreign litigation, the U.S. District Court for the District of Columbia, in *Application Pursuant to 28 U.S.C. 1782 v. Facebook Inc.*, compelled Facebook to produce deleted public posts and related metadata for use in an international proceeding.¹⁰ The resulting evidence was used to assist in an ongoing case, *The Gambia v. Myanmar*, filed in 2019 before the International Court of Justice alleging genocide.

In each instance, the U.S. discovery played a pivotal role in the outcome of the foreign proceeding. By allowing foreign litigants access to broad U.S. civil discovery, a request for assistance before a U.S. district court is an underutilized but incredibly effective tool that is available to U.K. and other litigants around the world.

Best Practices for Navigating U.S. Discovery Requests

Select the correct U.S. court in which to file. Requests for discovery must be filed in the U.S. district court in which the evidence is found, or in which the person or corporation resides. In some cases, several district courts may be able to satisfy this requirement.

Therefore, to select the best venue, applicants should consider additional factors, such as whether the court has previously granted similar requests, how frequently the court decides these types of discovery requests and how quickly the court tends to resolve discovery applications.

Identify the type of evidence needed with specificity. U.S. civil discovery can include a wide range of evidence, but a request for U.S. discovery to be used in foreign litigation is likely to fail if the requesting party cannot point to specific types of evidence and identify how that evidence will support the requester's position in the foreign proceeding.

⁸ See *Azima v. Insight Analysis and Research LLC*, No. 1:22-cv-20707 (S.D. Fla. application filed March 8, 2022).

⁹ *Azima v. JPMorgan Chase & Co.*, No. 1:22-mc-00073 (S.D.N.Y application filed March 9, 2022).

¹⁰ See *Application Pursuant to 28 U.S.C. 1782 v. Facebook Inc.*, No. 1:20-mc-00036 (D.D.C. application filed June 8, 2020).

Similarly, a court may be disinclined to grant a request that appears to be a fishing expedition. Therefore, specific requests that are grounded in clear evidentiary needs are most likely to be successful.

Research whether and how U.S. discovery has been admitted in the U.K. or other foreign court where litigation is pending or anticipated. This statutory discovery tool is ultimately rooted in a desire to foster judicial harmony and reciprocity and to support judicial factfinding in other countries. Therefore, while admissibility in the foreign court is not a required element — and indeed, should not be litigated in U.S. courts — it is helpful to express that the foreign court will be receptive to the assistance of a U.S. court.

U.S. discovery can be a powerful tool, but is often underutilized in litigation outside the U.S., including in U.K. litigation. The scope of U.S. discovery is broader than what is available in most other jurisdictions, including depositions and records located in the U.S.

Based on the data we analyzed, discovery requests made in the U.S. are likely to be granted, with many applications even proceeding without contest. A successful U.S. discovery application can change the course of litigation in courts around the world.

DISCLOSURE: O'Toole represented Gambia in *Application Pursuant to 28 U.S.C. 1782 v. Facebook Inc.* O'Toole and Behre represented Azima in *Azima v. Insight Analysis and Research LLC* and *Azima v. JPMorgan Chase & Co.* The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.