

DISCOVERY IN FEDERAL COURTS UNDER  
28 U.S.C. SECTION 1782:  
THE IMPACT OF  
JOHN DEERE LIMITED V.  
SPERRY CORPORATION

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*Resumen*

*Sentencias recientes en John Deere Ltd. v. Sperry Corp. 754 F.2d 132 (3d. Cir. 1985) y en In Re Court of Commissioner of Patents for Republic of South Africa, 88 F.R.D. 75 (E.D. Pa. 1960) regulan el uso por litigantes en juicios en el extranjero de un procedimiento judicial informal (discovery) para la obtención de pruebas en los Estados Unidos. Este procedimiento obliga a las partes a presentar documentos, testigos, declaraciones, confesionales o repuestas a interrogatorios con anterioridad a la fase probatoria de juicio. Ambas sentencias tratan del proceso para obtención de pruebas descrito en el estatuto conocido como 28 U.S.C. sección 1782. Ambas analizan los motivos por los cuales jueces de los Estados Unidos permitirían la obtención informal de pruebas (discovery) a favor de partes en un proceso extranjero. La intención de la sección 1782 ha sido "mejorar la cooperación jurídica internacional en materia de litigios." Ha decidido la jurisprudencia federal que el proceso de obtención de pruebas norteamericano no puede ser utilizado para obtener pruebas no obtenibles de estar todas las partes presentes en la jurisdicción extranjera.*

*México y al igual que muchos otros países civilistas no permiten un proceso informal de obtención de pruebas previo a la fase probatoria, tal como el que existe en los Estados Unidos. Además, las reglas de procedimiento vigentes en los Estados Unidos Mexicanos imponen límites a tal obtención.*

*Como la intención de la sección 1782 es facilitar la cooperación jurídica internacional, las cortes norteamericanas tienen que ser cuidadosas, e independientemente de su altruismo no imponer sus normas sobre cortes extranjeras. La obtención informal de pruebas en los Estados Unidos no debe ser permitida, si su propósito es de evadir los límites que pesan sobre las cortes mexicanas.*

The decision in *John Deere Limited v. Sperry Corporation*<sup>1</sup> gives an indication of the extent to which courts will allow parties in foreign

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<sup>1</sup>John Deere Limited v. Sperry Corporation, 754 F.2d 132 (3d Cir. 1985), hereinafter *John Deere*.

civil litigation to obtain discovery in the United States pursuant to 28 U.S.C. §1782.<sup>2</sup> Under the provisions of the statute, a district court may order a person resident in its district to comply with discovery sought by a foreign tribunal or a party to a foreign proceeding. This note is concerned primarily with the latter, discovery sought directly by a party.

Section 1782 was modified in 1964.<sup>3</sup> Most subsequent litigation has been concerned with situations in which discovery is sought by the foreign tribunal. The main issue concerning §1782 has usually been whether the foreign agency seeking discovery is properly classifiable as a tribunal.<sup>4</sup> There have, however, been two cases concerned with what factors the court must consider in deciding whether to compel discovery when the request is made by a party rather than by the foreign tribunal. The first was *In Re Court of Commissioner of Patents for Republic of South Africa*.<sup>5</sup> The district court for the Eastern District of Pennsylvania found that the purpose of the statute is "to im-

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<sup>2</sup>U.S.C. §1782 (1982).

Assistance to foreign and international tribunals and to litigants before such tribunals.

(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 for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing produced, before a person appointed by the court. By virtue of his appointment, the person appointed has the power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or in part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

<sup>3</sup>Pub. L. 88-619, Section 9(a), Oct. 3, 1964, 78 Stat. 997.

<sup>4</sup>*In re Letters Rogatory Issued by Director of Inspection of Gov't. of India*, 385 F.2d 1017 (2d Cir. 1967); *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) and *In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511 (9th Cir. 1973) are examples.

<sup>5</sup>*In re Court of Commissioners of Patents for Republic of South Africa*, 88 F.R.D. 75 (E.D. Pa. 1960), hereinafter *Commissioner of Patents of South Africa*.

prove practices of international cooperation in litigation" and that international cooperation would not be furthered if discovery were allowed to overcome the restrictions on discovery in force in the foreign jurisdiction.<sup>6</sup> The court held that no showing had been made that the documents and testimony sought would be discoverable in South Africa, the site of the foreign proceeding. Therefore, absent proof that this was not an attempt to overcome South African restrictions on discovery, the request for discovery was denied.

The second case dealing with this question also arose in the Eastern District of Pennsylvania. *John Deere* involved patent litigation that had been going on in one form or another for fifteen years, first in the United States, then in Canada. The district court, on John Deere's request, ordered the production of documents and the taking of depositions of two Sperry employees in order to assist the Canadian litigation. On motion by Sperry, the district court vacated its discovery order, citing three considerations: the use of permissive rather than mandatory language in §1782; the public policy considerations, especially the attitude of the foreign tribunal towards such discovery; and the likelihood that the other country would grant reciprocal rights.<sup>7</sup> The court held that a discovery order would not enhance the public policy considerations, as the evidence sought would likely not be admissible in the Canadian litigation, and that reciprocity would not be furthered since Canada would not grant reciprocal rights in a similar matter.<sup>8</sup>

This decision was overturned by the Third Circuit Court of Appeals. The court held that §1782 does not require a district court to consider the availability of reciprocal foreign procedures or the ultimate admissibility of evidence in the foreign proceeding.<sup>9</sup> Since one of the purposes of §1782 is to stimulate reciprocity rather than require it, the fact that the Canadian court would not reciprocate is irrelevant to the district court's consideration. The decision on admissibility in the foreign court is for the foreign court to decide; therefore, the district

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<sup>6</sup>*Id.* at 77.

<sup>7</sup>*John Deere Ltd. v. Sperry Corp.*, 100 F.R.D. 712 (E.D. Pa. 1983).

<sup>8</sup>It is possible that the court was incorrect in this determination. Canadian courts use letters rogatory, but will refuse to respond to letters rogatory if the testimony or documents sought are privileged. Several Canadian provinces have statutes protecting the confidentiality of corporations, and many refusals by Canadian courts to respond fully to letters rogatory have been a result of these statutory privileges, rather than a blanket refusal to respond to letters rogatory.

<sup>9</sup>See *supra* note 1, at 136-137.

court should provide discovery, leaving the court in which the material is to be presented to decide on its admissibility.<sup>10</sup>

The court held that the relevant factor in deciding whether to order discovery in such a situation should be whether the discovery sought would be obtainable if all persons were present in the foreign jurisdiction. Because the court found that such discovery would be possible if all were present in Canada, the discovery order should have been issued. Thus, the court established an apparently simple guideline for district courts in making their decisions.

This decision is not in conflict with the decision in *Commissioner of Patents of South Africa*. There the decision was based on whether the discovery sought was subject to discovery in the foreign jurisdiction. While the court did not specify whether the presence of the documents outside the country was a factor in rendering the matter undiscoverable in South Africa, it seems that the court believed that discovery would not have been available even if all persons were within the jurisdiction of the South African court.

The guideline established in *John Deere* is not as easy to apply as it appears, because it relies on the other jurisdiction having a discovery process. Many civil law countries do not have a discovery process. Furthermore, the decision in *John Deere* does not address the issue whether it is appropriate to use the procedure providing for discovery on motion of a party when conventions to which the United States and the other country are party call for the use of letters rogatory in such situations. To explore the first issue, we can consider whether such discovery should be ordered for use in a Mexican proceeding. In Mexico, as in most civil law countries, there is no conclusive trial preceded by a discovery process in which the court is largely passive.<sup>11</sup> Rather, there is a series of hearings conducted by the court at which evidence is taken. At the hearings, evidence is sought by the court rather than being offered by the parties, although parties may seek orders to have evidence produced, and may suggest lines of questioning.<sup>12</sup> The oral evidence from each hearing is reduced to a writing called the *expediente*. Any documentary evidence may become part of the *expediente*.<sup>13</sup> At the conclusion of the final hearing, the parties may offer further evidence to the court.<sup>14</sup> The court will then consider the *expediente* and any other evidence offered in making its determin-

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<sup>10</sup>It should also be noted that not all discoverable items are admissible as evidence.

<sup>11</sup>J. HERGET & J. CAMIL, *AN INTRODUCTION TO THE MEXICAN LEGAL SYSTEM* (1978).

<sup>12</sup>*Id.* at 75-76.

<sup>13</sup>*Id.*

<sup>14</sup>J. BECERRA BAUTISTA, *EL PROCESO CIVIL EN MEXICO* 79 (1965).

ation of the case. Thus, discovery and trial are combined into a series of judicial hearings at which the parties take a less active role, with the court being the active entity. At no time in such a proceeding may one party directly question the other. In some ways, the series of hearings is analogous to the discovery process, and therefore an American court could apply the *John Deere* rationale and determine whether something sought in discovery could be produced at the series of hearings.<sup>15</sup>

As there are few exclusionary rules of evidence in Mexico and judges may compel anyone within their jurisdiction to produce evidence, there is little that is not "discoverable" in these hearings. Privileges exist, but for the most part these privileges do not exceed the privileges available in the United States and, therefore, such privileged matter would not be discoverable in the district court proceedings. One matter, however, is different: parties may not testify as witnesses in these hearings, even though they may have to answer written interrogatories and their written statements are admissible as evidence.<sup>16</sup> This should restrict U.S. district courts from ordering oral depositions of those who are considered parties in the Mexican litigation. Although in general civil matters those with a close connection to one of the parties may testify, under the Mexican Commercial Code such people may not; therefore, if the case involves the Commercial Code, oral depositions of these people should also not be ordered.<sup>17</sup> Using the *John Deere* rationale, upon proper motion by a party to a Mexican proceeding, a U.S. district court could order the production of any relevant item or document, the use of written interrogatories directed to any person, or the oral deposition of anyone who is not prevented by Mexican law from being a witness at the Mexican hearing, such as parties or, in some cases, those with close ties to a party.

There is a question whether discovery should be granted on motion of a party if there is an established procedure for obtaining such information through the use of letters rogatory. It seems clear that if the real purpose of §1782 is to promote international cooperation, a procedure involving the courts of both countries is preferable. The use of

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<sup>15</sup>It is also possible that the discovery process could be considered so offensive to the Mexican legal system that no discovery should be ordered under §1782 for use in a Mexican proceeding. In this view, the parties usurp the role of the court in obtaining evidence. This view is unlikely to be accepted by U.S. courts, who see the usefulness of discovery. Therefore, this article will assume that in some situations courts will be willing to order discovery on motion of a party, and will attempt to outline those situations in which granting such motions would be appropriate.

<sup>16</sup>See *supra* note, at 95.

<sup>17</sup>*Id.*

and the procedure should be used when possible. Furthermore, §1782 specifically provides for this procedure, and discovery should be granted when requested by a foreign tribunal, although rights and privileges of parties and witnesses should be assured. However, §1782 does provide for the alternative process of discovery by direct application of a party to the foreign procedure; it therefore seems that this procedure should be applicable even if discovery by means of a letter rogatory is not requested by the party in the foreign court. While it seems clear that this procedure may be used, it must also be determined when discovery by direct motion of a party should be granted.

There are three situations in which it seems likely that a request for discovery would be made directly to a U.S. district court by a party to a Mexican proceeding. One situation is where one party wishes to have American-style litigation to the greatest extent possible. If the true purpose of §1782 is to promote international cooperation, and not to impose the American judicial system on other countries, then discovery should not be ordered by the district court in these situations, as this would appear to be a deliberate avoidance of the restrictions on discovery in force in the Mexican court, running counter to the ruling in *Commissioner of Patents of South Africa*.

The second situation would occur when one party has sought to have the Mexican court request the information through the use of letters rogatory, but has been refused by the Mexican court. In this situation, the rationale of the *John Deere* case could be applied, and the court could determine whether the refusal to issue letters rogatory was based on considerations of international jurisdiction or on a decision that such discovery is simply not available under the applicable Mexican law and procedural rules. If the refusal was based on considerations of jurisdiction (that is, if the Mexican court refused to take such action because it did not believe that it was not a proper matter for a letter rogatory or that its jurisdiction did not transcend the borders of Mexico), it would seem appropriate for discovery to be had under §1782. If, however, the court refused because it could not obtain such information even if all parties and documents were present in its own jurisdiction, then the rationale of *Commissioners of Patents of South Africa* should apply, and discovery should be denied.

A third situation occurs if one party decides that this direct procedure is more advantageous—either better, simpler or faster—than the use of letters rogatory. If the court determines that there is an attempt by the party seeking discovery to avoid the restrictions on discovery imposed by Mexican law, the court should deny the motion, because

granting it would impede, rather than foster, international cooperation. If it is not an attempt to avoid the restrictions on discovery, the court should order discovery of that which would be "discoverable" in Mexico.

At the present time there are no treaties in effect between Mexico and the United States governing the taking of evidence in the other country. The United States has signed and ratified the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,<sup>18</sup> but Mexico has not. Mexico has signed and ratified the Inter-American Convention on the Taking of Evidence Abroad,<sup>19</sup> but the United States, although it has signed this convention, has not yet ratified it. It is currently a matter of debate whether either Convention, if applicable, would preclude the use of discovery outside the procedures of the respective conventions. Since the conventions are not applicable between the two countries, they do not have preclusive effect on matters between the United States and Mexico and do not currently impose any restriction on the use of §1782 to obtain discovery in district courts by parties to a Mexican proceeding.

Section 1782 allows for discovery on direct application to a district court by a party to a foreign proceeding. The decisions in *Commissioner of Patents of South Africa* and *John Deere* indicate that discovery should not be granted in situations where a party is attempting to avoid the restrictions on discovery in the foreign tribunal, but should be granted if the discovery sought would be subject to discovery if all persons were present in the foreign jurisdiction. The lack of a discovery procedure in certain civil law countries such as Mexico may present difficulties for courts in deciding whether discovery requests should be granted. However, the decisions in these two cases provide guidelines even when the foreign jurisdiction has no discovery process.

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<sup>18</sup>Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231, codified at 28 U.S.C. 1781 (1982).

<sup>19</sup>Inter-American Convention on the Taking of Evidence Abroad, signed in Panama on January 30, 1975 at CIDIP-1, O.E.A./Ser. A/22 (English), reprinted at 14 I.L.M. 328 (1975).

