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Outside Counsel

Second Circuit Broadens Discovery In Aid of Foreign Proceedings

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In a decision sure to reverberate through the world of international commercial litigation, the U.S. Court of Appeals for the Second Circuit recently held that litigants in foreign proceedings may ask U.S. courts to compel discovery of documents and other information located outside of the United States. The Second Circuit changed course from dicta in an earlier decision and now joins the Eleventh Circuit in allowing U.S. courts to compel extraterritorial discovery in support of foreign proceedings. Under this decision, a person or entity subject to personal jurisdiction in the Second Circuit could be forced to produce documents located anywhere in the world in response to a discovery request regarding a foreign proceeding—even though that person or entity is not a party to that foreign proceeding.

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Section 1782

28 U.S.C. §1782 allows parties in foreign proceedings to obtain discovery for use in those proceedings through the U.S. federal court system. Upon application, §1782 permits a U.S. district court to exercise its discretion to compel discovery from any entity that "resides or is found" in the district where the application is made. Generally, the statute allows for discovery to the extent permitted by the Federal Rules of Civil Procedure in domestic cases.

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The Second Circuit's Decision

In re Application of Antonio Del Valle Ruiz, 939 F.3d 520 (2d Cir. 2019), arises from the government-forced sale of a struggling bank, Banco Popular Español, S.A. (BPE). After Banco Santander S.A. (Santander) acquired BPE for €1, former investors in BPE initiated multiple legal proceedings contesting the sale, all outside of the United States. In aid of these foreign proceedings, the litigants filed two §1782 applications in the Southern District of New York seeking discovery, including documents stored abroad, from Santander

and several of its affiliates, including New York-based Santander Investment Securities Inc. (SIS). Neither Santander nor any of its affiliates face liability in the foreign cases. The District Court denied the applications as to most of the respondents, finding it lacked personal jurisdiction over them. But because SIS is headquartered within the Southern District of New York, the District Court held it had jurisdiction over SIS and ordered it to produce documents, including documents stored abroad. In so doing, the District Court rejected SIS's argument that §1782 does not allow extraterritorial discovery. The Second Circuit affirmed.

Section 1782 Applies to Any Entity Subject to Personal Jurisdiction. *First*, the Second Circuit held that §1782's "resides or is found" language means the statute applies to any entity over which the petitioned district court has personal jurisdiction. *In re del Valle Ruiz*, 939 F.3d at 528. It was undisputed that New York-based SIS was within the reach of §1782, given that it is subject to general personal jurisdiction in the forum. See id. at 527; see also *Daimler v. Bauman*, 571 U.S. 117, 137 (2014) (general personal jurisdiction typically exists only in a corporation's place of incorporation and principal place of business). None of the other Santander affiliates have their principal place of business in New York. Santander argued that the statute's reach should be limited only to entities subject to general personal jurisdiction, but the Second Circuit concluded that any party over which a district court possesses specific personal jurisdiction—due to "some *causal* relationship between an entity's in-forum contacts and the proceeding at issue"—may also be compelled to produce evidence. *In re del Valle Ruiz*, 939 F.3d at 530. Specifically in the §1782 context, "where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient to establish specific jurisdiction for ordering discovery." Id. However, the Second Circuit held that none of the targeted companies were subject to specific jurisdiction under this standard, leaving only the application against New York-based SIS. Id. at 534.

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Section 1782 Applies Extraterritorially. *Second*, and more significantly, the Second Circuit held that there is no per se bar to the extraterritorial application of §1782, thereby allowing for discovery of documents and witnesses located abroad. Prior Second Circuit dicta had suggested that §1782 should not apply extraterritorially. See *Application of Sarrio, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997) ("despite the statute's unrestrictive language, there is reason to think that Congress intended to reach only evidence located within the United States"). Some district courts in the Southern District of New York had held the same, often based on that dicta. *In re del Valle Ruiz*, 939 F.3d at 532 n.16. But the Second Circuit has now unequivocally disavowed its prior dicta and held that the statute allows for discovery outside the United States, id. at 532-33 & n.16, perhaps recognizing that international discovery in the era of electronically stored information is not as burdensome as it once was.

The Second Circuit acknowledged the Supreme Court's statement that courts must apply the presumption against extraterritorial application of statutes "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction." Id. at 532 (quoting *RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2101 (2016)). Nonetheless, the Second Circuit dismissed as dicta the Supreme Court's requirement of a presumption against extraterritoriality in the context of "strictly jurisdictional" statutes, holding instead that the presumption does not apply to "strictly jurisdictional statute[s] not otherwise tethered to regulating conduct or providing a cause of action." Id. (citation omitted).

In a footnote, the Second Circuit stated that even if a presumption against extraterritoriality applied to §1782, the court would have reached the same conclusion: Because Congress had incorporated the Federal Rules of Civil Procedure, which allow for extraterritorial discovery, into §1782, that would be sufficient to rebut the presumption against extraterritorial application. Id. at 532 n.14; see also 28 U.S.C. §1782(a) ("To the extent that the [district court's discovery] 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.").

Courts Retain Significant Discretion To Tailor the Scope of §1782

Discovery. District courts considering §1782 applications retain discretion to determine whether to grant discovery and to what extent. *In re del Valle Ruiz*, 939 F.3d at 534. But this discretion is guided by the principle that "it is far preferable for a district court to … issu[e] a closely tailored discovery order rather than [] simply denying relief outright." Id. at 533 (quoting *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015)).

When presented with §1782 applications, courts will consider the (non-exclusive) factors enumerated by the Supreme Court in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004):

(1) whether "the person from whom discovery is sought is a participant in the foreign proceeding" in which event "the need for §1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad";

(2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court assistance";

(3) "whether the §1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and

(4) whether the request is "unduly intrusive or burdensome."

In re del Valle Ruiz, 939 F.3d at 533-34 (quoting *Intel*, 542 U.S. at 264-65). The Second Circuit cautioned that, notwithstanding its extraterritoriality holding, "the location of documents and other evidence" is a relevant consideration for a district court in deciding whether and how to exercise its discretion to authorize §1782 discovery. Id. at 533.

Impact of the Decision

The scope of discovery permitted in the United States generally is very broad compared to other jurisdictions. The Second Circuit has now rolled out a welcome mat for foreign litigants seeking to utilize the U.S. judicial process to obtain discovery they might not otherwise be able to access. *In re del Valle Ruiz* encourages foreign litigants to use the U.S. courts to seek discovery in the United States and elsewhere. Although the Second Circuit reemphasized its prior statement that district courts are encouraged to limit discovery rather than deny discovery altogether, entities with U.S. contacts may take solace in the fact that discovery under the statute is discretionary, and that district courts ruling on §1782 applications must consider the *Intel* factors in determining the appropriate scope of discovery. Corporations should expect aggressive foreign litigants to test the boundaries of §1782 discovery in the wake of *In re del Valle Ruiz*, but we expect that courts will continue to temper broad discovery requests with the practical considerations enumerated in *Intel*.

Section 1782 petition respondents that are not subject to general jurisdiction in the Second Circuit likely will argue, as a first line of defense, that they are not subject to specific jurisdiction because the discovery materials sought do not proximately result from their forum contacts. Where such an argument fails or is not available because the entity is subject to general jurisdiction, §1782 petitioners and respondents will now focus exclusively on the *Intel* factors, rather than debating the extraterritorial applicability of the statute. Judges can expect an increased reliance on competing expert opinions regarding the "policies of foreign governments," the "receptivity of foreign courts to discovery obtained through the U.S. courts," and "foreign proof gathering restrictions."

Because district court decisions regarding the appropriate scope of discovery will be reviewed under the deferential abuse of discretion standard, substantial variability in the adjudication of §1782 petitions is likely, making it more difficult for respondents to assess their exposure to discovery. As a result, some §1782 respondents—particularly those with no interest in the underlying foreign litigation—may choose to stipulate to limited discovery rather than incur the cost and risk of litigating a §1782 petition.