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Complex Commercial Litigation

Section 1782: Second Circuit Allows Foreign Litigants to Obtain Documents Located Outside the US

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Section 1782 of Title 28 of the US Code allows foreign litigants to petition federal district courts for US-style discovery from a person or entity who "resides or is found" where the district court is located for use in a foreign proceeding. Traditionally, foreign litigants have used this provision to seek documents or testimony from within the United States. Last week, however, the US Court of Appeals for the Second Circuit Court held that Section 1782 allows foreign litigants in a foreign proceeding to get documents located in a foreign country, so long as those documents are "controlled" by a US subsidiary (or any other entity over which the US court has personal jurisdiction). *See In re del Valle Ruiz*, No. 18-3226, 2019 WL 4924395 (2d Cir. Oct. 7, 2019). Specifically, the court held that an American subsidiary of Banco Santander S.A. (Santander), a Spanish entity, had to turn over foreign documents related to the forced sale of Banco Popular Español, S.A. (BPE) to Santander for €1. *Id.* at *1, *2. Such an extension of the use of Section 1782 makes it an increasingly powerful tool for international litigants to obtain US-style discovery and the court's ruling could well lead to an uptick in Section 1782 petitions, with parties taking advantage of the decision to seek non-US documents from American subsidiaries of global businesses.

The underlying dispute in *del Valle* concerns the government-forced sale of BPE to Santander pursuant to the EU's "resolution" procedure for banks at risk of bankruptcy. After the sale, two groups of investors in BPE brought various challenges to the legality of the resolution. To support their claims, the investors filed Section 1782 petitions in the US District Court for the Southern District of New York seeking discovery about the resolution process from Santander and three of its American subsidiaries, one of which, Santander Investment Securities Inc. (SIS) has its principal place of business in New York City. The lower court found that it did not have personal jurisdiction over Santander, but that it did have jurisdiction over SIS, which was thus subject to Section 1782. The district court also held that Section 1782 authorizes discovery of documents located outside of the United States. *Id.* at *1.

The Second Circuit affirmed both conclusions. Its reasoning on both was notable.

Personal Jurisdiction and Section 1782. As to Santander, it held that Section 1782's "resides or is found" language "extends to the limits of personal jurisdiction consistent with due process." *Id.* at *3. That is, if a court can exercise personal jurisdiction over an entity, then that entity "resides or is found" in the district for purposes of Section 1782. In so doing, the court rejected Santander's argument that Section 1782 encompasses only so-called "tag" jurisdiction, i.e. jurisdiction over natural persons "tagged" with service of process while present in a forum or over entities that are continuously present in a forum. *Id.* at *3-*5. Instead, the court concluded that an entity can be "found" in a district for purposes of Section 1782 not only if it is continuously present under modern principles of "general" jurisdiction, but also if it is subject to "specific" jurisdiction, i.e. if there is a sufficiently robust relationship between the entity, the forum, and the litigation—if the entity has the requisite "minimum contacts" with the forum—to make the exercise of jurisdiction fair. *Id.*

The court "translated" this well-established jurisdictional framework, which usually involves one party seeking to impose liability on another, to the context of Section 1782, which involves only discovery orders and does not create any liability. The court clarified what kinds of "minimum contacts" will give rise to specific jurisdiction for purposes of Section 1782. It held that in most cases, "where the discovery material sought proximately resulted from the respondent's forum contacts, that would be sufficient . . . . [T]he respondent's having purposefully availed itself of the forum must be the primary or proximate reason that the evidence sought is available at all." *Id.* at *6. However, the court seemed to create a different rule for entities "whose contacts are broader and more significant"—in such a case, the Section 1782 petitioner "need demonstrate only that the evidence sought would not be available but for the respondent's forum contacts." *Id.* Notably, both rules require some connection between the discovery sought and the respondent's connection with the forum—a real limitation that puts a reasonable limit on who can be "found" in a district via specific jurisdiction.

On the facts of the case, only one of Santander's forum contacts was related to the discovery sought: it hired two New York investment banks to perform due diligence on BPE as part of a contemplated private sale, before the resolution. A majority of the discovery sought by the investors pertained to the resolution, not the private sale. The court thus concluded that petitioners could not show that this lone contact "was the *proximate* reason the evidence sought was available." *Id.* at *7. Accordingly, the lower court correctly determined that it did not have personal jurisdiction over Santander for Section 1782 discovery purposes. *Id.*

Extraterritorial Discovery. As to SIS, on the other hand, there was no question that it could be "found" in the district—it had its principal place of business in New York, and the lower court had general jurisdiction over it. *Id.* The main question, then, was whether Section 1782 could reach documents SIS held overseas. Santander argued that under the presumption against extraterritoriality—a principle of statutory interpretation that the Supreme Court has repeatedly deployed in recent years to limit the scope of many federal statutes—Section 1782 could not reach evidence located abroad. *Id.* The court disagreed, holding that the presumption does not apply to Section 1782, and that even if it did, it was rebutted. *Id.* at *7 & n.14. Following the Eleventh Circuit's ruling, the court focused on the fact that Section 1782 incorporates the Federal Rules of Civil Procedure, which have long been interpreted to allow for discovery abroad: "The Federal Rules of Civil Procedure . . . authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody or control. Hence § 1782 likewise allows extraterritorial discovery." *Id.* at *8.

In the absence of a *per se* rule against extraterritorial discovery, SIS could be ordered to produce documents abroad at the court's discretion. As in any other Section 1782 case, that discretion is guided by the so-called *Intel* factors, named for a case in which the Supreme Court provided guidance on when discovery under Section 1782 is appropriate, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). "Those factors are: (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 US 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.'" *Id.* at *9 (quoting *Intel*, 542 U.S. at 264–65). The court quickly affirmed the district court's order, concluding that these factors "plainly weighed in favor of discovery against SIS." *Id.*

The English Court's Approach to Section 1782. *In re del Valle Ruiz* also has implications from an English law perspective. The English Court has demonstrated a willingness to uphold the use of Section 1782 orders. In general, the English Court will not seek to control the manner in which a party obtains evidence, provided that the means by which it does so are lawful in the country where they are used. However, there are limits, and the English Court has made clear that in some circumstances, use by a party of the Section 1782 procedure is capable of constituting (as a matter of English law) unconscionable conduct interfering with the fair disposal of English court or arbitration proceedings,

which the English Court will restrain by injunction [see, for example, **Dreymoor Fertilisers Overseas PTE Limited v Eurochem Trading GmbH* [2018] EWHC 2267, at 59 - 60]. While the appropriateness of the use of Section 1782 applications as a matter of English law will depend on all the circumstances, this Second Circuit decision reinforces the potential value of Section 1782 applications in a litigant's arsenal in English court proceedings or English-seated arbitrations to obtain US-style discovery, including evidence by deposition.

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The Second Circuit's opinion has established important new parameters for the use of Section 1782 within its jurisdiction. The breadth of the court's ruling on jurisdiction and the availability of discovery may make Section 1782 a more common tool for seeking discovery in aid of a foreign proceeding—especially from American subsidiaries of global companies. That said, the court affirmed the need to consider the *Intel* factors when ordering discovery in individual cases, and that analysis may become increasingly important. It is worth watching whether the parties pursue further proceedings before the Second Circuit or the US Supreme Court.

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