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The Long Arm of Section 1782 Discovery: Recent Developments in the US Second Circuit

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A short statute that it is, 28 USC § 1782 has given rise to prolific litigation. For years, litigants have been debating its import and courts have been dissecting its key terms: to name a few, the nature of the proceeding in aid of which discovery may be sought (see posts here, here, and here), the person from whom discovery may be sought (see post here), and the process for making an application (see post here). Despite the plethora of district court decisions (which are trial courts in the US federal court system), the questions resolved at the appellate level have been few and far between. And only once has the US Supreme Court weighed in on the scope of that statute. Many unknowns thus still remain. Some of them were recently tackled by the Second Circuit in a groundbreaking ruling in *In re Application of Antonio Del Valle Ruiz et al.* Addressing several issues of first impression for it, the Court held that Section 1782 discovery is available: (a) *only* from "persons" that are subject to the district court's jurisdiction — either by way of general jurisdiction or specific jurisdiction, consistent with the requirements of due process, and (b) from sources located both in the US *and abroad*.

The facts giving rise to the discovery request

In June 2017, Spanish bank Banco Santander ("Banco Santander") acquired another Spanish bank, nonperforming Banco Popular Espanol ("BPE"), in a forced sale for €1. US and Mexican stockholders and bondholders of BPE ("Petitioners") challenged the transaction, claiming that it had wiped out the value of their holdings. The Petitioners commenced several proceedings against Spain and BPE, and, in aid of these proceedings, they sought Section 1782 discovery about the details of the forced sale. The targets of discovery were Banco Santander, along with its two US-based subsidiaries incorporated in Virginia with principal places of business in Massachusetts (together with Banco Santander, "Santander") and Santander Investment Securities, an affiliate incorporated in Delaware with its principal place of business in New York ("SIS") (together with Santander, "Santander Parties").

The district court denied both parties' applications, for the most part. The court held that it lacked jurisdiction over Santander (thereby denying in part Petitioners' application). It also held that discovery from SIS can proceed and be obtained extraterritorially (thereby denying in part the Santander Parties' application). Both parties appealed.

The meaning of the "is found" requirement

The parties' positions. Section 1782 provides that discovery may be taken from a person that "resides or is found" in the district of the federal court where the application for discovery is made. The parties agreed that the "resides" prong contemplates the persons (individuals or companies) over whom the court has general jurisdiction. Their disagreement was over the "is found" prong, which, both parties recognized, must have some meaning. According to Petitioners, this term refers to the persons over which the court has *specific* jurisdiction. According to the Santander Parties, it contemplates only the so-called "tag jurisdiction" under *Edelman* (whereby a non-resident individual who is personally served within the district can be subject to the court's jurisdiction) and Santander posited that this was a particular type of *general* jurisdiction not covered by the word "resides."

The Court's ruling. The Court disposed of Petitioners' tag jurisdiction argument, reasoning that, while *Edelman* ruled that tag jurisdiction was *sufficient* to satisfy the "is found" requirement of section 1782, it did not rule that such jurisdiction was *necessary*. Santander's "cramped" reading of the "is found" language was found inconsistent with Congress's intent that Section 1782 be interpreted broadly, especially given the district court's discretion in determining whether, and in what manner, discovery may be had. Thus, the Court ruled that Section 1782's "resides or is found" language extends to the limits of personal jurisdiction consistent with due process, requiring proof that the court has either general or specific jurisdiction over the target of discovery.

As Petitioners "did not press" its general jurisdiction argument on appeal, the Second Circuit's inquiry was focused on the existence of specific jurisdiction. Applying the rudimentary principle that "the exercise of specific jurisdiction depends on in-state activity that gave rise to the episode-in-suit," the Second Circuit held that, in discovery context, the discovery material sought must be have resulted from respondent's forum contacts: "That is, the respondent's having purposefully availed itself of the forum must be the *primary or proximate reason* that the evidence sought is available at all. On the other hand, where the respondent's contacts are broader and more significant, a petitioner need demonstrate only that the evidence sought would not be available *but for* the respondent's forum contacts."

Applying its legal rulings to the facts, the Court held that Santander did not have the necessary contacts with the forum because all but one of its contacts arose after the forced sale. The sole contact predating the sale related to Santander's due diligence on BPE a month prior to the forced sale, when the bank was looking for a buyer through private placement that ultimately fell through. The Petitioners argued that it was because of that due diligence that Santander was in a position to nimbly bid at the forced sale (a fact admitted by Santander's CEO), and therefore the discovery material relating to BPE's finances arose out of that contact. The Second Circuit disagreed, pointing out that these were two different occurrences: "[t]his in-forum conduct relates only to BPE's [pre-forced sale] effort to seek a buyer . . [b]ut the Petitioners' claim here (and likewise the bulk of the discovery sought) arises from a separate financial transaction: the forced sale of BPE." On that basis, the Second Circuit affirmed the district court's finding of the lack of personal jurisdiction over Santander.

Sufficiency of process

The parties' positions. Petitioners also argued that a lower, albeit unspecified, standard should apply in the discovery context than in a liability context, because the burden on the respondent party is lower. Santander protested, pointing to the Second Circuit's decision in *Gucci*, where the Court applied the *Daimler* jurisdictional analysis, without modification, to determine whether a party should be compelled to comply with a discovery request.

The Court's ruling. The Court rejected the suggestion that some "categorically lower showing of due process" is sufficient in Section 1782 applications, noting that a respondent party has its own interests, such as "avoiding the burdens of discovery."

Extraterritorial application of Section 1782

The parties' positions. Petitioners sought discovery of documents located abroad, and the Santander Parties, naturally, objected.

The Court's ruling. Resolving a district court split on this issue, the Court held that Section 1782 is capable of reaching documents abroad, thereby dramatically extending the statute's reach. In doing so, the Court rejected the Santander Parties' reliance on "the presumption against extraterritoriality" (which holds that, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application") because Section 1782 is "simply a discovery mechanism [that] does not subject the person to liability." Pointing out that the US Supreme Court never applied the presumption against extraterritoriality to a strictly "jurisdictional statute" that is not otherwise "tethered to regulating conduct or providing a cause of action," the Court had little hesitation in dismissing the argument.

Even if the presumption against extraterritoriality had been applicable, the Court would still allow discovery to proceed because Section 1782 incorporates the Federal Rules of Civil Procedure, which themselves authorize such discovery. The Court further noted that the decisions of lower courts within the Second Circuit disallowing such discovery were based on some combination of three sources: the Court's dicta in *In re Application of Sarrio* noting that there is "reason to think that Congress intended to reach only evidence located within the United States," a contemporaneous Senate report mentioning obtaining "oral and documentary evidence in the United States," and late Professor Hans Smit's article advising against extraterritoriality. But, because the plain language of the statute does not preclude discovery abroad, these considerations were found "insufficient to win the day."

Thus, joining the Eleventh Circuit, which held several years prior that "the location of responsive documents and electronically stored information — to the extent a physical location can be discerned in this digital age — does not establish a *per se* bar to discovery under Section 1782," the Second Circuit now also allows its district courts to order extraterritorial discovery.

Conclusion

These rulings by the Second Circuit will undoubtedly have a far-reaching impact on the legal and

business community within the US Second Circuit and beyond. Professor Smit has warned that Section 1782 may transform US courts into "clearing houses for requests for information from courts and litigants all over the world in search of evidence to be obtained all over the world." While it remains to be seen whether that prophesy will materialize, one thing is certain: careful legal planning will now become all the more critical to properly obtain, or defend against, Section 1782 discovery applications.

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