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Victory Update:
Foreign Parties Can Use U.S. Court To Obtain Documents Located Abroad

Since 1964, an American federal statute—28 U.S.C. § 1782—has empowered the United States courts to permit discovery from persons who "reside" or are "found" in the United States for use in judicial and arbitral proceedings outside of the United States.[1] However, whether an applicant can use Section 1782 to obtain documents located abroad has been an unsettled issue in the Second Circuit. Last week, the Second Circuit in *In re del Valle Ruiz*[2] resolved this issue by confirming that "there is no per se bar to the extraterritorial application of § 1782" and affirming the lower court's decision allowing two American participants in foreign proceedings (both represented by Quinn Emanuel) to obtain extraterritorial discovery from a New York-based banking entity. The decision in this case resolves significant uncertainty regarding the scope of discovery available under the statute, and reaffirms the utility of Section 1782 as a discovery device for litigants in jurisdictions with more limited evidence-gathering procedures.

The case arose in connection with the June 2017 forced sale of Banco Popular de Español, S.A. ("BPE") to Banco Santander, S.A. for one Euro, an event that has resulted in criminal, civil, and arbitral proceedings in a variety of jurisdiction. To aid those proceedings, certain interested parties (represented respectively by Quinn Emanuel and Kirkland & Ellis) filed applications for discovery in the Southern District of New York from Banco Santander and its New York-based affiliate, Santander Investment Securities Inc. ("SIS"). Although the district court denied the application with respect to Banco Santander itself, it permitted discovery from SIS, and it specifically rejected the argument that such discovery should be limited to documents located in the United States.

On appeal, the Second Circuit was asked (1) whether Banco Santander "resides or is found" within the district for purposes of discovery under Section 1782, and (2) whether Section 1782 permits discovery of documents physically located outside of the United States.

On the first question, the Second Circuit held that by permitting discovery from any person who "resides or is found" in a judicial district, Section 1782 extends to the limits of personal jurisdiction consistent with due process. The court was unpersuaded by Santander's argument that jurisdiction required physical presence for purposes of Section 1782, recognizing that the word "found" has been interpreted more broadly in other statutory contexts. Applying a newly-adopted standard, the court then evaluated whether Santander's contacts with the Southern District of New York were sufficient to subject it to specific personal jurisdiction, focusing in particular on the connection between Santander's activities in New York and the discovery materials being sought. Although, on the facts of the case, the court concluded that the connection was not sufficiently direct, its decision provides a framework for courts and litigants to assess whether corporations active in the United States but not domiciled here will be required to produce discovery materials in response to a Section 1782 subpoena.

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[1] 28 U.S.C § 1782(a).
[2] *In re del Valle Ruiz*, No. 18-3226, 2019 WL 4924395, at *7 (2d Cir. Oct. 7, 2019).

On the second question, the Second Circuit explicitly considered the question:

"**does § 1782 apply extraterritorially**?"[3]

In affirming the lower court's decision allowing Section 1782 discovery for documents located abroad, the Second Circuit held that that "there is no per se bar to the extraterritorial application of § 1782." In so ruling, the Second Circuit joined the Eleventh Circuit in holding that because "§ 1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure" and the "Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control," it follows that "§ 1782 likewise allows extraterritorial discovery."[4] In other words, "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 § 1782."[5]

The Second Circuit also directly considered, and rejected, SIS's argument that the so-called "presumption against extraterritoriality"—a presumption that Congress ordinarily does not mean its legislation to apply outside the United States—weighs against granting an application seeking documents outside of the United States. Further, the decision also abrogated numerous decisions from the Southern District of New York and prior *dicta* from the Second Circuit which suggested a categorical bar to extraterritorial discovery under Section 1782.[6]

While the Second Circuit's decision appears to narrow the types of respondents subject to Section 1782 discovery in New York, it expands what an applicant can obtain in discovery from a qualified respondent, including in particular documents located outside of the United States. Of course, a district court has discretion to consider the location of documents in deciding a Section 1782 application. But the decision is a significant step in clarifying the applicability of the statute and confirms Section 1782's alignment with the Federal Rules of Civil Procedure, which permit discovery of documents within the respondent's possession, custody and control, wherever those documents are located.

As the largest business litigation and arbitration firm in the world, Quinn Emanuel is uniquely positioned to assist litigants in proceedings outside the United States in either seeking or resisting applications for discovery in United States courts under Section 1782. Our global roster of litigators have successfully pursued, and opposed, Section 1782 discovery applications in a wide variety of disputes on behalf of both individual and corporate clients, and we count among our multi-national ranks a number of dual-qualified attorneys able to advise clients in both U.S. and non-U.S. jurisdictions, including the author of the first treatise focused exclusively on the law and practice of Section 1782.[7]

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[3] *In re del Valle Ruiz*, at *7.
[4] *Id.*, at *8 (*quoting Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199-1200 (11th Cir. 2016)).
[5] *Id.*
[6] *See e.g. Purolite Corp. v. Hitachi Am., Ltd.*, No. 17-mc-67, 2017 WL 1906905, at *2 (S.D.N.Y. May 9, 2017) (no extraterritorial application); *In re Application of Kreke Immobilien KG*, No. 13-mc-110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (same); *In re Godfrey*, 526 F.Supp.2d 417, 423 (S.D.N.Y. 2007) (same); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (same).
[7] *See* Lucas Bento, *The Globalization of Discovery: The Law and Practice under 28 U.S.C. § 1782* (Kluwer Law International, 2019).

If you have any questions about the issues addressed in this memorandum, or if you would like to discuss ways in which Section 1782 can assist or impact your case, please do not hesitate to reach out to:

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