Published on *The National Law Review* https://natlawreview.com

“Ain’t No River Wide Enough”: Second Circuit Says No Per Se Bar to Extraterritorial Application of Section 1782

Article By:

Erica T. Jones

This month, the Second Circuit weighed in on open issues relating to discovery under 28 U.S.C. § 1782. Section 1782 allows federal courts to order entities that “reside[] or [are] found” in their district to produce evidence for use in a proceeding before “a foreign or international tribunal” upon request by “any interested person.”

In In re del Valle Ruiz, a group of Mexican nationals led by Antonio Del Valle Ruiz, alongside two US-based investment and asset management firms, sought discovery from the Spanish multinational commercial bank, Banco Santander SA (“Santander”), and its New York?based subsidiary, Santander Investment Securities Inc. (“SIS”), under Section 1782. Santander had acquired Banco Popular Español, S.A. (“BPE”) after a government?forced sale and petitioners initiated or sought to intervene in various foreign proceedings contesting the acquisition.

The district court largely denied the applications, explaining that it lacked personal jurisdiction over Santander. However, it did grant discovery against SIS – thereby rejecting Santander’s argument that Section 1782 does not allow for extraterritorial discovery. The district court held that it had personal jurisdiction over SIS and, further, that Section 1782 could be used to reach SIS’ documents located *outside* of the United States.

The Second Circuit, on appeal, affirmed the district court’s decision and answered two questions:

- What is meant by Section 1782’s requirement that a person or entity “resides or is found” within the district in which discovery is sought?
- Whether Section 1782 may be used to reach documents located outside of the United States?

The answers to both questions have a major impact on foreign corporations, which frequently find themselves conducting business in New York.

As to the first question, the Second Circuit held that “resides or is found” extends Section 1782’s reach to the limits of personal jurisdiction that are consistent with due process, as opposed to merely

general “tag” jurisdiction over individuals. Notwithstanding the Second Circuit’s more expansive reading of the federal court’s jurisdiction in Section 1782 proceedings, it nonetheless found that Santander’s contacts with the Southern District of New York were not sufficient enough to subject it to the district court’s personal jurisdiction. The district court’s conclusion that it had general personal jurisdiction over SIS was not challenged on appeal.

Perhaps more significantly, as to the second question, the Second Circuit joined the Eleventh Circuit in rejecting decisions by several district courts that have held that Section 1782 could *never* be used to obtain evidence located abroad (as well as a few other circuit courts that have suggested the same thing). Instead, the Second Circuit held that there is no *per se* bar to the extraterritorial application of Section 1782. That means that the district court may exercise its discretion concerning whether or not to allow such discovery.

Although it is difficult to predict how district courts might exercise such discretion moving forward, the Second Circuit explained that courts should look to the following non-exclusive factors when exercising their discretion:

- whether the person from whom discovery is sought is a party in the foreign proceeding, in which case the need for Section 1782 discovery is less apparent than if evidence were sought from a nonparty;
- the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the foreign entity to U.S. federal court assistance;
- whether the Section 1782 request conceals an attempt to circumvent foreign proof?gathering restrictions or other policies of a country; and
- whether the request is “unduly intrusive or burdensome.”

In this case, the Second Circuit held that the district court acted within its discretion when it allowed discovery from SIS, and that the factors unambiguously weighed in favor of extraterritorial discovery against SIS.

New York’s international business community is now on notice that documents held on offshore servers could be up for grabs under Section 1782 so long as they can be accessed in the United States—even if they were created abroad. It will be left to judges to determine, in light of the “pertinent issues” of the “particular dispute,” whether to impose US-style discovery in furtherance of foreign litigation. For now it seems, in the words of Marvin Gaye, Tammi Terrell, and later Diana Ross, there “ain’t no river wide enough” to keep Section 1782 applicants from seeking to access extraterritorial data.

National Law Review, Volume IX, Number 322