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International Arbitration Focus Team
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Going beyond Trump's wall: the extraterritorial reach of Section 1782 to discovery

International Arbitration Focus Team

Focus Team Leader
Laurence Shore
Laurence.Shore@belex.com
phone: +39-02-771131

Authors

Laurence Shore
Laurence.Shore@belex.com
phone: +39-02-771131

Justin Alexander Gambino
Justin.Gambino@belex.com
phone: +39-02-771131

Vanda Kopic
Vanda.Kopic@belex.com
phone: +39-02-771131

1. Introduction

In a recent decision dated 7 October 2019 (*In re del Valle Ruiz*, 2019 WL 4924395), the U.S. Court of Appeals for the Second Circuit held that a Federal Court pursuant to 28 U.S.C. § 1782 may order a party within its jurisdiction to produce documents located outside of the United States.

Section 1782 is a federal law which grants a federal court the discretion to issue a discovery order against an individual or entity within its jurisdiction upon application by an "interested person" to be used in proceedings before "a foreign or international tribunal".

2. The facts

In the case of *In re del Valle Ruiz*, former investors of Banco Popular Español, S.A. ("Banco Popular") petitioned the U.S. District Court for the Southern District of New York for court-ordered discovery pursuant to 28 U.S.C. § 1782, in connection with a foreign dispute arising from the forced sale by the Spanish government of Banco Popular to Banco Santander S.A. ("Santander") in 2017.

Alleging combined losses of over one billion euros as a result of the transaction, the investors commenced litigation and arbitration proceedings against Spain and the government agencies that authorised the forced sale. In particular, the investors brought actions before the General Court of the Court of Justice of the European Union against the government agencies that approved Banco Popular's "resolution" (authorising the sale to Santander), seeking its annulment on the ground that it was illegal. A group of these investors also commenced investor-State arbitration against Spain under the Mexico-Spain BIT to recover damages from their lost investment, claiming that the Spanish government participated in the decision-making process which culminated in the sale of Banco Popular to Santander.

3. The Section 1782 applications with the U.S. District Court for the Southern District

The investors' Section 1782 applications sought court-ordered discovery from Santander and its New York-based affiliate, Santander Investment Securities Inc. ("SIS"), neither of which was named as a respondent in any of the foreign proceedings. Both Santander and SIS opposed the applications for discovery.

The U.S. District Court for the Southern District denied the application for discovery against Santander for lack of personal jurisdiction but granted the application against SIS.

The presiding Judge was unpersuaded by the argument that the documents for which discovery was sought were abroad, and the Court could not, therefore, compel SIS to produce materials located outside of the United States.

> In granting the application, he noted in passing that the Court of Appeals for the Eleventh Circuit, as well as other District Courts within the Second Circuit, have previously concluded that **discovery of documents abroad is permissible** in light of Section 1782's plain language and legislative history.

4. The appeal before the U.S. Court of Appeals for the Second Circuit

The judgment was affirmed in full by the U.S. Court of Appeals for the Second Circuit. In reaching its decision on whether it has the power to order discovery of documents abroad, the Court of Appeals began by considering SIS's claim that the presumption against extraterritoriality (*i.e.*, presumption that federal laws only have domestic application) extends to Section 1782. The Court of Appeals dismissed the argument, commenting that the presumption against extraterritoriality is generally applied to those federal laws which regulate conduct (to determine whether these laws should apply abroad).

> It determined that the presumption was inapplicable in the present case as Section 1782 serves only to obtain discovery, and not to regulate conduct nor subject a person to liability.

The Court of Appeals then shifted its attention to the "split" between the District Courts as to Section 1782's application abroad. It remarked that this was an issue of first impression for the Second Circuit.

It observed that the Eleventh Circuit was the only Circuit Court of Appeals to have addressed this issue (see *Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194 (11th Cir. 2016)). The Eleventh Circuit answered this question in the affirmative:

> given that Section 1782 permits discovery under Federal Rules of Civil Procedure, which authorise discovery outside the United States, it follows that Section 1782 allows for discovery abroad.

In adopting the reasoning by the Eleventh Circuit, the Second Circuit cautioned that the location of the documents for which discovery is sought should be considered when exercising its discretion to order their production.

Having **determined that Section 1782 has extraterritorial application**, the Court of Appeals moved on to conclude that the four discretionary *Intel* factors – as identified by the Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) – called for the production of documents by SIS in the present case:

(i) SIS is not a party to any of the foreign proceedings;

(ii) there is nothing to suggest that the foreign courts would not be receptive to the evidence;

(iii) it has not been alleged that the order is being sought from the investors in contravention of any restrictions imposed in the foreign proceedings; and

(iv) neither Santander nor SIS had established in any way that the discovery request "*would be unduly intrusive or burdensome*".

5. Conclusion

With its ruling in *In re del Valle Ruiz*, the Second Circuit has sent an important message to the international legal community. Foreign litigants are encouraged to seek court-ordered discovery from entities within the Court's jurisdiction, and such entities will no longer be able to rely on geographical boundaries to escape the extraterritorial reach of Section 1782.

While the Second and Eleventh Circuits remain the only Courts that have expressly allowed for the extraterritorial application of court-ordered discovery pursuant to Section 1782, the increasingly broad approach with which this provision has been applied by Federal Courts in the United States suggests that other Circuits will soon follow suit.

International Arbitration Focus Team

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Laurence Shore
International Arbitration

Andrea Carlevaris
International Arbitration

Paolo Daino
Corporate

Giuseppe Manzo
Corporate

Lorenzo Melchionda
International Arbitration

Manlio Frigo
International Law

Giovanni Minuto
International Arbitration

Marco Adda
Tax

Andrea Carta Mantiglia
Corporate

Paolo Di Giovanni
International Arbitration

Alberto Saravalle
Corporate

Antonio Crivellaro
International Arbitration

Barbara Concolino
International Arbitration