

SECOND CIRCUIT EXPANDS THE GEOGRAPHIC REACH OF SECTION 1782

The Court of Appeals for the Second Circuit recently clarified the geographic scope of discovery available under 28 U.S.C. § 1782. Section 1782 allows parties in foreign proceedings to obtain discovery in the US in support of those foreign proceedings. In the past, many courts have limited such discovery to companies located in the US and to documents physically stored in the US. The Second Circuit has now clarified, however, that Section 1782 may reach any company subject to personal jurisdiction in the US, even if the documents requested are physically located outside the US. See *In re del Valle Ruiz et al.*, -- F. 3d --, No. 18-3226 (2d Cir. Oct. 7, 2019). Based on this ruling, a company with no operations in the US now may be subject to discovery pursuant to Section 1782.

Factual Background

The discovery application in *del Valle Ruiz* arose from the forced sale of one Spanish bank (the "Target") to another Spanish bank (the "Purchaser") in 2017. In May 2017, the Purchaser used two New York-based firms to conduct due diligence in connection with a potential private sale of the Target. The following month, however, the Spanish banking authorities determined that the Target was likely to fail and, on that basis, offered the Target for sale pursuant to a fast-moving "resolution" process in Spain. The Purchaser was the only bidder in that process, and was able to purchase the Target for only €1. Former shareholders of the Target brought proceedings in Europe to challenge the transaction.

In support of those foreign proceedings, some of the plaintiffs sought Section 1782 discovery in the US from the Purchaser and its New York-based subsidiary. They requested numerous categories of documents focusing on the forced sale process. The Purchaser and its subsidiary opposed the applications.

Section 1782 Framework

Section 1782 allows discovery through US federal courts when (1) the person from whom discovery is sought "resides or is found" in the district where the

application is made; (2) the discovery is for use in a proceeding before a foreign tribunal; and (3) the application is made by a foreign tribunal or any interested person. Section 1782 was enacted by Congress in part to encourage other countries to adopt and utilize broad, US-style discovery.

If the statutory requirements are met, a federal court has discretion to grant the requested discovery. In making this decision, courts consider: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (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 judicial assistance; (3) whether the Section 1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the US; and (4) whether the discovery request is unduly intrusive or burdensome. See *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264-65 (2004).

"Resides or Is Found" Requirement

Courts have struggled to interpret the "resides or is found" statutory requirement. Some courts have concluded that this requires something more than the "minimum contacts" necessary to exercise personal jurisdiction over a party in US courts. In *del Valle Ruiz*, the Second Circuit concluded for the first time that contacts sufficient for personal jurisdiction are also sufficient to meet the "resides or is found" statutory requirement. In the Court's words, "the statutory scope of 'found' extends to the limits of personal jurisdiction consistent with due process." This means that the complex rules governing personal jurisdiction in the US also govern the availability of Section 1782 discovery.

There are two types of personal jurisdiction: general and specific. General jurisdiction is "all purpose" jurisdiction that can be exercised against a person "at home" in the forum state. For a corporate entity, this usually means the state where the entity is incorporated or has its principal place of business. In *del Valle Ruiz*, for example, there was no dispute that the New York subsidiary was subject to general jurisdiction in New York, and thus potentially subject to Section 1782 discovery in New York federal courts.

Specific jurisdiction can be exercised only with respect to claims that arise out of a party's contacts with the forum state. For example, a nonresident who travels to New York and commits a tort while present in the state would be subject to specific jurisdiction for purposes of the resulting tort claim (but not for other claims unrelated to the New York contacts).

In *del Valle Ruiz*, the Second Circuit recognized that this traditional test for specific jurisdiction must be "translated" for use in the Section 1782 discovery context. The Court concluded that, in this context, specific jurisdiction would be appropriate only "where the discovery material sought proximately resulted from the respondent's forum contacts." In other words, the party's contacts with the forum state "must be the primary or proximate reason that the evidence sought is available at all."

Applying these principles to the facts of *del Valle Ruiz*, the Second Circuit recognized that the Purchaser had contacts with New York arising from its use of New York-based firms to conduct due diligence in connection with a potential

private sale. These contacts were arguably a "but for" cause of the forced sale because, according to the Purchaser's CEO, the due diligence conducted in May 2017 allowed the Purchaser to make a bid in the resolution process. The Court concluded, however, that these contacts were not the *proximate* cause of the sale in the subsequent resolution process. Accordingly, broad discovery concerning the forced sale was not justified by the Purchaser's New York contacts. (The Court indicated, however, that the result might have been different if the discovery requested had been limited to the due diligence process.)

Location of the Documents

The Court also addressed the argument that Section 1782 could not be used to obtain documents physically located outside the US. The Court expressly rejected this argument. If a party is subject to personal jurisdiction, then Section 1782 allows discovery of documents, wherever they may be located, that are within the party's possession, custody, or control. The Court noted, however, that "a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery."

Observations

The key takeaway from *del Valle Ruiz* is that a non-US company may be subject to discovery in the US under Section 1782 even if it does not maintain any physical presence in the US. The party seeking discovery would have to show a strong connection between the discovery sought and the company's contacts with the US, but this will be feasible in many situations. Indeed, the Court in *del Valle Ruiz* indicated that discovery under Section 1782 might have been available if the parties seeking discovery had tailored their document requests more carefully.

After *del Valle Ruiz*, the only way to avoid the risk of Section 1782 discovery is to avoid all contacts with the US, which is not a realistic option for most non-US companies.

The *del Valle Ruiz* decision is also significant in that it squarely addresses the problem of applying the standard for specific jurisdiction in the context of discovery requests. In the typical specific jurisdiction case, the claim at issue must arise from contacts with the forum state. In *del Valle Ruiz*, the Court adapts this standard for "cases" involving discovery only, holding that there must be a proximate connection between contacts with the US and the discovery sought. This implies that specific jurisdiction must be assessed on a request-by-request basis and, for a given set of discovery requests, personal jurisdiction may exist for some requests but not for others.

CONTACTS

Jeff Butler
Partner

T +1 212 878 8205
E jeff.butler
@cliffordchance.com

Anthony Candido
Partner

T +1 212 878 3140
E anthony.candido
@cliffordchance.com

Robert Houck
Partner

T +1 212 878 3224
E robert.houck
@cliffordchance.com

John Alexander
Counsel

T +1 212 878 3225
E john.alexander
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 31 West 52nd Street,
New York, NY 10019-6131, USA

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