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CAN A U.S. COURT ORDER FOREIGN DISCOVERY FOR A FOREIGN USE?

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A German company and an English company are litigating a dispute in an English court. The German company seeks third-party documents, owned by an American company and warehoused in Mexico, for use in the English litigation. The German company retains you—a U.S. lawyer—to ask a U.S. court to order the domestic owner to produce its Mexican documents.

Will you succeed?

Under 28 U.S.C. § 1782, U.S. district courts have the authority to order discovery for use in certain foreign or international proceedings. The statute serves two related goals—providing an efficient means of assisting participants in such proceedings and thereby encouraging foreign countries to provide similar means of assistance to U.S. courts.

One question repeatedly arises: Does section 1782 permit discovery of documents and things outside the United States? Recent district court decisions have suggested a trend toward holding

that section 1782, at a minimum, does not bar discovery of such documents but that courts still will consider the foreign location of documents in their exercise of the discretion given to them by the statute. That trend was recently validated by the U.S. Court of Appeals for the Second Circuit—widely viewed as the leading court of appeals on legal issues central to international litigation and arbitration.

Section 1782 establishes three requirements for obtaining discovery: (1) The person from whom the discovery is sought must “reside” or be “found” in the U.S. judicial district where the application is made; (2) the discovery sought must be “for use in a proceeding in a foreign or international tribunal”; and (3) the application must be made either by a foreign or international tribunal or by an “interested person.”

Even if those factors are met, the district court is not required to order the discovery, but has discretion whether to do so. The court is expressly authorized

to prescribe the practice and procedures for conducting the discovery; otherwise, by default, the Federal Rules of Civil Procedure govern.

In *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the U.S. Supreme Court described the factors that should guide the district court’s exercise of discretion: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, character of the proceedings, and receptivity of the foreign government or court to U.S. judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other foreign or U.S. policy; and (4) whether the discovery request is unduly intrusive or burdensome.

On its face, the text of section 1782 says nothing about the location of discoverable documents and things. And the Federal Rules of Civil Procedure, which govern discovery under section 1782 if the court does not order otherwise, have long been recognized to permit discovery of documents and things located abroad.

Nonetheless, district courts have disagreed on the issue, with no clear weight of authority falling on either side of the question. In essence, district courts have fallen into two camps: Some have focused on the plain language of section 1782, which contains no geographic limitation and cites the Federal Rules. Others have focused on the legislative history of section 1782, which may suggest that Congress intended to cover only discovery within the United States.

The confusion was partly due to the lack of clear guidance from the U.S. courts of appeals and the U.S. Supreme Court. In a 1997 decision, the Second Circuit noted, in dicta, the absence of a geographical restriction in section 1782, but still opined that “there is reason to think Congress intended to reach only evidence located within the United States.” *In re Application of Sarrío, S.A.*, 119 F.3d 143, 147 (2d Cir. 1997).

Until 2016, however, no circuit court had directly addressed the issue. In *Sergeeva v. Tripleton International Ltd.*, 834 F.3d 1194 (11th Cir. 2016), the Eleventh Circuit reviewed a district court decision ordering third-party discovery under section 1782. The documents sought related to the ownership of a Bahamian corporation and were to be used in litigation in Russia. The third party was a corporation located in Atlanta, Georgia. Some of the documents sought were located outside the United States.

The third party argued that section 1782 does not reach documents located in foreign countries. The Eleventh Circuit affirmed the trial court's order granting discovery, noting that section 1782 permits discovery in accordance with the Federal Rules and that Rule 45 governing third-party document subpoenas sets geographical limits on *the location of production* but not on the location of the documents themselves.

The court concluded 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 § 1782.”

District court decisions have suggested two trends in *Sergeeva*'s wake: a greater likelihood that courts will order discovery of documents located outside the United States, and a shift in focus to the application of the *Intel* factors and the district courts' exercise of discretion.

For example, in *In re Accent Delight International Ltd.*, 2018 U.S. Dist. LEXIS 97673 (S.D.N.Y. June 11, 2018), the district court acknowledged that “many district judges in this Circuit have accepted” the argument that section 1782 does not authorize discovery of documents located outside the U.S., but further noted the lack of “substantive analysis” in those decisions, rejected the Second Circuit's dicta in *Sarrío*, and agreed with the Eleventh Circuit's plain-language analysis in *Sergeeva*. The court also noted that

section 1782's legislative history is “at best ambiguous” on this issue.

In ordering discovery of documents located outside the United States, the court suggested that the location of the documents could still be a “discretionary consideration” under the fourth *Intel* factor—whether the discovery sought would be unduly intrusive or burdensome. For example, the court suggested that a request for documents located abroad beyond those relating directly to the petitioners' claims—which concerned the allegedly fraudulent sale of 38 works of art—would be unduly burdensome. *Accent Delight* remains on appeal to the Second Circuit.

In a second recent decision, *In re Effecten-Spiegel AG*, 2018 U.S. Dist. LEXIS 135837 (S.D.N.Y. Aug. 10, 2018), the district court, on reconsideration, declined to change its denial under section 1782 of discovery of certain documents located in Ireland. The court stated it had not “impose[d] a blanket territorial threshold on the application of Section 1782”; instead, the court appears to have considered the location of the documents sought as part of its discretionary analysis under *Intel*. The Second Circuit agreed, holding that the district court “did not impose a categorical bar on extraterritorial discovery”; rather, it had properly applied the *Intel* factors and had “acted within its considerable discretion” in denying the discovery sought. *Effecten-Spiegel, AG v. Lynch*, 771 F. App'x 38, 39 (2d Cir. 2019).

The Second Circuit now has joined the Eleventh Circuit in holding that “a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad.” *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019).

Del Valle Ruiz concerned two petitions under section 1782 for discovery related to the forced sale of a failing bank by the Spanish government. The petitioners sought documents from the buyer—which had acquired the failing bank for one Euro—and several of its affiliates. In holding that section 1782 does not bar the discovery of

evidence located outside the United States, the Second Circuit rejected its prior dicta in *Sarrío* and expressly adopted the Eleventh Circuit's rationale in *Sergeeva*, including the focus on the plain meaning of the statutory text. The court further noted that “a [district] 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,” and then found that the *Intel* factors weighed in favor of granting discovery from one of the respondents.

The Second Circuit's substantial influence in this area of the law means that other circuits are likely to follow *del Valle Ruiz*. Moreover, the approach in *del Valle Ruiz* reflects not only plain statutory language, but also current realities: as both the Second and Eleventh Circuits recognized, the prevalence of electronic information and storage calls into question the significance of the documents' physical location. District courts thus should focus their analysis on the question of *control*, rather than *location* – as, for example, in *In re Stati*, 2018 U.S. Dist. LEXIS 8111 (D. Mass. Jan. 18, 2018), in which the district court declined to take a position on the geographical scope of section 1782 and opted instead to “apply the possession, custody, or control of documents requirements in Rule 45(a)(1).”

What all this means is that you are likely to win an argument for the discovery you seek, based solely on the location of the documents in Mexico. But you should also be prepared to justify the breadth of your discovery requests and to make the case that the Mexican documents are in the control of the party from which you are seeking them. ■

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