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Second Circuit Clarifies Scope of Discovery Available in the United States for Use Outside the United States

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The U.S. allows persons with an interest in legal claims pursued outside the U.S. to obtain judicially enforced discovery of documents and testimony within the U.S. for use in the foreign proceedings. This is done by applying to a U.S. court under the federal statute entitled "Assistance to foreign and international tribunals and to litigants before such tribunals."[1]

An important recent decision by the U.S. Court of Appeals for the Second Circuit resolves two issues concerning the extent of discovery available under the statute. The decision, issued on October 7, 2019, in a case called *In re del Valle Ruiz*,[2] confirms the broad scope of the available discovery.

Background

An application for discovery under the statute will not be granted automatically. The application, which must be filed in a U.S. district court, will be evaluated in two steps.

First, the district court considers whether an order providing for the discovery is authorized by the statute. This step of the evaluation is governed by relatively well-defined rules. In the event of an appeal, this step of the evaluation would be reviewed *de novo*.

If the conclusion is that the requested discovery is not authorized, then the application must be denied. But if the statute does authorize the discovery, then the district court's evaluation proceeds to the second step. Having found itself empowered, the district court will weigh

[1] 28 U.S.C. § 1782.
[2] --- F.3d ---, 2019 WL 4924395 (2d Cir. 2019).

several "discretionary factors" to decide whether and, if so, how to exercise its power to order discovery. In the event of an appeal, this second step by the district court would be reviewed under the more deferential standard that asks only whether the district court abused its discretion.

The two issues of first impression in *In re del Valle Ruiz*

Both of the two issues newly resolved by the Second Circuit arise in the first step of evaluating an application – the step in which a district court evaluates whether the statute authorizes the discovery. The first of the two issues concerns *who* may be ordered to provide discovery. The second issue concerns *what* that person may be ordered to produce.

First issue: who may be ordered to provide discovery

The statute says that the district court may order discovery materials to be produced by a person who "resides or is found" within the judicial district. Specifically, the application for discovery must be filed with the district court for "the district in which a person [from whom discovery is sought] resides or is found."[3] The meaning of this statutory language – "the district in which a person resides or is found" – is not plain when the person is an organization as opposed to an individual.

Recent developments in the law concerning personal jurisdiction over corporate defendants are relevant to the statute's language. In 2014, the U.S. Supreme Court held that, aside from exceptional cases, an organization's presence in a forum will subject the organization to being sued on any sort of claim in that forum only if the organization is incorporated there or has its principal place of business there.[4] This is the sort of "presence" that makes the organization "essentially at home in the forum" and thus subject to general jurisdiction there.[5] With this as background, it was argued to the Second Circuit in *In re del Valle Ruiz* that the statute does not authorize discovery from any organization that is neither

[3] 28 U.S.C. § 1782(a).
[4] Daimler AG v. Bauman, 571 U.S. 117 (2014).
[5] *Id.* at 139 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

incorporated nor headquartered within the judicial district. Such an organization, according to the argument, is not a "person" who "resides or is found" in the district.

Confirming the broad scope of discovery available under § 1782, the Second Circuit rejected that argument. The court held that the statute authorizes discovery from organizations incorporated and headquartered outside the U.S. if the "the discovery material sought proximately resulted from [the organization's] forum contacts."[6] And the causal connection between the discovery material and the forum contacts need not even be "proximate" if the organization's forum contacts are "broader and more significant."[7]

Second issue: what that person may be ordered to produce

Next, the Second Circuit considered whether the statute authorizes a district court to order an organization to produce documents that the organization maintains outside the U.S. The Second Circuit answered: Yes.

By this decision, the Second Circuit disapproved of several contrary decisions by lower courts within the circuit and disavowed a prior statement of its own on which some lower courts had relied.[8] The law is now settled that "a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad."[9]

The Second Circuit emphasized, however, that when a district court passes to the second step of its evaluation – the weighing of the "discretionary factors" – it "may consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery."[10]

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[6] 2019 WL 4924395, at *6.
[7] *Id.*
[8] *See id.*, at *8 and n. 16 (citing cases).
[9] *Id.*
[10] *Id.*

Lessons from *In re del Valle Ruiz*

An application to a U.S. court for discovery that will be used abroad can be a powerful tool for those who are contemplating – or are already involved in – litigation outside the U.S. The success of an application is subject to the discretion of the district court. But the broad scope of the court's authority to order discovery is confirmed by *In re del Valle Ruiz*.

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