

2nd Circ. Ruling Could Have Big Impact In NY's Biz District

By **Caroline Simson**

Law360 (October 9, 2019, 8:41 PM EDT) -- The Second Circuit has resolved two issues surrounding an increasingly important discovery tool for litigants tracking down documents for legal proceedings abroad, a decision likely to have major consequences for New York's international business community.

The court ruled Monday there is "no per se bar" in Section 1782 of the U.S. code against using the statute to reach documents located outside the U.S. — meaning documents held by a business in New York on an offshore server are now fair game.

The Second Circuit also became the first circuit court to rule it has jurisdiction over a party targeted in a Section 1782 proceeding so long as the information sought is connected in some way to activity in the relevant district. That means a litigant could seek documents created during the course of the target entity's engagement with another entity in the district.

While both findings are important, their usefulness for parties involved in Section 1782 proceedings will vary depending on their particular circumstances.

The jurisdiction issue is particularly noteworthy for multinational corporations, especially since so many financial institutions have locations in the Empire State, says Morrison & Foerster LLP partner J. Alexander Lawrence.

"This is significant for foreign corporations like multinational banks that have a foothold in New York," he said. "Just showing they have a branch in New York will not be enough to open them up to 1782 discovery. There must be a nexus between the contacts with the forum and the discovery sought."

The ruling on the extraterritoriality point, meanwhile, is likely to have a far-reaching impact, since banks and other financial institutions can now be ordered to produce documents that, though created abroad, can be obtained in the U.S. through a computer.

"This is good news for parties seeking broad 1782 discovery and unhappy news for targets of 1782 discovery that maintain their documents overseas," Lawrence said.

Previously, some district courts have held that Section 1782 can never be used to obtain evidence located abroad, and some circuit courts have likewise cast doubt on the idea.

But with the Second Circuit's ruling, many U.S. subsidiaries of companies will now have access to documents created abroad, and they could be ordered to turn them over if they're accessible by computer.

"Most such Section 1782 cases will now turn on how district courts exercise this power, and they have the discretion to deny extraterritorial discovery where it would be unduly intrusive or burdensome," said Three Crowns LLP partner Luke Sobota.

The Second Circuit's ruling came in litigation initiated by U.S.-based investment and asset management firms Pacific Investment Management Co. LLC and Anchorage Capital Group LLC and a group of 55 investors led by Mexican billionaire Antonio Del Valle Ruiz. The petitioners had all sought information from Banco Santander SA in relation to legal proceedings in Europe over Banco Popular Español SA's 2017 sale for a token €1 (\$1.10) following liquidity problems.

Section 1782, the use of which has increased exponentially in recent years as international business has boomed, allows federal courts to order entities in their district to turn over evidence to be used in proceedings before "a foreign or international tribunal" at the request of "any interested person."

Although few had even heard of the statute 10 or 20 years ago, it is now recognized as a possible tactical advantage for litigants pursuing arbitration or litigation abroad, where their access to discovery may not be as expansive as it is in the U.S.

But as its use has expanded, so too have questions surrounding its applicability, including points decided by the Second Circuit on Monday. Last month, meanwhile, the Sixth Circuit ruled federal courts can order parties to turn over evidence for private commercial arbitration abroad — a decision that creates a circuit split between it and the Fifth and Second circuits.

In deciding on the extraterritoriality point, the Second Circuit joins the Eleventh Circuit in concluding Section 1782 extends to evidence abroad. The Eleventh Circuit had issued its ruling in 2016 in a case involving a Russian woman seeking evidence held in the Bahamas for use in a divorce proceeding in Moscow.

But the Second Circuit did leave room for each individual court to exercise discretion to grant such an application. As such, observers say it will be interesting to follow how the courts rule.

"I suspect there will still be a fair number of judges who will be reluctant to rule that, simply because a non-party witness is located in more than one country — one of which is the U.S. — they will be required to open all their files, anywhere in the world, for U.S.-style discovery in support of litigation abroad," said Wilk Auslander LLP partner Stuart M. Riback.

--Editing by Philip Shea and Emily Kokoll.