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Section 1782 Victory: Foreign Parties Can Use U.S. Court To Obtain Documents Located Abroad

Since 1964, an American federal statute—28 U.S.C. § 1782—has empowered the United States courts to permit discovery from persons who "reside" or are "found" in the United States for use in judicial and arbitral proceedings outside of the United States.[1] However, whether an applicant can use Section 1782 to obtain documents located abroad has been an unsettled issue in the Second Circuit. The Second Circuit in *In re del Valle Ruiz*[2] resolved this issue recently by confirming that "there is no per se bar to the extraterritorial application of § 1782" and affirming the lower court's decision allowing two American participants in foreign proceedings (both represented by Quinn Emanuel) to obtain extraterritorial discovery from a New York-based banking entity. The decision in this case resolves significant uncertainty regarding the scope of discovery available under the statute, and reaffirms the utility of Section 1782 as a discovery device for litigants in jurisdictions with more limited evidence-gathering procedures.

The case arose in connection with the June 2017 forced sale of Banco Popular de Español, S.A. ("BPE") to Banco Santander, S.A. for one Euro, an event that has resulted in criminal, civil, and arbitral proceedings in a variety of jurisdiction. To aid those proceedings, certain interested parties (represented respectively by Quinn Emanuel and Kirkland & Ellis) filed applications for discovery in the Southern District of New York from Banco Santander and its New York-based affiliate, Santander Investment Securities Inc. ("SIS"). Although the district court denied the application with respect to Banco Santander itself, it permitted discovery from SIS, and it specifically rejected the argument that such discovery should be limited to documents located in the United States.

On appeal, the Second Circuit was asked (1) whether Banco Santander "resides or is found" within the district for purposes of discovery under Section 1782, and (2) whether Section 1782 permits

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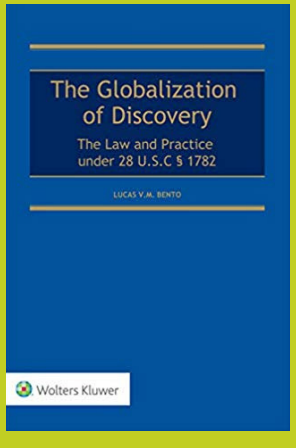
QE Lawyer Publishes Treatise on Section 1782



Lucas Bento, an Of Counsel in Quinn Emanuel's New York office, recently published "The Globalization of Discovery: The Law and Practice under 28 U.S.C. §1782." The US has the most extensive discovery procedures of any jurisdiction in the world. Section 1782 allows an "interested party" to a foreign proceeding to seek such US-style discovery from a person or entity located in the United States. Mr. Bento's book is the first to provide a comprehensive overview of Section 1782. The statute can be used to obtain evidence in the United States for use in foreign civil and criminal proceedings and can be used before a foreign action is commenced.

As the largest business litigation and arbitration firm in the world, Quinn Emanuel is uniquely positioned to assist litigants in proceedings outside the United States in either seeking or resisting applications for discovery in United States courts under Section 1782. The firm has successfully pursued, and opposed, Section 1782 discovery applications in a wide variety of disputes on behalf of clients around the world. Among its many recent victories, Quinn Emanuel obtained a significant victory in the Second Circuit in which the court held that Section 1782 can be used to obtain documents located outside of the United States. With Over 800 lawyers, many of them dual-qualified, and 23 offices in 11 countries, litigation involving disputes in multiple jurisdictions is a significant part of the firm's practice. Q

discovery of documents physically located outside of the United States.

On the first question, the Second Circuit held that by permitting discovery from any person who "resides or is found" in a judicial district, Section 1782 extends to the limits of personal jurisdiction consistent with due process. The court was unpersuaded by Santander's argument that jurisdiction required physical presence for purposes of Section 1782, recognizing that the word "found" has been interpreted more broadly in other statutory contexts. Applying a newly-adopted standard, the court then evaluated whether Santander's contacts with the Southern District of New York were sufficient to subject it to specific personal jurisdiction, focusing in particular on the connection between Santander's activities in New York and the discovery materials being sought. Although, on the facts of the case, the court concluded that the connection was not sufficiently direct, its decision provides a framework for courts and litigants to assess whether corporations active in the United States but not domiciled here will be required to produce discovery materials in response to a Section 1782 subpoena.

On the second question, the Second Circuit explicitly considered the question:

"does § 1782 apply extraterritorially?"[3]

In affirming the lower court's decision allowing Section 1782 discovery for documents located abroad, the Second Circuit held that that "there is no per se bar to the extraterritorial application of § 1782." In so ruling, the Second Circuit joined the Eleventh Circuit in holding that because "§ 1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure" and the "Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control," it follows that "§ 1782 likewise allows extraterritorial discovery."[4] In other words, "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."[5]

The Second Circuit also directly considered, and rejected, SIS's argument that the so-called "presumption against extraterritoriality"—a presumption that Congress ordinarily does not mean its legislation to apply outside the United States—weighs against granting an application seeking documents outside of the United States. Further, the decision also abrogated numerous decisions from the Southern District of New York and prior *dicta* from the Second Circuit which suggested a categorical bar to extraterritorial discovery under Section 1782.[6]

While the Second Circuit's decision appears to narrow the types of respondents subject to Section 1782 discovery in New York, it expands what an applicant can obtain in discovery from a qualified respondent, including in particular documents located outside of the United States. Of course, a district court has discretion to consider the location of documents in deciding a Section 1782 application. But the decision is a significant step in clarifying the applicability of the statute and confirms Section 1782's alignment with the Federal Rules of Civil Procedure, which permit discovery of documents within the respondent's possession, custody and control, wherever those documents are located.

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[1] 28 U.S.C § 1782(a).

[2] *In re del Valle Ruiz*, No. 18-3226, 2019 WL 4924395, at *7 (2d Cir. Oct. 7, 2019).

[3] *In re del Valle Ruiz*, at *7.

[4] *Id.*, at *8 (*quoting Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199-1200 (11th Cir. 2016)).

[5] *Id.*

[6] *See e.g. Purolite Corp. v. Hitachi Am., Ltd.*, No. 17-mc-67, 2017 WL 1906905, at *2 (S.D.N.Y. May 9, 2017) (no extraterritorial application); *In re Application of Kreke Immobilien KG*, No. 13-mc-110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013) (same); *In re Godfrey*, 526 F.Supp.2d 417, 423 (S.D.N.Y. 2007) (same); *In re Microsoft Corp.*, 428 F. Supp. 2d 188, 194 n.5 (S.D.N.Y. 2006) (same).

Pursuing Foreign Extra-Contractual Claims Relating to New York Governed Contracts: *New York's Narrow Interpretation of Choice-of-Law Provision*

New York courts customarily honor the parties' choice of which state's law should govern a contract. But, what does this mean for a claimant's extra-contractual claims?[1] Particularly where the at-issue conduct occurred abroad, a claimant should consider alleging its extra-contractual claims under foreign law while pleading its U.S. claims in the alternative. The benefits of which are two-fold: *first*, foreign extra-contractual claims tend to have a different, often lower, pleading requirement making surviving a motion to dismiss more tenable; and *second*, certain conduct may warrant the awarding damages under a foreign law, where such conduct alone would not be sufficient under U.S. law.

* * *

Where a claimant has extra-contractual claims that relate to a contract that (1) has a choice-of-law provision that is (2) governed by New York and (3) a forum-selection clause appointing New York as the exclusive jurisdiction, what law should apply?

How Do New York Courts Evaluate a Choice-of-Law Provision?

When dealing with choice-of-law provisions, as a threshold matter, New York courts evaluate two aspects: *first*, whether the choice-of-law provision is **valid**, and *second*, if valid, what is the **scope** of the choice-of-law provision—i.e., was the choice-of-law provision drafted broadly enough to encompass the extra-contractual claims. *See Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 414 F.3d 325, 332–36 (2d Cir. 2005);

Validity. Under New York law, a contract can be invalid or void where it was entered into under duress, fraud, or undue influence, and where the contract is unconscionable (or shockingly unfair). New York contract law also provides voiding contracts where doing so would serve public policy, e.g., forcing employees to sign a contract forbidding medical leave. The validity of a contract would be determined by the forum's choice-of-law, in this case New York. *See, e.g., Valley Juice Ltd. v. Evian Waters of France, Inc.*, 87 F.3d 604, 607–08 (2d Cir.1996).

Scope. Because most contracts do not specify what law governs the interpretation of the scope of the choice-of-law provision, courts will generally determine the choice-of-law clause's scope under the same law that governs the clause's validity—i.e., the law of the forum. *See e.g., Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir.1996).[2] New York courts will evaluate the scope of a choice-of-law provision under New York law. S*ee Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 414 F.3d 325, 332–36 (2d Cir. 2005); *J.A.O. Acquisition Corp. v. Stavitsky*, 192 Misc.2d 7, 745 N.Y.S.2d 634, 638 (Sup.Ct. N.Y. County 2001).

New York courts take a strict view towards construing contractual choice-of-law provisions and are generally reluctant to hold that they broadly encompass extra-contractual causes of action. *See Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 414 F.3d 325, 332–36 (2d Cir. 2005). Therefore, in instances where a choice-of-law provision only addresses the *governing* and *construing* of a specific agreement or contract, New York courts have refused to apply that choice-of-law provision to extra-contractual claims.

Examples of Choice-of-Law Provisions that ***Exclude*** Extra-Contractual Claims

- This contract shall be governed by the laws of the State of New York.[3]
- This letter agreement, including its validity, interpretation, construction and performance shall be governed by and construed in accordance with the internal laws of the State of New York, without regard to principles of conflicts of law.[4]
- This Agreement will be governed by and construed in accordance with the laws of the State of New York (without reference to choice of law doctrine).[5]
- This Agreement will be governed by and construed in accordance with the laws of the State of New York.[6]

However, New York courts have applied choice-of-law provisions where its language expands its scope to claims *relating* and *arising* from a specific contract or agreement.

Examples of Choice-of-Law Provisions that ***Include*** Extra-Contractual Claims

- This Agreement and all claims related to it, its execution or the performance of the parties under it, shall be construed and governed in all respects according to the laws of the State of New York.[7]
- The parties agreed that the laws of the state of Washington would apply to "any dispute of any sort that might arise between [Plaintiff] and Amazon."[8]

- This Agreement and the legal relations between the parties hereto will be governed by and construed in accordance with the internal laws of the State of New York and without regard to conflicts of laws principles.[9]
- In the event of any dispute between the parties to this agreement or with respect to any claim arising from the employment relationship, the applicable law shall be the substantive and procedural law of New York.[10]

The Choice-of-Law Provision Does Not Apply to an Extra-Contractual Claims, *Now What?*

Once determined that the choice-of-law provision does not apply to an extra-contractual claim, a New York court must conduct a choice-of-law analysis. However, such analysis is only appropriate past the motion to dismiss stage, as it is a fact-intensive inquiry. *See Mayaguez S.A. v. Citigroup, Inc.*, 16-cv-6788 (PGG), 2018 WL 1587597, at *10 (S.D.N.Y. Mar. 28, 2018).

Under the choice-of-law analysis, a New York court must determine (1) whether there is an actual conflict between the application of the foreign law and New York law, i.e., that each jurisdiction provides different substantive rules which have a significant possible effect on the outcome of the trial, *see Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc.*, 414 F.3d 325, 331 (2d Cir.2005), and (2) if so, which jurisdiction has the greatest interest in the litigation, *see Starr Indem. & Liab. Co. v. Am. Claims Mgt., Inc.*, 14-cv-0463 JMF, 2015 WL 2152816, at *3 (S.D.N.Y. May 7, 2015).

Determining an Actual Conflict. To evaluate whether there is an actual conflict between the jurisdictions, a New York court must first determine the foreign law at issue pursuant to Federal Rule of Civil Procedure 44.1. Under Rule 44.1, the parties can submit relevant information to the court without dealing with the same evidentiary standards required for other submissions, as determinations of foreign law is a question of law, not fact. *See Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 316 (S.D.N.Y. 2018), aff'd, 928 F.3d 186 (2d Cir. 2019). Usually, parties will submit briefing, expert reports and declarations on foreign law. Failing to do so runs a risk that the court may adopt an adversary's interpretation. *Cf. Banco de Mexico v. Orient Fisheries, Inc.*, 680 F. Supp. 2d 1132, 1145–46 (C.D. Cal. 2010).

After determining the foreign law at issue, a New York court will compare the foreign law and the forum law to determine whether there is an actual conflict, specifically looking at the differences in requirements for establishing liability. *See Curley v. AMR Corp.*, 153 F.3d 5, 15 (2d Cir. 1998). For example, in *Curley*, the Second Circuit found that there was an actual conflict between New York's common law claims for false imprisonment, negligence, and gross negligence and Article 1910 of Mexican Civil Code, which generally establishes that anyone acting unlawfully or against good customs who causes damage to another shall repair the damage. *Id.* The greatest difference between the two is that for the Mexican Civil Code claims, whether the wrongful act was intentional or negligent does not have a distinct bearing on liability. *Id.* Intent, on the other hand, bears directly on liability in New York. Thus, an actual conflict existed.

Interest Analysis. If there is an actual conflict, a court will look to which jurisdiction has the greatest interest for "issues relating to tort claims," where "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Williams v. Deutsche Bank Securities, Inc.*, 04-cv-7588 (GEL), 2005 WL 1414435, at *6 (S.D.N.Y. June 13, 2005) (internal formatting omitted); *see also Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985). In *Williams*, the Southern District of New York held that, although Defendant was incorporated in Delaware with its principle place of business in New York, California governed Williams' claims because (1) Williams was a resident of California, and (2) the tortious conduct—doing business with Williams as his advisor—took place in California.

Why Consider Pursuing Extra-Contractual Claims under Foreign Laws?

As the master of a complaint, a claimant has many theories available to it, as well as post-motion-to-dismiss leverage. Including foreign law claims is just one of the ways a claimant can better exert this leverage.

For example, foreign laws can offer a lower pleading requirement than their U.S. counterparts. As evidenced by *Generadora De Electricidad Del Caribe*, although the court recognized that the two legal concepts, *dolo* and fraud, were related—they were not synonymous. *See e.g., Generadora De Electricidad Del Caribe, Inc. v. Foster Wheeler Corp.*, 92 F. Supp. 2d 8, 19 (D.P.R. 2000). Puerto Rico's Supreme Court has "described 'dolo' as the genus and fraud as one of several species alongside with deceit, false representations, undue influence, and other insidious machinations." *Id.* In other words, where there is fraud, dolo is present, but dolo is also present in lesser modes, such as undue influence and insidious machination. *Id.* This difference is relevant in the pleading requirements—where, fraud requires

a heightened pleading requirement under Rule 9(b) and *dolo* does not necessarily have to be pled at the heightened standard. *Id.*

Foreign laws can also award damages for conduct not alone sufficient in the U.S. For example, as discussed above, Article 1910 of Mexico's Federal Civil Code establishes that anyone acting unlawfully or against good customs who causes damage to another shall repair the damage. This statute is unlike its counterpart under U.S. law, where whether the wrongful act was negligent or intentional has a bearing on liability.

These fewer requirements can operate to provide a less-encumbered path to victory, or at the very least, operate as a bargaining piece post-motion to dismiss.

The Benefits of Pleading in the Alternative.

Federal Rule of Civil Procedure 8 provides for the often underutilized tool of alternative pleadings. As detailed above, because there is some uncertainty as to how a court will apply the choice-of-law analysis, especially given its fact intensity, pleading in the alternative provides for the security that a claimant's pleadings will not be wholesale dismissed for alleging the wrong applicable law.

What Factors Should Interested Companies Consider?

Potential claimants should consider the following prior to initiating litigation:

- Do you have extra-contractual claims that relate to a contract? If so, does the contract have a conflict-of-law provision?
- Does the conflict-of-law provision provide for New York law to apply? Are you going to bring your lawsuit in New York?
- How broad is the conflict-of-law provision? Does it apply to "any claims relating" to the agreement? Or, does it apply only to "construing and interpreting" the agreement?
- Did the relevant conduct relating to your extra-contractual claims occur somewhere outside of New York? Were representations made in a foreign location?
- Is there an actual conflict between New York law as it relates to your extra-contractual claims and the foreign law? If so, are the differences significant that they could affect trial? Are you willing to hire an expert?
- Does the foreign law provide for additional causes of action? Is there any reason why you may not want to plead your foreign claims, and your U.S. claims in the alternative? Q

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[1] Examples of extra-contractual claims include fraud, breach of fiduciary duties, and setoff claims. However, unjust enrichment is not considered an extra-contractual claim in New York, as it is considered based in contract.

[2] Some other jurisdictions will apply the law of the contracted choice-of-law to determine its scope. *See Odin Shipping Ltd. v. Drive Ocean V MV*, 221 F.3d 1348, 2000 WL 576436, at *1 (9th Cir. May 11, 2000) (unpublished).

[3] *Knieriemen v. Bache Halsey Stuart Shields Inc.*, 74 A.D.2d 290, 427 N.Y.S.2d 10 (1st Dep't 1980), *overruled on other grounds, Rescildo v. R.H. Macy's*, 187 A.D.2d 112, 594 N.Y.S.2d 139 (1st Dep't 1993).

[4] *Twinlab Corp. v. Paulson*, 283 A.D.2d 570, 724 N.Y.S.2d 496, 496 (2d Dep't 2001).

[5] *Fin. One Pub. Co. Ltd. v. Lehman Bros. Spec. Financing, Inc.*, 414 F.3d 325, 332–36 (2d Cir. 2005).

[6] *Mayaguez S.A. v. Citigroup, Inc.*, No. 16-CV-6788 (PGG), 2018 WL 1587597, at *10 (S.D.N.Y. Mar. 28, 2018).

[7] *Bausch & Lomb Inc. v. Mimetogen Pharm., Inc.*, 2016 WL 2622013 *6 (W.D.N.Y. May 5, 2016).

[8] *Holmes v. Apple Inc.*, 17-cv-4557 (ER), 2018 WL 3542856, at *12 n.12 (S.D.N.Y. July 23, 2018).

[9] *Coscarelli v. ESquared Hosp. LLC*, 364 F. Supp. 3d 207, 220 (S.D.N.Y. 2019).

[10] *McPhee v. Gen. Elec. Int'l, Inc.*, 426 F. App'x 33, 34 (2d Cir. 2011).

Brazil Practice Contacts

Quinn Emanuel's Brazil Practice represents clients in disputes around the world involving Brazilian parties and investments in Brazil. We have represented individuals and companies in some of the most complex and important recent Brazilian disputes. If you have any questions about the issues addressed in this memorandum or would like to discuss how Quinn Emanuel can assist you, please do not hesitate to reach out to:

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