The Eleventh Circuit Affirms Extraterritorial Discovery to Assist International Proceeding and Production of Documents Held by Affiliates Abroad

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In a case of first impression in the circuit (Sergeeva), the Eleventh Circuit affirmed an order granting extraterritorial discovery pursuant to 28 U.S.C. § 1782 to support an asset recovery case. The case is significant because it recognizes that the scope of discovery available to support a foreign proceeding is not limited to information confined within U.S. borders but also reaches information accessible to those subject to the reach of U.S. courts. The opinion, therefore, is significant in the landscape of 28 U.S.C. § 1782 because it expressly recognizes a substantially broadened access to evidence for foreign proceedings.

Moreover, the opinion—in interpreting “possession, custody, or control”—highlights that such access to documents beyond U.S. shores pursuant to federal subpoena power extends to information in the hands of affiliated entities under proper circumstances. As such, the significance of Sergeeva is two-fold: It resolves the issue, in this circuit, of whether Section 1782 can be applied extraterritorially, and it recognizes that

subpoenaed documentary evidence also extends to affiliate entities consistent with the Federal Rules of Civil Procedure (as expressly incorporated into Section 1782).²

Background

Following marital dissolution proceedings in Russia, a former wife undertook efforts to discover concealed marital assets in multiple jurisdictions including Cyprus, Latvia, Switzerland, the BVI and the Bahamas. She ultimately sought discovery in the United States through 28 U.S.C. § 1782 to support her claim before a presiding Moscow court adjudicating the division of marital assets. The application sought information from third-party Trident Atlanta and its employee regarding information related to her former husband’s beneficial ownership of a Bahamian company.³

Extraterritorial Application of 28 U.S.C. § 1782

The court first set forth the prima facie requirements to obtain relief pursuant to 28 U.S.C. § 1782:

(1) the request must be made “by a foreign or international tribunal,” or by “any interested person”; (2) the request
must seek evidence, whether it be the “testimony or statement” of a person or the production of “a document or other thing”; (3) the evidence must be “for use in a proceeding in a foreign or international tribunal”; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.4

After determining that the predicate factors were met, the court addressed the discretionary factors as set forth by the United States Supreme Court (the Intel factors): “(a) whether aid is sought to obtain discovery from a participant in the foreign proceeding” (the first factor); (b) “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 U.S. federal-court judicial assistance” (the second factor); (c) whether the applicant is attempting to use § 1782 to “circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States” (the third factor); and (d) whether the discovery requests are “unduly intrusive or burdensome” (the fourth factor).5

Trident Atlanta took issue with the third factor arguing that Section 1782 does not apply extraterritorially.6 The court examined Section 1782 and held that it plainly provides for production consistent with the Federal Rules of Civil Procedure. Because Rule 45 (subpoena) calls for broad production of non-privileged documents, including those located outside of the United States, the court determined that the only limitation imposed by the rules related to the “location for the act of production,” not the location of the underlying documents.7 Therefore, documents subject to the subpoenaed party’s control were subject to production.

While the determination appears rather straightforward, it addresses a conflict in the application of Section 1782 dating back to Intel. Essentially, there have been two varying views as to whether Section 1782 entitles an applicant to obtain discovery of documents located outside of the United States (assuming the remaining requirements are met). The predominant view was that Section 1782 did not apply extraterritorially, while the minority view declined to limit its scope to U.S. borders. The prevailing view was generally espoused in dicta and relied on language from legislative history and commentary of the one of the statute’s chief drafters.9 For example, arguing against extraterritorial application, Professor Hans Smit argued that (1) the “evident purpose” of Section 1782 is to obtain evidence in the United States thereby setting up a “harmonious” international scheme where each jurisdiction determines production of evidence within its own borders; (2) application beyond borders would result in haphazard effects where a party unable to obtain foreign evidence in that jurisdiction obtained access due to the fortuitous presence of a party with information located in the United States; (3) extraterritorial application would render U.S. courts clearing houses for litigants from around the world, substantially burdening U.S. courts; and (4) resulting conflicts would inevitably arise between U.S. and foreign courts.10

In re Godfrey11 is representative of this view. Declining to grant a Section 1782 application seeking documents located in Russia, the court cited Professor Smit’s commentary and “[t]he bulk of authority in this Circuit, with which this Court agrees, hold[ing] that, for purposes of § 1782(a), a witness cannot be compelled to produce documents located outside of the United States.”12 The court specifically addressed and parted company with the contrary view espoused from the same court.13

That contrary view relies on nothing more than the plain language of Section 1782. Prior to Sergeeva, the extraterritoriality issue was squarely addressed in In re Application of Gemeinschaftspraxis Dr. Med. Schottdorf (Schottdorf) in which the court denied a motion to quash production of documents located in Germany.14 The court reasoned:

Section 1782 requires only that the party from whom discovery is sought be “found” here; not that the documents be found here. 28 U.S.C. § 1782(a). For this Court to read an implicit document-locale requirement into § 1782 would be squarely at odds with the Supreme Court’s instruction that § 1782 should not be construed... continued on page 69
to include requirements that are not plainly provided for in the text of the statute.\textsuperscript{15}

Described aptly as that “lone dissenting voice that others have declined to follow,”\textsuperscript{16} the court declined to “supplant the policy expressed by Congress in the plain words of the statute” with legislative history or commentary.\textsuperscript{17} Instead, the court concluded, “such considerations should be weighed on a case-by-case basis along with the other discretionary factors.”\textsuperscript{18}

In Sergeeva, the Eleventh Circuit Court of Appeals echoed the analysis set forth in Schottdorf. Arguing against the production of documents outside of the United States, Trident Atlanta relied on commentary and legislative history, as well as the presumption that U.S. law generally does not apply extraterritorially. The court, however, declined “to adopt such a provincial view given that the statutory text authorizes production of documents ‘in accordance with the Federal Rules of Civil Procedure.’”\textsuperscript{19} Further, because those rules place no limit on the location of documents or electronically stored information, only on the location of production, the court required Trident Atlanta to produce documents within its possession, custody or control noting any other restriction would run afoul of “the discretion Congress afforded federal courts to allow discovery under § 1782 ‘in accordance with the Federal Rules of Civil Procedure.’”\textsuperscript{20}

**“Possession, Custody, or Control” Extends to Affiliates Located Abroad**

Next, Trident Atlanta argued that it lacked control over non-U.S. affiliates in order to obtain the subpoenaed information.\textsuperscript{21} The court first recognized that the only limits on Federal Rule of Civil Procedure 45 concern privilege or unduly burdensome material—neither of which was at issue.\textsuperscript{22} Rejecting Trident Atlanta’s argument that it lacked the legal right to the documents, the court followed precedent holding that control for purposes of discovery meant “the legal right to obtain the documents requested upon demand” and “may be established where affiliated corporate entities— who claim to be providers of complimentary [sic] and international financial services—have actually shared responsive information and documents in the normal course of their business dealings.”\textsuperscript{23}

The court then determined that Trident Atlanta had the requisite control. As part of a group of companies with Trident Bahamas that operated as an international financial planner with production and liaison companies that cross-referred client requests, the court reasoned that the entities were otherwise incapable of performing “their intended functions for Trident Group clients” without the ability to exchange such information.\textsuperscript{24} The court held that the legal right to obtain information from an affiliated or related business entity with access to the information was sufficient.\textsuperscript{25}

Sergeeva relied, in part, on Costa v. Kerzner Int’l Resorts, Inc.,\textsuperscript{26} which addressed document production in the hands of an affiliate. There, the defendants objected to production of documents held by their Bahamian affiliates and argued they did not have control over production and plaintiffs should be required to seek the information through the Hague Convention on Taking Evidence Abroad.\textsuperscript{27} The court addressed the “possession, custody, or control” aspect of Fed. R. Civ. P. 34.\textsuperscript{28} Noting that the requirement is broadly construed, the court held that control “does not require that a party have legal ownership or actual physical possession of the documents at issue; indeed, documents have been considered to be under a party’s control (for discovery purposes) when that party has the ‘right, authority, or practical ability to obtain the materials sought on demand.’”\textsuperscript{29}

The court then applied the following analysis:\textsuperscript{30}

In determining whether a party has control over documents and information in the possession of nonparty affiliates, the Court must look to: (1) the corporate structure of the party and the nonparties; (2) the nonparties’ connection to the transaction at issue in the litigation; and (3) the degree to which the nonparties benefit from the outcome of the litigation.

Production was compelled because the defendants and affiliates were part of a unified corporate structure and wholly owned by a single entity and had operational
and financial interactions directly related to the transactions at issue, and the parent and subsidiary entities had a direct financial interest in the outcome of the case. The court also rejected the argument that plaintiffs be required to exhaust their efforts through the Hague Convention.

By contrast, in SeaRock v. Stripling, the court held that a ship owner lacked control over unrelated third parties who had invoiced him for work performed on a sunken ship. See also, In re Application of Passport Special Opportunities Master Fund, LP, 2016 WL 844833 (S.D.N.Y. Mar. 1, 2016) (denial of application pursuant to 28 U.S.C. § 1782 where movant failed to meet its burden to demonstrate that UK and Delaware Deloitte entities had requisite control over Deloitte affiliates in Pakistan despite change in corporate structure when it was not demonstrated that new conglomerate agreement provided authority or practical ability to obtain documents); Wiand v. Wells Fargo Bank, NA, No. 8: 12-CV-557-T-27EAJ (M.D. Fla. Dec. 13, 2013) (bank was not required to produce documents in possession of nonparty affiliates where agency relationship was not established and requisite control was absent). In short, the determination of whether the requisite “control” exists is fact determinative.

Conclusion

Sergeeva is significant on two counts. It expressly applies Section 1782 extraterritorially and requires production of documents held by affiliates consistent with the Federal Rules of Civil Procedure. The access granted by Sergeeva to documentary evidence beyond U.S. borders under the control of a party located in the United States for use by parties involved in foreign proceedings is potentially invaluable. The decision is straightforward, predicated on the plain meaning of the statute and the Federal Rules of Civil Procedure, and cements the Eleventh Circuit’s role, under proper circumstances, as a key venue to obtain access to evidence to support international legal proceedings.

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Endnotes

1 Sergeeva v. Tripleton Int’l Ltd. et al., 834 F.3d 1194 (11th Cir. 2016).

2 28 U.S.C. § 1782 provides in pertinent part: “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure . . .” (emphasis added).

3 Sergeeva, 834 F.3d at 1196.

4 Id. at 1198-99 citing Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F. 3d 1262, 1269 (11th Cir. 2014) (quoting In re Clerici, 481 F.3d 1324, 1331 (11th Cir. 2007).


6 Id.

7 Id. at 1200.


9 See, e.g., Hans Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 26 of the U.S. C. Revisited, 25 SYRACUSE J. INT’L L. & COM. 1 (1998). Noting that the statute itself “does not provide explicitly that § 1782 has no extraterritorial effect,” Professor Smit nonetheless concluded that Section 1782 should not be used to obtain documents beyond U.S. shores. Id. at 12 n.52 (emphasis added).

10 Id. at 11-12.


12 Id. at 423 citing In re Microsoft, 428 F. Supp. 2d 188 (S.D.N.Y. 2006); In re Nieri, 2000 WL 60214 (S.D.N.Y. 2000); In re Sarrio, 119 F.3d 143 (2d Cir. 1997) (dicta).

13 Schottdorf discussed infra.


15 Id. at *5.

16 Robinson, supra note 8, at 141.

17 Schottdorf, at *9 n.13.

18 Id.

19 Sergeeva, 834 F.3d at 1200.

20 Id.

21 Id. at 1200-01.

22 Id. n.5.

23 Id. at 1201.

24 Id.

25 Id. The court also affirmed a monetary contempt sanction in excess of US$230,000 imposed by the district court on Trident Atlanta for failing to establish a good-faith attempt to comply with the subpoena. Id. at 1202.

26 277 F.R.D. 468, 470-71 (S.D. Fla. 2011)

27 Id. at 470.

28 Both Rule 34 and Rule 45 requirements for production call for documents in the “possession, custody, or control” of the party to whom the request or subpoena is directed. Fed. R. Civ. P. 34(a)(1) & (c); 45(a)(1)(A)(iii).

29 Costa, 277 F.R.D. at 471 (citations omitted).

30 Id.

31 Id. at 472-73.

32 Id. at 473.

33 736 F.2d 650, 653-54 (11th Cir. 1984) (“Under Fed. R. Civ. P. 34, control is the test with regard to the production of documents. Control is defined not only as possession, but as the legal right to obtain the documents requested upon demand.”)

34 The court looked to Costa to analyze the control issue between Wells Fargo and its nonparty Wachovia affiliates. While the documents requested did impact the affiliates and a connection between the nonparties and Wells Fargo was present, the court determined that the receiver had failed to demonstrate the affiliates had an interest in the outcome of the litigation or sufficient commonality in the corporate structure or operations to warrant production. Notably, although the nonparties and Wells Fargo had a common parent, the relationship was not closely held but related to different subsidiaries at different levels before reaching a common remote publicly traded parent. The court, therefore, declined to find that Wells Fargo had the requisite control over the affiliates to produce the documents.