

Second Circuit Confirms Availability of U.S. Discovery in Aid of Foreign Criminal Investigations

On December 12, 2014, the United States Court of Appeals for the Second Circuit held that 28 U.S.C. § 1782 allows a U.S. district court to order a domestic party to produce documents for use in a foreign criminal investigation conducted by a foreign investigating magistrate.¹ While discovery in aid of foreign civil proceedings is common under § 1782, the request for discovery in support of a foreign magistrate's criminal investigation presented a question of first impression for the Second Circuit.

Background

Section 1782 authorizes the federal courts to order the production of documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation."² It allows such discovery if: (1) the person from whom discovery is sought resides or is found in the district of the district court to which the application is made; (2) the discovery is for use in a proceeding before a foreign or international tribunal; and (3) a foreign or international tribunal or any interested person makes the application. This case involved a request for discovery to aid in a criminal investigation conducted by a Swiss investigating magistrate.

In June 2009, Franck Berlamont, the President and CEO of Geneva Partners, commenced a criminal proceeding in Switzerland against Optimal Investment Services and the company's former Director General, Manuel Echeverría.³ Geneva Partners had invested in a fund managed by Optimal, and Berlamont alleged that Echeverría misrepresented that fund's investments with Bernard Madoff. Subsequently, a Swiss investigating magistrate opened a criminal investigation against Echeverría. Meanwhile, in 2010, a group of Optimal's investors brought a civil suit in the Southern District of New York raising claims similar to those in the Swiss criminal proceeding. During the civil suit, the plaintiffs deposed an ex-manager of Optimal in London. After learning of the deposition, Berlamont filed an *ex parte* application pursuant to § 1782, requesting a copy of the transcript and exhibits from the deposition to aid the criminal proceeding in Switzerland. The application was granted and Berlamont subpoenaed the documents from Optimal's attorneys. Optimal then moved to vacate the order and quash the subpoena, but the district court denied the motions. Optimal appealed, arguing that the discovery is improper because a Swiss investigating magistrate is not a foreign or international tribunal within the meaning of § 1782.

¹ *Optimal Investment Services, S.A. v. Berlamont (In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in Foreign Proceedings)*, No. 14-2807-CV, 2014 WL 6997484, at *1 (2d Cir. Dec. 12, 2014).

² 28 U.S.C. § 1782 (2012).

³ In Europe, private citizens are permitted to commence criminal proceedings.

The Second Circuit's Analysis

The Second Circuit held that the plain language of the statute and its legislative history supported the conclusion that a criminal proceeding before an investigating magistrate falls within the scope of § 1782. First, the statute plainly states that it covers “criminal investigations conducted before formal accusation.” That language plainly implies that no formal court proceeding is necessary before a request is granted. Second, the legislative history of § 1782, including amendments that broadened its scope, clarified its applicability to requests related to foreign criminal investigations conducted by magistrates. Moreover, the 1996 amendments added the clause “criminal investigations conducted before formal accusation” to the text of § 1782. The Second Circuit concluded that the Swiss criminal investigation is exactly the type of proceeding that Congress intended to cover with the 1996 amendment. The court thus upheld the District Court’s determination that the requested discovery was “for use in a proceeding in a foreign or international tribunal.”

This decision provides clear precedent for seeking U.S. discovery in aid of criminal investigations pending before a foreign investigating magistrate, clarifying the scope of § 1782.

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