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CLIENT MEMORANDUM

Second Circuit Ruling May Result in More Discovery Demands by Foreign Entities Even When No Litigation is Pending

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The Second Circuit recently issued a decision that could encourage foreign parties to make liberal use of the U.S. federal courts' expansive discovery procedures to obtain discovery for use in *potential* litigation in a foreign jurisdiction. Companies with operations in the United States who have potential adversaries abroad should take note of this development, as it highlights their potential exposure to burdensome discovery requests regardless of whether they are currently engaged in foreign litigation.

The Second Circuit's decision in *Mees v. Buiter*, No. 14-1866 (2d Cir. July 17, 2015), concerned the application of 28 U.S.C. § 1782, which provides a federal district court with the discretion, "upon the application of any interested person," to compel a person within its jurisdiction 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."[1] In *Mees*, the applicant was considering bringing—but had not yet brought—a defamation action in a Dutch court.[2] To assist in her investigation, she asked the U.S. District Court for the Southern District of New York to compel the would-be defendant, a resident of New York, to provide discovery related to

[1] 28 U.S.C. § 1782(a).

[2] Slip Op. at 5-6.

the potential Dutch suit.[3] The district court rejected the application, ruling that Section 1782's "for use" requirement was not satisfied because the discovery was not "necessary" to the suit.[4] The district court added that even if the discovery were within its discretion to grant, it would still deny the application because the discovery sought was outside the scope of discovery permitted under Dutch law.[5]

The Second Circuit reversed. It ruled that the "for use" requirement of Section 1782 does *not* include "a necessity requirement," but instead may be satisfied if the sought-after "materials . . . *can* be made of use in the foreign proceeding to increase [the applicant's] chances of success" at any stage in the proceedings.[6] As to the district court's discretion to deny a Section 1782 application, the Second Circuit stated that it would be error to impose any "foreign-discoverability requirement" on Section 1782: "[A] district court evaluating a § 1782 request should assess whether the discovery sought is overbroad or unduly burdensome *by applying the familiar standards of Rule 26 of the Federal Rules of Civil Procedure*," not the discovery standards of the foreign court.[7]

The Second Circuit's opinion demonstrates just how wide open the door is to foreign applicants seeking broad discovery from U.S. citizens or entities. The *Mees* respondent argued that the standard advocated by the applicant "would result in 'unbounded' fishing expeditions by 'would-be private litigants.'"[8] To avoid this result, the respondent argued, Section 1782 should apply only where foreign litigation is already pending, or where the discovery sought is necessary for the foreign litigant to initiate suit.[9] The Second Circuit notably did *not* disagree with the respondent's concern. However, the court rejected the respondent's argument based on a Supreme Court ruling that for Section 1782 to apply, "[i]t is not necessary for the adjudicative proceeding to be pending at the time the evidence is sought, but only that the evidence is *eventually to be used in such a proceeding*."[10]

This holding may appear counterintuitive to anyone accustomed to the limits typically placed on discovery in U.S. proceedings, including a strong bias against pre-litigation discovery. Indeed, the *Mees* respondent argued that, because discovery under Section 1782 borrows the standards of FRCP 26, Section 1782 should be cabined by the typical rule that,

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3 Slip Op. at 6-7, 10.

4 Slip Op. at 9-10.

5 Slip Op. at 10.

6 Slip Op. at 14-15, 18 (emphasis added).

7 Slip Op. at 23 (emphasis added).

8 Slip Op. at 19 n.13 (quoting respondent's brief).

9 Slip Op. at 18-19 & n.13; *see also* Respondent's Br. at 10-11, *In re Application of Dr. Helen Mees*, No. 14-mc-88 (S.D.N.Y. Apr. 16, 2014).

10 Slip Op. at 17-18 (quoting *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 259 (2004)) (emphasis added by Second Circuit).

absent good cause for pre-suit discovery, a party may seek discovery only in connection with *pending* proceedings.[11] The Second Circuit's ruling rejects this position. U.S. parties targeted for discovery thus have few if any hard-and-fast standards protecting them from discovery applications under Section 1782. They will have to be prepared to argue to the district court to which the discovery application is made that if discovery is permitted, it must be "closely tailored" to meet the legitimate needs of the applicant in the foreign proceedings.[12]

If you have any questions about this memorandum or would like additional information, please contact Mitchell J. Auslander (212-728-8201, mauslander@willkie.com), Matthew W. Edwards (202-303-1269, medwards@willkie.com), or the Willkie attorney with whom you regularly work.

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11 Br. for Respondent-Appellee at 25-26, *Mees v. Buiter*, No. 14-1866 (2d Cir. Jan. 30, 2015); Respondent's Br. at 10-11, *In re Application of Dr. Helen Mees*, No. 14-mc-88 (S.D.N.Y. Apr. 16, 2014).

12 Slip Op. at 24.