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Expert Analysis

# At the Intersection of Section 1782 Subpoenas and Personal Jurisdiction

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In the past few years, the U.S. Supreme Court has been remaking the landscape of personal jurisdiction, generally imposing more exacting standards for the assertion of both general and specific jurisdiction. The impact of these jurisdictional decisions has been far reaching and is still developing. We discuss below a decision last month by Southern District Judge Valerie Caproni considering how these evolving concepts of personal jurisdiction affect nonparty discovery. That decision, issued in *Australia and New Zealand Banking Group v. APR Energy Holding,* 2017 WL 3841874 (S.D.N.Y. Sept. 1, 2017) examines the question of what jurisdictional contacts are necessary to obtain discovery from a nonparty through a subpoena served pursuant to 28 U.S.C. §1782, which authorizes a court to order discovery for use in a foreign proceeding.

## Recent Jurisdictional Limits

Starting in 2011 with *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and continuing with *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), in 2014, the Supreme Court held that to exercise general jurisdiction, subjecting a defendant to suit on any claim in the jurisdiction, the defendant must be "at home" in the jurisdiction. For corporate defendants, that means that general jurisdiction will exist as a general rule only in the corporation's state of incorporation or principal place of business. These rulings have resulted in a reexamination of "doing business" jurisdiction, calling into question years of jurisprudence subjecting corporations to general jurisdiction wherever they engaged in substantial and continuous business. Edward M. Spiro and Judith L. Mogul, "A Smaller World, but Personal Jurisdiction Still Matters," N.Y.L.J., Feb. 17, 2016.

This year, in its decision in *Bristol-Myers Squibb v. Superior Court of California, San Francisco County*, 137 S. Ct. 1773 (2017), the Supreme Court turned its attention to specific jurisdiction, holding that the requisite nexus between a claim and the defendant's contacts with the forum state must be independently assessed and established with respect to each plaintiff's claims. It held in that case that although the California court had jurisdiction

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over the pharmaceutical products liability claims of California resident members of a plaintiff class, it lacked jurisdiction over the claims of non-resident plaintiffs who could not establish any connection between their claims and the state of California. The court also rejected the concept of a "sliding scale" for specific jurisdiction, where the degree of necessary contact between the claim and the defendant's forum contacts is reduced in circumstances where the defendant's other, non-claim related contacts with the forum are substantial.

### 'ANZ Bank v. APR Energy'

Against this backdrop of tightening jurisdictional requirements, the Australia and New Zealand Banking Group (ANZ Bank) challenged a §1782 subpoena served upon it by APR Energy Holding (APR), which was seeking records from ANZ Bank for use in an arbitration against the country of Australia under the Australia and United States Free Trade Agreement (AUSFTA).

ANZ Bank was the primary creditor of a bankrupt Australian power company and APR claimed an interest in several turbines that had been leased to the bankrupt entity. Because APR had not properly recorded its interest in the turbines or the lease prior to the bankruptcy, under Australian law it was considered an unsecured creditor, and its demands for the turbines had been rejected by the receivers for the bankrupt entity, appointed by ANZ Bank.

In pursuit of its claim for the turbines, APR initially brought suit against the estate of the bankrupt company in federal court in Florida but agreed to transfer the case to Australia, where it litigated and lost up through Australia's highest court. APR then sued the bankruptcy estate again in Texas state court, where its claims were dismissed for lack of personal jurisdiction. It subsequently commenced an arbitration against Australia, asserting that the divestment of its ownership interest in the turbines by operation of Australian law was an expropriation of its property in violation of AUSFTA. In connection with that arbitration, APR sought and obtained an ex parte subpoena pursuant to §1782 directing ANZ Bank to provide it with documents regarding ANZ Bank's transactions with the bankrupt company; that company's financial condition during the relevant period; the recording of ANZ Bank's lien; and actions taken by the receivers. All the documents sought by the subpoena were located in Australia. ANZ Bank moved to quash the subpoena for lack of personal jurisdiction.

> Judge Caproni's decision in 'ANZ Bank' is one of the few decisions in the Southern District of New York to explore the intersection of §1782 subpoenas and the growing post-'Daimler' jurisdictional jurisprudence.

### Section 1782

Judge Caproni's analysis focused first on the text of §1782, which provides that "[t]he district court of the district in which a person resides or is found" may order it to provide evidence for use in a foreign proceeding. She noted that the statute has three requirements that must be met before the court may exercise its discretion to enforce a §1782 subpoena: (1) the person from whom discovery is sought must "reside" or be "found" in the district; (2) the discovery must be for use in a foreign proceeding; and (3) the applicant must be an "interested person." 2017 WL 3841874, at *2 (citing *In re Edelman*, 295 F.3d 171, 175-76 (2d Cir. 2002)).

The parties disputed whether ANZ Bank could be said to "reside" or "be found" in the Southern District of New York. In reliance on *Daimler*, ANZ Bank argued that its contacts with New York were not so constant and pervasive that it could be considered "at home" in the state, and that the court thus lacked jurisdiction over it and the subpoena should be quashed. In support of this argument, ANZ Bank pointed to the fact that it is incorporated and headquartered in Australia; the majority of its operations are in the Oceania and Asia-Pacific regions; and only five of its more than 1,000 branches

and offices are in the United States, including one in New York, with only two percent of its assets, operating income and profits attributable to its New York presence. APR, by contrast, argued that the requirement in §1782 that a person be found or reside in the district does not refer to personal jurisdiction, and that the fact that ANZ Bank has a New York presence means that it can be found in the state.

Judge Caproni noted that §1782's "found or reside" language creates some ambiguity as to whether the court must have personal jurisdiction over the person from whom discovery is sought, because the statute does not refer to jurisdiction. She concluded that "[r]egardless of what §1782 requires, the Constitution's due process protections apply," and that those requirements were not met as to ANZ Bank in this case. She rejected APR's argument that courts have not subjected §1782 applications to Constitutional due process scrutiny, noting that the Second Circuit "has held unequivocally that a federal court 'must have personal jurisdiction over a nonparty in order to compel it to comply with a valid discovery request … .'" Id. at *3 (quoting *Gucci Am. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014)). She concluded that there is "no meaningful distinction" between a nonparty subpoena and a §1782 order, and that accordingly, regardless of whether the statute's "resides or is found" language equates to a personal jurisdiction requirement, the Constitution imposes one.

Applying *Daimler*'s "at home" test to ANZ Bank, Judge Caproni found that the court did not have general jurisdiction over the Bank, which had only a single branch office in New York and was incorporated and had its principal place of business in Australia. Turning to the question of whether the court had specific jurisdiction sufficient to enforce the §1782 subpoena, she observed that the case law regarding specific jurisdiction over nonparty discovery was "sparse and unsettled." She noted that the Tenth Circuit has analyzed specific jurisdiction over nonparty discovery by assessing the connection between the nonparty's contacts with the forum and the requested discovery. Id. at *5 (quoting *Gucci*, 768 F.3d at 141 (citing *Application to Enforce Admin. Subpoenas Duces Tecum of the S.E.C. v. Knowles*, 87 F.3d 413, 418 (10th Cir. 1996))). Because the discovery at issue here concerned turbines located in Australia that were leased to an Australian company that went into bankruptcy in Australia and had received loans from an Australian bank, and none of the requested discovery was located in New York, she concluded that there was no nexus between ANZ Bank's New York contacts and the §1782 subpoena. The fact that funds transferred pursuant to a letter of credit in favor of the bankruptcy receivers may have passed through New York was insufficient. For these reasons, Judge Caproni found not only that the court lacked jurisdiction over ANZ Bank, but that APR was not entitled to jurisdictional discovery, because it had not made even a "sufficient start" toward establishing jurisdiction over the Bank so as to avoid jurisdictional discovery becoming an unwarranted fishing expedition.

## Conclusion

Judge Caproni's decision in *ANZ Bank* is one of the few decisions in the Southern District of New York to explore the intersection of §1782 subpoenas and the growing post-*Daimler* jurisdictional jurisprudence. Because ANZ Bank was so clearly not "at home" in New York, and the contacts between ANZ Bank's New York branch and the requested discovery were virtually non-existent, the jurisdictional questions in *ANZ Bank* were not a close call. In light of the Supreme Court's recent decision in *Bristol-Myers*, we expect to see more litigation challenging §1782 subpoenas for lack of specific jurisdiction where some greater nexus exists between the forum contacts of the nonparty and the discovery sought.