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Oh, And One More Thing . . . Issuing A Subpoena For Documents Under 28 U.S.C. § 1782 Also Requires Personal Jurisdiction Over The Subpoena Target

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Under 28 U.S.C. § 1782, "[t]he district court of the district in which a person resides or is found may order him to . . . produce a document for use in a proceeding in a foreign or international tribunal . . . ." Courts in the Second Circuit appear to be coming around to accepting that a commercial arbitration can be "a foreign or international tribunal" for these purposes. Swell. But there is one more thing: they are also likely to treat a subpoena under that statute like a subpoena under Fed. R. Civ. P. 45, and therefore require that the court have personal jurisdiction — general, preferably — over the subpoena target. *See*, *Australia and New Zealand Banking Group Ltd. v. APR Energy Holding Ltd.*, 2017 U.S. Dist. LEXIS 142404 (S.D.N.Y. Sept. 1, 2017) ("*ANZ Bank*").

In *ANZ Bank*, a subpoena had been issued to ANZ Bank's New York branch office based upon an *ex parte* application under 28 U.S.C. § 1782. *Id*. at *5. The request was made by APR in connection with its arbitration against Australia under the Australia-U.S. Free Trade Agreement ("AUSFTA"), in which APR claimed that the application by Australia of a domestic law (the Personal Property Securities Act) had worked an expropriation of APR's alleged private property in violation of the AUSFTA. ANZ Bank moved to quash the subpoena.

The court (Caproni, J.) granted the motion on the ground that the Constitution's due process protections applied to the proceeding, over and above the requirements of Section 1782, and the court lacked personal jurisdiction over ANZ Bank.

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An applicant for discovery pursuant to 28 U.S.C. § 1782 must, as a threshold matter, satisfy three requirements, including that "the person from whom discovery is sought must 'reside' or 'be found' in the district" in which the application is made. *See id*. at *6. Whether the requirement for Section 1782 purposes that a subpoena target "be found" or "reside" in the district is equivalent to a requirement that the court have personal jurisdiction over that person "is unclear." *Id*. at *7.

But "regardless of what section 1782 requires, the Constitution's due process protections apply." *Id*. at *8. And, the court found, the Constitutional due process requirements were not satisfied in the case of ANZ Bank.

Specifically, the Second Circuit has held that a federal court "must have personal jurisdiction over a non-party in order to compel it to comply with a valid discovery request under [Fed. R. Civ. P.] 45," *id*. at *8, *citing Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 141 (2d Cir. 2014), "and the court saw 'no meaningful distinction from a constitutional standpoint between a subpoena issued to a non-party pursuant to Rule 45 and a subpoena issued to a non-party pursuant to section 1782,'" *id*. at *9. (The court also noted that Section 1782 itself provides that "to the extent that the [court's] order does not prescribe otherwise," documents are to be produced in accordance with the Federal Rules of Civil Procedure. *See id*. at *6n.1.)

And the Court found that it did not have general personal jurisdiction over ANZ Bank under the test set out by the U.S. Supreme Court in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), noting that the Second Circuit had applied *Daimler* in previously holding that a court "did not have general jurisdiction over a non-party foreign bank in order to enforce a subpoena served on the bank because the mere fact that the bank had branch offices in New York did not satisfy the Constitution's due process requirements." *Id*. at *9-*10, *citing Gucci*, 768 F.3d at 135, 141. In the circumstances, the court felt that *Gucci* was the determinative precedent, and that *ANZ Bank* presented the analogous case with respect to a Section 1782 subpoena.

Finally, the court considered whether specific personal jurisdiction might be sufficient to support Section 1782 discovery from a non-party, and noted that the case law in that regard "is sparse and unsettled," *id*. at *14. However, without deciding the legal issue, the Court found that there was "no nexus between ANZ Bank's New York contacts and the subject matter of the discovery sought by APR pursuant to the section 1782 subpoena." *Id*. at *15. Thus there was no basis for specific personal jurisdiction for present purposes. (Moreover, the court found that APR had not made a "sufficient start" towards establishing specific personal jurisdiction such as might have justified limited jurisdictional discovery to develop a record in that regard, and it denied APR's application to pursue jurisdictional discovery. *See id*. at *16.)

To practicioners who may have been encouraged by a seeming increased willingness of federal courts to provide Section 1782 discovery in support of international commercial arbitrations, one can only say — if it's not one thing, it's another.