JONES DAY

COMMENTARY

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Australian Court Approves Use of American 28 USC § 1782 for Assistance to Foreign Litigants

IN SHORT

The Background: Australian courts have previously restrained parties who had made 28 USC § 1782 and similar applications in the United States to gather evidence for use in Australian proceedings.

The Question: If a party first seeks the Australian court's approval before making the application, can 28 USC § 1782 and similar procedures for evidence-gathering be used for Australian proceedings?

Looking Ahead: In circumstances where the party seeking to utilize 28 USC § 1782 in Australian proceedings first seeks the Australian court's approval, and the proposed application is limited to documentary evidence, an Australian court may approve the making of the application.

For the first time, the Federal Court of Australia has allowed the applicants in an Australian proceeding to make applications for orders under 28 USC § 1782. In *Lavecky v Visa Inc* [2017] FCA 454 ("*Lavecky*"), the applicants sought the court's approval to apply to the District Court for the Southern District of New York under § 1782 for the production of documents relevant to the Australian proceeding from two U.S. entities and a French entity.

> In approving the proposed application, the court stressed the importance of seeking the endorsement of the Australian court before actually making an application to the relevant U.S. District Court.

In approving the proposed application, the court stressed the importance of seeking the endorsement of the Australian court before actually making an application to the relevant U.S. District Court. Australian superior courts have, on a number of occasions, issued anti-suit injunctions on parties from proceeding with § 1782 or similar applications. Recently, the Full Court of the Federal Court of Australia in *Jones v Treasury Wine Estates Ltd* [2016] FCAFC 59; (2016) 241 FCR 111 ("*Jones*") restrained the lead applicant in a class action from proceeding with his § 1782 application because, amongst other reasons, he had begun the application without the Australian court's prior approval. In doing so, the applicant in *Jones* was held to have sought to undermine the court's supervisory and case management functions.

The court in *Lavecky* held that the following considerations are likely to be relevant to the endorsement an application made under procedures such as § 1782:

1. The importance of the sought after material to the applicant's case;
2. Whether there are other methods available for obtaining the material;
3. Whether the sought after material impinges upon, or undermines, some important procedural limitation in Australia, such as the unwillingness of the court to permit fishing expeditions;

4. The costs involved in the process for the parties before the Australian court;

5. Whether that cost is a proportionate burden in relation to the significance of the material;

6. Whether the proposed proceeding under § 1782 in the U.S. District Court is frivolous or obviously doomed to fail;

7. How long the applications might take to resolve and what impact they might have upon the timely preparation of the matter before the Australian court for trial; and

8. Whether there is any need to impose conditions upon the endorsement of the proposed application so as to address any issues arising from (1) to (7) above.

In *Lavecky*, the court satisfied itself of each of these matters and approved the making of the application, subject to one condition. The court required the applicants to provide the respondents with the proposed application and supporting material prior to filing in the U.S. District Court. This requirement placed the respondents in a similar position to the one they would be in if the court made orders for discovery from a third party under its own rules (*Federal Court Rules 2011* (Cth), r 20.23).

28 USC § 1782 allows for various ways in which evidence can be taken by a U.S. District Court for use in a foreign proceeding, including orders for the giving of oral testimony or "depositions". The court in *Lavecky*, however, limited the scope of the discovery that it authorized applicants to seek to the production of documents. Whether future applicants will be able to successfully request authorization to take depositions under § 1782 in Australian proceedings remains to be seen.

TWO KEY TAKEAWAYS

1. A party to Australian proceedings seeking to use 28 USC § 1782 and similar procedures should always approach the Australian court for approval first, with sufficient supporting material, before making the application in the United States.

2. In *Lavecky*, the court provided guidance as to the considerations that are likely to be relevant to the endorsement of an application made under procedures such as § 1782.

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