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Insights

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Third party-discovery in aid of foreign arbitrations – a split in the Atlantic?

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Evidence from third parties is often difficult to obtain in the arbitration context, given that arbitral proceedings typically bind only the arbitration parties. The law chosen by the parties to apply to the arbitral procedure—or *lex arbitri*—may itself permit third party disclosure in some circumstances.

In the United States, section 7 of the Federal Arbitration Act ("FAA") authorizes a tribunal in an arbitration seated in the United States to order a non-party to testify at a hearing, which testimony can be compelled by the relevant district court. Similarly, in England and Wales, s.43 of the English Arbitration Act 1996 (the "EAA") allows English courts (with the permission of the tribunal or the agreement of the other parties to the arbitration) to issue a witness summons ordering the attendance of the witness before the tribunal in order to give oral testimony, or even to produce documents or other material evidence, where a witness is in the United Kingdom and the arbitration is being conducted in England and Wales.

While both US and English courts recognize some ability to seek witness testimony in aid of the arbitral process seated within their jurisdiction, a more controversial question has occupied these courts with respect to efforts to obtain evidence in aid of *foreign* proceedings. In the United States, 28 U.S.C. §1782 is a federal statute that allows parties to a legal proceeding outside of the United States to apply to a U.S. federal court for the purpose of obtaining evidence. If the application is granted, this evidence can be used in the proceeding outside of the United States. Parties to arbitrations conducted outside of the United States have increasingly attempted to use Section 1782 to obtain evidence from third parties, which would otherwise be unobtainable in a typical arbitration. This has now come to an end in the US, while the English courts have, in effect, opened the door to non-party depositions (as discussed in further detail below).

On June 13, 2022, in *ZF Automotive v. Luxshare*, the U.S. Supreme Court shut down any ability for foreign arbitration parties to use the American court system to seek evidence outside of the arbitral process. In contrast, the English Court of Appeal recently opened the door to third party disclosure in *A and B v C, D and E* ("*A and B*") by permitting depositions of third parties resident in the United Kingdom in support of foreign-seated arbitration proceedings.[1]

[1] [2020] EWCA Civ 409.

Non-party Depositions and Production of Documents in the United States -- *ZF Automotive v. Luxshare*

Under Section 1782, a court has power to grant discovery when the person from whom discovery is sought resides in the same district as the district court, and the discovery is for use by a "foreign or international tribunal." A circuit split had developed regarding the interpretation of Section 1782 with respect to the question of whether the reference to "foreign tribunals" covers foreign private arbitrations. On one side of the split were the Second, Fifth and Seventh Circuits.[2] The Second Circuit reasoned that, in light of its legislative history, the phrase "foreign or international tribunals" was intended to cover only "governmental entities," and not "private tribunals" such as commercial arbitral tribunals.[3] On the other side of the split were the Fourth and Sixth Circuits. [4] The Fourth Circuit noted that Congress replaced the language cabining the application of Section 1782 to only "judicial proceeding pending in any court in a foreign country" with the more capacious language "proceeding in a foreign or international tribunal."[5] Its conclusion was that Congress intended Section 1782 to be used before "not only foreign *courts* but before all foreign and international *tribunals*," including arbitrations.[6]

The Supreme Court granted certiorari in two cases (later consolidated) presenting the question of applicability of Section 1782 to arbitration: *ZF Automotive US, Inc. v. Luxshare, Ltd.* ("*Luxshare*") and *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States* ("*AlixPartners*").[7] The first case involved Luxshare, Ltd., a company based in Hong Kong, and ZF Automotive, a Michigan-based automotive parts manufacturer and subsidiary of a German corporation. Luxshare alleged fraud in a sale transaction with ZF Automotive for concealing information about the transaction price. The contract stated that all disputes would be exclusively settled under the rules of the German Arbitration Institute ("DIS"), a private dispute resolution organization in Berlin. In anticipation for arbitration, Luxshare filed an *ex parte* application under §1782 to obtain information from ZF and two of its senior officers. The U.S. District Court for the Eastern District of Michigan granted the request and the Sixth Circuit denied ZF's request for a stay. The second case was an ad hoc arbitration between Lithuania and The Fund for Protection of Investors' Rights in Foreign States, a Russian corporation and assignee of a Russian investor in a failed Lithuanian bank, AB bankas SNORAS (Snoras). Snoras was nationalized and assigned the CEO of New York-based AlixPartners as a temporary administrator. The administrator issued a report on Snoras's financial status leading to the commencement of bankruptcy proceedings, as Lithuanian authorities declared Snoras insolvent. The Fund claimed that Lithuania expropriated investments from Snoras and initiated an arbitral proceeding under a bilateral investment treaty. The Fund then filed a §1782 application to obtain information from AlixPartners. AlixPartners resisted discovery and argued that the ad hoc arbitration was a private adjudicative body, not included under the meaning of §1782. The District Court disagreed and granted the discovery request. Because this was an investment treaty-based arbitration, and not an ordinary commercial arbitration, the Second Circuit affirmed, finding that the ad hoc tribunal was "foreign or international" for purposes of §1782.

On June 13, 2022, Justice Barrett authored a unanimous opinion in the consolidated cases, holding that (1) the phrase "foreign or international tribunal" in §1782 does not include private arbitration tribunals and (2) to be classified as a "foreign or international tribunal", the tribunal in question must be "imbued with governmental authority" conferred by one or multiple nations.[8]

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[2] *See NBC v. Bear Stearns,* 165 F.3d 184, 186 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).
[3] *Id.* at 189.
[4] *See Servotronics, Inc. v. Boeing Co. and Rolls-Royce PLC*, 954 F.3d 209 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp*. (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710 (6th Cir. 2019).
[5] *Servotronics, Inc.*, 954 F.3d at 213 (4th Cir. 2020).
[6] The courts relied on dicta in *Intel* and a law review article by Hans Smit, which was cited in a footnote in *Intel*. *Id.* (quoting *Intel Corp.,* 542 U.S. at 258); *Id.* (citing Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71, 1027 n.73 (1965) (cited with approval in *Intel*)).
[7] The Supreme Court had already signalled in 2021 its interest in resolving the split under § 1782 in *Servotronics Inc. v. Rolls Royce Plc.* The case was withdrawn before the Supreme Court could decide it.
[8] *ZF Auto. US, Inc. v. Luxshare, Ltd.*, Nos. 21-401 and 21-518, slip op. at 7 (U.S. S. Ct. 2022).

Interpretation of the Scope of Section 1782

In the first instance, the Court parsed the meaning of "tribunal", "foreign", and "international." The Court found that by itself, "tribunal" does not explicitly implicate either a governmental or private body and is too broad to shed light on the question. But when "foreign" or "international" is added to the phrase, the meaning is elucidated. To the Court, a "foreign tribunal" refers to a tribunal belonging to a foreign nation rather than any tribunal located in a foreign nation. As to the word "international," the Court found that it means "involving or of two or more 'nations,' or 'nationalities'" thereby entailing that those nations have "imbued the tribunal with official power to adjudicate disputes."

Then, the Court engaged in a teleological analysis by delving in the legislative history of §1782. The Court noted that, when Congress established the Commission on International Rules of Judicial Procedure to modernize §1782, Congress instructed the Commission to improve judicial assistance "between *the United States and foreign countries.*" The Court thus determined that the replacement of the word "courts" by "tribunals" simply broadened the range of governmental and intergovernmental bodies covered by the statute, not its scope from public to private.

Having established that only governmental and intergovernmental tribunals are included in §1782, the Court could turn to the applicability of §1782 to the cases at hand. With respect to *Luxshare*, the Court found that the result was straightforward as there was no governmental involvement in this procedure between private parties. Section 1782 was inapplicable. With respect to *AlixPartners*, the Court noted that the issue was more complicated because a sovereign was involved and the consent to arbitrate existed in a treaty, rather than a contract. The Court determined that the controlling question was whether Lithuania or Russia intended to confer governmental authority on the arbitral tribunal. The Court concluded that the parties did not: the ad hoc tribunal was not formed by the treaty, and it operated independently of the signatory-nations. Finding no indicia of governmental authority, the Court concluded that the signatory-nations did not "cloth[e] the panel with governmental authority." Section 1782 was inapplicable.

Implications

The Supreme Court has now made clear that U.S. discovery is not available in the arbitration practitioners' toolkit. In fairness, U.S. discovery was unavailable to arbitration parties in U.S.-seated arbitrations—who, as mentioned *supra*, are left with only Section 7 of the FAA as an instrument to compel the testimony of third-party witnesses at hearings. There is no apparent reason for foreign arbitration parties to be given the tactical advantage of U.S. discovery where such advantage is denied to parties to arbitrations seated in the United States. In this sense, the decision arguably makes U.S. law more uniform, and arbitration proceedings more efficient and predictable by removing the prospect of extensive (and expensive) discovery in the United States.

At the same time, it should be noted that the Supreme Court did not entirely reject the notion that Section 1782 could be utilized in foreign arbitral proceedings, so long as the "foreign tribunal" is imbued with governmental authority. One can imagine that this would be the case, for instance, with proceedings involving standing arbitrators nominated by governments or transnational bodies. An example could be proceedings conducted under the EU-US Privacy Shield Framework, which has an Arbitrator Panel comprised of individuals chosen by the U.S. Department of Commerce and the European Commission. Another example might be the future adjudicators of disputes arising under the European Union's trade and investment agreements, which will be nominated by a panel of standing experts, themselves selected by the European Commission,[9] or the European Union's proposed Multilateral Investment Court.[10]

[9] The current panel of experts consists of Bruno Simma, Inge Govaere, Jan Klabbers and Pavel Šturma.
[10] Negotiations for the setting up of a Multilateral Investment Court are currently ongoing within the framework of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).

Contrast of ZF Automotive with English Courts' Powers to Make Orders Against Third Parties

Sections 43 and 44 of the EAA set out certain powers that are exercisable by the English courts in support of arbitral proceedings, including (under s.43) securing the attendance of witnesses or the production of documents (as long as the witness is resident in the United Kingdom and the proceedings are being conducted in England and Wales).

However, until recently, there had been doubt as to whether parties could seek an order from the English courts for the taking of evidence of non-party witnesses (*e.g.,* by deposition). The doubts had arisen from previous decisions of the English courts that had indicated that s.44 of the EAA does not confer powers to grant orders against non-parties. For example, in *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3704 (Comm), the judge commented that "*the better view is that section 44 does not include any power to grant an injunction against a non-party*" to the arbitration. Similarly, the High Court in *DTEK Trading SA v Morozov* [2017] EWHC 94 (Comm) held that s.44 does not give the court any power to make orders against non-parties regarding the preservation and inspection of documents. In 2020, however, the Court of Appeal held in *A and B* [11] that, notwithstanding these previous decisions, s.44(2)(a) of the EAA does confer power on the English courts to order a non-party witness to give evidence by way of deposition and that it can do so in support of arbitration proceedings being conducted outside of England and Wales.

Interpretation of the Scope of s. 44

The *A and B* case concerned an application by the appellants for an order to depose a non-party (who was resident in England) in relation to arbitration proceedings in New York.[12] The Court of Appeal reasoned that the reference in s.44(2)(a) to "*the taking of the evidence of witnesses*" meant that it was "*clearly directed towards obtaining the evidence of individuals who are not parties to the arbitration*",[13] or else it would have referred to 'parties' rather than 'witnesses'. Furthermore, the Court of Appeal noted that s.44 was intended to confer on the courts the same powers as they have in relation to civil proceedings (which include the power to order depositions of non-parties).

The Court of Appeal's decision is also important because it confirmed that the courts' powers under s.44(2)(a) are not limited to arbitrations conducted in England and Wales (in contrast to the power to order witness summons pursuant to s.43). Instead, and despite the fact that the arbitration was seated and being conducted in New York, the court was able to make an order under s.44(2)(a) because the witness was resident in the United Kingdom and s.2(3) of the EAA expressly states that the powers conferred by s.44 apply even if the seat of arbitration is outside England and Wales (or no seat has been designated).[14]

Implications

Whilst this decision should give heart to parties to arbitrations that wish to obtain evidence from third parties in England and Wales, it is worth noting a word of caution about the restrictions that apply in

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[11] [2020] EWCA Civ 409.
[12] The individual was the lead negotiator in relation to an agreement for the sale of interests in a Central Asian oil field, pursuant to which a dispute had arisen between the parties (but not involving that individual) concerning the characterisation of certain payments that were said to be bonuses but which the appellants contended to be bribes.
[13] Per Males LJ at paragraph 59.
[14] The Court of Appeal also noted that s.44 is intended to confer the same powers on the courts as they have in relation to civil proceedings in England and Wales (which include the power to order depositions), rather than the powers that the courts have in relation to assisting foreign court proceedings (which do not include the power to order depositions without a letter of request). Therefore, the Court of Appeal's decision means that the English courts arguably have greater power to assist foreign arbitral proceedings that they have to assist foreign court proceedings. See paragraph 39 of Flaux LJ's judgment.

relation to the courts' exercise of those powers (and, in particular, to the exercise of those powers in aid of foreign arbitrations).

First, since s.44 is not a mandatory provision of the EAA,[15] parties can agree that it shall not apply (and so it is important to check, for example, that the relevant arbitration agreement or institutional rules do not exclude the parties' rights to apply to the courts for this purpose).

Second, as with an application for a witness summons pursuant to s.43, English courts should only consider an application under s.44 that is made with the tribunal's permission or the parties' written agreement, and with notice to all parties and the tribunal.[16] Therefore, parties do not have an unfettered right to apply to the court under s.44 and, instead, the applicant party will likely have to persuade the tribunal that the evidence is material and cannot be obtained from any other witness that is willing to give evidence (as in *A and B*).

Third, and in any event, in relation to applications to secure evidence in aid of foreign arbitrations, the English courts may refuse to exercise their power if, in the court's opinion, it would be inappropriate to do so in light of the fact that the seat of arbitration is outside of England and Wales (or Northern Ireland).[17] In *Commerce & Industry Insurance Co (Canada) v Lloyd's Underwriters* [2002] 1 W.L.R. 1323, the English court considered that it was inappropriate to order the examination of unwilling witnesses, on the basis that there were differences between the foreign curial law and English law (namely, that under the foreign curial law, the witnesses would also be required to give oral evidence if they were deposed, which was not the case under English law). The court also considered it to be relevant that there was insufficient evidence to enable an assessment of whether the witnesses' evidence would be important to the outcome of the arbitration.

Fourth, the decision in *A and B* has received some criticism, so, while it has opened the doors to such applications against third parties, there may remain challenges for applying parties in seeking to rely on that decision.

Comment

The divergence in the approaches of the US and English courts reflects the difficulty that the arbitration community faces in ensuring that parties have access to relevant evidence whilst respecting the fundamental principle of arbitration that it only binds those that have agreed to be bound. Given the significance of this issue, and the fact that (in England and Wales, at least) there remains uncertainty, it is likely that the boundaries of the courts' powers will continue to be tested.

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[15] *See* s.4 of the EAA.
[16] *See* s.44(4) of the EAA. The court can act on the application of one party for the purpose of preserving evidence or assets if "*the case is one of urgency*" (s.44(3) of the EAA) and the tribunal or relevant institution has no power or is unable to act (s.44(5) of the EAA), but it is difficult to see how a witness summons would meet this criteria.
[17] *See* s.2(3) of the EAA.

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