ALERT MEMORANDUM

Second Circuit Reinforces Its Approach To Section 1782 While U.S. Supreme Court Case On Application Of Section 1782 To Private International Arbitration Remains Pending

July 19, 2021

On July 15, 2021, the Second Circuit reinforced its recent jurisprudence on the application of 28 U.S.C. § 1782 to international arbitration proceedings, holding that an arbitral panel constituted in an investor-state arbitration under a bilateral investment treaty ("BIT") and the UNCITRAL Rules qualified as a "foreign or international tribunal" under § 1782 for purposes of U.S. discovery in aid of arbitration.[1] The Court's decision, *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners*, applied the functional test first established by the Second Circuit in its 2020 *In re Hanwei Guo* decision[2] to find that the BIT arbitration in question was not a private international arbitration and was instead "a proceeding in a foreign or international tribunal" within the meaning of § 1782.

While the Second Circuit concluded that the investment treaty arbitral panel was within the ambit of § 1782, whether a *private* international commercial arbitral panel falls under the statute remains uncertain pending the U.S. Supreme Court's review of the issue in *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, which is scheduled for oral argument on October 5, 2021.

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[1] *See In re Fund for Prot. of Inv. Rts. In Foreign States v. AlixPartners, LLP*, — F.4th —, No. 20-2653-cv, 2021 WL 2963980, at *6 (2d Cir. July 15, 2021).
[2] *See In re Application of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020).

Background

28 U.S.C. § 1782 allows federal courts to compel witness testimony or document production from any person or entity who "resides" or is "found" in the judicial district for "use in a proceeding in a foreign or international tribunal."[3]

The use of § 1782 in different types of arbitration proceedings has been the subject of increased judicial activity in recent years. There has been significant uncertainty regarding whether an international arbitration constitutes "a proceeding in a foreign or international tribunal" within the meaning of the statute. This debate has primarily focused on whether private international arbitration may be considered a proceeding before "foreign or international tribunal" for purposes of § 1782.[4]

The U.S. Court of Appeals for the Second Circuit weighed in on this issue over 20 years ago in *National Broadcasting Co. v. Bear Stearns & Co.*, drawing a distinction between private international arbitration – which it concluded was not a proceeding before a "foreign or international tribunal" – and "governmental or intergovernmental arbitral tribunals," that it found Congress "intended to cover" under § 1782.[5] The Second Circuit adhered to this precedent in *In re Application of Hanwei Guo*, holding that § 1782 does not permit recourse to the U.S. courts for discovery for use in private international arbitration.[6] The recent *Guo* decision reinforced a circuit split that has developed since the Second Circuit's original decision in *NBC*, and in which the Second, Fifth, and Seventh Circuits have held that § 1782 discovery is not permitted for use in private international arbitrations,[7] and the Fourth and Sixth Circuits have ruled in contrast that § 1782 *is* available in private international arbitrations.[8]

The U.S. Supreme Court recently granted certiorari to address this circuit split and is set to rule on this issue in its next term. Despite the pending Supreme Court decision, courts have continued to grapple with the application of § 1782 to international arbitration.

In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners

In *In re Fund for the Protection of Investor Rights in Foreign States v. AlixPartners*, the Second Circuit – in its first § 1782 decision since *Guo* was decided in July 2020 and its first to address a BIT arbitration in the context of § 1782 – considered "whether an arbitration between a foreign State and an investor, which takes place before an arbitral panel established pursuant to a bilateral investment treaty to which that foreign State is a party, constitutes a 'proceeding in a foreign or international tribunal' under § 1782."[9] The Court affirmed the district court's decision, permitting § 1782 discovery for use in a bilateral investment treaty arbitration brought against Lithuania under the Russia-Lithuania BIT and the UNCITRAL Rules.

The Court acknowledged that *Guo* "re-affirmed *NBC*'s holding and elaborated on the framework" for determining whether an arbitral tribunal is a "foreign or international tribunal" under § 1782.[10] Applying the factors enumerated in *Guo*,[11] the Court then reviewed the functional attributes of the arbitral tribunal at issue in order to answer the "key question" of "whether the body in question possesses the functional attributes most commonly associated with private arbitration."[12]

The Court found that while the arbitral panel – which was established according to a BIT between Lithuania and Russia – "function[ed] independently from the

[3] 28 U.S.C. § 1782.
[4] 28 U.S.C. § 1782(a).
[5] *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188, 190 (2d Cir. 1999).
[6] *See Guo*, 965 F.3d at 109.
[7] *See id.* at 106; *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694-95 (7th Cir. 2020); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).
[8] *See Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2019).
[9] *AlixPartners*, 2021 WL 2963980, at *1.
[10] *AlixPartners*, 2021 WL 2963980, at *5.
[11] *See id.* at *5-6 (listing *Guo* factors).
[12] *Id.* at *5 (citing *Guo*, 965 F.3d at 107).

governments of Lithuania and Russia,"[13] there was sufficient "affiliation with the foreign States" to weigh in favor of a finding that the panel qualified as a "foreign or international tribunal" because the panel was convened according to a BIT between two nations and governed by the UNCITRAL Rules.[14] The Court similarly found that the nature of the panel itself – constituted under a BIT to resolve disputes between States – "closely resemble[d] the sort of arbitral body that we anticipated in *Guo*" and therefore also weighed "heavily" in favor of a finding that the arbitral tribunal was a "foreign or international tribunal" under § 1782.[15] The Court further determined that Lithuania's status as a State party to the underlying arbitration and "the importance of bilateral investment treaties as tools of international relations" also supported the conclusion that the arbitral panel constitutes a "foreign or international tribunal" within the meaning of § 1782.[16] The Court opined that its conclusion was consistent with legislative intent, and "§ 1782's modern expansion to include intergovernmental tribunals."[17]

Servotronics, Inc. v. Rolls-Royce PLC, et al.

The Second Circuit's decision in *AlixPartners* demonstrates that courts continue to grapple over and delimit the applicability of § 1782 in international arbitration. The Supreme Court's forthcoming decision in *Servotronics, Inc. v. Rolls-Royce PLC, et al.* should provide much needed guidance.

The arbitration community itself remains divided as to the appropriate outcome for the Supreme Court's decision, as demonstrated by the number of *amicus curiae* briefs that have been submitted to date. The United States has filed an *amicus curiae* brief in support of the more limited view maintained by the Second, Fifth, and Seventh Circuits, arguing, *inter alia*, that the policy implications strongly counsel against reading § 1782 to permit discovery in private international arbitrations, which it cautioned would allow parties to foreign private international arbitrations to obtain more expansive discovery in the United States than what would be permitted in U.S. domestic arbitrations and create inconsistent standards for foreign arbitrations subject to the Federal Arbitration Act.[18] Columbia Law School Professor George Bermann, in an *amicus curiae* brief supported the broader view, contended that the term "tribunal" does not preclude private arbitral bodies, and the discretionary nature of § 1782 provides appropriate safeguards to limit any abuse of the statute.[19] The ICC filed a brief in support of neither party, declining to express a position regarding § 1782's application, but requesting that the Supreme Court "make it explicit that the views of the constituted arbitral tribunal [on the permissibility of § 1782 discovery] should be given a very high degree of deference."[20]

Oral argument in *Servotronics* is scheduled for October 5, 2021. A decision on this issue will provide necessary clarity to resolve a decades-long circuit split on the permissibility of U.S. discovery in international arbitration proceedings. It will be interesting to see, in this regard, whether the Supreme Court draws a distinction between BIT arbitration and private international commercial arbitration, as the Second Circuit did in *In re AlixPartners*, adopts the United States *amicus* position that § 1782 applies to neither type of arbitration, upholds the application of § 1782 to both forms of international arbitration, or takes some other approach.

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[13] *Id.* at *6.
[14] *Id.*
[15] *Id.* at *7.
[16] *Id.* at *8.
[17] *Id.*
[18] *See* Brief for the United States as *Amicus Curiae* Supporting Respondents at 14-15, 141 S.Ct. 1684 (2021) (No. 20-794).
[19] *See* Brief *Amicus Curiae* of Professor George A. Bermann in Support of Petitioner at 3-6, 141 S.Ct. 1684 (2021) (No. 20-794).
[20] Brief *Amicus Curiae* of the ICC in Support of Neither Party at 16, 141 S.Ct. 1684 (2021) (No. 20-794).