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How Will the US Supreme Court Break the Logjam in Assessing § 1782? Few Clues Arise Out of This Week's Oral Arguments

Jonathan Tompkins (Shearman & Sterling) · Friday, March 25th, 2022

Kluwer Arbitration Blog has given ample attention over the years to 28 U.S.C. § 1782—the US federal statute authorizing federal district courts to order individuals and entities within their districts to provide evidence to "interested person[s]" for use "in a proceeding in a foreign or international tribunal." (*see, for example,* here, here, here, here, and here). Following an increasingly deepening Circuit split, chief among the open questions for the US Supreme Court (the "Court") today is how broadly (or narrowly) federal courts must read § 1782's reference to "foreign or international tribunal." This includes which, if any, arbitral tribunals that language covers. Other than ordinary courts of law, does it comprise solely "state-to-state" tribunals "exercising the authority of one or more sovereigns" (*see* AlixPartners Reply Brief), which might include, for example, intergovernmental mixed claims commissions? Does it also encompass "any adjudicative or quasi-adjudicative entity" insofar as it is "of a foreign government" (*see* ZF Auto Reply Brief), which might include, for example, investigating magistrates or certain administrative tribunals? Does it extend more broadly to arbitral tribunals "endowed with the authority to act by an instrument of public international law, [*i.e.*,] a treaty" (*see* The Fund for Protection of Investors' Rights in Foreign States Brief), such as tribunals established pursuant to bilateral or multilateral investment treaties or free trade agreements? Or does it stretch even farther to reach so-called "private" foreign-seated commercial arbitral tribunals (*see* Luxshare Brief)?

On 23 March 2022, these questions came front and center before the Court during oral arguments on two consolidated cases—one involving an international commercial arbitral tribunal and the other involving a tribunal established pursuant to a standing offer in a bilateral investment treaty ("**BIT**").

Background

To recall, as noted in a recent blog post, the case that previously had been before the Court (fully briefed and scheduled for oral argument on 5 October 2021)—and that was expected to resolve the 3-2 split amongst the Circuit Courts of Appeal on whether so-called "private" international commercial arbitral tribunals fell within the statute's ambit—was withdrawn by counsel for Petitioner Servotronics on 8 September 2021, and the Court removed the case from its arguments calendar that day. This was a disappointing end for the many who had anticipated this controversy

would finally be addressed.

However, it did not take long before another party—two, in fact—filled the void. On 10 September 2021, ZF Automotive US Inc., Gerald Dekker, and Christophe Marnat ("**ZF Auto**"), faced with subpoenas from Luxshare, Ltd., petitioned the Court for a writ of certiorari (*see* Petition), presenting a substantively identical question to the one posed in *Servotronics*. Meanwhile, another group—AlixPartners LLP and Mr. Simon Freakley ("**AlixPartners**"), the targets of a § 1782 request lodged by a Russian investment entity—petitioned the Court for a similar writ (*see* Petition), which, unlike *ZF Auto* (and *Servotronics* before it), involves a tribunal constituted under a BIT (here, between Russia and Lithuania). Unlike for "private" international commercial arbitrations (where there exists a notable split amongst the Circuit Courts of Appeal), there was arguably consensus amongst the Circuit Courts prior to AlixPartners' application that an arbitral tribunal formed under a BIT constitutes "a foreign or international tribunal." The Court nevertheless chose to grant both petitions and consolidated the cases on 10 December 2021 (*see* here), teeing up an important issue that many, for years, have hoped the Court would resolve.

The consolidated cases have garnered wide attention among arbitration practitioners, academics and other specialists. Multiple *amicus curiae* briefs were filed in support of both parties, and even for neither party (*see* here). The United States, in particular, filed an *amicus* brief in support of Petitioners in both cases, seeking a dramatically scaled back view of the statute's scope (*see* here).

This Week's Oral Argument: Tough Questions, but Few Clues as to the Ultimate Outcome

One should be reticent to assume a particular outcome from the Justices' questioning (*see* transcript here), but it was counsel for Petitioners, as well as the US government, who faced the brunt of questions from the Justices, who at times expressed skepticism over taking too narrow a view of the statute's scope. In a case, as here, that turns so heavily on questions of statutory construction, it was unsurprising to see the Court address these points head on.

Starting with *ZF Auto*, the case involving a German-seated commercial arbitral tribunal, Chief Justice Roberts opened questioning by expressing doubt about whether the phrase "tribunal," while certainly broad enough to carry a governmental connotation, necessarily excludes all other tribunals without such connotation. He noted, in particular, that "arbitral bodies function as a tribunal," that "[i]t's natural to refer to them in that way," that arbitral "tribunals are also adjudicatory bodies," and Congress' placement of the term "foreign" in front of "tribunal" suggests that it "happens to be located, set up in a foreign country." Justice Kagan echoed Justice Robert's skepticism, questioning whether placing "foreign" in front of a term necessarily connotes government sponsorship. Justice Breyer, while giving some credit to Petitioners' arguments, nevertheless countered that "the language can be read more broadly," querying: "Why not treat them the same way as these quasi-judicial [tribunals]? … Purpose is similar. Language, similar. Nothing that says you can't. Why not?" In response, Petitioner's counsel cautioned against breaking the phrase "foreign tribunal" into its constituent parts; instead, he argued, one must ascertain what the full phrase, as a unified whole, has meant historically and empirically. But, perhaps recognizing the Court's skepticism, counsel pivoted to Petitioner's other arguments involving context, legislative history, and, importantly, policy issues, which Petitioner considered to reinforce its textual arguments.

Some of the Justices, Justice Breyer among them, also seemed unconvinced by the ostensible "parade of horribles" (e.g., flooding courts with discovery applications, undermining arbitration's goals, and inflicting asymmetric harm on US businesses) that might arise if the Court were to interpret the text broadly because courts have "several ways of preventing [that broader] interpretation from getting out of hand," including most notably applying the discretionary factors recognized in its earlier *Intel* decision. Justice Breyer noted, further, that other countries (as addressed in *amicus* briefs) have similar legislation as the US.

Turning to questions for AlixPartners' counsel, in the case involving an investor-treaty tribunal, the Court focused on why the nature of the treaty, an agreement amongst governments, would not imbue the tribunal with sufficient "governmental" character to fall within § 1782's ambit when a tribunal composed of purely "governmental decisionmakers" would suffice. Justice Sotomayor, in particular, expressed having a "very hard time understanding [the] distinction."

The government, for its part, focused heavily on the notion that the statute's 1964 liberalizing amendments were designed to promote comity with other governments by improving existing practices of judicial assistance in litigations, not arbitrations, and stressed that it makes no difference that one of the arbitrations in the cases before the Court arises from a treaty between two sovereigns. The government went so far as to refer to arbitration generally as "something very different" than litigation, contending that arbitral panels are "not administering justice," but rather are only "trying to divine the intent of two parties to an agreement."

This led to a renewed focus by the Court on questions relating to the purpose and objectives of Congress in updating the statute in 1964 and the foreign policy implications of defining the statutory phrase more broadly. Petitioners and the US government strove to cast the revised statute as a command from Congress to promote "government-focused objectives," namely "interstate comity" and assistance solely to "judicial and quasi-judicial arms of foreign governments," but they had difficulty at times articulating the specific problems for comity and US foreign relations that would result if the Court were to construe the statute more broadly.

The government also found some traction in its argument that the present ambiguity is for Congress to remedy, not for the Court to impart a broad interpretation—a point that soon became the crux of direct questioning of Respondents' counsel. Justice Gorsuch for one, who Justice Breyer joined, queried repeatedly of both Respondents' counsel why the Court should not "err in the other direction" in cases of arguably ambiguous language, especially when foreign policy implications are involved, by having Congress—not the Court—sort out the present mess. Counsel for Respondent Luxshare, in the commercial arbitration case, perhaps sensing this renewed focus on comity, stressed in his opening that providing assistance to foreign-seated commercial arbitral tribunals actually "promotes cross-border commercial arbitration and international comity," pointing to other countries that follow a similar (albeit narrower) path as the US.

In the end, the difficulties these cases present were perhaps best summed up by Justice Breyer, who expressed "having trouble with this case" because there will undoubtedly be "matching problems no matter what" the Court decides. At this point, the outcome is anyone's guess.

The author's firm submitted an amicus brief on behalf of Federal Arbitration, Inc. in favor of Petitioner in Servotronics Inc. v. Rolls-Royce PLC (No. 20-794) and Respondent in ZF Automotive

US, Inc. v. Luxshare (Nos. 21-401).

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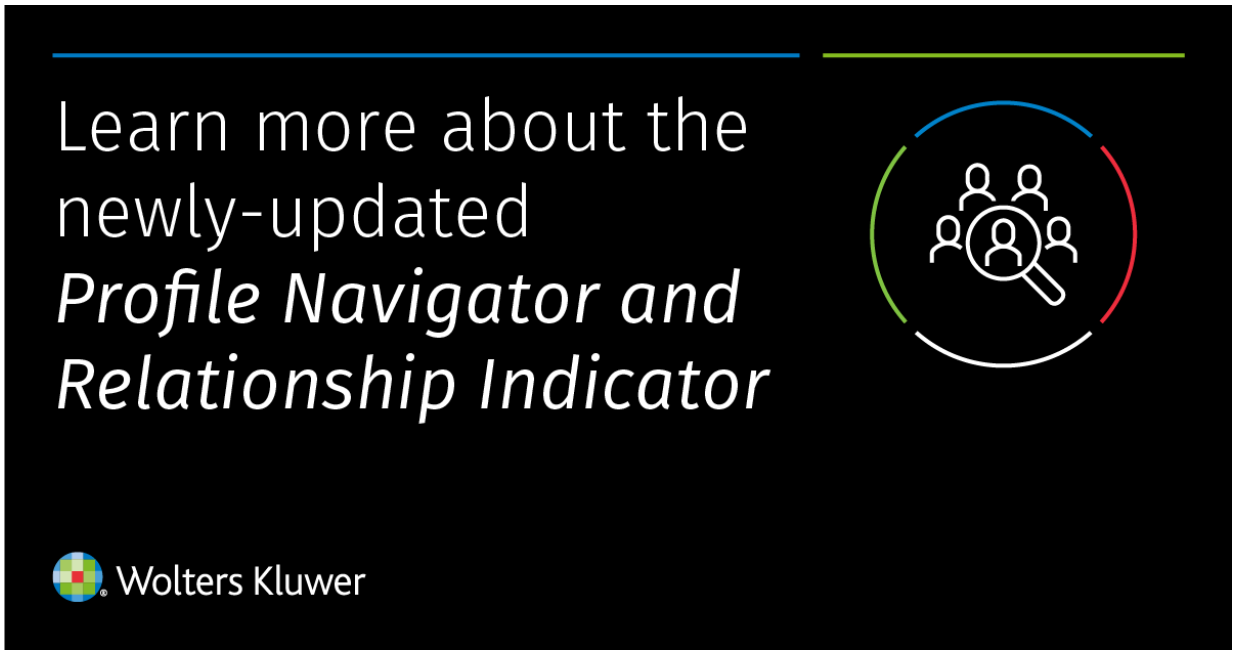

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