Kluwer Arbitration Blog

2022 in Review: The United States Supreme Court and Arbitration

Paige von Mehren (Assistant Editor for Canada and the United States), Christian Vandergeest (Freshfields Bruckhaus Deringer US LLP) · Sunday, January 22nd, 2023

2022 was a busy year for the United States Supreme Court's arbitration docket. The Court spent significant time defining the role of federal courts in arbitration-related litigation: it curbed Section 1782 discovery in support of international arbitration, limited the preferential treatment given to arbitration over litigation, protected the right to individualized arbitration, and limited the role of federal courts in the confirmation and vacatur of awards. Opinions will differ as to the wisdom of some of these decisions, but many will agree that 2022 saw the Supreme Court develop arbitration law in a number of significant ways.

Long-Awaited Answers, and New Questions, in *ZF Automotive v. Luxshare* and *AlixPartners v. Fund for Protection of Investors' Rights in Foreign States*

One of the most exciting cases for arbitration practitioners this past term dealt with one of the more mundane (though often critically important) topics: discovery. Under 28 U.S.C. § 1782, district courts have the power to order discovery for use in a proceeding before a "foreign or international tribunal" upon the request of an interested person. As frequent readers of the Blog will know, courts in the United States have long grappled with whether they can order discovery under Section 1782 for use in international commercial arbitrations (for a comprehensive overview, see the collection of posts on Section 1782 Discovery here).

In June 2022, after many years and one false start, the Supreme Court finally resolved the circuit split in consolidated cases *ZF Automotive US, Inc. v. Luxshare Ltd.* (Case No. 21-401) and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States* (Case No. 21-518), unanimously holding that only an adjudicative body that exercises governmental or intergovernmental authority constitutes a "foreign or international tribunal" under Section 1782. The Court's decision focused on the meaning of "foreign or international" and concluded that a "foreign tribunal" is "a tribunal imbued with governmental authority by one nation" while an "international tribunal" is "a tribunal imbued with governmental authority by multiple nations." As the Blog reported earlier, the commercial arbitration tribunal at the center of *ZF Automotive*, which was constituted pursuant to a contract under the German Arbitration Institute (DIS) Rules, did not qualify.

The Court then considered whether investment treaty arbitration tribunals exercise "governmental authority." *AlixPartners* concerned an application for Section 1782 discovery for use in an *ad hoc* UNCITRAL arbitration under the Russia-Lithuania bilateral investment treaty. Unlike with international commercial arbitrations, which had generated a deep circuit split, U.S. courts had consistently held that investment treaty arbitration tribunals qualified for Section 1782 discovery. But in *AlixPartners*, the Court held that Russia and Lithuania had not imbued the tribunal with governmental authority via their investment treaty, and so Section 1782 discovery was not available. It remains to be seen how lower courts will apply *AlixPartners*. Some courts in New York, for instance, have already relied on *AlixPartners* to deny Section 1782 applications in aid of ICSID arbitrations, although later proceedings in the district and/or appellate courts may change those decisions. It remains to be seen whether the Supreme Court has laid the foundation for yet another circuit split over the application of Section 1782 to some kinds of international arbitrations, and to ICSID investment treaty arbitrations in particular.

Limits on Preferential Treatment for Arbitration in *Morgan v. Sundance*

The Supreme Court has often cited the federal "policy favoring arbitration" when invalidating laws or regulations that hinder contractual rights to arbitration. In *Morgan v. Sundance* (Case No. 21-328), the Court further defined this policy—and in particular, the policy's boundaries—by rejecting the Eighth Circuit's use of the policy to make it more difficult to waive the right to arbitration.

The issue in *Morgan* was whether a party to an arbitration agreement waived its right to arbitration by first litigating a dispute in court for eight months. The Eighth Circuit's test for finding that a party had waived its right to arbitration included a requirement that the counterparty to the arbitration agreement show that it was prejudiced by the delay in seeking arbitration. This prejudice element—which is not required to establish that other contractual rights have been waived—made it harder to waive the right to arbitration than to waive other contractual rights. The Eighth Circuit justified this special treatment by pointing to the federal policy favoring arbitration, an approach shared by eight other circuit courts of appeal.

The Supreme Court unanimously disagreed, holding that the special prejudice requirement was incompatible with the Federal Arbitration Act ("FAA"). As the Court explained, the purpose of the policy favoring arbitration was "to make arbitration agreements as enforceable as other contracts, but not more so," and so courts "may not devise novel rules to favor arbitration over litigation." The result is that it is now easier to waive the right to arbitration in the Eighth Circuit (and the other eight circuits that had adopted a similar prejudice requirement). More generally, the Supreme Court appears to have defined a limit of its pro-arbitration policy, which is perhaps less pro-arbitration than many courts of appeals believed.

But Support for Contractual Arbitration Agreements in *Viking River Cruises v. Moriana*

Every so often, the Supreme Court takes issue with a California law restricting the contractual right to arbitration. The Court's decision in *Viking River Cruises v. Moriana* (Case No. 20-1573) continues that trend, this time circumscribing the California Private Attorneys General Act ("PAGA").

PAGA allows any employee who has suffered a violation of California's Labor Code to bring an action against their employer in their individual capacity, but also as a representative of all other employees who also suffered any violation of the statute. Predictably, employment contracts used by most California employers have waivers for such PAGA actions. The California Supreme Court invalidated these waivers to the extent the waivers force employees to separately arbitrate individual claims, holding that an employee cannot agree to opt out of the collective nature of actions under PAGA (in this case, collective arbitrations) as a matter of public policy.

The Supreme Court held that this restriction on the contractual right to individualized arbitration was incompatible with the FAA. Under the Court's jurisprudence, states cannot require collective arbitration unless parties agree to such collective procedures in their contract. Here, the Court found, the California rule effectively forced parties to choose between collective arbitration or no arbitration at all, by limiting the ability to opt out of collective proceedings—a result preempted by the FAA.

Thus, under the Court's ruling, if an employment agreement requires individualized arbitration of PAGA claims, that agreement must be respected. Further, once an employee has submitted to individualized arbitration, they no longer have standing to bring a representative PAGA claim on behalf of other employees. The result: California employers can continue to use contractual waivers and arbitration clauses to avoid representative PAGA claims.

Raising the Bar for Federal Subject-Matter Jurisdiction in *Badgerow v. Walters*

In March 2022, the Supreme Court resolved a technical, but practically important, question in *Badgerow v. Walters* (Case No. 20-1143): whether federal courts in the United States have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA when the only basis for jurisdiction is that the underlying dispute involved a federal question.

The FAA governs the involvement of U.S. courts in arbitration proceedings and post-award actions, but does not itself provide federal subject-matter jurisdiction in actions to confirm or vacate awards from arbitrations seated in the United States. Some federal courts, however, had applied so-called "look-through" jurisdiction to actions to confirm or vacate awards under Section 9 or Section 10 of the FAA. "Look-through" jurisdiction is commonly applied to motions to compel arbitration under Section 4 of the FAA, a practice that the Supreme Court previously endorsed, and involves "looking through" to the underlying dispute for a basis for federal subject-matter jurisdiction.

In an 8-1 decision authored by Justice Kagan, however, the Supreme Court held that there was no statutory basis for look-through jurisdiction under Sections 9 and 10 of the FAA. The lone dissenter, Justice Breyer, disagreed with the majority's view that the text of the FAA clearly precluded the application of look-through jurisdiction to motions to confirm or vacate arbitration awards, and would have permitted the application of look-through jurisdiction to those motions in order to avoid what he saw as undesirable consequences. As a result of the majority's decision, however, we may see state courts playing a greater role in interpreting and applying Sections 9 and 10 of the FAA.

Exploring the FAA's Carveout for Certain Employment Contracts in *Southwest Airlines v. Saxon*

The FAA does not apply to all agreements to arbitrate: Section 1 carves out employment contracts for certain classes of workers, including "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Southwest Airlines v. Saxon* (Case No. 21-309), the plaintiff was employed by Southwest Airlines to load and unload cargo from airplanes. She brought an employment action against her employer in court despite an arbitration agreement in her employment contract. Southwest Airlines moved to compel arbitration of the dispute, and the key question became whether the FAA applied to the contract. The Supreme Court answered in the negative, holding that the plaintiff is part of a "class of workers engaged in foreign or interstate commerce." The Court defined this specific class of workers narrowly, as all workers who load and unload planes, but simultaneously held that "any class of workers directly involved in transporting goods across state or international borders falls within [the] exemption"—a holding that will make it more challenging to enforce employment arbitration agreements with a wide range of transportation workers.

Conclusion

Looking forward to 2023, the Court has already granted certiorari in *Coinbase, Inc. v. Bielski* (Case No. 22-105), which concerns whether a U.S. district court may proceed with a litigation pending the non-frivolous appeal of a denial of a motion to compel arbitration. The Court has also agreed to hear *CMB Monaco v. Smagin* (Case No. 22-383), which concerns whether and when non-US plaintiffs can bring civil actions under the Racketeer Influenced and Corrupt Organizations Act on the basis of, among other things, alleged interference with payment of an arbitral award. It remains to be seen, however, whether 2023 will be a similarly busy year for the Court's arbitration docket, or if the Court will turn its attention to other topics after its focus on arbitration in 2022.

This post is part of Kluwer Arbitration Blog's 2022 in Review series. Other posts in the series can be seen here.

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