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Client Alert

International Arbitration and Litigation

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SDNY Rules Section 1782 Discovery Unavailable for Use in ICSID Arbitration

SUMMARY

On December 19, 2022, the SDNY further restricted the use of Section 1782 discovery by ruling that an ICSID tribunal constituted under the Italy-Panama BIT does not qualify as a "foreign or international tribunal" within the meaning of Section 1782.

BACKGROUND

28 U.S.C. § 1782 ("Section 1782") provides that a U.S. district court may order the production of "testimony or statement or . . . a document or other thing for use in a proceeding in a foreign or international tribunal." Last year, the U.S. Supreme Court ruled that Section 1782 discovery extends only to "governmental or intergovernmental" adjudicative bodies imbued with "governmental authority."[1] In *ZF Automotive US v. Luxshare*, the Supreme Court found that "private adjudicatory bodies," such as private commercial arbitrations and certain investor-state arbitrations, are excluded from the definition of "foreign or international tribunal" under Section 1782. The Court ruled that neither an *ad hoc* tribunal constituted under the United Nations Commission on International Trade Law ("UNCITRAL") arbitration rules nor under the German Institution of Arbitration constituted a "foreign or international tribunal" within the meaning of Section 1782. However, the Court did not prescribe whether other types of investor-state tribunals, such as arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID"), could qualify as a "foreign or international tribunal" under Section 1782.

On December 19, 2022, the Southern District of New York ("SDNY") rendered an opinion in *In re Webuild S.P.A.* concluding that an ICSID tribunal constituted under the bilateral investment treaty ("BIT") between Italy and Panama also does not qualify as a "foreign or international tribunal" within the meaning of Section 1782.[2] This decision follows an October 2022 decision by the Eastern District of New York ("EDNY") in *In*

re Alpene that found that an ICSID tribunal constituted under the China-Malta BIT was not a "foreign or international tribunal" imbued with "governmental authority" under Section 1782.[3]

IN RE *WEBUILD*

The applicants in *In re Webuild* had filed a Section 1782 application for discovery in support of two investment arbitrations against Panama under the Italy-Panama BIT related to an infrastructure project for the Panama Canal. They sought discovery from WSP USA Inc., which had assisted Panama in designing and costing the project, and a discovery order had been granted and a subpoena served on WSP USA. WSP USA challenged both the discovery order and the subpoena.

The key issue in the case was whether an *ad hoc* ICSID tribunal constitutes a "foreign or international tribunal" imbued with "governmental authority." To resolve this question, the SDNY court directly applied the factors that the Supreme Court considered in *ZF Automotive*:

- *First*, the SDNY assessed whether the ICSID tribunal was "a pre-existing body" or "one formed for the purpose of adjudicating investor-state disputes."[4] It found that ICSID does not have "standing or pre-existing arbitration panels," and that the tribunal was constituted upon Webuild's request for arbitration.[5]
- *Second*, the SDNY assessed whether the Italy-Panama BIT "itself created the [ICSID tribunal]."[6] It found that the BIT "simply references the set of rules govern[ing] the panel's formation and procedure if an investor chooses that forum."[7] In *ZF Automotive*, the Supreme Court too had found that the "treaty does not itself create the panel" which meant that the *ad hoc* panel derived its authority from the parties' consent to arbitrate in much the same way as in a private commercial arbitration.[8]
- *Third*, the SDNY inquired whether the ICSID tribunal "'functions independently' of and is not affiliated with either' of the relevant BIT nations."[9] It found that the ICSID arbitrators "lacked any 'official affiliation'" with Italy or Panama, or "any other governmental or intergovernmental entity."[10]
- *Fourth*, the SDNY observed that much like the UNCITRAL tribunal at issue in *ZF Automotive*, the ICSID tribunal did "not receive any 'government funding'" but rather was funded "jointly by parties to the dispute."[11]
- *Fifth*, the SDNY analyzed whether the ICSID tribunal maintained the confidentiality of the proceedings and the award. It found that the ICSID tribunal's treatment of confidentiality was "more akin to private commercial arbitration than adjudication by a governmental body."[12] Even though the 2022 ICSID Rules require that "excerpts" of awards be published without the parties' consent, the SDNY noted that "these excerpts are subject to objections by the parties and can be 'protected from public disclosure . . . by agreement of the parties.'"[13]
- *Finally*, the SDNY found that like the UNCITRAL tribunal at issue in *ZF Automotive*, the ICSID tribunal "derive[d] its authority from the parties' consent to arbitrate" since the ICSID tribunal was "only one of several options available" under the BIT.[14] It observed that the BIT offered investors the "choice of bringing [a] dispute[] before a pre-existing governmental body" such as local courts.[15]

The SDNY therefore concluded that the ICSID tribunal was not a "foreign or international tribunal" imbued with "governmental authority" within the meaning of Section 1782.

FUTURE CONSIDERATIONS

Webuild and *Alpene* provide early signals that New York courts are continuing to interpret Section 1782 in a restrictive manner. This position is in line with the circuit split that existed prior to *ZF Automotive*, where the Second, Fifth, and Seventh Circuits had found that Section 1782 could not be used in aid of foreign private arbitrations, while the Fourth and

Sixth Circuits had held the opposite. It is too early to tell whether other circuits, particularly the Fourth and Sixth Circuits, will follow *Webuild* and *Alpene* and exclude ICSID tribunals from Section 1782 discovery. Indeed, although the EDNY in *Alpene* noted the "similarities" between an ICSID tribunal and the UNCITRAL tribunal at issue in *ZF Automotive*, it also noted "significant differences."[16] While other U.S. courts continue to interpret the contours of Section 1782 discovery in investor-state arbitrations in light of *ZF Automotive*, Section 1782 remains a valuable discovery tool available in aid of foreign court proceedings.

[1] *ZF Automotive US, v. Luxshare,* 142 S.Ct. 2078 (2022); and *AlixPartners, v. Fund for Protection of Investors' Rights in Foreign States*, 142 S.Ct. 638 (2022).
[2] *In re Webuild S.P.A. and Sacyr S.A., 22-mc-140 (LAK), 2022 WL 17807321 (S.D.N.Y. Dec. 19, 2022).* However, on July 1, 2022, Sacyr S.A. gave notice of its voluntary dismissal of the instant action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A).
[3] *In re Alpene Ltd.*, 21 MC 2547 (MKB)(RML), 2022 WL 15497008 (E.D.N.Y. Oct. 27, 2022).
[4] *In re Webuild*, 2022 WL 17807321, at *1.
[5] *Id.*
[6] *Id.* at *2.
[7] *Id.* (citing *ZF Automotive*, 142 S. Ct. at 2090).
[8] *ZF Automotive*, 142 S. Ct. at 2090–2091.
[9] *In re Webuild* at *2 (citing *ZF Automotive*, 142 S. Ct. at 2090).
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *In re Alpene*, 2022 WL 15497008, at *3.