Corporate Disputes, Shareholders' Agreements and Arbitration

Updates in International Arbitration

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Topics to be Discussed

- Discovery
  - Specifically in light of *ZF Automotive, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*

- Confidentiality
  - Addressing misconceptions and discussing how to adapt

- Enforcement
  - Using RICO to pursue assets under *Yegiazaryan v. Smagin*

Discovery in International Arbitration

- IBA Rules (Article 3(3)):
  - A Request to Produce shall contain:
    - (a) (i) a description of each requested Document sufficient to identify it, or (ii) a description in sufficient detail (including subject matter) of a narrow and specific requested category of Documents that are reasonably believed to exist; in the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner;
    - (b) a statement as to how the Documents requested are relevant to the case and material to its outcome; and
    - (c) (i) a statement that the Documents requested are not in the possession, custody or control of the requesting Party or a statement of the reasons why it would be unreasonably burdensome for the requesting Party to produce such Documents, and (ii) a statement of the reasons why the requesting Party assumes the Documents requested are in the possession, custody or control of another Party.
  - Viewed generally as a bridge between common law and civil law approaches to document production

Characteristics of Discovery in International Arbitration

- No depositions
- Document requests must be fairly precise (no "U.S.-style discovery")
- Can depend on background of arbitrator(s) (e.g., common law v. civil law)
- Not uncommon for both sides to submit over 100 requests that are all rejected
- A party is unable to bring a case with the idea that it will rely on documents received (because of limited discovery and because the Statement of Case will have to be submitted before discovery even takes place)
- Extremely rare for a case to turn on documents obtained during discovery

Section 1782

- 18 U.S.C. § 1782 – Assistance to foreign and international tribunals and to litigants before such tribunals
  - **(a)The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal**, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

U.S. Supreme Court Held That Private Foreign International Arbitral Tribunals Did Not Qualify

- Before this latest term, there was a circuit split, with some circuits determining that "foreign or international tribunal" included private international arbitral tribunals.

- In consolidated cases *ZF Automotive, Inc. v. Luxshare, Ltd. a*nd *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States,* the Supreme Court unanimously ruled held that "[o]nly a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under § 1782 (142 S. Ct. 2078 (2022).

- In doing so, the Court noted that § 1782 permitted broader discovery than even the FAA.

How to Obtain Section 1782 Discovery in Light of SCOTUS Decision

- While Parties are restricted from seeking Section 1782 discovery purely for use in private commercial international arbitrations, they may still seek such discovery in relation to actual foreign court proceedings related to the issues/facts at hand in the arbitration.

- Under *Inter Corp v. Advanced Micro Devices, Inc.* (542 U.S. 241 (2004), such relevant foreign court proceedings must be within "reasonable contemplation", but need not be "pending" or "imminent".

- Such a strategy will of course be met with opposition, but courts and tribunals have shown a willingness to entertain such requests and admit the evidence into the arbitration.

Using RICO to Enforce International Arbitration Award

- Typical process for enforcing foreign arbitral award is seeking recognition and enforcement in a jurisdiction where the debtor has assets.

- So what happens if an award debtor, aware of your intention to seek out assets, simply moves assets outside the jurisdiction?

Using RICO to Enforce International Arbitration Award

- In *Yegiazaryan v. Smagin*, (599 U.S. ____ (2023)), the U.S. Supreme Court was faced with such a scenario.
- In this case, respondent had won a multimillion-dollar arbitration award against petitioner stemming from the misappropriation of investment funds in a joint real estate venture in Moscow. Because petitioner lived in California, respondent, who lives in Russia, filed suit to confirm and enforce the award in the Central District of California.
- The District Court initially froze petitioner's California assets before finally entering judgment against him. The District Court also entered several post-judgment orders barring petitioner and those acting at his direction from preventing collection on the judgment. While the action was ongoing, petitioner was awarded a multimillion-dollar arbitration award in an unrelated matter and sought to avoid the District Court's asset freeze by creating "a complex web of offshore entities to conceal the funds".

Using RICO to Enforce International Arbitration Award

- Respondent filed a RICO act, which provides a private right of action to "[a]ny person injured in his business or property by reason of a violation of" RICO's substantive provisions (18 U.S.C. § 1964(c)).

- Respondent alleged that petitioner and others worked together to frustrate respondent's collection on the CA judgment through a pattern of wire fraud, witness tampering, obstruction of justice, etc. (i.e., RICO predicate racketeering acts).

- The issue at hand was whether respondent's pleading included a "domestic injury" as required for private civil RICO suits (*RJR Nabisco, Inc. v. European Community*, 579 U.S. 325).

Using RICO to Enforce International Arbitration Award

- Rejecting a residency-based bright line rule for the "domestic injury" inquiry, the Court held that a plaintiff alleges a domestic injury when the circumstances surrounding the injury indicate it arose in the U.S., with such an inquiry being context specific, turning largely on the facts alleged in the complaint.

- In this case, it would require looking to the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity.
  - Nature of injury – inability to enforce CA judgment
  - Racketeering activity – acts that largely "occurred in, or w[ere] targeted at, California"
  - Aims and effects – "designed to subvert" enforcement of CA judgment

Main Takeaways from *Yegiazaryan v. Smagin*

- International arbitration award creditors can now use RICO to pursue assets if they can show improper domestic conduct frustrates their ability to collect what is owed.

- As the dissent points out, such a context specific rule may be difficult for lower courts to enforce in a uniform manner.

Importance of Understanding Confidentiality in International Arbitration

- There are several factors that often get listed as the main ones to consider when weighing cross-border litigation v. international arbitration.
  - Enforceability of awards
  - Avoiding specific legal systems/national courts
  - Flexibility
  - Ability of parties to select arbitrators
  - **Confidentiality and privacy**
  - Neutrality
  - Finality
  - Speed
  - Cost

(Queen Mary/White & Case 2018 International Arbitration Survey)

Why Confidentiality Can Be Important

- Business do not generally enjoy airing their dirty laundry in public.

- Sometimes dispute proceedings can include trade secrets, intellectual property, business practices, etc.

Confidentiality is Not Automatic

- It is a common misconception that international arbitrations are by default confidential.

- ICC Rules Article 22(3) - **Upon the request of any party**, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

- JAMS Rule 26(a) - **JAMS and the Arbitrator** shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

The Parties Can Seek Increased Confidentiality

- The parties can agree to levels of confidentiality in the relevant dispute resolution clause or can seek to establish confidentiality during the early stages of the arbitration proceedings.
  - If parties want to establish confidentiality in the dispute resolution clause, need to be careful about clarity.

- Parties do commonly add confidentiality provisions at the outset of an arbitration, but the details of the confidentiality can be in dispute and require the tribunal to decide.

Even Confidential Proceedings Can Become Public

- The easiest way international arbitration proceedings can become public is in the context of confirmation actions, in which the arbitral award is attached as an exhibit. These awards are usually quite detailed about the facts of the case and the procedural history of the arbitration.

- While the parties can attempt to keep the award under seal in such confirmation proceedings, there is no guarantee that courts will abide by such requests (e.g., *Lohnn v. Int'l Bus. Machs. Corp.*, 21-cv-6379 (LJL) (S.D.N.Y. Jan. 4, 2022), "the fact that information exchanged between private parties is subject to a confidentiality agreement that binds them is not itself sufficient to deprive the public of the right of access to that information when it is properly filed in support of a motion asking the Court to take dispositive judicial action on a matter properly before the Court").

Even Confidential Proceedings Can Become Public

- Sometimes, confidential information is simply leaked for strategic reasons. Tribunals can strongly remind the parties of their specific duty of confidentiality in a given case but are hesitant to take decisive action against a party absent clear evidence that it was responsible for a particular leak.

- Ultimately, parties must be aware: (1) that confidentiality should not be assumed in any arbitration; (2) if such confidentiality is not agreed in a dispute resolution provision, they can add such a provision at the outset of the arbitration but may not be able to get the other side to agree; (3) must be diligent in trying to trace any impermissible leaks if any do occur; and (4) very well may have details of the proceedings made public if one party is forced to go to court to have the award confirmed/enforced.

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