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Recent U.S. Supreme Court Decisions Impacting International Arbitration

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During 2022, the U.S. Supreme Court issued two decisions that bear on international arbitration. The first, *Badgerow v. Walters*, 142 S. Ct. 1310 (2022), addressed the subject matter jurisdiction of U.S. federal courts to confirm awards issued in international arbitrations. The second, *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), addressed the use of 28 U.S.C § 1782 to obtain evidence for use in an international arbitration.

Two Judicial Systems in the United States

The United States has two distinct judicial systems with partially overlapping jurisdiction. State courts have general subject matter jurisdiction, allowing them to hear all claims. Federal courts, in contrast, have limited subject matter jurisdiction. Federal courts may only hear disputes where federal law is at issue or that meet the statutory requirements for "diversity jurisdiction." Diversity jurisdiction exists pursuant to 28 U.S.C. § 1332 when the amount in controversy exceeds $75,000 and the dispute is between (i) citizens of different states; (ii) citizens of a state and subjects of a foreign state; (iii) citizens of different states and a subject of a foreign state is a party; or (iv) a foreign state and a citizen of a state. Contract disputes generally present matters of state, not federal, law. Thus, absent "diversity jurisdiction," federal courts typically do not have subject matter jurisdiction to hear contract disputes.[1]

Federal Court Jurisdiction to Confirm or Vacate Arbitral Awards

The Federal Arbitration Act ("FAA") is the federal statute that sets U.S. policy in favor of enforcing agreements to arbitrate. Section 4 of the FAA provides for petitions to compel arbitration. One might expect that seeking to compel arbitration pursuant to the FAA raises issues of federal law. However, under Section 4 of the FAA and the Supreme Court's decision in *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009), a federal court will "look through" a petition to compel arbitration to determine if the underlying dispute is within its limited subject matter jurisdiction. If the underlying dispute does not raise issues of federal law and is not among diverse parties, then the petitioner seeking to compel arbitration must bring the application in state court.

1. Where a case presents issues of both federal and state law, a federal court may exercise "supplemental" jurisdiction and hear the entire controversy. However, if the federal court dismisses the federal claims, it has the ability to decline jurisdiction over the remaining state claims and send the state claims to state court.

Vaden established the jurisdictional rule for compelling arbitration, but did not address applications to confirm or vacate an arbitral award made pursuant to Section 9 or Section 10 of the FAA. Notwithstanding that the petitioner seeking relief pursuant to the FAA is facially raising issues of federal law, in its recent *Badgerow* decision, the Supreme Court explained that confirmation of an arbitration award involves contract interpretation (*i.e.*, the contractual settlement of a dispute through arbitration) and, therefore, is a matter of state law. The Supreme Court compared the statutory language of FAA Section 4 with that of Sections 9 and 10. It found that because Sections 9 and 10 omit the language in Section 4 that was the basis for the "look through" jurisdiction it addressed in *Vaden*, that approach would not apply to applications to confirm arbitral awards. *Badgerow*, 142 S. Ct. at 1317-18. It explained that although a claim "may have originated in the arbitration of a federal-law dispute … the underlying dispute is not" at issue on confirmation. *Badgerow*, 142 S. Ct. at 1321. At confirmation, "the application concerns the contractual rights provided in the arbitration agreement, generally governed by state law." *Id.* Thus, absent diversity jurisdiction, confirmation of an arbitration award typically is a matter for state courts.

Discovery in Aid of Foreign Arbitration

The other recent decision, *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), addressed the question of whether 28 U.S.C. § 1782 ("Section 1782") can be used as a basis for obtaining discovery in support of an international arbitration. Section 1782 provides: "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." It allows a party (or potential party) to a proceeding before a "foreign or international tribunal" to use the pre-trial discovery mechanisms available in U.S. litigation to obtain evidence for use in that proceeding, including by compelling the production of documents and the testimony of U.S. witnesses. Section 1782 can be extremely useful to foreign litigants if helpful information (including financial information) is located in the U.S.

At issue in *ZF Automotive* was whether a private international arbitration tribunal was a "foreign tribunal" or an "international tribunal" under Section 1782. The central question was whether the meaning of the phrases "foreign tribunal" and "international tribunal" is limited to tribunals that act with governmental authority, or whether it also includes private arbitral panels. As part of its analysis, the Supreme Court noted that it appeared unreasonable to allow parties to foreign arbitrations the benefits of federal-court discovery, while parties to domestic arbitrations do not have access to those same benefits. The Court concluded that Section 1782 discovery is available only to parties or prospective parties to matters before a

tribunal imbued with governmental authority, the most common of which are courts and governmental administrative bodies.

New York's Procedural Rules Are Different

State law may provide an alternative mechanism to obtain discovery. New York's procedural rules provide for pre-action discovery to aid a party in bringing a litigation or arbitration. CPLR 3102(c) states: "Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order." Thus, if a prospective arbitration has a jurisdictional link to New York (or involves information located in New York), a party will continue to be able to seek pre-commencement discovery in aid of its case, even if it cannot obtain that relief pursuant to Section 1782. Instead of invoking Section 1782 in federal court, the party will invoke CPLR 3102(c) in New York state court.

Notably, New York permits parties to elect jurisdiction in New York – even if neither party has contact with New York and the dispute does not touch New York – provided that their contract specifies that New York law shall apply, the underlying contract involves more than $1 million, and the contract contains their consent to New York jurisdiction. *See* N.Y. Gen Oblig. L. §§ 5-1401 and 5-1402. Decisions to elect New York jurisdiction are not to be made lightly. We urge parties considering that issue to consult with counsel *before* executing a contract.

Parties May – To a Degree – Contract Around the Supreme Court's Decision

Parties that wish to incorporate U.S.-style discovery into their private arbitrations retain the ability to do so in some situations.

A wide variety of pre-existing rules exist in the arbitration marketplace, and the parties should select the most appropriate set of rules for their potential dispute. Moreover, parties entering into an agreement to arbitrate may contractually alter those rules to create a custom approach to discovery that suits their anticipated needs.

Parties can draft an arbitration agreement that addresses such details as (1) whether the parties should exchange documents in a pre-hearing discovery process and the scope of that exchange; (2) whether party witnesses should be subject to pre-trial depositions, and if so, the duration and number of such depositions; (3) whether third-parties should be subject to subpoenas seeking documents and testimony (although enforcing such subpoenas may be challenging); and (4) whether any other type of information exchange should be permitted or required.

For example, although the standard commercial rules of the American Arbitration Association ("AAA") do not provide for pre-hearing depositions, the AAA's rules for large and complex cases permit depositions for good cause shown. Parties may alter those provisions by including detailed guidance in their arbitration agreement. We recommend consultation with counsel concerning those issues.

Fox Horan & Camerini LLP's attorneys have extensive experience preparing arbitration agreements and clauses, and arbitrating and litigating complex, often multinational, legal matters for their clients. Many U.S. and international clients choose the Firm for its attorneys' wealth of experience, diversity of training, professional ability, and commitment to efficient dispute resolution. For more information regarding the Firm's services and attorneys, contact us today.

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