INTERNATIONAL UPDATE: CHANGES IN US ARBITRATION JURISPRUDENCE

Arbitration, especially international commercial arbitration, is meant to provide results that are faster and fairer than those obtainable in local courts. The most popular location for arbitration, with geographic proximity to Mongolia, is Singapore. However, a majority of the top-ranked international arbitration legal practices are based in the U.S. As a result, these large American law firms shape global arbitration practice.

It is therefore worth considering the rapid changes in U.S. arbitration jurisprudence over the last few years. The ways in which U.S.-licensed attorneys learn and deploy the law can have practical ramifications for key Asian arbitration centers, and even for Mongolian companies.

The U.S. is a common law jurisdiction, and therefore its contract law is based on judicial opinions and precedent. There are very limited federal regulations pertaining to contracts. Contract law as developed by judges in individual states will instead govern contract clauses such as arbitration language. In 1925, the U.S. federal government passed its arbitration statute, the Federal Arbitration Act ("**FAA**"), in order to affirm the validity of agreements to arbitrate and to encourage judicial support and enforcement of arbitral results. The FAA has been the exclusive and authoritative law on American arbitration for nearly one hundred years. Though the popular Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) is known as the New York Convention, the U.S. did not take an active role in its drafting, and only ratified it as law in 1970. The New York Convention, when adopted by the U.S., became incorporated into the FAA.

The Supreme Court of the United States is the ultimate authority on interpreting the FAA and shaping the contours of U.S. arbitration rules. The Supreme Court has seen a recent shift in composition, with three of its nine members replaced in the last five years. During that same time period, the Supreme Court has taken a renewed interest in the FAA. Just this past term (2022), the Supreme Court issued opinions on four separate cases related to the FAA, as well as an additional case explicitly related to international arbitration. The overall arc of this trend is that the Supreme Court is encouraging and expanding the use of arbitration. The international case from this year reveals that an aversion to litigation might be the driving logic behind these judicial opinions.

1. TRAJECTORY OF CHANGES

The Supreme Court of the United States has long supported the parties' freedom to contract, including their ability to specify the method of mediating disputes. The Court's decisions since 2017 can best be characterized as pro-business and pro-arbitration, due to arbitration's "speed and simplicity and inexpensiveness." The Court will generally enforce the arbitration clause in a contract as it is written, and will resolve ambiguities in a way that favors arbitration and disfavors use of the judicial system. For example, if an arbitration

clause in a contract does not discuss whether class actions – as an alternative to arbitration – are permitted, then the Court has determined that there can be no such class exceptions to arbitration. Any exception must be explicitly incorporated into the wording of the clause's language.

In 2018 and 2019, the Supreme Court increased the power of individual arbitrators by deciding that they, not courts, have the power to determine whether arbitration applies to a particular case. The Supreme Court describes the logic of the cases as holding true to the text of the FAA, which is meant to encourage arbitration. Critics charge that the Court is really more concerned with judicial economy. The Supreme Court has had the same number of justices, and the lower federal courts have not expanded, for many decades. As a result, the same quantity of judicial resources must be expended on caseloads that increase year over year. By encouraging arbitration, the Court is leveraging a mechanism to clear court dockets and push dispute resolution out of the civil court system.

2. 2022 TERM

The Supreme Court agrees to hear, on average, about 75 cases per year of the many thousands presented to it. This term, the Court issued opinions in 66 cases. Four revolved around questions of interpreting the scope of the FAA. The cases are more modest than in prior years, but nevertheless continue to clear away any attempts by courts or state laws to impede the arbitration process. The decisions this term were nearly unanimous (9-0 or 8-1), an unusual contrast to previous FAA cases that are usually split very closely along ideological lines.

In the case of *Badgerow v. Walters*, the Court denied that U.S. federal courts have the authority to confirm or vacate arbitral awards. In *Viking River Cruises, Inc. v. Moriana*, the Court ruled that certain state laws are not allowed to interfere with arbitration agreements. In particular, the Court determined that the FAA prevented California from interfering in arbitration matters.

In *Morgan v. Sundance, Inc*, the Court held that federal courts must treat arbitration contracts on "equal footing" to other types of contracts, in the context of a judiciary-created test that inquired into prejudice for waiver of arbitration. *Southwest Airlines v. Saxon* addressed a category of people exempt from FAA coverage – the "class of workers engaged in foreign or interstate commerce." The Court determined that certain kinds of airport workers were exempt from the FAA, but it refrained from addressing the broader question many hoped it would: whether contract workers, like those who deliver goods through Amazon or drive cars via apps like Uber, meet this FAA carveout.

3. INTERNATIONAL IMPLICATIONS

A fifth case this year dealt directly with international matters. In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, Luxshare believed that ZF had concealed certain facts that inflated the purchase agreement price. The parties' contract required that all disputes be settled by three arbitrators in Germany. Luxshare wanted to use tools of discovery in the U.S. prior to arbitration. In a companion case, which the Supreme Court consolidated together with the *Luxshare* case, the Fund for Protection of Investor Rights in Foreign States initiated an international arbitration against Lithuania, and then sought discovery from a consulting firm in New York.

For many decades, sophisticated business parties have been using 28 U.S.C. §1782, which gives federal courts authority to order parties to give testimony or produce documents "for use in a foreign or international tribunal," to gather evidence for use in international arbitration. The Supreme Court's opinion in *Luxshare* held that private commercial arbitration panels do not fall within the scope of Section 1782. Consequently, the decision

newly limits parties' abilities to get discovery in U.S. court for use in international arbitrations.

The U.S. has very broad discovery rules. The official federal rules of civil procedure provide several tools and mechanisms by which parties obtain any nonprivileged material for use in adversarial proceedings. These include subpoenas, interrogatories, and depositions. Each party to a case is supposed to turn over all materials related to either the claim or a possible defense to the claim. The discovery tools can also be directed at third parties, such as requests to consulting companies that might hold the records of an opposing party. These rules are quite generous in their scope. As a result, it has been popular for businesses to use 28 U.S.C. §1782 to avail themselves of U.S. discovery rules in preparation for an international arbitration.

On some level, *Luxshare* might reveal how the Supreme Court opposes litigation more than it favors arbitration. Common wisdom is that the Supreme Court has recently been encouraging arbitration in every possible manner. Here, the Supreme Court stepped in to complicate the ways in which parties can conduct private international commercial arbitration. While scholars generally believe recent arbitration decisions are rooted in a "freedom of contract" approach, here and elsewhere the Court seems to be most concerned with limiting parties' access to the civil court system.

Expert reactions have been mixed. Some believe the decision equalizes footing for parties, in that non-U.S. parties previously could obtain expansive findings on U.S. parties, while U.S. parties were not allowed to do the same in other jurisdictions. Others believe it will have an overall negative impact on proceedings across the board, as every party will be deprived of a technique that previously allowed more information to come to light. One potential ramification is that parties might now choose to have their contracts or arbitration clauses governed by U.S. law, in order to have access to U.S. discovery. Or parties may initially file lawsuits in the U.S., prior to or instead of engaging in arbitration, so as to obtain more expansive discovery. The upshot of the decision is that, both in private commercial and investor-state arbitrations, parties can approach contracts with an eye toward increasing their own capabilities of using U.S. discovery tools or minimizing the likelihood of being subject to them.

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