UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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IN RE APPLICATION OF ALPENE, LTD. FOR AN ORDER DIRECTING DISCOVERY FROM ELIZABETH McCAUL PURSUANT TO 28 U.S.C. §1782

MEMORANDUM AND ORDER
21 MC 2547 (MKB)(RML)

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LEVY, United States Magistrate Judge:

Alpene Ltd. ("Alpene") commenced this case on August 30, 2021 for the purpose of seeking an expedited order authorizing Alpene's counsel to issue subpoenas for documents and testimony to Elizabeth McCaul ("McCaul") in aid of a foreign proceeding, pursuant to 28 U.S.C. § 1782. By order dated September 9, 2021, the Honorable Margo K. Brodie, United States District Judge, referred the application to me. On September 20, 2021, I granted the request. (See Order, dated Sept. 20, 2021.) McCaul filed the instant motion to vacate on November 11, 2021. (See Motion to Vacate, dated Nov. 11, 2021 ("Mot."), Dkt. No. 14; Memorandum of Law in Support of Motion to Vacate Order Granting Discovery Pursuant to 28 U.S.C. § 1782, dated Nov. 11, 2021, Dkt. No. 15.) McCaul also moves for an order quashing and granting a protective order with respect to the document and deposition subpoenas. (See Mot.) I heard oral argument on January 11, 2022. (See Transcript of Oral Argument, dated Jan. 11, 2022 ("Tr."), Dkt. No. 25.) For the reasons stated below, the application is stayed pending the United States Supreme Court's decision in AlixPartners, LLP v. The Fund for Protection of Investors' Rts. in Foreign States, No. 21-518, 2021 WL 5858633 (U.S. Dec. 10, 2021).

BACKGROUND

Alpene, a Hong Kong corporation, is a claimant in an international treaty arbitration against the Republic of Malta before the World Bank's International Centre for the

Settlement of Investment Disputes ("ICSID").[1] It brought this case to obtain discovery from McCaul, a New York resident, in connection with the ICSID proceeding. McCaul, a former executive at Promontory Financial Group ("Promontory"), is not a party to the ICSID arbitration and the ICSID tribunal cannot subpoena or otherwise compel her to provide documents or testimony.

Alpene is the parent company of Pilatus Bank, a private bank that was registered in Malta in 2013. The European Central Bank revoked Pilatus Bank's license in November 2018, approximately eight months after the Malta Financial Services Authority ("MFSA") appointed Lawrence Connell as Pilatus Bank's administrator, or "Competent Person." At the time, Promontory was a consultant to the MFSA. Alpene seeks documents and testimony from McCaul concerning, *inter alia*, her role in, and knowledge about, the MFSA's decision to appoint Connell as Competent Person for Pilatus Bank. McCaul raises a number of objections, including relevance and privilege.

DISCUSSION

28 U.S.C. § 1782 empowers federal courts to order persons in the United States to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal." The statute imposes three requirements: "'(1) that the person from whom discovery is sought reside (or be found) in the district of the district court to which the application is made; (2) that the discovery be for use in a proceeding before a foreign tribunal; and (3) that the application be made by a foreign or international tribunal or 'any interested person.'" In re Edelman, 295 F.3d 171, 175-76 (2d Cir. 2002) (quoting In re Esses, 101 F.3d 873, 875 (2d Cir.

[1] The treaty at issue is the Treaty between the People's Republic of China and Malta on the Promotion and Protection of Investments. The ICSID operates under the Convention on the Settlement of Disputes between States and Nationals of Other States.

1996)). At issue here is whether the ICSID arbitration constitutes a "foreign or international tribunal" within the meaning of § 1782.

The Supreme Court has only considered § 1782 once, and not in the context of international arbitration. In Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248-49 (2004), the Court held that an antitrust complaint filed before the Directorate-General for Competition of the Commission of the European Communities satisfied § 1782's "foreign or international tribunal" requirement. Adopting a functional approach, the Court in Intel provided some guidance as to the characteristics that a "foreign or international tribunal" might possess. First, the Court noted that proceedings before such a tribunal would lead to "a final administrative action both responsive to the complaint and reviewable in court" or, stated simply, a dispositive ruling. Id. at 255. Second, it found that § 1782 applies to a "first-instance decisionmaker" in "administrative and quasi-judicial proceedings." Id. at 257-58. Third, the Court cautioned that comparing § 1782, which is aimed at assisting tribunals abroad, with American domestic law "can be fraught with danger." Id. at 263. According to the Court, § 1782 "does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here." Id. Finally, the Court rejected "categorical limitations" on the reach of § 1782, noting that "Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'" Id. at 263 n.15.

Since Intel, there has been disagreement, both in the courts and among commentators, about whether the phrase "foreign or international tribunal" in § 1782 includes *private* international commercial arbitral tribunals. In ZF Automotive US, Inc.v. LuxShare, Ltd., No. 21-401, 2021 WL 4173622 (U.S. Sept. 10, 2021), which involves a private commercial

arbitration in Germany between two companies, the Supreme Court granted certiorari to address that question.

By contrast, courts "have regularly found that arbitrations conducted *pursuant to Bilateral Investment Treaties*, and specifically by the ICSID, qualify as international tribunals under § 1782 and are not private arbitrations." In re Eni, No. 20 MC 334, 2021 WL 1063390, at *3 (D. Del. July 15, 2021) (collecting district court cases) (italics added). Despite the lack of a circuit split, in AlixPartners, LLP v. The Fund for Protection of Investors' Rts. in Foreign States, No. 21-518, 2021 WL 5858633, at *1 (U.S. Dec. 10, 2021), the Supreme Court recently granted certiorari to address the question of "whether the phrase 'foreign or international tribunal' in 28 U.S.C. § 1782(a) includes international arbitral tribunals constituted pursuant to a treaty signed by two or more sovereign States." AlixPartners, which was consolidated with ZF Automotive, does not concern a proceeding before the ICSID, but rather an arbitration between a foreign State and an investor before an arbitral panel established by a bilateral investment treaty between Lithuania and the Russian Federation.

If the Supreme Court finds that § 1782 does not apply to either commercial or investment treaty arbitrations, then litigants will be precluded from using United States district courts to compel discovery from any witness located in the United States. However, if the Supreme Court instead finds that § 1782 encompasses both commercial and investment treaty arbitrations, then litigants in such arbitrations could turn to the district court in which a witness resides to compel discovery for use in foreign arbitrations. Alternatively, the Supreme Court might distinguish between commercial and investment treaty arbitrations, and find that only the latter qualify as international tribunals subject to § 1782. In that event, litigants in investment treaty arbitrations, including Alpene, could invoke § 1782 to request discovery orders.

Alpene argues that arbitrations before the tribunal in question here, the ICSID, will not be affected by the Supreme Court's decision in Alix Partners, since the World Bank is a "quasi-governmental" authority. (Tr. at 37.) It is true that the use of the word "tribunal" in the statute is intended "to ensure that 'assistance is not confined to proceedings before conventional courts,' but extends also to 'administrative and quasi-judicial proceedings.'" Intel, 542 U.S. at 249 (quoting S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964)). In In re Guo, 965 F.3d 96 (2d Cir. 2020), the Second Circuit provided a roadmap for analyzing whether a foreign arbitration should be deemed a private or quasi-governmental proceeding. The court explained that no single factor makes a tribunal private or state-sanctioned, but that courts must instead consider elements such as the degree of State affiliation, the State's authority to intervene in arbitration, and the jurisdiction of the arbitral panel. Id. at 107–08. The arbitral body at issue in Guo, the China International Economic and Trade Arbitration Commission ("CIETAC"), was established by the People's Republic of China and received "at least some funding from the Chinese government." Id. at 100-01. However, the court concluded that CIETAC was "closer to a private arbitral body" than a governmental tribunal or other "state-sponsored adjudicatory body," id. at 101 (brackets omitted), and therefore fell outside the ambit of § 1782, because there was no affiliation with the Chinese government, the ability of the government and courts to intervene in the arbitration was limited, the jurisdiction of the arbitral panel was created solely by parties' agreements, and the parties had the ability to select their own arbitrators. Id. at 107–08.

I have not had occasion to analyze how the ICSID would fare under this analysis, and the parties have not briefed this issue. But given that the Supreme Court has reached out to decide an issue that was not in dispute—namely whether arbitrations conducted pursuant to bilateral investment treaties qualify as international tribunals under the statute—I am reluctant to

predict how it might rule. Without a doubt, the Court will shed light on what qualifies as a foreign or international tribunal for purposes of § 1782. Counsel for Alpene has indicated that the parties to the ICSID arbitration have not yet scheduled their initial procedural conference (Tr. at 28), and I am not convinced that staying this matter would prejudice Alpene in any way. Accordingly, this case is stayed pending the Supreme Court's decision in Alix Partners.

SO ORDERED.

/s/
ROBERT M. LEVY
United States Magistrate Judge

Dated: Brooklyn, New York
February 3, 2022