Dispute Resolution Hotline

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UNITED STATES SUPREME COURT REFUSES COURT ASSISTANCE UNDER 28 USC S.1782(A) TO OBTAIN EVIDENCE FOR FOREIGN ARBITRATION PROCEEDINGS – PART I (ANALYSIS)

The US Supreme Court has held that:

- foreign private arbitral tribunals cannot seek assistance of US courts under 28 USC Section 1782 to obtain evidence located in the United States;
- a 'foreign or international tribunal' under 28 USC Section 1782 refers to 'governmental or intergovernmental authorities' and does not encompass private adjudicative bodies;
- arbitral tribunals in commercial or investment treaty arbitration do not constitute 'governmental or intergovernmental authorities', unless they have been constituted by governments or vested with some form of governmental authority.

I. INTRODUCTION

28 USC Section 1782 (**S.1782**) is a powerful tool available in the United States federal law to litigants before foreign and international tribunals. This legal provision allows litigants or tribunals to seek assistance of American courts in gathering evidence present in the United States, for use in foreign proceedings. This provision was particularly attractive for foreign arbitral tribunals or parties involved in foreign arbitration, since arbitral tribunals lack sovereign tools to ensure compliance of their orders directing third parties or parties to produce evidence. While arbitral tribunals can make orders drawing adverse inferences against a non-compliant party or impose costs, they require court assistance to obtain evidence from third parties or parties that are undeterred by such orders.

However, the issue of whether a foreign-seated arbitral tribunal is covered within the ambit of a 'foreign or international tribunal' in S.1782 has been a highly contested issue in the United States. The Second,[1] Seventh[2] and Fifth[3] Circuits had narrowly read S.1782 to exclude private arbitral tribunals from the ambit of 'foreign or international tribunal', such that they could not seek assistance of US courts in obtaining evidence for use in foreign arbitration proceedings. Conversely, the Fourth,[4] Sixth[5] and Eleventh Circuits[6] read S.1782 broadly and allowed private arbitral tribunals to seek assistance of US courts. Please see our detailed article on '*28 U.S.C. Section 1782(a) – The Good Samaritan for Taking Evidence in the USA for Foreign Arbitrations – A Comparative Analysis*'.[7]

On 13 June 2022, the USSC resolved this ambiguity and rendered a joint unanimous decision in *ZF Automotive US Inc. et al v. Luxshare, Ltd.* (**ZF Automotive case**), and Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States (**Alix Partners case**).[8] The USSC confirmed that a private arbitral tribunal does not fall within the ambit of a 'foreign or international tribunal' under S.1782, and cannot seek assistance of US courts in obtaining evidence for use in foreign-seated arbitration proceedings.

In this article, we will provide an analysis of the judgment (Part I). In our next article, we will provide the way forward and recourse for parties in need of evidence located in the US, for use in foreign-seated arbitration proceedings (Part II, published by *LexisPSL*).

II. FACTUAL BACKGROUND

a. ***28 USC Section 1782(a)***

S.1782(a) states:

"*Assistance (by courts) to foreign and international tribunals and to litigants before such tribunals:*

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*

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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." (***emphasis supplied***)

b. ***ZF Automotive US Inc. et al v. Luxshare Ltd.***

The first case before the USSC stemmed from the Sixth circuit and involved a dispute under a contract for sale (**Contract**). The dispute resolution clause in the Contract provided that all disputes would be exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration (**First Arbitral Tribunal**).

When a dispute arose between the parties under the Contract, Luxshare filed an *ex parte* application under S.1782 in the US District Court of Eastern District of Michigan, seeking information about ZF and two of its senior officers before commencing arbitration proceedings. The District Court granted this application and allowed Luxshare to serve subpoenas on ZF and its officers. ZF moved to quash the subpoenas on the ground that arbitral tribunals do not constitute 'foreign or international tribunal' under S.1782. However, the District Court rejected ZF's application owing to the Sixth circuit precedents[9] which allowed arbitral tribunals to seek assistance of US courts under S1782.

c. ***Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States case***

The second case stemmed from the Second circuit and involved a dispute between Lithuania and the Fund for Protection of Investor's Rights in Foreign States (**Fund**) - a Russian corporation and an assignee of a Russian investor - under the Lithuania-Russia Bilateral Investment Treaty (**BIT**). The BIT provided that a dispute between one of the contracting parties to the BIT and an investor of the other party may be resolved by one of four forums, including an ad-hoc arbitration in accordance with the UNCITRAL Rules with a three-member arbitral tribunal (**Second Arbitral Tribunal**).

The dispute arose out of a Russian investor's investment in a Lithuanian bank AB Bankas SNORAS (**Snoras**) that was subsequently nationalized by the Lithuanian Government. As part of the nationalization process, Lithuania had appointed a CEO of a New York-based consulting firm as a temporary administrator of Snoras. The Fund commenced arbitration proceedings against Lithuania under the BIT, and alleged that the Russian investor's investment was expropriated by Lithuania due to its nationalization of Snoras. After commencing the arbitration, the Fund filed a S.1782 application in the US District Court for the Southern District of New York, seeking information about the temporary administrator. The temporary administrator resisted this application by arguing that the arbitral tribunal was not a 'foreign or international tribunal'. The District Court granted the Fund's request, despite the Second Circuit precedents[10] that had held that private arbitration tribunals do not constitute 'foreign or international tribunal' under S.1782. The District Court's decision was affirmed by the Second Circuit by adopting a multifactor test - which concluded that the arbitral tribunal constituted under the BIT "did not possess functional attributes commonly associated with private arbitration".

To resolve the split among the Courts of Appeal of the Sixth and Second Circuits, the USSC granted a stay and a certiorari in both these cases.

III. JUDGMENT

a. ***Inclusion of private adjudicative bodies in the phrase "foreign or international tribunal" in S.1782***

According to the USSC, the legislative history of S.1782 indicated that Congress used the term 'tribunal' in a broad sense, and did not restrict its meaning to a 'formal court'. However, it then found that the context of the term 'tribunal' in this section indicated that such a tribunal should exercise governmental authority. It based its findings on two reasons. First, it found that the term 'foreign tribunal' has governmental or sovereign connotations since a tribunal must belong to a foreign nation to be called a 'foreign tribunal'.

Second, it noted that S.1782 mentions that a district court order under this section "may prescribe the practice and procedure, which may be in whole or part the *practice and procedure of the foreign country*". Accordingly, it found that Congress could not have intended to cover foreign private arbitral tribunals within S.1782 since it cannot be presumed that foreign arbitral tribunals, which prescribe their own rules typically, would follow the '*practice and procedure of the foreign country*'. Therefore, the USSC concluded that a 'foreign tribunal' clearly refers to a tribunal which is "imbued with governmental authority by [a] nation".

The USSC also held that 'international tribunal' then refers to a tribunal which has been "imbued with governmental authority by multiple nations". Citing the American Heritage Dictionary, the USSC found that international can mean either "involving two or more nations" or "involving two or more nationalities". USSC found that the first definition would be applicable in the present context and a tribunal will be international when it involves two or more nations, i.e. two or more nations have "imbued the tribunal with official power to adjudicate disputes". By reaching these findings, the USSC concluded that a 'foreign or international tribunal' under S.1782refers to 'governmental or intergovernmental authorities'.

The USSC also noted that this interpretation is consistent with the legislative intent behind introducing S.1782to promote comity and reciprocal assistance between the United States and foreign nations, which would not be achieved by aiding private adjudicative bodies in foreign nations.

It also noted that allowing assistance by US courts to foreign private arbitral tribunals under S.1782 would be in tension with the Federal Arbitration Act (**FAA**). This is because S.1782 would allow a foreign or international tribunal, or an interested person, to seek assistance of the US courts before arbitration proceedings have been commenced. However, there is no such provision for pre-arbitration discovery under the FAA for domestic arbitral tribunals. Accordingly, the USSC found that allowing private arbitral tribunals to be covered under S.1782 would lead to an absurd result where US courts would aid foreign arbitral tribunals but not domestic arbitral tribunals.

b. ***Whether the arbitral tribunals in both cases qualify as "governmental or intergovernmental bodies"***

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The arbitral tribunals in both cases were of a different nature. The First Arbitral Tribunal, dealing with a commercial arbitration, was constituted by parties privy to a contract. The second arbitral tribunal, dealing with an investment arbitration, was constituted by a country and an investor of another country under an international treaty. Accordingly, the USSC analyzed the nature of both arbitral tribunals to decide if they constituted "governmental or intergovernmental bodies" - such that they can be classified as 'foreign or international tribunals' under S.1782.

For the First Arbitral Tribunal, the USSC found that no government was involved in creating this arbitral tribunal or prescribing its procedures. Accordingly, it held that such an arbitral tribunal cannot be a governmental body. For the Second Arbitral Tribunal, the USSC acknowledged that the tribunal would be different from the First Arbitral Tribunal since there was a sovereign State on one side, and the option to arbitrate was contained in an international treaty rather than in a private contract.

However, it ultimately held that such a tribunal would not be a governmental body since neither Lithuania nor Russia could be said to have given such an ad-hoc tribunal "governmental authority". It noted that the treaty does not constitute the panel, and merely references the set of rules that govern the panel formation and procedure if an investor chose that forum. It also noted that the *ad-hoc* tribunal would function independently of Lithuania or Russia, and that the tribunal "lacks any potential indicia of governmental nature". Accordingly, the USSC found that the Second Arbitral Tribunal was "*indistinguishable in form and function*" from the First Arbitral Tribunal.

Therefore, the USSC held that neither the First Arbitral Tribunal nor the Second Arbitral Tribunal would constitute a 'foreign or international tribunal' under S.1782. Accordingly, it reversed the judgment of the Sixth Circuit District Court and the Second Circuit Court of Appeals in the first and second cases respectively.

IV. ANALYSIS AND OUTLOOK

While bringing clarity, the USSC decision may be considered as a setback for the international arbitration community. By denying arbitral tribunals or arbitrating parties the right to seek assistance of US courts in obtaining evidence, the USSC may have made it harder to seek crucial pieces of evidence in arbitration.

Arbitral tribunals may still be able to enforce their orders against the parties for document production and discovery by drawing adverse inferences or imposing costs. However, they would continue to need the assistance of courts in procuring evidence in possession of third parties, or in situations where threats of adverse inference or costs are insufficient in ensuring compliance of parties with an order for production or discovery by an arbitral tribunal.

It may be argued that the USSC relied on circular definitions of 'foreign', 'international' and 'tribunal' to find that they strictly relate to governmental or intergovernmental bodies. The USSC found that these words may independently have broader connotations than governmental authority, but put together indicate that the legislature intended that assistance for governmental or intergovernmental bodies only under S.1782. However, without any further analysis into why such words put together have governmental connotations, it is hard to understand how the USSC reached this conclusion.

The USSC's argument that the discretion provided to district courts under S.1782 (to give an order prescribing the practices or procedures of the foreign country) indicates that a foreign tribunal has to be one which necessarily follows such practices or procedures, is not very persuasive.

First, providing such discretion to district courts under S. 1782 does not necessarily mean that the foreign tribunal is following the practices or procedures of its country. It could mean that a district court can give such an order when the foreign tribunal is following such practices or procedures. Second, this also does not mean that foreign arbitral tribunals do not follow practices or procedures of their countries. In fact, arbitral tribunals are bound by mandatory practices or procedures of the seat of arbitration. Therefore, it was possible for the USSC to take an alternative interpretation. This would have encouraged arbitration by providing the much-required assistance from courts in the United States.

This decision can have implications on proper functioning of arbitration. It is important that a symbiotic relationship be maintained between courts and arbitral tribunals to assist parties in fully utilizing the advantages of arbitration.

In our next article (Part II, published by *LexisPSL*), we will provide the way forward and recourse for parties in need of evidence located in the US, for use in foreign-seated arbitration proceedings.

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You can direct your queries or comments to the authors

[1] National Broadcasting Co. v. Bear Stearns & Co., 165 F. 3d 184 (CA2 1999).

[2] Servotronics, Inc. v. Rolls-Royce PLC, No. 19-1847 (7th Cir. Sept. 22, 2020).

[3] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999).

[4] Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

[5] Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F. 3d 710 (CA6 2019).

[6] Consorcio Ecuatoriano De Telecomunicaciones S.A. v. Jas Forwarding (Usa), Inc, 685 F.3d 987 (11th Cir. 2012).

[7] By Kshama A. Loya & Moazzam Khan, at : https://www.natlawreview.com/article/28-usc-section-1782a-good-samaritan-taking-evidence-usa-foreign-arbitrations.

[8] Case number 21-401.

[9] Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F. 3d 710 (CA6 2019).

[10] National Broadcasting *Co. v. Bear Stearns & Co.*, 165 F. 3d 184 (CA2 1999).