Dispute Resolution Hotline

July 29, 2022

WHAT RECOURSE DO PARTIES HAVE AFTER THE US SUPREME COURT'S VERDICT ON 28 USC SECTION 1782(A) RE ARBITRATIONS?

(Part II – Way Forward)

(For Part I – Judgment Analysis, click here)

This article was first published on LexisNexis.

On 13 June 2022, the Supreme Court of Unites States (USSC) rendered its unanimous decision in ZF Automotive US Inc et al v Luxshare, Ltd. (ZF Automotive) and Alix Partners LLP et al v The Fund for Protection of Investors Rights in Foreign States (Alix Partners) (case number 21-401). Thereby resolving a long-drawn out circuit split on the use of section 1782 of Title 28 of the United States Code (Section 1782) by private arbitral tribunals to seek assistance of US district courts in obtaining evidence for use in arbitration proceedings seated outside the US.

Before the USSC decision, there was no consensus between the circuits on the interpretation of Section 1782. The judgment clarified that parties cannot seek assistance from US courts to gather evidence located in the US for use in foreign-seated arbitration proceedings.

While bringing clarity on a deeply-contested issue, this decision is a setback for the international arbitration community. The USSC may have made it harder for parties to seek crucial pieces of evidence located in US for use in arbitration.

Does this leave parties or arbitral tribunals remediless? Is there room for distinct approach for use of evidence in commercial and investment treaty arbitrations? In this article, we explore the way forward for parties to arbitrations seated outside the US and requiring evidence located in the US. We also provide brief strategies for parties and arbitration practitioners to navigate this conundrum.

RELEVANT ANALYSES FROM THE JUDGMENT

To understand the way forward, the following points from the judgment are pertinent to note. The USSC held that:

- the context of the term 'tribunal' in Section 1782 indicates that such a tribunal should be exercising governmental authority. It based its findings on two reasons:
  - first, it found that to be called a 'foreign tribunal', a tribunal must belong to a foreign nation and hence, has governmental or sovereign connotations
  - second, it noted that Section 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'. Congress could not have intended to cover foreign private arbitral tribunals within Section 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'
- 'foreign tribunal' clearly refers to a tribunal which is 'imbued with governmental authority by a nation'
- 'international tribunal' refers to a tribunal which has been 'imbued with governmental authority by multiple nations' ie two or more nations have 'imbued the tribunal with official power to adjudicate disputes'

WAY FORWARD—OPTIONS, STRATEGIES, INTERPRETATIONS AND CRITIQUE

In light of the above key analyses from the judgment, parties and members of the international arbitration community could consider the following options, strategies and creative interpretations depending on the nature of the dispute and applicable law.

USING 28 USC SECTION 1781 INSTEAD

Without the availability of Section 1782, it seems likely that arbitral tribunals would now have to seek judicial assistance of courts at the seat to issue letters of request or letters rogatory which can in turn be executed by American courts under section 1781 of Title 28 of the United States Code (Section 1781). The US, is a party to the Hague Convention on the Taking of Evidence, and codified its obligation under the convention as Section 1781. This section, which is similar to Order 26, Rule 19 of the Indian Civil Procedure Code 1908, allows assistance of US courts to foreign courts, foreign tribunals or international tribunals when a letter of request or letter rogatory is issued by such foreign court or tribunal to the Department of State in the United States.

Research Papers

Littler International Guide (India) 2024
November 08, 2024

Unmasking Deepfakes
October 25, 2024

Are we ready for Designer Babies
October 24, 2024

Research Articles

The Bitcoin Effect
November 14, 2024

Acquirers Beware: Indian Merger Control Regime Revamped!
September 15, 2024

Navigating the Boom: Rise of M&A in Healthcare
August 23, 2024

Audio

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part I
August 26, 2024

Renewable Roadmap: Budget 2024 and Beyond - Part II
August 26, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

"Investment return is not enough" Nishith Desai with Nikunj Dalmia (ET Now) at FII8 event in Riyadh
October 31, 2024

Analysing SEBI's Consultation Paper on Simplification of registration for FPIs
September 26, 2024

It is unclear whether an arbitral tribunal can directly issue such a letter rogatory under Section 1781. However, considering that Section 1781 covers 'foreign or international tribunals' like Section 1782, it seems likely that US courts would not execute letters issued by private arbitral tribunals. This process is likely to be very time consuming since it requires such letters to be processed through diplomatic channels rather than a more direct mechanism under Section 1782. However, this mechanism remains available.

THE ROLE OF EVIDENCE, THE LAW OF THE SEAT AND INTERNATIONAL CONVENTIONS IN NEGOTIATIONS

Evidence plays a crucial role in determining the outcome of arbitration proceedings. Parties may struggle with gathering of evidence and access to witnesses, documents or third parties. Normally, witnesses belonging to the parties appear before arbitral tribunals to provide testimony or submit documents. However, some witnesses might refuse to appear before arbitral tribunals or submit documents in evidence, or the relevant evidence might be with third parties who are not part of the foreign arbitration proceedings (and hence, beyond the jurisdiction of the arbitral tribunal). In such cases, when arbitration is seated in a jurisdiction, but evidence is located in another jurisdiction, parties may be compelled to seek assistance of courts in the other jurisdiction to obtain evidence for use in arbitration proceedings.

The success of these applications depends on the national rules of procedure applied by courts. It is therefore worthwhile for parties to anticipate key pieces of evidence required to establish the case; location, availability of and access to such evidence; need for court assistance, the judicial approach in enabling such access, and the law of the seat, for strategizing the course of the dispute and submission of evidence.

While it is difficult for parties to anticipate disputes at the stage of negotiation of arbitration clauses, let alone location of evidence if disputes were to arise, it might be helpful to guesstimate and do some crystal ball gazing. Parties or advising counsel can anticipate the type of disputes that can arise, the location of subject matter of the dispute, location of key witnesses and documents, and possible involvement of third parties in the case. If majority are located in the US, a seat could be chosen in the US to benefit from the Federal Arbitration Act (FAA). However, since neutrality of seat is often insisted upon, parties could choose a seat that promises judicial support in taking of evidence during arbitration proceedings under its law, and that is party to international treaties and reciprocal arrangements with the US such as The Hague Convention on Taking of Evidence.

EXPANDING THE SCOPE OF FAA

USSC noted that allowing assistance by US courts to foreign private arbitral tribunals under Section 1782 would be in tension with the FAA. This is because the scope of Section 1782 is wider than the FAA and would allow pre-arbitration discovery. However, the FAA does not allow the same for domestic arbitral tribunals. Accordingly, allowing arbitral tribunals to be covered under Section 1782 would lead to an absurd result.

Rather than restricting Section 1782 to avoid tension with the FAA, a better approach could have been to expand the scope of the FAA to provide greater assistance by US courts to arbitral tribunals in the United States.

The US legislature could also take steps to ease the tension and make certain provisions of the FAA available for foreign-seated arbitrations. For instance, India amended its Arbitration & Conciliation Act, 1996 (Indian A&C Act) in 2015 to extend the applicability of Section 27 of the Indian A&C Act to foreign seated arbitrations. Section 27 of the Indian A&C Act allows court assistance to arbitral tribunals in taking of evidence. Section 2(2) of the Indian A&C (Amendment) Act, 2015 makes Section 27 available to parties, subject to an agreement to the contrary, in international commercial arbitrations seated outside India. These provisions allow foreign arbitral tribunals to seek assistance of Indian courts in gathering evidence. This approach of the Indian legislature is certainly more arbitration friendly towards this specific issue.

PRACTICE AND PROCEDURE

USSC's interpretation that the discretion provided to district courts under Section 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 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 only 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. In fact, arbitral tribunals are bound by mandatory practices or procedures of the seat of the arbitration. Therefore, an alternative interpretation encouraging arbitration by providing court assistance is possible.

DISTINCTION BETWEEN COMMERCIAL AND INVESTMENT ARBITRATION TRIBUNALS

For the arbitral tribunal in ZF Automotive, USSC found that no government would be involved in creating such an arbitral tribunal or prescribing its procedures. Accordingly, it held that such an arbitral tribunal cannot be a governmental body.

For the arbitral tribunal in the Alix Partners case, USSC acknowledged that the tribunal would be different from ZF Automotive, since there would be a sovereign on one side of the dispute, and the option to arbitrate was contained in an international treaty rather than a private contract.

However, it ultimately held that such a tribunal would not be a governmental body either 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 arbitral panel, and merely references the set of rules that govern the panel formation and procedure if an investor chooses 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, USSC found that the Alix Partners tribunal was 'indistinguishable in form and function' from the ZF Automotive tribunal.

USSC held that ad-hoc investment arbitral tribunals which were not 'pre-existing governmental bodies' but were constituted solely for arbitration cannot be 'governmental' or 'intergovernmental' bodies. However, this does not resolve ambiguity surrounding pre-existing arbitral institutions in investment arbitration such as the ICSID, or a

Scope of judicial interference and inquiry in an application for appointment of arbitrator under the (Indian) Arbitration and Conciliation Act, 1996
September 22, 2024

potential Multilateral Investment Court imbued by governmental authority.

Unlike ad-hoc investment arbitral tribunals or arbitral tribunals in commercial arbitration, the ICSID is funded by parties as well as the World Bank, which is in turn financed by multiple nations. Further, the ICSID Convention requires member states to sign and ratify the convention to be able to access the ICSID dispute resolution mechanism—a step which is not required for other arbitral institutions or rules. Member states are also obligated to recognize ICSID awards as binding, and enforce them as if they were final judgments of a court of such state. These facts would reflect that there is a 'higher level of government involvement' in the ICSID which might make it an 'intergovernmental body'.

However, at the same time, an ICSID arbitral tribunal continues to derive its authority from the parties' consent to arbitrate. Unlike other governmental bodies such as courts, no party can be forced to resolve their disputes before ICSID. Therefore, there remains uncertainty whether arbitral institutions such as ICSID will be considered a 'private' body or a 'governmental/intergovernmental' body.

The situation would be similar for a Multilateral Investment Court which would be a product of a multilateral convention among states, imbued with governmental authority to resolve Investor-State disputes.

Such uncertainty may only be resolved when USSC directly deals with this question, or puts forwards a multifactor test like the Second Circuit did to decide the extent to which governmental involvement is required in order to term a body 'private' or 'governmental'.

REMEDY WITH ARBITRAL TRIBUNALS

Arbitral tribunals may still be able to enforce their orders for document production and discovery against parties to the arbitration by threat of adverse inferences or costs. Parties must seek such orders from arbitral tribunals where possible. However, they would continue needing the assistance of courts in procuring evidence in the possession of third parties, or in situations where threats of adverse inference or costs have been insufficient in ensuring compliance of parties with an order for production or discovery by an arbitral tribunal.

COMITY

USSC noted that its interpretation was consistent with the legislative intent behind introducing Section 1782 to promote comity and reciprocal assistance between the US and foreign nations, which would not be achieved by aiding private adjudicative bodies in foreign nations.

The goals of comity and reciprocity could have been met by allowing foreign arbitral tribunals to seek assistance of US courts. Such a measure may have encouraged courts in such foreign countries to also aid arbitral tribunals in the US. It was possible for USSC to undertake a more arbitration-friendly interpretation of Section 1782.

CONCLUSION

This decision, as it stands, can have implications on the proper functioning of international arbitration. For such proper functioning, it is important that a symbiotic relationship is maintained between courts and arbitral tribunals, whether domestic or foreign. It is hoped that parties will be able to use some of the options, strategies or interpretations outlined above when they are in need of judicial or strategic assistance in taking of evidence for foreign-seated arbitral proceedings.

– Ritika Bansal & Kshama A. Loya

You can direct your queries or comments to the authors