The United States Supreme Court Restricts Discovery for International Arbitrations

By Sarah Vasani and Peter Bekker

In a landmark decision issued on 13 June 2022,[1] the US Supreme Court ("SCOTUS"), America's highest court, ruled that the scope of Section 1782 of the United States Code ("U.S.C.") does not extend to evidence gathering, including discovery, in aid of international arbitrations. The decision creates a level playing field between foreign and domestic arbitrations in the United States and brings much needed clarity in the US courts' role in relation to foreign arbitrations.

Background

Pursuant to Section 1782(a) U.S.C., "*[t]he 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.*" This provision allows a party to obtain US-style discovery, including document production, which is relatively broad compared to numerous other jurisdictions, even in advance of a proceeding. A prior version of Section 1782 covered "*any judicial proceeding*" in "*any court in a foreign country*" and, in 1964, the US Congress expanded the provision to cover proceedings in a "*foreign or international tribunal.*" In 2004, SCOTUS interpreted this expansion as creating "*the possibility of U. S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.*"[2] In turn, this interpretation raised the question of whether the scope of the statute expands to evidence gathering in assistance of international arbitrations. This resulted in a split among US appellate courts interpreting the phrase "*foreign or international tribunal*". SCOTUS agreed to consider the matter by granting certiorari (leave for appeal to SCOTUS) and consolidating *ZF Automotive US, Inc., et al. v. Luxshare, Ltd., No. 21-401*, a case concerning an international commercial arbitration that was to be conducted under the Arbitration Rules of the German Institution of Arbitration ("DIS"), and *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States, No. 21-518*, a case arising from an investment treaty arbitration conducted under the UNCITRAL Arbitration Rules.

SCOTUS Limits the Ability of Parties in Private Foreign and International Arbitration Proceedings to Seek Discovery

SCOTUS noted that the relevant question was "*whether the phrase 'foreign or international tribunal' in Section 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies.*" If the phrase excluded private adjudicative bodies, the second question was whether the DIS and UNCITRAL arbitral tribunals qualified as governmental or intergovernmental bodies.

SCOTUS adopted a contextual interpretation in answering this question. It noted that the modifiers "*foreign or international*" attached to "*tribunal*" *meant that "'tribunal' is best understood as an adjudicative body that exercises governmental authority.*" It observed that "*'Tribunal' is a word with potential governmental or sovereign connotations, so 'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation.*" Similarly, it noted that "*[a] tribunal is 'international' when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.*" SCOTUS observed that its contextual interpretation was supported by the drafting history of the statute in question: "*the animating purpose of §1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance.*" Finally, SCOTUS noted that Section 1782 permits much broader discovery than the Federal Arbitration Act ("FAA") allows in respect of domestic arbitrations. Among other

1 https://www.supremecourt.gov/opinions/21pdf/21-401_2cp3.pdf
2 https://www.supremecourt.gov/opinions/03pdf/02-572.pdf

differences, the FAA does not allow pre-arbitration discovery. SCOTUS observed that *"[i]nterpreting §1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration."* Holding that private adjudicatory bodies do not fall within Section 1782, SCOTUS then determined that the DIS and UNCITRAL panels in the consolidated cases before it were not governmental or intergovernmental bodies. In relation to the DIS panel, SCOTUS noted that no government was involved in creating it or prescribing its procedures. In relation to the UNCITRAL panel, SCOTUS noted that neither the presence of an investment treaty party in the dispute nor the existence of the investment treaty is dispositive, because the treaty parties *"are free to structure investor-state dispute resolution as they see fit."* SCOTUS recounted the forum options available to the investor and noted that the chosen UNCITRAL panel *"is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes. And nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority."* It pointed out that *"[i]n a private arbitration, the panel derives its authority from the parties' consent to arbitrate"* and the UNCITRAL panel *"derives its authority in essentially the same way."*

Implications

The Court's unanimous decision forecloses the availability of US court assistance in evidence gathering in aid of foreign arbitrations. Whether or not one agrees with the decision, it establishes a level playing field in the US courts' assistance of domestic and foreign arbitrations. Undoubtedly, foreign seated commercial arbitration cases are now excluded from the scope of Section 1782 U.S.C., which will limit parties' ability to develop evidence in private arbitration proceedings abroad. A similar fate is in store for investment treaty arbitrations conducted under the UNCITRAL Arbitration Rules. It remains to be seen if the decision will affect investment treaty arbitrations conducted under the World Bank's ICSID Convention or before the EU Multilateral Investment Court and other similar standing bodies to be established under international investment agreements. ICSID tribunals, while deriving their authority from the ICSID Convention, a multilateral treaty, are still *ad-hoc* arbitration panels. In its dicta, SCOTUS indicated that the relevant question is whether the treaty parties intended that the *ad-hoc* panel exercise governmental authority. While such tribunals were unquestionably formed to resolve international disputes between private parties and host States, whether this entails the delegation of government authority is unlikely. Nevertheless, discovery under Section 1782 may still be available in relation to certain special arbitral bodies imbued with sufficient governmental authority (e.g., state-to-state arbitrations) or for use in aid of arbitration-related foreign court litigation, including proceedings to recognise and enforce arbitral awards or proceedings to set aside an arbitral award.

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