Kluwer Arbitration Blog

How Should the United States Supreme Court Have Decided in the Controversy over 28 U.S.C. § 1782(a)?

Eric van Ginkel · Tuesday, June 14th, 2022

The *Kluwer Arbitration Blog* previously published an excellent summary by Jonathan Tompkins of the oral arguments held before the United States Supreme Court on March 23, 2022 on the future scope and application of 28 U.S.C. §1782, a federal statute that allows foreign or international tribunals and their litigants to ask the relevant district court to order witnesses who reside or can be found in its territory to give testimony or produce documents located there). It involves the consolidated cases of *ZF Automotive US, Inc. v. LuxShare Ltd.* and *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States.*

Yesterday, the US Supreme Court issued a unanimous opinion (available here, authored by Justice Barrett) in the above-mentioned cases, holding that neither the DIS tribunal in ZF Automotive, nor the ad hoc BIT tribunal under the UNCITRAL arbitration rules in AlixPartners falls within the scope of §1782. To quote from Justice Barrett's opinion:

> "The current statute, 28 U.S.C. §1782, permits district courts to order testimony or the production of evidence 'for use in a proceeding in a foreign or international tribunal.' These consolidated cases require us to decide whether private adjudicatory bodies count as 'foreign or international tribunals.' They do not. The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill." Slip Op. at 1.

1. **The Opinion of the Supreme Court**

The issue before the Supreme Court is whether the term "foreign or international tribunals" includes arbitral tribunals. As Tompkins correctly concluded in his prior post, the oral arguments gave no reliable indication as to how the Supreme Court would decide. But now we know.

The Court based its decision mostly on an analysis of the words, first taken separately, then the combination of "foreign tribunal" and "international tribunal". The Court observed that the word "tribunal" expanded the 1958 wording "any court in a foreign country" to the 1964 version of a "foreign or international tribunal". "[T]hat shift created 'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'" citing *Intel*, 542 U.S., at 258. The Court goes on to say:

> "So a §1782 'tribunal' need not be a formal 'court,' and the broad meaning of 'tribunal' does not itself exclude private adjudicatory bodies. If we had nothing but this single word to go on, there would be a good case for including private arbitral panels." Slip Op. at 6.

The Court then looks at the "context," because "tribunal" does not stand alone as it is part of the phrase "foreign or international tribunal". Attached to these "modifiers", the word is "best understood as an adjudicative body that exercises governmental authority." Slip Op. at 7. Taking each of "foreign tribunal" and "international tribunal" in turn, the Court ventures that in either case Congress could have used it both in a governmental context or more generally. It concludes, without any further, deeper inquiry, that "'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." *Ibid.* The Court finds that this reading of "foreign tribunal" is reinforced by the statutory defaults for discovery procedure, as §1782 permits the district court to "prescribe the practice and procedure, which may be in whole or in 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." (emphasis by the Court).

Where this author would find the reference to the practice and procedure of the international tribunal to include a reference to the evidentiary rules adopted by an international arbitral tribunal, the Court finds that "that would be an odd assumption to make about a private adjudicatory body, which is typically the creature of an agreement between private parties who prescribe their own rules." Slip Op. at 8.

Similarly, in its analysis, the Court observes that the interpretation of "international tribunal" could go either way, "either (1) involving or of two or more "nations," or (2) involving or of two or more "nationalities." It finds that the "latter definition is unlikely in this context because "an adjudicative body would be 'international' if it had adjudicators of different nationalities—and it would be strange for the availability of discovery to turn on the national origin of the adjudicators." *Ibid.*

Huh? Does the Court not know what the world of arbitration ordinarily calls an international arbitral tribunal? As in "a tribunal involved in arbitrating an international dispute"?[1)]

"So understood," the Court concludes, "'foreign tribunal' and 'international tribunal' complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations." It finds that this interpretation is confirmed by both the statute's history and a comparison to §7 of the Federal Arbitration Act.

As to the history, the Court emphasizes that pursuant to the Act of Sept. 2, 1958, the Commission on International Rules of Judicial Procedure was charged "with improving the process of judicial assistance, specifying that the 'assistance and cooperation' was '*between the United States and foreign countries*' and that the rendering of assistance *to foreign courts and quasi-judicial agencies*' should be improved." Slip Op. at 10 (emphasis by the Court).

This author wonders since when arbitral tribunals are no longer held to be "quasi-judicial agencies." The Court demonstrates how little it understands about the breadth and depth of international commercial arbitration, when it wonders "[w]hy would Congress lend the resources

of district courts to aid purely private bodies adjudicating purely private disputes abroad?" Slip Op. at 10. Obviously, it is unfamiliar with the fact that (1) most international disputes are purely private, and (2) the vast majority of international disputes do not end up before courts or governmental quasi-judicial agencies, but before international arbitration tribunals. It shows no understanding of the implications of the New York Convention, which now includes 170 states.

Lastly, the Court also repeats the often heard complaint that §1782 would give more extensive rights to discovery than §7 FAA does domestically. The answer to that point is simple: the Commission was not charged with amending the Federal Arbitration Act. It was charged exclusively with broadening the availability of discovery internationally, even if the suggestion was made at the time for Congress to amend §7 FAA.

So why is it that the Supreme Court decided as it did? Were the arguments made on behalf of the petitioners not strong enough? Was it simply following the wishes of the Justice Department?

It is true that the arguments were deficient in showing the Supreme Court that the Second Circuit decision discussed here was built on quicksand. Neither written nor oral arguments argued *why* the issue was wrongly decided when the Second Circuit Court of Appeals (as the first court of appeals) was asked to rule on the question.

The circuits were split as to whether such assistance may be given to *private* foreign or international tribunals or only to tribunals that are "*state-sponsored*." Holding that § 1782 permits discovery assistance to private arbitrations were the 4th, 6th and likely the 11th circuit: *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. Fedex Corp.*, 939 F.3d 710 (6th Cir. 2019); and *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 993–98 (11th Cir. 2012), later withdrawn in *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA) Inc.*, 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) ("leav[ing] the resolution of the matter for another day").

Holding that § 1782 does *not* permit discovery assistance to private arbitrations were the 7th, 5th and 2nd circuit: *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999), confirmed in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009); and *Nat'l Broadcasting Co. v. Bear Stearns*, 165 F.3d 184 (2d Cir. 1999) (hereinafter "*NBC*"), confirmed in *In re: Application and Petition of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020).

The remainder of this post provides a summary of my personal conclusions following a more detailed analysis of the issue, more specifically of where the Second Circuit Court of Appeals went wrong in its 1999 case involving a § 1782 application, *Nat'l Broadcasting Co. v. Bear Stearns Co.*, 165 F.3d 184 (2d Cir. 1999) ("*NBC*").

NBC involved a dispute between a Mexican television company, TV Azteca S.A. de C.V ("Azteca") and National Broadcasting Company and NBC Germany ("NBC"), in which NBC filed an *ex parte* § 1782 application to obtain testimony from six investment banking firms, including Bear Stearns Co., in anticipation of an ICC arbitration to be brought by Azteca in Mexico. When five of the six forms objected by filing a motion to quash, the district court (by Judge Robert W. Sweet) granted the motion and quashed the subpoenas originally authorized by Judge Deborah A.

Batts. NBC appealed to the Second Circuit, which affirmed Judge Sweet's ruling holding that the term "foreign or international tribunals" in 28 U.S.C. § 1782 does not "apply to proceedings before private arbitral panels".

When Judge Sweet's decision in *NBC* had come to the attention of Professor Hans Smit, the principal draftsman of § 1782 as amended by Public Law 88-619, 78 Stat. 995 (1964), he wrote an article in which he went into greater detail about how and why § 1782 applies to foreign and international tribunals. Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Comm. 1 (1998).

Shortly after the adoption of the 1964 Act, he wrote a lengthy commentary about the entire overhaul of 28 U.S.C.: *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015 (1965). The 1965 article was cited approvingly by Justice Ginsburg in *Intel Corp. v. Advanced Micro Devices*, 542 U. S. 241 (2004), the only other time that the Supreme Court had the opportunity to interpret § 1782 (but involving a different though related issue).

Rather than relying on Professor Smit's 1965 and 1998 articles, the *NBC* court ignored the 1965 article and did away with the 1998 article in a footnote. Instead, the court seemingly found support in Professor Smit's 1962 article, *Assistance Rendered by the United States in Proceedings Before International Tribunals*, 62 Colum. L. Rev. 1264 (1962).

The court's footnote read in pertinent part:

> "It is perhaps enough to say … that Professor Smit's recent article does not purport to rely upon any special knowledge concerning legislative intent, and we find its reasoning unpersuasive. By contrast, statements in the 1962 article, which was specifically relied upon in the House and Senate reports, are probative of Congress's contemporaneous interpretation of the statutory language."[2)]

2. ***NBC*'s textual analysis**

The *NBC* court's textual analysis of § 1782 was nothing less than convoluted, as it wrote:

> "In support of its position, NBC cites numerous references to private arbitration panels as 'tribunals' or 'arbitral tribunals' in court cases, international treaties, congressional statements, academic writings, and even the Commentaries of Blackstone and Story. This authority amply demonstrates that the term 'foreign or international tribunals' *does not unambiguously exclude private arbitration panels*. On the other hand, the fact that the term 'foreign or international tribunals' is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in § 1782, does include both. . . In our view, *the term "foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here.* Accordingly, we look to legislative history and purpose to determine the meaning of the term in the

> statute."[3)]

Judge Cabranes had to get to the conclusion that the term "foreign or international tribunal" is "sufficiently ambiguous" by first fabricating a *triple negative* with respect to the word "tribunal": "does (1) **not** (2) **un**ambiguously (3) **ex**clude" private arbitration panels.[4)] And then, in order to justify this tortuous conclusion, Judge Cabranes had to rely on a misinterpretation of *Robinson v. Shell Oil Co.*, a 1997 Supreme Court case[5)], which held that the term "employees" in some provisions of Title VII was broad enough to include "former" employees, whereas in other sections the term had to mean just "current" employees, and that therefore the use of the term in the section relevant in that case was ambiguous.[6)]

In his 2006 opinion in *In re Roz Trading Ltd.*, Judge William S Duffey, Jr., a federal district court judge in Georgia, summarized well the erroneous reasoning by the *NBC* court in a footnote:

> "The Second Circuit started with the premise that the term 'tribunal' is ambiguous. In essence, the Second Circuit reasoned that even though the common usage and widely accepted definition of 'tribunal' include private arbitral bodies, it was free to impose its own limitations on the statute. This is precisely the type of conduct that courts engaged in statutory construction are directed to avoid. *[United States v.] Turkette*, 452 U.S. 576, 580, 587 (1981). Even if the Second Circuit found 'contrary indications' , 469 F. Supp. 2d 1221, 1227, n.4 (N.D. Ga. 2006) (other citation omitted).

3. *NBC*'s reliance on 22 U.S.C. §§ 270-270(g) and the 1958 version of § 1782

The Second Circuit court relied on Professor Smit's 1962 article where it described the proposed deletion of 22 U.S.C. §§ 270 – 270(g) in light of the *1958 version* of § 1782. The court cited a passage in which Professor Smit "asserted" that "an international tribunal [as described in Section 270] owes both its existence and its powers to an international agreement."

Even in that effort, however, the court got it wrong, as it not only failed to note that Professor Smit clearly referred to the 1958 version of § 1782[7)] rather than the then not yet existing 1964 version, but the court also took this passage completely out of context: Professor Smit was discussing "international tribunals" *in connection with the history of Section 270 in the 1930s*.[8)]

4. The 1964 Act and Professor Smit's 1965 Commentary

The amendments to Title 28 of the U.S. Code were signed into law by President Johnson on October 3, 1964, "to improve judicial procedures for serving documents, obtaining evidence, and proving documents in litigation with international aspects."[9)]

The intent of the 1964 Act was to liberalize all domestic procedures in aid of foreign procedures. In fact, the reforms were premised on the hope that their principle of liberality in rendering aid to

foreign courts and litigants will find widespread acceptance abroad. The 1964 Act as drafted by the Project on International Procedure at Columbia Law School was adopted by Congress without encountering any objection.

As a former research associate and assistant of the late Professor Hans Smit, who (as noted above) was the principal drafter of the 1964 amendments to 28 U.S.C., I have some knowledge as to how he wrote in general, and specifically how § 1782(a) was intended to function – alongside the other changes that the 1964 Act brought to 28 U.S.C.

For one, Professor Smit believed in brevity and conciseness, by using only necessary words while omitting all words that are superfluous. As he noted in a footnote to his lengthy 1965 article, "[t]he term 'tribunal' was chosen deliberately as being both neutral and encompassing. Any person or body exercising adjudicatory power is included." 65 Colum. L. Rev. at 1021, n. 36.

In the body of the article, on the same page, he emphasized explicitly the breadth of the term "tribunal":

> "The term tribunal encompasses all bodies that have adjudicatory power, and is intended to include not only civil, criminal, and administrative courts (whether sitting as a panel or composed of a single judge), but also arbitral tribunals or single arbitrators." 65 Colum. L. Rev. at 1021.

Although this explanation of the word "tribunal" was used in connection with the meaning and breadth of §1781, the same meaning was to be attributed to "tribunal" in all other sections of Title 28. Thus, for example, Professor Smit refers in footnote 71 to his writings on § 1782 to the same broad concept:

> "71. The term "tribunal" embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts. See SENATE REPORT 7-8. On the use of the term tribunal in other sections of the Act, see notes 36-38, 53 *supra* and accompanying text." 65 Colum. L. Rev. at 1026.

5. **Section 1782 Today**

Reliance on Professor Smit's explanations of § 1782, whether in his 1965 article or any of his later articles, is not really necessary: as even the Supreme Court found in the present case, the word "tribunal", whether 100 or 60 years ago, or at present, has always included arbitral tribunals.

In 1923, the *Protocol on Arbitration Clauses* (the so-called Geneva Protocol of 1923) distinguished arbitral tribunals and judicial tribunals. In 1964, (as Professor George Bermann explained in his *amicus* brief in the *Servotronics* case) the Supreme Court found that in submitting a labor dispute to private arbitration rather than the National Labor Relations Board, the union was "resort[ing] to a *tribunal* other than the Board." *Carey v. Westinghouse Elec. Corp*., 375 U.S. 261, 272 (1964). Today, the increased use of international commercial arbitration makes that the use of the word

"tribunal" as referring to an arbitral tribunal is ubiquitous.

As for the applicability of § 1782 to investment arbitration, it clearly makes no difference whether the tribunal deals with commercial or investment arbitration. The artificial structure built by the Second Circuit's opinion in the *AlixPartners* case (also written by Chief Judge Cabranes) has no foundation in the text, structure or history of the statute.

As noted previously, Professor Smit wrote in 1965, "the term 'tribunal' was chosen deliberately as being both neutral and encompassing." In my opinion, that includes both tribunals created by pursuant to an international treaty, such as the Court of Justice of the European Union (CJEU), and arbitral tribunals in international arbitration.

6. **The District Court's Discretionary Authority**

The Supreme Court in *Intel* pointed out that § 1782 authorizes, but does not require, discovery assistance, and it developed certain factors that a district court ought to take into account as guidelines when it exercises its discretion. This is especially relevant with respect to discovery assistance as it applies to foreign or international arbitration. For example, as the district court may not know what rules of evidence the tribunal will apply, it may well decide to deny discovery assistance to an "interested person" if sought before the arbitral tribunal has been constituted.

Since the §1782 application in *ZF Automotive* (one of the cases presently before the U.S. Supreme Court for decision) relates to a discovery request prior to the commencement of the arbitration proceeding, the Supreme Court ought to remand the case to the district court so that it can decide whether to continue to grant the discovery request or to further limit it or deny it – at least until such time as a complaint in arbitration has been filed and an arbitral tribunal has been formed.

The above ideas are elaborated in a more in-depth article I hope to publish in the forthcoming issue of the *American Review of International Arbitration.*

7. **So How Should the Supreme Court Have Decided?**

It is clear to me that Justice Barrett's opinion is not very convincing since its reasoning borders on the unacceptable – and that it is plainly wrong. It surprises me that this is a unanimous decision. It appears that the entire Court may have little understanding of the importance of international commercial arbitration to the United States and the international community and how much § 1782 helps improve international arbitration.

Or, if it does understand that importance, perhaps the Court does not believe the argument made on behalf of Petitioners that recognizing that § 1782 extends to arbitral tribunals will not unduly burden the district courts.

If that was the true reason, the Supreme Court's decision is most regrettable. It will have given preference to an unfounded fear of overburdening the district courts over the need to serve the international community which more and more makes international or cross-border discovery available in international commercial arbitration.

It may be that a future Congress will have the same enlightened vision as the Congress of 1958 showed by its appointment of, and charge to the Commission on International Rules of Judicial Procedure. If that should happen, as optimists certainly hope, they may decide to amend § 1782 and while they are at it, amend Section 7 of the Federal Arbitration Act.

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References

In a simple google search, I found this definition: “The international arbitration tribunal is the independent and non-governmental panel of independent and impartial experts most often
?1 composed of three members nominated by the Parties (or appointed by the international arbitration institution, or more rarely by a national court) on the basis of their legal and practical expertise and knowledge, to render a final and binding award.” available here

?2 165 F.3d 184, 190 (2d Cir. 1999).

?3 *Ibid.* (emphasis added)

As the *amicus* brief of Federal Arbitration Inc. in support of ZF Automotive points out, “courts should not presume that the language of a statute is ambiguous. See *United States v. LaBonte*, 520 U.S. 751, 757 (1997) (“We do not start from the premise that [the statutory] language is imprecise.
?4 Instead, we assume that in drafting legislation, Congress said what it meant.”). Similarly, courts may not impose their own limitations upon a plain and unambiguous statute or resort to legislative history to upend its commonsense construction.” [citing cases]. *Brief of Federal Arbitration, Inc. (FEDARB) as Amicus Curiae in support of Petitioner*, at 7. (last visited February 21, 2022)

?5 *Robinson v. Shell Oil Co.*, 519 U.S. 337, 339 (1997).

Robinson v. Shell Oil Co. involved a Title VII action by Mr. Robinson, an African-American person who had been fired by Shell. Mr. Robinson filed a charge with the EEOC, alleging that Shell had discharged him because of his race. While that charge was pending, Mr. Robinson applied for a job with another company. That company contacted Shell, as Mr. Robinson’s former employer, for an employment reference. Shell allegedly gave him a negative reference in retaliation for his having filed the EEOC charge. Section 704(a) of Title VII of the Civil Rights Act of 1964
?6 makes it unlawful “for an employer to discriminate against any of his employees or applicants for employment” who have either availed themselves of Title VII’s protections or assisted others in so doing. The issue was whether the term “employees” as used in §704(a) includes former employees, such that Robinson could bring suit against his former employer for post-employment actions allegedly taken in retaliation for his having filed a charge with the EEOC. The Court found that in several sections of Title VII the term “employee” necessarily meant to include former employees whereas in other sections it necessarily meant current employees.

In fact, Prof. Smit quotes in this connection in a footnote the text of the 1958 version of §1782: “The deposition of any witness within the United States to be used in any judicial proceeding in any court in a foreign country with which the United States is at peace may be taken before a person
?7 authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.” 62 Colum. L. Rev. at 1267, n. 18.

The language quoted by the *NBC* court is followed by this sentence: “The correctness of this view
?8 was sustained by the United States–German Mixed Claims Commission when the American agent tried to invoke the 1930 act.” 62 Colum. L. Rev. at 1267. From the context I surmise that the word “owes” in the sentence quoted by the *NBC* court has a typo and that it should read “owed” instead.

For a full report on the activities of the Commission on International Rules of Judicial Procedure, including the text and explanatory notes of all the reform measures developed by the Commission and the Project on International Procedure of the Columbia University School of Law (the
?9 “Project”), see *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963). The explanatory notes are reprinted almost verbatim in S. REP. No. 1580, 88th Cong., 2d Sess. (1964) [herein the “Senate Report”]. Professor Smit was the Director of the Project and the Reporter for the Commission.

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