Kluwer Arbitration Blog

Document Production Outside the Seat: Looking Beyond SCOTUS's Interpretation of 28 U.S.C. § 1782

Dustin Zojaji · Tuesday, September 6th, 2022

In June of this year, the Supreme Court of the United States issued a unanimous opinion (*ZF Automotive US, Inc. v. Luxshare, Ltd.*, available here) settling a circuit-split regarding the interpretation of 28 U.S.C. § 1782. The provision grants U.S. federal courts the authority to compel testimony or the production of documents to aid "foreign or international tribunals". The question before the Court was whether private adjudicative bodies, such as arbitral tribunals, qualified as "foreign or international tribunals" or not. Having held that the provision only applies to adjudicative bodies somehow embodied with the authority of one or more governments, the Court decided that the provision is not applicable to foreign seated private arbitrations. The ruling has been discussed widely, not the least on this blog (see, for example, the posts by Dana MacGrath and Eric van Ginkel). Rather than revisiting the subject matter of the ruling at hand, this post seeks to briefly explore other options available to arbitral tribunals and the parties that appear before them to support the collection of evidence outside the country where the arbitration is seated.

The issue of gathering evidence outside the seat-country is not a novel one. Some jurisdictions address it explicitly. For example, the Swedish Arbitration Act (SAA) provides that its provisions on courts' assistance to tribunals and parties in collecting evidence also be applied to foreign seated arbitrations, provided such arbitrations are conducted based on an arbitration agreement and their subject matter is considered arbitrable under Swedish law, SAA § 50. The English Arbitration Act provides that parties may, with the permission of either the arbitration agreement or the tribunal, seek court assistance to compel witnesses in the U.K., § 43(3)(a). On the other hand, other jurisdictions do not bless users with such clarity. The UNCITRAL Model Law provides a provision on court aid in evidence taking, Article 27. However, the aforementioned provision is not applicable to foreign-seated arbitrations, Article 1(2). Jurisdictions that have implemented the Model Law "as is" will thus not allow parties to foreign-seated arbitrations to seek assistance. Some Model Law jurisdictions have, however, amended Article 1(2), providing the scope of the law, as to also include the provision on court assistance in taking evidence in the enumeration of provisions that are also applicable to foreign-seated proceedings, *e.g.* Section 1025(2) of the German Code on Civil Procedure providing that Section 1050 on court aid in taking evidence also be applicable to foreign seated arbitrations.

In light of this, one might ask what options are available to parties seeking to obtain evidence from adverse or third parties in these, let's say a bit trickier, jurisdictions? One option could be having a court at the seat send a letter of request (also known as letter rogatory). Such letters are often used when the question of obtaining evidence abroad is presented in court litigation rather than arbitration. Letters of request are sent by a court usually upon motion or application from a litigant, sometimes by diplomatic means, to a foreign court, requesting the foreign court's aid in collecting evidence or performing certain other judicial acts.

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (1970) ("Hague Convention"), or in intra-EU scenarios, the EU Taking of Evidence Regulation ("the EU Regulation"), provide provisions governing the procedure of requesting and collecting evidence in cross-border scenarios and the exchange of such requests between signatory jurisdictions may be more straight forward than between non-signatory (or non-EU) jurisdictions. Below, I first elaborate on the prerequisites for the application of the two instruments, the practical application of the instruments to parties in international arbitrations and what obstacles may arise if this path is chosen.

The Hague Convention

The Hague Convention sets out a framework for the procedure for courts of one state requesting that another state take evidence on its behalf, upon the request of a litigant. The Convention is adopted by 64 nations, with the U.S. being among them.

One of the most central prerequisites for the requesting court to transmit a letter of request is that the evidence requested is to be used in a commenced or contemplated judicial proceeding, Article 1. It is this requirement that is of special interest to parties to arbitration.

For the sake of argument, I present the following scenario. Two parties, A and B, belonging in states outside the EU and with arbitration laws not permitting their courts to directly aid foreign arbitral tribunals nor their parties, conduct an arbitration in Stockholm, Sweden. Party A files a motion to the Stockholm District Court to aid in collecting written evidence from Party B, with the consent of the tribunal. The court, being of competence to aid in this matter, orders Party B under threat of administrative penalty, to produce the documents in question. Party B refuses the order and does not pay the administrative fines subsequently ordered by the court. As Party B lacks any assets in Sweden, the fine cannot be enforced. The documents cannot be gathered through execution of the court order since the documents are kept in Party B's home jurisdiction. Party A now motions the court to transmit a letter of request under the Hague Convention to the competent authorities in Party B's domicile to aid the collection of evidence.

The now relevant question is whether or not the evidence is to be used in a "*judicial proceeding*". The proceeding before the Stockholm District Court is indeed a judicial proceeding. But is the evidence to be *used* in said proceeding? The question can of course be answered in different ways. The evidence is to be used in said proceedings in the sense that the evidence will be sent to the court and added to its case docket and furthermore the receipt of the evidence and its forwarding to Party A (probably) marks the end of the court proceedings. On the other hand, the evidence is not be *used* <u>*as evidence*</u> in the court proceedings. I leave this question of whether the Stockholm court proceedings themselves satisfy the requirement of the evidence to be used, open.

As to the arbitration proceeding, which is commenced, the answer to the question of whether the evidence is to be used is more apparent; yes, it is. What now remains to be answered is whether the arbitration is a *judicial* proceeding. As to this question, the answer is not as clear. Arbitration is not a judicial proceeding in the sense that an arbitral tribunal is not a court of law. It is not endowed with the sovereign powers of the state (or of the sovereign), nor is it considered a part of the judiciary. However, arbitration is a judicial proceeding in the sense that it constitutes a binding way to adjudicate a dispute, it is administered by independent and impartial arbitrators deriving their powers not only from the parties' agreement, but also the state's recognition of said powers.

Some scholars argue that arbitrations are judicial in character, *e.g.* Gary Born.[1)] The English text of the Hague Convention offers no indication as to what sense the proceeding must be judicial. To further complicate matters, the French text of the Hague Convention, which is of equal validity, does not mention "judicial proceedings" but rather just the word "procédure" (proceeding). Applying only the French text, it would probably be clear that the requirement is satisfied by the arbitration proceeding in Stockholm.

The EU Regulation

In regard to the EU Regulation – and in such case Party B had its domicile in another EU country– it can first be noted that it is based on the same principles as the Hague Convention and that the language is similar. Like the Convention, the English version of the EU Regulation stipulates that a request for evidence may not be made if the evidence is not to be used in a judicial proceeding, Article 1.2. However, the French version of the regulation also uses the same wording, "procédure judiciaire", as opposed to just "procédure" as in the Convention. The Swedish language version uses the words "rättsligt förfarande", meaning legal proceeding. The Danish language version simply uses the word "trial". The European Court of Justice has issued no ruling explaining the proper application of the article in question and the preamble of the regulation is equally silent on the issue. In light of this, it is unclear whether Party A's intention to use the evidence in the arbitration proceedings would be enough to satisfy the requirement for the evidence to be used in a judicial proceeding. And, as is the case with the Hague Convention, the question of whether the Stockholm court proceedings themselves satisfy the requirement of the evidence to be used, is left open.

Finishing Remarks

To further complicate matters, some of these jurisdictions previously categorized as "a bit trickier" have national legislation differing from the Hague Convention. These differences can both mean further opportunities for parties to obtain evidence, but they can also be of a restrictive kind. First of all, the Hague Convention does not shut the door on countries wishing to enact laws and rules that are more favorable for foreign parties seeking evidence, as it only sets a minimum standard. On the other hand, some jurisdictions may have stricter rules than others for allowing their own courts to request foreign judicial assistance. Furthermore, the Hague Convention is a convention, more often than not meaning that its application is dependent on the way it was implemented into the national legislation of each signatory state. To circle back to the start of this post, let's have another look at 28 U.S.C. § 1782(a). The provision goes beyond what is required by the Hague Convention in that it allows litigants in foreign courts to directly make an application to the court. In our fictional scenario, Party A is a litigant before a foreign court of law and would as such generally be within its rights to make an application under this provision. It can however be questioned, as in the case with the Hague Convention, whether Party A is to *use* the evidence in a proceeding before said court. In light of the recent June ruling by SCOTUS, it is evident that the proceeding in which the evidence is to be for use cannot be an arbitration proceeding. The now remaining question is whether evidence is “intended for use” in the court proceeding in Stockholm.

As a finishing note, the example of the 2013 Austrian Arbitration Act is of great interest. Section 602 of the Act provides that courts may provide arbitral tribunals (and the parties, given the tribunal’s permission) aid by conducting “judicial acts” and that such acts may include “the court requesting a foreign court or administrative authority to conduct such acts”. This is, in my view, a good example showing that the options presented in this post are plausible. That being said, the success of taking the route through the courts at the seat to obtain foreign evidence is ultimately subject to the laws and procedural rules of the foreign jurisdiction.

As a matter of policy, one could only assume that choosing to accept letters of request from foreign courts aiding arbitrations, is generally beneficial for the state in question. Many forms of judicial assistance and cooperation are based on reciprocity, something that is not helped by being restrictive in providing assistance in these cases. With these final remarks, I finish this post hoping that arbitration practitioners worldwide keep contributing to the legal development in this area of law.

References

?1 Gary Born, International Commercial Arbitration § 1.05[A] (3rd ed. 2021), Kluwer Law International

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