Kluwer Arbitration Blog

No Section 1782 Discovery for ICSID Arbitrations Says Second Circuit in In re Webuild S.p.A. (But Some Paths Remain)

Gavin Frisch, Lucas Bento (Quinn Emanuel Urquhart & Sullivan, LLP) · Saturday, August 3rd, 2024

The chasm between the Section 1782 and arbitration worlds just got wider. In *Webuild S.p.A. v. WSP USA Inc.* ("*Webuild S.p.A.*"), the Second Circuit determined that a tribunal in an arbitration administered by the International Centre for Settlement of Investment Disputes ("ICSID") was not a "foreign or international tribunal" under Section 1782, the U.S. federal statute providing private parties with the ability to obtain discovery from U.S. persons for use in certain foreign proceedings. The Second Circuit's decision poses a hurdle to litigants in foreign arbitration proceedings before tribunals not imbued with governmental authority from seeking to leverage Section 1782 and the broad discovery afforded under United States federal law, but there is an opening to still utilize Section 1782 evidence in such foreign arbitrations.

Background

Webuild was one of several investors in an international infrastructure project related to the expansion of the Panama Canal. In 2020, Webuild initiated an ICSID arbitration against the Republic of Panama pursuant to the Italy-Panama BIT, alleging that Panama had breached its obligations under the Italy-Panama BIT, international law, and Panamanian law.

In May 2022, Webuild and another investor, Sacyr, filed an *ex parte* Section 1782 application, requesting to serve subpoenas on WSP, a principal advisor to Panama and the Panama Canal Authority ("ACP") involved in the assessment, design, planning, management, and coordination of the Panama Canal expansion project. Webuild and Sacyr sought discovery concerning information provided to ACP during the project by ACP's engineering consultant – which WSP had acquired during the course of the Panama Canal expansion project – for use in the pending ICSID arbitration. The district court granted the *ex parte* application on May 19, 2022 (the "May 2022 Order"), necessarily finding the ICSID arbitral tribunal (the "Webuild Tribunal") was a "foreign or international tribunal" in accordance with Section 1782.

On June 13, 2022, the U.S. Supreme Court issued its widely anticipated decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. 619 (2022). In *ZF Automotive*, the Supreme Court held that the phrase "foreign or international tribunal" in Section 1782 refers to a "tribunal imbued with governmental authority" from one or more nations (596 U.S. at 631). The Court also found that two different arbitral tribunals – one an international commercial arbitration tribunal, and the other

an investment arbitration tribunal operating under the UNCITRAL Rules – did not satisfy this requirement (for more on *ZF Automotive*, see here) (*Id.* at 633-38). Nonetheless, the Supreme Court left open the possibility that an arbitral body could constitute a "foreign or international tribunal" for purposes of Section 1782, and did not "foreclose[] the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority" (*Id.* at 637).

After the Supreme Court issued its decision in *ZF Automotive*, WSP moved to vacate the May 2022 Order and to quash the subpoena, and Sacyr voluntarily withdrew its request for Section 1782 discovery. In a decision issued December 19, 2022, the district court granted WSP's motion to vacate the May 2022 Order and to quash the subpoena served on WSP (and a motion to vacate and quash filed by Panama a few days before the Supreme Court's decision in *ZF Automotive*). The district court held the Webuild Tribunal was not a "foreign or international tribunal" within the meaning of Section 1782, as interpreted in *ZF Automotive*, because the Webuild Tribunal was neither a pre-existing entity nor one created by the Panama-Italy BIT, but rather a tribunal specially formed following Webuild's request for arbitration where the members of the tribunal were chosen and compensated by the parties and had no official affiliation with, nor received any government funding from, Italy, Panama, or any other governmental or intergovernmental entity. The district court also explained that the Webuild Tribunal maintained confidentiality of the proceedings, only making awards public with the consent of the parties, and derived its authority from the parties' consent to arbitrate.

The Second Circuit's Decision

On appeal, Webuild contended that ICSID arbitral tribunals are "quintessential 'international tribunals'" with "numerous features" that make "clear that [they] are imbued with governmental authority." Webuild argued that ICSID itself is a permanent institution, having been established by the ICSID Convention, and that the Convention regulates various aspects of ICSID's operations with regard to arbitrations, including the formation of the panel of arbitrators and the formation and operations of tribunals.

The Second Circuit rejected all of Webuild's arguments. The Court first observed that the Supreme Court's conclusion in *ZF Automotive* was guided by Section 1782's animating purpose: comity. The Court also observed that, under *ZF Automotive*, "foreign or international tribunals" "are those that exercise governmental authority conferred by one nation or multiple nations."

The Second Circuit then compared the UNCITRAL arbitral tribunal from *ZF Automotive* to the Webuild Tribunal, ultimately concluding that:

> "the characteristics of UNCITRAL that the *ZF Automotive* Court found insufficient to give the ad hoc arbitration panel at issue there a governmental character are virtually the same as those of Webuild's ICSID Tribunal."

The Court therefore affirmed the district court's denial of Section 1782 discovery.

Implications of the Decision

Assuming Webuild cannot successfully convince the Supreme Court to grant *certiorari* and persuade the Court to overturn the Second Circuit's decision, Webuild's application for Section 1782 discovery has reached the end of the road. Although Webuild may be out of luck, the Second Circuit's decision in *Webuild S.p.A.* provides further guidance as to whether an arbitral body is imbued with governmental authority and thus qualifies as a "foreign or international tribunal" under Section 1782:

- **Who funds the tribunal?** The Second Circuit was not persuaded by Webuild's arguments, which it said "conflate[d] the Centre with the Webuild Tribunal." The Second Circuit explained that "funding for ICSID does not fund the Tribunal, directly or indirectly: the Webuild Tribunal is instead funded through advances on arbitrator fees and expenses paid by the parties."
- **Who appoints the arbitrator?** The Second Circuit rejected Webuild's attempt to distinguish the panels considered in *ZF Automotive* on the basis that the ICSID Chairman may appoint arbitrators from an ICSID-maintained Panel of Arbitrators to a tribunal when parties to an arbitration cannot agree on panel members or a presiding arbitrator, explaining that "possibility has no relevance to this case, as the parties agreed on the arbitrators and the Chairman did not appoint any member of the Webuild Tribunal." The Second Circuit's brief discussion of this issue has left the door open to the possibility that the appointment of an arbitrator by ICSID (or an equivalent body) may result in a different outcome – but presumably, other indicia of intent to imbue with governmental authority would need to be present.
- **What is the evidence of intent to imbue with governmental authority?** In *ZF Automotive*, the Supreme Court framed the intent to imbue inquiry as "whether th[e] features [of the arbitral body] and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority" (596 U.S. at 637). Webuild argued that the ICSID Convention's unique post-award procedures (both through annulment and enforcement mechanisms) distinguished the Webuild Tribunal as an international tribunal, and that the heightened finality accorded to tribunal awards under the Convention rendered ICSID tribunals analogous to national courts of Member States. The Second Circuit was not persuaded, rejecting the notion "that the intent to imbue tribunals with governmental authority follows from Convention procedures that accord awards with finality," explaining such procedures "merely facilitate the enforcement of ICSID awards" and "grant ICSID 'Annulment Committees' the authority to annul ICSID awards upon a party's request." Although the Second Circuit did not say what evidence would be sufficient to establish the requisite intent to imbue a tribunal with governmental authority, the Court in *Webuild S.p.A.* suggests significantly more is required than pointing to post-award procedures.

In addition, the Second Circuit's decision should not be read to deter parties to an arbitration from seeking discovery under Section 1782 *if* they are separately involved in, or are reasonably contemplating, proceedings before a tribunal that independently qualifies as a "foreign or international tribunal" under Section 1782 (such as a foreign court). As the Second Circuit made clear in *In re B&C KB Holding GmbH* less than a month before *Webuild S.p.A.*, there is:

> "nothing in *ZF Automotive* that contradicts our prior precedent that Section 1782 'does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise.'"

In other words, assuming an applicant can show that it meets Section 1782's requirements with respect to a qualifying foreign proceeding before a qualifying foreign or international tribunal, there is nothing stopping an applicant from using Section 1782 discovery obtained in that proceeding in another proceeding, even in an arbitration, absent the district court's entry of a protective order restricting the applicant's use of the discovery.

Ultimately, following *Webuild S.p.A.* parties will face difficulties convincing U.S. federal courts to allow Section 1782 discovery for arbitral proceedings, but the door is not necessarily closed with respect to using lawfully obtained Section 1782 discovery in arbitration proceedings or with respect to arguments that a given arbitral tribunal has been imbued with governmental authority in accordance with the Supreme Court's holding in *ZF Automotive*.

Lucas Bento FRSA FCIArb is Chair of the Section 1782 Practice at Quinn Emanuel Urquhart & Sullivan. Gavin Frisch is an associate at the firm and a member of the Section 1782 Practice. The views expressed in this post are the authors' personal views, and do not reflect the opinions of Quinn Emanuel or its clients.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

2024 Summits on Commercial Dispute Resolution in China

17 June – Madrid
20 June – Geneva

Register Now →

This entry was posted on Saturday, August 3rd, 2024 at 8:57 am and is filed under Disclosure, Discovery, Section 1782 Discovery, United States, United States Courts
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.