U.S. Supreme Court Restricts Discovery Assistance to International Arbitral Tribunals

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On 13 June 2022, the U.S. Supreme Court ruled that U.S. courts may not help arbitral tribunals sitting abroad in the taking of evidence. This is because in the opinion of the Court, such an arbitral tribunal is not a „foreign or international tribunal" in the sense of 28 U.S.C. § 1782, which allows federal district courts to order the production of evidence for use in proceedings before such tribunals.

The decision concerned an institutional and an ad-hoc arbitration. The first, ZF v. Luxshare, was a commercial arbitration between two companies under the rules of the German Arbitration Institution (DIS). The second, AlixPartners v. Fund for Protection of Investors' Rights in Foreign States, was an investment arbitration involving a disgruntled Russian investor and a failed Lithuanian bank; it was conducted under the UNCITRAL Arbitration Rules.

The opinion, written by Amy Coney Barrett, rejects assistance by U.S. courts in both cases, whether in the pre-arbitration phase or in the main arbitration proceedings. It was unanimously adopted by the Court.

The Supreme Court first relies on a dubious literal interpretation of § 1782. While it does not dispute that arbitral tribunals may be "tribunals", this would change by the addition of the adjectives "foreign or international", as this would require that one or several nations have imbued the tribunal with governmental authority. Alas, the drafters of the New York Convention on recognition and enforcement of "foreign" arbitral awards were wrong, and so apparently were the signatories – among them the U.S. As for the term "international", numerous treatises on "international commercial arbitration" will now supposedly have to be rewritten or newly titled.

The opinion further argues that the "animating purpose" of § 1782 would be "comity" with other nations, and that it would be "difficult to see how enlisting district courts to help private bodies would help that end". Yet other nations also

have an interest in efficient arbitration proceedings, as evidenced by the New York Convention. This is even particularly clear for investment arbitration because of the involvement of a state party, but it is also true in commercial arbitration. What is decisive from the point of view of many countries is that arbitration as a dispute resolution method is equivalent to litigation, and should not be treated less favourably.

The Supreme Court further argues that if § 1782 were to be extended to commercial arbitral "panels", it would cover everything, including even a university's student disciplinary tribunal. Yet the absurdity of this *argumentum ad absurdum* lies not in the inclusion of arbitration in § 1782 but in the extension made by the Court, which was only asked about the former and not about the latter. If need be, it would have been easy to distinguish commercial and investment arbitral tribunals established under national or international rules and covered by international agreements such as the New York Convention from student disciplinary "tribunals" (rather: panels).

Finally, the Court notes that allowing district courts to proffer evidence to a foreign arbitral tribunal would create a mismatch with the Federal Arbitration Act (FAA), which does not foresee such assistance for domestic arbitral tribunals. Yet the solution of this mismatch should have better been left to the legislator, who could either extend the FAA to discovery or exclude foreign and international arbitral tribunals from the scope of § 1782. At any rate, the worse situation of domestic arbitral tribunals does not seem a sufficient justification to also deprive arbitral tribunals abroad, who may have particular difficulties in gathering evidence in the U.S., of assistance by U.S. courts.

All in all, this is disappointing news from Capitol Hill for international arbitration. Whether on arbitration or abortion, the current Supreme Court seems to be willing to upend legal precedent and to question customary legal terminology. At least for arbitration, the consequences will not be life-threatening, because the practice will be able to adapt. But one can already see the next questions coming to the Supreme Court. How about this one: Are ICSID tribunals imbued with governmental authority?