**Obtaining Evidence in the USA in support of international arbitrations – the new US Supreme Court decision on the use of US Civil Code s 1782 - a backward step?**

Obtaining evidence from the USA using the Hague Convention was never easy. The procedure was often long drawn-out and was only obtainable through the intermediary of a judge in the national court where proceedings were being carried on.

US Civil Code s 1782 was therefore a real boon. Little known about by UK, European or indeed any other non-American lawyers, it provides a quick route to obtaining evidence, by way of documents and/or witness testimony. Applications are made direct to a US judge.
It can be used for actual or contemplated foreign court proceedings. I have used it myself and it produced case-winning evidence quickly. It had been used also to help in a number of international arbitrations.

S 1782 reads as follows:

"Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The 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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced before a person appointed by the court. By virtue of his appointment, the person appointed has the power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice or procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him."

However, its use in international arbitrations was controversial. I reviewed the history of its use and the US court decisions in a chapter (in English) in "Die Internationale Durchsetzung von Schutzrechten" published by C.H. Beck in 2020. [**Contact us for a copy of this chapter**]

1782 was last considered by the Supreme Court in 2004. In short, in Intel Corp v Advanced Micro Devices ( AMD ) [REF], the Court decided wholly in favour of the use of 1782 as widely as possible. In that case, the application had been made in contemplation of a complaint being made to the EU Commission. The Supreme Court held that the Commission qualified as a tribunal; it was a first instance decision maker.

The Supreme Court applauded 1782 being applied widely, so as to broadcast abroad the high quality of the US justice system. Amongst many appeal points run, one was that there should be a requirement of reciprocity but this, together with all the other appeal points, were rejected.

Intel left open (because it was not one of the matters it had to decide) whether 1782 could be used in arbitrations or international arbitrations. In the intervening period, it has remained controversial: in that some US courts had ruled that proceedings before international arbitration tribunals qualified and others decided to the contrary. Positive pro-1782 decisions had been rendered in the huge Ninth Circuit area (California, Arizona , Nevada, Idaho, Montana, Oregon, Washington state – and Alaska), the Fourth (Maryland, the Carolinas and Virginia) and the Sixth Circuits (Kentucky, Michigan, Ohio and Tennessee) but there had been contrary decisions in for instance the important Second Circuit (New York).

Now a rather different-looking Supreme Court has been considering a consolidated appeal of two cases: ZF Automotive US , Inc. et al v Luxshare Ltd. (from the Sixth Circuit) and AlixPartners LLP v The Fund for Protection of Investors' Rights in Foreign States (Second Circuit). Both related to arbitrations. Both appeals required the Court to decide whether private adjudicatory bodies qualify as "foreign or international tribunals". In the Luxshare case, a case was contemplated before the German Institution of Arbitration (DIS); in the other case the Fund started a proceeding before an ad hoc arbitration panel using the UNCITRAL Rules under a bilateral treaty between Lithuania and Russia.

The Supreme Court decided 9-0 that neither of the arbitral panels in the two appealed cases qualified. This is a most disappointing development.

Justice Barrett, the newest Supreme Court Judge, gave the lead judgment. As a neutral, I may on this subject be partial, but I find her construction of the key words to be misjudged. For example, having said that, if 1782 had specified "tribunal" to be the qualifying word on its own, "there would have been a good case for including private arbitral panels", she goes on to say that expanding the qualification (in words but not effect) to "foreign or international tribunal" somehow narrows the definition. Or rather she says the terms are "best understood" to mean just an adjudicative body that exercises governmental authority. This is why I say I find her construction strained.

As a matter of policy, the ZF decision goes in a different direction to Intel. A reason is indicated (at page 10): "Why would Congress lend the resources of district courts to aid purely private bodies adjudicating purely private disputes abroad". Of course reining in

government courts saves money, but in practice, such is the current rarity of these applications, the cost saving to the US will be minimal.

The Court distinguishes Intel by saying that the proceedings contemplated there were to be before a government body (the EU Commission) and the point about private arbitrations did not arise for decision. It goes further by saying that the animating purpose of 1782 is comity (it is unclear where this came from) – "Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments **and encourages reciprocal assistance**" (my emphasis"). Yet I am unaware, after all this time, of any foreign court that has a reciprocal to 1782, and none is cited.

A unanimous decision by the Supreme Court is to be respected. My view itself is likely to be controversial. However, I do think that in deciding as it has, it has missed an excellent opportunity to broadcast an admirable and progressive American evidence-gathering mechanism. It would have also enhanced the usefulness of international arbitration and helped to ensure that panels can do full justice. This means of dispute resolution has been endorsed by so many governments and courts over many years. It relieves the heavy burdens on courts, in time and money, and provides a discreet manner for commercial enterprises to resolve their disputes.

I would welcome the views of others.

Richard Price August 2022

richard.price@arbdb.com

For enquiries for Richard's services as arbitrator or mediator, please contact Martin Poulter, Clerk to ArbDB Chambers on +44 (0)203 514 9020 or martin.poulter@arbdb.com