AMERICAS
ARBITRATION REVIEW 2023

The *Arbitration Review of the Americas 2023* contains insight and thought leadership from 38 pre-eminent practitioners from the region. It provides an invaluable retrospective on what has been happening in some of Latin America's more interesting seats. This edition also contains an interesting think piece on concurrent delay as well as an excellent pair of reviews of decisions in the US and Canadian courts.

All articles come complete with footnotes and relevant statistics.

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Preface

Welcome to *The Arbitration Review of the Americas 2023*, one of *Global Arbitration Review*'s annual, yearbook-style reports. For the uninitiated, *Global Arbitration Review* is the online home for international arbitration specialists everywhere, telling them all they need to know about everything that matters in their chosen professional niche.

Throughout the year, we provide our readers with pitch-perfect news (every day), and other surveys and features; organise the liveliest events (under our GAR Live and GAR Connect banners ('Connect' when it is online)) and curate various time saving databases and know-how titles.

In addition, assisted by external contributors, we curate a series of online regional reviews that go deeper into local developments than the exigencies of journalism allow. *The Arbitration Review of the Americas*, which you are reading, is part of that series.

It contains insight and thought leadership inspired by the recent past from 38 pre-eminent practitioners. The 16 articles they've co-written give an invaluable retrospective on the year just gone, and what the year ahead may hold. All contributors are vetted for their standing and knowledge before being invited to take part.

These volumes also on occasion provide valuable background to get you up to speed quickly on a particular seat.

This edition covers Canada, Mexico, Panama, Peru and the United States; and has 11 overviews, including a thought-provoking look at the meaning of 'concurrent delay' around the region, using five scenarios, and another on how Latin American concession contracts are likely to cope with the various shocks the world has been experiencing of late.

As so often with these reviews, a close reading yields many nuggets. For this reader, on this occasion, they included that:

- Brazil's CAM-CCBC is about to get new rules;
- Mexico faces a wave of lithium-related claims. (This is in addition to the 21 or so arbitrations its Federal Electricity Commission is fighting, for which it has reserved $470 million); and
- Secured creditors of Panamian PPP projects have the right to take part in any arbitrations related to the project under the local law, even if they haven't taken possession of the security in question!

There's also an excellent pair of reviews of decisions in the US and Canadian courts. Plus much, much more.

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I wish you an enjoyable read. If you have any suggestions for a future edition, or want to take part in this annual project, my colleagues and I would love to hear from you. Please write to insight@globalarbitrationreview.com.

David Samuels
Publisher
July 2022

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US arbitration hubs thriving thanks to robust judicial support

Adolfo E Jiménez, Marisa Marinelli, Brian A Briz
and Katharine Menéndez de la Cuesta
Holland & Knight

IN SUMMARY

In the past year, US courts have issued a number of arbitration-friendy decisions. The District of Columbia is the situs for a large number of investor-state disputes and the US court decisions can have far-reaching ramifications.

DISCUSSION POINTS

- The Supreme Court held that only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under section 1782 United States Code
- Federal courts lack subject-matter jurisdiction to confirm or vacate an award under Chapter 1 of the Federal Arbitration Act per se
- In New York, evidence of intent to submit questions of arbitrability to arbitration may be found in agreements reached during the proceeding
- In Washington, DC, whether a foreign state that is a New York Convention signatory can impliedly waive sovereign immunity under the FSIA by agreeing to arbitrate in another signatory state has become somewhat muddled
- Florida is now in line with almost all federal circuits on arbitrators' implied power to decide arbitrability issues

REFERENCED IN THIS ARTICLE

- *ZF Automotive US, Inc v Luxshare, Ltd*
- *AlixPartners LLP v The Fund for Protection of Investor Rights in Foreign States*
- 28 USC section 1782(a)
- *Denise A Badgerow v Greg Walters et al*
- *Beijing Shougang Mining Inv Co v Mongolia*
- *Process and Indus Dev Ltd v Fed Republic of Nigeria*
- *Airbnb, Inc v Doe*

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US Supreme Court

US Supreme Court reviews whether discovery may be obtained in the US for use in international commercial arbitration

The US Supreme Court granted certiorari in two cases – *ZF Automotive US, Inc v Luxshare, Ltd (ZF Auto)*[1] and *AlixPartners LLP v The Fund for Protection of Investor Rights in Foreign States (AlixPartners)*[2] – in late 2021 to address the scope of 28 USC section 1782(a) (section 1782), and specifically, the issue of whether a private foreign commercial arbitration constitutes a 'proceeding in a foreign or international tribunal' under section 1782.

On 13 June 2022, the Court issued its long awaited decision in *ZF Automotive US, Inc v Luxshare, Ltd*,[3] holding that in the context, legislative history and purpose of section 1782 only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under section 1782, and that neither a private, international commercial arbitral tribunal nor an ad hoc arbitral tribunal constituted pursuant to a bilateral investment treaty qualified.

Section 1782

As discussed in our article in last year's edition, section 1782 empowers a US federal district court to order a person within its district to give testimony or provide evidence for use in foreign dispute resolution proceedings. The key portion of section 1782[4] is as follows:

> *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 issue that arises in many of these section 1782 cases – and addressed here – is whether a private foreign arbitration constitutes a 'proceeding in a foreign or international tribunal' under that section.

Sixth Circuit decision in ZF Auto

In *ZF Auto*, petitioner Luxshare sought discovery pursuant to section 1782 from ZF US and two of its senior officers who resided in the district (collectively ZF Auto) in connection with an arbitration proceeding that it intended to commence

1 15 F4th 780 (6th Cir 2021), cert granted, 142 S Ct 637 (2021).
2 5 F4th 216 (2d Cir 2021), cert granted, 142 S Ct 638 (2021)
3 No. 21-401, 2022 WL 2111355 (US 13 June 2022).
4 28 USC § 1782(a).

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in Munich, Germany, by the end of 2021. ZF Auto sought to stay an order that had granted limited discovery, and Luxshare moved to compel the discovery. The district court denied ZF Auto's motion and granted Luxshare's.

In denying the motion for a stay, the court analysed four factors that are determinative. Two of those are instructive here. First, the district court considered whether ZF Auto was likely to succeed on the merits of its claim. ZF cited, among other arguments, the Supreme Court's grant of certiorari in *Servotronics* to address a circuit split over whether section 1782 encompasses private commercial tribunals. ZF Auto argued that if section 1782 did not encompass private commercial tribunals, Luxshare would not be entitled to the discovery that had been granted. The district court, however, made clear that 'the current law in the Sixth Circuit is that § 1782 discovery may be used for private commercial arbitrations'[5] and further, that the 'Supreme Court's grant of certiorari in *Servotronics* does not change this binding precedent.'[6] On appeal, the Sixth Circuit court agreed and denied ZF Auto's motion for a stay of the order compelling discovery. The Sixth Circuit also noted that the Supreme Court had dismissed *Servotronics* by the time of its decision.[7]

One of the other factors the district court considered is whether the public interest would be served by the stay. Luxshare argued that a stay would frustrate the aims of section 1782, which are to provide efficient assistance to participants in international arbitration and to encourage similar assistance to our courts, and because discovery 'supports the truth in foreign actions'.[8] The district court agreed that the public interest 'in truth and efficiency in foreign actions and in encouraging mutual assistance between foreign tribunals' weighed against a stay and in favour of ordering the discovery.[9]

Second Circuit decision in AlixPartners

AlixPartners involves an appeal of a US District Court for the Southern District of New York decision granting an application for discovery pursuant to section 1782. The discovery was for use in an arbitration between an investor – The Fund for Protection of Investor Rights in Foreign States, a Russian corporation, (the Fund) – and a foreign state (Lithuania). The Fund initiated ad hoc arbitration in accordance with UNCITRAL rules, pursuant to the terms of a bilateral treaty between Lithuania and the Russian Federation. The parties disputed whether the arbitration between a foreign state and an investor constitutes a 'proceeding in a foreign or international tribunal' under section 1782.

5 555 F Supp 3d 510, 514 (ED Mich 2021) (citations omitted).
6 Id.
7 *ZF Automotive US, Inc v Luxshare, Ltd*, 15 F4th 780, 783 (6th Cir 2021).
8 555 F Supp 3d at 518 (citations omitted).
9 Id. The Sixth Circuit did not address this issue, finding that, since ZF Auto had not shown a likelihood of success on the merits, it need not address the other factors. 15 F4th at 783.

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The Second Circuit held that the arbitration between Lithuania and the Fund, taking place before an arbitral panel convened pursuant to the bilateral investment treaty to which Lithuania is a party, 'qualifies as a "foreign or international tribunal"' under section 1782.[10] The Second Circuit is one of the three circuits that does not consider a foreign private commercial arbitration to qualify as a tribunal under section 1782.[11]

The Fund in *AlixPartners* commenced arbitration to challenge the expropriation of certain shares of a private bank located in Lithuania (Snoras), which was nationalised by the central bank of Lithuania and an individual (Freakley) appointed as administrator. Snoras was declared bankrupt by a Lithuanian court. The Fund sought discovery from Freakley and AlixPartners in the district where they could be found (SDNY) related to the expropriation of Snoras.[12] AlixPartners opposed the Fund's section 1782 application. Moreover, Lithuania submitted a letter to the arbitration panel, asking the panel to order the Fund to withdraw the section 1782 application.[13] The panel rejected Lithuania's request, noting that Lithuania would be able to contest any evidence that might be obtained via the section 1782 request (if granted) in the arbitration.[14]

In holding that the panel hearing the arbitration between the Fund and Lithuania qualifies as a 'foreign or international tribunal' under section 1782, the Second Circuit distinguished between a private commercial arbitration between private parties[15] and one between a private party and a state, convened pursuant to a bilateral investment treaty to which the state is a party. To reach this conclusion, the Second Circuit noted its finding in *In re Guo* (*Guo*)[16] that the '"foreign or international tribunal" inquiry does not turn on the governmental origins of the entity in question;'[17] it then proceeded to analyse the issue under the 'functional approach' and factors laid out in *Guo*, including: (1) the 'degree of state affiliation and functional independence possessed by the entity'; (2) the 'degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision'; (3) the 'nature of the jurisdiction possessed by the panel'; and (4) the 'ability of the parties to select their own arbitrators.'[18] On balance, the court found the factors weighed in favour of its holding.

10 5 F4th at 228.
11 The other circuits are the Seventh and Fifth Circuits. See Jiménez et al, 'US Supreme Court Engages on Arbitration Issues', *The Arbitration Review of the Americas* (Global Arbitration Review, August 2021), at p. 119 n.41.
12 5 F4th at 222 (the discovery sought related, *inter alia*, to Freakley's (the then-CEO of AlixPartners) role as the temporary administrator, the circumstances of his appointment, instructions he received from the Lithuanian government, and the nature, scope and findings of Freakley; the Fund also sought a deposition of Freakley and a representative of AlixPartners.).
13 Id.
14 Id.
15 The court cited its decision in *In re Guo (Guo)*, 965 F3d 96 (2d Cir 2020), where it held that section 1782 discovery does not extend to private commercial arbitration (in that case, a CIETAC arbitration).
16 965 F3d 96 (2d Cir 2020).
17 Id at 107.
18 5 F4th at 225-26.

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The court also cited two additional 'functional attributes' that supported its finding that the panel qualifies as a foreign or international tribunal under section 1782: first, Lithuania (in its capacity as a foreign state) is a party to the arbitration; and second, 'the importance of bilateral investment treaties as tools of international relations' supported a conclusion that this arbitral panel constitutes a 'foreign or international tribunal'.[19] 'That this arbitral panel was assembled pursuant to this Treaty – as part of this effort to facilitate mutually beneficial relations between Russia and Lithuania – signals that this arbitration differs from a private commercial arbitration.'[20]

Supreme Court decision

On 13 June, the Supreme Court unanimously held that section 1782 did not apply to a commercial international arbitration or to an UNCITRAL investor–state arbitration.[21] Only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under section 1782. According to the Court, '"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. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation.'[22]

The Court also looked to the statute's history, finding that interpreting section 1782 to reach only bodies exercising governmental authority is consistent with Congress's intent to improve existing practices of providing judicial assistance between the United States and foreign countries. In addition, the Court found that comity is fostered when federal courts assist foreign and international governmental bodies, not when they help private bodies decide private disputes abroad. Finally, the Court found that extending section 1782 to permit discovery in private international arbitration disputes would be at odds with the Federal Arbitration Act (FAA), which governs domestic arbitration, because section 1782 permits much broader discovery than the FAA. In the Court's view, if section 1782 applied to international arbitration tribunals, parties to private foreign arbitrations would have access to more extensive discovery than is available in domestic arbitration.

Accordingly, the Supreme Court concluded that the commercial German Arbitration Institute (DIS) arbitral tribunal in *ZF Auto* did not qualify as a foreign or international tribunal under section 1782 because no government is 'involved in creating the DIS panel or prescribing its procedures'.[23]

19 Id at 228.
20 Id.
21 *ZF Automotive US, Inc v Luxshare, Ltd*, No. 21-401, 2022 WL 2111355 (US 13 June 2022).
22 Id at *6.
23 Id at *8.

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Similarly, the Supreme Court found that the ad hoc investment treaty tribunal in AlixPartners was not a governmental or intergovernmental tribunal that fell within the scope of section 1782. Under section 1782, the test is whether 'the features [of the adjudicatory body] and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority'.[24] But nothing in the relevant treaty showed 'Russia and Lithuania's intent that an ad hoc panel exercise governmental authority'.[25]

Impact of Supreme Court decision

The Supreme Court's ruling resolves a circuit split over the scope of section 1782, with the US Courts of Appeals for the Second, Fifth and Seventh Circuits' previous holdings that 'foreign or international tribunal' in section 1782 excludes foreign commercial arbitrations, and the Fourth and Sixth Circuits' holding that it does not. From now on, parties to foreign private commercial arbitrations and investor–state arbitrations (similar to the ad hoc one in AlixPartners) will not be able to seek discovery in US courts under section 1782.

The Supreme Court, however, reserved its position on certain ad hoc tribunals because 'sovereigns might imbue an ad hoc arbitration panel with official authority' since governmental and intergovernmental bodies 'may take many forms.'[26] This carve-out may allow for section 1782's use in some investor–state arbitrations.

Importantly, the Supreme Court's decision in *ZF Auto* does not affect the availability of section 7 of the FAA as a discovery tool in international arbitrations seated in the US. Under section 7, the arbitrators 'may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case'. Further, the federal district court where the arbitral tribunal is seated may compel the person to comply with the order of the arbitrators to appear before them and to provide documents that may be material to the case. The ruling does protect entities and persons residing or found in the US, however, from being subject to US discovery for use in foreign, international arbitrations where they are not a party.

24 Id at *10.
25 Id at *9.
26 Id at *10.

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Federal jurisdiction limited when confirming or setting aside arbitration awards

In *Denise A Badgerow v Greg Walters, et al*,[27] the US Supreme Court held that federal courts do not have subject-matter jurisdiction to confirm or vacate an arbitration award under sections 9 and 10 of the US Federal Arbitration Act (FAA) when the only basis for jurisdiction is that the underlying dispute involves a federal question. In so doing, the court eschewed extending the 'look through' provision of section 4 of the FAA, which allows a court to look at the subject matter of the underlying dispute when determining whether it has jurisdiction to hear a motion to compel arbitration, or a motion to confirm or vacate an award. While this case does have a greater impact in US domestic arbitration, it is one that still should be kept in mind when pleading jurisdiction in a case seeking to confirm, vacate or avoid recognition of an international arbitration award.

Background

Denise Badgerow, an associate financial advisor with a Louisiana financial service company, initiated a Financial Industry Regulatory Authority (FINRA) arbitration against the three principals of the corporation after her termination. Badgerow sought damages for tortious interference of contract and for violation of Louisiana's whistleblower law. The FINRA panel dismissed all of her claims with prejudice.

Badgerow then filed a petition in Louisiana state court to vacate the arbitration award. The defendants removed the action to federal court, and Badgerow filed a motion to remand, asserting that the federal court lacked subject-matter jurisdiction over the petition to vacate. The district court held that it had subject-matter jurisdiction over the petition to vacate, denied remand and denied vacatur of the FINRA arbitration award. The US Court of Appeals for the Fifth Circuit affirmed, and Badgerow petitioned for a writ of certiorari before the Supreme Court.

The 'look through' approach

The issue before the Supreme Court was whether the district court had jurisdiction over the petition to confirm or vacate the FINRA arbitration award because the parties' underlying substantive dispute would have fallen within the federal court's jurisdiction, or conversely, whether the federal court was prohibited from looking through to the underlying dispute to establish federal subject-matter jurisdiction over a petition to confirm or vacate an arbitration award under sections 9 and 10 of the FAA.

27 No. 20–1143, 2022 WL 959675 (US 31 March 2022).

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The controversy arose because, in an earlier decision, *Vaden v Discover Bank*,[28] the Supreme Court approved the look-through approach in the context of FAA section 4 and held that, in determining whether federal subject-matter jurisdiction exists for the purposes of a motion to compel arbitration, a federal court may look through the petition to compel arbitration to the underlying dispute between the parties. *Vaden*, though, is based on language unique to section 4 of the FAA, which provides that it is proper to bring a motion to compel to any federal district court that, 'save for [the arbitration] agreement, would have jurisdiction [over] a suit arising out of the controversy between the parties'. The Supreme Court found this language allows district courts to look through the section 4 petition and base its jurisdiction on the substance of the underlying dispute.

In contrast, *Badgerow* considered sections 9 and 10 of the FAA. The Supreme Court noted that these sections 'contain none of the statutory language on which *Vaden* relied'. It declined to 'redline the FAA, importing section 4's consequential language into provisions containing nothing like it' and noted that 'Congress could have replicated section 4's look-through instruction in sections 9 and 10,' or it 'could have drafted a global look-through provision, applying th[at] approach throughout the FAA. But Congress did neither.' The Supreme Court felt prevented from 'pulling the look-through jurisdiction out of thin air – from somehow finding without textual support, that federal courts may use the method to resolve . . . section 9 and 10 applications'. Absent an independent basis for federal court jurisdiction (eg, diversity of citizenship), the court found there was no basis for federal court jurisdiction.

Impact of decision

Importantly, the court's decision in *Badgerow* does not apply in cases where the underlying arbitration is subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) or the Inter-American Convention on International Commercial Arbitration (the Panama Convention). The Conventions are incorporated into federal statute,[29] and independently establish a federal district court's subject-matter jurisdiction over petitions to confirm or vacate an award where the award falls under the Conventions[30] – namely foreign awards or awards rendered in the United States that have an international component.[31] In contrast, the FAA does not provide an independent basis for federal subject-matter jurisdiction over petitions to confirm or vacate domestic arbitration awards.

28 556 US 44, 50 (2009).
29 At 9 USC § 201 et seq and 9 USC § 301 et seq respectively.
30 Subject-matter jurisdiction is automatically conveyed on district courts under the Conventions (9 USC §§ 203, 302 (section 302 incorporates § 203 of the New York Convention into the Panama Convention)).
31 See *Bergesen v Joseph Muller Corp.*, 710 F2d 928, 932 (2d Cir 1983); *Zhang v Dentons US LLP*, 2021 WL 2392169, at *3 (CD Cal 11 June 2021).

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US Court of Appeals for the Second Circuit

What constitutes 'clear and unmistakable' evidence of agreement to delegate arbitrability in ISDS

Issue presented

In the US, courts and not arbitrators must decide whether a dispute is subject to arbitration – questions of arbitrability[32] – unless there is clear and unmistakable evidence of the parties' intent to submit these questions to the arbitrators.[33] In practice, this means that, when presented with the issue, courts will generally conduct an independent determination on questions of arbitrability. However, if the parties 'clearly and unmistakably'[34] agreed to submit issues of arbitrability to arbitration, then courts will not conduct an independent review of the award but rather defer to the arbitrators' determination on the issue. To be clear, this does not affect the applicability of the doctrine of *Kompetenz-Kompetenz* in arbitrations conducted in the US, under which, generally, arbitrators have authority to make a determination on their own jurisdiction without waiting for a court to decide the issue.

In *Beijing Shougang Mining Inv Co v Mongolia*,[35] the court addressed whether Mongolia, on the one hand, and the investors Beijing Shougang Mining Investment Company Ltd, China Heilongjiang International Economic & Technical Cooperative Corporation and Qinhuangdaoshi Qinlong International Industrial Company Ltd, on the other, 'clearly and unmistakably'[36] agreed to submit questions of arbitrability to the arbitral tribunal either in the treaty under which the investors brought the arbitration or during the dispute.

Background

The subject of the underlying arbitration was Mongolia's alleged expropriation of certain investments made before 2006 in an iron-ore mine in Mongolia. The investors are state-owned and privates entities incorporated in the People's Republic of China. In 2010, the investors initiated an ad hoc arbitration proceeding against Mongolia under the 1991 bilateral investment treaty (the Treaty) between Mongolia and the PRC. Article 8(3) of the Treaty provides that: 'If a dispute involving the amount of compensation for expropriation cannot be

32 The issue of 'arbitrability' 'include[s] questions such as "whether the parties are bound by a given arbitration clause", or "whether an arbitration clause in a concededly binding contract applies to a particular type of controversy".' *BG Grp PLC v Republic of Argentina*, 572 US 25, 34, 134 S Ct 1198, 188 L Ed 2d 220 (2014) (quoting *Howsam v Dean Witter Reynolds, Inc*, 537 US 79, 83, 123 S Ct 588, 154 LEd2d 491 (2002)).
33 *First Options of Chicago, Inc v Kaplan*, 514 US 938 (1995).
34 Id.
35 11 F4th 144 (2d Cir 2021).
36 Id.

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settled within six months after resort to negotiations . . ., it may be submitted at the request of either party to an ad hoc arbitral tribunal.'[37]

Shortly after the tribunal was constituted, a procedural hearing was held where the parties agreed, among other things, that (1) the seat of the arbitration would be in New York; (2) the arbitral tribunal had been properly constituted; and (3) the proceedings would be bifurcated into two phases, where the first phase would cover jurisdiction and liability, and the second phase would address damages, if necessary. The arbitration lasted seven years, and the arbitral tribunal ultimately decided that it lacked subject-matter jurisdiction to decide the investors' claims, among other reasons, because article 8(3) of the Treaty only provided the tribunal with authority to decide 'a dispute involving the amount of compensation for expropriation,'[38] and not whether an expropriation had actually occurred. Because no determination had yet been made that an expropriation occurred, the tribunal held that there was no dispute involving the amount of compensation for such expropriation.

In 2017, the investors filed a petition in the US District Court for the Southern District of New York seeking to set aside the arbitral award, claiming the arbitrators allegedly exceeded their powers in construing the scope of the arbitral agreement. The district court declined to conduct an independent review of the arbitral tribunal's determination, but rather deferred to the arbitrators' determination on the issue. It also confirmed the award and dismissed the investors' petition to vacate it.

The investors appealed.

Analysis

The US Court of Appeals for the Second Court affirmed the district court's opinion.

First, it found that the deference provided to the arbitrators' determination on whether the dispute was subject to arbitration was correct because the parties clearly and unmistakably agreed to submit issues of arbitrability to arbitration.

The Court of Appeals agreed with the district court that the Treaty itself did not contain clear and unmistakable evidence of the delegation because the Treaty only provides arbitrators authority to decide 'a dispute involving the amount of compensation for expropriation.' This language lacks a reference to the tribunal's authority to decide arbitrability issues.

37 Treaty art. 8(3).
38 Id.

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Instead, the Court of Appeals found 'clear and unmistakable' evidence of the delegation in the 'agreement reached by the parties at the outset of the arbitration'.[39] Because the parties agreed the arbitration would have a phase expressly covering jurisdiction, the parties agreed to arbitrate the issue of arbitrability, 'clearly and unmistakably'.[40] Notably, the parties reached this agreement after the jurisdictional issue was raised by the investors. By this time, the parties were already disputing whether the Treaty limited the arbitrators' authority to 'an assessment of the compensation due for an expropriation'[41] or rather authorised the arbitrators to determine whether the expropriation had actually occurred.

As a result of this first determination, the Court of Appeals only reviewed the award with deference. It found the arbitrators did not exceed their powers in construing the scope of the authority of the arbitral tribunal, and dismissed the investors' petition to vacate.[42]

Impact of the decision

The Second Circuit clarified that evidence of intent to submit arbitrability issues to arbitration may be found not only in the arbitration agreement, but also in agreements reached during the arbitration. The decision also highlights that the analysis is similar in commercial or investment disputes because both are based on agreements to arbitrate, wherever these agreements may be found.

The court disregarded the fact that the investors did not personally negotiate the Treaty, which was the primary source of the tribunal's authority, especially because the parties negotiated and agreed to the procedural order providing for an arbitration phase focused on jurisdiction, and thus providing the arbitrators with such authority.

Finally, this case is consistent with *Schneider v Kingdom of Thailand*.[43] In *Schneider*, the Court of Appeals found that 'an investor and sovereign state had clearly and unmistakably agreed to arbitrate questions of arbitrability'[44] because the parties executed terms of reference delegating issues of arbitrability to the arbitral tribunal and because the applicable treaty provided for the application of the UNCITRAL Arbitration Rules (which in turn delegate arbitrability issues to the arbitrators).

39 *Beijing Shougang Mining Inv Co v Mongolia*, 11 F4th 144, 154 (2d Cir 2021).
40 Id.
41 Id at 155.
42 The court's reasoning on this second issue is not the focus of this note. The court's reasoning starts at id at 158.
43 688 F3d 68, 71 (2d Cir 2012).
44 Id.

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US Court of Appeals for the DC Circuit

Interplay between the New York Convention and the Foreign Sovereign Immunities Act

Issue presented

On 11 March 2022, the United States Court of Appeals for the District of Columbia Circuit addressed the intersection between the New York Convention[45] and the Foreign Sovereign Immunities Act (FSIA)[46] in *Process and Industrial Development Ltd v Federal Republic of Nigeria*.[47] The opinion was issued in the long-running, cross-continental dispute between Process and Industrial Developments Limited (P&ID), an engineering and project management company owned by Irish nationals, and the Federal Republic of Nigeria and its Ministry of Petroleum Resources (collectively, Nigeria).[48] The case is notable both for what the Court decided as for what it declined to decide.

At issue was the question of whether a foreign state can assert sovereign immunity under the FSIA in a proceeding against it to enforce an international arbitration award subject to the New York Convention. Specifically, the Court was asked to address whether the foreign state waived immunity or whether the arbitration exception to the FSIA applied.

Background

In 2010, P&ID and Nigeria entered into a natural gas supply and processing agreement containing an agreement to arbitrate disputes under the Nigerian Arbitration and Conciliation Act, with the seat of the arbitration in London, England.[49] Alleging that Nigeria breached the agreement, in 2012, P&ID initiated arbitration proceedings against Nigeria in London.[50]

In 2015, the arbitral tribunal overseeing the dispute issued an award on liability in favour of P&ID, finding that Nigeria breached the agreement.[51] After the English courts refused to set aside the award, in 2016, the Federal High Court of Nigeria issued an order setting aside the award.[52]

45 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 28 UST 2517.
46 28 USC § 1602 et seq.
47 27 F4th 771 (DC Cir 2022).
48 *Process and Indus Dev Ltd v Fed Republic of Nigeria*, 27 F4th 771 (DC Cir 2022).
49 Id at 772.
50 Id.
51 Id.
52 Id at 773.

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Notwithstanding, the following year, the arbitral tribunal determined that the Nigerian court lacked jurisdiction to set aside the award and issued an award on damages against Nigeria exceeding US$10 billion, including interest.[53] In 2019, the English High Court of Justice concluded that the award was enforceable.[54] Although a trial is scheduled before the High Court as to whether the award should be set aside for fraud and corruption, to date, no English court has set aside the award.[55]

Across the Atlantic, in 2018, P&ID petitioned the United States District Court for the District of Columbia to confirm the arbitration award and reduce it to a judgment pursuant to the New York Convention, as codified at 9 USC § 201 et seq.[56] Nigeria, in turn, argued that it was immune from suit under the FSIA.[57] P&ID countered that the district court had jurisdiction under the waiver exception and arbitration exception to FSIA immunity.[58]

The district court concluded that it had subject-matter jurisdiction because Nigeria's sovereign immunity had been abrogated by the FSIA's waiver exception.[59] Specifically, it found that Nigeria 'impliedly waived its sovereign immunity to the confirmation action by becoming a party to the New York Convention and agreeing to arbitrate its dispute with P&ID in a Convention state'.[60] The district court, however, declined to address the arbitration exception under the FSIA and whether the exception even applied after the Nigerian High Court had set aside the liability award.[61]

On appeal, the Court declined to address the waiver exception and instead found that Nigeria's sovereign immunity had been abrogated under the FSIA's arbitration exception.

Analysis

The FSIA provides the exclusive basis for obtaining jurisdiction over a foreign state in a civil court proceeding before a United States court.[62] Foreign states are presumptively immune from the jurisdiction of the United States courts unless an exception exists under the FSIA.[63]

53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id at 774.
59 Id.
60 Id.
61 Id.
62 *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428, 434 (1989).
63 28 USC § 1604.

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The questions for the Court to decide were whether Nigeria was immune from the jurisdiction of the district court under the arbitration exception[64] and the waiver exception[65] of the FSIA.[66]

The arbitration exception

The FSIA's arbitration exception provides, in pertinent part:

> *A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards . . . .*[67]

Nigeria argued that the arbitration exception did not apply because the Nigerian High Court had set aside the liability award, and therefore, there was no award to confirm.[68] Although the district court declined to address the arbitration exception, on appeal, the Court found that the application of the exception was 'straightforward, as all of the jurisdictional facts required by the statute exist'.[69] Specifically, the Court found that an arbitration agreement existed, and that there was also an arbitration award and a treaty governing the award.[70] Moreover, the New York Convention 'is exactly the sort of treaty Congress intended to include in the arbitration exception'.[71]

The Court flatly rejected Nigeria's argument that the arbitration exception did not apply because the Federal High Court of Nigeria had set aside the liability award.[72] This, the Court explained, was a merits question.[73] Accordingly, while Nigeria was not foreclosed from challenging the 'validity or enforceability' of the liability award on the merits, the legitimacy of the award had no bearing on the jurisdictional inquiry.[74]

64 28 USC § 1605(a)(6).
65 28 USC § 1605(a)(1).
66 *Process and Indus Dev Ltd*, 27 F4th at 774.
67 *Process and Indus Dev Ltd*, 27 F4th at 774 (citing 28 USC § 1605(a)(6)).
68 Id at 775.
69 Id at 776.
70 Id.
71 Id (citing *Creighton*, 181 F3d at 123-23).
72 Id at 776.
73 Id (citing *Diag Human, SE v Czech Republic-Ministry of Health*, 824 F3d 131, 138-38 (DC Cir 2016)).
74 Id.

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The waiver exception

The FSIA's waiver exception provides that a foreign state is not immune from the jurisdiction of the courts of the United States where 'the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver'.[75]

In finding that Nigeria's sovereign immunity had been abrogated by the waiver exception, the district court followed the Second Circuit's leading case on the subject.[76] Specifically, because there was no settled law within the District of Columbia Circuit, the district court relied on *Seetransport Viking Trader Schiffarhtsgesellschaft MBH & Co, Kommanditgessellschaft v Navinmpex Centrala Navala*[77]and found that Nigeria had impliedly waived its immunity under the FSIA because it agreed to an arbitration clause providing for arbitration in England – the United Kingdom is a New York Convention signatory – and Nigeria was itself a signatory to the Convention, and therefore, 'must have contemplated enforcement actions in other signatory states.'[78] Moreover, although the District of Columbia Circuit had not adopted *Seetransport*'s waiver rule, the district court noted that the former had 'opined in dicta that *Seetransport*'s reasoning is 'correct'.[79]

On appeal, the Court acknowledged that it had favourably cited *Seetransport* and its reasoning in dicta, but it clarified that the decision had not been formally adopted and declined to address the district court's application and interpretation of the waiver exception.[80] Specifically, the Court explained that the United States submitted an amicus curiae brief stating that the interpretation of the waiver exception 'may have implications for the treatment of the United States in foreign courts and for [its] relations with foreign states' and due to these 'significant policy concerns and the ready application of the arbitration exception,' it declined 'to wade into the murky waters of the waiver exception'.[81]

Impact of decision

The answer to the question of whether a foreign state – that is also a signatory to the New York Convention – can impliedly waive sovereign immunity under the FSIA by agreeing to arbitrate in a state that is also a signatory to the Convention has become somewhat muddled. However, under this scenario, regardless of whether the final arbitration award has been set aside, the foreign states' sovereign immunity will likely be found to have been abrogated under the FSIA's arbitration exception.

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75 28 USC § 1605(a)(1).
76 *Process and Indus Dev Ltd*, 27 F4th at 774.
77 989 F2d 572 (2d Cir 1993).
78 *Process and Indus Dev Ltd v Fed Republic of Nigeria*, 506 F3d 1, 7 (DDC 2020).
79 Id (citing *Creighton Ltd v Gov't of State of Qatar*, 181 F3d 118, 123 (DC Cir 1999).
80 *Process and Indus Dev Ltd*, 27 F4th at 774-75.
81 Id at 775, n.3.

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Florida Supreme Court

Adopting arbitration rules empowering arbitrators to decide arbitrability constitutes 'clear and unmistakable' evidence of agreement to delegate

Issue presented

In *Airbnb, Inc v Doe*,[82] the Florida Supreme Court on 31 March 2022, found that the incorporation by reference of the American Arbitration Association (AAA) arbitration rules in Airbnb's Terms of Service constitutes clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability away from the court and to the arbitrator.

Under *First Options of Chicago, Inc v Kaplan*,[83] the US Supreme Court held that courts – and not arbitrators – must decide questions of arbitrability unless there is clear and unmistakable evidence of the parties' intent to submit questions of arbitrability to the arbitrators. Following *First Options*, eleven of the twelve federal circuit courts of appeal have found that the incorporation by reference of arbitration rules into an agreement to arbitrate evidences the parties' clear and unmistakable intent to have the arbitrators, and not the courts, determine arbitrability.

Background

In 2016, a couple from Texas (John Doe, et al) rented a condominium unit in Florida using Airbnb. The unit was owned by Wayne Natt, who, according to the Does, secretly recorded the Does' entire stay in his unit. The Does sued both Natt and Airbnb in tort, claiming intrusion and loss of consortium. Airbnb moved to compel arbitration, arguing that under Airbnb's terms of service, the Does and Airbnb agreed to arbitrate any disputes arising from the rental under the AAA rules, which delegate issues of arbitrability to the arbitrator. Airbnb argued this reference provides clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability away from the court and to the arbitrator. Among other things, the Does argued that the mere incorporation by reference of AAA rules into Airbnb's terms and conditions did not evidence delegation of the question of arbitrability to the arbitrator.

82 No. SC20-1167, 2022 WL 969184 (Fla 31 March 2022).
83 514 US 938 (1995).

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The trial court sided with Airbnb, but the Florida Second District Court of Appeal reversed.[84] In a 2-1 decision, the Second District found that 'the clickwrap agreement's arbitration provision and the AAA rule it references that addresses an arbitrator's authority to decide arbitrability did not, in themselves, arise to clear and unmistakable evidence that the parties intended to remove the court's presumed authority to decide such questions'.[85] Because Florida's Third and Fifth District Courts of Appeal had reached the opposite conclusion on the question of arbitrability, the Florida Supreme Court accepted jurisdiction over the appeal.

Analysis

On 31 March 2022, the Florida Supreme Court quashed the Second District's opinion and held that incorporating by reference arbitration rules that empower arbitrators to decide arbitrability amounts to clear and unmistakable evidence of the parties' intent to remove such authority from the court and delegate it, exclusively, to the arbitrators.

In reaching its decision, the Court sought to prevent Florida from becoming an outlier, because all of the US federal circuit courts of appeal to consider the issue have consistently 'agreed that incorporation by reference of arbitral rules into an agreement that expressly empower an arbitrator to resolve questions of arbitrability clearly and unmistakably evidences the parties' intent to empower an arbitrator to resolve questions of arbitrability'.[86]

The Court made no mention that its decision is at odds with the Restatement of the US Law of International Commercial and Investor-State Arbitration. Professor George A Bermann, chief reporter of the Restatement, filed an Amicus Brief in support of the Does, addressing, among other things, how 'after lengthy deliberations, the [American Law Institute] membership in May 2019 unanimously endorsed the view that the presence of competence-competence language in incorporated rules of procedure fails to meet the *First Options* test'.[87]

The Miami International Arbitration Society (MIAS), on the other hand, filed an amicus brief in support of Airbnb. MIAS requested 'the Court reverse the Second District Court of Appeal and hold – in line with virtually every court that has addressed this issue – that adopting arbitration rules that empower the arbitrator to decide his or her own jurisdiction constitutes "clear and

84 *Doe v Natt*, 299 So 3d 599, 607 (Fla Dist Ct App 2020), review granted sub nom. *Airbnb, Inc v Doe*, No. SC20-1167, 2021 WL 798838 (Fla 2 March 2021), and quashed and remanded sub nom. *Airbnb, Inc v Doe*, No. SC20-1167, 2022 WL 969184 (Fla 31 March 2022).

85 *Natt*, 299 So 3d at 609-10.

86 2022 WL 969184, at *4.

87 Brief for George A Bermann as Amicus Curiae Supporting Respondents at 21, 2022 WL 969184 (citing to Restatement of the US Law of Int'l Commercial and Investor-State Arb § 2.8, art. b, Reporter's n. b (iii), (Am L Inst 2019).).

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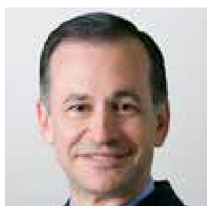
unmistakable" evidence that the parties agreed to arbitrate arbitrability', as the Court ultimately did.[88]

Impact of the decision

This decision shows how important it is for parties to pay careful attention to the language of their arbitration agreements to ensure they reflect the true intent of the parties and to avoid issues by specifying key points in the agreements.



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Adolfo Jiménez is a litigation attorney in Holland & Knight's Miami office whose practice focuses on international disputes. He leads the South Florida litigation practice group and also heads the firm's international arbitration and litigation team. He represents clients in disputes across numerous industries, including media, energy, maritime, infrastructure, transportation, hospitality, mining, construction, medical devices, pharmaceuticals, food distributors and technology. Mr Jiménez has extensive experience representing client arbitrations in English and Spanish before the International Chamber of Commerce (ICC), International Centre for Dispute Resolution (ICDR), American Arbitration Association (AAA), International Centre for Settlement of Investment Disputes (ICSID), China International Trade and Arbitration Commission (CIETAC) and cases administered under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. He has served in numerous cases as a sole arbitrator, panel chair and party-appointed arbitrator in proceedings conducted in English and Spanish. He also maintains an active federal and state court practice in which he represents clients in class actions, shareholder disputes, distribution agreements, mergers and acquisitions, unfair competition, fraud, trademark and copyright infringement, business torts and transportation disputes. Mr Jiménez is licensed to practise in the state of Florida.

88 Brief for Miami International Arbitration Society as Amicus Curiae Supporting Petitioner at 20, 2022 WL 969184.

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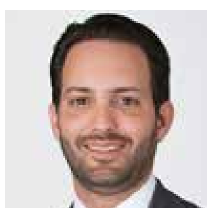

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