HOHENSTEIN & PARKINSON, LLP
info@hplawnyc.com
www.hplawnyc.com

LEGAL ALERT:

INTERNATIONAL ARBITRATION: A POSSIBLE NEW AVENUE FOR DISCOVERY IN THE UNITED STATES

3 May 2023
New York, New York

Introduction

In international commercial proceedings, the ability to obtain discovery of documents and the testimony of witnesses located in the United States is starkly different depending on the nature of the international proceeding.

For matters pending in a foreign court, a U.S. statute (28 U.S.C. § 1782) provides a relatively efficient way for discovery in the U.S. to be obtained.

That same U.S. statute cannot be used where the dispute is pending in a private international arbitration. Further, while the U.S. Federal Arbitration Act (9 U.S.C. §§ 1-16) has a provision regarding discovery, the effectiveness of that provision in the context of a subpoena issued in an international arbitration has been unclear.

However, a recent decision by a federal appellate court in California presents a possible new procedural avenue for obtaining discovery in the U.S. for use in a foreign private arbitration.

Background

28 United States Code § 1782

The caption of this statute is "Assistance to foreign and international tribunals and to litigants before such tribunals" and directs in pertinent part that:

> 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…The order may be made…upon the application of any interested person...[1]

It is well-established that a "foreign or international tribunal" includes commercial litigation involving private parties in a non-U.S. jurisdiction. It is equally clear that "any interested

[1] 28 U.S.C. § 1782(a).

person" includes the parties to such litigation. As such, the statute has been routinely applied to obtain discovery in the U.S. for use in non-U.S. litigation proceedings.

For a number of years, it was unclear whether "foreign or international tribunal" encompassed private international arbitrations. Various U.S. federal intermediate appellate courts had rendered different holdings on the issue creating what is colloquially known as a "split in the circuits".[2]

The "split in the circuits" has been resolved by the U.S. Supreme Court. In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, __ U.S. __, 142 S. Ct. 2078 (2022), the Court held that a private commercial arbitral panel was not a "tribunal" under the statute. *Id.* at 2091.

<u>The U.S. Arbitration Statutes</u>

The U.S. arbitration statutes are found in Title 9 of the United States Code and consists of three chapters. Chapter 1 (9 U.S.C. §§ 1 – 16) is captioned "General Provisions" and is popularly known as the Federal Arbitration Act ("FAA"). Chapter 2 (9 U.S.C. §§ 201 – 208) is captioned "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" and is the U.S. statutory enactment of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention").[3] Chapter 3 (9 U.S.C. §§ 301 – 307) is captioned "Inter-American Convention on International Commercial Arbitration".[4]

The FAA includes a discovery provision:

> The arbitrators…or a majority of them, 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…Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such

[2] *Compare Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020)(UK arbitral panel was a "tribunal"); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 722 (6th Cir. 2019)("tribunal" encompassed privately contracted-for arbitral body) *with Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 696 (7th Cir. 2020)(statute did not apply to private foreign arbitration); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999)(private international arbitration body not a "tribunal"); *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999)("tribunal" does not include private commercial arbitration).
[3] 21 U.S.T. 2517, T.I.A.S. No. 6997.
[4] Chapter 3 is not relevant to the issue addressed in this Legal Alert.

> person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7.

In contrast to the discovery devices and procedures available to parties in U.S. federal litigation, there are a number of limitations in FAA § 7, e.g., only the arbitrators can issue the summons and the evidence must be presented in a hearing before the arbitrators.[5] Indeed, such differences were part of the rationale of the Supreme Court's decision in *Luxshare*:

> Extending § 1782 to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because § 1782 permits much broader discovery that the FAA allows. Among other differences, the FAA permits only the arbitration panel to request discovery…while the district courts can entertain § 1782 requests from foreign or international tribunals or any 'interested person,' 28 U.S.C. § 1782(a)…Interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration.

142 S. Ct. at 2088 (other citations omitted).

Turning to Chapter 2 of Title 9, it is important to note that under § 203 that an action or proceeding related to an arbitration agreement "falling under" the Convention is subject to the original jurisdiction of the U.S. district courts.[6] There is also a specific venue provision in the Chapter, § 204, which allows that actions brought under § 203 "may" be brought in any U.S. federal court "which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought…" Further, in accordance with § 208: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States."

---

[5] The details and precedent concerning the interpretation and use of FAA § 7 are beyond the scope of this Legal Alert.

[6] "For an arbitration agreement to be covered by the Convention, four requirements must be met: (1) there must be an agreement in writing to arbitrate the dispute; (2) the agreement must provide for arbitration in the territory of a Convention signatory; (3) the agreement must arise out of a commercial legal relationship; and (4) at least one party to the agreement must not be an American citizen." *Stemcor USA Inc. v. CIA Siderurgica do para Cosipar*, 927 F.3d 906, 909-10 (5th Cir. 2019)(citations omitted). Moreover, there is no requirement that <u>any</u> party to the arbitration agreement be a U.S. citizen. *See, e.g., Rhone Mediteranee Compagnia Francese Assicurazioni e Riassicurazoni v. Achille Lauro*, 712 F.3d 50, 52 (3d Cir. 1983)(all parties to the contract falling under the Convention were Italian).

Having discussed the statutory framework, we will now turn to the discussion of the recent California decision of interest.

***Jones Day v. Orrick, Herrington & Sutcliffe, LLP*, 42 F.4th 1131 (9th Cir. 2022)**

A recent decision of the U.S. Court of Appeals for the Ninth Circuit provides analytical support for the notion that the arbitrators participating in an arbitration falling under the Convention can use FAA § 7 to obtain discovery in the U.S. from third parties, even if the *situs* of the arbitration is outside the U.S.

In *Jones Day*, a partner (a German national) of that law firm based in its Paris office left and joined the law firm of Orrick, Herrington & Sutcliffe, LLP. The Jones Day partnership agreement provided for mandatory arbitration of disputes among its partners which arbitration was to be governed by the FAA. Washington, D.C. was the location of the arbitration designated in the agreement. Jones Day requested that the arbitrator issue a subpoena on Orrick for documents Jones Day asserted were material to the dispute. Initially, the subpoena required compliance in Washington, D.C. but Orrick refused to comply. The local court dismissed the enforcement action on jurisdictional grounds. *Id*. at 1134.

Jones Day took further action:

> Jones Day then requested that the arbitrator sit for a hearing in the Northern District of California and issue a revised subpoena requiring two Orrick partners residing in the Northern District to appear at a hearing in San Jose, California. The arbitrator granted Jones Day's request and issued the arbitral summonses. Orrick refused to comply with those summonses, so Jones Day filed this action to enforce them in the District Court for the Northern District of California.
>
> The District Court denied Jones Day's petition, concluding that it lacked authority to compel compliance with the summonses under FAA § 7, which it construed as providing that the district where the arbitrator sits is the only district in which a district court may compel attendance. *See* 9 U.S.C. § 7. Reasoning that 'it is undisputed that Washington D.C. is the seat of the underlying arbitration,' the district court rejected Jones Day's argument that an arbitrator can 'sit' in more than one location, and that for the purposes of the hearing in San Jose, the arbitrator would be sitting in the Northern District. Because it dismissed Jones Day's petition on venue grounds, the district court declined to decide whether Chapter Two of the FAA conferred subject matter jurisdiction over actions to enforce an arbitral summons to a third party.

Id.

In reversing the District Court's decision, the Ninth Circuit found the following:

- The petition to compel compliance with the subpoena is an action or proceeding falling under the Convention. *Id*. at 1135.

- The arbitration agreement itself falls under the Convention. *Id*.

- "Neither the Convention nor Chapter 2 contains any language excluding the use of petitions to enforce arbitral summonses. There is no language in either that limits the tools that may be utilized in international arbitrations in ways domestic arbitrations are not so limited. The only limitation is set forth in § 208, which as the Supreme Court noted in *GE Energy* [*Power Conversion France SAS, Corp. v. Outkumpu Stainless USA, LLC*, ___ U.S. ___, 140 S. Ct. 1637, 1644-45, 207 L.Ed.2d 1 (2020)], disallows only those processes provided for in domestic arbitrations under Chapter One that conflict with Chapter Two or the Convention. 9 U.S.C. § 208…Far from conflicting with the Convention, judicial enforcement of an arbitrator's summons only aids in the arbitration process. We therefore conclude that 'Section 7 [of the FAA] is a nonconflicting provision in Chapter 1 that residually applies through Chapter [ ] 2.' Restatement (Third) U.S. Law of Int'l Comm. Arb. § 3.4(e) (Am. Law Inst., Prop. Final Draft (April 24, 2019))("Restatement Prop. Final Draft")(citing 9 U.S.C. §§ 203 and 208). *Id*. at 1136.

- "We hold that a federal court has original jurisdiction over an action or proceeding if two requirements are met: (1) there is an underlying arbitration agreement or award that falls under the Convention, and (2) the action or proceeding relates to that arbitration agreement or award….Thus, under 9 U.S.C. § 203, the district court had subject matter jurisdiction to enforce the petitions to comply with the arbitral summonses." *Id*. at 1138-39 (citations omitted).

- Concerning venue, § 204 is a "permissive" venue statute, and when read in conjunction with the general federal venue statute, meant that the Northern District of California was a proper venue to enforce the summonses. *Id*. 1140-42.

- As such, "we reverse and remand with instructions to enforce Jones Day's petitions to compel Orrick and its partners to comply with the arbitral summonses." *Id*. at 1142.

In summary, Jones Day is an important jurisdictional decision. Prior to its issuance "no federal court of appeals had explicitly held that an action to enforce an international arbitral subpoena constitutes an action 'falling under the Convention' for the purpose of federal subject matter jurisdiction under §203 and that such a subpoena may be enforced under § 7 of the FAA."[7]

---

[7] T. Meshel, "Enforcing international arbitral subpoenas in the United States", *Arbitration International*, 2023, XX, 1, 11 (advance access to publication, 16 March 2023).

Conclusion

The holding in *Jones Day* is centered on the international nature of the underlying arbitration.

While the contractually-designated place of arbitration in *Jones Day* was Washington, D.C., there should not have been any difference in the outcome if the designated place of arbitration was a non-U.S. location, assuming the "falling under" factors had been met.

As a practical matter, if the arbitrators in a non-U.S. location determined that a subpoena directed against a third party in the U.S. was appropriate, at a minimum it would mean that those arbitrators (or at least one of them in a multiple arbitrator situation) would need to be present in the U.S. district in which the subpoena target is resident and the evidence would need to be presented to the arbitrators in a live physical hearing.[8]

Some cautionary notes:

- While there is academic support for the procedure described here,[9] as far as can be ascertained, the procedure has yet to be tested in litigation.

- Given the differing treatment of various arbitral discovery issues in the U.S. federal courts, prior to the commencement of any such procedure, careful consideration of the specific holdings in the target jurisdiction would need to be reviewed.

- It is fair to assume that the target of the subpoena (as in *Jones Day*) will resist any enforcement action, which as in that case, could include appellate proceedings: the timeline of such proceedings could well be a year or more.

All that said, if the evidence located in the United States is crucial and the matter of sufficient importance to justify moving the arbitrators to the target jurisdiction, the *Jones Day* procedure is a viable action and worthy of being asserted and tested in the U.S. courts.

[8] This statement is based on various court precedents holding that the physical hearing requirement is not met by way of a videoconference hearing. *See, e.g., Broumand v. Joseph*, 522 F.Supp.3d 8, 23-24 (S.D.N.Y. 2021)(a videoconference does not meet the physical hearing/geographic limits requirements of arbitral subpoenas).
[9] T. Meshel, *supra* at 16-18.

For further information, contact:

James H. Hohenstein
Partner
jim.hohenstein@hplawnyc.com
(917) 873-2528

Sheryl K. Parkinson
Partner
sheryl.parkinson@hplawnyc.com
(646) 251-2410

Information contained in this legal alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem, and it should not be substituted for legal advice, which relies on a specific factual analysis. Moreover, the laws of each jurisdiction are different and are constantly changing. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. If you have specific questions regarding a particular fact situation, we urge you to consult the authors of this publication or other competent legal counsel.

Attorney Advertising. Copyright © 2023 Hohenstein & Parkinson, LLP   Legal Disclaimer | Privacy Policy