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U.S. Supreme Court Holds that Section 1782 Discovery does not Apply to Private Foreign or International Arbitration Proceedings

On June 13, 2022, the U.S. Supreme Court issued a long-awaited opinion on the scope of 28 U.S.C. § 1782 ("**Section 1782**"), unanimously holding that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" for purposes of Section 1782. Thus, Section 1782 applications cannot be used to obtain discovery in aid of private arbitration proceedings abroad. The two consolidated cases before the Court both involved parties seeking discovery in the United States for the use in foreign private arbitrations, but involved different tribunals; one case involved a private commercial arbitration, while the other involved an ad hoc investment arbitration. The Supreme Court held that both arbitral bodies did not constitute a "foreign or international tribunal," and thus ruled that parties to private arbitrations abroad may not obtain U.S. discovery for use in those arbitration proceedings. This decision settles a long-outstanding circuit split concerning whether a private arbitral body constitutes a "foreign or international tribunal" within the meaning of Section 1782.

1. Summary:

- A district court may grant an ex parte Section 1782 application if (i) the person from whom discovery is sought resides or is found in the district of the district court in which the application is made; (ii) the application is made by an interested person; and (iii) the discovery is for use in a foreign or international tribunal. As such, the district courts are authorized to grant a Section 1782 applicant certain discovery, including depositions and documentary productions, for use in a proceeding before a "foreign or international tribunal."

- The ambiguity relating to what qualified as a "foreign or international tribunal" previously allowed parties to obtain U.S. discovery through Section 1782 in some circuits (e.g., U.S. Courts of Appeals for the Fourth and Sixth Circuit) despite having contracted to resolve their disputes through private arbitrations abroad. This often meant that parties to international arbitrations could in some circumstances obtain more discovery through a Section 1782 application to the U.S. courts than parties in U.S.-based arbitration proceedings.

- The Supreme Court has now held that under Section 1782(a), only a governmental or intergovernmental adjudicative body qualifies as a "foreign or international tribunal," and, therefore, private foreign arbitrations like private international commercial arbitrations or ad hoc investor-state arbitrations are excluded from the reach of Section 1782.

2. Background:

The Court's decision resolved two companion cases. The first case, *ZF Automotive US, Inc. v. Luxshare, Ltd*., involved a U.S. company and a Hong Kong based company. The Hong Kong company, Luxshare, alleged fraud in a sales transaction which provided a clause that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration, a private association based in Berlin. Pursuant to Section 1782, Luxshare filed a Section 1782 application before a federal district court in Michigan to obtain discovery to support its claim that ZF had fraudulently concealed certain facts and developments regarding a significant decline in business relationships. Luxshare filed a Section 1782 application in federal court, seeking information from ZF. The U.S. company, ZF, moved to quash Luxshare's Section 1782 application, arguing that the arbitral panel was not a "foreign or international tribunal" within the meaning of Section 1782. The district court denied ZF's motion and instead ordered ZF to produce documents and an officer to sit for a deposition, holding that a private commercial arbitral body qualifies as a "foreign or international tribunal" pursuant to Section 1782. The Sixth Circuit denied ZF's request for a stay. ZF then filed a petition for certiorari, and the Supreme Court granted certiorari (and ultimately reversed the decision).

In the second case before the Court, *AlixPartners, LLP v. Fund for Protection of Investor's Rights in Foreign States*, AlixPartners, a failed Lithuanian bank, was declared insolvent and nationalized by the Lithuanian government. The Fund, a Russian entity, commenced arbitration against the Lithuanian government under UNCITRAL rules, pursuant to the Russia-Lithuania Bilateral Investment Treaty (the "**BIT**") claiming that Lithuania expropriated its investments. The BIT established a procedure for resolving any dispute between the contracting party and an investor regarding investments in the contracting party's territory. The Fund brought an ad hoc UNCITRAL arbitration and later applied for Section 1782 discovery from AlixPartners. During the pendency of the Section 1782 application, AlixPartners argued that the ad hoc arbitration brought by the Fund was not a "foreign or international tribunal" under Section 1782. The district court rejected that argument and granted The Fund's discovery request. On appeal, the Second Circuit affirmed, holding that the UNCITRAL arbitral panel was a "foreign or international tribunal," as it derived its adjudicative authority from the BIT itself.

3. The Supreme Court's Decision:

The Supreme Court held that under Section 1782 a "foreign or international tribunal" only means a governmental or intergovernmental adjudicative body. The Supreme Court reasoned that the term "foreign tribunal" suggests a tribunal belonging to a foreign nation, and thus must possess sovereign authority conferred by a nation. The Supreme Court added that an "international tribunal" is a tribunal that involves two or more nations, meaning that those nations provided the tribunal with power to resolve disputes. In *ZF*, the parties were privately held entities that contractually agreed to arbitrate; no government was involved in creating the panel or defining its procedure. The Court explained that a commercial arbitral tribunal does not qualify as a

governmental body solely because the law of the country where the arbitration takes place governs the arbitration or because that country's courts enforce arbitration agreements. Thus, the Court held in *ZF* that Section 1782 could not be used to obtain discovery for use in the private commercial arbitration taking place in Germany.

In *AlixPartners*, Lithuania's government was a party to the dispute and a BIT between Lithuania and Russia provided for ad hoc arbitration. The Court in *AlixPartners* reasoned that neither Lithuania's presence nor the fact the BIT governed the proceeding were decisive. Instead, the relevant question was whether the two governments intended to confer governmental authority on the ad hoc arbitration tribunal. The Court observed that the ad hoc tribunal was not a pre-existing dispute resolution tribunal, but rather one that was created solely for the purpose of settling investor-state disputes, and that the arbitrators who were chosen by the parties were not associated with the parties' governments. Further, the BIT only provided the procedural rules and did not establish the arbitral tribunal. Thus, the Court concluded that an arbitral tribunal does not have governmental authority just because governments agree to arbitrate in a BIT and held that the ad hoc tribunal in *AlixPartners* was not a "foreign or international tribunal" and was no different from the private arbitral panel in *ZF* because both tribunals derived their authority from the parties' consent. The Court observed that the principal rationales which support federal court assistance to "foreign or international tribunals" are: (i) to assist governmental bodies and (ii) to support judicial assistance between the United States and foreign countries in order to encourage comity and reciprocity. Given this observation, the Court concluded that comity is not promoted by assisting private bodies in resolving disputes. In addition, the Court concluded that extending Section 1782 to private foreign arbitral bodies is inconsistent with the Federal Arbitration Act (the "FAA"), which governs U.S.-based arbitration proceedings, because the FAA does not grant broad discovery rights as are available under Section 1782.

Accordingly, the Court in *ZF and AlixPartners*, reversed the lower courts' decisions, ruling that the Section 1782 applications in both cases should have been denied.

4. Key takeaways for our clients:

- The Supreme Court's decision resolved a long-existing circuit split concerning whether discovery pursuant to Section 1782 is available in aid of foreign or international private arbitration proceedings.

- This decision effectively denies parties to private foreign and international arbitration proceedings access to U.S.-based discovery through Section 1782. While this decision restricts the parties' ability to obtain evidence through the U.S. courts, it may foster streamlined arbitration proceedings.

- This decision ensures that parties to private foreign arbitrations do not have broader access to discovery than parties in private domestic arbitrations. Under the FAA, parties to private domestic arbitrations may not apply directly to a federal court for discovery assistance, but

must instead generally pursue any discovery applications through the arbitration proceeding.

- This decision precludes the use of Section 1782 in arbitrations pursuant to a bilateral investment treaty or similar international treaty, where the treaty does not confer governmental authority on the arbitral body. It remains to be seen, however, whether the Court's decision will prevent the use of Section 1782 in bilateral investment treaty arbitrations conducted through the International Centre for Settlement of Investment Disputes ("ICSID"), as the Court did not explicitly address arbitrations arising under the ICSID.

- Foreign and international arbitration proceedings are often confidential. This decision helps to maintain that confidentiality by preventing parties from initiating litigation in federal courts under Section 1782, in which court filings are generally matters of public record, and in which some discovery documents and testimony may become public.

- Parties considering initiating arbitration proceedings should be confident in the merits of their claims based on the evidence already available to them. The Court's ruling will help ensure that private arbitrations are more cost-effective and expedient than traditional litigation in the U.S., given that the scope and availability of discovery will generally be less extensive in arbitration.

Further information

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