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Supreme Court Bars Discovery in Aid of Foreign Arbitrations

U.S. Supreme Court Rules That 28 U.S.C. § 1782 Does Not Authorize Discovery in Aid of an International Commercial Arbitration or an Ad Hoc Investor-State Arbitration

SUMMARY

Under 28 U.S.C. § 1782, U.S. federal district courts may grant interested parties discovery "for use in a proceeding in a foreign or international tribunal."[1] In a unanimous decision issued on June 13, 2022, the U.S. Supreme Court ruled in *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, that arbitral tribunals constituted in (i) a private international commercial arbitration or (ii) investor-state disputes under a bilateral investment treaty do not qualify as a "foreign or international tribunal."[2] The Court held that this phrase only includes governmental or intergovernmental bodies, and that the arbitral panels at issue did not qualify.[3] Accordingly, the parties in those arbitrations could not use Section 1782 to obtain discovery in the United States.

BACKGROUND

Section 1782 is the U.S. federal statutory provision that permits interested parties to apply to a district court for a subpoena to obtain documents or testimony from persons in the United States "for use in a proceeding in a foreign or international tribunal."[4] The Court consolidated two cases in which a party sought discovery in the United States for use in arbitration proceedings abroad pursuant to that statute.[5] In the first case, Luxshare, Ltd. ("Luxshare"), a Hong Kong-based company, alleged fraud in a sales transaction with ZF Automotive US, Inc. ("ZF"), a Michigan-based automotive parts manufacturer and subsidiary of a German corporation.[6] The sales contract provided that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), which is a private arbitral institution based in Berlin.[7] In anticipation of commencing the arbitration, Luxshare filed an application in the Eastern

District of Michigan seeking issuance of subpoenas under Section 1782.[8] The District Court granted the discovery request.[9] ZF moved to quash the subpoenas, arguing that an arbitral tribunal constituted under DIS pursuant to a private contract was not a "foreign or international tribunal" under Section 1782.[10] The District Court denied the motion to quash.[11] The Sixth Circuit denied a stay pending appeal.[12] The Supreme Court granted a stay and certiorari before judgment.[13]

In the second case, the Fund for Protection of Investors' Rights in Foreign States (the "Fund"), a Russian corporation assignee of the rights of a Russian investor in a bankrupt Lithuanian bank, AB bankas SNORAS ("Snoras"), initiated an ad hoc UNCITRAL arbitration against Lithuania under a bilateral investment treaty between Lithuania and Russia, claiming that Lithuania expropriated certain investments from Snoras.[14] The Fund filed an application for discovery under Section 1782 in the Southern District of New York, seeking information from third parties, including the consulting firm AlixPartners.[15] AlixPartners objected, arguing that the ad hoc arbitration panel was a private adjudicative body rather than a "foreign or international tribunal" under Section 1782.[16] The District Court rejected that argument and granted the Fund's discovery request.[17] The Second Circuit affirmed, concluding that the ad hoc UNCITRAL arbitration under the bilateral investment treaty constituted a "foreign or international tribunal" under Section 1782.[18]

THE SUPREME COURT'S DECISION

The Court considered two issues in the cases: (1) whether the phrase "foreign or international tribunal" in Section 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies, and (2) whether the arbitral panels in the two cases qualified as private adjudicative bodies or governmental or intergovernmental bodies.[19]

On the first issue, the Court concluded that the term "tribunal," when attached to the modifiers "foreign or international" as in Section 1782, is "best understood to refer to an adjudicative body that exercises governmental authority."[20] In particular, the Court reasoned that a "foreign tribunal" refers to "a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation."[21] Similarly, the Court found that an "international tribunal" refers to a tribunal that "involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[22]

In reaching this interpretation, the Court relied on "both the statute's history and a comparison to the Federal Arbitration Act" (the "FAA").[23] The Court explained that the intent of Congress in adopting the legislation that became Section 1782 was to provide assistance and cooperation between the United States and foreign countries and in particular foreign courts and quasi-judicial agencies. The Court further found that a key purpose of § 1782 is comity, and "permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance," while "lend[ing] the resources of district court to aid purely private bodies adjudicating purely private disputes abroad" does not necessarily do so.[24] The Court also noted that "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 than the FAA allows."[25] The Court explained that "interpreting § 1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration."[26] In sum, the Court held that § 1782 requires a "foreign or international tribunal" to be a governmental or intergovernmental body, and thus, a private adjudicatory body does not fall within the statute.[27]

The Court then applied its interpretation to the two arbitrations at issue. In the first case, the Court analyzed the arbitral panel in Luxshare's dispute with ZF constituted under the DIS rules, and held that the panel did not qualify as a governmental or intergovernmental body.[28] The Court reasoned that the DIS arbitral panel was formed by the parties pursuant to a private contract and that no government was involved in creating the panel or prescribing its procedures.[29] The Court rejected Luxshare's argument that since the law and courts of the country in which it would sit govern some aspects of arbitration, a commercial arbitral panel like the DIS panel qualifies as governmental, and noted that "private entities do not become governmental because laws govern them and courts enforce their contracts."[30]

The Court acknowledged that the investor-state arbitration in the second case "present[ed] a harder question." Although a sovereign was a party to the dispute, and the arbitration clause was contained in an international treaty between two nations rather than a private contract, the Court held that the arbitral panel did not qualify as a governmental or an intergovernmental body.[31] The Court reasoned that "neither Lithuania's presence nor the treaty's existence is dispositive," and "what matters is the substance of their agreement."[32] The Court explained that the treaty at issue offers an investor a choice of four forums to resolve disputes, including national courts, which reflects the intent of Russia and Lithuania to give investors the choice of where to bring their disputes before a pre-existing governmental body.[33] The Court further explained that the ad hoc arbitration panel is not a pre-existing body, but is formed for the purpose of adjudicating investor-state disputes.[34] The Court further found that "nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority."[35]

IMPLICATIONS

The Court's decision resolves a long-standing Circuit Court split on whether private international commercial arbitrations fall within the scope of Section 1782, and clearly holds that they do not. Thus, parties involved in or anticipating private international commercial arbitrations will no longer be able to invoke § 1782 to obtain discovery in the United States for use in such a proceeding.

The decision is also likely to substantially narrow, if not foreclose, the use of Section 1782 for discovery in aid of investor-state arbitrations. However, it remains to be seen how lower courts will apply this decision in the context of anticipated or actual arbitral proceedings brought under investment treaties with terms that differ from the Russia-Lithuania treaty at issue in the case. The Court's decision on this front relied heavily

on the particular terms of that treaty, which provided for ad hoc arbitration under the UNCITRAL rules as an option for resolving an investment dispute. Some treaties, for example, direct that disputes be resolved through arbitrations under the ICSID Convention, which have several distinct characteristics from ad hoc arbitrations.

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ENDNOTES

1 28 U.S.C. § 1782(a).

2 *ZF Automotive US, Inc.*, No. 21-401, 2022 WL 2111355 (June 13, 2022).

3 *Id.*

4 *Id.* (citing 28 U.S.C. § 1782(a)).

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 *Luxshare, Ltd.* v. *ZF Auto. US, Inc.*, No. 2:20-MC-51245, 2021 WL 2154700, at *15 (E.D. Mich. May 27, 2021).

10 *Id.*

11 *Id.*

12 *Luxshare, Ltd.* v. *ZF Auto. US, Inc.*, 555 F. Supp. 3d 510, 519 (E.D. Mich. July 1, 2021).

13 *ZF Automotive US, Inc.*, No. 21-401, 2022 WL 2111355, at *4 (June 13, 2022).

14 *Id.* at *3.

15 *Id.*

16 *Id.*

17 *In re Fund for Prot. of Inv. Rts. in Foreign States*, No. 19 MISC. 401 (AT), 2020 WL 3833457, at *4 (S.D.N.Y. July 8, 2020).

18 *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding* v. *AlixPartners, LLP*, 5 F.4th 216, 233 (2d Cir. 2021).

19 *ZF Automotive US, Inc.*, No. 21-401, 2022 WL 2111355, at *5 (June 13, 2022).

20 *Id.*

21 *Id.* at *6.

22 *Id.*

23 *Id.* at *7.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.* at *8.

29 *Id.*

30 *Id.*

31 *Id.*

ENDNOTES (CONTINUED)

[32] *Id.*

[33] *Id.* at *9

[34] *Id.*

[35] *Id.*

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