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Supreme Court Limits Section 1782 Discovery in International Arbitrations

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This is the third in a series of Legal Updates about international discovery and cross-border litigation. Robinson+Cole has broad experience representing international clients and their U.S. subsidiaries in both domestic and international disputes. If you have any questions about this article or cross-border litigation, please contact the attorneys listed below.

International arbitration just got cheaper for U.S. companies. Until now, U.S. participants in international arbitration could face U.S.-style discovery through 28 U.S.C § 1782. This meant they (and third parties) might have to produce documents and face depositions even though they were not in court. That just changed with a decision issued on June 13, 2022, by the Supreme Court that § 1782 does not apply to private international arbitration. That means U.S. companies will no longer face the time, exposure, and expense of U.S.-style discovery that Section 1782 had injected into those proceedings.

1. Section 1782 and the Supreme Court's Ruling

The Supreme Court's decision resolves a deep circuit split over whether private commercial arbitrations qualify for § 1782 discovery. Section 1782 originally permitted discovery for use only in "any judicial proceeding in any court in a foreign country." Congress later amended § 1782 to allow a district court to order a person who "resides or is found" in its jurisdiction to provide evidence "for use in a proceeding in a foreign or international tribunal." Section 1782 does not define "tribunal." The decision to replace the word "court" with "tribunal" indicates Congress intended to broaden the application of § 1782, but, until now, it was unclear how broadly courts should interpret "tribunal."

In its ruling in this consolidated appeal—*ZF Automotive U.S., Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. The Fund for Protection of Investors Rights in Foreign States*—the Supreme Court held that "a foreign or international tribunal" does not include a private arbitral panel. The dispute between Luxshare and ZF arose from a private commercial arbitration in Germany between ZF Friedrichschafen AG, a German company, and Luxshare, a Hong Kong company. Luxshare filed a § 1782 application in a federal district court in Michigan to obtain discovery from a U.S. subsidiary of ZF Friedrichshafen AG to demonstrate that it had been fraudulently induced to sign a contract.

The second case stemmed from an international ad hoc arbitration between the Fund for Protection of Investors Rights in Foreign States (the assignee of a Russian investor) and the Republic of Lithuania pursuant to a bilateral investment treaty between Russia and Lithuania. The Fund alleged that the government of Lithuania expropriated the investment of a Russian investor in a failed Lithuanian bank. To help in the merits phase of the arbitration, the Fund filed a § 1782 request for discovery from AlixPartners, a New York consulting firm which had served as bankruptcy receiver for the Lithuanian bank.

In reaching its holding, the Supreme Court did not evaluate "tribunal" as a stand-alone term, but instead interpreted the word as part of the phrase "foreign or international tribunal."[1] The Court concluded that the word "foreign" takes on a governmental meaning when it modifies a word with "potential governmental or sovereign connotations."[2] Deciding that the term "tribunal" is a word with potential governmental or sovereign connotations, the Court reasoned a "foreign tribunal" refers to a tribunal belonging to a foreign nation, which must possess sovereign authority conferred by that nation.[3] As for the word "international," the court cited the dictionary definition for the term - "involving of two or more nations" - to determine that an international tribunal is one involving two or more nations that have imbued the tribunal with official power to adjudicate disputes.[4] In other words, "foreign tribunal" and "international tribunal" complement one another: a "foreign tribunal" refers to a governmental body of one foreign nation whereas an "international tribunal" refers to a tribunal that two or more nations have imbued with governmental authority.

The Court also relied on the statute's history and a comparison to the Federal Arbitration Act (FAA) to support that a "foreign or international" tribunal requires governmental authority.[5] First, the statutory history makes clear the purpose of § 1782 is comity, and mandating district courts to help private bodies adjudicating purely private disputes abroad would not serve that purpose.[6] Additionally, if § 1782 extended to include private arbitrations abroad, it would be in tension with the FAA, which governs domestic arbitration and permits much more-limited discovery than § 1782.[7]

The Court next decided whether the private arbitrations in these cases exercise governmental authority allowing for § 1782 discovery. The private arbitration between Luxshare and ZF will take place under the rules of the German Arbitration Institute. Rejecting Luxshare's argument that the private arbitration is under government authority because it is governed by German law as "implausibl[e]," the Supreme Court concluded the case is purely private and § 1782 discovery is unavailable.[8] Noting that the Fund's case was a tougher call, the Supreme Court determined the ad hoc arbitration panel does not have governmental authority because the panel, whose members are chosen by the parties, is not affiliated with Russia or Lithuania and functions independently of both nations.[9] In other words, the Fund's ad hoc panel is no different from the private arbitration panel in Luxshare.

2. What's Next for Discovery in Private Commercial Arbitrations Abroad?

At a time when litigants have increasingly relied on U.S. federal courts to acquire otherwise unobtainable evidence from entities located within the U.S., the Supreme Court has decisively closed the door to U.S.-style discovery in private arbitrations abroad. Although the Supreme Court's decision curtails the discovery available to participants in foreign or arbitration arbitrations, the Supreme Court's decision may result in streamlined arbitrations abroad. The decision also levels the playing field when one participant in the arbitration is located within the U.S. Following the Supreme Court's decision, companies within the U.S. can rest assured that their exposure to U.S.-style discovery has been significantly limited in the context of private arbitrations.

FOR MORE INFORMATION

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ENDNOTES

[1] ZF Automotive US, Inc. v. Luxshare, Ltd., 21-401, at 6–7; AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States, No. 21-518, at 6–7.
[2] Id. at 7.
[3] Id.
[4] Id. at 8-9.
[5] Id. at 9–11.
[6] Id. at 9–10.
[7] Id. at 11.
[8] Id. at 11–12.
[9] Id. at 12–16.