International Arbitration

US Supreme Court Holds That US Courts Cannot Assist Discovery in Private Foreign or International Arbitrations

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Litigants in foreign arbitrations have long looked to 28 U.S.C. § 1782 as a potential avenue for obtaining something close to US-style discovery. But, the US Supreme Court unanimously held this week that this federal statute allowing US courts to assist "foreign or international tribunal[s]"[1] in gathering evidence does not apply to private adjudicative bodies, such as private international commercial arbitral tribunals.[2] The Court's opinion in *ZF Automotive US, Inc. v. Luxshare, Ltd.,* 596 U.S. ___ (2022), thus forecloses parties' utilization of 28 U.S.C. § 1782(a) to obtain discovery in the United States for use in purely private international arbitrations and has the following implications:

- Parties to private international arbitrations now have clarity regarding their options for seeking discovery. The prior circuit split, described in this client alert, caused uncertainty and allowed for forum shopping.
- Parties will have more limited options to develop evidence in private international arbitration proceedings with a US nexus, although certain state-law options may still be available.
- Parties will no longer be able to use § 1782 to publicize commercial arbitration proceedings that are intended to be confidential.
- Section 1782 will also not be an available tool in at least some investor-state arbitrations—namely, those conducted pursuant to bilateral investment treaties that do not confer governmental authority on the arbitral body, such as those governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). It is unclear whether investor-state arbitrations conducted through organizations with governmental connections, most notably the International Centre for Settlement of Investment Disputes (ICSID), would qualify.

Summary of Opinion

In the opinion written by Justice Amy Coney Barrett, the Court's reasoning proceeded in two steps: first, it resolved the circuit split described in this client alert concerning whether the reference in § 1782 to "a foreign or international tribunal," includes "private adjudicatory bodies," and second, it addressed whether the two types of proceedings at issue constituted "foreign or international tribunals" under its interpretation of that phrase.

In concluding that § 1782 reaches "only bodies exercising governmental authority," not "private adjudicatory bodies," the Court focused on the definitions of the terms "foreign" and "international" and their modification of "tribunal." 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 "to belong to a foreign nation" means that "the tribunal must possess sovereign authority conferred by that nation." The Court noted that the statutory defaults for the discovery procedure in § 1782 reinforced its reading of "foreign tribunal" because § 1782 permits district courts to "prescribe the practice and procedure, which may be in whole or part *the practice and procedure of the foreign country or the international tribunal,"* for taking the testimony or producing the documents. "The statute thus presumes that a 'foreign tribunal' follows 'the practice and procedure of the foreign country.'" The Court thus interpreted "foreign tribunal" to mean a tribunal "that exercises governmental authority conferred by a single nation."

The Court determined that "a tribunal is 'international' when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes." The Court thus interpreted "international tribunal" to mean a tribunal "that exercises governmental authority conferred by two or more nations."

The Court also analyzed the history of § 1782 and compared it to the Federal Arbitration Act ("FAA") to reach its conclusion. It noted that "the animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promoted respect for foreign governments and encourages reciprocal assistance." "[E]nlisting district courts to help private bodies" would not "serve that end." The Court also recognized that § 1782 allows broader discovery than the FAA, leading it to the conclusion that "[i]nterpreting § 1782 to reach private arbitration would … create a notable mismatch between foreign and domestic arbitration."

The Court then addressed whether each of the two particular proceedings before it constituted a "foreign or international tribunal" under its interpretation of that phrase, holding that § 1782 applied to neither.

The first "straightforward" case involved a private dispute that arose under a private contract that contained a provision mandating that the dispute be arbitrated by a private dispute-resolution organization—the German Institution of Arbitration e.V. (DIS). The Court determined that the private commercial arbitral panel did not qualify as a "foreign or international tribunal" because "[n]o government is involved in creating the . . . panel or prescribing its procedures."

The second case presented "a harder question." That case involved a bilateral investment treaty ("BIT") dispute between Lithuania and a Russian private investor before an ad hoc three-member panel under UNCITRAL Rules. After commencing the arbitration, the private party had filed a § 1782 application seeking information from third parties, including AlixPartners LLP and its CEO.

The Court homed in on one key question to determine whether the proceeding constituted a "foreign or international tribunal": Did the two countries that formed the treaty "intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" The Court concluded that they did not in this case, making the following observations:

- Ad hoc arbitration was one of four options for dispute resolution in the Russia-Lithuania BIT, and the inclusion of a separate option to bring the dispute before a "competent court or court of arbitration" belonging to Lithuania or Russia reflected the two countries' intent to give investors the option of raising their disputes before "a pre-existing governmental body," which ad hoc panels are not.
- Nothing in the BIT signaled the countries' intent that the ad hoc panel exercise governmental authority. For example, "the treaty does not itself create the panel," "the ad hoc panel 'functions independently' of and is not affiliated with either Lithuania or Russia," and "it lacks other possible indicia of a governmental nature," such as receiving government funding or requiring the proceedings or award to be made public without consent of the parties.
- The ad hoc panel "is 'materially indistinguishable in form and function' from the DIS panel."

The Court was careful to note that its decision did not "foreclose[] the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority." While it did not identify a particular test to determine whether an ad hoc arbitration panel is imbued with governmental authority, such that it would be deemed a "foreign or international tribunal," it noted several distinguishing features of two past adjudicatory bodies over which "[t]here appears to be broad consensus that these bodies would qualify as intergovernmental." The two bodies were (1) the body that adjudicated the dispute over the sinking of the Canadian ship *I'm Alone*, and (2) the United States-Germany Mixed Claims Commission. The Court noted that the treaties providing for those bodies "specified that each sovereign would be involved in the formation of the bodies," and that the treaty creating the Mixed Claims Commission "specified where the commission would initially meet, the method of funding, and that the commissioners could appoint other officers to assist in the proceedings." Thus, the Court's decision left the door open to determining other arbitral tribunals created under other treaties could be deemed "foreign or international tribunals."

If you have any questions regarding the issues raised in this alert, please feel free to contact the Jenner & Block lawyers listed below.

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[1] 28 U.S.C. § 1782.

[2] *ZF Automotive US, Inc. v. Luxshare, Ltd*., 596 U.S. ___ (2022).

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