U.S. Supreme Court Narrows Availability of Court-Ordered Discovery in Aid of Proceedings before Foreign and International Tribunals

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The U.S. Supreme Court has finally spoken on the statutory authority of U.S. federal courts to order discovery in aid of proceedings before foreign and international tribunals, a hotly debated issue that had split U.S. Courts of Appeals. In its June 13, 2022 unanimous opinion in *ZF Automotive US, Inc. v Luxshare, Ltd*,[1] the Court determined that 28 U.S.C. § 1782—a provision authorizing a U.S. district court to order the production of evidence "*for use in a proceeding in a foreign or international tribunal*"—could not be used to obtain discovery for use in an international commercial arbitration seated in Munich or in an *ad hoc* investor-state arbitration under the Lithuania-Russia bilateral investment treaty. The decision substantially narrows the scope of discovery available under § 1782 and blunts a previously powerful tool available to parties in arbitration proceedings. It will be of particular interest to financial institutions that are frequently the target of § 1782 applications seeking third-party discovery.

Background. ZF Automotive US, Inc. ("ZF"), a U.S. subsidiary of a German corporation, entered into a contract with Luxshare, Ltd. ("Luxshare"), a Hong Kong-based company, for the sale of two business units. The contract provided for disputes to be resolved by international commercial arbitration in accordance with the Arbitration Rules of the German Arbitration Institute before a three-person tribunal seated in Munich, Germany, applying German law. A fraud dispute arose, and before arbitration was commenced, Luxshare applied under § 1782 to a Michigan federal court for discovery from ZF and two of its senior officers. The Court granted Luxshare's request, and ZF moved to quash the subpoenas, arguing that the arbitration tribunal was not a "*foreign or international tribunal*" under § 1782. However, applying Sixth Circuit precedent that § 1782 discovery is available for commercial arbitrations with a foreign seat, the District Court denied ZF's request, and the Sixth Circuit Court of Appeals affirmed.

In a consolidated case, Fund for Protection of Investors' Rights in Foreign States (the "Fund"), a Russian corporation, commenced an arbitration against the Government of Lithuania under the Lithuania-Russia bilateral investment treaty (the "BIT") regarding a

[1] This case was consolidated and determined together with another case, *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*.

failed Lithuanian bank, which the Fund claimed had been expropriated by Lithuania. From the dispute settlement options in the BIT, the Fund chose *ad hoc* investor-state arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). After initiating arbitration, the Fund applied under § 1782 to a New York federal court for discovery from an individual who had been appointed by Lithuania as a temporary administrator of the bank and from the administrator's employer, AlixPartners, LLP. The discovery application was opposed on the basis that the *ad hoc* tribunal was not a "*foreign or international tribunal*" under § 1782. However, the District Court ordered discovery, and the Second Circuit Court of Appeals affirmed, holding that an arbitration between an investor and a foreign state before a tribunal constituted under a BIT falls within the scope of § 1782.

The U.S. Supreme Court granted certiorari in both cases because the scope of § 1782 had split the Courts of Appeals. Previously, the Fourth and Sixth Circuits had ruled that commercial arbitration tribunals with foreign seats constituted a "*foreign or international tribunal*" under § 1782, while the Second, Fifth and Seventh Circuits had adopted the opposing interpretation.

The Supreme Court Decision. The Supreme Court held that the phrase "*foreign or international tribunal*" in § 1782 refers to an adjudicative body exercising governmental authority conferred by one or more nations.

The Court reached its decision by applying basic principles of statutory interpretation, having regard to the text, context and purpose of § 1782. While the Court observed that the word "*tribunal*" is not restricted to formal courts and does not, standing alone, exclude private adjudicatory bodies, the Court reasoned that when the modifiers "*foreign or international*" are attached to a word with government or sovereign connotations such as "*tribunal*," the phrase is better understood as referring to an adjudicative body that exercises governmental authority. The Court's interpretation was reinforced by the statutory history of § 1782.

The Court's reasoning made resolution of Luxshare's discovery application straightforward: § 1782 did not permit discovery in aid of an international commercial arbitration arising under a contract between private parties according to the rules of a private international arbitration institution. There was no government involved, and the mere fact that a tribunal seated in Germany was bound to apply foreign law was insufficient for the tribunal to come within the scope of § 1782.

The resolution of the Fund's application was more difficult. While the dispute involved a sovereign as respondent and arose under a treaty entered into by two nations, the Court reasoned that neither Russia or Lithuania intended to confer governmental authority on an *ad hoc* arbitration tribunal formed under the BIT. Indicia relied upon by

the Court to reach that conclusion included, for example, that: (i) the BIT did not itself form the tribunal but only established the process for the parties to constitute the tribunal; (ii) the tribunal functions independently of both Russia and Lithuania and is affiliated with neither; (iii) the tribunal consists of individuals chosen by the parties, who lack any official affiliation with Russia, Lithuania or any governmental or intergovernmental organization; and (iv) the tribunal receives no government funding.

As a result, the Supreme Court ordered that discovery under § 1782 was unavailable in both cases, and it reversed the intermediate appellate decisions.

Takeaways and Practical Implications. The decision substantially narrows the scope of discovery available under § 1782, especially in federal circuits where international commercial arbitration tribunals were held to fall within the scope of the provision. As a result, this decision will likely be welcomed by multinational businesses with a presence in the United States and especially by international banks and financial institutions that are frequently the target of § 1782 applications in U.S. courts.

Looking ahead, questions will persist over whether particular adjudicative bodies exercise "*governmental authority*" so as to constitute a "*foreign or international tribunal*" under § 1782. Notably, the Court's decision does not address whether an International Centre for Settlement of Investment Disputes ("ICSID") tribunal or a tribunal constituted in accordance with the rules of the Permanent Court of Arbitration ("PCA") exercises governmental authority. The answers to those questions will be of interest to a range of stakeholders, including international investors, sovereigns and intergovernmental organizations.

While the Court identified certain indicia that will be relevant to resolving such questions, as indicated above, it expressly refused to prescribe how governmental and intergovernmental bodies must be structured in order to exercise governmental authority. In fact, the Court even recognized that its decision does not foreclose the possibility that in other circumstances sovereigns might imbue an *ad hoc* arbitration panel with governmental authority. Thus, whether § 1782 will be available in specific cases, and especially those involving sovereign parties, will require close analysis on a case-by-case basis and is likely to be the subject of future litigation across the United States.

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