Supreme Court Rejects Use of Section 1782 Discovery for Private Arbitration

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Key Takeaways:

- According to the Supreme Court's decision, for purposes of Section 1782, the key inquiry is whether the features of the adjudicatory body establish an intent to imbue the body with governmental authority such that it constitutes a "foreign or international tribunal."
- The court limited the use of Section 1782 discovery in aid of international commercial arbitrations because those proceedings are conducted by tribunals which lack governmental or intergovernmental authority.
- However, the decision leaves unanswered whether a tribunal constituted under the ICSID Convention would qualify as "foreign or international tribunal," a question that is likely to be litigated in future cases.

A. Introduction

On June 13, 2022, the U.S. Supreme Court decided whether 28 U.S.C. § 1782 – a provision of U.S. law that allows a federal district court to compel a resident individual or company to provide discovery for use "in a proceeding in a foreign or international tribunal" – extends to private international arbitration. In a unanimous decision written by Justice Amy Coney Barrett, the Court held that it does not.[1]

In our previous Litigation Alert, we discussed the circuit split over whether an arbitral tribunal seated in a foreign jurisdiction constitutes a "tribunal" under Section 1782. This alert discusses the Supreme Court's ruling on the question and its implications for parties seeking to rely on Section 1782 to compel discovery for use in foreign-seated arbitrations.

B. The Phrase "Foreign or International Tribunal"

Section 1782 has served as a mechanism for parties with an interest in a proceeding before a foreign or international tribunal to seek the aid of U.S. courts in obtaining testimonial or documentary evidence in the United States. The present case consolidated two actions: *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investor's Rights in Foreign States*. Both involved discovery requests made pursuant to Section 1782 in aid of arbitrations seated abroad where the party resisting discovery argued that the tribunal did not qualify as a "foreign or international tribunal" under the statute.[2]

The Court began its analysis by examining whether the phrase "foreign or international tribunal" includes *private* adjudicative bodies or only governmental or intergovernmental bodies. With respect to the term "tribunal," the Court noted that the legislative history indicates that the drafters intended the word to be construed broadly.[3] However, the inclusion of the modifying phrase "foreign or international" suggests that, as a whole, the formulation is "best understood as an adjudicative body that exercises governmental authority."[4]

The Court reasoned that "the word 'foreign' takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations," such as "tribunal."[5] It further considered that "foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation imbued with governmental authority.[6] Similarly, in the Court's view, the word "international" commonly holds the meaning of involving two or more nations, as opposed to involving two or more nationalities.[7] The phrase "international tribunal" should thus be read to refer to a tribunal with "governmental authority by multiple nations."[8] As such, private adjudicatory bodies do not fall under Section 1782.

The Court considered this interpretation to be consistent with Section 1782's "animating purpose" because Congress' efforts in promoting international comity through the statute would be better supported by "broadening the range of governmental and intergovernmental bodies" and excluding private arbitral bodies.[9] Moreover, including private international tribunals under Section 1782 would be incongruous since the discovery permitted under Section 1782 is broader than that allowed under the Federal Arbitration Act for domestic arbitrations.[10]

C. Exclusion of *Ad Hoc* Private Arbitration

Turning to whether the arbitral tribunals in the consolidated cases qualify as a "foreign or international tribunal," the Court ruled that they do not.

ZF Automotive involved an international commercial arbitration between two private parties, administered by a private dispute resolution organization, the German Institution of Arbitration.[11] As such, the Court found that the tribunal is private, not governmental in nature. The Court considered the fact that German law governed the proceedings to be immaterial, since "private entities do not become governmental because laws govern them and courts enforce their contracts."[12]

The Court considered *AlixPartners* to present a "harder question."[13] There, a foreign sovereign, Lithuania, was a party to an arbitration under the Lithuania-Russia bilateral investment treaty. The Court determined, however, that neither Lithuania's status as a party to the arbitration, nor the fact that the arbitration agreement was found in an investment treaty, is dispositive of whether the *ad hoc* tribunal was imbued with governmental authority.[14] Rather, in the context of *ad hoc* tribunals, the proper inquiry is to ascertain whether the State parties to the treaty intended "to confer governmental authority on an *ad hoc* panel formed pursuant to the treaty."[15]

The Court found the answer in the treaty's dispute resolution clause, which allows investors to choose between pursuing dispute settlement before a "pre-existing governmental body" or a private one, specifically an *ad hoc* tribunal formed under the ICC, SCC, or UNCITRAL Rules.[16] Such *ad hoc* arbitral tribunals are not standing bodies, like domestic courts, but rather are formed for the purpose of adjudicating specific disputes. They thus lack the features necessary to imbue them with governmental authority. Indeed, the Court considered an *ad hoc* investment tribunal under the treaty to be virtually indistinguishable from an international commercial tribunal because both derive their authority from the parties' consent to arbitrate.[17] Therefore, the Court concluded that the *ad hoc* investment tribunal in *AlixPartners* – like the *ad hoc* commercial arbitral tribunal in *ZF Automotive* – did not qualify as a "foreign or international tribunal" for purposes of Section 1782.

D. Conclusion

The Court's decision closes the door on the ability of parties to seek discovery assistance from U.S. district courts in aid of ad hoc private arbitration. However, as the Court recognized, States may still endow arbitration tribunals with governmental authority.[18] Examples that might qualify under Section 1782 include mixed claims commissions and adjudicatory bodies created, funded and run by sovereign States under treaties. [19]

The Court did not address whether a tribunal constituted under the ICSID Convention could fall under the statutory definition of a "foreign or international tribunal." Provisions of the ICSID Convention indicate that ICSID tribunals may exercise official authority under the Court's interpretation of Section 1782. For example, ICSID tribunals derive their authority from Contracting States' consent and fall under the purview of the World Bank, which is an international organization. Further, ICSID tribunals are subject to the rules and procedures of the Convention, and their members can be appointed by the ICSID Secretariat, which is funded by sovereign States. They also have immunity from legal processes in discharging their duties, and obtain their fees and allowances free of taxes and at rates subsidized by the Member States. Additionally, the ICSID Secretariat has international legal personality, sets a budget that is funded by World Bank Member States, and its staff enjoys full immunities and privileges. Whether such ICSID tribunals are covered by Section 1782 remains an open question.

Additional contributions to this alert were made by summer associate Amanda Gialil.

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

[2] *Id.* at 2.

[3] *Id.* at 6.

[4] *Id.* at 7.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 8.

[8] *Id.* at 9.

[9] *Id.* at 10.

[10] *Id.* at 11.

[11] *Id.* at 12.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 12-13.

[15] *Id.* at 13.

[16] *Id.*

[17] *Id.* at 14-15.

[18] *Id.* at 15.

[19] *Id.* at 15-16.

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