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SCOTUS Holds Courts Cannot Order Discovery in Most International Arbitrations

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Can parties to a private, commercial international arbitration use the federal courts to compel a person in the United States to provide testimony or produce documents? For decades, United States courts have disagreed over the answer to this question.

On June 13, 2022, the Supreme Court unanimously resolved it. Parties engaged in private, commercial arbitrations seated abroad cannot obtain discovery in the United States under 28 U.S.C. § 1782(a). Section 1782 provides for the production of documents or testimony in aid of proceedings before "foreign and international tribunal(s)."

With limited exceptions, the Court's decision precludes parties to such arbitral proceedings from obtaining evidence through U.S. federal courts. The ruling settles a long-standing circuit split and debate within the international arbitration community as to whether a private arbitral panel constitutes a "foreign or international tribunal" within the meaning of section 1782.

Because there was ambiguity in that term, some circuits previously allowed for U.S.-style discovery even though the parties had contracted to resolve their disputes through international arbitration. As a result, parties to international arbitrations could, in some circumstances, get more discovery through the U.S. court system than parties in domestic (U.S.) arbitration. Now, the Court has resolved that the statute "reaches only governmental or intergovernmental adjudicative bodies." Private arbitral panels do not "fit[] that bill."

Case Background

The Court consolidated two cases to address this issue: (1) *ZF Automotive US, Inc. v. Luxshare, Ltd.*,and (2) Alix Partners, LLC v. Fund for Protection of Investor Rights in Foreign States. In *ZF Automotive*, Luxshare, Ltd., sought information from Michigan-based ZF Automotive for use in a German arbitration dispute. The parties agreed by contract that disputes would be "exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS)." The U.S. District Court for the Eastern District

of Michigan granted Luxshare's section 1782 application under then settled law in the Sixth Circuit. When the Sixth Circuit declined to stay the order, the Supreme Court intervened and granted a stay, pending resolution of the section 1782 circuit split.

In *Alix Partners*, disgruntled Russian investors in a failed Lithuanian bank sought third-party discovery from New York-based Alix Partners and its chief executive officer. The investors sought the discovery for use in an ad hoc arbitration instituted by the investors under a bilateral investment treaty between Russia and Lithuania. Under the treaty, the investors claimed that Lithuania had wrongfully expropriated certain investments from the bank. The U.S. District Court for the Southern District of New York granted the investors' request for discovery under section 1782, and the Second Circuit affirmed based on its finding that the arbitration under the bilateral investment treaty was imbued with the characteristics of a "foreign or international tribunal"—i.e., it was not merely a private commercial arbitration.

The Court's Resolution of the Section 1782 Circuit Split

Section 1782(a) reads, in relevant part:

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

The statute permits any "interested person" to file a "1782 application" in a relevant U.S. district court to request the production of documents or testimony from a person present in the district. As the Court noted in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), the term "interested person" extends to any non-litigant with a reasonable interest in obtaining the evidence. The statute requires that section 1782 discovery relate to proceedings in a "foreign or international tribunal." However, the statute fails to define that term.

The circuit courts historically split over the definition of "foreign or international tribunal"—specifically as to whether this included private parties arbitrating abroad. The U.S. Court of Appeals for the Fourth and Sixth Circuits have held section 1782 to cover "private, contracted-for commercial arbitrations." Other circuits, including the Second, Fifth, and Seventh Circuits, have limited their interpretation of "tribunal" to only "state-sponsored, public, or quasi-governmental" forums. For more history on the circuit split, read our previous coverage here.

In a unanimous decision, and in line with its recent penchant for a textualist approach, the Court has resolved the disagreement. Justice Amy Coney Barrett wrote the opinion holding that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under [section] 1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations." *ZF Automotive*, No. 21-401, slip op. at 17.

In reaching this conclusion, the Court held that the term "tribunal" in section 1782 was ambiguous in the abstract. However, Justice Barrett explained that, in context, the modifying "foreign or international" made that term "best understood as an adjudicative body that exercises governmental authority." In this regard, a prior version of section 1782 had permitted district courts to order discovery in aid of foreign judicial proceedings. Congress then amended the statute to encompass "foreign and international tribunals." The Court concluded the amendment did

not signal an expansion from public to private bodies "but rather an expansion of the types of public bodies covered." *Id.* at 10.

The Court found further support for its decision in the statute's purpose. Justice Barrett stated: "[T]he animating purpose of [Section] 1782 is comity[.] Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance." As a result, "[i]t is difficult to see how enlisting district courts to help private bodies adjudicating purely private disputes abroad would serve that end." *Id.*

Extending section 1782 to private bodies, the Court concluded, would also create significant tension with domestic arbitration law. The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., governs domestic arbitration and casts a narrow net over party discovery, requiring that any request be made (or approved) by the arbitral tribunal itself. In contrast, section 1782 allows district courts to entertain requests from "foreign or international tribunals *or any interested person*." Further, the FAA is also stricter in terms of the timing of these requests in that it does not allow discovery in advance of arbitration. In contrast, courts are free to prescribe section 1782 discovery in anticipation of a foreign proceeding. Thus, "[i]nterpreting [section] 1782 to reach private arbitration," the Court noted, "would therefore create a notable mismatch between foreign and domestic arbitration." *ZF Automotive*, No. 21-401, slip p. at 3.

The Results

Armed with this new standard, the Court denied the use of section 1782 discovery in both consolidated cases. With the meaning of "foreign or international tribunal" resolved, the Court quickly held that discovery could not be had in aid of the private, commercial German arbitration in *ZF Automotive*.

Alix Partners presented a closer issue. There, one party to the underlying arbitration (Lithuania) was a sovereign, and the parties initiated the arbitration under an investment treaty between Russia and Lithuania. Ultimately, however, the Court framed the dispositive question as follows: "Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" *Id.* at 13. The Court held that they did not. Importantly, the treaty itself did not create the panel; rather, it simply stipulated the set of rules that would govern its formation. *Id.* at 14. Further, the panel was not associated with either government. Therefore, the ad hoc panel was "materially indistinguishable in form and function from the DIS panel resolving the dispute between ZF and Luxshare." *Id.*

In concluding that section 1782 did not apply, however, the Court offered one caveat:

None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. . . . The point is only that a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it.

Id. at 15.

Implications

The Court has resolved a long unresolved question, and in doing so, it raised a few more. Preliminarily, the Court's caveat leaves the lower courts to determine whether various arbitral bodies—including tribunals established by the World Trade Organization, free trade agreements, investment treaties, or standing investment courts created by European Union agreements—fall under the Court's new definition of "foreign or international tribunal."

Regardless, for some, this ruling may come as a relief for the following reasons:

- First, one reason that many parties elect to resolve their disputes through international arbitration is to avoid broad discovery. Courts in the U.S. typically permit broader discovery than would be possible elsewhere. International businesses with a presence in the U.S. may be relieved that they will no longer be exposed to all-encompassing, American-style discovery by agreeing to international arbitration.
- Second, parties seeking to maintain confidentiality of their disputes can be assured that the facts disclosed in private arbitration proceedings will not be aired in the federal courts through discovery disputes.
- Third, the Court's decision will relieve the already-overburdened U.S. federal court system from having to resolve discovery disputes related to private arbitrations around the world.
- Fourth, in private commercial arbitrations with one party in the U.S. and one outside the U.S., this ruling ensures that both parties now face the same discovery obligations.
- Fifth, and finally, within the U.S., the ruling arguably puts foreign and domestic arbitration back on equal footing with respect to the scope of discovery.

For others in the international arbitration community, however, the outcome may be a disappointment. The Court's decision further limits the ability of parties to obtain even the narrowest of evidence in the U.S. that may be critical to their disputes. This is particularly true with respect to third-party discovery, because international arbitration tribunals are generally not empowered to order third-party discovery.

Next Steps and Practical Tips

What remains a question after the Court's ruling is what arbitral institutions (or types of institutions) are sufficiently imbued with sovereign authority so as to permit section 1782 discovery. For example, the decision appears to leave room for applications from parties appearing before quasi-international organizations, such as the International Centre for Settlement of Investment Disputes (ICSID), which derives its authority from the organization of states that make up the World Bank. Other investor-state arbitrations may also have enough governmental touches to qualify under section 1782. For example, the Court noted that had the parties to the underlying *Alix Partners* arbitration elected to submit their dispute to "a competent court or court of arbitration of the Contracting Party in which territory the investments are made"—which the Lithuania-Russia bilateral investment treaty permitted—such an arbitral body "would clearly be governmental" such that section 1782 discovery would be available. However, the "ad hoc" panel created solely for the purpose of arbitrating the dispute did not qualify. In the future, courts will be required to draw lines between these two outer boundaries.

For international arbitration practitioners, this ruling emphasizes the importance of (i) ensuring their international clients have the evidence available to them before initiating proceedings; and (ii) revisiting the available scope of discovery within the arbitration proceedings, using the tribunal rules. Some practitioners may also need to explore other options to obtain discovery, including section 7 of the FAA and section 3102 of the New York Civil Practice Law and Rules, to obtain judicial discovery to assist them in prosecuting and defending arbitrations. Practitioners

should also consider whether ICSID is a more favorable forum, if available, when third-party discovery is necessary in an investor-state arbitration.

Similarly, corporations and their counsel drafting contracts with forum selection clauses should reconsider which forum to use in light of the Court's decision. Corporations or individuals that want the option of obtaining broader discovery may prefer (i) foreign courts, (ii) other bodies imbued with governmental authority, or (iii) even U.S.?based litigation. Conversely, those wishing to avoid broad discovery may prefer a foreign arbitration clause strictly limited to private commercial arbitration.

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