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SCOTUS Resolves Section 1782 Controversy: Courts Cannot Order Discovery in Most International Arbitrations

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On June 13, the Supreme Court unanimously held that parties engaged in private, commercial arbitrations, as well as at least some investor-state arbitrations, seated abroad cannot obtain discovery in the United States under 28 U.S.C. § 1782(a) (Section 1782), which provides for the production of documents or testimony in aid of proceedings before "foreign and international tribunal(s)." With limited exception, the Court's decision will preclude parties to such arbitral proceedings from obtaining evidence in the United States through the federal courts. The ruling settles a decades-old 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. The ambiguity of that term in the statute previously allowed parties to obtain U.S. style discovery in some circuits despite contracting to resolve their disputes through international arbitration, with the resulting anomaly that 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, that possibility has been wholly precluded. The Court has resolved that the statute "reaches only governmental or intergovernmental adjudicative bodies," and 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) *AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States.* In *ZF Automotive*, Luxshare Ltd. sought information from Michigan-based ZF Automotive (ZF) for use in a German arbitration in a dispute arising from a sale of two of ZF's business units. The German arbitration was the product of the contract governing the sale in which the parties agreed 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 district court granted Luxshare's application for discovery under Section 1782 under the 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 *AlixPartners,* disgruntled Russian investors in a failed Lithuanian bank sought third-party discovery from New York-based AlixPartners and its CEO in connection with AlixPartners' prior actions as the bank's administrator. The investors sought the discovery in aid of an ad hoc arbitration instituted by the investors under a bilateral investment treaty (BIT) between Russia and Lithuania. Under the treaty, the investors claimed that Lithuania had wrongfully expropriated certain investments from the bank. The district court granted the investors' request for

discovery under Section 1782, and the Second Circuit affirmed based on its finding that the BIT arbitration was *not* merely a private commercial arbitration but imbued with the characteristics of a "foreign or international tribunal."

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.

As noted above, the circuits historically split over the definition of "foreign or international tribunal" — specifically as to whether this included private parties arbitrating abroad. For more history on the circuit split, read our previous coverage here.

In a unanimous decision written by Justice Barrett, however, the Court has now provided an answer: "[O]nly 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." Op. 17.

In reaching this conclusion, the Court allowed 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 court's 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." Op. 10.

The Court found further support for its decision in the statute's purpose. As 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.*

Finally, the Court also concluded that extending Section 1782 to private bodies would create significant tension with domestic arbitration law. The Federal Arbitration Act (FAA) 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." Op. 9–11.

The Results

Armed with their 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*.

AlixPartners presented a closer issue. There, one party to the underlying arbitration (Lithuania) was a sovereign, and the arbitration was initiated under the investment treaty between Russia and Lithuania. Ultimately, however, the Court framed the dispositive question as: "Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" Op. 13. The Court held that they did not. Importantly, the treaty itself did not create the panel, but simply stipulated the set of rules that would govern its formation. Op. 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. Op. 15.

Implications

The Court has resolved a long outstanding question. For some, this ruling may come as a relief. Among the reasons that parties may elect to resolve their disputes through international arbitration is to avoid broad discovery and maintain the confidentiality of their disputes. Both purposes are aided by the Court's decision. International businesses with a presence in the United States can be assured that they will not be exposed to all-encompassing, American-style discovery by agreeing to international arbitration. Further, they can be assured that their private arbitration proceedings will not be aired in the federal courts in discovery disputes. In addition, the Court's decision will also relieve the federal courts from having to resolve discovery disputes related to private arbitrations around the world.

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 United States that may be critical to their disputes. This is particularly true with respect to third-party discovery since international arbitration tribunals are generally not empowered to order third-party discovery.

What remains after the Court's ruling is the question of what arbitral institution(s) (or types of institutions) are significantly 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, 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 AlixPartners 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 BIT 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.

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