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SCOTUS to Resolve Circuit Split After All — Can Federal Courts Order Discovery For Use in Private, Commercial International Arbitrations?

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The U.S. Supreme Court will resolve the circuit split concerning whether 28 U.S.C. § 1782(a) (Section 1782) applies to private, commercial international arbitrations after all. On December 10, the Court agreed to hear a pair of petitions stemming from the Second and Sixth Circuits asking to determine whether Section 1782 allows the U.S. federal courts to order entities in their districts to produce evidence for use before a "foreign or international tribunal." The Court's most recent decision comes just months after the parties in *Servotronics Inc. v. Rolls-Royce PLC et al.*— the case previously accepted by the Court in deciding this issue — settled and withdrew the action from the Court's docket.

In *AlixPartners, LLP et al., v. The Fund for Protection of Investor Rights in Foreign States*, counsel for third-party defendants-appellants AlixPartners, LLP, a consulting firm in New York, and Simon Freakley, the firm's CEO, filed an emergency motion in the Second Circuit seeking a stay pending the filing and disposition of a petition for a *writ of certiorari* to the Court.

The petition asked the justices to overturn the Second Circuit's grant of discovery to a Russian investors' rights organization for use in its arbitration against the Republic of Lithuania.

The respondent, The Fund for Protection of Investor Rights in Foreign States, initiated arbitration in April 2019 following Lithuania's decision to nationalize the Lithuanian bank, AB Bankas Snoras. The Bank of Lithuania appointed Freakley as the temporary administrator of AB Bankas Snoras in late 2011. Shortly after commencing arbitration, the Fund sought leave to serve third-party discovery and deposition requests to AlixPartners and Freakley concerning his appointment and work as temporary administrator, although some of the information sought has been "classified as a State secret by the Lithuanian special services." *See AlixPartners, LLP et al.,* Petitioners, *v. The Fund for Protection of Investor Rights in Foreign States*, Respondent, No. 21-518, 2021 WL 4705742 (U.S.) (Oct. 1, 2021).

The Court consolidated *AlixPartners* with another petition filed by ZF Automotive US Inc. (ZF), a Michigan-based automotive parts manufacturer. ZF sought reversal of an order from the Eastern District of Michigan granting discovery to Luxshare Ltd., an electronics manufacturer based in Hong Kong, in support of an arbitration in Germany. *See ZF Automotive US, Inc. et al.*, Petitioners, *v. LuxShare, Ltd.*, Respondent, No. 21-401, 2021 WL 4173622 (U.S.) (Sep. 10, 2021). The decision is peculiar because the Sixth Circuit Court of Appeals did not weigh in on the matter except to decline to stay the Michigan federal district court's order despite ZF's pending Court

petition. *See* Order Denying Summary Affirmance, No. 21-2736, CA6 ECF No. 39 (Nov. 2021).

These two cases are significant because the Fourth and Sixth Circuits previously ruled that Section 1782 can be used in connection with private commercial arbitrations abroad, while the Fifth and Seventh Circuits have ruled that the statute cannot.[1] With these consolidated cases, the question as to whether U.S. federal courts can order discovery for private, commercial arbitrations seated abroad may finally be answered.

For additional information regarding Section 1782 and the circuit split, please see our December 9, 2020 or July 7, 2020 articles on whether parties in private, commercial international arbitrations can avail themselves of Section 1782 to obtain discovery through U.S. federal courts.

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[1] Previously, the Second Circuit sided with the Fifth and Seventh Circuits, but in the case of AlixPartners, LLP, apparently reversed its position.

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