International Arbitration Alert

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US Supreme Court Closes the Door on § 1782 Discovery in Aid of Foreign International Arbitrations

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In a decision with global arbitral significance, the U.S. Supreme Court has now clarified that § 1782 discovery is not available in support of foreign private international arbitration proceedings. Parties subject to U.S. jurisdiction may consider this to be good news insofar as it reduces the risk of them having to give potentially intrusive and expensive discovery of documents. Those elsewhere may be disappointed to be deprived of a potentially useful tactical and evidential tool.

Introduction

By way of background, 28 U.S.C. § 1782(a)—last amended in 1964—provides that:

> *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 order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.*
>
> *[…]*
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> *A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.*

An application under § 1782 must satisfy three main criteria:

- The District Court has jurisdiction over the person from whom disclosure is sought.
- The proceeding in which the requested material is to be used is in a foreign or international tribunal.
- The request is being made by a "foreign or international tribunal" or by "an interested person" in proceeding in a foreign or international tribunal.

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The U.S. Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), had previously ruled that the Commission of the European Communities (a quasi-judicial arm of the European Union) was a foreign or international tribunal under § 1782(a). The question considered by the U.S. Supreme Court in its June 13, 2022 decision was whether the same applies to foreign private international arbitration proceedings that do not involve governmental or quasi-governmental bodies. This question had been the subject of a Circuit Split with intermediate appellate courts coming to different conclusions. The 2nd, 5th, and 7th Circuits have held that § 1782 does not extend to private international arbitration, but in 2019 and 2020, respectively, the 4th and 6th Circuits held that it did.

ZF Automotive US, Inc. v. Luxshare, Ltd., and AlixPartners, LLP v. The Fund for Prot. of Inv.'s Rights in Foreign States

Before the Supreme Court were two consolidated cases, each involving a § 1782 request for discovery in the United States for use in arbitration proceedings abroad:

- *ZF Automotive* involved a forthcoming private commercial arbitration seated in Germany and administered by a German arbitral institution called "DIS". ZF Automotive, a U.S. company, had sold various business units to Luxshare, Ltd., a Hong Kong-based company. After the deal was finalized, Luxshare claimed that ZF Automotive concealed information, which caused Luxshare to overpay by hundreds of millions of dollars. In preparing to file arbitration in Germany, Luxshare filed an *ex parte* application for discovery under § 1782 in the U.S. District Court for the Eastern District of Michigan seeking information from ZF and two senior officers resident in the jurisdiction. The District Court permitted § 1782 discovery because, under 6th Circuit precedent, a private international arbitration qualified as a "foreign" or "international" tribunal within the meaning of § 1782.
- *AlixPartners, LLP* arose out of a pending arbitration under a Bilateral Investment Treaty (BIT) between the Fund for Protection of Investor's Rights in Foreign States (the "Fund") against the Republic of Lithuania for expropriation. The Fund sought information from the administrator of bankruptcy proceedings in Lithuania, AlixPartners, in the Southern District of New York for its arbitration claims under the BIT. The 2nd Circuit used a multifactor test to determine the meaning of "tribunal" under 1782, and held that the arbitral tribunal formed to resolve the BIT dispute was a "foreign" or "international" tribunal under § 1782 such that discovery was permissible. It is worth noting that the 2nd Circuit had previously decided that a purely commercial arbitration arising out of a private contractual relationship was not a "foreign" or "international" tribunal within the meaning of § 1782. Under 2nd Circuit precedent, the nature of a BIT dispute was fundamentally different from a private contractual relationship such that § 1782 did apply to the BIT dispute, but not private commercial disputes.

The Supreme Court unanimously held that § 1782 "reaches only governmental or intergovernmental adjudicative bodies," and that neither of the arbitral panels in these consolidated cases qualified as governmental or intergovernmental. Private adjudicatory bodies do not fall within § 1782. The Court has now clarified that the term "foreign tribunal," refers to a body that "exercises governmental authority conferred by a single nation." An "international tribunal" referred to a similar body acting with governmental authority bestowed by two or more nations.

The Supreme Court found that § 1782 discovery was not permissible in *ZF Automotive* given that both parties were private actors and there was no government involved in creating the arbitral panel. The panel did not therefore fall within the meaning of a "foreign or international tribunal." The Court acknowledged that *AlixPartners, LLP* presented a more difficult question because a sovereign nation was a party to the arbitration and the option to arbitrate was contained in an international treaty. These factors were not, however, dispositive. The Court found the key determination was whether the two parties intended to "confer governmental authority on an ad hoc panel." There was no indication that was the case, and hence the arbitral body was not a "foreign or international tribunal."

Practical Implications

(i). The holding resolves a circuit split, providing certainty and predictability related to the scope of U.S. discovery in international arbitrations.

The Supreme Court's decision creates a bright-line rule that is dichotomous; either an adjudicative body is governmental and thus subject to § 1782 or it is not, and hence not subject to the statute. Private adjudicatory bodies, of which the vast majority of arbitral bodies qualify as, are now clearly outside the scope of § 1782. As a result of this ruling, there is now greater certainty—and hence predictability—in international arbitration. Arguably, this ruling takes choice away from contracting parties. If the Supreme Court had ruled differently and permitted discovery in private arbitrations, then parties could decide for themselves whether to (i) accept the default discovery rules or (ii) contractually preclude § 1782 discovery in their arbitration agreements.

(ii). Limited U.S. discovery may be welcomed by U.S. parties but not by foreign parties.

Parties to an arbitration are now aware that discovery in the U.S. will not be available pursuant to § 1782. The certainty that this decision provides comes with certain costs and potential benefits. Foreign parties to international arbitrations will no longer be able to seek discovery in the United States as they were previously able to, at least in the 4th and 6th Circuits. Instead, the Supreme Court foreclosed the possibility that § 1782 discovery will be available in foreign arbitral proceedings. On the other hand, parties resident in a U.S. jurisdiction may find this ruling helpful in limiting the amount and type of discovery available in their foreign arbitration proceedings and leveling the playing field between them and their contractual counterparts.

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