U.S. SUPREME COURT NARROWS SCOPE OF 28 U.S.C. § 1782 TO PROCEEDINGS BEFORE "GOVERNMENTAL OR INTERGOVERNMENTAL ADJUDICATIVE BODIES"

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U.S. Litigation and Dispute Resolution Alert

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On 13 June 2022, the U.S. Supreme Court narrowed the scope of 28 U.S.C. § 1782 (Section 1782), holding that the statute does not permit federal courts to order discovery for use in foreign private commercial arbitrations or investment treaty arbitrations. As detailed in our previous alerts on this issue,[1] U.S. Circuit Courts of Appeals have diverged on whether discovery assistance is available to parties in a private international arbitration. Specifically, the Fourth and Sixth Circuits ruled that a private international arbitral tribunal is a "foreign or international tribunal" within the meaning of Section 1782,[2] while the Second, Fifth, and Seventh Circuits reached the opposite conclusion.[3] The Supreme Court's decision this week in *ZF Auto. US v. Luxshare, Ltd.*[4] resolved that split, with the Court unanimously holding that "only a governmental or intergovernmental adjudicative body" is a "foreign or international tribunal" under Section 1782.[5] This decision puts an end to a years-long debate, and is welcome news for many U.S. companies that have been the target of numerous discovery requests through Section 1782 in private international arbitrations.

THE U.S. SUPREME COURT'S DECISION

The Supreme Court began its analysis by recognizing that Congress used "tribunal" in Section 1782 in a broad sense that does not exclude private adjudicatory bodies.[6] The Supreme Court, however, then carefully considered the impact of the statutory modifiers "foreign or international" on the meaning of "tribunal." Addressing the impact of the word "foreign" first, the Supreme Court concluded that "'foreign' takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations," such as "tribunal."[7] Turning to the impact of the word "international," the Supreme Court concluded that a "tribunal is 'international' when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[8] Based on these modifiers, the Supreme Court ultimately concluded that the language of Section 1782 limits the statute's application to proceedings before "a tribunal imbued with governmental authority by one nation, [or] a tribunal imbued with governmental authority by multiple nations."[9]

The Supreme Court found further support for its limited construction of Section 1782 in the statutory history and in comparison to the Federal Arbitration Act (FAA). The Supreme Court traced the history of Section 1782, noting that "the statute has been about respecting foreign nations and the governmental and intergovernmental bodies they create," and "the animating purpose of [Section 1782] is comity."[10] The Supreme Court was thus led to conclude that "[i]t is difficult to see how enlisting district courts to help private bodies would serve that end."[11] The

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Supreme Court also noted that applying Section 1782 to private international arbitrations would cause "significant tension with the FAA, which governs domestic arbitration, because such an extension would result in "much broader discovery than the FAA allows" to litigants in domestic arbitrations. This was a "notable mismatch" the Supreme Court could not allow.[12]

After analyzing the text and history of Section 1782, the Supreme Court then turned to the question of whether the adjudicative bodies at issue in the cases before it (namely tribunals established under the Arbitration Rules of the German Institution of Arbitration and the Arbitration Rules of the United Nations Commission on International Trade Law) qualified as "foreign or international tribunals." The Supreme Court quickly concluded that the private commercial arbitral tribunal in *ZF Auto* was not governmental or intergovernmental because the panel there operated under private arbitral rules and was formed by the parties with no governmental involvement.[13] Turning next to *AlixPartners*, the Supreme Court that the circumstances there presented a "harder question" because the case involved a sovereign state (Lithuania) and the option to arbitrate was contained in a bilateral investment treaty between Lithuania and Russia.[14] The Supreme Court, however, noted that "[w]hat matters is the substance of [Russia and Lithuania's] agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?"[15] The Supreme Court concluded they did not because the treaty did not create the arbitral panel, the panel did not exercise governmental authority, and the panel did not operate in a manner consistent with governmental bodies, *e.g.*, the proceedings remained confidential.[16]

IMPLICATIONS OF THE DECISION

The Supreme Court's decision in *ZF Auto* provides much welcome relief to third-party commercial partners in the U.S. that have found themselves on the receiving end of a Section 1782 subpoena. Pre-*ZF Auto*, parties to private international arbitrations have taken advantage of Section 1782 to impose sometimes considerable discovery burdens on third parties in the U.S. that otherwise have no stake in the subject arbitral proceedings and that can be made to bear discovery burdens disproportionate to the parties to the proceedings. Post-*ZF Auto*, these burdens will be considerably reduced. As for the parties to foreign private arbitration, including investment treaty arbitrations, going forward, they must be ever more mindful of the arbitral rules they choose to govern their arbitrations as their discovery options may be limited to those shaped by those rules.

K&L Gates stands ready to assist clients in navigating international arbitrations, including discovery issues, post-*ZF Auto*.

FOOTNOTES

[1] U.S. Supreme Court to Review Circuit Split Over Scope of 28 U.S.C. § 1782 for Obtaining Discovery in International Arbitrations; U.S. Supreme Court Hears Oral Argument on Circuit Split Over Scope of 28 U.S.C. § 1782 for Obtaining Discovery in International Arbitrations; Arbitration World: U.S. Cases and International Arbitration — U.S. Supreme Court set to Decide Section 1782 Circuit Split.

[2] See *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 213 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proc.*), 939 F.3d 710, 730 (6th Cir. 2019).

[3] *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 692–96 (7th Cir. 2020); *In re Application and Petition*

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of Guo, 965 F.3d 96, 103 (2nd Cir. 2020); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009).

[4] ZF Auto was decided with a consolidated case--*AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*, 142 S. Ct. 638 (2021)--which arose in a different factual circumstance but asked fundamentally the same question. *See* U.S. Supreme Court to Review Circuit Split Over Scope of 28 U.S.C. § 1782 for Obtaining Discovery in International Arbitrations.

[5] *ZF Auto US v. Luxshare, Ltd.*, 596 U.S. ___, 16--17 (2022).

[6] *Id*. at 6.

[7] *Id*. at 7.

[8] *Id*. at 9.

[9] *Id*.

[10] *Id*. at 9-10.

[11] *Id*. at 10.

[12] *Id*. at 11.

[13] *Id*. at 12.

[14] *Id*.

[15] *Id*. at 13.

[16] *Id*. at 14.

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