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The U.S. Supreme Court closes the door on discovery in support of international commercial arbitration:

On 13 June 2022, the Supreme Court of the United States issued a landmark decision on the debated topic as to whether parties to international commercial arbitrations are entitled to seek discovery from U.S. courts under 28 U.S.C. §1782. The Supreme Court held that "*private adjudicatory bodies*" do not fall within the definition of "*foreign or international tribunals*" under the statute. While a clarification on this issue is welcome, some uncertainties remain regarding the distinction between "*governmental or intergovernmental adjudicative body*" and "*private adjudicatory bodies*" in case of investor-state arbitrations.

A private arbitral tribunal is not a "foreign or international tribunal" under 28 U.S.C. §1782

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In its unanimous decision of 13 June 2022, the Supreme Court held that "*[o]nly a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under 28 U. S. C. §1782*". Accordingly, the Supreme Court concluded that neither an arbitration administered by the German Arbitration Institute between private parties pursuant to an arbitration clause included in a private contract, nor an *ad hoc* arbitration between a private party and a sovereign pursuant to an arbitration clause contained in an international treaty met the requirements of Section 1782. This interpretation significantly limits the right that certain U.S. jurisdictions granted to parties to international arbitrations to seek discovery in support of their proceeding outside the U.S. under the statute.

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Section 1782

Section 1782 of Title 28 of the United States Code ("**Section 1782**") is a U.S. federal statute that allows the district courts to order a person residing or found in the jurisdiction of the courts "*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.*"[1] The requirements for an application under Section 1782 can be summarized as follows: the application is (i) from a foreign or international tribunal or a person with a valid interest, (ii) against a person residing or found in the jurisdiction of the U.S. courts, and (iii) seeking evidence for its use in a proceeding in a foreign or international tribunal. Even when these requirements are met, the U.S. court still has discretion over whether to grant discovery under Section 1782.

The procedural background

The decision of the Supreme Court of the United States (the "**Supreme Court**") stems from two proceedings under Section 1782 initiated in support of two distinct arbitrations seated outside the U.S.

The first proceeding (*ZF Automotive US, Inc. v. Luxshare, Ltd.*) arose out of a contractual dispute between ZF Automotive US, Inc., Michigan, U.S. ("**ZF**") and Luxshare, Ltd. Hong Kong ("**Luxshare**"). The relevant contract of sales entered into by ZF and Luxshare provided that all disputes between the parties were to be settled by an arbitral tribunal seated in Munich in accordance with the arbitration rules of the German Arbitration Institute (the "**DIS Arbitration**"). Before initiating the arbitration, Luxhsare filed an *ex parte* application for discovery under Section 1782 before the District Court of the Eastern District of Michigan and obtained an order from the court. ZF resisted the subpoena served by Luxshare by arguing, *inter alia*, that the definition of "*foreign or international tribunal*" under Section 1782 did not encompass private commercial arbitration such as the DIS arbitration. While a precedent of the Sixth Circuit (which was binding for the district court) had found that Section 1782 encompassed private arbitral bodies, ZF argued that there was a circuit split on the question. The District Court denied ZF's motion to quash and the Sixth Circuit denied ZF a stay of the proceeding.

The second case (*AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*) concerned an *ad hoc* arbitration initiated by the Fund for Protection of Investors' Rights in Foreign States, Russia (the "**Fund**") against the Republic of Lithuania ("**Lithuania**") arising out of Lithuania's nationalization of a bank (the "***ad hoc* arbitration**"). The arbitration was held before an arbitral tribunal established by a bilateral investment treaty between Lithuania and the Russian Federation ("**Russia**") in accordance with the UNCITRAL arbitration rules. After initiating the arbitration, the Fund filed a Section 1782 application in the District Court of the Southern District of New York seeking discovery from AlixPartners, LLP, New York ("**AlixPartners**") and AlixPartners' CEO Simon Freakley ("**Mr. Freakley**"), who had been involved in the administration of the Lithuanian bank. AlixPartners and Mr. Freakley resisted discovery objecting, *inter alia*, that the *ad hoc* arbitration tribunal did not fall within the definition of a "*foreign or international tribunal*" under Section 1782. According to a precedent of the Second Circuit (which was binding for the district court), a private arbitral tribunal did *not* constitute a "*foreign or international tribunal*" under Section 1782. However, upon appeal, the Second Circuit held that the *ad hoc* arbitration between the Fund and Lithuania was an arbitration before a "*foreign or international tribunal*" rather than a private arbitration. The Second Circuit thus affirmed the district court's decision to grant the Fund's discovery request.

The decision of the Supreme Court

On 10 September 2021, the petitioner ZF Automotive, filed a writ of certiorari before the Supreme Court and presented the following question (emphasis added):[2]

"**Whether 28 U.S.C. § 1782(a)**, *which permits litigants to invoke the authority of United States courts to render assistance in gathering evidence for use in 'a foreign or international tribunal,'* ***encompasses private commercial arbitral tribunals****, as the U.S. Courts of Appeals for the Fourth and Sixth Circuits have held, or excludes such tribunals, as the U.S. Courts of Appeals for the Second, Fifth, and Seventh Circuits have held.*"

On 5 October 2021, the petitioner AlixPartners filed a a writ of certiorari before the Supreme Court presenting a very similar question.[3]

The issue pending before the Supreme Court thus pertained to the **third statutory requirement of Section 1782**, i.e., that the parties seek **evidence** "*for [its]* ***use in a proceeding in a foreign or international tribunal***". The Supreme Court granted both petitions and consolidated the cases.

In a 9 to 0 opinion written by Justice Barret **the Supreme Court held as follows** (emphasis added):[4]

"Although 28 U.S.C. § 1782(a) permits a district court to order discovery 'for use in a proceeding in a foreign or international tribunal,' ***only a governmental or intergovernmental adjudicative body*** *may* ***qualify as such a tribunal,*** *and* ***the arbitration panels in these cases are not such adjudicative bodies***."

To reach its conclusion, the Supreme Court interpreted the words "*foreign and international*" as adding a governmental or sovereign connotation to the word "*tribunal*", in the sense that a "*foreign […] tribunal*" is "*imbued with governmental authority by one nation*" and an "*international tribunal*" is "*imbued with governmental authority by multiple nations*". The Supreme Court concluded that this interpretation was supported by the historical interpretation of the statute and by a comparative analysis with the corresponding provisions governing domestic arbitration under the Federal Arbitration Act.

The Supreme Court also expressly clarified that, conversely, private adjudicatory bodies do not count as tribunals under the definition of Section 1782. With regard to the specific underlying arbitrations, the Supreme Court held as follows:

The Supreme Court considered that the dispute between ZF and Luxshare presented the common features of a typical private commercial arbitration, such as (i) both Luxshare and ZF were private parties, (ii) the arbitration clause was included in a private contract and referred to a private dispute-resolution organization, and (iii) there was no governmental involvement in the creation of the arbitral tribunal or in the determination of the procedural rules. The fact that the law of the seat of the arbitration regulated certain aspects of the arbitration was not considered sufficient to qualify the arbitral tribunal as a governmental adjudicative body.

The arbitration initiated by the Fund against Lithuania presented certain elements that made the qualification more difficult. In particular, the presence of a sovereign as a party to the arbitration and the inclusion of the arbitration clause in an international treaty offered some support to the argument that the *ad hoc* arbitral tribunal was an intergovernmental adjudicative body. The Supreme Court held, however, that these elements were not sufficient to render the arbitration governmental. The **relevant test** was rather **whether the governmental parties to the treaty "*intended to confer governmental authority on [the arbitral tribunal]*"**. In answering this question in the case at hand, the Supreme Court considered that the authority of the *ad hoc* arbitral tribunal was based on the Fund's and Lithuania's consent to the arbitration and not on a pre-existing governmental authority conferred by Russia and Lithuania. Therefore, the Supreme Court concluded, the *ad hoc* arbitral tribunal did not exercise governmental authority for purposes of Section 1782.

Take-aways from the decision

ZF Automotive U. S., Inc. v. Luxshare, Ltd. closes the door on applications for

discovery under Section 1782 submitted by parties or arbitral tribunals in support of international commercial arbitration seated outside the U.S. The decision might be welcomed by many users of arbitration. When entering into an arbitration agreement, in many instances, the parties might not wish to run the risk of being drawn into a potentially burdensome discovery dispute in the U.S. While that risk could be avoided or at least mitigated by a respective drafting of the arbitration clause (or later when discussing the procedural order of the arbitration with the tribunal), parties often do not envisage this possibility at that stage.[5] Against that background, the decision of the Supreme Court might even increase the attractiveness of international commercial arbitration. The decision has, indeed, no impact on state proceedings held outside the U.S., in which discovery under Section 1782 remains a potentially powerful tool, considering in particular its far-reaching scope.[6] The full impact of the decision will depend, however, on which other doors (and backdoors) the parties to international commercial arbitration might find to access evidence located in the U.S.

As seen above, the Supreme Court's decision also affects investor-state arbitration, since an arbitral tribunal only constitutes an intergovernmental adjudicative body if the governmental parties to a treaty intended to imbue the arbitral tribunal with governmental authority. While the qualification depends on the facts of the specific case, the Supreme Court's decision mentions certain features that the lower courts will need to consider when deciding future disputes about that issue. In particular, the following questions might be relevant:
(i) whether the treaty creates the tribunal or only sets forth rules for the tribunal's constitution and the arbitral proceeding; (ii) whether the tribunal is affiliated with and its function depends on one of the parties to the treaty; (iii) whether the tribunal is composed by independent arbitrators appointed by the parties to the arbitration or whether the arbitrators have an official affiliation with the parties to the treaty or with other (inter-) governmental entities; (iv) whether there are other "*indicia of a governmental nature*", which might relate to the origins of the funding of the arbitral tribunal, the confidentiality of the proceedings or to other governmental involvement in the operations of the tribunal or in the proceeding. In contrast, the fact that the governmental parties to the treaty decided to submit their dispute to arbitration seems to be, by itself, insufficient to conclude that the arbitral tribunal is a governmental authority under Section 1782. It remains to be seen whether the courts will reach consistent decisions by applying these factors.

Endnotes

[1] The full text of Section 1782 can be found at the following link: https://uscode.house.gov/view.xhtml?req=(title:28%20section:1782%20edition:prelim)%20OR%20(granuleid:USC-prelim-title28-section1782)&f=treesort&edition=prelim&num=0&jumpTo=true

[2] ZF Automotive's petition for a writ of certiorari can be consulted on: https://www.scotusblog.com/case-files/cases/zf-automotive-us-inc-v-luxshare-ltd/.

[3] AlixPartners' petition for a writ of certiorari can be found on: https://www.scotusblog.com/case-files/cases/alixpartners-llc-v-fund-for-protection-of-investor-rights-in-foreign-states/.

[4] A PDF version of the entire decision can be consulted on: https://www.supremecourt.gov/opinions/21pdf/21-401_2cp3.pdf.

[5] Cf. our Newsletter No. 160, available at the following link: https://www.walderwyss.com/user_assets/publications/211202_Newsletter-160_E.pdf and Louis Christe, The Use of 28 U.S.C. § 1782 in Swiss Seated Arbitrations, in: ASA BULLETIN Volume 39, Issue 3, p. 537 et seqq.

[6] For a brief summary of the scope of the statute and the potential targets of discovery in the digital era, cf. our Newsletter No. 160, available at the following link: https://www.walderwyss.com/user_assets/publications/211202_Newsletter-160_E.pdf.

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