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“I Can See Clearly Now the Rain Is Gone…” U.S. Supreme Court Definitively Holds that Section 1782 Does Not Permit Discovery Assistance from U.S. Courts for Private Foreign or International Arbitrations

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On June 13, 2022, the U.S. Supreme Court issued its unanimous opinion resolving a U.S. Circuit Court split over a hotly debated issue, namely whether 28 U.S.C. § 1782 applies to private foreign or international arbitrations. In *ZF Automotive US, Inc. v. Luxshare, Ltd*., 596 U.S. ___ (2022), the Supreme Court was required to decide whether private adjudicatory bodies constitute “foreign or international tribunals” under Section 1782 and concluded they do not. A prior post discussed the oral argument and concluded that there were few clues as to how the Court may rule. Yesterday, the Court held that Section 1782 only reaches “*governmental or intergovernmental adjudicative bodies*” and that neither of the arbitral tribunals at issue in the consolidated cases before the Court “*fits that bill*.” Justice Barrett delivered the unanimous opinion for the Court.

28 U.S.C. § 1782 is the U.S. federal statutory provision that permits district courts to order testimony or the production of evidence “for use in a proceeding in a foreign or international tribunal.” Both cases before the Court involved a party seeking discovery in the United States for use in arbitration proceedings abroad. However, the nature of the foreign arbitration proceedings in the two cases differed, which set the stage for the Court to speak more definitively on its interpretation of “foreign or international tribunals” in the opinion.

The two underlying arbitrations at issue

One case concerned a private commercial DIS arbitration seated in Munich between a U.S. based automotive parts manufacturer (and subsidiary of a German corporation) and a Hong Kong based company regarding a sale of goods transaction. In anticipation of commencing the arbitration, a discovery application under Section 1782 was filed in the Eastern District of Michigan. The resisting party argued that a DIS arbitration was not a “foreign or international tribunal” under Section 1782. However, Sixth Circuit precedent foreclosed that argument (the Sixth Circuit’s decision is available here). The U.S. Supreme Court granted a stay and *certiorari* to resolve a split among the Circuit Courts over whether private arbitral tribunals fell within the phrase “foreign or international tribunal” in Section 1782.

The second case concerned an ad hoc UNCITRAL arbitration initiated under a bilateral investment

treaty (BIT) between Lithuania and Russia. A discovery application was filed under Section 1782 in the U.S. District Court of the Southern District of New York seeking information from third parties. The application was resisted on the ground that an ad hoc arbitration tribunal was not a "foreign or international tribunal" under Section 1782 but rather a private adjudicative body. The district court rejected that argument and the Second Circuit affirmed. The Second Circuit previously had held that a private arbitral tribunal does not constitute a "foreign or international tribunal" under Section 1782. However, it found that the ad hoc UNCITRAL arbitration under the BIT between Lithuania and Russia did not possess "*the functional attributes most commonly associated with private arbitration*." 5 F.4th 216, 225 (2021). Accordingly, the Second Circuit concluded that the ad hoc UNCITRAL arbitral tribunal initiated under the BIT constituted a "foreign or international tribunal" under Section 1782 rather than private arbitration proceeding. 5 F.4th 216, 228 (2021).

The Court's Analysis

The Court approached its analysis in two steps. First, it considered whether the phrase "foreign or international tribunal" in Section 1782 included private adjudicatory bodies, on the one hand, or rather only governmental or intergovernmental bodies, on the other hand. If the Court were to determine that Section 1782 only applies to the latter, it then would need to determine whether either of the arbitral tribunals at issue constituted governmental or intergovernmental bodies.

The Court began its analysis focusing on the definition of "tribunal" in the context of the statutory phrase in which it appears, concluding that in light of the modifiers of "foreign or international," the term "tribunal" in Section 1782 "*is best understood as an adjudicative body that exercises governmental authority*," citing a prior Supreme Court case for the proposition that words together may assume a more particular meaning than those words in isolation.

The Court went on to explain that in isolation, the word "foreign" could mean something belonging to another nation or country, which would support interpreting "foreign tribunal" as a governmental body. On the other hand, the word "foreign" could "*more generally mean 'from' another country, which would sweep in private adjudicative bodies too*." The Court concluded that the first meaning "*is the better fit*." The Court opined that the word "foreign" takes on a more governmental meaning when modified with potential governmental or sovereign connotations. The term "tribunal" is "*a word with potential governmental or sovereign connotations, so 'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation*." The Court continued, "*for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation*." The Court noted that its reading of "foreign tribunal" was "*reinforced by the statutory defaults for discovery procedure*." The statute "*presumes that a 'foreign tribunal' follows 'the practice and procedure of the foreign country*." The Court further explained, "*[t]hat the default discovery procedures for a 'foreign tribunal' are governmental suggests that the body is governmental too*."

Turning next to the term "international tribunal," the Court noted that "international" can mean either involving or of two or more "nations", on the one hand, or "nationalities" on the other hand. The Court concluded that nations as opposed to nationalities was the more applicable definition of "international" in Section 1782, reasoning that "*it would be strange for the availability of discovery to turn on the national origin of the adjudicators*." The Court concluded that for purposes of

Section 1782, a tribunal is "international" when it involved or is of two or more nations and "*those nations have imbued the tribunal with official power to adjudicate disputes*." The Court explained: "*So understood, 'foreign tribunal' and 'international tribunal' complement one another: the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations*."

The Court noted that "*Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the federal Arbitration Act (FAA), 9 U.S.C. § 7 et seq*." The Court explained that "*in light of the statutory history*," the amendment of Section 1782 in 1964 "*did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered*." In the Court's view, Congress had broadened "*the range of governmental and intergovernmental bodies included*" in Section 1782, thereby increasing the assistance and cooperation rendered by the United States to those foreign nations, noting that the purpose of Section 1782 is comity – promoting respect for foreign governments and encouraging reciprocal assistance. The Court noted that it was difficult to see how enlisting district courts to help private bodies, adjudicating purely private disputes abroad, would serve that end.

The Court observed that extending Section 1782 "*to include private bodies would also be in significant tension with the FAA, which governs domestic arbitration, because §1782 permits much broader discovery than the FAA allows*." Interpreting Section 1782 to reach private arbitration "*would therefore create a notable mismatch between foreign and domestic arbitration*" and that it is hard to identify a rationale for providing broader court-assisted discovery to parties in foreign seated private arbitrations than in domestic arbitrations.

In concluding its statutory analysis, the Court stated: "*we hold that § 1782 requires a 'foreign or international tribunal' to be governmental or intergovernmental. Thus, a 'foreign tribunal' is one that exercises governmental authority conferred by a single nation, and an 'international tribunal' is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within § 1782*."

Applying this statutory analysis, the Court concluded that neither the DIS arbitration nor the ad hoc UNCITRAL arbitration at issue in the cases before it fell within Section 1782.

The DIS arbitration was plainly a private arbitration under the auspices of a private arbitral institution pursuant to private arbitration rules. "*No government is involved in creating the DIS panel or prescribing its procedures. The adjudicative body therefore does not qualify as a governmental body*." The fact that the arbitration was subject to the arbitration law and courts of the country in which it was seated did not alter the analysis: "*private entities do not become governmental because laws govern them and courts enforce their contracts – that would erase any distinction between private and governmental adjudicative bodies*."

The ad hoc arbitration panel constituted pursuant to the BIT between Lithuania and Russia "*presents a harder question*" but results in the same answer. The Court reasoned that "*neither Lithuania's presence nor the treaty's existence is dispositive, because Russian and Lithuania are free to structure investor-state dispute resolution as they see fit. What matters is the substance of their agreement*," namely whether the two nations intended to confer governmental authority on an ad hoc arbitral panel formed pursuant to the treaty, noting that as a general matter, a treaty is a contract between two nations.

While the BIT at issue permits an investor to choose one of four forums to resolve disputes, including a national court, the inclusion of national courts on the list of possible elective forums reflects the intent of the treaty parties to give investors the choice of where to bring their disputes.

The Court observed that the "*ad hoc panel … 'is materially indistinguishable in form and function' from the DIS panel resolving the dispute*" in the other case, quoting the Brief for George A. Bermann et al. as *Amici Curiae* at 19. The Court went on to explain that "*[i]n a private arbitration, the panel derives its authority from the parties' consent to arbitrate. The ad hoc panel in this case derives its authority in essentially the same way*." The Court reasoned "*a body does not possess governmental authority just because nations agree in a treaty to submit to arbitration before it. The relevant question is whether the nations intended that the ad hoc panel exercise governmental authority. And here, all indications are that they did not*."

The Court concluded that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under Section 1782 and that such bodies are "*those that exercise governmental authority conferred by one nation or multiple nations*." Applying that statutory interpretation, the Court concluded that neither the DIS private commercial arbitration not the ad hoc arbitration pursuant to the BIT qualified.

The Supreme Court's decision resolves a long-standing Circuit Court split on whether private foreign or international arbitrations fall within Section 1782. In the past decade, a myriad of appellate court cases on Section 1782 have been issued with differing results and, in some cases, internally inconsistent or incomprehensible reasoning. By contrast, the Supreme Court's decision in *ZF Automotive US, Inc. v. Luxshare, Ltd*. is straight-forward and clear. It outlines a coherent rationale for its statutory interpretation grounded in first principles. It then applies its statutory interpretation to the two separate arbitrations at issue in a cogent way that further illustrates the meaning of its interpretation of the phrase "foreign or international tribunal" in Section 1782.

At last, the Supreme Court finally has empowered courts to see clearly how to interpret and apply the phrase "foreign or international tribunal" in Section 1782. This decision will be welcomed by many in the international arbitration field. Whether or not you agree with the Supreme Court's statutory interpretation or wish the Court to have reached a different result, clarity was sorely needed after more than a decade of confusion.

This entry was posted on Tuesday, June 14th, 2022 at 8:28 am and is filed under Evidence, SCOTUS, Section 1782 Discovery
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