Kluwer Arbitration Blog

# What Alternatives Exist for International Arbitration Parties to Access §1782 Discovery?

MarcAnthony Bonanno · Wednesday, November 8th, 2023

Prior to the Supreme Court's decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (June 13, 2022), certain Circuits permitted parties to private international commercial arbitrations to avail themselves of U.S. discovery proceedings via 28 U.S.C. §1782 ("§1782" or "Section 1782"). The Supreme Court's decision in *ZF Automotive* removed that option.

Section 1782 authorizes federal courts to order a party to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal" so long as (1) the target is "found" within the district of the court which the application is made; (2) discovery is "for use" in a proceeding before a foreign or international tribunal; and (3) the moving party is an "interested party" to the dispute. In short, §1782 offers foreign parties access to U.S. style discovery procedures. In June 2022, the Supreme Court issued its unanimous decision in *ZF Automotive* holding that §1782 ***did not*** apply to international commercial arbitrations. According to the Supreme Court, §1782 only extends to governmental or intergovernmental tribunals, and private commercial arbitration panels do not satisfy this test. Nonetheless, the question remains: are there any alternatives to secure evidence for use in international arbitration?

**Can a Simultaneous Litigation Allow Parties to a Private International Arbitration Access to §1782?**

One of the first post-*ZF Automotive* decisions was issued by a magistrate judge in the U.S. District Court for the Eastern District of New York on October 27, 2022 in *In re Alpene, Ltd.*, No. 21-MC-2547 (MKB) (RML), 2022 U.S. Dist. LEXIS 196061 (E.D.N.Y. Oct. 27, 2022), wherein the Court denied a petition that requested the issuance of a subpoena to obtain records and deposition testimony from a third party located in the Eastern District of New York for use in an ICSID arbitration between a Hong Kong corporation and the Republic of Malta.

At issue, was whether the ICSID panel constituted a "foreign or international" tribunal within the definition of §1782. Therein, the magistrate judge, in applying the non-exhaustive and non-exclusive list of factors provided by the court in *ZF Automotive*, reasoned that the ICSID panel, which was borne out of the China-Malta Bilateral Investment Treaty ("BIT"), was not "imbued with governmental authority." Notably, the Court explained that the fifth *ZF Automotive* factor – comity between the United States and a foreign nation – is not promoted by the ICSID panel because the panel does not have the authority to provide a reciprocal discovery. On August 15, 2023, Magistrate Judge Levy's decision was upheld by the U.S. District Court Judge Brodie. *See*

*In re Alpene, Ltd.*, No. 21-MC-2547 (MKB) (RML), 2023 U.S. Dist. LEXIS 142606, at *15 (E.D.N.Y. Aug. 15, 2023).

*In re Alpene* is not the only post-*ZF Automotive* case to decide whether parties to an international arbitration could avail themselves of §1782. In the matter of *In re Application of B&C KB Holding GmbH*, No. 22-mc-00180 (LAK) (VF), 2023 U.S. Dist. LEXIS 19813, at *9 (S.D.N.Y. Feb. 6, 2023), the Southern District of New York granted a §1782 application for a petitioner who was involved in an international commercial arbitration in Germany and applied to obtain discovery from two parties located within the Southern District. The Court reasoned that because there were two concurrent and active criminal investigations being conducted by the Austrian and German authorities, and that the discovery sought to be obtained would be turned over to the Austrian and German authorities to support the respective criminal investigations, the "for use" in a foreign proceeding requirement was satisfied.

In support of their application, the petitioner submitted evidence and sworn statements from the Austrian and German counsels that described the scope of the criminal investigation and the allegations in the draft criminal complaints, attesting that the information sought in the application is directly relevant to the scope of the investigations, and that it is lawful for the Austrian and German authorities to accept the desired discovery. Likewise, the petitioner and their counsel submitted their own sworn statements reaffirming their intent to provide all materials obtained through the discovery process to the respective authorities in Austria and Germany.

Parties to an ongoing international arbitration that wish to avail themselves of §1782 discovery should consider whether there are related criminal or civil litigations that may also benefit from the discovery sought. If so, one method to access §1782 discovery could be to "piggy-back" off of the concurrent litigation by submitting sworn affidavits similar to those filed in *In re Application of B&C KB Holding GmbH*.

Additionally, when drafting arbitration agreements where there might be a risk that one would need to obtain discovery or information from non-parties located in the United States, counsel should assess whether carving out specific disputes to be litigated in a court of competent jurisdiction, instead of in an arbitration, may be strategically beneficial. The inverse is also true: counsel wishing to protect their clients from potential §1782 litigation may consider restricting the forums of dispute resolution solely to arbitral tribunals.

**Can the Reasonable Contemplation Standard Provide an Avenue to Obtain §1782 Discovery?**

As explained above, the Supreme Court's decision in *ZF Automotive* is not a complete bar preventing parties to international arbitrations from availing themselves of §1782 discovery – it just limits the availability. Section 1782 still allows a court to grant a petition for parties seeking material to be used in a foreign or international proceeding that is not yet commenced, but within "reasonable contemplation." Hypothetically, could the "reasonable contemplation" standard open the door for parties to access §1782 discovery, especially when a treaty or commercial contract offers multiple forums to resolve a dispute? For example, the treaty in the matter of *In re Alpene*, provided three (3) forums to resolve a dispute: (1) a court of competent jurisdiction; (2) an arbitration under ICSID; or, (3) an ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"). Consequently, if a treaty or contract has a similar provision allotting for either an arbitration or court of competent jurisdiction to resolve the dispute, should counsel, pre-arbitration, assess whether there are any §1782

discovery needs? Unequivocally, yes. But, why?

To satisfy the "reasonable contemplation" standard, the Second Circuit in *Mangouras v. Squire Patton Boggs*, 980 F.3d 88, 100 (2d Cir. 2020), held that the movant "must have more than a subjective intent to undertake some legal action, and instead must provide some objective indicium that [legal] action is being contemplated." There is not a clear test setting forth the "reasonable contemplation" standard. In the *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1269 (11th Cir. 2014), the Eleventh Circuit upheld the granting of a §1782 application where the movant (1) attested to the extensive internal audit regarding the contemplated litigation that was conducted, (2) provided a good faith and facially legitimate explanation of the investigation, (3) stated the intent to commence a civil action, and (4) explained how the discovery sought would benefit the contemplated action. Conversely, the Second Circuit in *Certain Funds, Accounts &/or Inv. Vehicles v. KPMG, LLP*, 798 F.3d 113, 124 (2d Cir. 2015) upheld the denial of an application when the movant retained counsel and was only discussing a potential litigation.

As the Court explained in *In re Ex Parte Application of Gen. Elec. Co. For An Order to Take Discovery Pursuant to 28 U.S.C. § 1782*, Civil Action No. 1:22-cv-91125-IT, 2022 U.S. Dist. LEXIS 201177, at *10 (D. Mass. Nov. 4, 2022), a petitioner should likely satisfy the reasonable contemplation standard when it retains counsel for the purposes of commencing an action, has conducted some level of an internal investigation and review, and there is a good faith basis to assert that materials sought would benefit or be related to the contemplated action. When a contract or treaty provides for an arbitration or court of competent jurisdiction to resolve a dispute, counsel should make an immediate assessment of whether there are any §1782 discovery needs. If so, and prior to deciding whether arbitration is the desired path, counsel should petition the applicable U.S. District Court to attempt to avail its client of the §1782 discovery.

Importantly, if counsel elects to pursue the above path, the decision to arbitrate or litigate should legitimately remain an open question. Therein, counsel might consider attesting to the positives and negatives of commencing both an arbitration or a litigation, clarify how the strategic decision to commence an arbitration or litigation is dependent on the evidence gathered prior to commencement, explain whether the sought after material would be available in the "contemplated" court of competent jurisdiction, and note that the recommendation to the client will not be made until all pre-commencement due diligence has been completed. Lastly, counsel should submit draft allegations that may be the basis for the envisaged arbitration or litigation.

These §1782 discovery considerations extend to drafting of arbitration agreements as well. When drafting arbitration agreements, counsel should assess the future risks or needs for §1782 discovery. If readily apparent that the client may need to pursue such discovery, the alternate forums of resolving disputes should remain in the agreement to allow the client to avail itself of §1782. The inverse is also true.

**Can Parties Utilize New York's CPLR §3102(c) to Obtain Pre-Arbitration Discovery?**

Despite the Supreme Court's decision in *ZF Automotive*, parties in an international arbitration may utilize New York's Civil Practice Law and Rules ("CPLR") §3102 to obtain discovery to assist in an arbitration. CPLR §3102 allows a party to commence a proceeding to obtain discovery in aid of an arbitration. Parties may utilize §3102(c) to obtain useful information to support a complaint or an arbitration. *Leff v. Our Lady of Mercy Acad.*, 55 N.Y.S.3d 392, 394 (2d Dep't 2017). New

York courts generally admonish the usage of §3102(c) to determine if a party has a cause of action in that pre-arbitration disclosure that can only be used to "frame [the] complaint," so long as the party can make a prima facie showing that it has a right to redress. *Urban v. Hooker Chemicals & Plastics Corp.*, 427 N.Y.S.2d 113, 114 (4th Dep't 1980); *Liberty Imports v. Bourget*, 536 N.Y.S.2d 784, 786 (1st Dep't 1989). "[P]re-action discovery is available only where a petitioner demonstrates that it has a meritorious cause of action and the information sought is material and necessary to the actionable wrong." (Internal quotations omitted) *Mascolo v. Triborough Bridge & Tunnel Auth.*, Index No. 155143/2023, 2023 NY Slip Op 32308(U), ¶ 3 (Sup. Ct.). In other words, to utilize §3102(c) a party must show that extraordinary circumstances are present.

Although not commonly used for arbitrations, §3102(c) may offer an alternative path for parties to obtain discovery prior to the commencement of an international arbitration.

**Conclusion**

Despite the limitations to §1782 that the *ZF Automotive* decision put on parties to international arbitrations, this type of discovery is not completely barred. U.S. discovery continues to remain broad and accessible. Parties that need or want to avail themselves of benefits of U.S. discovery mechanisms can still do so, but it may take additional creativity or following less-charted paths. And, finally, parties should not overlook utilizing individual states' pre-action disclosure or discovery mechanisms that exist, like New York's CPLR §3102(c), to obtain some of the desired information.

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