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# Supreme Court Significantly Restricts the Use of Section 1782 Discovery For Use In Foreign and International Arbitrations

JUNE 15, 2022

Earlier this week, the Supreme Court of the United States ruled that 28 U.S.C. section 1782—which permits courts to order discovery "for use in a proceeding in a foreign or international tribunal"—does *not* authorize a district court to order discovery for use in any arbitration conducted by a non-governmental body. Specifically, the Court held that "only a governmental or intergovernmental adjudicative body constitutes a 'foreign or international tribunal' under § 1782" and explained that "[s]uch bodies are those that exercise governmental authority conferred by one nation or multiple nations."

Because section 1782 permits parties involved in proceedings before "a foreign or international tribunal" to access U.S.-style discovery to gather evidence in the United States, it provides parties to foreign and international proceedings a powerful tool, especially relative to other jurisdictions that generally do not permit expansive discovery. The Supreme Court's decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, ___U.S. _____, 2022 WL 2111355 (June 13, 2022), takes this powerful tool off the table in any arbitration conducted by a non-governmental body, and thus shields companies and individuals in the U.S. from having to turn over information for use in such an arbitration. The decision also levels the playing field for U.S.-based companies relative to their foreign counterparts, who are not compelled by their own countries' laws to similarly produce discovery.

The Supreme Court's decision was issued in two cases consolidated for appeal. One involved a commercial dispute between companies whose contract stipulated that all disputes between them would be resolved under the arbitration rules of the German Arbitration Institute, a private arbitral institution. The second involved a dispute between a private party and a sovereign nation that, pursuant to an international treaty, was being heard by an ad hoc arbitration panel.

A unanimous Court held that to constitute a "foreign tribunal" for purposes of section 1782, the "tribunal must possess sovereign authority conferred by [a foreign] nation." The Court likewise held that the phrase "international tribunal" refers to "one that involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes." Thus, under the Court's interpretation, a "foreign tribunal" is "a tribunal imbued with governmental authority by one nation," while an "international tribunal" is "a tribunal imbued with governmental authority by multiple nations."

To determine whether section 1782 applies in a particular arbitration, district courts must now examine "whether the features of the adjudicatory body and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority." If the evidence shows the nations intended for the body to have governmental authority, then section 1782 discovery is available; if not, then the district court cannot order discovery. In the Court's view, "[p]rivate adjudicatory bodies do not fall within § 1782."

The Court said that its interpretation of section 1782 is supported by the provision's purpose, legislative history, and relationship to the Federal Arbitration Act (FAA). Looking at the statute's purpose and history, the Court found that section 1782 was intended to promote comity and that it is "difficult to see how enlisting district courts to help private bodies would serve that end." The Court further found that extending section 1782, which applies to foreign or international tribunals, to include private arbitration would be "in significant tension with the FAA," which governs domestic arbitration, "because § 1782 permits much broader discovery than the FAA allows."

The Supreme Court's decision resolves a long-standing debate and provides a clear rule that section 1782 is not available for use in private commercial arbitration. Going forward, this means that U.S.-based parties are less likely to be targeted with broad U.S.-style discovery in aid of commercial arbitration. Still, other avenues, like section 7 of the FAA and section 3102 of the New York Civil Practice Law and Rules, remain available to obtain discovery in aid of private commercial arbitration.

As to disputes between private investors and sovereign states, the Court's decision narrows the circumstances under which discovery can be sought but does not categorically prohibit use of section 1782. For example, the decision—which examined an ad hoc arbitral panel deliberately created as an alternative to governmental bodies—does not address investor-State arbitration administered by the World Bank Group's International Centre for Settlement of Investment Disputes, a forum established by the ICSID Convention and its State parties to settle disputes under most international investment treaties, numerous investment laws, and many contracts. It is likely that parties will continue invoking section 1782 for aid in ICSID arbitration.
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