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Supreme Court Clarifies Scope of Federal Courts' Authority to Assist with Discovery in Arbitrations Abroad

On June 13, 2022, the Supreme Court unanimously held in *ZF Automotive US* v. *Luxshare* that 28 U.S.C. § 1782—which empowers district courts to order discovery "for use in a proceeding in a foreign or international tribunal"—applies only when the tribunal is a governmental or intergovernmental body. The statute does not reach private arbitral panels that are not imbued with governmental authority.

Background

To foster cooperation between United States courts and their counterparts overseas, Congress authorized federal district courts to assist with discovery in foreign and international fora. Under 28 U.S.C. § 1782(a), a district court in the district where "a person resides or is found" may order that person to provide testimony or documents "for use in a proceeding in a foreign or international tribunal." The parties in *ZF Automotive* (and a companion case, *AlixPartners* v. *Fund for Protection of Investors' Rights in Foreign States*) dispute whether Section 1782(a) empowers a district court to order discovery for use in foreign commercial arbitration proceedings before private adjudicators.

ZF Automotive US is a Michigan-based subsidiary of a German corporation. In 2017, ZF sold part of its business to Luxshare, which is based in Hong Kong. The purchase agreement provided for dispute resolution by arbitration under the rules of the German Arbitration Institute, a private body. In 2020, Luxshare prepared to initiate arbitration against ZF, alleging fraud during the 2017 sale. Invoking Section 1782(a), Luxshare applied to the district court for the Eastern District of Michigan for an order requiring discovery from ZF. Consistent with binding Sixth Circuit precedent, the district court authorized subpoenas and rejected ZF's argument that the German arbitral panel was not a "foreign or international tribunal" under Section 1782(a). ZF appealed to the Sixth Circuit and filed a petition for certiorari before judgment.

Unlike *ZF*, where the parties consented to arbitration in a private contract, *AlixPartners* arose from a treaty between the governments of Russia and Lithuania. The treaty afforded certain protections to cross-border investors and allowed investors based in either Russia or Lithuania to enforce those protections against the other sovereign nation by ad hoc arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). In 2019, the Fund for Protection of Investors' Rights in Foreign States, a Russian investment entity, initiated an ad hoc arbitration against Lithuania alleging that Lithuania breached the treaty by expropriating certain investments in the Lithuanian-based Snoras Bank. The arbitral panel consisted of three private individuals selected by the parties.

The Fund applied to the district court for the Southern District of New York for leave to serve non-party discovery requests on AlixPartners and its CEO, whom Lithuania had appointed in 2016 as the temporary administrator of Snoras Bank. The district court granted the application, reasoning that the arbitral panel was a "foreign or international tribunal" under Section 1782(a) because it was convened pursuant to the Russian-Lithuanian treaty, that treaty established the rights to be adjudicated, and the arbitration would proceed under UNCITRAL. The Second Circuit affirmed, relying on the facts that the arbitral panel derived its

authority from a treaty—as opposed to a private contract—and that the arbitration would proceed under the rules of an international body.

The Supreme Court granted review and consolidated the cases to decide whether the arbitral panels are "foreign or international tribunals" within the meaning of Section 1782(a).

The Supreme Court's Decision

In a unanimous opinion written by Justice Barrett, the Supreme Court held that only a governmental or intergovernmental adjudicative body can constitute a "foreign or international tribunal" under 28 U.S.C. § 1782. Such a body is one that exercises "governmental authority conferred by one nation or multiple nations." Applying that rule, the Court determined that neither of the arbitral bodies at issue qualified.

The Court first considered whether the phrase "foreign or international tribunal" includes private adjudicative bodies or only governmental and intergovernmental bodies. At the outset, the Court recognized that the word "tribunal," standing alone, might sweep broadly enough to encompass private arbitral panels. When considered in context, however, the modifier "foreign or international" signifies an adjudicative body that exercises governmental authority.

The Court explained that although the word "foreign" can be used broadly to describe something that is "from" another country—such as a "foreign" film—it takes on a "more governmental" meaning when modifying a word "with potential governmental or sovereign connotations." Because "tribunal" has such connotations, "foreign tribunal" refers to a tribunal with sovereign authority conferred by the foreign nation, rather than to a tribunal that is simply located abroad. The Court found further confirmation of this interpretation in the default discovery procedure under Section 1782, which applies the procedure "of the foreign country or the international tribunal." That default is sensible when applied to a governmental adjudicatory body, which typically follows the practice and procedures prescribed by the government. But such a default makes less sense as applied to a private adjudicatory body, which is typically governed by the rules agreed upon by the parties themselves. The Court further reasoned that the statute's use of "international tribunal" complements the understanding of "foreign" because it signifies a tribunal that multiple nations have "imbued with governmental authority."

Next, the Court considered Section 1782's history and purpose. As originally enacted, the statute empowered the district courts to assist only foreign "courts." In amending the statute, Congress sought to promote cooperation between the United States and foreign nations by improving "the rendering of assistance to foreign courts and quasi-judicial agencies." Accordingly, Congress amended the statute to expand the types of public bodies that it covers—not to sweep in private bodies. That understanding is consistent with the statute's "animating purpose" of fostering comity. Expending district court resources to aid private bodies in private disputes abroad would not serve that end. The Court also noted that extending Section 1782 to private bodies would create tension with the Federal Arbitration Act, 9 U.S.C. §§ 1-16, which limits the scope of discovery available in domestic arbitrations. The Court saw no rationale for giving parties to private foreign arbitrations broad access to discovery assistance, while precluding such assistance for domestic arbitrations.

Turning to the arbitral bodies at issue, the Court determined that neither qualified as a governmental entity. The arbitral body in *ZF* is a private entity operating under private arbitral rules. It makes no difference that German law governs some aspects of the proceeding, or that German courts might enforce the parties' arbitration agreement. Holding otherwise would "erase any distinction between private and governmental adjudicative bodies." The Court acknowledged that the arbitral body in *AlixPartners* presents a more difficult question because one party to the dispute is a sovereign, and the arbitration arose from an international treaty. The Court determined that the "relevant question" is whether the parties to that treaty intended that the ad hoc arbitration panel exercise governmental authority. Here, the treaty at issue contains no indicia of such intent and instead offers a choice between resolving disputes before a governmental court or "the potentially appealing option of bringing . . . disputes to a private arbitration panel." The Court left open the possibility that, in other cases, a sovereign might imbue an ad hoc arbitration panel with governmental authority.

Implications

The Court's decision in *ZF* and *AlixPartners* resolves a circuit conflict over whether the phrase "foreign or international tribunal" in Section 1782 includes private arbitral panels. By answering this question in the negative, the Court rejected a broad reading of the statute that would involve district courts in purely private arbitrations abroad. The Court's reading will limit delays in those proceedings and prevent parties to foreign arbitration agreements from taking advantage of the broader discovery often permitted by United States courts. The narrower reading that the Court adopted preserves district-court resources for the assistance of foreign nations. Future cases will determine the circumstances under which there is sufficient evidence of intent that an arbitral panel exercise governmental authority, such that Section 1782 applies. It is unclear, for example, whether the International Centre for Settlement of Investment Disputes will be viewed differently, as it is a permanent institution created by a multilateral treaty, with awards that are binding as a matter of public international law. Regardless, it will be important to carefully consider discovery issues in selecting arbitral forums and in drafting arbitration clauses.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

Allan J. Arffa
+1-212-373-3203
aarffa@paulweiss.com

H. Christopher Boehning
+1-212-373-3061
cboehning@paulweiss.com

Jessica S. Carey
+1-212-373-3566
jcarey@paulweiss.com

Geoffrey R. Chepiga
+1-212-373-3421
gchepiga@paulweiss.com

Andrew J. Ehrlich
+1-212-373-3166
aehrlich@paulweiss.com

Michael E. Gertzman
+1-212-373-3281
mgertzman@paulweiss.com

Andrew G. Gordon
+1212-373-3543
agordon@paulweiss.com

Gregory F. Laufer
+1-212-373-3441
glaufer@paulweiss.com

Mark F. Mendelsohn
+1-202-223-7377
mmendelsohn@paulweiss.om

Jessica E. Phillips
+1-202-223-7388
jphillips@paulweiss.com

Aidan Synnott
+1-212-373-3213
asynnott@paulweiss.com

Kannon K. Shanmugam
+1-202-223-7325
kshanmugam@paulweiss.com

Daniel J. Toal
+1-212-373-3869
dtoal@paulweiss.com

Associates Aimee W. Brown and Hillary Black contributed to this client memorandum.