CLIENT ALERT

SCOTUS Limits Section 1782 Discovery to Proceedings Before Governmental or Intergovernmental Adjudicatory Bodies

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AUTHORS

Joseph T. Baio | Mark T. Stancil | Charles Dean Cording | Stuart R. Lombardi
Jordan C. Wall | Richard Li | Samantha G. Prince

A recent decision by the United States Supreme Court has settled a long-debated issue of when discovery may be obtained through United States federal courts in support of private foreign or international arbitrations. In a unanimous decision authored by Justice Amy Coney Barrett, the Court limited the scope of 28 U.S.C. § 1782, a statute that empowers federal district courts to order persons or entities within their jurisdiction to provide testimony and produce documents "for use in a proceeding in a foreign or international tribunal." The Court held that a party to a *non-governmental* proceeding may not seek discovery in the United States for use in that proceeding, even where that proceeding involves a foreign sovereign in an arbitration authorized under a bilateral investment treaty between two foreign governments. *AlixPartners, LLP v. The Fund for Protection of Investor Rights in Foreign States*, No. 21-518.[1]

Case Background

AlixPartners arose from an arbitration between a private party and a *foreign state* (commonly known as "investor-state arbitration"). There, the Fund for Protection of Investors' Rights in Foreign States—a Russian corporation and alleged assignee of a Russian investor—brought an *ad hoc* arbitration against the Republic of Lithuania, alleging, among other things, that Lithuania had expropriated an investment in a failed Lithuanian bank without appropriate compensation, in violation of a bilateral investment treaty between Russia and Lithuania. Under the investment treaty, aggrieved investors

[1] Consolidated with *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401.

had the option to commence an *ad hoc* arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL) rather than pursue claims in Russia or Lithuania.

The Fund commenced arbitration proceedings and petitioned the United States District Court for the Southern District of New York under Section 1782 to obtain documents from and to depose AlixPartners LLP and its Chief Executive Officer, who had previously served as a temporary administrator of the failed bank. Through counsel at Willkie Farr & Gallagher LLP, AlixPartners opposed the Fund's discovery request, contending, among other things, that the *ad hoc* arbitration did not constitute a "foreign or international tribunal" under Section 1782. The Southern District concluded that the arbitration met the statutory requirements of Section 1782, which the United States Court of Appeals for the Second Circuit subsequently affirmed on appeal. The Supreme Court granted certiorari.

In a case decided the same day as *AlixPartners*, Luxshare, Ltd., a Hong Kong-based company, filed an application to obtain Section 1782 discovery from ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation. *ZF Automotive US, Inc. v. Luxshare Ltd.*, No. 21-401. Luxshare sought to use the information in a German arbitration arising out of a dispute over a sales contract. The contract signed by the parties provided that all disputes would be resolved by three arbitrators under the Arbitration Rules of the German Institution of Arbitration (DIS), a private dispute-resolution organization. The United States District Court for the Eastern District of Michigan granted that request, and ZF moved to quash, arguing the same statutory interpretation point as in *AlixPartners*, *i.e.,* that the private commercial arbitration panel did not constitute a "foreign or international tribunal" under Section 1782. Unlike the *AlixPartners* case, however, the *ZF Automotive* case did not involve a foreign state as a party to the arbitration. The Eastern District of Michigan denied ZF's motion, and the United States Court of Appeals for the Sixth Circuit subsequently declined to stay that order. The Supreme Court granted certiorari in tandem with *AlixPartners* to resolve them simultaneously.

Text and Development of Section 1782

Section 1782(a) provides, in pertinent part:

> The district court of the district in which a person resides or is found may order him 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.

In enacting § 1782, Congress authorized United States district courts to grant discovery in aid of proceedings before a "foreign or international tribunal." The prior version of Section 1782 authorized district courts to assist in the production of evidence for use in "any judicial proceeding pending in any *court* in a foreign country." In 1964, Congress amended the statute to permit such assistance for use in proceedings "in a foreign or international tribunal." Act of Oct. 3, 1964 § 9(a), Pub. L. No. 88-619, 78 Stat. 997; *see Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247 (2004). Yet, the

meaning of that statutory phrase has long been debated. In particular, courts have been in widespread disagreement over whether a "foreign or international tribunal" as that phrase was used in the amended Section 1782 includes private commercial arbitrations.

Surrounding Context

The use of Section 1782 has exploded over the last two decades. Section 1782 provided a convenient means for litigants outside of the United States to obtain discovery within the United States by filing a straightforward, often *ex parte* petition to a federal district court. As a result, as one academic commentator and *amicus curiae* observed, Section 1782 discovery requests for use in international commercial proceedings *quadrupled* across the nation between 2005 and 2017. Professor Yanbai Andrea Wang Amicus Br. 5. Most of those requests came from parties to international arbitrations, who could avail themselves through Section 1782 of the United States' more permissive and expansive discovery rules to obtain broad discovery from United States firms and individuals in contravention of narrower discovery options typically available in arbitration.

Given arbitration's increasing prevalence, the question of whether all, or any, international arbitrations qualified as a "foreign or international tribunal" for purposes of Section 1782 remained a hotly-contested issue. The debate ultimately split the United States Courts of Appeals. The Fifth and Seventh Circuits held that an arbitral body did not qualify as a "foreign or international" unless the arbitral body actually wielded governmental or quasi-governmental authority. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694-96 (7th Cir. 2020). By contrast, the Fourth and Sixth Circuits construed Section 1782 more broadly as encompassing arbitrations that had some governmental origin. *Servotronics, Inc. v. Boeing Co*., 954 F.3d 209, 213-15 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp*, 939 F.3d 710, 722-23 (6th Cir. 2019).

In *AlixPartners*, the Second Circuit ultimately adopted a four-factor test which required district courts to evaluate: (1) whether the arbitral body was "functionally independent"; (2) whether a state could alter the outcome; (3) the nature of the jurisdiction of the arbitral panel; and (4) whether the parties could select their own arbitrators.

Supreme Court's Holding and Reasoning

On June 13, 2022, the Supreme Court held that a party to an international, non-governmental proceeding could not obtain discovery through Section 1782 for use in that proceeding. The Court reasoned that only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under Section 1782. The Court relied on the terms and history of Section 1782, and considered the intersection of Section 1782 and the Federal Arbitration Act. As a result, the Court concluded that neither of the underlying arbitral panels in *AlixPartners* or *ZF Automotive* qualified as "foreign or international tribunals."

Tracing Section 1782's statutory history to the Eighteenth Century, the Court found that while a "tribunal" need not be a formal "court," read in context—with "tribunal" attached to the modifiers "foreign or international"—Section 1782's phrase is "best understood to refer to an adjudicative body that exercises governmental authority." Op. 9. Examining the statute's purpose, the Supreme Court observed:

> [T]he animating purpose of § 1782 is comity: Permitting federal courts to assist foreign and international governmental bodies promotes respect for foreign governments and encourages reciprocal assistance. It is difficult to see how enlisting district courts to help private bodies would serve that end.

Op. 10. In other words, the statute was intended to reach ***governmental proceedings*** and encourage foreign governments to provide reciprocal benefits to United States citizens. The Court easily applied this rationale to the German commercial arbitration in *ZF Automotive*, holding that the private commercial arbitration in that case was clearly non-governmental.

The facts of *AlixPartners* presented "a harder question" for the Court. Op. 12. There, a foreign sovereign (Lithuania) was a party to the dispute, and the option to arbitrate was contained in an international treaty rather than a private contract. The Court recognized, however, that the investment treaty between Russia and Lithuania specifically provides an *ad hoc* arbitration option, among several dispute resolution options, including Russian or Lithuanian courts, to permit investors the option to ***avoid governmental proceedings***. The Court concluded that such a proceeding, by design, falls outside the ambit of Section 1782. The Court further observed that "neither Lithuania's presence nor the treaty's existence is dispositive, because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit." Accordingly, "[w]hat matters is whether the two nations intended to confer governmental authority on an ad hoc panel formed pursuant to the treaty." Op. 12–13.

Additionally, the Court noted that its decision was consistent with the provisions of the Federal Arbitration Act, which significantly limit the ability of parties to domestic arbitrations to obtain discovery from federal district courts. The Court concluded that "interpreting §1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration." Op. 11.

Impact

The Supreme Court's decision provides greater clarity on the scope of Section 1782 discovery to the foreign proponents of such requests, to their domestic targets, and to the federal district courts administering the statute. Questions persist, however, as to the appropriate quantum of "governmental" or "intergovernmental" authority necessary to render a proceeding a qualifying "foreign or international tribunal," particularly in investor-state arbitrations.

Purely "private" foreign or international arbitrations now appear to be clearly excluded from assistance under Section 1782. But the Court set few contours on the qualities of a "private" versus a "governmental" arbitration. Although the Court firmly rejected that an arbitration might become governmental merely because "the law of the country in which it would sit . . . governs some aspects of arbitrations" or local courts enforce the arbitral agreement, Op. 12, it took care to note that:

> None of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority. Governmental and intergovernmental bodies may take many forms, and we do not attempt to prescribe how they should be structured.

Op. 15.

Courts, and discovery targets, should therefore expect to see the thresholds of the requisite "governmental" or "intergovernmental" authorization tested in the years to come. Many commercial arbitrations, as structured today, would likely fail any governmental "sniff test" as anything but private proceedings, but parties to these proceedings may get creative in trying to circumvent the Court's decision. For example, by selecting governmental figures as arbitrators, or incorporating more fork-in-the-road clauses to arbitration agreements whereby litigation before a foreign court remains equally within "reasonable contemplation" as private arbitration, but not absolute.

In investor-state arbitration, the Supreme Court's decision would appear to exclude many *ad hoc* arbitrations structured like the Fund's. As many bilateral investment treaties have followed the "model BIT" and include similar dispute resolution options, the Court's decision could foreclose Section 1782 to a number of active or forthcoming investment arbitrations under these treaties. Just as with commercial arbitrations, parties to investor-state arbitrations will seek to circumvent the Court's decision. For example, because the Supreme Court relied on the Fund's decision to pursue investor-state arbitration, a party could pursue Section 1782 discovery earlier: once a dispute is within "reasonable contemplation," but before the investor has firmly committed to one of the dispute resolution options available under the investment treaty. The scope of the Court's decision as to "intergovernmental" authorization is also likely to be tested imminently with respect to investment disputes conducted through the International Centre for Settlement of Investment Disputes (ICSID).

Thus, while the Court's decision in *AlixPartners* and *ZF Automotive* brings welcome clarification, parties to foreign or international arbitrations, and potential domestic targets of discovery, will continue to have to think carefully about availing themselves of, or defending themselves against, Section 1782.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Joseph T. Baio
212 728 8203
jbaio@willkie.com

Mark T.Stancil
202 303 1133
mstancil@willkie.com

Charles Dean Cording
212 728 8154
ccording@willkie.com

Stuart R. Lombardi
212 728 8882
slombardi@willkie.com

Jordan C. Wall
212 728 8465
jwall@willkie.com

Richard Li
212 728 8891
rli@willkie.com

Samantha G. Prince
212 728 8909
sprince@willkie.com