ALERT MEMORANDUM

U.S. Supreme Court's Decision on the Applicability of Section 1782 Discovery Likely to Have Practical Impact on Arbitration in Latin America

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There are many open questions regarding how and when parties in Latin America-related arbitrations can obtain U.S.-based discovery following the United States Supreme Court's much-anticipated decision regarding the application of the Section 1782 discovery statute to international arbitration in *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States*. The Court held unanimously that Section 1782 does not permit U.S. courts to order discovery for use in commercial arbitrations abroad but introduced substantial ambiguity with respect to whether Section 1782 can be used in investor-state cases. [1]

This Alert Memorandum briefly summarizes the U.S. Supreme Court's decision and then focuses on the practical impact that the decision is expected to have in arbitrations where the parties are from, or the proceedings are seated in, Latin America. The Memo distinguishes the potential effect of the decision on public international law cases, from its impact on international commercial arbitrations. This Memo suggests arguments and alternative mechanisms that parties may use in cases with a Latin America nexus to provide for, or help parties obtain, discovery in arbitration.

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[1] *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. __ (2022).

I. Section 1782 and the Supreme Court's Decision[2]

28 U.S.C. § 1782 ("Section 1782") grants U.S. federal courts the discretion to compel witness testimony and document production for "use in a proceeding in a foreign or international tribunal" from any person or entity who "resides" or is "found" in the judicial district where the federal court sits.[3]

Although U.S. courts were previously split on the question whether Section 1782 was available to obtain discovery for use in private international commercial arbitration – with the Second, Fifth, and Seventh Circuits for the U.S. Courts of Appeals finding that Section 1782 was not permissible in private commercial arbitrations,[4] and the Fourth and Sixth Circuits holding the opposite[5] – courts have generally assumed that Congress "intended to cover" investor-state arbitrations within Section 1782.[6]

The Supreme Court addressed the scope of Section 1782 – resolving the longstanding Circuit split of the statute's applicability to private commercial arbitrations but introducing considerable uncertainty with respect to its continued application to investor-state arbitrations – in two consolidated cases: *Luxshare, Ltd. v. ZF Automotive US, Inc.* and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States.*

In a unanimous decision authored by Justice Barrett on June 13, 2022, the Court held that Section 1782 was not applicable to the private commercial arbitration in *Luxshare* or the arbitration pursuant to a bilateral investment treaty in *AlixPartners*.[7] The Court utilized a two-step test in assessing the statute's applicability to commercial and investment arbitrations.[8] After determining that a "foreign or international tribunal" includes only governmental or intragovernmental bodies, the Court determined that an arbitral tribunal could qualify within the meaning of the statute if it was "imbued with governmental authority" by one or more nations.[9]

Luxshare definitively forecloses the possibility of using Section 1782 to obtain discovery for use in private commercial arbitrations outside the United States. However, in the realm of public international law arbitrations, the Court left open the possibility that arbitral panels constituted in investor-state cases could qualify as a governmental or intergovernmental body under Section 1782 if they are "clothed . . . with governmental authority" by sovereigns.[10]

II. Practical Impact on Arbitrations in Latin America

Practically speaking, the Supreme Court's decision generally means that parties in commercial arbitrations will have to seek new means of obtaining discovery located in the United States, while parties in investor-state arbitrations may still seek recourse to Section, if they can meet the Court's "governmental authority" test, which is still subject to certain ambiguities as to the possibility of its application.

The Supreme Court's decision will likely have significant impacts on strategic considerations for parties that may wish to obtain evidence for use in arbitrations in Latin America, where there has been a sharp uptick in both private commercial arbitrations seated in the region and investor-state arbitrations involving Latin American sovereigns.

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[2] For more information regarding Section 1782 and the U.S. Supreme Court's decision, *see U.S. Supreme Court Denies Applicability of Section 1782 Discovery Statute With Respect to Private Commercial and Treaty Arbitrations*, Cleary Gottlieb (June 14, 2022), https://www.clearygottlieb.com/news-and-insights/publication-listing/us-supreme-court-denies-applicability-of-section-1782-discovery-statute-with-respect-to-private-commercial-and-treaty-arbitrations.

[3] 28 U.S.C. § 1782.

[4] *See In re Guo*, 965 F.3d 96, 106-08 (2d Cir. 2020); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694-95 (7th Cir. 2020); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

[5] *See Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2019).

[6] *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 190 (2d Cir. 1999). *See Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, No. 18-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019) ("District courts, including in this district, have regularly found that arbitrations conducted pursuant to Bilateral Investment Treaties, and specifically by the ICSID, qualify as international tribunals under the statute.").

[7] *ZF Automotive*, 596 U.S. at *2.

[8] *Id.* at *5.

[9] *Id.* at *3, 9.

[10] *Id.* at *16.

A. Impact on Investor-State Arbitrations

Because the Court declined to adopt a bright-line rule that arbitral tribunals in public international law arbitrations cannot constitute a "foreign or international tribunal" under Section 1782, parties in investor-state cases may still pursue Section 1782 discovery in the United States if there are colorable arguments that the arbitral tribunal exercises governmental authority conferred by one or multiple nations.[11] The Court did not provide substantial guidance on the kind or level of authority that would be sufficient to qualify the tribunal within the ambit of Section 1782; however, there are several factors that parties may rely upon to advance arguments regarding governmental authority, including whether: the sovereign was involved in convening or conferring powers on the panel or the panel was created by an international treaty; the sovereign funds the panel.

The uncertainty over whether investor-state panels can constitute "foreign or international tribunals" is particularly likely to impact cases involving Latin American sovereigns, which have been named as respondents in an increasing number of arbitrations before the International Centre for Settlement of Investment Disputes ("ICSID") in recent years as a result of regulatory changes and political upheaval experienced in the region.[12] For example, in 2021, more than 23% of newly registered ICSID cases involved Latin American parties.[13] While not yet tested, parties may argue – and U.S. courts may ultimately find – that ICSID tribunals in particular have the requisite "governmental authority" mandated by the Court's *Luxshare* ruling, because they are governed by both an multi-governmental institution (ICSID) and an international treaty (the ICSID Convention), which grant the tribunal several traditional features of governmental authority, including, for example, immunity and tax exemption for fees and expenses).[14]

B. Impact on Private Commercial Arbitrations

Because the Court's decision conclusively held that Section 1782 could not be used to obtain discovery in private commercial arbitrations, it will be critical for parties to such arbitrations to devise other means of acquiring discovery from U.S. sources, particularly in Latin American jurisdictions where discovery may not be otherwise readily available or parties may not include provisions allowing for discovery in their arbitration agreements (as U.S. parties often do).

With respect to arbitrations seated in Latin America, discovery is still available through local laws. Certain jurisdictions in Latin America regulate the arbitrators' ability to request assistance from domestic courts to obtain documents or compel testimony. This is the case in Brazil, where the *Carta Arbitral* procedure allows domestic courts to enforce arbitrators' orders compelling discovery.[15] The same is true with respect to Chile and Peru, where the *Ley de Arbitraje Comercial Internacional*[16] and the *Ley General de Arbitraje*,[17] respectively, establish that arbitral tribunals can request assistance or collaboration from domestic courts to obtain evidence. Therefore, in arbitrations seated in or relating to parties located in these jurisdictions, parties may be able to avail themselves of local discovery laws to compel the production of

[11] Indeed, parties to investor-state cases have continued to argue regarding the applicability of Section 1782 in the aftermath of the Supreme Court's decision. *See* C. Simson, *Malta Arb. Outside Reach of Discovery Tool, Court Hears*, Law360 (June 17, 2022), https://www.law360.com/articles/1503897/malta-arb-outside-reach-of-discovery-tool-court-hears (party to an ICSID arbitration arguing that Section 1782 discovery is still available in such cases following the U.S. Supreme Court's decision).

[12] United Nations UNCTAD, Investor–State Dispute Settlement Cases: Facts And Figures 2020 (Sept. 2021) available at: https://unctad.org/system/files/official-document/diaepcbinf2021d7_en.pdf. *See also Ecuador Re-Ratifies The ICSID Convention: Impact Of The Ratification In Ecuador And In The Region* (Aug. 9, 2021) available at: https://www.clearygottlieb.com/-/media/files/alert-memos-2021/ecuador-re-ratifies-the-icsid-convention.pdf.

[13] ICSID, The ICSID Caseload – Statistics: Issue 2022-1, 24 (2021) available at: https://tinyurl.com/mrxynhm7.

[14] *See, e.g.*, International Centre for Settlement of Investment Disputes Convention, Arts. 21, 24(3).

[15] *See* Law No. 13,129 (Brazil) Art. 22, May 26, 2015, available at: https://tinyurl.com/ym33r948 (amending Laws Nos. 9,307/96 and 6,406/76).

[16] *See* Law No. 19,971 (Chile) Art. 27, Sept. 10, 2004, available at: https://tinyurl.com/2p8wdunv.

[17] *See* Decree Law No. 1,071 (Perú) Art. 45, Sept. 1, 2008, available at: https://tinyurl.com/3wzpy8xb.

documents or witness testimony. While these laws apply territorially and therefore may not assist in obtaining discovery from an individual or entity located in the United States, they still provide mechanisms by which parties in Latin America can obtain discovery.

Moreover, there may be additional local laws, such as Chile's *Ley Sobre Acceso a la Información Pública*[18] or Peru's *Ley Transparencia y Acceso a la Información Pública*[19] which allow parties to request information and documents pertaining to the government or governmental agencies, including publically-owned enterprises, provided that the requests meet certain requirements (similar to the Freedom of Information Act request mechanism provided for in the United States).[20] Depending on the information sought, these local law mechanisms may present an interesting alternative for parties. However, parties should be mindful of the limitations of this option, including that: only documents from certain entities can be obtained; requests may be denied for reasons relating to public interest or security;[21] and the lengthy processing time to which many of these requests may be subject.[22]

With respect to discovery of U.S. entities and individuals, although Section 1782 is not available in the commercial arbitration context, parties that anticipate discovery needs from individuals or entities in the United States may increase the likelihood of obtaining discovery by including a U.S. seat in their arbitration agreement. In arbitrations with a U.S. seat, parties from Latin America may be able to rely on other discovery tools, such as Section 7 of the Federal Arbitration Act ("FAA") which empowers arbitrators to "summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."[23] In addition, other U.S. state laws – which may be made applicable through the parties' arbitration agreement to the extent these state laws are not in conflict with the FAA – may additionally allow parties to pursue discovery.[24] For example, Section 3102(c) of the New York Civil Practice Law and Rules ("CPLR") authorizes discovery "to aid in arbitration,"[25] and CPLR Section 2302(a) and CPLR Section 7505 additionally provide that arbitrators or counsel to an arbitration can issue subpoenas for documents or testimony for use in those proceedings.[26] Florida's International Commercial Arbitration Act similarly establishes that arbitral tribunals seated in Florida "may request assistance in taking evidence from the competent court of this state."[27] Given that a number of Latin American entities choose New York or Texas law – particularly in the oil and gas industry – or Florida law for the cultural ties between the region and said state as the law governing commercial contracts and oftentimes elect for a U.S.-based seat – these mechanisms may present attractive alternatives to Section 1782-style discovery, although there are difficult jurisdictional and other hurdles that may prevent their application.

Finally, in order to avoid questions regarding the permissible invocation of local laws or U.S. laws in

[18] Law No. 20,285 (Chile), Aug. 11, 2008, available at: https://tinyurl.com/53fxxp8s.
[19] Law No. 27,806 (Perú), Feb. 4, 2003, available at: https://tinyurl.com/yckjm5tn.
[20] *See, e.g.*, Law No. 20,285 (Chile) Arts. 2, 12, Aug. 11, 2008, available at: https://tinyurl.com/53fxxp8s.
[21] *See, e.g.*, Law No. 20,285 (Chile) Art. 21, Aug. 11, 2008, available at: https://tinyurl.com/53fxxp8s. https://tinyurl.com/53fxxp8s; Law No. 27,806 (Perú) Art. 13, Feb. 4, 2003, available at: https://tinyurl.com/yckjm5tn.
[22] *See, e.g.*, Law No. 20,285 (Chile) Art. 14, Aug. 11, 2008, available at: https://tinyurl.com/53fxxp8shttps://tinyurl.com/53fxxp8s; Law No. 27,806 (Perú) Art. 11, Feb. 4, 2003, available at: https://tinyurl.com/yckjm5tn.
[23] 9. U.S.C. § 7 (1947).
[24] When U.S. state arbitration laws may be expressly or implicitly incorporated into an arbitration agreement is a complicated question that is likely to depend on the precise language of the arbitration agreement itself. *See* B. Morag & K. Gonzalez, *CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters*, The International Lawyer (2019).
[25] N.Y. C.P.L.R. § 3102(c) (2022).
[26] N.Y. C.P.L.R. § 2302(a) (2022) ("[s]ubpoenas may be issued without a court order by . . . an attorney of record for . . . an arbitration [or . . .] an arbitrator"); N.Y. C.P.L.R. § 7505 (2022) ("[a]n arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas[]").
[27] Fla. Stat. § 684.0038 (2011).

order to obtain discovery in arbitration proceedings, parties should consider whether they should at the outset provide for discovery between the parties in the parties' arbitration agreement, or in a procedural order after a dispute has arisen. It may be helpful to incorporate discovery at the outset of an arbitration agreement. In addition, if discovery against a non-party proves helpful to advance claims in aid of or throughout the course of an arbitration proceeding, a party can also consider whether there are independent causes of action that could be brought in an ancillary litigation against the non-party to obtain such discovery.

III. Conclusion

The U.S. Supreme Court's *Luxshare* decision has far-reaching implications on parties' ability to obtain evidence for use in international arbitrations from individuals or entities with a U.S. nexus, in particular in Latin American jurisdictions where certain discovery tools may not be otherwise available, or where parties do not include discovery provisions in their arbitration agreements.

However, parties in Latin American arbitrations can adapt in both private commercial arbitrations – where the absence of Section 1782 can be supplemented through local laws, careful drafting of an arbitration agreement, or possible ancillary litigation against a third party – and in public international arbitrations, where the applicability of Section 1782 remains ambiguous, but creative legal arguments can improve the likelihood of U.S. courts finding the requisite "governmental authority" necessary to permit discovery.

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