ALERT MEMORANDUM

U.S. Supreme Court Denies Applicability of Section 1782 Discovery Statute With Respect to Private Commercial and Treaty Arbitrations

June 14, 2022

On June 13, 2022, the United States Supreme Court issued a much-anticipated decision regarding the application of the Section 1782 discovery statute to international arbitration.[1] Resolving an entrenched split among multiple U.S. Courts of Appeals, the Supreme Court held unanimously in *ZF Automotive US, Inc. v. Luxshare, Ltd.* and *AlixPartners, LLC v. Fund for Protection of Investors' Rights in Foreign States* that Section 1782 does not permit U.S. courts to order discovery for use in commercial arbitrations abroad, because the phrase "foreign or international tribunal," as used in the statute, limits its use to providing assistance to foreign governmental or intergovernmental adjudicative bodies that exercise governmental authority. The Supreme Court seemingly left open the possibility that Section 1782 *could* apply to some types of public law international arbitration, even though it found that the specific ad hoc arbitral panel at issue in *AlixPartners* formed under a bilateral investment treaty did not possess the attributes that evidence an intent to imbue the arbitral panel with the requisite governmental authority.

This Alert Memorandum provides an overview of Section 1782, analyzes the U.S. Supreme Court's decision, and assesses potential implications of the decision on arbitrations in other jurisdictions, including England, France, Germany, and Italy.

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I. Background To Section 1782

28 U.S.C. § 1782 ("Section 1782") allows U.S. federal courts the discretion to compel witness testimony and document production from any person or entity who "resides" or is "found" in the judicial district where the federal court sits for "use in a proceeding in a foreign or international tribunal."[2]

The U.S. Supreme Court's first (and until the cases discussed in this Memorandum, only) decision on the scope of Section 1782 and the meaning of a "foreign or international tribunal" was in 2004 in *Intel Corp. v. Advanced Micro Devices, Inc.*, where the Court held that the term "foreign or international tribunal" includes not only judicial proceedings in foreign courts, but also "administrative and quasi-judicial proceedings abroad."[3]

Since then, numerous courts have considered whether an international arbitration constitutes "a proceeding in a foreign or international tribunal" within the meaning of Section 1782. This debate has primarily focused on private commercial arbitrations, rather than arbitrations conducted pursuant to bilateral investment treaties. In relation to the latter, most courts have generally assumed, as the U.S. Court of Appeals for the Second Circuit found in *National Broadcasting Co. v. Bear Stearns & Co.*, that Congress "intended to cover" investment treaty arbitrations by the statute.[4]

By contrast, the U.S. Circuit Courts of Appeals were split as to the availability of Section 1782 to obtain discovery for use in private commercial arbitration. The Second, Fifth, and Seventh Circuits held that Section 1782 discovery was not authorized for use in private commercial arbitrations,[5] while the Fourth and Sixth Circuits had ruled that Section 1782 *is* available in such arbitrations.[6]

II. Background To The Consolidated Cases

The Supreme Court's decision arose in the context of two cases regarding the application of Section 1782 to private commercial arbitration and investment treaty arbitration, respectively: *Luxshare, Ltd. v. ZF Automotive US, Inc*. and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States*.

In *Luxshare, Ltd. v. ZF Automotive US, Inc.*, Luxshare initiated a private commercial arbitration before the German Institution of Arbitration ("DIS") to recover alleged losses from its contracting partner ZF Automotive. Luxshare filed a Section 1782 application in the United States District Court for the Eastern District of Michigan for discovery in preparation of the arbitral proceedings, which was partially granted. ZF Automotive appealed to the Sixth Circuit, seeking a stay of the district court's discovery order; after the stay was denied by the Court of Appeals, ZF Automotive petitioned for *certiorari* before the Supreme Court.

In *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States*, following the conclusion of a bilateral investment treaty ("BIT") between Lithuania and Russia, the Fund for Protection of Investor Rights in Foreign States (the "Fund"), a Russian entity, initiated arbitration proceedings against Lithuania under the UNCITRAL Rules to seek compensation for the alleged expropriation of its share in a previously nationalized bank. The Fund filed a Section 1782 application for discovery from third party AlixPartners in the District

[2] 28 U.S.C. § 1782.
[3] *Intel Corp v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004). In *Intel*, the adjudicative body at issue was the Directorate-General for Competition of the Commission of the European Communities.
[4] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999). Lower courts have regularly found that a tribunal constituted pursuant to an investment treaty is a "foreign or international tribunal" within the meaning of Section 1782. *See, e.g.*, *Islamic 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.").
[5] *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).
[6] *See Abdul Latif Jameel Transportation Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 2019 (4th Cir. 2019).

Court for the Southern District of New York, which granted the Fund's request. AlixPartners appealed to the Second Circuit, which applied a multi-factor test reviewing the functional attributes of the arbitral tribunal at issue to find that the specific tribunal at issue convened pursuant to the Lithuania-Russia BIT qualified as a "proceeding in a foreign or international tribunal" within the scope of Section 1782, and AlixPartners then petitioned for *certiorari* before the Supreme Court.

III. The Supreme Court's Decision

In a unanimous decision written by Justice Barrett, the Court applied a two-step test in assessing the applicability of Section 1782 to commercial and investment arbitrations. *First*, the Court considered whether "foreign or international tribunal" in Section 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies. *Second*, after finding that Section 1782 applied only to the latter category of governmental or intergovernmental bodies, the Court determined whether either of the arbitral tribunals constituted governmental or intergovernmental adjudicative bodies.[7] The Court ultimately concluded that neither the DIS arbitral tribunal in *ZF Automotive* nor the ad hoc UNCITRAL tribunal in *AlixPartners* fell within this ambit.

Turning to the first question, the Court looked to the "key phrase" in Section 1782: "foreign or international tribunal."[8] Acknowledging that the word "tribunal" by itself is ambiguous, the Court relied on "statutory history" and its precedent in *Intel* to note that Congress's use of the term "foreign or international tribunal" was to "expand[] the provision" and create "'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'"[9] Considering, therefore, the term "foreign or international tribunal" as a complete phrase in context, the Court found that "'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation," which would require the tribunal to "possess sovereign authority conferred by that nation," rather than to "a tribunal . . . simply located in a foreign nation."[10] The Court similarly found that an "international tribunal" is, by its plain meaning, a tribunal that "involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[11] In both cases, the Court determined that the phrase "foreign or international tribunal" required the tribunal to have governmental authority conferred by one or more nations.[12]

According to the Court, this approach was "confirmed by both the statute's history and a comparison to the Federal Arbitration Act (FAA)."[13] Looking again to Section 1782's statutory history, the Court found that the Commission on International Rules of Judicial Procedure charged with drafting Section 1782 had been tasked with improving judicial assistance "between the United States and foreign countries" in order to promote international comity, which was consistent with interpreting Section 1782's reach as limited only to "public bodies," and not "private bodies."[14] The Court determined that expanding Section 1782 to cover private international bodies would not further comity goals, and would "be in significant tension with the FAA, which governs domestic arbitration," because Section 1782 would then permit "broader discovery than the FAA,"[15] which authorizes the arbitral panel to request discovery only through an arbitral subpoena.[16] The Court therefore concluded that interpreting "foreign or international tribunal" as limited to governmental bodies empowered with governmental authority would help to avoid a "notable mismatch between foreign and domestic arbitration."[17]

Having determined that only a governmental or intergovernmental entity constitutes a "foreign or international tribunal" within the meaning of Section 1782, the Court turned to the second question – whether the arbitral tribunal in either case qualified as governmental or intergovernmental, and found that both were not.[18]

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[7] *ZF Automotive*, 596 U.S. at *5, 11.
[8] *Id.* at *6.
[9] *Id.* at *6 (citing *Intel*, 542 U.S. at 258).
[10] *Id.* at *2, *7-8.
[11] *Id.* at *9.
[12] *Id.*
[13] *Id.*
[14] *Id.* at *10.
[15] *Id.* at *11.
[16] 9 U.S.C. § 7.
[17] *ZF Automotive*, 596 U.S. at *11.
[18] *Id.* at *12.

In *ZF Automotive*, where the arbitral tribunal was to be constituted under DIS rules pursuant to a private contract, the Court determined that the answer was "straightforward."[19] Because a DIS tribunal is constituted "like [a] panel[] of any other private arbitration organization" and "operate[d] under private arbitral rules," was to be formed by the parties, and "[n]o government [was] involved in creating the DIS panel or prescribing its procedures," a DIS panel lacked a governmental element and therefore did not qualify as a "foreign or international" tribunal.

The Court found that the ad hoc UNCITRAL rules arbitral panel in *AlixPartners* to present a "harder question."[20] In assessing this question, the Court appeared to weigh (1) the sovereign's involvement as a party to the dispute; and (2) the inclusion of the option to arbitrate in a BIT, as opposed to a private contract," each of which "offer[ed] some support for the argument that the ad hoc panel is intergovernmental."[21] However, the Court found that the mere presence of a sovereign as a party to the dispute, and the fact that "an adjudicative body shares some features of other bodies that look governmental" were not dispositive,[22] noting instead that "[w]hat matters is the substance" of two sovereigns' agreement to arbitrate: "Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?"[23]

Turning to the specific ad hoc panel at issue in *AlixPartners*, the Court found that the arbitration panel had been "formed for the purpose of adjudicating investor-state disputes," and that there was nothing in the BIT between Russia and Lithuania permitting the creation of the ad hoc arbitral tribunal that evinced their "intent that an ad hoc panel exercise governmental authority."[24] While noting that "[n]one of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority," the Court was not satisfied that, in this case, that Lithuania and Russia, pursuant to their BIT, had "intended that the ad hoc panel exercise governmental authority."[25]

IV. Practical Impact

With this decision, the Supreme Court definitively foreclosed the possibility of using Section 1782 to obtain discovery for use in private commercial arbitrations abroad, resolving a longstanding Circuit split. Where courts in the Fourth and Sixth Circuit had granted Section 1782 petitions for discovery in such private commercial cases, they will no longer be permitted to do so. Because the Second, Fifth, and Seventh Circuits had previously found that Section 1782 discovery was not permitted in private commercial arbitrations, there is unlikely to be any significant change in the availability of such discovery in those circuits.

As it relates to public international law tribunals, the Court's decision provided much but not categorical clarity, and may set the stage for additional inquiries relating to the application of Section 1782 to investor-state arbitral panels – a form of arbitration which, up until this decision, had been consistently found by U.S. courts to fall within Section 1782's ambit. Although the Court found that the specific ad hoc panel at issue in *AlixPartners* did not qualify as a "foreign or international tribunal" within the meaning of the statute, the Court left open the possibility that other arbitral panels constituted in investor-state cases involving international investment agreements could qualify as a governmental or intergovernmental body under Section 1782 if they are "clothed . . . with governmental authority" by the sovereigns that provide for their creation.[26] 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, and instead found that "the inquiry is whether those [governmental] features and other evidence establish the intent of the relevant nations to imbue the body in question with governmental authority,"[27] parties in investor-state

[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at *16.
[23] *Id.* at *13 (citing *BG Group plc v. Republic of Argentina*, 572 U.S. 25, 37 (2014)).
[24] *Id.* at *13, *14.
[25] *Id.* at *15.
[26] *Id.*
[27] *Id.* at *16.

cases may still pursue Section 1782 discovery in the United States if there are cognizable arguments that the arbitral tribunal exercises governmental authority conferred by one or multiple nations. For instance, in the case of ICSID arbitrations, there may be arguments that Section 1782 discovery remains available in those arbitrations.

The Court's decision will have far-reaching implications on parties' ability to obtain evidence in international arbitrations from individuals or entities with a U.S. nexus, in particular in jurisdictions where discovery tools are not otherwise available, or provided for in the parties' arbitration agreements, and where the parties have (in the past) therefore attempted to use Section 1782 to obtain discovery.

V. Comparative Analysis

Below is an overview of the implications in, and comparison with, England, France, Germany, and Italy.

1. England

The Arbitration Act 1996 empowers the English court to secure the attendance of a witness before an arbitral tribunal to give oral testimony and to order the witness to produce documents,[28] and also to secure witness evidence in the form of a deposition before a court-appointed officer.[29] These provisions apply even where the arbitration is not seated in England,[30] although there is relatively little case law regarding how the court should exercise its discretion in relation to witnesses and documents in circumstances where there is only a tenuous connection between England and the arbitration proceedings at issue.

A party seeking to make use of the English court's powers to support arbitration proceedings must satisfy several requirements. For example, to secure the attendance of a witness before an arbitral tribunal or the production of documents by a witness, the applicant must obtain the tribunal's permission or the agreement of the other parties, the witness must be located in the United Kingdom and the arbitral proceedings must be taking place in England (although not necessarily seated there, as noted above).[31]

While the Arbitration Act 1996 provides a mechanism for obtaining witness testimony and documents for use in arbitration, discovery in England, while not as restricted as in some civil law jurisdictions, is generally less expansive than in the United States. Still, in cases where a witness or important documents are located in England, the Arbitration Act 1996 may prove a useful tool.

2. France

In France, Article 1469 of the French Code of Civil Procedure, which is applicable to international arbitration proceedings, provides that a party to arbitration proceedings who seeks to make use of a legal instrument to which it was not a party, or a document belonging to a third party, may – at the request of the arbitral tribunal – summon the relevant third party to appear before the president of the *Tribunal judiciaire*, a domestic court, in order to obtain the delivery or production of the document for use in the arbitration.[32]

Parties to commercial arbitration proceedings may seek to rely on this mechanism to obtain discovery, although this mechanism is limited in scope, aiming at the production of a key document or documents, rather than obtaining broad U.S.-style discovery.

3. Germany

U.S.-style discovery is generally not available under German law. While parties may request the production of documents in German state court under Section 142 of the German Code of Civil Procedure, such requests are often disregarded due to the high threshold under procedural law (documents need to be specified; principle that there is no investigation of facts *ex officio* must not be circumvented).

While parties to German-seated arbitrations may, of course, opt for document production in the procedural rules of an arbitration (*e.g.*, by reference to the IBA Rules on the Taking of Evidence), experience shows that German parties and counsel are often reluctant to

[28] *See* Arbitration Act 1996, c. 23, § 43 (Eng.).
[29] *See id.* § 44.
[30] *See id.* § 2(3).
[31] *See id.* § 43(2)-(3).
[32] Code de procédure civile [C.P.C.] (Civil Procedure Code) Arts. 1469, 1506 (Fr.). *See also* Jean-Yves Garaud & Elisabeth Iung, *L'obtention ex parte d'un document en matière d'arbitrage*, 2020 Revue de l'arbitrage, no. 1, 15-52 (2020).

agree to potentially extensive document production upfront, given that they are less familiar with such discovery or may want to avoid its time and costs. When such discovery was not available in the arbitration, parties to German arbitrations have therefore in the past sought to obtain documents by way of discovery under Section 1782 where there was a U.S. nexus, but given the foreclosure of this option under U.S. law, parties may now have to attempt to obtain such evidence by pushing more vigorously for the production of documents within the procedural framework of the arbitration.

4. Italy

The Italian arbitration statute (in Articles 806-840 of the Italian Code of Civil Procedure ("ICCP")) does not provide for a U.S.-style discovery phase.[33] Each party is expected to offer the pieces of evidence deemed appropriate for its case. While Article 816-*ter* ICCP on the evidence-gathering phase in Italy-seated arbitration is silent on the matter, commentators agree that an Italy-seated arbitral tribunal may still issue an order requesting a party to produce a specific document as identified by the counterparty.[34] Should a party refuse to abide by a document production order, however, the arbitrators would not be allowed to enforce it and could at most draw adverse inferences.

Against this background, reliance on the IBA Rules on the Taking of Evidence (and related provisions on document production) is very common in Italy-seated international commercial arbitration, while more rare in purely domestic arbitrations.[35] This is arguably the reason why parties in Italy-seated international commercial arbitrations have generally not resorted to Section 1782. Accordingly, from an Italian perspective, the U.S. Supreme Court decision will not entail major changes. By contrast, there are instances of *ex parte* applications under Section 1782 in support of Italian court proceedings as well as of ICSID arbitrations involving Italian parties. The former, and possibly the latter, will not be affected by the U.S. Supreme Court decision.[36]

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[33] *See* Codice di procedura civile [C.p.c] (Code of Civil Procedure) Arts. 806-840 (It.).

[34] *See, e.g.*, Massimo V. Benedettelli, *International Arbitration In Italy* 269 (Wolters Kluwer 2020).

[35] Luca G. Radicati di Brozolo & Michele Sabatini, *Arbitration Guide – Italy*, IBA Arbitration Committee 2, 16 (2018), https://www.ibanet.org/MediaHandler?id=1607A591-F647-4231-8664-0C8B7C1FE397.

[36] *See HT S.R.L. v. Velasco*, 125 F. Supp. 3d 211 (D.D.C. 2015); *In re Ex Parte Eni S.P.A.*, No. 20-mc-334-MN, 2021 U.S. Dist. LEXIS 52304 (D. Del. Mar. 19, 2021).