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Questions Remain After Supreme Court Resolves Circuit Split Over Discovery in Arbitration Under 28 U.S.C. § 1782

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On June 13, 2022, the Supreme Court resolved a long-standing circuit split holding that broad U.S.-style discovery under 28 U.S.C. § 1782 is not available in private foreign arbitrations. In the past decade, litigants in international arbitrations had been trying to use section 1782 more frequently to obtain comprehensive discovery that would otherwise typically be unavailable in arbitration abroad. While the Supreme Court has ostensibly put an end to that practice, the possibility of further litigation over section 1782 remains, as parties are likely to test the boundaries of the Supreme Court's decision.

The decision addressed two different appeals that each questioned whether section 1782, which authorizes federal district courts to order discovery from U.S. entities for use "in a foreign or international tribunal," extends to private arbitrations, as opposed to only governmental or quasi-governmental proceedings. Federal courts have long grappled with this question, resulting in a circuit split. The 2nd, 5th, and 7th Circuit Courts of Appeal had held that a "foreign or international tribunal" does not include private international arbitration, while the 4th and 6th Circuits disagreed.

In a unanimous opinion authored by Justice Amy Coney Barrett, the Supreme Court adopted the majority view, concluding that private arbitral bodies are not "foreign or international tribunals" within the meaning of section 1782. As a result, parties engaged in private foreign arbitration may no longer seek expansive discovery in the United States under the statute.

The Court's analysis focused on the plain language of section 1782, reasoning that a "'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation." Similarly, as to the meaning of "international tribunals," the Court interpreted the statute's language as involving a tribunal

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that is “of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.”

The Court concluded that “‘foreign tribunal’ and ‘international tribunal’ complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.”

The Court found support for its statutory interpretation by examining the history and purpose of section 1782, noting that the “animating purpose” was to promote respect for foreign nations and the governmental and intergovernmental bodies they create, as well as to encourage reciprocal assistance. The Court determined that authorizing discovery in foreign or international disputes between wholly private parties would do little to serve that end.

Although the two cases before the Court presented different fact patterns, both were found to involve “tribunals” that do not fall within the ambit of section 1782.

The first case*, Z.F. Automotive U.S. Inc. v. Luxshare Inc.*, involved a private arbitration in Germany, pursuant to a contract, between a German bank and a Hong Kong limited liability company. The arbitration was conducted under the rules of the German Arbitration Institute (Deutsche Institution für Schiedsgerichtsbarkeit or DIS), a private dispute-resolution organization.

The Court had no difficulty concluding that the adjudicative body was not imbued with governmental authority and section 1782 discovery was not available to the parties given that no government was involved in creating the panel or prescribing the procedures to be used in the arbitration.

The second case, *AlixPartners, LLP, et al. v. The Fund for Protection of Investor’s Rights in Foreign States*, presented a closer question, the analysis of which opens the door to future litigation about the scope of the Supreme Court’s decision.

The AlixPartners case stemmed from an investor-state dispute — a mechanism that allows foreign investors to resolve disputes with the government of the country where their investment was made — between a Russian investment fund and the Republic of Lithuania, pursuant to a treaty between Russia and Lithuania.

The Russian investor opted for ad hoc arbitration under the UNCITRAL Rules of Arbitration. Despite recognizing that one of the parties was a sovereign, and that the option to arbitrate arose from an international treaty, the Court nevertheless held that neither fact is dispositive “because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit.” The Court noted that the ad hoc arbitration panel “is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes.”

It also rejected the notion that the presence of an international treaty imbues the UNCITRAL panel with governmental authority, finding that "nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority," and that the panel functions independently of, and is not affiliated with, Lithuania or Russia.

The Court also noted that "the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum." And, the Court found that the panel's authority is derived only from the parties' consent to arbitrate — just as in private arbitration — and "not because Russia and Lithuania clothed the panel with governmental authority." As a result, the panel was found to be "materially indistinguishable" from the Z.F. Automotive panel.

Importantly, the Russian investor chose UNCITRAL arbitration among other dispute resolution options available to it under the treaty, and the Court was careful to point out that "[n]one of this forecloses the possibility that sovereigns might imbue an ad hoc arbitration panel with official authority."

Future litigation, therefore, is likely to involve questions as to whether an ad hoc panel is imbued with governmental authority and could arise in the context of arbitration proceedings before adjudicative bodies like the International Centre for Settlement of Investment Disputes — a World Bank Group organization that adjudicates many investor-state matters.

For example, litigants are sure to point out that, unlike UNCITRAL, the ICSID was not only created by a treaty with more than 150 member states, but that the countries making up the ICSID Administrative Council, on which each member state has one representative, meet every year to adopt administrative and financial regulations, and approve rules for ICSID-administered cases.

The chair of the Administrative Council also designates individuals to serve as arbitrators and conciliators and decides applications for their disqualification. Courts may find that these factors mean that the ICSID (and other similar adjudicative bodies) are sufficiently imbued with governmental authority so as to bring the proceedings within the ambit of section 1782.

Regardless, for the lion's share of international commercial arbitration, the Court's decision overturns years of precedent in the 4th and 6th Circuits, and renders section 1782 far less useful, as most proceedings will now fall outside the definition of a "foreign or international tribunal." Going forward, the scope of discovery in private international arbitration will be left to the parties' contractual agreement, the extent to which discovery is permitted by arbitral panels overseeing disputes, and the local courts that may have authority to provide ancillary relief to the parties.

Accordingly, parties will need to pay particular attention to their dispute resolution provisions, applicable arbitral rules, and the arbitral forum (including

the courts that could provide relief in aid of arbitration) and should consider incorporating greater specificity as to the scope of discovery in the arbitration.

Additionally, parties doing business with foreign states or state-owned entities should consider not only the content of the arbitration agreement itself and available choices under applicable treaties, but also the powers of the arbitral tribunal they choose.

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