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Axinn Litigation Insight: Supreme Court Limits Reach of Discovery for Foreign Arbitrations

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PRACTICE AREAS

Litigation

Axinn Update

On June 13, 2022, the Supreme Court issued its decision in *ZF Automotive U.S., Inc. v. Luxshare, Ltd.*, unanimously holding that a federal statute allowing district courts to direct the production of evidence "for use in a proceeding in a foreign or international tribunal" does not apply to proceedings before a private adjudicatory body. *ZF Auto. U.S., Inc. v. Luxshare, Ltd.*, Nos. 21-401 and 21-518, slip op. at 2 (U.S. June 13, 2022). The ruling provides a welcome shield for U.S.-based companies and individuals who previously could have been subject to burdensome discovery in aid of foreign, private arbitrations. It also represents an important shift in the legal landscape that should be taken into account when forming an agreement to arbitrate disputes abroad.

Under the statute, 28 U.S.C. § 1782, U.S. federal courts may order any company or person in the U.S. to turn over information in relation to a foreign proceeding. The Supreme Court's decision settles a circuit split between the Fourth and Sixth Circuits, which had held that the statute applied to foreign, private arbitrations, and the Second, Fifth, and Seventh Circuits, which had held that it did not, and with which the Supreme Court agreed.

The Court's Reasoning

The Supreme Court addressed § 1782's scope by analyzing whether a private adjudicatory body qualifies as a "foreign or international tribunal" for purposes of the statute. The Court concluded that while "tribunal" is broad enough to encompass numerous types of proceedings, a "foreign tribunal" is one "imbued with governmental authority by one nation," and an "international tribunal" is one "imbued with governmental authority by multiple nations." *Id.* at 9.

Justice Barrett further reasoned that "the animating purpose" of § 1782 is comity. *Id*. at 10. The statute is about "respecting foreign nations and the . . . bodies they create." *Id.* at 9. Allowing U.S. federal courts to assist

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foreign nations "encourages reciprocal assistance," and assisting purely private bodies does not further that purpose. *Id*. at 10.

Relationship to Federal Arbitration Act

The Court also considered § 1782's relation to the Federal Arbitration Act (the "FAA"), which governs domestic arbitrations, and concluded that extending § 1782 to private arbitrations would cause "significant tension" with the FAA because § 1782 "permits much broader discovery than the FAA allows." *Id*. at 11. For instance, under the FAA, only an arbitration panel may request discovery, but under § 1782, "any 'interested person'" may do so. *Id*. Because the arbitration panels at issue in *ZWF Automotive* were not "imbued with government authority," the Court concluded that § 1782 did not apply to the two consolidated cases on appeal.

In particular, the Court held that the arbitration panel in the first case lacked the imprimatur of governmental authority because two private parties contractually agreed to bring their disputes before a private dispute resolution organization.

The Court explained that the second case presented a closer question. There, a Russian corporation brought a claim against Lithuania under a treaty between Russia and Lithuania, which allowed the corporation to choose "an ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law." *Id*. at 13. The Court concluded that the ad hoc arbitration panel did not qualify as an "international tribunal" such that § 1782 would apply for several reasons:

1. the treaty did not create the panel;
2. the panel functioned independently of the nations;
3. the parties chose the arbitrators, who had no affiliation with either nation or government;
4. as with a private arbitration, the panel's authority existed by virtue of the parties' consent, not because Russia and Lithuania conferred governmental authority upon it; and
5. the panel "lack[ed] other indicia of a governmental nature" because it did not receive government funding, the proceedings were confidential, and the award could only be made public by consent of the parties. *Id*. at 13.

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Nevertheless, recognizing that governmental bodies can take many forms, the Court expressly left open the possibility that nations might confer official authority on an ad hoc arbitration panel.

Practical Implications

ZF Automotive has a number of practical implications, both for U.S.-based companies and individuals, and for anyone with an existing or potential agreement to arbitrate disputes overseas.

- The decision is a positive development for companies and individuals residing or present in the U.S. that can no longer be forced to undertake expensive and burdensome discovery in aid of private arbitrations taking place abroad.
- On the other hand, those with agreements to arbitrate overseas may not be able to rely on § 1782 to obtain U.S. discovery for use in those arbitrations.
- When choosing a foreign forum for an arbitration agreement, contracting parties should consider whether they want to be able to obtain U.S. discovery through § 1782. Those that want to be shielded from the expense and burden of U.S. discovery should choose a purely private forum. Those that want to utilize § 1782 should consider a forum that is imbued with governmental authority. The more that a government is involved—such as through creating, funding, operating, or prescribing the rules governing the forum—the more likely it is that § 1782 will apply.
- It will not always be clear whether a particular adjudicatory body is private or governmental. Companies and individuals served with subpoenas under the authority of § 1782, and those entering into agreements to arbitrate overseas, should consult with counsel to determine how *ZF Automotive* and § 1782 apply to their circumstances.

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