

## Supreme Court Ended Circuit Splits on Judicial Aid of Overseas Arbitral Proceedings

### Introduction

On March 23, 2022, the U.S. Supreme Court heard oral argument in two consolidated cases—*ZF Auto. US v. Luxshare, Ltd.* and *AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*—on whether 28 U.S.C. § 1782 (Section 1782) can be used to obtain information and documents in aid of private international arbitrations conducted overseas. In the decision rendered on June 13, 2022, the Supreme Court held that American law does not allow federal courts to order discovery for private commercial arbitration abroad, significantly narrowing the scope of foreign litigant’s uses of U.S. discovery procedures.<sup>1</sup> The decision has generated a significant amount of discussion within and outside the international arbitration community—while some doubt the correctness of this decision, others welcome a decision that has finally ended the long circuit splits in clarifying the applicable scope of Section 1782 in transnational legal proceedings.

### Section 1782 and Earlier Cases

Section 1782 of the United States Code is at the core of international judicial assistance of American courts. It provides discovery aid rendered by any U.S. district court in support of proceedings taking place in a “foreign or international tribunal.”<sup>2</sup> In an area of law dominated by international agreements executed by national governments, demands for judicial assistance are usually based on reciprocity and comity but can entail lengthy and uncertain procedures. However, Section 1782 outlines crucial provisions regarding transnational discovery proceedings by giving U.S. federal courts a broad discretionary power to order U.S.-based discovery in support of judicial proceedings abroad.<sup>3</sup> Generally, requests made under Section 1782 are on an *ex parte* basis and have a high grant rate.

Section 1782 also does not preclude individuals from voluntarily giving evidence for use in a proceeding in a foreign or international tribunal. Possibly because of such efficacy, the use of Section 1782 in assistance of foreign legal processes has exploded in recent years.

The Supreme Court previously reviewed the applicable scope of Section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (*Intel*). That case involved the question of whether Section 1782 could be used to obtain evidence for use in a non-judicial international commission. In *Intel*, the Court held that the Commission of the European Communities constituted a “tribunal” under Section 1782. While *Intel* did not involve the issue of Section 1782’s applicability to private international arbitration, in discussing the legislative intent behind the statute, the Court cited favorably a law review article written by Professor Hans Smit stating that “[t]he term ‘tribunal’ . . . includes . . . arbitral tribunals.”<sup>4</sup> While interesting, the *Intel* decision was not clear enough to guide lower courts’ interpretations, leading to a split over whether private international arbitration constitutes a “foreign or international tribunal” within the meaning of Section 1782. In subsequent decisions, the Second, Fifth, and Seventh Circuits held that Section 1782 could not be used in aid of private foreign arbitration, while the Fourth and Sixth Circuits held otherwise.

In December 2020, a New York electronics supplier Servotronics filed a petition for a writ of certiorari over a Seventh Circuit decision rendered in September 2020, which denied the company’s effort to obtain documents for use in a UK-seated arbitration.<sup>5</sup> Servotronics asked the Supreme Court to resolve the current circuit split over the scope of discovery applications under Section 1782.<sup>6</sup> The Supreme Court agreed, but Servotronics filed a notice of its intention to dismiss the case in late 2021, and the Court subsequently dropped the case. Then the Supreme Court decided to review the proceeding consolidated by *ZF Auto. US v. Luxshare, Ltd*, appealed from the Sixth Circuit involving a commercial arbitration proceeding administered under the German Arbitration Institute (DIS) Rules; and *AlixPartners v. The Fund for Prot. Of Inv. Rights in Foreign States*, appealed from the Second Circuit, an *ad hoc* UNCITRAL arbitration filed by Lithuanian investors against the Republic of Russia based on a Russia-Lithuania bilateral treaty (BIT) violation. The oral argument was held on March 23, 2022.

## **The Supreme Court Decision**

The final *ZF Auto* decision issued on June 13, 2022, was unanimous, and Justice Amy Barrett penned the judgment. The decision is straightforward to read; the Court adopted a textualist approach and concluded that only a governmental or intergovernmental

adjudicative body constituted a “foreign or international tribunal” under Section 1782 and that such bodies are those that exercise governmental authority conferred by one nation or multiple nations.<sup>7</sup> Going back to the meaning of “foreign tribunal,” the Court concluded that “foreign tribunal more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply *located* (emphasis added) in a foreign nation.”<sup>8</sup> Based on the same rationale, the Court believed that such a tribunal “must possess sovereign authority,” while an “international tribunal” is one that “nations have imbued the tribunal with official power to adjudicate disputes.”<sup>9</sup>

Relying on legislative history and comparative views, the Court also acknowledged that “Section 1782’s focus on governmental and intergovernmental tribunals is confirmed by both the statute’s history and a comparison to the Federal Arbitration Act (“FAA”).”<sup>10</sup> Extending Section 1782 to include private bodies would create a tension with the FAA—as the discovery scope permitted by the FAA in domestic arbitrations is much narrower than what had been allowed under Section 1782 in some circuits. Applying such statutory interpretation, the Court concluded that neither the DIS private commercial arbitration nor the *ad hoc* arbitration pursuant to the Russia-Lithuania BIT qualified for assistance under Section 1782. Before concluding, the Court did take some time to consider the differences between a private commercial arbitration tribunal and an investor-state arbitration tribunal. According to the Court, while the BIT permits an aggrieved investor to choose a national court to resolve disputes, “neither Lithuania’s presence nor the treaty’s existence is *dispositive* (emphasis added), because Russia and Lithuania are free to structure investor-state dispute resolution as they see fit.”<sup>11</sup> The distinguishing issue is whether nations intend to confer government authority on an *ad hoc* tribunal, which the Court believed was not present in the underlying arbitration in *AlixPartners*.<sup>12</sup> Nonetheless, the decision has reserved some limited space for Section 1782 to be applied to investor-state arbitration adjudicated by a tribunal clearly vested with governmental authority, such as a sovereign court.

Overall, the outcome of the case is in line with a series of recent U.S. court decisions promoting “international comity” and “sovereign equality” principles. The Court has emphasized that the “animating purpose” of Section 1782 is *comity*. It is therefore difficult to see how permitting federal courts to assist foreign and international non-governmental bodies promotes respect for foreign governments and encourages reciprocity.

### **Implications for Transnational Discovery in International Arbitration**

As the decision would have significant impact on how discovery proceedings are handled in cross-border arbitral proceedings, members of the international arbitration community

held divergent views on how the case should be decided. Many submitted *amicus* briefs to try to assist the Court's reasoning. In his *Amicus* Brief in support of petitioners, Professor George Bermann of Columbia University argued that the Court should not adopt a narrow interpretation of international tribunals. Adopting a plain meaning approach similar to the Court's textual method, Professor Bermann et al. argued that Congress did not limit assistance under Section 1782 to foreign or international courts or judicial bodies, and "tribunal" is indisputably the term used to identify the bodies that conduct international arbitral proceedings.<sup>13</sup> Relying on the *Intel* factors, he also believed that there was no evidence that the availability of Section 1782 had been detrimental to international arbitration.<sup>14</sup> On the other hand, the *Amicus* Brief submitted by the U.S. Government, acknowledging its substantial interests in the proper constriction of Section 1782, strongly contended that "Section 1782 does not authorize discovery assistance for an arbitration, before a nongovernmental adjudicator," and advocated for the Court to adopt a similar view.<sup>15</sup> It is unclear whether the Court was persuaded by any advocacy made in those *amicus* briefs.

Shortly after the decision was rendered, some started to worry that the decision would negatively impact the U.S.'s pro-arbitration policy. For instance, in a widely circulated blog post, Eric van Ginkel, who regularly serves as an arbitrator, complained that "Justice Barrett's opinion is not very convincing."<sup>16</sup> He called the decision "most regrettable" and stated that "[i]t will have given preference to an unfounded fear of overburdening the district courts over the need to serve the international community which more and more makes international or cross-border discovery available in international commercial arbitration."<sup>17</sup>

Overall, the decision has provided some clarity in the field. For a time, parties and their counsels came to the United States to seek discovery because they could obtain it where the arbitration was seated. In many civil law countries, transposing U.S.-style discovery has the potential for improving the popularity and reputation of arbitration, particularly for sophisticated business parties.<sup>18</sup> For international commercial arbitration parties wishing to conduct discovery with the aid of U.S. courts, the decision has closed the door tightly. On the flip side, the decision has reserved U.S. judicial resources for sovereignty and comity-based uses only. It also, to some extent, precludes growing evidentiary forum shopping. Even though the decision has no bearing on the power of arbitral tribunals located anywhere to compel discovery from the parties, it will create some short-term imbalances in needs and rights of arbitral parties, particularly if no better mechanism is available for obtaining some evidence deemed necessary by arbitral tribunals. The longer-term impact on the shape and form of evidence production in international arbitration is hard to access at this moment. Nonetheless, it is arguably not a national

court's job to extend its domestic legal mechanisms and remedies to guard the interests of generally resourceful foreign dispute resolution parties, particularly if such an extension has no reciprocal basis.

**About the Author:** Carrie Shu Shang is Assistant Professor and Program Advisor of Business Law Minor at California State Polytechnic University, Pomona, and Special Counsel at LTL Attorneys.

---

<sup>1</sup> ZF Automotive US, Inc. v. Luxshare, Ltd., 596 U.S. \_\_\_\_\_ (2022).

<sup>2</sup> 28 U.S.C. § 1782.

<sup>3</sup> Cameron S. E. Ford & Christopher Bloch, *The Availability of Section 1782 Discovery in International Commercial Arbitration: A View from Northern California and the Epicenter of IP*, GLOBAL BUSINESS IP AND TECHNOLOGY BLOG (Apr. 28, 2020), <https://www.lexology.com/library/detail.aspx?g=ac7dfe1d-62db-410c-a6f3-429d4a60e88b>.

<sup>4</sup> Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), at 14 (quoting Smit, *International Litigation under the United States Code*, 65 COLUM. L.REV. 1015, 1026–1027 (1965)).

<sup>5</sup> Servotronics, Inc., v. Rolls-Royce PLC, et al., No. 19-1847 (7th Cir. 2020), *petition for cert.* filed (U.S. Dec. 7, 2020) (No. 20-794).

<sup>6</sup> *Id.*

<sup>7</sup> ZF Automotive, 596 U.S. at 7-8.

<sup>8</sup> *Id.*, at 7.

<sup>9</sup> *Id.*, at 9.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, at 12-3.

<sup>12</sup> *See Id.*, at 13-4.

<sup>13</sup> ZF Automotive, Brief for George A. Bermann et al. as Amici Curiae, at 5.

<sup>14</sup> *Id.*, at 24-9.

<sup>15</sup> ZF Automotive, Brief for United States as Amicus Curiae, at 13.

<sup>16</sup> Eric van Ginkel, *How Should the United States Supreme Court Have Decided in the Controversy over 28 U.S.C. § 1782(a)?*, KLUWER ARBITRATION BLOG (June 14, 2022), <http://arbitrationblog.kluwerarbitration.com/2022/06/14/how-should-the-united-states-supreme-court-have-decided-in-the-controversy-over-28-u-s-c-%c2%a7-1782a/>.

<sup>17</sup> *Id.*

<sup>18</sup> Kimberly R. Wagner, *The Perfect Circle: Arbitration's Favors Become Its Flaws in an Era of Nationalization and Regulation*, 12 PEPP. DISP. RESOL. J. 159, 165-66 (2012) (stating that the Americanization of discovery are perceived by civil law lawyers as allowing more full finding of the facts in international arbitration).