US Supreme Court closes section 1782 discovery avenue to foreign arbitration traffic (ZF Automotive v Luxshare)

This analysis was first published on Lexis®PSL on 21 June 2022 and can be found here (subscription required).

Arbitration analysis: The US Supreme Court held that 28 U.S.C. §1782 (section 1782) discovery is not available to foreign arbitration proceedings, whether private commercial or investment treaty arbitration. This is a seminal decision for the global arbitration community; it resolves a long-standing circuit split and removes the greater discovery powers seemingly allowed to foreign arbitrations under section 1782 than to domestic ones under the Federal Arbitration Act 1925 (FAA 1925). Clients are advised to discontinue any pending s 1782 applications in support of arbitration proceedings. Written by Rumen Cholakov, barrister at 3 Verulam Buildings Chambers.

Automotive US Inc et al v Luxshare Ltd and AlixPartners, LLP v Fund for Protection of Investors' Rights in Foreign States Nos 21-401 and 21-518 (citation pending)

What are the practical implications of this case?

Foreign parties and tribunals in both commercial and investment treaty arbitrations no longer can rely on s 1782 for any discovery anywhere in the US. This change is effective immediately and clients should be advised to discontinue the pursuit of any such pending or intended applications.

The previous opportunities to take advantage of different treatment in the Circuits (eg, the Fourth and Sixth allowing all such discovery and the Second allowing investment treaty discovery) have been closed off. Applications of such nature in the Fourth Circuit will fail, even though no decision from that circuit was expressly on review by the Supreme Court.

The Supreme Court left open the possibility that some tribunals may be served by s 1782 where imbued with sovereign power. Without prescribing a list, the court suggested that the following features may suggest such power: involvement of a state in the formation of the bodies, the place where they meet, the method of funding, and the appointment of other officers to assist the bodies (eg, the I'm Alone Commission and US-Germany Mixed Claims Commission).

The decision undoubtedly will limit the information available in global arbitration disputes, but other options might be explored either under FAA 1925, s 7, or the relevant state law.

What was the background?

The court consolidated two cases, in which the parties relied on 28 U.S.C. §1782 (section 1782) to seek discovery in aid of a foreign arbitration: one in commercial arbitration and one in investment treaty arbitration. The first was an application by Luxshare Ltd (Hong Kong) for information from ZF Automotive US, Inc (Michigan) (ZF) and two of its officers in relation to the alleged concealed information prior to the sale of business units from ZF to Luxshare, which was to be used in a German DIS arbitration seated in Berlin.

The second was an application by the Fund for Protection of Investors' Rights in Foreign States, as an assignee of a Russian investor's interest in the failed and subsequently nationalised Lithuanian bank SNORAS, which sought information about Simon Freakley's (of Alix Partners, LLP) role as a temporary administrator of SNORAS. The Fund had initiated an UNCITRAL ad hoc arbitration pursuant to a bilateral investment treaty between Lithuania and Russia, which provided four different avenues for dispute resolution at the choice of the parties (the other being the Russian or Lithuanian courts, ICC arbitration, and SCC arbitration).

Both applications had been successful, respectively in the Sixth Circuit (which includes Michigan) and the Second Circuit (which includes New York), though the Second Circuit's precedent would not have allowed ZF's application had it been brought there, drawing a distinction between private commercial arbitration and investment treaty arbitration.

What did the court decide?

The Supreme Court reversed both decisions and precluded almost all reliance by parties and tribunals in foreign arbitrations on s 1782.

First, the court held that 'foreign or international tribunal' in s 1782 includes only governmental or intergovernmental bodies and not private adjudicative bodies such as arbitration tribunals. The Supreme Court relied both on textual interpretation and legislative history:

- if Congress had referred only to tribunals, that would be a good case for including private arbitration panels. However, the context of this word is derived from the modifiers 'foreign or international'
- 'Foreign' can have two meanings: (i) 'belonging to another nation or country' (eg, foreign leader) or (ii) 'from' another country (eg, foreign film). The first is a more natural fit and so a 'foreign tribunal' within s 1782 must possess sovereign authority conferred by that nation.
- this reading is reinforced by the procedure set out in s 1782, which references the 'practice and procedure of the foreign country or the international tribunal', and thus presumes that the body would follow such procedure—an unnatural assumption for a private adjudicatory body
- 'International' also can have two meanings: (i) involving or of two or more 'nations', or (ii) involving or of two or more 'nationalities'. The second meaning would lead to odd conclusions, such as the availability of discovery resting upon the adjudicators being of different nationalities. The first must be correct—two or more nations having imbued the tribunal with official power to adjudicate disputes
- thus read, 'foreign' and 'international' complement one another
- finally, the animating purpose of s 1782 when enacted was comity, focusing on assistance and cooperation with foreign nations

Second, the court found that neither case involved a 'foreign or international tribunal':

- there was no strain to find that DIS is a private organisation in Germany unrelated to the state (and Luxshare's argument to the contrary based upon the operation of the law of the arbitral seat was described by the court as 'weak')
- a more difficult consideration arose to determine the investor dispute with Lithuania. The decision ultimately rested on the question whether the two nations intended to confer governmental authority to an ad hoc panel pursuant to the treaty. Referencing the amicus brief of Professor George A Bermann et al, the court held that both the DIS and ad hoc panels derived their authority from the parties' consent to arbitrate—Russia and Lithuania's treaty being a contractual agreement, and the investor choosing the forum of dispute resolution under that agreement

An underlying consideration for the court was that allowing s 1782 to aid discovery in international arbitration would give more powers to foreign arbitrations than domestic ones which must be brought under the FAA. The FAA allows only the panels to request discovery, while s 1782 entertains requests from any 'interested person'.

Case details:

- Court: Supreme Court of the United States
- Judge: Justice Amy Coney Barrett delivered the unanimous opinion of the Court
- Date of judgment: 13 June 2022

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