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Supreme Court Holds That Parties To Private Foreign Or International Arbitrations Cannot Seek Discovery Assistance From U.S. Courts

***ZF Automotive US, Inc. v. Luxshare, Ltd.*,**
No. 21-401; and *AlixPartners, LLP v. The Fund for Protection of Investors' Rights in Foreign States,* No. 21-518

Decided June 13, 2022

Today, the Supreme Court held 9-0 that parties to private arbitrations abroad may not seek the assistance of federal courts in gathering evidence for use in those arbitrations.

Background:

Congress has authorized district courts to order certain discovery "for use in a proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). Luxshare, Ltd. applied under Section 1782 for discovery from ZF Automotive US, Inc. for use in a planned arbitration under the rules of a private German association. The district court granted the application, holding that a private commercial arbitral body abroad qualifies as a "foreign or international tribunal" under Section 1782. The Supreme Court granted certiorari before judgment.

In a separate case, a Russian entity brought an arbitration against Lithuania pursuant to a bilateral investment treaty between Russia and Lithuania. The Russian entity applied under Section 1782 for discovery from U.S.-based third parties. The district court granted the application. The Second Circuit affirmed, holding that the arbitral panel was a "foreign or international tribunal" in large part because it derived its adjudicatory authority from the treaty.

Issue:

Whether a private arbitral body is a "foreign or international tribunal" under 28 U.S.C. § 1782(a).

Court's Holding:

Only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under 28 U.S.C.

"The statute reaches only governmental or intergovernmental adjudicative bodies, and neither of the arbitral panels involved in these cases fits that bill."

Justice Barrett,
writing for the Court

§ 1782(a). Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Thus, a private commercial arbitration abroad does not qualify, nor does an arbitral panel formed pursuant to an international treaty unless the parties to that treaty conferred governmental authority on the arbitral panel.

What It Means:

- The Court's decision limits the ability of parties to private foreign and international arbitration proceedings to seek discovery under the United States' discovery rules, which are relatively liberal compared to other nations' rules. This might hamstring parties' ability to develop evidence in private arbitration proceedings abroad, but it also might streamline those proceedings. Parties to these arbitrations may still, however, be able to use state-law remedies to obtain discovery assistance.

- This decision ensures that private foreign arbitrations do not have broader access to federal-court discovery assistance than do private domestic arbitrations. Under the Federal Arbitration Act, parties to private domestic arbitrations may not apply directly to a federal court for discovery assistance, but instead must seek discovery through the arbitrator.

- The Court's ruling precludes the use of Section 1782 in arbitrations conducted pursuant to bilateral investment treaties, where the treaty does not confer governmental authority on the arbitral body. It remains to be seen whether that holding will prevent the use of Section 1782 in bilateral investment treaty arbitrations conducted through the International Centre for Settlement of Investment Disputes.

- Foreign and international arbitration proceedings are often confidential. The Court's ruling helps preserve that confidentiality by preventing parties from initiating public litigation in federal courts under Section 1782.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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