The US Supreme Court Transforms 1782 Evidence Gathering

ZF Automotive US Inc. et al v. Luxshare Ltd.

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Summary: The Supreme Court's decision bars the use of §1782 to seek evidence in support of a foreign-seated commercial or ad hoc investment arbitration. The position of arbitration under the ICSID Convention potentially remains open.

28 U.S.C. §1782(a) authorizes a district court to order production of evidence "for use in a proceeding in a foreign or international tribunal." Applications under §1782 have become a common tool for parties to international and foreign arbitrations to seek evidence from U.S. entities for use in the arbitration, even when those entities were not party to the dispute. The central role of American banks in the international financial system has increased the importance of §1782. An application could produce financial records that could be used to evidence transactions or to assist in the enforcement of awards.

But the availability of such applications has been criticized and contested. §1782 has been deeply unpopular with many U.S. companies, which consider that it exposes them to greater discovery obligations than their foreign counterparts. Certain members of the arbitral community have also criticized §1782 discovery in aid of arbitration because it allegedly disrupts the arbitral process, which typically contemplates a more limited scope of document production than U.S.-style discovery.

In 1999 the Second Circuit held, in *National Broadcasting Company v. Bear Stearns & Co.*, that a commercial arbitration was not a proceeding before a "foreign or international tribunal," meaning that an application under §1782 was not available in support of such an arbitration. In contrast, the Fourth and Sixth Circuits held that a party to foreign commercial arbitration could rely on §1782.

The Supreme Court's unanimous opinion in *ZF Automotive US Inc. et al. v. Luxshare Ltd.* now resolves that circuit split in favor of the Second Circuit's interpretation. Moreover, in the opinion — which also concerned the consolidated case of *AlixPartners, LLP et al. v. The Fund for Protection of Investors' Rights in Foreign States* — the Court issued an unprecedented ruling that §1782 discovery is also unavailable in support of ad hoc arbitration under investment treaties.

The Facts

The case concerned two consolidated appeals.

- In *ZF Automotive v. Luxshare*, the underlying dispute was a commercial arbitration conducted under the rules of the German Institution of Arbitration. In that case the claimant, Luxshare, sought discovery from the defendant ZF Automotive in Michigan.

- In *AlixPartners LLP v. Fund of Protection of Investors' Rights in Foreign States*, the underlying dispute was an ad hoc investment arbitration brought by a Russian company against Lithuania under the Lithuania-Russia bilateral investment treaty. There the claimant sought discovery by §1782 from Alix Partners, which had acted as administrator of an allegedly expropriated bank.

The Court's Findings

The Court held that both applications should be rejected.

Its starting point was the interpretation of §1782. In the Court's view, the section's reference to a "foreign or international tribunal" referred to an adjudicative body that exercises governmental authority.

In the Court's view, this interpretation was supported by the language of the section and would remove a tension with the Federal Arbitration Act (FAA), which governs U.S. domestic arbitration. A reading of §1782 that included private arbitration would mean that U.S. district courts would be able to provide discovery for use in a foreign or international commercial arbitration, even though that same scope of discovery is not available under the FAA for use in a U.S. domestic arbitration.

Based on this interpretation, the Court disposed of the application in support of a commercial arbitration in *ZF Automotive*. Because the arbitral tribunal was a product of a commercial agreement between the parties, the Court held that it did not exercise governmental authority and so fell outside §1782.

Alix Partners proved more difficult for the Court. That case concerned a §1782 request in support of an ad hoc tribunal constituted under an investment treaty between two sovereign States. The Court found that the treaty context was not dispositive, however. The Court instead looked to a subjective question: did the State parties to the treaty intend to confer governmental authority on the ad hoc panel?

The Court reasoned that the treaty parties did not intend to confer governmental authority on the ad hoc tribunal because that tribunal (i) was not a "pre-existing body," (ii) was not created by the treaty itself, (iii) functioned independently from Lithuania and Russia, (iv) was not officially affiliated with the State parties or funded by them, and (v) did not issue public decisions.

Conclusions

The Court's decision likely forecloses any future use of §1782 to support an international commercial arbitration, but leaves some questions open:

- The Court's decision leaves at least one back door open. It has become common for parties to make an §1782 application before any proceedings are commenced, asserting that they are considering both foreign litigation and arbitration. The Court's decision does not affect a party's ability to seek discovery in support of contemplated foreign litigation. It is not unforeseeable that parties may then attempt to use documents obtained for that purpose in subsequent arbitration proceedings.
- The Court did not consider directly whether an arbitration administrated by the World Bank's International Centre for Settlement of Investment Disputes (ICSID) would fall within §1782. An ICSID tribunal would still be an "ad hoc" body, in the sense that its members would be selected by the parties to a particular dispute. But it would be constituted under the administrative supervision

of ICSID—an intergovernmental organization created by the ICSID Convention, a multilateral international treaty—and would usually render a public or semi-public decision. Likewise, the Court's decision also leaves unclear the status of other investment dispute resolution bodies, most obviously the EU's proposed multilateral investment court and the investment courts contemplated in recent draft treaties between the EU and other States.

Regardless, the Court's decision has narrowed the scope of §1782 discovery significantly, leaving parties to an arbitration to seek new strategies for gathering evidence located in the United States.