SUPREME COURT NIXES USE OF 28 U.S.C. § 1782 AS A DISCOVERY VEHICLE IN PRIVATE INTERNATIONAL COMMERCIAL ARBITRATIONS

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In *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 213 L. Ed. 2d 163 (2022), a unanimous but unheralded decision handed down in June 2022, the Supreme Court materially altered the reach of 28 U.S.C. § 1782. While not generating headlines like other decisions issued this term, *ZF Automotive* directly addressed an issue that had caused considerable heartburn for organizations on the receiving end of discovery requests in private international arbitration proceedings.

Under Section 1782, Congress authorized U.S. district courts to grant requests for discovery "for use in a proceeding in a foreign or international tribunal . . ." 28 U.S.C. § 1782 (a). Before the June 13, 2022 *ZF Automotive* decision, this authorization was generally interpreted broadly to include any foreign dispute resolution body, including private arbitration. Following the *ZF Automotive* decision, Section 1782 requests should now only be granted if the underlying proceeding is before an adjudicative body "that exercise[s] governmental authority conferred by one nation or multiple nations." 142 S.Ct. 2078, 2091 (2022). As a result, Section 1782 can no longer be used to obtain discovery from parties – or non-parties – in private foreign arbitration proceedings.

Section 1782 Framework & The ZF Automotive Decision

Section 1782 allows parties involved in proceedings before a foreign or international tribunal to apply to a U.S. district court to obtain documents or testimony relevant to those proceedings. *See* 28 U.S.C. § 1782.

If the statutory requirements are met, a U.S. district court has the discretion to grant the application based on four factors: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) whether the Section 1782 request "conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the discovery request is "unduly intrusive or burdensome." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 264–65, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004).

The *ZF Automotive* decision focuses on the statutory requirement that the underlying proceedings be in a "foreign or international tribunal." In this respect, the Court determined that "foreign or international tribunal" can only refer to adjudicative bodies "that exercise governmental authority conferred by one nation or multiple nations."

Specifically, the Court found that a "foreign tribunal" means "a tribunal belonging to a foreign nation" that has "sovereign authority conferred by that nation" and not a "tribunal that is simply located in a foreign nation." ZF *Automotive*, 142 S. Ct. at 2087. The Court defined an "international tribunal" as a tribunal "that involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes." *Id.* As a result, private arbitration bodies would be outside the statutory requirements of Section 1782. The Court also considered whether an arbitration body allowed by an international treaty could meet the statutory requirements of Section 1782. Because, in *ZF Automotive*, the treaty merely allowed for the use of an arbitrator and did not establish or empower an arbitration panel, the Court determined that the statutory requirements of Section 1782 were not met.

Practical Issues with the Section 1782 Process

While not addressed by the *ZF Automotive* decision, there are several other reasons to be skeptical of discovery requests made pursuant to Section 1782. The inclusion of actual or potential proceedings within an international private arbitration expanded the reach of Section 1782 and the potential for its abuse.

First, as a matter of practice, Section 1782 applications are filed ex parte and without notice to the responding party. Only after the application is granted can the respondent challenge the application by arguing either that it was improperly granted or that the application violates Federal Rule of Civil Procedure 26 or 45. Further, the Supreme Court previously found that Section 1782 applications can be granted for "reasonably contemplated, and not necessarily imminent, proceedings." *Intel Corp.*, 542 U.S. at 259. As a result, not only is the initial application submitted *ex parte*, it could be submitted before the responding party is even identified as a party in an actual dispute or before the commencement of a foreign private arbitration proceeding.

Second, the standard for determining whether the requested discovery "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States" is based on the court finding the requesting party "engaged in a bad faith endeavor to misuse Section 1782" and not whether "the requested documents are [] obtainable through [foreign] proceedings." In re *Hansainvest Hanseatische Inv.-GmbH*, 364 F. Supp. 3d 243, 252 (S.D.N.Y. 2018) (citing, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004).). Which is to say, district courts do not need to consider whether the discovery requested would be allowed in the underlying proceeding as long as the requests are not found to be a "bad faith" use of Section 1782.

Third, whether district courts fully consider the burden on the responding party is debatable. For example, district courts considering arguments of burden related to complying with international privacy regimes (e.g., GDPR) have

considered whether the responding party can afford compliance and not whether compliance creates an unnecessary burden. *In re Valitus, Ltd.*, No. CIV 20-MC-91133-FDS, 2020 WL 6395591, at *6 (D. Mass. Nov. 2, 2020) (noting, "[the court] is not convinced that compliance would be unduly burdensome for an entity like BCH, which, according to Valitus' memorandum in support, 'operates a highly sophisticated worldwide enterprise with assets under management of over $100 billion.'"). Other courts have applied a proportionality standard similar to analysis under FRCP 26 – even though the court likely only had limited information about the underlying matter. *In re Polygon Glob. Partners LLP*, No. 21 MISC. 364 (ER), 2021 WL 2117397, at *11 (S.D.N.Y. May 25, 2021) (noting, "while the Court acknowledges that KKR's efforts to comply with the GDPR will likely impose some additional compliance costs, it has not demonstrated that compliance would impose a financial burden to KKR that is disproportionate to the needs of the case.")

Finally, and as the Court reasoned in *ZF Automotive*, finding that private arbitration tribunals met the statutory requirements of Section 1782 created an awkward scenario where foreign parties to a private international arbitration proceeding could seek and obtain more expansive discovery than allowed under the Federal Arbitration Act. By creating a bright line and foreclosing the possibility of using Section 1782 to obtain discovery in private commercial arbitration abroad, the decision harmonizes the discovery regimes for foreign and domestic arbitrations.

Takeaways

- The Court's decision limits the ability of parties to private international arbitration proceedings to seek discovery under the U.S. discovery rules. It provides symmetry as no other country has legislation like Section 1782 that would enable discovery against entities outside the U.S. within a private arbitration setting.

- This decision ensures private foreign arbitrations do not have broader access to federal court discovery assistance than private domestic arbitrations. Under the Federal Arbitration Act, parties to private domestic arbitrations may not apply directly to a federal court for discovery assistance. Instead, they must seek discovery based on the rules established by the arbitration body.

- This decision will further streamline the international arbitration process and reduce the overall cost of the dispute, as the proceedings will not be delayed by related litigation over discovery in U.S. courts.

- Among the reasons that parties elect to resolve their disputes through private international arbitration is to avoid broad, often costly discovery and maintain the confidentiality of their disputes. The Court's decision aids the parties' desires to avoid American-style discovery and preserve confidentiality by preventing parties from initiating public litigation in federal courts under Section 1782.

- Finally, the risk for abuse of the Section 1782 discovery process should be significantly reduced because fewer cases would meet the statutory requirements of Section 1782. That said, the Court did not address most of the procedural issues that could allow for abuse. It will be worth watching whether district courts continue to approve Section 1782 discovery applications for matters that have not yet been filed but theoretically could be filed with a foreign tribunal that meets the statutory requirements.

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