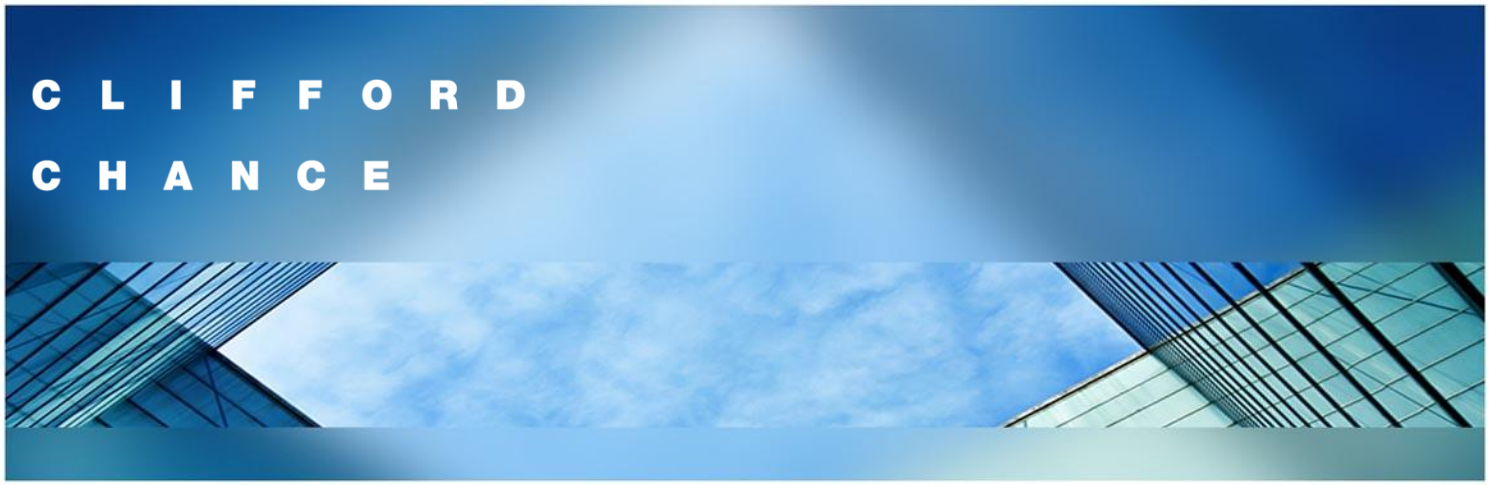

SUPREME COURT RULES SECTION 1782 DISCOVERY INAPPLICABLE TO PRIVATE ARBITRATION

In the past, participants in private foreign arbitrations often have sought evidence by taking advantage of U.S.-style discovery practices in parallel U.S. court proceedings, potentially expanding discovery far beyond the rules of the arbitration tribunal. The U.S. Supreme Court has just ruled that this use of U.S. discovery is impermissible, in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, Nos. 21-401 and 21-518.

The issue centers around the scope of 28 U.S.C. § 1782, which permits interested persons to seek discovery in the U.S. for use in "a proceeding in a foreign or international tribunal." In a unanimous decision authored by Justice Amy Coney Barrett, the Supreme Court has made clear that "foreign or international tribunal" refers only to governmental or intergovernmental adjudicative bodies, *not* private arbitration panels.

Prior to this decision, the issue had divided U.S. courts, with some concluding that only courts count as tribunals, and others including arbitration tribunals within the scope of "international tribunals." The broader interpretation permitted parties in foreign arbitrations to direct wide-ranging U.S.-style discovery requests to persons and entities in the U.S. in connection with those arbitrations, including document requests and depositions, whether or not such discovery requests were contemplated by arbitration procedures.

With the Supreme Court's ruling, Section 1782 is now clearly inapplicable to private arbitrations. Thus, parties to foreign arbitrations will no longer be able to obtain judicial assistance from U.S. courts to obtain discovery in the U.S.

SECTION 1782 GENERAL FRAMEWORK

Section 1782 allows discovery through U.S. federal courts when (1) the person from whom discovery is sought "resides or is found" in the district where the application is made; (2) the discovery is for use in "a proceeding in a foreign or international tribunal"; and (3) the application is made by that tribunal or any interested person. *See* 28 U.S.C. § 1782.

If the statutory requirements are met, a federal court has discretion to grant the requested discovery. In making this decision, courts generally consider: (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 (2004).

THE SUPREME COURT'S DECISION

The primary issue in *ZF Automotive* was whether the language of Section 1782 referencing "a proceeding in a foreign or international tribunal" includes private foreign arbitrations. On June 13, 2022, the Supreme Court concluded that it does not.

The Court focused heavily on the text of the statute. The Court began its analysis by observing that the "statutory history [of Section 1782] indicates that Congress used 'tribunal' in the broader sense" to include "any adjudicative body" and, accordingly, the term "does not itself exclude private adjudicatory bodies" such as arbitral panels. But the Court went on to say that when attached to the modifiers "foreign or international," the word "'tribunal' is best understood as an adjudicative body that exercises governmental authority." In particular, the Court noted that the word "foreign" could have a broad meaning concerning anything to do with a foreign country — like a "foreign film" — or a narrower meaning relating to a foreign government — like a "foreign leader." The Court reasoned that the "word 'foreign' takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations" like the word "tribunal." Thus, a "foreign tribunal" is one that has sovereign authority conferred by the foreign state. As to "international," the Court found that the dictionary definition of "involving or of two or more '*nations*'" — as distinct from "involving or of two or more *nationalities*" — to be the most plausible in the circumstances. (emphasis added). (Otherwise, a tribunal would be "international" if it happened to have arbitrators from more than one country.)

Thus, the Court held that a "foreign tribunal" is one "imbued with governmental authority by one nation," and an "international tribunal" is one "imbued with governmental authority by multiple nations."

The Court cited additional factors in support of its analysis:

- The statutory history of Section 1782 reflects a focus on foreign nations, as opposed to private arbitrations. Indeed, the commission that proposed the current statutory language was charged with improving the process of judicial assistance "*between the United States and foreign countries*" and that "'*the rendering of assistance to foreign courts and quasi-judicial agencies*' should be improved."
- The Court's reading is consistent with Congress's evident interest in promoting comity with foreign governments. It is difficult to see how using the resources of the district courts to assist foreign private bodies —

"everything from a commercial arbitration panel to a university's student disciplinary tribunal" — would achieve these ends, or why Congress would want to do so.

- Extending Section 1782 to include private arbitrations would cause tension with the Federal Arbitration Act ("FAA"). The FAA allows very narrow judicial assistance for discovery in domestic arbitrations — *e.g.*, only at the request of the panel during a pending arbitration. By contrast, Section 1782 discovery is much broader, so reading it to cover private arbitration would "create a notable mismatch between foreign and domestic arbitration."

With the above principles in mind, the Court determined that Section 1782 was inapplicable to the two arbitration proceedings at issue in the cases before it. One arbitration was to take place pursuant to the rules of the German Institution of Arbitration ("DIS"), a private dispute resolution organization based in Germany. The Court's conclusion regarding this DIS arbitration was straightforward because it involved a private agreement by private parties to submit to a private dispute resolution organization. The Court flatly rejected the argument that an arbitral panel qualifies as governmental merely because courts might enforce arbitration agreements or foreign law governs some aspect of the arbitration.

The other arbitration at issue was an ad hoc proceeding agreed to in a bilateral investment treaty between Lithuania and Russia. The Court considered that this case presented a harder question. The option to arbitrate was set forth in a bilateral investment treaty, which supported the argument that this was a "international tribunal." However, the Court found that "[w]hat matters is the substance of their agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?" Sovereign states can structure dispute resolution mechanisms however they choose, and the treaty here gave the parties a number of options in this respect (including court proceedings or different arbitral forums). But this did not mean that the ad hoc arbitration panel here was exercising governmental authority. Among other reasons, the treaty did not itself establish the arbitral body, the parties selected the arbitrators, and the panel otherwise operated like any ordinary commercial arbitration panel. Therefore, discovery pursuant to Section 1782 was unavailable.

CONCLUSION

The Supreme Court's decision makes clear that U.S. courts will not provide judicial assistance for the taking of U.S.-style discovery in U.S. courts in support of a private foreign arbitration pursuant to 28 U.S.C. § 1782. While in the past this may have been possible (depending on the location of the dispute), parties to most commercial arbitration proceedings may no longer obtain U.S. discovery in this manner. Instead, discovery under Section 1782 will generally be limited to the support of foreign and multilateral institutions — primarily courts. Some forms of state-sponsored arbitration might still qualify for Section 1782 discovery — that is, if the panel is exercising governmental authority — but whether this is so will depend on the facts of a given case.

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