IADC COMMITTEE NEWSLETTER

INTERNATIONAL ARBITRATION

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This article discusses the arguments made by the parties before the US Supreme Court on the application of 28 U.S.C. § 1782 ("Section 1782") to private international commercial arbitration cases. Section 1782 has been used in various US Circuit Courts to compel discovery to be used in foreign arbitrations. These two cases before the Court have brought to light the US Circuit Court split on the issue and the Court's ruling will resolve the differing interpretations among them.

Round 2! U.S. Supreme Court Has Heard the Arguments on Section 1782 – Discovering the Issues with Discovery in International Arbitrations

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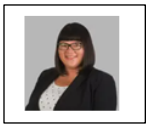

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ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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As noted in our prior posts, the U.S. Supreme Court Justices (with the exclusion of Justice Clarence Thomas who was hospitalized on March 18) heard oral arguments on March 23, 2022, for *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. Roman Martinez of Latham & Watkins LLP, and Joseph Baio of Willkie Farr & Gallagher LLP represented ZF Automotive and AlixPartners, respectively, while respondent Luxshare was represented by Andrew Rhys Davies of Allen and Overy LLP, and the Fund for Protection of Investor Rights in Foreign State was represented by Alexander Yanos of Alston & Bird LLP. Numerous *amici* also submitted briefs prior to the hearing, including the Solicitor General's office, represented by Edwin S. Kneedler.

At issue was whether 28 U.S.C. § 1782(a), which allows parties to rely on a federal district court order to obtain discovery for use in "a foreign or international tribunal," encompasses private commercial arbitral tribunals, or only proceedings before governmental bodies. There is presently a 3-to-2 circuit split on this issue, with the U.S. Court of Appeals for the Second, Fifth, and Seventh Circuits limiting Section 1782's application to proceedings only before governmental or quasi-governmental bodies, versus the Sixth and Fourth Circuits permitting the statute to extend to private commercial arbitral tribunals.

This question of interpretation of Section 1782 in arbitral proceedings was previously raised in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, which involved arbitration between two private parties, but the case was settled before reaching oral argument at the U.S. Supreme Court level. In the current consolidated cases heard in oral arguments, *ZF Automotive* involved a private arbitration, while *AlixPartners LLP* involved a purported investor-state arbitration.

During oral arguments, the parties spent significant time addressing whether "foreign or international tribunal," or rather "tribunal" alone should inform the Court's consideration of whether Section 1782 allows for discovery assistance in international arbitral tribunals. Petitioners opposing discovery enforcement under Section 1782 argued the entirety of "foreign or international tribunal" should be considered, and compared the term to "foreign leader" to argue the complete phrase was most naturally interpreted as applying only to a governmental authority or entity.

Counsel for the petitioners, seeking to limit Section 1782's application, also relied on the statute's history to argue "foreign tribunal" refers solely to governmental adjudicatory bodies, as Congress enacted it in 1964 to expand discovery assistance to government entities at a time when international arbitration was in its infancy, and therefore, would not have been considered. Additionally, counsel contended that allowing expansive discovery assistance in private foreign arbitral proceedings would

be counter to the policies in the Federal Arbitration Act, which often limits discovery assistance in domestic arbitration. Finally, the petitioners argued that expanding Section 1782 to private arbitrations would "flood the courts" with discovery applications and undermine the efficiency of arbitration.

At the hearing, Assistant Solicitor General Edwin Kneedler supported the petitioners' argument and asserted that extending Section 1782 discovery to foreign private arbitrations could negatively impact the United States' relationships with international actors by involving the government in unnecessary and potentially controversial discovery disputes. Like the petitioners, Mr. Kneedler relied heavily on the statute's history, which he contended was designed to promote beneficial relationships with other international governments by improving methods for offering judicial assistance within the limited context of litigation. Mr. Kneedler maintained that as an alternative to litigation, arbitration would not fall within the purview of Section 1782.

Interestingly, Mr. Kneedler indicated the State Department did not find a meaningful difference between the private arbitration petitioner and the investor-state petitioner for purposes of determining Section 1782's scope. When pressed by Chief Justice Roberts, Mr. Kneedler indicated that the AlixPartners case was not a governmental arbitral body merely because the arbitration was between two state actors, but rather, presented a scenario where one state made an offer to arbitrate if the private investor so chose. If the investor then accepted the state's offer, the private party's acceptance formed the agreement to arbitrate. In comparison, for a tribunal to be properly considered foreign or international, the tribunal must have been established by, and exercise, governmental authority.
Instead of extending Section 1782 via judicial decision, Mr. Kneedler argued Congress should decide the scope. Justices Gorsuch and Breyer, in particular, appeared receptive to Mr. Kneedler's argument and questioned counsel for respondents at length on why the interpretation of Section 1782 should not be left to Congress.

In rebuttal, counsel for respondents, seeking to include private arbitrations within the scope, asserted Section 1782's use of the word "tribunal" was broad and did not have a particular meaning when enacted, given that international arbitration was still in its primary stages. By using this expansive term, Congress intended to allow a broad interpretation that may now include the more modern understanding of foreign private arbitrations. Counsel for respondents focused on the term "tribunal" alone in making their arguments, rather than the phrase "foreign or international tribunal" in its entirety and argued the term included arbitral tribunals based on common parlance. In the international arbitration industry, arbitral panels are routinely referred to as "tribunals." Moreover, counsel for respondents contended "foreign" should not be construed to require

a strictly governmental association, but that the adjective is frequently applied to a wider variety of terms, such as foreign films or cars.

Counsel for respondents also relied heavily on the Court's decision in *Intel v. Advanced Micro Devices, Inc.,* which examined whether a branch of the European Union investigating antitrust violations could be considered a tribunal under Section 1782. Concluding it could, the Court's opinion stated in *dictum* that Section 1782 should not be limited solely to what discovery would be permissible in comparative domestic litigation. Under *Intel*, respondents argued any differences between permissible discovery assistance in foreign versus domestic arbitrations would not be incongruous as the petitioners contended, but merely indicative of Congress' favorable view of international commercial arbitration.

Furthermore, to address the petitioners' argument that expanding Section 1782 would open the proverbial floodgates of litigation, respondents contended that arbitral institutions could always choose to limit their assistance with discovery by their own rules and that parties could likewise exclude discovery under Section 1782 by contract.

The U.S. Supreme Court is expected to render its decision by the end of this summer, and the outcome will likely have a noteworthy impact on international arbitration.

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