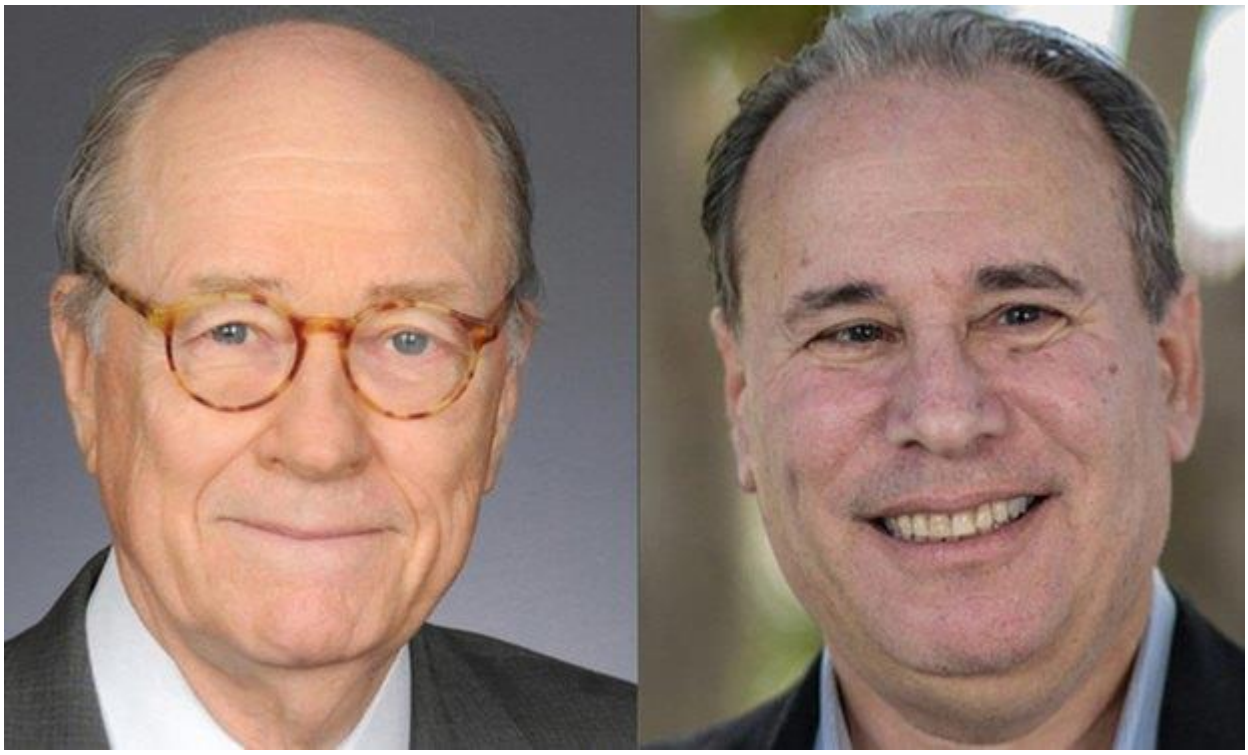
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**Supreme Court Holds That §1782 May Not Be Used in Aid of International Arbitration**

In their International Litigation column, Lawrence W. Newman and David Zaslowsky discuss the long-awaited decision by the U.S. Supreme Court that resolved a Circuit split and held that §1782 discovery is (largely) unavailable in aid of international arbitration.

By **Lawrence W. Newman and David Zaslowsky** | June 16, 2022 at 03:00 PM



Regular readers of this column will know that §1782 is a topic we have followed closely for many years. The Supreme Court has issued only two decisions on §1782. In today's column, we discuss the second of those two decisions, *ZF Automotive US v. Luxshare, Ltd*., No. 21-401, issued on June 13, 2022. This decision resolved a Circuit split that can be traced to the court's first §1782 case (18 years earlier), *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004). The Supreme Court has now made clear that, with narrow exceptions, §1782 discovery is not available in aid of international arbitration.

**Background of the Statute**

First, some background. Section 1782 authorizes a federal district court to order the production of documents, as well as depositions of witnesses, in aid of foreign proceedings. The §1782 application is typically initiated through an ex parte application and does not require that the foreign proceeding even be pending at the time of the application (as long as it is in "reasonable contemplation"). Section 1782 authorizes a district court to grant a petition for judicial assistance if three statutory requirements are met: (1) the request for discovery is made "by a foreign or international tribunal" or "any interested person;" (2) the discovery requested is "for use in a proceeding in a foreign or international tribunal"; and (3) the person from whom the discovery is sought resides, or is found, in the district of the district court where the request has been made.

If these statutory requirements are met, the district court may—although it is not required to—exercise its discretion and grant the petition. The Supreme Court's only prior treatment of §1782, in *Intel*, identified four non-exclusive factors a district court should consider in exercising its discretion and, ever since, it has been essentially de rigueur for every §1782 decision to discuss those factors. They are:

(1) Whether the person from whom discovery is sought is a party to the foreign proceeding (with discovery being much more difficult to obtain from a party);

(2) The receptivity of the foreign court to U.S. assistance;

(3) Whether the §1782 request conceals an attempt to circumvent foreign truth-gathering restrictions; and,

(4) Whether the request is unduly intrusive or burdensome.

Prior to the Supreme Court's decision in *Intel*, there had been two circuit courts that had addressed the issue of whether §1782 could be used in aid of private, international arbitration—*Nat. Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999) and *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999). Both the Second and Fifth Circuits held that §1782 was not so available.

In *Intel*, however, Justice Ginsberg quoted from an article written by the late Professor Hans Smit, the primary draftsperson of the current version of §1782, in which he wrote "[t]he term 'tribunal' … includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." The reference in this quotation to "arbitration" resulted in 18 years of §1782 cases being brought in aid of arbitration and, ultimately, to a split on the issue in the district courts and then the Circuit courts. The Supreme Court granted certiorari to resolve this split.

**The Supreme Court Case**

*ZF Automotive US v. Luxshare Ltd.*, No. 21-401 __ U.S. __(June 13, 2022) was a consolidated case that concerned two arbitrations. In the first, Luxshare had a dispute concerning a sales transaction with ZF. The contract provided for arbitration under the Arbitration Rules of the German Institution of Arbitration e.V. (DIS), a private dispute-resolution organization based in Berlin, with each side choosing an arbitration panel member (the DIS Panel). To prepare for a potential DIS arbitration against ZF, Luxshare filed an application under §1782, seeking information from ZF and its officers. The district court and the Sixth Circuit held that the DIS Panel qualified as a "foreign or international tribunal" under §1782.

The second case, *AlixPartners, et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518 __ U.S. __(June 13, 2022), involved AB bankas SNORAS (Snoras), a failed Lithuanian bank that was nationalized by Lithuanian authorities. The rights of a Russian investor in Snoras were assigned to the Fund for Protection of Investors' Rights in Foreign States, which initiated a proceeding against Lithuania under the bilateral investment treaty (BIT) between Lithuania and Russia, claiming that Lithuania expropriated investments. That BIT allowed for a number of choices for dispute resolution and the Fund chose ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law. Each party selected one arbitrator and those two chose a third (the BIT Panel). After initiating arbitration, the Fund filed a §1782 application seeking information from the temporary administrator of Snoras. His company, AlixPartners, resisted discovery, arguing that the ad hoc arbitration panel was not a "foreign or international tribunal" under §1782 but instead a private adjudicative body, which the Second Circuit had already held may not be the basis for §1782 discovery. The district court and Second Circuit disagreed and allowed the discovery.

The Supreme Court's analysis of the availability of §1782 was very much textual. The key statutory language is "for use in a proceeding in a foreign or international tribunal." The court explained that the definition of the word "tribunal" did not really help answer the question. It can be used as a synonym for "court," in which case it carries

a distinctively governmental flavor. But it can also be used more broadly to refer to any adjudicatory body. Statutory history indicated that Congress used "tribunal" in the broader sense because the 1964 changes to the statute expanded the provision to cover proceedings in a "foreign or international tribunal" and not just "courts." And, in *Intel*, the court observed, that shift created the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad. The court said that if it had nothing but this single word to go on, there would be a good case for including private arbitral panels within the ambit of §1782.

But that word did not stand alone and, therefore, the court went on to analyze the meaning of the word "tribunal" as part of the phrases "foreign tribunal" and "international tribunal." With respect to a "foreign tribunal," the court referred to the amicus brief of the United States, which said, "The phrase 'foreign leader' brings to mind 'an official of a foreign state, not a team captain of a European football club.'" Id. at *7. "Foreign tribunal" was similar: "'Tribunal' is a word with potential governmental or sovereign connotations, so 'foreign tribunal' more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation."

Turning next to the meaning of "international tribunal," the court said "international" can mean either (1) involving or of two or more "nations," or (2) involving or of two or more "nationalities." The latter definition did not seem right for §1782 because it would be strange if the availability of discovery turned on the national origin of the adjudicators. Thus, the court said, a tribunal is "international" when it involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes.

The court saw its two definitions as complementary: "foreign tribunal" is a tribunal imbued with governmental authority by one nation, and "international tribunal" is a tribunal imbued with governmental authority by multiple nations.

**Additional Support for the Court's Interpretation**

The court also found support for its position in looking at discovery under the Federal Arbitration Act (FAA), 9 U. S. C. §1 et seq., which governs domestic arbitration. Under the FAA, only the arbitration panel can request discovery, but a party to the foreign arbitration may do so under §1782. Also, pre-arbitration discovery is not permitted under the FAA, while, under §1782, discovery may be sought for a case that is "within reasonable contemplation." Interpreting §1782 to reach private arbitration would therefore create a notable mismatch between foreign and domestic arbitration. Quoting from the Seventh Circuit, the Supreme Court observed, "[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."

The court said also that the statute's history supported its interpretation. From 1855 until 1964, §1782 and its antecedents covered assistance only to foreign "courts." And before 1964, a separate strand of law covered assistance to "any international tribunal or commission … in which the United States participate[d] as a party." Act of June 7, 1933, ch. 50, 48 Stat. 117. The legislative efforts that led to the 1964 amendments to §1782 brought these two strands together. As the Supreme Court explained: "Seen in light of the statutory history, the amendment did not signal an expansion from public to private bodies, but rather an expansion of the types of public bodies covered."

The court next applied its standard to the two cases before it to see if those adjudicative bodies are governmental or intergovernmental. The DIS Panel was an easy call. (1) Private parties, (2) agreed in a private contract, (3) that DIS, a private dispute resolution organization, would arbitrate any disputes between them, (4) using DIS's private arbitral rules, (5) before a panel chosen by the parties. No government was involved in creating the DIS panel or prescribing its procedures. This adjudicative body therefore did not qualify as a governmental body and §1782 discovery was not available.

The BIT Panel raised a more challenging question. One of the parties to the arbitration was a sovereign. And the option to arbitrate was contained in an international treaty (the BIT), rather than a private contract. These factors were not, however, dispositive. The real question was whether the two governments intended to confer governmental authority on an ad hoc panel formed pursuant to the treaty? The Court said that one of the dispute resolution options under the treaty was the courts of one of the countries, which is certainly a pre-existing government body. But the Fund chose ad hoc arbitration instead. That is not a pre-existing body, but one formed for the purpose of adjudicating investor-state disputes.

Further, the BIT Panel was not chosen by the countries and it "functioned independently" from the two governments. In addition, the governments provided no funding. Quoting from the amicus brief of Prof. George Berman of Columbia Law School, the court said that the BIT Panel at issue in the Fund's dispute with Lithuania is "materially indistinguishable in form and function" from the DIS panel. The court explained that including an arbitration option in a treaty does not automatically render ad hoc arbitration governmental. Rather, it reflects the countries' choice to offer investors the potentially appealing option of bringing their disputes to a private arbitration panel that operates as commercial arbitration panels do. The court concluded that the BIT Panel did not meet the test for being a foreign or international tribunal.

**Takeaways**

Since *Intel*, there have been hundreds of cases seeking §1782 discovery in aid of private commercial arbitration, and a smaller number in aid of investor state arbitration. Because of *Intel*'s lack of clarity on the issue, the lower courts, and then the Circuit courts, were hopelessly split on whether §1782 should be used in aid of arbitration. It was therefore interesting to see the Supreme Court's effort to absolve itself from any responsibility for causing this confusion and the bringing of hundreds of cases that probably never would have been brought were it not for a single sentence of dictum in *Intel*. In footnote 1, the court said that, in *Intel*, the court did not "purport to establish a test for what counts as a foreign or international tribunal" and that the issue of "whether a private arbitral body qualifies as a 'foreign or international tribunal'" was not before the court in *Intel.*

But the Supreme Court has now addressed the issue clearly, through a unanimous decision. Though we do not underestimate the creativity of the Bar, going forward, district court dockets should be free of §1782 requests in aid of private arbitration. On the investor-state side, specially created tribunals, such as the Iran-U.S. Claims Tribunal, could probably meet the Supreme Court's standard. And perhaps some parties will argue that Supreme Court addressed ad hoc arbitration under a BIT but left open the question of ICSID arbitration. Indeed, prior to *ZF Automotive*, conventional wisdom and case law supported the conclusion that an ICSID tribunal is quintessentially an "international tribunal." But even in the area of investor state arbitrations, §1782 cases will likely be fewer and farther between. The inarguable benefit of the *ZF Automotive* decision, whether one agrees with the outcome or not, is that it has largely cleared up 18 years of muddy waters.

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