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The United States Supreme Court Strikes a Blow Against Arbitration

While the United States Supreme Court assiduously asserts the prominence, and sometimes preemption, of the Federal Arbitration Act, this policy apparently has no effect on the Court's overall view in terms of international arbitrations. In a case that has received very little publicity, but will have a major effect for international practitioners and those who address disputes in foreign mediations and arbitrations, *ZF Auto. US, Inc. v. Luxshare, Ltd.*, will be a major impediment to pursuing those cases in foreign private arbitrations.

The decision in *ZF Auto. US, Inc. vs. Luxshare, LTD.*, 142 Sup. Ct. 2078, 213 L. Ed. 2d 163, ___U.S.___, (June 13, 2022), which consolidated two cases involving arbitration proceedings abroad in which a party sought discovery in the United States pursuant to 28 U.S.C. §1782(a), was written by Justice Barrett. She noted that Congress has long allowed federal courts to assist foreigner international adjudicative bodies in evidence gathering. The current statute, 28 U. S. C. §1782, permits district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal."

The consolidated cases required the United States Supreme Court to decide whether private adjudicatory bodies count as "foreign or international tribunals." The Court determined that they do not.

The cases before the Supreme Court involved a party seeking discovery in the United States for use in arbitration proceedings abroad. Such practice is common and sometimes essential for the foreign arbitration to be worthwhile and successful. Many commercial disputes are resolved this way, rather than by litigation in courts, foreign or in the United States.

In both of the cases before the Supreme Court, the party seeking discovery invoked §1782 of 28 United States Code, which permits a district court to order the production of certain evidence "for use in a proceeding in a foreign or international tribunal." In both cases, the party resisting discovery argued that the panel at issue did not qualify as a "foreign or international tribunal" under the statute.

The Court began its analysis with an examination of whether the phrase "foreign or international tribunal" in §1782 includes private adjudicative bodies or only governmental or intergovernmental bodies. If the former, all agree that §1782 permits discovery to proceed in both cases. If the latter, the Court would be faced with whether the arbitration panels in these cases qualify as governmental or intergovernmental bodies.

The specific language of the statute at issue states as follows:

> The district court of the district in which a person

> resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation.

28 U.S.C. §1782(a).

The key phrase for purposes of this case is "foreign or international tribunal." Statutory history indicates that "tribunal" is used in a broader sense, to include administrative and quasi-judicial proceedings, because prior to 1964 the language specified only "judicial proceedings." However, " '[t]ribunal' does not stand alone—it belongs to the phrase 'foreign or international tribunal.' And attached to these modifiers, 'tribunal' is best understood as an adjudicative body that exercises governmental authority." *ZF Auto, supra,* at 2085. "Foreign tribunal" and "international tribunal" complement one another; the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations.

The Court held that Section 1782 required a "foreign or international tribunal" to be governmental or intergovernmental. Thus, a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies, therefore, do not fall within Section 1782.

The Court's analysis left the question as to whether the adjudicative bodies in the cases before the Court are governmental or intergovernmental. The Court found that they were neither. Only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under Section 1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies.

The Supreme Court reversed the order of the District Court in No. 21-401 denying the motion to quash, and reversed the judgment of the Court of Appeals in No. 21- 518.

Bullet point take aways from the decision are as follows:

1. 28 U.S. Code §1782 permits district courts to order testimony or production of evidence for use in a foreign or international tribunal.

2. Private international arbitration does not fall within this requirement, and hence U.S. courts cannot assist in discovery.

3. A foreign or international tribunal is one that exercises governmental authority conferred by a nation.

4. The cases before the court were commercial arbitration panels.

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