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United States Supreme Court Restricts Availability of U.S. Discovery in Support of International Arbitration

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Parties involved in litigation outside the U.S. have long had a useful information-gathering tool at their disposal: a U.S. statute allowing them to obtain by court order testimony and documents from persons located in the U.S. The statute, 28 U.S.C. § 1782(a), or "Section 1782," authorizes U.S. district courts to order persons "resid[ing] or found" in their district to give testimony or produce evidence for use in a proceeding in a "foreign or international tribunal." Courts in the U.S. have long disagreed about whether and when parties to international arbitrations can use Section 1782. The U.S. Supreme Court has now held they generally cannot. On June 13, the Court issued a unanimous opinion in ZF Automotive US, Inc., v. Luxshare, LTD, holding that Section 1782 applies "only [to] governmental or intergovernmental adjudicative bodies." Accordingly, Section 1782 cannot be used to obtain evidence for private commercial arbitrations or for investor-state arbitrations, unless a foreign government has conferred governmental authority upon the arbitral panel.

In reaching this result, the Court primarily focused on the meaning of the statutory phrase "foreign or international tribunal." The Court held that a "foreign tribunal" is a tribunal belonging to a foreign nation, rather than a tribunal that is simply located in a foreign nation. The Court further held that an "international tribunal" is a tribunal involving two or more nations, rather than two or more nationalities. Hence a "foreign tribunal" is a tribunal imbued with governmental authority by one nation, and an "international tribunal" is a tribunal imbued with governmental authority by multiple nations.

The Court also was influenced by legislative history, suggesting that the "animating purpose of § 1782 is comity" between nations, and that "[i]t is difficult to see how enlisting district cour help private bodies would serve that end."

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Finally, the Court highlighted the fact that reading Section 1782 to cover private bodies would be in "significant tension" with the Federal Arbitration Act ("FAA"), which governs domestic arbitration, because Section 1782 "permits much broader discovery than the FAA allows." The Court said it was difficult to conceive a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the U.S. while precluding such discovery assistance for litigants in domestic arbitrations.

The Court applied its holding to two consolidated cases. In one case, two commercial parties agreed that they would arbitrate their disputes under the arbitration rules of the German Institution of Arbitration e.V. ("DIS"), a private dispute-resolution organization based in Berlin. Because no government was involved in creating the arbitration panel or prescribing its procedures, the Court held that the panel did not qualify as a governmental body and therefore the parties could not use Section 1782 to obtain discovery.

In the second case, a Russian corporation initiated an arbitration against the Lithuanian government under a bilateral investment treaty between the two countries. Pursuant to the treaty, the arbitration was before an ad hoc arbitration panel, with each party selecting one arbitrator and those two choosing a third. In finding that the ad hoc arbitration panel did not qualify as a "governmental or intergovernmental adjudicative body," the Court pointed to several key facts: that the treaty authorizing arbitration did not create an arbitration panel; the panel functioned independently of and was not affiliated with either the Lithuanian and Russian government; the panel consisted of individuals chosen by the parties without any official affiliation with any public body; the panel received no government funding; the proceedings were confidential; and the award could only be made public with the parties' consent.

In sum, the Supreme Court's ruling makes clear that typically neither a foreign private commercial arbitral panel nor an ad hoc panel adjudicating investor-state disputes qualifies as a "foreign or international tribunal" under Section 1782—only panels on which a foreign government conferred governmental authority qualify.

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