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Supreme Court Precludes Resort to Federal Courts to Compel
Discovery for Use in Private Foreign Arbitrations

For decades, through a somewhat obscure but powerful federal statute known as Section 1782, litigants have been able to petition U.S. courts for American-style discovery of U.S.-based parties "for use in a proceeding in a foreign or international tribunal." Federal courts had split, however, over whether Section 1782 extends to discovery in aid of private foreign arbitrations. Yesterday, in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, the U.S. Supreme Court unanimously held that it does not. Rather, the statute "reaches only governmental or intergovernmental adjudicative bodies."

The Supreme Court explained that Section 1782 does not reach even arbitrations where a sovereign is a party and the option to arbitrate derives from an international treaty. Rather, the critical question is whether the arbitral panel is imbued with "governmental authority." Thus, for example, an arbitration pending between Lithuania and a Russian corporation, pursuant to a bilateral treaty, was not sufficiently "governmental" to come within the scope of Section 1782.

Justice Barrett's opinion for the Court also noted that Section 1782 provides for "much broader discovery than the [Federal Arbitration Act] allows" — such that a contrary interpretation of the statute would "create a notable mismatch between foreign and domestic arbitration." In that sense, *ZF Automotive* can be understood as protective of arbitration and its well-recognized appeal as a forum marked by greater efficiency in part through a more cabined process.

The Supreme Court's decision has implications for parties to cross-border transactions, which have increasingly settled on private foreign arbitration as their dispute resolution mechanism of choice. The decision makes clear that Section 1782 will not offer a backdoor to U.S.-style discovery in such proceedings. And though that had already been the prevailing rule in some federal jurisdictions, the Court has clarified the test, eliminated a circuit split, and ensured uniform treatment across the federal courts.

Notwithstanding yesterday's cabining of Section 1782, the statute remains a dynamic and potent tool — for example, as the Supreme Court recognized, litigants can leverage Section 1782 to obtain even pre-suit discovery so long as litigation is reasonably contemplated. Sophisticated actors that find themselves involved in or contemplating foreign litigation are well-advised to consult with experienced counsel as to how the statute may inform or complement a commercial litigation strategy.

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