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COMMENTARY

Latham plays 3D chess in bid for SCOTUS to take up new discovery case

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Whether you call it procedural gamesmanship or shrewd counterpunching, Latham & Watkins is trying to make it very hard for the U.S. Supreme Court to say no to a new opportunity to resolve a circuit split on whether parties in private foreign arbitration can obtain discovery from U.S. courts.

The Supreme Court had been primed to decide whether such discovery is permissible under Section 1782 of Title 28 of the U.S. Code in Servotronics Inc v. Rolls-Royce PLC. That case seemed over the summer to be shaping up as one of the most consequential business cases of the court's term. But on Sept. 29, in response to a joint motion from Servotronics and Rolls-Royce, the Supreme Court dismissed the case.

Latham's client, ZF Automotive U.S. Inc, had by then already filed a petition asking the Supreme Court to review a Michigan trial court order that it turn over documents to Luxshare Ltd. Luxshare, which paid about $1 billion to acquire part of ZF in 2017, sought the discovery in advance of threatened arbitration in Germany, which must be filed before the end of 2021. U.S. District Judge Laurie Michelson of Detroit approved Luxshare's request in August, citing the 6th U.S. Circuit Court of Appeals holding that private arbitration is within the scope of Section 1782.

ZF appealed to the 6th Circuit – but also went straight to the Supreme Court with a request to skip the 6th Circuit appeal. ZF's certiorari petition anticipated that the Servotronics case might be moot before the Supreme Court heard the case. (The UK arbitrators had refused to stay their proceeding to wait for the U.S. court to decide whether Servotronics was entitled to the disputed discovery.) So Latham pitched ZF's case as a sort of Plan B for the Supreme Court, arguing that because Luxshare had not yet launched its arbitration in Germany, this case didn't raise the same mootness problem as the Servotronics case.

Latham told the Supreme Court that ZF had even agreed to waive the statute of limitations on Luxshare's arbitration filing to assure that the discovery dispute would stay alive.

Luxshare's lawyers at Allen & Overy filed a compelling brief in opposition on Thursday. It's extremely rare, Luxshare argued, for the Supreme Court to grant certiorari before a judgment from the lower courts. Historically, the court has

only agreed to hear pre-judgment cases in the most dire circumstances, such as cases implicating U.S. foreign policy or raising concerns about the federal government's institutional authority.

A discovery fight in a prospective arbitration over a private business deal "cannot hold (its) own alongside the kinds of extraordinary cases in which this court has granted certiorari before judgment," the opposition brief said.

That's all the more true, Allen & Overy argued, because the scope of Section 1782 might not even be the dispositive question in Luxshare's discovery battle. ZF had also raised case-specific challenges to the discovery order. Better to let the 6th Circuit hear ZF's appeal, Luxshare said, before rushing the case to the Supreme Court.

The 6th Circuit, meanwhile, denied ZF's motion to stay the discovery order on Oct. 13. That decision meant ZF faced an Oct. 27 deadline to turn over documents to Luxshare. The company faced the imminent prospect that even its hurry-up Supreme Court petition might be too late to keep its documents out of Luxshare's hands – and out of the threatened German arbitration.

Here's where Latham's strategy gets really mind-bending. On Thursday night, after Luxshare filed its brief opposing Supreme Court review, ZF asked the 6th Circuit for summary affirmance of the trial court discovery order. ZF also informed the 6th Circuit that it was dropping its case-specific challenges to the order, so the court need only address the Section 1782 issue in its summary affirmance ruling.

It's extremely rare, of course, for the losing side to ask an appeals court for summary affirmance of its defeat. Latham made no secret of ZF's motive: to improve its odds at the Supreme Court. After all, Luxshare's strongest argument in opposition was the unusual procedural posture of ZF's request for Supreme Court review before a lower-court judgment. A summary affirmance from the 6th Circuit would negate that argument – and ZF's concession on case-specific challenges would erase Luxshare's assertion that the Section 1782 issue might not end the dispute.

The summary affirmance motion was only the first part of ZF's plan, though. Remember, Luxshare is due to get hold of the disputed evidence in a matter of days. So on Friday, Latham filed a stay application at the Supreme Court, arguing that unless the court freezes the status quo, Luxshare will be able to make use of discovery that it might not be entitled to.

More broadly, ZF argued, the Supreme Court should grant the stay to preserve its own opportunity to resolve the circuit split on whether Section 1782 authorizes U.S. courts to grant discovery in foreign private arbitration. Mootness looms over every case presenting this issue, ZF warned. At least in this dispute, the arbitration hasn't yet started – and ZF once again promised in its stay application to waive the statute of limitations on Luxshare's arbitration launch.

"In light of the Servotronics dismissal, this case presents an ideal vehicle by which the Court could determine — once and for all — what Section 1782 means," ZF said.

ZF lead counsel Roman Martinez of Latham and Luxshare lawyer Andrew Rhys Davies of Allen & Overy both declined to provide statements. It's a good bet, though, that Luxshare will oppose the Supreme Court stay by arguing that ZF won't be irreparably hurt if it has to turn over the disputed discovery.

If Latham's machinations come to naught, there's another Section 1782 petition waiting for the justices' attention, from consulting firm Alix Partners LLP, in an investor-state arbitration brought by a Russian investment entity pursuing a claim against Lithuania. But that's a story for another day.