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Supreme Court Narrows Scope Of Foreign Discovery Statute

By **Caroline Simson**

Law360 (June 13, 2022, 10:49 AM EDT) -- The U.S. Supreme Court ruled Monday that U.S. law does not allow federal courts to order discovery for investor-state and private commercial arbitration abroad, a highly anticipated decision that narrows the scope of a foreign discovery statute.

The justices unanimously concluded that only a governmental or intergovernmental adjudicative body falls under the scope of Section 1782 of the U.S. Code, which allows federal courts to order entities in their districts to turn over evidence to be used in proceedings before a "foreign or international tribunal."

"'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," according to the decision, authored by Justice Amy Coney Barrett. "And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation."

"Similarly, an 'international tribunal' is best understood as one that involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes," the decision continued. "So understood, 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 question about the scope of Section 1782 had become increasingly more urgent in recent years, as the number of petitions under the statute had grown rapidly. Section 1782 had proven to be a powerful weapon for those allowed to use it since U.S. courts generally allow for more broad discovery than international arbitration tribunals.

In its decision on Monday, the high court said that Section 1782's focus on governmental and intergovernmental tribunals is confirmed by both the statute's history and a comparison to the Federal Arbitration Act.

On the first point, they said that amendments made to the statute in 1964 were the result of legislation that had been proposed by the Commission on International Rules of Judicial Procedure. That commission had been established by Congress in order to find ways to improve the process of judicial assistance, meaning that comity was the main purpose, the high court found.

"Permitting federal courts to assist foreign and international governmental bodies promotes respect for

foreign governments and encourages reciprocal assistance," according to the decision. "It is difficult to see how enlisting district courts to help private bodies adjudicating purely private disputes abroad would serve that end."

On the second point, the justices noted that extending Section 1782 to include private bodies would also be in significant tension with the Federal Arbitration Act, which governs domestic arbitration, since 1782 permits much broader discovery than the FAA allows.

Monday's decision resolves a circuit split over whether district courts can order discovery for private commercial arbitration abroad. While the Fourth and Sixth circuits had previously ruled Section 1782 can be used in relation to private commercial arbitration abroad, the Second, Fifth and Seventh circuits had ruled it cannot.

The issue had arisen in a petition brought by an American unit of German auto parts maker ZF Group, which was trying to fend off Hong Kong electronics manufacturer Luxshare Ltd.'s bid for documents in preparation for a billion-dollar arbitration in Germany stemming from its acquisition of two of ZF Automotive US Inc.'s business units.

That case was consolidated with another petition filed by Simon Freakley, CEO of consulting firm AlixPartners LLP, who was challenging a Second Circuit decision granting a petition filed by a Russian investors' rights group, the Fund for Protection of Investors' Rights in Foreign States, which sought evidence for use in arbitration against Lithuania.

The fund was assigned the claims of Russian businessman Vladimir Antonov, who held a controlling stake in AB Bankas Snoras until it was forced into bankruptcy by Lithuanian authorities in 2011.

Counsel for AlixPartners and Freakley, Willkie Farr & Gallagher LLP senior counsel Joseph Baio, said that they are "pleased with the Supreme Court's unanimous decision that U.S. citizens should no longer have to bear the burden and substantial expense of discovery for use in foreign and international arbitrations where they aren't a party."

"Today's ruling removes a huge burden for U.S. citizens and will help streamline the foreign and international arbitration process, aligning it with provisions of the U.S. Federal Arbitration Act," he continued.

Counsel for ZF Automotive likewise expressed satisfaction with the decision.

"As the court made clear, Section 1782 is carefully limited to authorize discovery only for use in governmental and intergovernmental adjudicatory bodies, not purely private arbitrations abroad," said Latham & Watkins partner Roman Martinez. "This opinion will ensure that parties to foreign commercial arbitrations will not be able to improperly take advantage of discovery in U.S. courts and will have immediate impact on a broad range of current and future international arbitrations."

Counsel for the Fund for Protection of Investors' Rights in Foreign States declined to comment on Monday, while counsel for Luxshare could not immediately be reached for comment.

Monday's decision marks the first time that the high court has ruled on Section 1782 since its 2004 decision authored by Justice Ruth Bader Ginsburg in Intel v. AMD.

That case related to an antitrust complaint AMD had filed against Intel with the European Commission. AMD had asked a California federal court to order Intel to turn over potentially relevant documents, but the court declined. That decision was reversed by the Ninth Circuit, whose opinion was then upheld by the high court, which said the statute conferred broad discretion on district courts to permit foreign litigants to obtain discovery in the U.S.

Justice Ginsburg's opinion didn't specifically address arbitration, except to note that Congress had intended during revisions in the early 1960s for the term "tribunal" to include "arbitral tribunals."

In its decision on Monday, the high court reversed a Michigan federal judge's decision last year authorizing the Hong Kong company, Luxshare, to seek discovery from ZF Automotive US.

It also reversed a Second Circuit decision granting a petition filed by the Fund for Protection of Investors' Rights in Foreign States seeking information from Freakley and his New York-based consulting firm, AlixPartners LLP, for use in an arbitration against Lithuania.

During oral arguments in March, the high court struggled with how to address concerns that expanding the scope of Section 1782 would overburden federal courts and slow the pace of arbitration.

ZF Automotive US Inc. is represented by Roman Martinez, Sean M. Berkowitz, Zachary L. Rowen, Justin S. Kirschner, Tyce R. Walters and Brent T. Murphy of Latham & Watkins LLP.

Luxshare Ltd. is represented by Andrew Rhys Davies, Bradley S. Pensyl, Patrick W. Pearsall, Mark L. Daniels, Kendall R. Pauley, Laila Delimustafic, Michael Rodríguez Martínez and Erin Downey of Allen & Overy LLP.

AlixPartners is represented by Joseph T. Baio, Mark T. Stancil, Charles D. Cording, Stuart R. Lombardi, Jordan C. Wall and Samantha G. Prince of Willkie Farr & Gallagher LLP.

The Fund for Protection of Investors' Rights in Foreign States is represented by Alexander Yanos, Rajat Rana, Tamar Sarjveladze, Kristen Bromberek and Robert Poole of Alston & Bird LLP.

The cases are ZF Automotive US Inc. et al. v. Luxshare Ltd., case number 21-401, and AlixPartners LLP et al. v. The Fund for Protection of Investors' Rights in Foreign States, case number 21-518, in the Supreme Court of the United States.

--Editing by Alyssa Miller and Emily Kokoll.