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US Supreme Court prohibits 28 U.S.C. § 1782 discovery for most international arbitrations

Corporate Newsletter

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1. Introduction

This newsletter recaps the US Supreme Court's landmark ruling on 13 June 2022, by which the court's nine Justices unanimously dismissed applications for discovery under 28 U.S.C. § 1782[1] in support of international arbitrations ("**§ 1782 discovery**").[2]

Japanese companies may wonder how the Supreme Court's decision may be relevant to them. In broad terms, discovery under US law is a tool by which a party in a US litigation may compel an opposing or third party to produce certain relevant evidence. Discovery can be lengthy and costly. Thus, companies from non-US jurisdictions, particularly civil law jurisdictions such as Japan, often are wary of agreeing to US court jurisdiction in their contractual relationships. Also, foreign companies have to be aware that their US subsidiaries may get embroiled in § 1782 discovery applications.

28 U.S.C. § 1782 is commonly applied where an interested party seeks discovery from a US-based entity or individual that allegedly possesses information relevant to a litigation in a foreign court. Such foreign court proceedings need not be pending but only "reasonably contemplated".[3] This has for instance been decided in the so-called *Lufthansa* case.[4] In this case, Lufthansa Technik AG ("**Lufthansa**") initiated several IP infringement proceedings against US competitor Astronics Advanced Electronic Systems ("**Astronics**") before courts in Germany, France and the United Kingdom, and contemplated further proceedings in Spain and Japan. Separately, Lufthansa successfully applied to the district court in the Western District of Washington ("**Washington court**") for § 1782 discovery from Astronics for use in the pending and contemplated

[1] See language of 28 U.S.C. § 1782 under Section 3 below.

[2] *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401; *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, slip op. at 7 (U.S. S. Ct. 2022). For a related Japanese article on the topic, please see here.

[3] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004) at 258-259.

[4] *Matter of Lufthansa Technik*[sic] *AG*, No. C17-1453-JCC, 2019 WL 331839 at 1 (W.D. Wash. Jan. 25, 2019).

infringement proceedings.[5] In the course of the dispute, Lufthansa also managed to obtain an order for § 1782 discovery against the US-subsidiary of Japanese company Panasonic, which was not involved in the dispute but had made certain sales to Astronics. Lufthansa requested some of the information in Panasonic's possession in order to calculate its damages claim against Astronics.[6] Against this background, a non-US company could become indirectly embroiled in US-style discovery where its US affiliate has certain information or where the relevant evidence is located in the US, even if the relevant contract between the non-US company and another party establishes a foreign court's jurisdiction. As the case of Panasonic shows, a company does not even have to be involved in the dispute but still may be ordered to produce evidence.

While § 1782 discovery follows well-established tests and jurisprudence in the context of court litigations, 28 U.S.C. § 1782 has been subject to controversy, particularly among US courts, in disputes where a party attempted to compel a US entity to produce evidence for use in a pending or prospective international arbitration. The US courts hearing these cases had diverging views on whether the reference to a "foreign or international tribunal" in 28 U.S.C. § 1782 could be expanded beyond its common use in court litigations to include international arbitration tribunals.

The Supreme Court's opinion has finally put an end to a prolonged split among US federal appeal courts on the interpretation and scope of § 1782 discovery, and determined that the provision, in principle, does not apply to international commercial and investment arbitration disputes. Specifically, the Supreme Court consolidated two appeals in which the competent lower US courts had ordered appellants to produce information for use in their respective arbitrations: (i) the prospective commercial arbitration *ZF Automotive v. Luxshare* pursuant to the rules of the German Arbitration Institute ("**DIS**"), and (ii) the *ad hoc* investment arbitration *Fund for the Protection of Investors' Rights in Foreign States v. Lithuania* under the UNCITRAL arbitration rules.[7] The Supreme Court's ruling has substantially reduced the risk of foreign companies with US entities or evidence located in the US of having to undergo a § 1782 discovery proceeding, even before any international arbitration has been initiated. This will probably be seen as positive news, including by Japanese companies operating in the US or with a US nexus.

Section 2 highlights the relevant facts of the two appeals subject to the Supreme Court's ruling. Sections 3 and 4 provide a brief summary of the court's reasoning as well as an outlook for Japanese companies.

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[5] *Matter of Lufthansa Technick*[sic] *AG*, No. C17-1453-JCC, 2019 WL 331839 at 1 (W.D. Wash. Jan. 25, 2019). Lufthansa had previously sought § 1782 discovery from several parties: (i) from Astronics, whereby the Washington court had limited discovery to information relating to infringement allegations, and denied discovery relating to damages pending a decision on Astronics' liability by the German courts (*In re Lufthansa Technik AG*, C11-1386-JCC (W.D. Wash. Jul. 22, 2011)); (ii) from Astronics' New York-based parent company, Astronics Corporation, whereby the district court in the Western District of New York dismissed the § 1782 discovery application, ruling that it was essentially identical and duplicative to the application before the Washington court (*Lufthansa Technik AG v. Astronics Corporation*, 11-CV-628A (W.D.N.Y. Sep. 7, 2011)); and (iii) from Astronics' customer equally based in Washington, Panasonic Avionics Corporation, whereby the Washington court granted discovery in part, but rejected it insofar as some of the evidence was more likely in Astronic's control (*In re Lufthansa Technik AG*, C11-1386-JCC (W.D. Wash. Dec. 11, 2017)).

[6] *In re Lufthansa Technik AG*, C11-1386-JCC (W.D. Wash. Dec. 11, 2017).

[7] *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401; *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, slip op. at 7 (U.S. S. Ct. 2022). *Fund for the Protection of Investors' Rights in Foreign States v. Lithuania*, PCA Case No. 2019-48, UNCITRAL.

2. Background

The first appellant, ZF Automotive, a Michigan-based subsidiary of German car parts group ZF Friedrichshafen, had appealed a Sixth Circuit ruling upholding a lower US court's order to produce evidence to Hong Kong electronics company Luxshare.[8] Before commencing the DIS arbitration, Luxshare applied for § 1782 discovery, accusing ZF Automotive of fraud by withholding relevant information in a sales transaction. The sales contract provided Munich as the seat of the arbitration and German law as governing law on the merits.

Separately, New York-based consulting firm AlixPartners and its CEO Simon Freakley had appealed a Second Circuit ruling that required them to disclose information regarding the CEO's prior role as a temporary administrator of AB Bankas SNORAS, a failed Lithuanian bank. In the underlying UNCITRAL investment arbitration, a Russian entity, the Fund for Protection of Investors' Rights in Foreign States ("**Fund**"), had been assigned the claims of a Russian investor against SNORAS. The Fund claimed that Lithuania had expropriated the Russian investor's investment in the bank under the Russia-Lithuania BIT.[9] Alleging that the Lithuanian authorities had declared the bank insolvent and commenced bankruptcy proceedings against it following a report authored by Mr. Freakley, the Fund sought and was granted § 1782 discovery by the Second Circuit.[10]

3. The Supreme Court's reasoning

The relevant part of 28 U.S.C. § 1782 provides:

> *(a) The district court* […] *may order* [a person] *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* […]. *The order may be made pursuant to a* […] *request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.* […] *The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing.* […]

The crux of the case was whether an international arbitral tribunal qualifies as a "foreign or international tribunal" pursuant to 28 U.S.C. § 1782. According to the Supreme Court, only an adjudicative body with governmental authority or exercising such authority (as opposed to private adjudicative bodies) could

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[8] *Luxshare, Ltd. v. ZF Auto. US, Inc.*, 15 F.4th 780 (6th Cir. 2021); *Luxshare, Ltd. v. ZF Auto. US, Inc.*, 547 F.Supp.3d 682 (E.D. Mich. 2021) (granting and denying in part motion to quash subpoenas); *Luxshare, Ltd.*, Opinion of Anthony P. Patti, Case No. 2:20-mc-51245 (E.D. Mich. May 27, 2021) (granting application).

[9] *Fund for the Protection of Investors' Rights in Foreign States v. Lithuania*, PCA Case No. 2019-48, UNCITRAL.

[10] *In re the Application of the Fund for Protection of Investor Rights in Foreign States Pursuant to 28 U.S.C. § 1782*, Order of Analisa Torres, 19 Misc. 401 (AT) (S.D.N.Y. July 8, 2020) (granting application); *In re the Application of the Fund for Protection of Investor Rights in Foreign States Pursuant to 28 U.S.C. § 1782*, Order of Analisa Torres, 19 Misc. 401 (AT) (S.D.N.Y. Aug. 25, 2020) (denying reconsideration).

constitute a "foreign or international tribunal".[11] The Supreme Court concluded that the arbitral tribunals in the *ZF Automotive* and the *Fund* cases did not exercise "governmental" authority and therefore rejected § 1782 discovery.

In making its determination, the Supreme Court interpreted the terms "tribunal", "foreign" and "international" contextually and teleologically. Specifically, the Supreme Court observed that "tribunal" carried "potential governmental or sovereign connotations".[12] In its view, a "foreign tribunal" was one which had been conferred governmental authority by a specific state, and not simply because it was located in such state. In this vein, the Supreme Court added that an "international tribunal" was one which had been accorded adjudicative power by multiple states, not merely that its tribunal members had different nationalities.

The Supreme Court found further support for its interpretation in the "animating purpose" of 28 U.S.C. § 1782. According to the Supreme Court, 28 U.S.C. § 1782 is aimed at promoting comity, which would empower federal courts to assist foreign or international tribunals. Assisting a purely private adjudicative body would not further comity.[13]

Moreover, the Supreme Court noted that an expansive reading of 28 U.S.C. § 1782 would "create a notable mismatch" between international and domestic arbitrations. This is because domestic arbitrations subject to the US Federal Arbitration Act ("**FAA**") had much more limited discovery possibilities than 28 U.S.C. § 1782.[14]

Applying its observations to the cases at hand, the Supreme Court found that the DIS panel in *ZF Automotive v. Luxshare* is clearly and exclusively a private arbitral institution with no governmental authority.[15] Similarly, the Supreme Court found no evidence of any intention by Russia or Lithuania to confer the *ad hoc* UNCITRAL tribunal in the *Fund v. Lithuania* arbitration with any governmental authority.[16] While acknowledging that the investment case posed a "harder question" given its links to two sovereign states, the Supreme Court held that the UNCITRAL tribunal had derived its authority exclusively from the parties to the dispute, i.e., the private investor/claimant, the Fund. In the Supreme Court's opinion, the mere fact that Lithuania was a state party to the dispute and that Russia and Lithuania had concluded the applicable BIT were not sufficient to deviate from its conclusion.

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[11] US courts have so far held conflicting views on this point, which has caused considerable uncertainty for parties to international arbitrations. While the Fourth and Sixth Circuits had ruled that 28 U.S.C. § 1782 included private international arbitration tribunals, the Second, Fifth and Seventh Circuits had found that it did not.

[12] *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401. *AlixPartners, LLP, et al. v. .Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, slip op. at 7 (U.S. S. Ct. 2022), page 7.

[13] In fact, the Supreme Court somewhat pointedly noted that holding otherwise would open the floodgates to § 1782 discovery for "everything from a commercial arbitration panel to a university's student disciplinary tribunal". *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401. *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, slip op. at 7 (U.S. S. Ct. 2022), page 10.

[14] In highlighting some of the differences, the Supreme Court noted that under the FAA, only an arbitral panel could request discovery (as opposed to requests from foreign or international tribunals and "interested persons" pursuant to 28 U.S.C. § 1782). Furthermore, pre-arbitration discovery would only be permitted under 28 U.S.C. § 1782, not the FAA.

[15] The fact that German law governed the dispute and German courts may have some involvement under certain circumstances, to the Supreme Court, did not amount to "governmental authority".

[16] "[W]hat matters is the substance of [the states'] agreement: Did these two nations intend to confer governmental authority on an ad hoc panel formed pursuant to the treaty?". *ZF Automotive US, Inc., et al. v. Luxshare, Ltd.*, No. 21-401. *AlixPartners, LLP, et al. v. .Fund for Protection of Investors' Rights in Foreign States*, No. 21-518, slip op. at 7 (U.S. S. Ct. 2022), page 13.

The Supreme Court supplemented in an *obiter dictum* that governmental authority could be affirmed where a government had sufficient involvement in the tribunal's establishment and procedures, including through funding, or a tribunal's government affiliation or dependency.

It remains to be seen to what extent the Supreme Court's ruling will cause a new wave of domestic proceedings relying on the Supreme Court's special cases *caveat* as well as alternative discovery tools.[17] Some commentators have voiced concerns about a possible misuse of 28 U.S.C. § 1782, whereby discovery may be requested for a purported litigation "within reasonable contemplation", but is subsequently introduced in an international arbitration. Others have noted that parties interested in broad US discovery may increasingly insist on exclusive US court jurisdiction rather than international arbitration as a means of dispute resolution.

Also, the Supreme Court's ruling leaves open the question of how US courts will regard investment arbitrations under the auspices of the International Centre for Settlement of Investment Disputes ("**ICSID**"), or a Multilateral Investment Court ("**MIC**"). While ICSID is an arbitral institution, an MIC would be designed as a standing tribunal with state-appointed judges. Both institutions derive their powers from and are funded by their member states and at least the MIC concept seems to potentially fit the Supreme Court's exception.

4. Outlook

The Supreme Court has conclusively ruled out § 1782 discovery for most international arbitrations, thus somewhat reducing uncertainty for companies with subsidiaries or potential evidence in the US.[18] At the same time, in light of the possibility of new litigations aimed at circumventing the Supreme Court's decisions, or court litigations in which § 1782 discovery remains fully available, Japanese companies are well advised to be aware of this issue. Our international disputes practice with substantial expertise in the relevant jurisdictions will continue to monitor the US courts' jurisprudence and report on the topic. For further assistance and an introduction to our team, please feel free to contact us anytime.

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[17] Some practitioners expect a rise in discovery applications pursuant to section 7 of the FAA and section 2102 of the New York Civil Practice Law and Rules, on the basis that the Supreme Court's ruling has substantially narrowed the use of § 1782 discovery for international arbitrations.

[18] It should be noted that the Supreme Court received several *amicus curiae* briefs, including one presented by the International Arbitration Centre in Tokyo ("**IACT**"). Remarkably, the IACT favored a broad reading of 28 U.S.C. § 1782, irrespective of any "government" test. Conversely, the International Chamber of Commerce (ICC) and the US Council for International Business urged that US courts afford a high degree of deference to international arbitral tribunals.