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New York Federal Court Decision Creates Doubt Over Use of 28 U.S.C. § 1782 in International Arbitration

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On October 27, 2022, a magistrate judge in the U.S. District Court for the Eastern District of New York quashed a subpoena issued in aid of an International Centre for Settlement of Investment Disputes (ICSID) proceeding under 28 U.S.C. § 1782. The decision found insufficient support for the claim that the governments involved intended to imbue the ICSID tribunal with "governmental authority," the predominant question for Section 1782 requests after the U.S. Supreme Court drastically narrowed the statute's applicability to international arbitration this June in the landmark case, *ZF Automotive US, Inc., et al., v. Luxshare, Ltd*., 142 S. Ct. 2078 (2022). As the first request under the law related to an ICSID claim since *ZF Automotive*, the decision casts doubt over whether Section 1782 will be a tool for discovery in international arbitration cases moving forward.

In *re Alpene, Ltd.*, involved a dispute between Alpene, a Hong Kong corporation, and the Republic of Malta before the ICSID, which is operated by the World Bank. Alpene brought the action in New York seeking documents and testimony from Elizabeth McCaul, an individual connected to the arbitration who resides in New York. A request under 28 U.S.C. § 1782 allows federal courts to order persons in the United States to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal." The statute requires that the discovery be for use in a proceeding before a "foreign or international tribunal."

Interpretation of whether a "foreign or international tribunal included an arbitral tribunal was the subject of a circuit split until the Supreme Court ruling in *ZF Automotive* this past summer. In its unanimous decision, the Supreme Court reasoned that a "foreign tribunal," under 28 U.S.C. § 1782, "is best understood as an adjudicative body that exercises governmental authority" rather than a private body that is merely located in another country. The Court found that a "foreign tribunal" is thus best understood as a tribunal belonging to a foreign nation while an "international tribunal" is best understood as one that involves two or more nations that is imbued with governmental authority. The Court also noted that extending Section 1782 discovery to cover international arbitrations would conflict with the Federal Arbitration Act, which governs domestic arbitrations, and could create a "notable mismatch between foreign and domestic arbitration." In short, private arbitral tribunals do not fall under that definition and thus Section 1782 is unavailable in aid of a private arbitration proceeding.

However, the Supreme Court did not decide whether ICSID cases might still meet the Court's

definition of a foreign or international tribunal. In the first analysis of that question post-*ZF Automotive*, the court in I*n re Alpene, Ltd.* signals that that the window for U.S. discovery in international arbitration may being narrowed still.

The court acknowledged that ICSID is different from the ad hoc panel considered in *ZF Automotive*. It is under the authority of an intergovernmental organization (the World Bank) and was established to adjudicate claims against sovereign states. Member states of ICSID can designate individuals to serve on panels, have representatives which participate in the administrative decisions of the organizations, and have agreed through treaty to treat awards from the permanent institution as binding, final judgments.

However, the *Alpene* court also noted that like the ad hoc panel in *ZF Automotive*, ICSID requires the payment of arbitration costs and provides immunity to its panel members. Further, the ICSID treaty does not expressly imbue the organization with the authority of the signatory governments.

After analyzing the similarities to and differences with the circumstances in *ZF Automotive*, the court looked to the purpose of Section 1782 to tip the scale. It found that the principle of comity did not weigh in favor of granting discovery because of a lack in reciprocity. Further, the dissonance would continue between discovery allowed in a domestic arbitration and that of an international arbitration, with the international proceeding afforded broader discovery.

The court concluded that the Supreme Court intended to narrow Section 1782 in international arbitration and that its decision should reflect that. Thus, it found that the ICSID tribunal did not meet the definition and quashed Alpene’s discovery requests. Practitioners should note that this is only the first of what are likely many decisions on this issue in the years to come. The Supreme Court was noticeably silent as to whether investor-state arbitrations fell under the definition of a “foreign or international tribunal” and no binding precedent on that question yet exists. That said, this decision will certainly impact the debate and signals doubt about the extent to which Section 1782 will extend to international arbitration proceedings.

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