JENNER & BLOCK

Client Alert: US Supreme Court Holds That US Courts Cannot Assist Discovery in Private Foreign or International Arbitrations

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Litigants in foreign arbitrations have long looked to 28 U.S.C. § 1782 as a potential avenue for obtaining something close to US-style discovery. But, the US Supreme Court unanimously held this week that this federal statute allowing US courts to assist "foreign or international tribunal[s]" in gathering evidence does not apply to private adjudicative bodies, such as private international commercial arbitral tribunals. The Court's opinion in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 596 U.S. ___ (2022), thus forecloses parties' utilization of 28 U.S.C. § 1782(a) to obtain discovery in the United States for use in purely private international arbitrations and has the following implications:

- Parties to private international arbitrations now have clarity regarding their options for seeking discovery. The prior circuit split, described in this client alert, caused uncertainty and allowed for forum shopping.
- Parties will have more limited options to develop evidence in private international arbitration proceedings with a US nexus, although certain state-law options may still be available.
- Parties will no longer be able to use § 1782 to publicize commercial arbitration proceedings that are intended to be confidential.
- Section 1782 will also not be an available tool in at least some investor-state arbitrations—namely, those conducted pursuant to bilateral investment treaties that do not confer governmental authority on the arbitral body, such as those governed by the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). It is unclear whether investor-state arbitrations conducted through organizations with governmental connections, most notably the International Centre for Settlement of Investment Disputes (ICSID), would qualify.

Read the full alert here.

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