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The Door Closes on Section 1782 Discovery: U.S. Supreme Court Interprets Controversial Law with Decisive Consequences for International Arbitration

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The role of U.S. courts in international arbitration has fundamentally shifted. The Supreme Court issued a unanimous decision in *ZF Automotive US v. Luxshare* holding that 28 U.S.C. § 1782 does not apply to international arbitration tribunals—in either commercial or investor-state arbitration cases. The Court held that only "governmental" or "intergovernmental" adjudicative bodies fall within the scope of Section 1782.

1. **The Supreme Court's Decision**

In recent years, U.S. courts had split over the meaning of Section 1782. The provision authorizes federal district courts to order persons residing or found within their districts to provide discovery "for use in a proceeding in a foreign or international tribunal." Many litigants sought to use Section 1782 as a weapon for broader discovery than would have been possible in arbitration, particularly against non-parties with relevant evidence in the United States. The international community has closely watched the issue, with a dozen amicus briefs filed in the case, including by the U.S. government against an expansive interpretation of Section 1782.

The Supreme Court decisively closed the door in *ZF Automotive US v. Luxshare*. Justice Barrett authored the unanimous opinion and reasoned that a "foreign tribunal" refers to a governmental body of a foreign nation, such as a court, in part because of the sovereign connotations of Section 1782. As the Court put it, "'foreign' suggests

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something different in the phrase 'foreign leader' than it does in 'foreign films.'" The Court rejected in short order the argument that a commercial arbitration tribunal is governmental as long as the law of the country in which it would sit governs aspects of the arbitration.

Similarly, the Court held that "international tribunal" refers to a tribunal that two or more nations have imbued with official power to adjudicate disputes—a definition that would encompass entities like the Iran-U.S. Claims Tribunal or the International Court of Justice. Consistent with the position of the U.S. government, the Court made clear that even an investor-state tribunal does not qualify as an "international tribunal" for purposes of Section 1782. Although the Court did not explicitly address arbitrations arising under the International Centre for the Settlement of Investment Disputes (ICSID), the Court's logic seems to exclude ICSID tribunals unless they somehow "exercise governmental authority." That narrow exception will likely be tested in future cases, but courts will be guided by the Court's dictum that "the animating purpose of § 1782 is comity."

2. **Discovery in International Arbitration: What's Next?**

The Court's decision has brought much-needed clarity to the field. Companies involved in international business with a presence in the United States can take comfort that their exposure to American-style discovery has been significantly limited, if not eliminated, in connection with arbitration disputes. Likewise, some U.S. judges will sigh in relief as burdensome Section 1782 cases vanish from the dockets. The decision also levels the playing field when one party – being outside the United States – could have faced different discovery obligations and thus unequal treatment.

Many arbitration practitioners, however, will view the decision as a disappointment. The Supreme Court's interpretation of Section 1782, perhaps continuing in the vein of *BG Group v. Argentina*, relegates international arbitration to the purely private domain such that U.S. courts will have no role in assisting discovery. The decision will also disadvantage parties in international arbitration that seek evidence from non-parties, because arbitral tribunals are empowered to order discovery only against parties to the arbitration.

Moving forward, companies involved in international arbitration must remain vigilant about discovery *within* arbitration proceedings, such as through the IBA Rules on the Taking of Evidence. When discovery against non-parties is critical, parties can also consider ancillary litigation as part of a broader strategy for global disputes.