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SCOTUS Limits Discovery Tool

By Kyle Kolb

The Supreme Court's decision in *ZF Automotive US, Inc., v. Luxshare, Ltd.* is its first to address the scope of a federal statute that can serve as a powerful tool in legal disputes unfolding outside of the United States. The statute, 28 U.S.C. § 1782, may not be well-known amongst U.S. bankruptcy practitioners, as these applications must be filed in federal district courts, but it is increasingly used to assist proceedings in a variety of foreign jurisdictions and can potentially aid in disputes and proceedings that *Turnarounds & Workouts* readers are involved in abroad.

The requirements of Section 1782 are well-established, even if certain facets of this law remain subject to the disputes discussed further below, including the one resolved this term by the Supreme Court. Section 1782, in relevant part, states as follows:

> The district court of the district in which a person resides or is found

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All Eyes on *Boy Scouts* Plan Ruling

By Steven B. Smith and Rachel Ginzburg

The propriety of non-consensual, third-party releases, always a hot topic in the restructuring world, is making again headlines in several high-profile bankruptcy cases including the *Boy Scouts of America* case in Delaware and the *Purdue Pharma* case in the Southern District of New York. The linchpin of the *Boy Scouts* plan is the global settlement where the debtor will grant releases to non-debtor third parties from estate claims in exchange for the funding of a $2.7 billion settlement fund. After a five-week confirmation trial, the bankruptcy court took the matter under advisement and has not ruled yet. This article will discuss some of the issues surrounding the third-party releases in the *Boy Scouts* plan, some of the debtor's responses to those objections, and some policy considerations surrounding third-

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> may order him 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, including criminal investigations conducted before formal accusation. The order may be made … by a foreign or international tribunal or upon the application of any interested person… . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.-

From this text, three statutory requirements must be met: (i) the person from whom discovery is sought must reside or be found in the district in which the application was made; (ii) the discovery must be "for use" in a foreign proceeding; and (iii) the applicant must be either a foreign tribunal or an "interested person." After those requirements are met, courts must consider the discretionary factors established by the Supreme Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.* Those factors are: (i) whether the person from whom discovery is sought is a participant in the foreign proceeding; (ii) whether the foreign tribunal is receptive or hostile to the assistance of the U.S. court; (iii) whether the application conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the U.S.; and (iv) whether the discovery requests are unduly intrusive or burdensome.

As an example, liquidators or trustees appointed in a complex foreign bankruptcy proceeding may wish to obtain discovery from banks located in New York, in order to investigate financial transactions or trace assets. The trustees can retain U.S. counsel to file a Section 1782 application in the Southern District of New York (where the banks are "found") and request leave to serve subpoenas on those banks to obtain documents and/or testimony to use in the foreign bankruptcy to investigate the debtor and its estate. As the Southern District of New York ("SDNY") Court recently noted, this type of discovery is "routinely sought and produced via § 1782 petitions." *In re Hellard*, 2022 WL 656792, at *2 (S.D.N.Y. Mar. 4, 2022). So too has the Second Circuit recently confirmed that "a foreign bankruptcy proceeding is within the intended scope of § 1782." *In re Application of Gissin*, 649 Fed. App'x 27, 28 (2d Cir. 2016)

A number of facets of the evolving law on Section 1782 are worth discussing for any practitioner considering utilizing the statute's powers.

For starters, the Supreme Court's *ZF Automotive* decision limited the availability of using Section 1782 to obtain discovery for use in private arbitrations pending abroad. Prior to this decision, courts had differing interpretations of the meaning of the phrase "foreign or international tribunal" in the text of Section 1782. This resolved a dispute amongst courts about the meaning of one of the requirements set forth in the statute.

The *ZF Automotive* opinion addressed two consolidated appeals that involved Section 1782 applicants seeking discovery in the U.S. for use in two different types of arbitral bodies located abroad. The first arbitration at issue was a "purely private" commercial arbitration pending in Germany. The

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arbitration provision was contained in a private contract governing the sale of a business, and the arbitration was pending before an arbitral body that was established under a German statute. In contrast, the second case arose from an arbitration that was pending before an arbitral forum provided for under a bilateral investment treaty between Lithuania and Russia. The dispute in this arbitration concerned a Russian national who had invested in a Lithuanian bank, which had been declared insolvent by Lithuanian authorities and commenced bankruptcy proceedings. The Second Circuit Court of Appeals applied a multi-factor test to determine that this arbitral forum (an ad hoc arbitration in accordance with UNCITRAL) was a "foreign or international tribunal" and allowed for the Section 1782 discovery to proceed.[1]

The Supreme Court's opinion first applied a textual analysis to the text of Section 1782, finding that the use of "foreign" or "international" in the phrases "foreign tribunal" or "international tribunal" requires more than the location of the arbitration be outside the U.S. Summarizing, the Court stated that "for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation." In other words, "a 'foreign tribunal' is one that exercises governmental authority conferred by a single nation, and an 'international tribunal' is one that exercises governmental authority conferred by two or more nations. Private adjudicatory bodies do not fall within §1782."

Beyond the Supreme Court's guidance in *ZF Automotive* on the treatment of foreign arbitrations, other issues remain subject to dispute nationwide. For example, many practitioners are surprised to learn that Section 1782 can be used to obtain evidence for use in a foreign proceeding that has not yet been commenced. Instead, the foreign proceeding must be merely "reasonably contemplated." What that means is a fact-intensive inquiry, typically requiring the Section 1782 applicant to have taken some concrete steps in the foreign jurisdiction, and be pursuing more than a fishing expedition for documents in the U.S. For example, in a recent case[2] in which a Credit Suisse fund sought discovery from a U.S. SoftBank affiliate in connection with a proposed fraudulent conveyance action to be brought in England arising from the Greensill insolvency situation, the SDNY Court found that the English action was within reasonable contemplation. In doing so, the SDNY Court relied upon the application made with the English Court seeking leave to file the claim and offered expert testimony asserting that under English law such leave was likely to be granted. In addressing a concern that the documents may be used in other litigations, the SDNY Court conditioned the service of the subpoenas on the SoftBank entity on the English Court first granting leave for Credit Suisse to file the claim. This conditional granting of the Section 1782 application, however, is rather unique and other courts have not imposed such a requirement when grappling with the "reasonable contemplation"

1 *Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216 (2d Cir. 2021).*

2 *In re Application of Credit Suisse Virtuoso SICAV-SIF in Respect of the Sub-Fund Credit Suisse (Lux) Supply Chain Finance Fund, 2022 WL 1786050 (S.D.N.Y. June 1, 2022).*

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requirement.

Courts have also faced circumstances in which there is a dispute about whether the evidence obtained using Section 1782 can be admitted in the foreign proceeding. As a general matter, U.S. courts will not wrestle with the rules of evidence of a foreign court and instead opt for granting Section 1782 discovery. This issue is more complicated, however, when the foreign proceeding is on appeal or post-judgment, or when the evidentiary record is generally closed. If the evidence obtained using Section 1782 discovery conclusively cannot be admitted on appeal, the application may be denied. Similarly, the availability of Section 1782 in judgment enforcement efforts may be denied if an actual enforcement proceeding, in which the evidence could be used (as contrasted with an asset-hunting endeavor), has not been commenced.

Once the statutory requirements are met, a Section 1782 applicant still must satisfy the *Intel* factors. Of particular note to foreign attorneys, the scope of discovery to be authorized under Section 1782 is not governed by the generally more limited bounds of the foreign jurisdiction, but by the limitations of the Federal Rules of Civil Procedure. Thus, the familiar bounds of whether a document is within the "possession, custody, or control" of a subpoena recipient and whether the document requests seek "relevant" information — as with any subpoena issued under Rule 45 of the Federal Rules of Civil Procedure — governs the U.S. court's supervision of discovery disputes in Section 1782 proceedings. This has led most of the courts addressing the issue to hold that documents that are "located" abroad are discoverable under Section 1782, as long as they are within the "possession, custody, or control" of the subpoena recipient.

These issues continue to require careful analysis of the availability of Section 1782 prior to pursuing such discovery. But the continued growing use of the statute, alongside the international nature of many of the most sophisticated disputes and the Supreme Court's decision to grant *certiorari* in the *ZF Automotive* case to resolve one of the splits amongst courts on the interpretation of Section 1782, should encourage any practitioner to be aware of its application.¤

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Kyle Kolb is a partner in the Restructuring & Finance Litigation Department at Herrick, Feinstein LLP. He has significant experience in complex commercial, corporate finance, and securities litigation matters in both federal and state courts. His clients include public and privately held companies, debtors, creditor committees, and hedge funds.