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New York Statute Offers Alternative Mechanism for Seeking Discovery in Aid of Private Arbitration Given Narrowed Scope of 28 U.S.C. § 1782

Go-To Guide:

- Section 1782 does not apply to private arbitration given recent Supreme Court rulings.
- Parties to ICSID investor-state arbitrations foreclosed from seeking discovery in the U.S. under Section 1782.
- New York’s CPLR § 3102(c) may serve as an alternate, useful discovery tool.
- CPLR § 3102(c) is available both pre-arbitration as well as during an arbitration.

On June 13, 2022, in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, the U.S. Supreme Court narrowed the scope of 28 U.S.C. § 1782 (“Section 1782”) by holding that “only a governmental or intergovernmental adjudicative body” is a “foreign or international tribunal” under Section 1782 and that Section 1782 does not apply to private arbitration. The Supreme Court’s decision resolved a circuit split over the scope of Section 1782. The Second, Fifth, and Seventh Circuit Courts of Appeal had held that a “foreign or international tribunal” does not include private arbitration panels, while the Fourth and Sixth Circuits disagreed.

The *ZF Automotive* decision did not specify whether arbitral tribunals constituted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID tribunals) qualified as “foreign or international tribunals” under Section 1782. Recent decisions out of the Eastern and Southern Districts of New York further restricted the use of Section 1782 and concluded that ICSID tribunals established to resolve investor-state arbitrations did not qualify as “foreign or international tribunals” under Section 1782. In *In re Webuild* and *In re Alpine*, the New York district courts in 2022 found no material difference between ICSID tribunals and the arbitration tribunal convened in accordance with the UNCITRAL Rules¹ at issue in *ZF Automotive*, all of which are convened pursuant to investment treaties between contracting states. For the district courts, the treaty parties did not indicate an intent to imbue the ICSID tribunals with “governmental authority,” so as to qualify as a “governmental or intergovernmental adjudicative bod[y]” with privileges of assistance under Section 1782.

While the Supreme Court’s ruling, as well as subsequent district court decisions, narrow the reach of Section 1782 and remove the option for parties in a non-governmental or non-intergovernmental proceeding to seek foreign discovery, parties to a private arbitration may turn to New York’s Civil Practice Law and Rules (CPLR) § 3102 to obtain discovery in aid of arbitration from parties who are subject to the jurisdiction of New York courts.

Specifically, CPLR § 3102(c) provides:

Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.

Under CPLR § 3102(c), a party may initiate a special proceeding, which is commenced by a notice of petition or an order to show cause and a petition to obtain discovery in aid of arbitration. *Bumpus v. New York City Transit Auth.*, 66 A.D.3d 26, 33 (2009).

Parties who seek discovery in aid of arbitration under CPLR § 3102(c) may benefit by obtaining discovery that is otherwise not available through the arbitration or under the applicable arbitration rules. For example, a party may use CPLR § 3102(c) to help frame a complaint and to obtain the identity of prospective defendants, once a party has determined it has a viable cause of action. *See Leff v. Our Lady of Mercy Acad.*, 150 A.D.3d 1239, 1240 (2017); *see, e.g., In re Vtrader Pro, LLC*, 24 Misc.3d 828, 830-31 (Sup. Ct. 2009) (ordering issuance of subpoena to discover proper parties for FINRA arbitration); *Matter of Moock v. Emanuel*, 99 A.D.2d 1003, 1004 (1984) (ordering discovery of the books and records of the partnership in aid of arbitration); *Urb. v. Hooker Chemicals & Plastics Corp.*, 75 A.D.2d 720, 720 (1980) (ordering disclosure of the identity of persons involved and related records to aid in framing the complaint).

A party seeking disclosure in aid of arbitration under CPLR § 3102(c) must show that extraordinary circumstances are present. *Guilford Mills, Inc. v. Rice Pudding, Ltd.*, 90 A.D.2d 468, 468 (1982). The test is necessity rather than convenience. *See Hendler & Murray, P.C. v. Lambert*, 127 A.D.2d 820, 820 (1987) (concluding that the court did not abuse its discretion in granting the discovery requested in aid of arbitration because the respondent demonstrated that the documents are required “to present a proper case to the arbitrator”).

¹ United Nations Commission on International Trade Law rules (UNCITRAL Rules).

While the use of CPLR § 3102(c) to obtain discovery in aid of arbitration seems infrequent, CPLR § 3102(c) nonetheless may serve as an alternate, useful discovery tool in private arbitration given the narrowed scope of Section 1782. *See, e.g., Zampolli v. Range Devs.*, 2019 WL 5394487, at *2 (N.Y. Sup. Ct. Oct. 22, 2019) (directing respondent-entity to respond to subpoena *duces tecum* under CPLR § 3102(c) in order to aid pending arbitration in London when petitioner has demonstrated that requested documents “are required ‘in order to present a proper case in arbitration.’”); *Cusimano v. The Strianese Family Ltd. Partnership*, 2010 WL 3974909 (N.Y. Sup. Ct. Oct. 05, 2010) (directing deposition pursuant to CPLR 3102(c) in order to aid arbitration and explaining that CPLR § 3102(c) authorizes the Court to order disclosure in a matter that has been referred to arbitration). In connection with the discovery requests, New York courts also regularly grant stays of arbitration to permit discovery under Section 3102(c), particularly in insurance-related arbitration. *See Nationwide Affinity Ins. Co. v. Mannese*, 2017 WL 2261146, at *3 (N.Y. Sup. Ct. Apr. 04, 2017) (staying insurance arbitration and compelling the respondent, under CPLR 3102(c), to comply with petitioner’s outstanding pre-arbitration requests to produce); *New York Cent. Mut. Fire Ins. Co. v. Serpico*, 45 A.D.3d 598 (2007) (reversing branch of insurer’s motion that denied insurer’s request to temporarily stay arbitration of an uninsured motorist claim to allow for discovery in aid of arbitration).

The below table compares features of Section 1782 to CPLR § 3102(c).

	Section 1782	CPLR § 3102
Text	“The district court of the district in which a person resides or is found 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. . . .”	“Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.”
Commencement	Letters rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person	Notice of Petition or Order to Show Cause and a Petition
Arbitration	Pending or Anticipated	Pending or Anticipated
Discovery Available	Written discovery, depositions	Written discovery, depositions
Threshold Requirements	<ul style="list-style-type: none"> • The target of the discovery either resides or is found in the U.S. jurisdiction where the application was filed; • The discovery sought is for use in a foreign proceeding; and 	<ul style="list-style-type: none"> • The target of the discovery is subject to the jurisdiction of New York courts; • The party seeking discovery has determined a cause of action exists; and

	Section 1782	CPLR § 3102
	<ul style="list-style-type: none"> The party seeking discovery is an “interested person”. 	<ul style="list-style-type: none"> Extraordinary circumstances exist.

In light of the recent narrowing of Section 1782 as a private-arbitration discovery tool, parties should be aware that CPLR § 3102(c) is available as a suitable replacement for seeking discovery to aid in arbitration from an individual or entity located in New York. CPLR § 3102(c) is available both pre-arbitration, when potential respondents are being identified, as well as during an arbitration to ascertain information that otherwise is not discoverable through the proceeding. Parties should keep in mind the availability of this useful discovery tool whenever they consider an arbitral proceeding with some connection to New York or where potential parties and/or witnesses may reside therein.

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