

SCOTUS Limits U.S. Discovery Requests in Foreign Arbitrations

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June 17, 2022

The U.S. Supreme Court has ruled unanimously that litigants of private overseas arbitration proceedings may not seek a U.S. court order for discovery from American parties.

ZF Automotive US Inc. v. Luxshare Ltd.; [*AlixPartners LLP et al. v. Fund for Protection of Investors' Rights in Foreign States*, No. 21-401, \(U.S. June 13, 2022\)](#).

The high court's June 13 decision, authored by Justice Amy Coney Barrett, resolves a U.S. circuit court split over the terminology in [28 U.S.C.A. § 1782](#), the statute that allows litigants of foreign cases to request U.S. court assistance in gathering evidence for use in a "foreign or international tribunal."

The 4th and 6th circuits have ruled that commercial arbitration panels are considered "foreign tribunals" under [Section 1782](#), while the 2nd, 5th and 7th circuits have found such panels are not subject to the statute.

Justice Barrett wrote that under [Section 1782](#), a foreign tribunal is one that is "imbued with governmental authority," and the arbitration panels in the underlying cases do not have such authority.

Underlying allegations

Hong Kong-based Luxshare Ltd. alleged fraud in an acquisition to acquire two business units of ZF Automotive US Inc., a Michigan-based indirect subsidiary of German company ZF Friedrichshafen AG, according to court records. The purchase agreement stipulated that any disputes would be resolved by an arbitration panel under the rules of a German private dispute-resolution organization.

Luxshare claimed ZF Automotive and two executives omitted negative information to inflate the \$1 billion purchase price and sought discovery from them.

The U.S. District Court for the Eastern District of Michigan, citing 6th Circuit precedent, overruled ZF Automotive's objections that the arbitration panel did not meet [Section 1782](#)'s definition of a tribunal.

The Supreme Court granted ZF Automotive's certiorari petition and consolidated the case with one filed by AlixPartners LLP, which posed the same question regarding [Section 1782](#) in a dispute involving a failed Lithuanian bank.

In that case, the Fund for Protection of Investors' Rights in Foreign States, acting on behalf of a Russian investor, claimed AB Bankas Snoras of Lithuania expropriated certain investments without due process or proper compensation for investors.

The fund brought ad hoc arbitration proceedings against Lithuania under a treaty promoting cross-investment between the two countries and sought discovery from nonparties AlixPartners, a New York consulting firm, and its CEO, Simon Freakley.

According to AlixPartners, Lithuania had hired Freakley to investigate AB Bankas and its solvency. Following his report, Lithuania placed the bank into bankruptcy proceedings and declared it insolvent, the company said.

The U.S. District Court for the Southern District of New York authorized the fund's requested subpoenas, and the 2nd Circuit affirmed.

No governmental authority

The Supreme Court reversed those judgments, ruling that only governmental or intergovernmental adjudicative bodies constitute foreign tribunals under [Section 1782](#), "and neither of the arbitral panels involved in these cases fits that bill."

Justice Barrett said that while a tribunal alone does not exclude private arbitration panels, the statute pairs the word with the adjectives "foreign or international." Alongside these modifiers, "tribunal" is best understood as an adjudicative body that exercises governmental authority," she said.

No such authority created the arbitration panel in *ZF Automotive*, the high court said, adding that Luxshare and the seller are private parties disputing a private contract.

Turning to *AlixPartners*, Justice Barrett said that while a country is a party and the action stems from an international treaty, "nothing in the treaty reflects Russia and Lithuania's intent that an ad hoc panel exercise governmental authority."

At oral argument Roman Martinez of [Latham & Watkins LLP](#) represented ZF Automotive, and Andrew R. Davies of [Allen & Overy LLP](#) represented Luxshare.

Joseph T. Baio of [Willkie Farr & Gallagher LLP](#) represented AlixPartners. Alexander A. Yanos of [Alston & Bird LLP](#) represented the fund.

Deputy Solicitor General Edwin S. Kneedler argued for the United States as amicus curiae for both petitioners before the Supreme Court.

"While the Supreme Court decision hampers parties' ability to obtain evidence in the U.S. for international arbitration proceedings seated abroad, the decision ensures that parties to private international arbitrations do not have broader access to federal-court discovery than parties to private domestic arbitrations." – Lisa Houssiere, principal, McKool Smith