

# International Arbitration Report

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## International Arbitration Experts Discuss *ZF Automotive US, Inc. v. Luxshare, Ltd.*

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Mealey's International Arbitration Report recently asked industry experts and leaders for their thoughts on *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078, 2022 U.S. LEXIS 2861, in which the U.S. Supreme Court held that Section 1782 discovery is available only for governmentally authorized foreign proceedings, resolving a circuit split and excluding discovery for ad hoc or private commercial arbitrations. We would like to thank the following individuals for sharing their thoughts on this important case.

- Luis Perez, Chair, Latin America and the Caribbean Practice, Akerman, Miami
- Ben Love, Partner, Boies Schiller Flexner, New York
- Lisa Houssiere, Principal, McKool Smith, Houston
- Kamel Aitelaj, Special Counsel, Milbank, Washington, D.C.
- Alex Lawrence, Partner, Morrison Foerster, New York

Mealey's: What impact, if any, will the U.S. Supreme Court's recent decision in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, have on international arbitration?

Perez: The Supreme Court decision on *ZF Automotive* will have a negative effect on international arbitrations mainly because the participants and the tribunals will have more limited access to information. If the purpose of dispute resolution proceedings is to bring out all the facts that might be pertinent to the dispute, this decision will detrimentally affect reaching this goal. Discovery in the U.S. is geared towards eliciting all facts that might be pertinent to the controversy; therefore, any barrier to elucidating such facts will have a negative impact on international arbitrations. Plus, the more facts that are presented to the tribunal, the greater the chances that a fair decision will be achieved. By prohibiting U.S. based discovery, for use in international arbitrations, the Supreme Court has in effect limited tremendously the facts that can be obtained and presented to the tribunal. The less facts and evidence that might be available to the parties and to the tribunal, the lesser the chances that all truths will be uncovered. We are reverting to a system of "hiding the ball."

International arbitration will still be a preferred mode of dispute resolution in international commercial cases as neither party will want to be subject to a trial in the opponent's backyard. Therefore, I do not think that we will see a significant decline in the overall number of international arbitrations. However, I believe that the decision by SCOTUS will not allow all pertinent facts to come to light and therefore, the fairness and propriety of international arbitrations will be called into question. In the end, getting to the "truth" in international arbitrations will be called into question. Was the tribunal exposed to all pertinent facts in arriving to a decision.

In my opinion, SCOTUS got it wrong this time. It underwent too literal of an interpretation of what the legislators intended to do and somewhat forgot about the realities of the real world. Instead of striving for openness and the ability to gather all the pertinent facts, it opted for a closing of the doors to discovery in the U.S. This will have a chilling effect and will call into question how other statutes will be interpreted by SCOTUS. Based upon this decision, we can expect more scrutiny and less liberal interpretations of statutes affecting international business and commerce. In an era where the world is becoming smaller and more dependent on international commerce, SCOTUS decided to go in the opposite direction, it has closed another door.

Love: The Supreme Court's decision in *ZF Automotive US Inc. et al. v. Luxshare Ltd.* settled a circuit split on the availability of §1782 discovery in aid of international commercial arbitration. Although the Court's opinion was not unanticipated, it is notable as a unanimous divergence from the position adopted by the American Law Institute's draft *Restatement of the U.S. Law of International Commercial and Investor State Arbitration*. Leading scholars and practitioners have criticized both the outcome and the reasoning

employed by the Court. Still, other members of the arbitration bar have welcomed the legal clarity the Court's opinion provides.

But the opinion's decision in the consolidated case of *AlixPartners, LLP et al. v. The Fund for Protection of Investors' Rights in Foreign States* — which concerned an investment treaty arbitration before an ad hoc tribunal constituted under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") — left the availability of §1782 discovery in aid of certain other categories of international arbitration unresolved. In particular, the Court's opinion does not clarify whether §1782 discovery would be available to support other forms of investor-State dispute resolution, including arbitration proceedings administered by the World Bank's International Centre for Settlement of Investment Disputes ("ICSID"), investor-State disputes before the European Union's proposed Multilateral Investment Court, and investor-State disputes under modern investment treaties that envisage standing bodies of arbitrators and appellate mechanisms.

Nor did the Court's decision affect parties' ability to seek discovery in support of foreign litigation, whether already on foot or merely contemplated. Parties to an arbitration in need of U.S.-based discovery are thus now incentivized to consider and pursue foreign litigation proceedings they might otherwise forgo. Accordingly, by eliminating §1782 discovery in aid of international commercial arbitration, the Court has potentially increased the caseload burden borne by foreign judges. This impact of the Court's decision is incompatible with goals of procedural efficiency in international dispute resolution that international arbitration should contribute to addressing.

Houssiere: The recent Supreme Court decision brings much needed clarity about the role of Section 1782 in private commercial arbitration and levels the playing field for U.S. based companies compared to their foreign counterparts who may not have the same discovery obligations in their home country. In addition, the ruling honors a key benefit of international arbitration proceedings, which is confidentiality of the proceedings. By precluding parties in international arbitrations from bringing Section 1782 applications in federal courts, this ruling effectively helps maintain the bargained for confidentiality of the arbitration proceedings.

Going forward, parties to private commercial arbitration will have to be increasingly vigilant about the arbitral rules they choose to govern disputes because those rules will likely dictate their discovery options. It will be even more important for companies involved in international arbitration that need crucial evidence from non-parties to consider ancillary litigation as part of a broader strategy at the outset of the case. For international arbitrations seated in the United States, the Supreme Court decision does not affect the ability of the arbitrators to invoke Section 7 of the Federal Arbitration Act for discovery, which provides that arbitrators "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."

With regard to investor-state arbitration, the Supreme Court decision substantially narrows the circumstances under which discovery can be sought in disputes between investors and sovereign states, but the door has not been closed entirely on the use of Section 1782. The Supreme Court seemed to carve out ad hoc tribunals because "sovereigns might imbue an ad hoc arbitration panel with official authority," meaning parties could still attempt to use Section 1782 in some investor-state arbitrations. At this juncture, it remains to be seen whether Section 1782 is available as a discovery tool in ICSID arbitrations, which is significant since ICSID has hosted the majority of all known international investment cases.

Aitelaj: The Supreme Court's decision regarding the scope of 28 USC 1782 comes on the heels of a recent boom in attempts to bypass the typically-curtailed discovery process in arbitration by foreign parties seeking the benefit of more invasive U.S. discovery protocols. This trend had spiked following a much publicized investment arbitration pitting Chevron against the Republic of Ecuador, which dispute alone spawned no less than fifty opinions and orders regarding 1782 requests. Interestingly, the circuit split decided in *ZF Automotive* hinged on diverging views among Federal Courts as to the import of 1782's legislative history: what was Congress's intent in replacing the reference to a "court in a foreign country" in the prior version of 1782 with the broader word "tribunal"? The question garnered much attention in scholarship, and it was thus no surprise to see no less than twelve amicus briefs filed in the *ZF Automotive/ AlixPartners* consolidated cases. Most prominently, Professor Bermann advocated in favor of an expansive use of 1782, noting that, "when the term 'foreign or international tribunal' is mentioned, international arbitration tribunals

come immediately to mind.” The Supreme Court ultimately disagreed, however, finding that the reference to the word “tribunal” was of no assistance in elucidating the scope of 1782. Instead, the Supreme Court agreed with the Second Circuit that “foreign and international tribunals” must necessarily possess sovereign authority from a nation, thereby disqualifying private arbitration proceedings.

Ultimately, the Supreme Court’s rationale is sensible for two main reasons. First, for over a century of existence, 1782 has always been intended to provide judicial assistance between the U.S. and other countries. Nowhere in the legislative history is there evidence of an intent by Congress to broaden the scope of 1782 to private adjudicators. Second, if 1782 was capable of granting access to U.S. discovery to foreign litigants, not only would this defeat the consensual nature of the arbitral process but it would also create a significant imbalance between foreign and U.S. parties. There is no apparent reason for foreign arbitration parties to be given the tactical advantage of full-fledged U.S. discovery where such advantage is denied to parties to arbitrations seated in the United States. In this sense, the decision arguably makes U.S. law more uniform, and arbitration proceedings more efficient and predictable by removing the prospect of extensive (and expensive) discovery in the United States. Of course, the parties remain free to determine procedural and evidentiary rules akin to those prevalent in U.S.-style discovery, if that is their preference.

Although 1782 is no longer available to private arbitration parties, it is worth noting that the Supreme Court did not entirely reject the notion that 1782 could be utilized in foreign arbitral proceedings, so long as the “foreign tribunal” is imbued with governmental authority. One can imagine that this would be the case, for instance, with proceedings involving standing arbitrators nominated by governments or transnational bodies. An example could be proceedings conducted under the EU-US Privacy Shield Framework, which has an Arbitrator Panel comprised of individuals chosen by the U.S. Department of Commerce and the European Commission. Another example might be the future adjudicators of disputes arising under the European Union’s trade and investment agreements, which will be nominated by a panel of standing experts, themselves selected by the European Commission, or the European Union’s proposed Multilateral Investment Court.

Finally, it is interesting to contrast *ZF Automotive* with recent case law from the English Court of Appeal, which opened the door to third party disclosure in *A and B v C, D and E* [2020] EWCA Civ 409. In that case, the Court of Appeal indeed determined that the English Arbitration Act 1996 confers power on the English courts to order a non-party witness to give evidence by way of deposition and that it can do so in support of arbitration proceedings being conducted outside of England and Wales. The divergence in the approaches of the U.S. and English courts reflects the difficulty that the arbitration community faces in ensuring that parties have access to relevant evidence whilst respecting the fundamental principle of arbitration that it only binds those that have agreed to be bound.

Lawrence:

Nuances Of The Decision

In *ZF Automotive*, the Supreme Court unanimously held that 28 U.S.C. § 1782 (“Section 1782”), which permits litigants to seek the assistance of U.S. district courts in obtaining evidence for use in a “foreign or international tribunal,” does not apply to arbitrations before “private adjudicatory bodies.”<sup>1</sup>

The Court held that, although the statutory history indicates that Congress used the word “tribunal” broadly, the context of the statute, specifically “foreign or international,” limits the word “tribunal” to “an adjudicative body that exercises governmental authority,”<sup>2</sup> specifically, to “a tribunal imbued with governmental authority by one nation, and . . . [to] a tribunal with governmental authority by multiple nations.”<sup>3</sup> The Court further reasoned that this interpretation of the statute is consistent with the Federal Arbitration Act (FAA). Because Section 1782 permits much broader discovery than the FAA, litigants in domestic arbitrations would be precluded from broad federal-court discovery assistance, while parties to private foreign arbitrations would be given broad access to federal-court discovery assistance.<sup>4</sup>

Having determined the scope of Section 1782, the Court held that the adjudicative bodies at issue in *ZF Automotive* and *AlixPartners* were not governmental or intergovernmental bodies within the meaning of the statute.<sup>5</sup> The Court so held because the arbitral panel in *ZF Automotive* (1) was formed by the parties, (2) was operated by default, private arbitral rules, and (3) had no government involvement when creating the panel or prescribing its procedures.<sup>6</sup> Likewise, the Court found that the ad hoc arbitration panel in *AlixPartners* did not qualify as a governmental body under Section 1782 because there was nothing in the treaty that reflected “Russia and Lithuania’s intent that an ad hoc panel exercise governmental authority.”<sup>7</sup>

Moreover, the Court held that Lithuania’s consent to submit to an arbitration panel does not automatically make that panel a governmental or intergovernmental body. The key question is whether the nation “intended that the ad hoc panel exercise governmental authority.”<sup>8</sup>

#### History Of The Case

The Court’s decision in *ZF Automotive* resolved the split among the circuits with the Fourth and Sixth Circuits on one side, and the Second, Fifth, and Seventh Circuits on the other. However, this was not the first time the Court was asked to address the issue. The Court had previously granted certiorari in *Servotronics Inc. v. Rolls-Royce PLC*, to resolve the circuit split, but the parties dismissed their case before the Supreme Court because the underlying arbitration concluded.<sup>9</sup>

The two consolidated cases, *ZF Automotive and AlixPartners*, presented the same issue that the Supreme Court did not have a chance to answer in *Servotronics*. In *ZF Automotive*, Luxshare, a party to private international arbitration, obtained an order from the U.S. District Court for the Eastern District of Michigan granting limited discovery from ZF Automotive under Section 1782.<sup>10</sup> After Luxshare served subpoenas on ZF, ZF moved to quash the subpoenas, arguing that the arbitration panel was not a foreign or international tribunal under Section 1782.<sup>11</sup> But the district court ordered ZF to produce documents, and the Sixth Circuit Court of Appeals—which had previously held that private arbitration panels constitute “foreign or international tribunals” under Section 1782<sup>12</sup>—denied ZF’s request for a stay.<sup>13</sup> The Supreme Court granted certiorari.

In *AlixPartners*, the Fund for Protection of Investor Rights in Foreign States (the “Fund”) commenced an international arbitration against Lithuania, pursuant to a bilateral investment treaty between Russia and Lithuania.<sup>14</sup> The Fund subsequently filed a Section 1782 application in the U.S. District Court for the Southern District of New York, seeking leave to obtain discovery from AlixPartners, among others, to be used in the international arbitration proceeding.<sup>15</sup> The district court granted the Fund’s application. The Second Circuit Court of Appeals affirmed the decision.<sup>16</sup> Although the Second Circuit had previously held that Section 1782 does not apply to private arbitration panels,<sup>17</sup> in *AlixPartners*, the Second Circuit found that the ad hoc arbitration panel constituted a “foreign or international” arbitration panel, rather than a private arbitration panel.<sup>18</sup> The Supreme Court granted certiorari and consolidated the two cases.<sup>19</sup>

#### Underlying Factors And Implications For International Arbitrations Going Forward

The Court’s decision appears, at least in part, motivated by the fact that the parties opted for and consented to arbitration. The parties could have resolved their dispute before a court, but they chose to arbitrate. Arbitrations are meant to be faster and more efficient, which is often inconsistent with broad and costly U.S.-style discovery. Thus, when they signed up for arbitration, the parties should have known that they were not getting access to U.S. federal courts and broad document discovery and depositions.

One also wonders whether the decision was motivated at least in part to limit access to U.S. courts. In recent years, there has been a marked increase in Section 1782 litigation in the federal district courts. We see far more Section 1782 decisions than we did twenty years ago. While Section 1782 remains a powerful tool to obtain discovery for use in litigation in courts outside the United States, the Court has provided clear guidance to the international arbitration community: you cannot use Section 1782 in most international arbitrations. It can only be used where the arbitral body has been imbued with official governmental authority.

#### Endnotes For Lawrence

1. *ZF Automotive US, Inc. v. Luxshare, Ltd.*, Nos. 21-401, 21-518, 596 U.S. \_\_\_\_\_, slip op. at 1 (June 13, 2022).
2. *Id.* at 6–7.
3. *Id.* at 9.
4. *Id.* (citing *Servotronics Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (Mar. 22, 2021), *cert. dismissed*, 142 S. Ct. 54 (Sept. 29, 2021)).
5. *Id.* at 11.
6. *Id.* at 12.
7. *Id.* at 14.
8. *Id.* at 15.
9. *Servotronics Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (Mar. 22, 2021), *cert. dismissed*, 142 S. Ct. 54 (Sept. 29, 2021).

10. 596 U.S. \_\_\_\_\_, slip op. at 2–3.
11. *Id.* at 3.
12. *Abdul Latif Jameel Transp. Co. Ltd. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).
13. 596 U.S. \_\_\_\_\_, slip op. at 3.
14. *Id.* at 4.
15. *Id.*
16. *Id.* at 5.
17. *Id.* (citing *Nat'l. Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999)).
18. *Id.*
19. The Court consolidated *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 and *AlixPartners, LLP v. Fund for Prot. of Investors' Rights in Foreign States*, No. 21-518. The June 13, 2022 opinion resolves both cases.