

# Discovery Unlimited: The Supreme Court Set to Rule on Whether Parties to a Foreign Arbitration Can Order U.S. Discovery

**Minding Your Business Blog** on January 25, 2022

The United States Supreme Court is finally set to resolve a Circuit split regarding whether district courts can order discovery for private commercial arbitrations abroad pursuant to [28 U.S.C. § 1782](#). The Court granted certiorari in [ZF Automotive US, Inc., v. Luxshare, Ltd.](#), No. 21-2736, after another case raising the same question was abruptly abandoned in September 2021. See [Servotronics Inc. v. Rolls-Royce PLC](#), No. 20-794 (Sept. 8, 2021). At the heart of the issue is whether Luxshare can use the U.S. court system to get document and deposition discovery from ZF Automotive US, Inc. in the service of a pending private commercial arbitration set in Germany.

Presently, the Circuit Courts are split as to whether private commercial arbitrations should be read into § 1782(a)'s authorization to assist in gathering evidence "for use in a proceeding in a foreign or international tribunal." Until now, federal courts have relied upon the Supreme Court's [Intel Corp. v. Advanced Micro Devices, Inc.](#), 542 U.S. 241 (2004) decision, which put forth a three-factor test and an additional discretionary test of four questions for deciding whether to grant a § 1782 motion. Significantly, the second of the Court's three factors was whether discovery sought in the United States was to be used in a "foreign or international tribunal." This decision left unanswered what a "foreign or international tribunal" can include. While the Fourth and Sixth Circuits have held that § 1782(a) can be used to generate discovery for private foreign arbitral tribunals, the Second, Fifth, and Seventh Circuits have reached opposite conclusion.

The facts giving rise to this petition began with Luxshare, a Hong Kong LLC, accusing Michigan-based ZF Automotive US Inc. of misleading it about the profitability of two businesses it intended to buy during sales negotiations. The underlying agreement was entered into in Germany and the transaction closed in Germany in April 2018 for approximately \$1 billion. Luxshare intends to initiate arbitration before the German Arbitration Institute for a fast-track proceeding, and filed an ex parte application for discovery under § 1782 to issue subpoenas for two ZF Automotive executives — Gerald Dekker, a former vice president, and Christophe Marnat, the current chief operations officer. In October 2020, the Court of the Eastern District of Michigan authorized the issuance of these subpoenas pursuant to 28 U.S.C. § 1782(a). In May 2021, a magistrate judge granted in part ZF Automotive’s motion to quash the subpoenas, permitting Luxshare to depose either Dekker or Marnat, but not both, and limiting document discovery. Thereafter, the District Court granted Luxshare’s motion to compel.

In the previously dismissed *Servotronics* case, the Biden Administration had taken the position that Congress never intended for § 1782 to extend to foreign private commercial arbitrations as “tribunal[s.]” On June 28, 2021, the Department of Justice (“DOJ”) filed an amicus brief urging the Court to rule against discovery for private commercial arbitrations abroad. The DOJ argued that ordering discovery for such foreign arbitrations would create “significant tension” with federal law that limits parties’ access to court-assisted discovery in domestic commercial arbitrations. Additionally, the DOJ requested that the Court rule that § 1782 cannot be used in investor-state arbitration.

Whichever way the Supreme Court decides in this case could potentially have serious implications for private parties engaged in arbitration abroad. Generally, U.S courts allow for broader discovery than international arbitration tribunals. Meaning, if the Court decides to expand 28 U.S.C. § 1782(a)’s applicability to international commercial arbitrations, American courts could be called upon to order discovery much more frequently. This decision may deter parties from entering into contracts agreeing to privately arbitrate their disputes. However, if the Court rules against discovery, parties to foreign arbitrations will be limited to foreign discovery rules and may have certain evidence remain inaccessible to them as they arbitrate their disputes.

[View Original](#)

[Related Professionals](#)

---

- **Reut N. Samuels**

Associate