The Future of US Discovery in Support of International Arbitration: The US Supreme Court Settles the Debate Over the Reach of Section 1782

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Section 1782 of Title 28 of the US Federal Code is a powerful tool that allows foreign litigants to use US 'discovery' to obtain evidence that in many cases is not available to them in their home forum, allowing a US district court to order a person who 'resides or is found' in its jurisdiction to provide documentary evidence or testimony 'for use in a proceeding in a foreign or international court'. A difference of opinion developed among the federal circuit courts on the scope of the section due in part to the Supreme Court leaving the matter open at Intel Corp. v. Advanced Micro Devices, Inc., 542 US 241 (2004). On 13 June 2022, the US Supreme Court ruled on this issue in two consolidated cases. ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401 (Commercial Arbitration), and AlixPartners LLP v. The Fund for the Protection of the Rights of Investors in Foreign States, No. 21-518 (investment arbitration), ruling that only an adjudicative body of a governmental or intergovernmental nature constitutes an 'foreign or international tribunal' under §1782. This long-awaited ruling will have a significant impact on international arbitration.

Keywords: § 1782, discovery, ZF Automotive, AlixPartners, Intel Corp. v. Advanced Micro Devices, In re *del Valle Ruiz*, foreign or international tribunal

1 BACKGROUND

Section 1782 of Title 28 of the United States Code is a powerful tool that allows foreign litigants to use US-style discovery to obtain evidence that in many instances is unavailable to them in their home forum. Indeed, §1782 allows a US district court to order a person who 'resides or is found' in its jurisdiction to provide document discovery or deposition 'for use in a proceeding in a foreign or international tribunal'. The use of this section has grown over the years.

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There had been a circuit split on the scope and reach of the section with the US Court of Appeals for the Second, Fifth, and Seventh Circuits limiting §1782's application to proceedings only before governmental or quasi-governmental bodies, versus the Sixth and Fourth Circuits permitting the statute to extend to private commercial arbitral tribunals. This was due in part to the Supreme Court´s having left the issue open in Intel Corp. v. Advanced Micro Devices, Inc., 542 US 241 (2004) (hereinafter Intel), where the Court considered that §1782(a) authorized discovery in connection with a proceeding pending before the European Commission, which it held to be a foreign tribunal.

2 WHY IS THIS IMPORTANT?

The US Supreme Court has just ruled on this question in two consolidated cases[1]:

- ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401 (private arbitration), and
- AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States, No. 21-518 (investor-state arbitration)

At issue was whether 28 U.S.C. § 1782(a), encompasses private commercial arbitral tribunals and investor-state arbitration; or is the section limited only to proceedings before governmental bodies? The Court has just ruled that:

> *In sum, only a governmental or intergovernmental adjudicative body constitutes a "foreign or international tribunal" under §1782. Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the* ad hoc *arbitration panel in the second case qualifies.*

Justice Barrett, writing for the Court, 596 US ____ (2022) *Slip OP* at 17

The Supreme Court´s decision will have important consequences for international arbitration. In the present article, I will discuss the background of the controversy and the possible implications of the ruling on international arbitration.

3 THE § 1782 DISCOVERY DEVICE

The discovery device is set out at 28 U.S.C. §1782(a) – last amended in 1964 – which provides that:

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[1] ZF AUTOMOTIVE US, INC., ET AL. *v.* LUXSHARE, LTD. CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, United States Supreme Court 596 US____ (2022) Slip Op. No. 21-401. Argued 23 Mar. 2022 – Decided 13 Jun. 2022.

> *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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.*

In order for the District Court to consider whether to grant the request for discovery, the applicant must show:

- The District Court has jurisdiction over the person from whom disclosure is sought.
- The proceedings are in a foreign or international tribunal.
- A request for discovery is being made by a 'foreign or international tribunal' or by 'an interested person' in the foreign proceedings.

From a non-US perspective, the section may seem odd insofar as it allows a federal court compelled disclosure of evidence (both documents and witness testimony) prior to the commencement of litigation[2] and at the instance of an 'interested person'.[3] Under §1782 foreign parties may make an application directly to the federal court (sitting in the jurisdiction where the object of the application resides) without having made the request through their local foreign court. Indeed some courts have granted §1782 petitions where documents may be held outside the United States so long as the documents are in the possession, custody or control of a person that falls within the jurisdiction of the court.[4]

Unsurprisingly, the use of §1782 by non-US litigants has become increasingly popular. One firm reported that applications grew from twenty-five in 2012 to 120 in 2020. They also reported that since 2012 federal courts have granted in full approximately 54% of the §1782 petitions that they have heard, with an additional 19% of petitions having been granted in part.[5]

Due to the flexibility of §1782, the Hague Convention is not the primary legal statute used by foreign entities to request discovery within the United States. Indeed some might say it is easier for foreign attorneys and interested parties to

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2 The Supreme Court in Intel held that §1782 requires only that a dispositive ruling by a foreign judicial or quasi-judicial body, reviewable by the courts, be within 'reasonable contemplation'. Intel, 542 US at 259.

3 In Intel, the Supreme Court held that 'any interested person' under §1782's includes not only litigants before foreign or international tribunals, but also any other person who possesses a 'reasonable interest' in obtaining judicial assistance.

4 *See* e.g., Sergeeva *v.* Tripleton Int'l Ltd., 834 F.3d 1194 (11th Cir. 2016); In re Barnwell Enterprises Ltd, 265 F. Supp. 3d 1, 16 (D.D.C. 2017), In re del Valle Ruiz, 939 F.3d 520, 523 (2d Cir. 2019). In re Accent Delight Int'l, 2019 US App. LEXIS 33785, 2019 WL 5960348 (2d Cir. 13 Nov. 2019).

5 Legal Update, The Expanding Use of 28 USC §1782, Seyfarth, 7 Jun. 2021, https://www.seyfarth.com/print/content/59301/the-expanding-use-of-28-usc-1782.pdf. (accessed 14 Feb. 2023).

request data within the United States under §1782 than it is for US lawyers to request discovery in other countries.

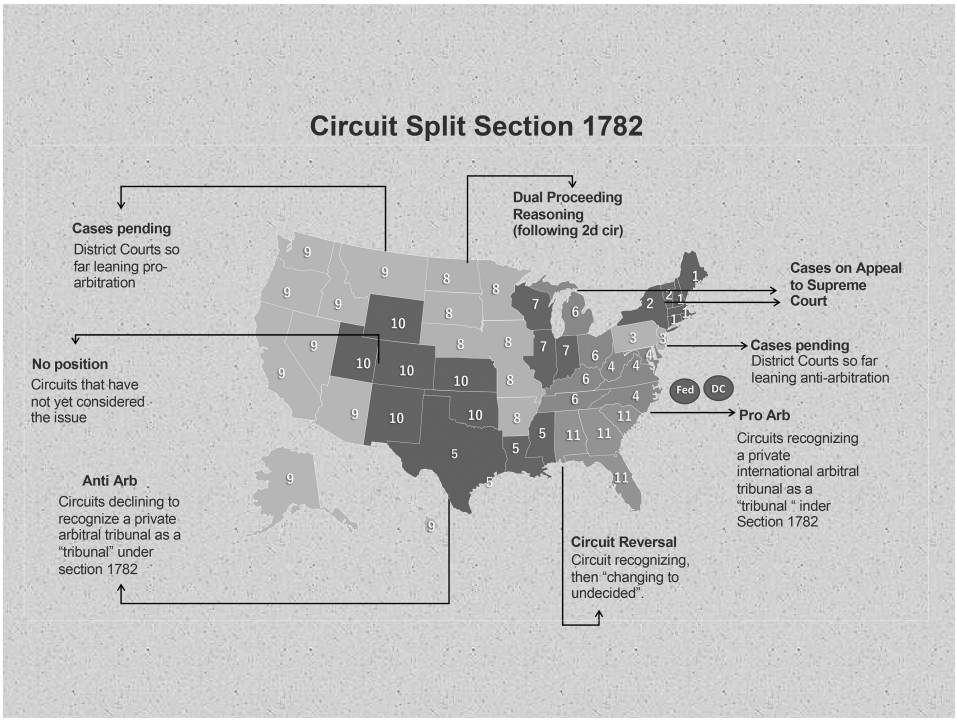
4 THE CONTROVERSY

The main issue in the debate focused on the last element of the section: whether a foreign international commercial **arbitral** tribunal qualifies as a 'foreign tribunal' for purposes of the statute.

The US Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 US 241 (2004), ruled that the Commission of the European Communities (a quasi-judicial arm of the European Union) was a foreign or international tribunal under §1782(a), such that recourse to documents/evidence under that statute was appropriate.

However, as described below, the circuits over the twenty years since Intel developed an important split as to whether international commercial arbitral tribunals and investor state arbitration tribunals fall within the purview of §1782.

5 CIRCUIT SPLIT



6 INTERNATIONAL COMMERCIAL ARBITRATION

Ultimately, the use of §1782 for an international commercial arbitration would come to depend on where the targeted US company resided or was incorporated.

Two federal circuits allowed foreign parties to issue subpoenas to obtain discovery for an international arbitration. These were the 4th and 6th Circuits that had held that §1782 discovery is available in all foreign and international arbitrations, including private proceedings before arbitrators selected by the parties.[6]

Three federal circuits did not agree. The 2nd, 5th, and 7th Circuit Courts of Appeal had opted for a narrow interpretation of §1782, holding that it only permits a US court to order US-style discovery in connection with foreign proceedings that involve some form of 'governmental' or 'quasi-governmental' authority.[7]

For the remaining federal courts, the validity of §1782 subpoenas depended on each particular federal district in which the targeted company resides or is incorporated. The 1st, 3rd, 8th and DC Circuits, district courts had held that at least some types of private arbitral tribunals fall within the scope §1782,[8] while district courts in the 5th, 7th, 9th and 10th Circuits had held the opposite. [9]

7 DUAL PROCEEDING THEORY

Perhaps to avoid the controversy, some courts developed a dual proceeding theory. For example, in *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011), citing *Intel*, the 2nd Circuit avoided overruling its precedent in *NBC*, choosing not to address the argument that the treaty arbitration between Chevron and Ecuador is not 'a proceeding in a foreign or international tribunal' within the meaning of §1782. The 2nd Circuit chose instead to allow discovery to proceed because

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6 *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2020) *('Servotronics I'), Abdul Latif Jameel Transportation Co. v. FedEx Corp.,* 939 F.3d 710 (6th Cir. 2019).

7 *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (2020). *See also National Broadcasting Corp. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann International,* 168 F.3d 880 (5th Cir, 1999).

8 *See HRC-Hainan Holding Company, LLC v. Hu*, 19-MC-80277, 2020 US Dist. LEXIS 32125 (N.D. Cal. 25 Feb. 2020). The District Court for the Northern District of California in this case found the reasoning of the Sixth Circuit persuasive, and held that a private arbitration is a 'foreign or international tribunal' for purposes of 28 U.S.C. § 1782(a), and that the CIETAC proceeding was indeed before 'a foreign or international tribunal'. *See also* In re Application for an Ord. Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for use in a Foreign Proceeding, 286 F. Supp.3d 1, 4 (D.D.C. 2017).

9 *See also In re Ex Parte Application of Axion Holdings Cyprus Ltd.*, Misc. No. 20-00290(MN) (D. Del. 18 Sep. 2020) (mem. order); *In re Storag Etzel GmbH*, 2020 WL 1849714 (D. Del. 13 Apr. 2020); *In re EWE Gasspeicher GmbH*, 2020 WL 1272612 (D. Del. 17 Mar. 2020).

Chevron sought the evidence for use in concurrent litigation and criminal prosecutions in Ecuador. The 8th Circuit followed the *Berlinger dual* proceedings logic in *Gov't of Ghana v. ProEnergy Servs., LLC*, 2011 US Dist. LEXIS 75029 at *8 (8th Cir. 6 June 2011), stating, '[e]ven if the Court found that the arbitration tribunal was not a proceeding under the statute, the existence of the litigation in Ghana would constitute a proceeding and would alone provide a sufficient basis for the Court to grant Ghana's request'. This approach was also followed in In re Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc., 2012 WL 2369166 (11th Cir. 25 June 2012) . Relying heavily on Intel, the 11th Circuit first held that §1782 may be used for private international arbitration, but on further consideration vacated its original opinion sua sponte, and substituted a revised decision that reaffirmed the district court's decision to grant CONECEL's discovery request, but on the grounds that the subpoenaed documents were relevant to civil and criminal proceedings within reasonable contemplation before a foreign court.

8 INVESTMENT TREATY ARBITRATION

There seems to have been some degree of consensus that treaty-based arbitrations should fall within the scope of §1782. For example, in *In re Oxus Gold PLC*,[10] the New Jersey federal district court determined that a bilateral investment treaty governed by the UNCITRAL Arbitration Rules constituted a foreign tribunal, finding that 'Article 8 of the BIT Agreement between the United Kingdom and Kazakhstan specifically mandate[d] that disputes between nationals of the two countries would be resolved by arbitration governed by international law'.

9 CONSEQUENCES OF THE CIRCUIT SPLIT

One consequence of the circuit split was that parties could forum shop in an effort to find discovery-friendly jurisdictions. For example, in cases involving New York, where the courts seem to require involvement of ordinary court jurisdiction, parties to foreign international arbitration proceedings could consider bringing parallel proceedings before their domestic courts (for related claims) to ensure access to the section. Particularly illustrative was in In re del Valle Ruiz,[11] where the 2nd circuit affirmed an order of discovery against the US affiliate of the Banco

[10] *In re* Matter of Application of Oxus Gold PLC, No. MISC.06-82, 2006 WL 2927615, at *6 (D. N.J. 10 Oct. 2006); *see also* between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd., 626 F. Supp.2d 882, 885 (N.D. Ill. 2009). *In re Veiga*, 746 F. Supp. 2d 8, 22–23 (D.D. C. 2010); *In Re Guo*, 965 F.3d 96, 108 n. 7 (2d Cir. 2020), as amended (9 Jul. 2020).

[11] 939 F.3d 520 (2d Cir. 2019).

Santander under §1782 for use in several concurrent international proceedings, namely the EU Court of Justice, an investment arbitration tribunal under the Mexico-Spain bilateral investment treaty, and a Spanish criminal proceeding.

10 THE US SUPREME COURT CASE

On 13 June 2022 the US Supreme Court decided the consolidated cases of *ZF Automotive US Inc. (ZF) v. Luxshare, Ltd.*3 and *AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States*.[12] Oral argument in these consolidated cases was held 23 March 2022.

AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States arises from a dispute between two foreign parties – the Fund for Protection of Investors Rights in Foreign States ('Fund'), a Russian investment entity, and the Republic of Lithuania – which were engaged in international ad hoc arbitration pursuant to a treaty between Russia and Lithuania. The fund initiated arbitration in 2019 after Lithuania nationalized the AB Bankas Snoras. To assist in the merits phase of arbitration, the Fund filed for an application under §1782 for discovery from a New York-based consulting firm, AlixPartners, who in turn challenged the 2nd Circuit´s grant of discovery to the for use in the investor state arbitration with Lithuania. AlixPartners and its CEO Simon Freakley appealed the decision after the court granted discovery of AlixPartners' internal documents to the Fund.

ZF Automotive US Inc. (ZF) v. Luxshare, Ltd. involves a challenge brought by a Michigan-based automotive parts manufacturer, ZF, seeking reversal of an order from the Eastern District of Michigan granting discovery to Luxshare Ltd., a Hong Kong-based electronics manufacturer, for use in a private commercial arbitration in Germany between ZF Friedrichshafen AG, a German corporation, and Luxshare, a Hong Kong limited liability company. Luxshare filed an ex parte application in federal district court in Michigan for §1782 discovery from a US subsidiary of ZF Friedrichshafen AG. The application was originally granted and eventually appealed to the 6th Circuit. Applying the *Intel* factors, the district court found that:

- ZF and its supervisors (object of the application) were participants in the foreign proceedings.
- There was no proof that the German tribunal would reject discovery.

[12] ZF AUTOMOTIVE US, INC., ET AL. *v.* LUXSHARE, LTD. CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, United States Supreme Court Slip Op. No. 21-401. Argued 23 Mar. 2022 – Decided 13 Jun. 2022.

- German tribunals, although not proponents of extensive discovery, were receptive to foreign judicial assistance and the request ultimately did not attempt to circumvent German proof gathering restrictions; and
- The requests were not unduly intrusive.

In response, *ZF Automotive* sought a determination as to whether §1782 applies to private parties conducting international commercial arbitration. In an unusual procedural move, the Supreme Court granted certiorari before the 6th Circuit and rendered a decision on ZF´s petition to quash, and consolidated the case with AlixPartners, LLP, et al. *v.* The Fund for Protection of Investors' Rights in Foreign States.

Numerous amicus curae (i.e., friends of the court) briefs were filed, the most important of which was filed by the **US government.** Significantly, the US contended that §1782 should not apply to commercial arbitral tribunals or investment arbitral tribunals. At the hearing, Assistant Solicitor General Edwin Kneedler asserted that extending §1782 discovery to foreign private arbitrations could negatively impact the United States' relationships with international actors by involving the government in unnecessary and potentially controversial discovery disputes.[13]

11 THE DECISION

The Court, in a unanimous decision, penned by Justice Barrett, focused almost exclusively on the definitions of the terms 'international' and 'foreign' in relation to the term 'tribunals' relying primarily on grammatical and dictionary definitions.

The Court found that being a 'foreign tribunal' or 'international tribunal' requires that the tribunal be imbued with some form of governmental power. Indeed the Court stated that:

> "Tribunal" is a word with potential governmental or sovereign connotations, so "foreign tribunal" more naturally refers to a tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation. And for a tribunal to belong to a foreign nation, the tribunal must possess sovereign authority conferred by that nation. Slip Op at 8

And following this line of reasoning, the Court went on to conclude that:

> But private entities do not become governmental because laws govern them and courts enforce their contracts – that would erase any distinction between private and governmental adjudicative bodies. Luxshare's implausibly broad definition of a governmental adjudicative body is nothing but an attempted end run around §1782's limit. Slip Op at 12

[13] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-401_k53m.pdf. (accessed 14 Feb. 2023).

The Court ignored the judicial safeguards on international arbitration and the international enforceability of arbitral awards through the York Convention as well as all the safeguards built into international arbitration (e.g., UNCITRAL Rules and Model Law, international arbitral institutional rules) to ensure that disputes are resolved fairly without compromising due process and fundamental fairness.

Indeed one noted legal commentator, Erik van Ginkel, observed that in examining the meaning of the term 'foreign tribunal' the Court did not consider the common sense meaning of an international arbitral tribunal, that being 'a tribunal involved in arbitrating an international dispute'.[14] One cannot help but share his astonishment that the United States Supreme Court could possibly demonstrate such a poor understanding of international commercial arbitration.[15] Clearly, the absence of Professor Smit,[16] who had testified in the Intel case (not to mention Justice Ginsburg, who authored it), was felt.

The decision did not explain why it deviated from the Intel decision´s 'functionality' test that would look to whether an international arbitral panel is a final adjudicator, whose rulings are subject to judicial review; or from the rule that Courts may exercise their discretion to tailor discovery requests to avoid abuse so as not to undermine the process. Interestingly, the Court did not overrule Intel (as that Court´s support for international arbitration was obiter dicta), and seems to agree with Intel that arbitral tribunals are 'adjudicative'. Indeed, the Court notes that:

> There, [in Intel] we recognized that the body at issue, the Commission of the European Communities, was a §1782 tribunal in part because it was a "first-instance decisionmaker" that rendered dispositive rulings reviewable in court. 542 U. S., at 254–255, 258. But we did not purport to establish a test for what counts as a foreign or international tribunal. The issue before us now – whether a private arbitral body qualifies as a "foreign or international tribunal" – was not before us in Intel. No one there disputed that the body at issue exercised governmental authority. Slip Op at fn 1.

In the context of investor–state arbitration the Court did not consider the surrender of sovereignty inherent in the signing and ratification of an international Bilateral Investment Treaty (BIT). The Court stated that unless a BIT panel is

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[14] *See* Eric van Ginkel, *How Should the United States Supreme Court Have Decided in the Controversy Over 28 U.S.C. § 1782(a)?*, Kluwer Arbitration blog (14 Jun. 2022), http://arbitrationblog.kluwerarbitration.com/2022/06/14/how-should-the-united-states-supreme-court-have-decided-in-the-controversy-over-28-u-s-c-§-1782a/. (accessed 14 Feb. 2023).

[15] *See ibid*. *See also* Carrie Shu Shang, *Supreme Court Ended Circuit Splits on Judicial Aid of Overseas Arbitral Proceedings*, 26(5) Am. Soc'y Int'l L. (4 Aug. 2022), https://www.asil.org/insights/volume/26/issue/5. (accessed 14 Feb. 2023).

[16] In Intel, the Court stated in *dicta*, that the term 'tribunal' may include 'arbitral tribunals', quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026–1027 & nn. 71, 73 (1965). *See* Intel. *supra* n. 2, at 258.

expressly imbued with some form of governmental power it is not a foreign tribunal under §1782. The Court states in pertinent part that:

> For instance, the treaty does not itself create the panel; instead, it simply references the set of rules that govern the panel's formation and procedure if an investor chooses that forum. In addition, the ad hoc panel "functions independently" of and is not affiliated with either Lithuania or Russia. … . It consists of individuals chosen by the parties and lacking any "official affiliation with Lithuania, Russia, or any other governmental or intergovernmental entity." *Ibid*. And it lacks other possible indicia of a governmental nature. *See ibid*. ("[T]he panel receives zero government funding," "the proceedings … maintain confidentiality," and the " 'award may be made public only with the consent of both parties' ")". Slip OP at 14

It is not clear which international or foreign tribunals would qualify. Nor for that matter would one want to see the apparition of standing government-controlled investor-state arbitration tribunals, with government appointed arbitrators. The EU's apparent hostility towards investor-state arbitration and its proposal for a multilateral investment court comes to mind. Perhaps just as ominous is the prospect of bringing a BIT claim before such a tribunal in an autocratic nondemocratic regime. That would seem to defeat the very purpose of BITs.[17]

It is interesting to consider the report of the oral arguments on the case. It appears the justices were sceptical as to whether placing 'foreign' in front of a term 'tribunal' necessarily connotes government sponsorship. Some of the Justices, Justice Breyer among them, also seemed unconvinced by the ostensible 'parade of horribles' (e.g., flooding courts with discovery applications, undermining arbitration's goals, and inflicting asymmetric harm on US businesses) that might arise if the Court were to interpret the text broadly.[18]

The Court also questioned why the nature of the treaty, an agreement amongst governments, would not imbue the tribunal with sufficient 'governmental' character to fall within §1782's ambit when a tribunal composed of purely 'governmental decision-makers' would suffice.

Perhaps the best hint at the underlying reason for the decision was the argument that the present ambiguity is for the US Congress to remedy, not for

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[17] *See* Gary Born, *'Court-Packing' and Proposals for an EU Multilateral Investment Court*, Kluwer Arbitration Blog (25 Oct. 2021) 'A disregard by the EU, and others, for long-standing, independent adjudicative mechanisms, and a willingness to tamper with the selection process for dispute resolution, breeds contempt for those mechanisms and the rule of law and emboldens authoritarian rulers around the world'. http://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/. (accessed 14 Feb. 2023).

[18] Minyao Wang, *ARGUMENT ANALYSIS: In Dispute Over Discovery Requests in International Arbitration, Justices Weigh Text, Comity, Academic Literature, and Their Own Role*, SCOTUS blog (29 Apr. 2022), https://www.scotusblog.com/2022/04/in-dispute-over-discovery-requests-in-international-arbitration-justices-weigh-text-comity-academic-literature-and-their-own-role/. (accessed 14 Feb. 2023).

the Court to impart a broad interpretation. It is reported that Justice Gorsuch for one, with whom Justice Breyer joined, queried repeatedly of both Respondents' counsel why the Court should not 'err in the other direction' in cases of arguably ambiguous language, especially when foreign policy implications are involved, by having Congress – not the Court – sort out the present mess.[19]

12 IMPLICATIONS OF THE RULING

The Supreme Court has now held that private international arbitrations and investor-state arbitration are not covered by §1782. This severely curtails what had once been a very powerful tool for obtaining discovery across the United States. There are several broad implications for arbitration practitioners.

13 THE WAY FORWARD

The US Supreme Court's ruling does not necessarily mean that parties to international arbitration may no longer pursue discovery in the United States. Indeed, §1782 will continue to allow 'interested parties' to request judicial assistance to obtain discovery where legal proceedings are reasonably contemplated in a foreign jurisdiction. In order to show 'reasonable contemplation', applicants must show some 'objective indicia' of their intent to commence proceedings (i.e., hiring legal counsel, demand letters, etc.).[20] In *Intel*, the Supreme Court held that a proceeding may be within 'reasonable contemplation' and rejected the requirement that the proceedings be 'imminent'. The *Intel* court clarified that the evidence requested need only be 'eventually … used in such a proceeding'.

As such, §1782 does not require that the petitioner be a party or that proceedings be currently under way.[21] Indeed Courts have applied a de minimis standard on applicants requiring merely a showing of a good faith intention to use the evidence to assert claims or defenses in a foreign proceeding.[22] Courts have applied a 'some relevance' standard which requires applicants to show only that the information has 'some relevance' as a general matter to the foreign proceedings.[23] Further, the 'use in'

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19 *Supra* n. 13.

20 *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270 (11th Cir. 2014) (finding that a detailed explanation of its prospective claim as well as a declaration of its intent to file a civil action to be sufficient to bring a claim within the realm of reasonable contemplation).

21 § 1782 applications have even been granted in support of post adjudicative enforcement proceedings (and in proceedings naming an administrator of an estate).In re Clerici, 481 F.3d 1324 (11th Cir. 2007); In re Esses, 101 F.3d 873 (2d Cir. 1996).

22 In re Veiga, *supra* n. 10, In re Application of Republic of Ecuador, 2010 WL 4027740 (E.D. Cal. 14 Oct. 2010).

23 Fleischmann *v.* McDonald's Corp., 466 F. Supp. 2d 1020, 1029 (E.D. Ill. 2006).

language in the section does not require applicants to show that the evidence sought is admissible or even discoverable in the foreign proceeding.[24]

It is noteworthy that the US Supreme Court did not mention the 'dual process' line of cases which held that, as long as there is a contemplated parallel non-US proceeding in the foreign jurisdiction, parties might still be able to make §1782 applications for US discovery as long as they apply the Intel factors in their application. Cases along the lines of In re del Valle Ruiz[25] come to mind. (That case involved discovery against the US affiliate of the Banco Santander under §1782 for use in several concurrent international proceedings, namely the EU Court of Justice, an investment arbitration tribunal under the Mexico-Spain bilateral investment treaty, and a Spanish criminal proceeding.) Indeed, where a US district court is to consider an application under §1782, it may very well be able to proceed in the same manner as the 2nd circuit did in that case, as long as the application seeks discovery related to concurrent international proceedings that qualify as a 'foreign or international tribunals'.

So in the context of international arbitration, one could reasonably interpret that while SCOTUS has ruled that interested parties in such proceedings may not use the section to pursue discovery for those proceedings, they are by no means barred from using the section to pursue US discovery for related proceedings before bodies imbued with governmental power that are either running in parallel or that are reasonably contemplated by interested parties. Going forward, parties to international arbitral proceedings, may indeed consider employing these concurrent or anticipated parallel proceedings, to form the basis of their § 1782 applications. Far from closing access to the section, the Unites States Supreme Court (SCOTUS) has only invited more complexity to international dispute resolution.

14 LEVEL PLAYING FIELD?

By not allowing §1782 to apply in international arbitration, some would argue that US parties to international arbitration are presumably now on the same footing as foreign parties. It follows that this corrects the structural disadvantage borne by US companies in international arbitration proceedings against foreign parties not found in the United States, as they were unable to pursue comparable discovery from their foreign adversaries. First, non-US jurisdictions are not quite as unfriendly to discovery as some claim. In the United Kingdom for example, it was recently held that parties to a foreign-seated arbitration may use section 44 of the Arbitration Act

[24] In re Veiga, *supra* n. 10, at 17–18, Brandi-Dohrn *v.* IKB Deutsche Industriebank AG, 673 F.3d 76, 77 (2d Cir. 2012), Euromepa S.A. *v.* R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995).

[25] 939 F.3d 520, *supra* n. 11.

1996 to obtain an order from the English courts for the taking of evidence of witnesses in support of that foreign arbitration.[26]

But more importantly, this oversimplifies the reality of international arbitration where parties and their affiliates are located around the world. Many non-US multinationals have US affiliates and subsidiaries. Consider for example the In re del Valle Ruiz case, mentioned previously, where §1782 discovery was ordered against the US affiliate of a Spanish company. Indeed that case seemed to suggest that §1782 could have reached the Spanish parent company itself had the facts of the case been different.[27] Clearly the decision cuts both ways, as all parties to foreign arbitrations are barred from using §1782 discovery and may now find critical evidence inaccessible to them.

15 CONSISTENCY WITH FAA?

By disallowing access to §1782, international arbitration is not necessarily on the same footing as domestic US arbitration in relation to the scope of available discovery. As mentioned earlier, parties are rarely entirely 'foreign' or US-based. Furthermore, the power of arbitrators under US law is far from uniform and is also far from being entirely clear. Section 7 of the Federal Arbitration Act (FAA) permits an arbitrator to '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'.[28] That section also states that an arbitrator may compel a witness 'in the same manner provided by law for securing the attendance of witnesses'. Once more we have a circuit split between the 2nd, 3rd, 9th, and 11th Circuits which would allow subpoenas in connection with the actual arbitration hearing – and not for pre-hearing discovery[29] – versus the 4th Circuit which has held that an arbitrator has the power to issue a subpoena to a non-party for pre-hearing discovery 'under unusual circumstances' and 'upon a showing of special need or hardship'.[30] Compounding uncertainty is that several states have granted broader authority to arbitrators than what is granted under the FAA, granting the arbitrator the power to issue subpoenas for discovery 'to the extent a court could if the

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[26] In *A v. C* [2020] 1 WLR 3504.

[27] Preeti G. Bhagnani & Eric Lenier Ives, *US Discovery in Aid of International Commercial Arbitration After Valle Ruiz and Abdul Latif Jameel*, https://www.ibanet.org/article/1878ECB1-C902-4EBB-A7DD-EB26F9853A49. (accessed 14 Feb. 2023).

[28] 9 U.S. C. § 7.

[29] CVS Health Corp. *v.* Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017); *see also* Managed Care Advisory Grp., LLC *v.* CIGNA Healthcare, Inc., 939 F.3d 1145 (11th Cir. 2019); CVS Health Corp., *ibid*. (pre-hearing document subpoena found invalid); Life Receivables Tr. *v.* Syndicate 102 at Lloyd's London, 549 F.3d 210 (2nd Cir. 2008) (document subpoena invalidated); Hay Group, Inc. *v.* E.B.S. Acquisition Corp., 360 F.3d 404 (3rd Cir. 2004) (invalidating document subpoena).

[30] COMSAT Corp. *v.* Nat'l Science Foundation, 190 F.3d 269, 275–276 (4th Cir. 1999).

controversy were the subject of a civil action in this state'.[31] It is also worth adding that non-US jurisdictions are not quite as unfriendly to discovery as some claim. In the United Kingdom for example, it was recently held that parties to a foreign-seated arbitration may use section 44 of the Arbitration Act 1996 to obtain an order from the English courts for the taking of evidence of witnesses in support of that foreign arbitration.[32]

16 CONFIDENTIALITY?

Some have argued that barring access to §1782 serves the interest of maintaining privacy and confidentiality, insofar as applications for §1782 discovery often contain extensive disclosure and background in support of the filing, which in many cases is publicly available information. While this is a fair point, the ruling only bars direct access to §1782. It does not ban discovery by foreign parties for use before qualifying foreign and international tribunals. It is fair to assume that the same confidentiality concerns will continue to hound those applications as well.

17 LESS ACCESS TO EVIDENCE/LESS COST?

Some have argued that limiting the scope of §1782 discovery may benefit parties by limiting the cost of international proceedings. It may very well have the opposite effect, as parties are forced to bring dual proceedings before qualifying international and foreign tribunals, to obtain needed discovery. It should also be noted that there remain other means of obtaining evidence in the United States. Freedom of information requests, for example, remain available to obtain documents held by public authorities. Similarly, personal data held in jurisdictions with data protection laws (along the lines of the EU´s General Data Protection Regulation) such as California may also be accessed through data subject access requests. Another, perhaps more aggressive manner of obtaining evidence, might involve filing a parallel criminal complaint and joining the proceeding as a private prosecutor.

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[31] *See* Uniform Arbitration Act, adopted by Arizona, Utah, Colorado, Nevada, New Mexico, Oregon, Washington, and over fifteen other states, A.R.S. § 12-3017(D); *see also* Utah Code Ann. § 78B-11-118; CO Rev Stat § 13-22-217; NRS 38.233; NM Stat § 44-7A-18; Or. Rev. Stat. § 36.675; RCW 7.04A.170.

[32] In *A v. C* [2020], *supra* n. 26.

18 ARBITRATION PROVISIONS

Parties may now need to consider redrafting the text of arbitration provisions in their agreements to adapt to this new state of play. In the context of private international arbitration, parties often incorporate the International Bar Association Guidelines on the Taking of Evidence (IBA Rules), which are guided by the principle that '[e]xpansive American- or English-style discovery is generally inappropriate in international arbitration'. That said, parties worldwide may now need to reconsider the arbitration provisions they currently use to accommodate for this change in the access to evidence. It is foreseeable that parties may seek to either avoid or impose similarly broad discovery through carefully drafted arbitration provisions. Indeed, arbitral organizations may need to amend their rules and procedures on the production of evidence. It is foreseeable that parties may need to take a closer look at the rules of arbitral organizations to ascertain whose rules allow or prohibit broader discovery.

19 CONCLUSION

The decision is a blow to the prestige of international arbitration. One cannot help but cringe when one reads how the US Supreme Court likened international arbitration to a 'university's student disciplinary tribunal'. Almost as disheartening was the US government´s assertion, at oral argument, that arbitral panels are 'not administering justice', but rather are only 'trying to divine the intent of two parties to an agreement'. Indeed, it is quite concerning that the Court demonstrated such hostility towards international arbitration. Would it indeed be happy to grant access to §1782 discovery to a (possibly) autocratic state-controlled investment tribunal as opposed to an impartial investor-state arbitration panel, as long as it is imbued with state power?

On the other hand, the Court has neither overturned Intel nor banned US discovery to foreign litigants. Perhaps the decision merely curtails to some degree the use of the section, forcing parties to pursue parallel proceedings to obtain US discovery. Time will tell whether this works to improve the process. In either case, I think it's fair to say this is not the end of the §1782 saga.