CHAPTER 6

United States Case Law Developments under 28 U.S.C. §1782 with Regard to International Arbitration Proceedings

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One of the most significant and well-known differences between litigation and arbitration proceedings in the United States (U.S.) and the same proceedings in many civil law traditions is discovery. With regard to its scope and methods, it is very unique. It may, however, be used by foreign litigants, outside the U.S. as well. When an arbitration proceeding abroad involves a connection to the U.S., an application for seeking evidence in the U.S. under 28 U.S.C. §1782 can be made to benefit from U.S. style discovery. 28 U.S.C. §1782 permits any party or other "interested person" involved in proceedings before a "foreign or international tribunal" to make a request to a U.S. federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the U.S. court sits. There have been two recent notable lower court developments redefining the scope of 28 U.S.C. §1782. First, the applicability of 28 U.S.C. §1782 was clarified with regard to evidence located outside the U.S., i.e., extraterritorial discovery. Then, several U.S. Courts of Appeals have rendered decisions regarding the applicability of 28 U.S.C. §1782 in private international arbitration proceedings, i.e., arbitration proceedings conducted outside of arbitration institutions, resulting in a veritable circuit split. The chapter explains the different approaches taken with regard to an interpretation of 28 U.S.C. §1782, including the filing of a writ of certiorari with the U.S. Supreme Court.

§6.01 INTRODUCTION

Undoubtedly, the most significant and well-known difference between litigation and arbitration proceedings in the United States and the same proceedings in many civil law traditions is discovery. Discovery is the procedure parties to a lawsuit, and their attorneys utilize to obtain information from each other before trial. Specifically,

discovery occurs through demands for production of documents, depositions of parties and potential witnesses, written interrogatories (questions and answers written under oath), written requests for admissions of fact, examination of the scene and the petitions and motions employed to enforce discovery rights. Parties can file requests for discovery for the preparation of a claim even before they initiate the proceedings in court. While common law practitioners consider discovery requests to be an "indispensable tool for determining the truth,"[1] discovery requests by one of the parties are often denounced as overly expensive "fishing expeditions"[2] and rejected as inadmissible in many civil law jurisdictions.[3]

In international arbitration, however, the Anglo-American approach has caught on in general, even though it is less extensive than the traditional U.S.-style discovery process. Requests for document production are common in most present-day international commercial and investment arbitrations despite considerable cost implications.[4] The legal basis for document production or other discovery requests during an ongoing arbitration proceeding is usually an agreement between the parties to the arbitration. Many arbitration rules also provide for the arbitral tribunal to order document production, e.g., Article 34(2)(a) of the International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, Article 27(3) UNCITRAL Arbitration Rules 2010, Article 28(2) DIS Arbitration Rules 2018, but they never take on the broad and expansive approach U.S. law does.

§6.02 GATHERING EVIDENCE FOR PROCEEDINGS WITH A UNITED STATES ELEMENT

When arbitration involves a connection to the United States, even if it appears to be remote at first glance, one should consider one very unique tool for obtaining discovery—an application for seeking evidence in the United States under 28 U.S.C. §1782 ("§1782"), a U.S. federal statute.

The tool of §1782 generally extends to proceedings abroad, as it is an expression of Congress' intention for the judiciary branch to cooperate internationally. Accordingly, the wording is quite broad. §1782 permits any party or other "interested person" involved in proceedings before a "foreign or international tribunal," or the tribunal

1. Klaus Sachs, *Use of Documents and Document Discovery: "Fishing expeditions" Versus Transparency and Burden of Proof*, SchiedsVZ 2003, p. 193-194.
2. *Ibid*.
3. Civil law jurisdictions, if at all, usually provide for merely rudimentary discovery procedures: For example, according to sections 422, 423 of the German Code of Civil Procedure (*Zivilprozessordnung*), a party to a court proceeding can only claim production of documents by other parties if it is entitled to do so under substantive law or if the other party itself referred to these documents. Also, in accordance with section 142 para. 1 of the German Code of Civil Procedure, the court may direct one of the parties or a third party to produce records or documents, as well as any other material, that are in its possession, but only if one of the parties has made reference to such records, materials or documents.
4. Akram Mirza, *28 U. S. Code § 1782—Overview and latest Developments*, GRUR Int. 2019, pp. 781 et seq.

itself, to make a request to a U.S. district court for an order compelling discovery from a person or entity that resides or is found in the district in which the U.S. court sits.

28 U.S.C. §1782 reads:

> (a) 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.

The requirements for a successful discovery request under §1782, therefore, are that:

(i) the request seeks testimony or statement of a person or production of a document or "other thing";
(ii) the addressee of the discovery resides or is found in the district of the court before which the application is made;
(iii) the discovery is for use in a proceeding in a "foreign or international tribunal"; and
(iv) the petitioner is a "foreign or international tribunal" or "any interested person."

If these requirements are met, the court has broad discretion to grant discovery.[5]

Apart from requesting discovery for ongoing litigation or arbitration proceedings from the opposing party, §1782 also allows for ex parte requests. Since the parties are not limited to requesting discovery only from the opposing party, the petitioner of a successful request made under §1782 therefore gains access to documents and witnesses that might have nothing to do with the actual litigation proceedings. According to the wording, the documents to be produced need not be located in the United States.

Discovery pursuant to §1782 thus affords litigants an attractive alternative to the limited discovery procedures available under the procedural rules in their respective home countries. Thanks to the broad wording of the legal provision, the requirements for a successful request made under §1782 are quite easy to satisfy.

A petitioner can obtain discovery for use in either civil or criminal proceedings and from either a party to the foreign litigation or a third party. The statute does not even impose a requirement that a petitioner first seeks the requested discovery from the foreign tribunal. Nor must an applicant demonstrate that the discovery it seeks is admissible in the foreign proceedings.[6]

5. "The district court '*may* order'" (emphasis added).
6. United States Court of Appeals: *John Deere Ltd v. Sperry Corp*, 754 F.2d 132, 136 (3d Cir. 1985).

In addition, according to the wording, a request under §1782 can also in general be made by the tribunal itself—which is one of the biggest differences to most discovery procedures in other countries.

Given the broad discretion U.S. district courts have in granting requests under §1782, it is hard to reverse any order. Basically, such order will only be reversed upon a finding that the court abused its discretion. The argument of foreign judicial considerations, such as that discovery is not known in the jurisdiction in question, alone will likely not suffice. The U.S. district court is not required to determine whether the evidence will be admissible. It is not necessary to obtain the foreign tribunal's permission first, either.

As the wording shows, the scope of discovery available under §1782 is potentially very broad. Any U.S. district court deciding on a request made under §1782 has the authority to direct that discovery under §1782 takes place in accordance with U.S. discovery procedures. U.S. discovery is recognized as among the most extensive and costly in the world. Specifically, a person from whom discovery is sought can be ordered to produce documents directly to the petitioner or even to sit for a deposition conducted by the petitioner. U.S. district courts also have the authority to accommodate requests for foreign discovery procedures, even if those are not identical to the ones under the Federal Rules of Civil Procedure.[7]

Compliance with such a request can be exceptionally expensive, require disclosure of sensitive or private information, and possibly expose an entity to future liability. In view of these serious consequences of having to comply with a potential order under §1782, opposition to such requests must be carefully crafted.

§1782 has long been an untapped resource for obtaining access to documents and electronic data. In the last ten years, requests through §1782 have become more popular, as they have proven to be a powerful and increasingly successful tool for litigants involved in foreign proceedings, including more recently international arbitration proceedings.

Especially in arbitration, where litigating parties are more in control of the rules and procedures to be followed, this tool could be of great importance. The tool could especially be of great importance as document production has become a prominent fixture in most arbitral proceedings anyways and often features in the procedural timetable from the start.

However, while the tool of §1782 gained more and more attention over the last years, there are still unresolved issues that arbitrators and counsel should have in their mind before considering using it. The terms of §1782 have been subject to interpretation by different courts of different instances in the United States, especially with regard to its applicability in international arbitration proceedings.

7. For instance, in *In re Application of Merck & Co., Inc.*, 197 FRD 267 (NDNC 2000), the district court issued an order deciding that the discovery should follow the U.S. Federal Rules of Civil Procedure, but that in accordance with U.K. law, written summaries of the witness were to be given to the opposing party in appropriate time prior to the depositions.

So, in order to decide whether §1782 is the right tool to use in an arbitration proceeding, and how to handle a discussion about it, it is necessary to take a closer look at the judicial developments in the United States with regard to this provision.

§6.03 THE INTEL DECISION BY THE UNITED STATES SUPREME COURT

In the leading §1782 case, *Intel Corp. v. Advanced Micro Devices* (2004), the U.S. Supreme Court addressed several inconsistencies of the provision.[8]

The first inconsistency, which was raised by *Intel*, concerns the meaning of the word "tribunal" in the statute. The U.S. Supreme Court cited an article written by Professor Hans Smit from Columbia Law School in 1965, which suggested that the term "tribunal," in §1782 covers, *inter alia*, "administrative judges, arbitral tribunals and other adjudicative bodies."[9] The court then laid out a test to answer the question of whether an adjudicative institution abroad can be considered a "tribunal" in accordance with §1782.

The Supreme Court held that aside from ensuring that the statutory requirements are satisfied, a judge must also undertake a secondary four-step analysis:

(i) Whether the person from whom discovery is sought is not a participant in the foreign proceeding and is therefore outside the foreign tribunal's jurisdictional reach.
(ii) The nature of the foreign tribunal and its receptivity to judicial assistance by U.S. federal courts.
(iii) Whether the request conceals an attempt to circumvent foreign evidence-gathering rules.
(iv) Whether the request is unduly intrusive or burdensome.

What is more, the court held that if the foreign institution considers evidence in order to decide a dispute, it can be considered a "tribunal" in accordance with §1782.[10]

§6.04 TWO UNRESOLVED ISSUES WITH 28 U.S.C. §1782: EXTRATERRITORIALITY AND FOREIGN PRIVATE ARBITRATION

While *Intel* clarified some aspects of §1782, it still left much for the lower courts' interpretation.

There have been two recent lower court developments redefining the scope of §1782. First, the applicability of §1782 was clarified with regard to evidence located outside the United States, i.e., extraterritorial discovery (V). Then, several U.S. Courts of Appeals have rendered decisions regarding the applicability of §1782 in private

8. United States Supreme Court: *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241 (2004).
9. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n. 71 (1965).
10. United States Supreme Court: *Intel Corp. v. Advanced Micro Devices, Inc.* 542 U.S. 241, at 264 (2004).

international arbitration proceedings per se, i.e., arbitration proceedings conducted outside of arbitration institutions, such as ICSID or International Chamber of Commerce (ICC) (VI).

§6.05 EXTRATERRITORIAL DISCOVERY IS PERMITTED UNDER 28 U.S.C. §1782

Regarding applicability of §1782 to evidence located outside the United States, the U.S. Court of Appeals for the Second Circuit on October 7, 2019, issued a decision significantly broadening the scope of discovery available to foreign litigants seeking evidence from persons or entities with contacts to the U.S. in the *In re Application of Antonio del Valle Ruiz* decision.[11]

[A] The Second Circuit *In re del Valle Ruiz* Decision

In *In re Application of Antonio del Valle Ruiz*, the Second Circuit held that petitioners could, in principle, file an application under §1782 to obtain documents held outside the U.S. if and to the extent the entity from which the documents were sought had sufficient links to the forum state so as to satisfy the requirements of constitutional due process.

[1] The Facts in In re del Valle Ruiz

The facts in *In re del Valle Ruiz* were quite complex. In 2017, Banco Popular Español, S. A. (BPE), a Spanish bank, underwent a forced sale by the Spanish government. After a short due diligence phase, Banco Santander S. A. (Santander), another Spanish bank, purchased BPE for only EUR 1.00, even though BPE had previously been valued at almost EUR 160 billion. Pacific Investment Management Company LLC and Anchorage Capital Group, LLC (the "Petitioners") were two former investors in BPE that claimed to have lost over EUR 1 billion as a result of the forced sale. Faced with such a significant financial loss, the Petitioners challenged the sale before the Court of Justice of the European Union, initiated an international arbitration against the Government of Spain, and sought to intervene in Spanish criminal proceedings against BPE. In support of the proceedings, all of which were pending outside the United States, the Petitioners filed an application in the Southern District of New York under §1782 seeking discovery from Santander and three of its affiliates for use in those foreign proceedings.

In the application, Petitioners requested documents regarding the financial state of BPE at the time of its forced sale from: (1) Santander itself and (2) Santander's New York-based affiliate, Santander Investment Securities Inc. (SIS). The district court granted the application in part, rejecting the application as to Santander itself but ordering SIS to produce documents, including those not located in the United States.

11. United States Court of Appeals: *In re del Valle Ruiz* 939 F.3d 520 (2nd Cir. 2019).

On appeal, the Second Circuit affirmed the district court's decision, thereby departing from earlier jurisprudence.[12] Explicitly joining the U.S. Court of Appeals for the Eleventh Circuit,[13] the Second Circuit found that "a district court is not categorically barred from allowing discovery under §1782 of evidence located abroad."

Indeed, the Second Circuit held that discovery was possible where a court had personal jurisdiction over the party from which the evidence was requested. The Second Circuit further held that discovery of documents located outside the United States may be sought under §1782, thereby affirming an extraterritorial application of §1782.

[2] The Test Devised by the Second Circuit in In re del Valle Ruiz

In its reasoning, the Second Circuit first found that the presumption against extraterritorial application of laws was not applicable to strictly jurisdictional statutes such as §1782. While the Second Circuit noted that previous commentators had argued that §1782 only applies to companies over which the court has general jurisdiction and therefore, only U. S. companies within the court's district could be subject to the broad discovery under §1782, the Second Circuit extended the scope of applicability of §1782 by referring to the broad language of the provision. Particularly, the Second Circuit reasoned that Congress intended the scope of discovery under §1782 to be similar to the scope of discovery available in an ordinary domestic lawsuit.[14] In an ordinary domestic lawsuit, discovery that is conducted in accordance with the Federal Rules of Civil Procedure permits extraterritorial discovery so long as the *evidence sought is within the subpoenaed party's* "possession, custody, or control." The Second Circuit did caution,

12. *See* United States Court of Appeals: *In re Sarrio*, 119 F.3d 143, 147 (2nd Cir. 1997); United States District Court: *Purolite Corp. v. Hitachi America, Ltd.*, 2017 WL 1906905 (S.D.N.Y 2017); United States District Court: *In re Application of Gorsoan Ltd. and Gazprombank OJSC*, 2014 WL 7232262 (S.D.N.Y. 2014); United States District Court: *In re Fuhr*, 2014 WL 11460502 (S.D.N.Y. 2014); United States District Court: *In re Godfrey,* 526 F.Supp.2d 417, 423-424 (S.D.N.Y.2007) ("The bulk of authority in this Circuit, with which this Court agrees, holds that, for purposes of §1782(a), a witness cannot be compelled to produce documents located outside of the United States").
13. The U.S. Court of Appeals for the Eleventh Circuit had been the first U. S. Circuit Court to recognize that §1782 could apply to documents held outside the United States, see United States Court of Appeals: *Sergeeva v. Tripleton*, 834 F.3 d 1194 (11th Cir. 2016). The Eleventh Circuit reasoned that the text of §1782 authorizes discovery pursuant to the Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure in turn authorize extraterritorial discovery so long as the documents to be produced are within the subpoenaed party's possession, custody, or control.
14. United States Court of Appeals: *In re Valle Ruiz*, 939 F.3d at 529 (2nd Cir. 2019) citing to United States Court of Appeals: *In re Edelman*, 295 F.3d at 177 (2nd Cir. 2002): "Given this, and legislative history expressing Congress's 'aim that the statute be interpreted broadly and that courts exercise discretion in deciding whether, and in what manner, to order discovery in particular cases,' we concluded that tag jurisdiction was sufficient to satisfy §1782's 'found' requirement. Id. at 179–80." And: "Indeed, we have repeatedly recognized Congress's intent that §1782 be 'interpreted broadly,' especially given the district court's ability 'to exercise discretion in deciding whether, and in what manner, to order discovery in particular cases'." Referring as well to, *inter alia*, United States Court of Appeals: *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 80 (2nd Cir. 2012).

however, that an order compelling production of documents was not automatic if such request was filed.

Instead, the Second Circuit devised a framework in which the court must: (i) "'first assess the connection between the nonparty's contacts with the forum and the order at issue' and *[(ii)]* 'then decide whether exercising jurisdiction for the purposes of the order would comport with fair play and substantial justice.'"[15]

According to the Second Circuit, courts are still obligated to consider a number of factors in determining whether to actually exercise their discretion. In particular, the Second Circuit noted that "*a court may properly, and in fact should, consider the location of documents and other* evidence when deciding whether to exercise its discretion to authorize such discovery (emphasis added)."[16]

The Second Circuit explicitly relied on the four-factor test the U.S. Supreme Court had developed in *Intel Corp. v. Advanced Micro Devices, Inc*.[17] In applying the *Intel* factors, the Second Circuit found that the district court had not abused its discretion in ordering SIS to produce documents held abroad and that, therefore, the district court order of discovery as to SIS had been proper. However, the Second Circuit also found that it did not have personal jurisdiction with regard to Santander and that, consequently, production of documents could not be ordered.

[B] United States District Courts Have Started Applying and Following *In re del Valle Ruiz*

The *In re del Valle Ruiz* decision opened the doors for extending the reach of §1782 to the multitude of international companies doing business with and in the United States. Indeed, several district courts in the Second Circuit have already issued decisions referring to *In re del Valle Ruiz,* related to both, litigation and arbitration proceedings abroad.[18]

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15. United States Court of Appeals: *In re del Valle Ruiz*, 939 F.3d at 529 (2nd Cir. 2019).
16. *Ibid., at 533*.
17. In its *Intel* decision, the U.S. Supreme Court had held that aside from checking whether the statutory requirements are satisfied, a court must undertake a secondary four-step analysis to determine whether and how it should exercise its discretion. The steps in the analysis are: "(1) whether the person from whom discovery is sought is a participant in the foreign proceeding, 'in which event' the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal- court assistance; (3) whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) whether the request is 'unduly intrusive or burdensome'," United States Supreme Court: *Intel Corp. v. Advanced Micro Devices*, 542 U.S. at 264, 265.
18. The following decision shall serve as an example for the applicability of *In re del Valle Ruiz* to discovery requests made with regard to litigation proceedings pending abroad: in 2020, the United States District Court for the Southern District of New York granted a §1782 application filed by a German national, but only in part. After the respective petitioner's investment in certain silver certificate options derivative securities had been rendered worthless due to the allegedly illegal activities of Deutsche Bank AG and DZ Bank AG, Deutsche Zentral-Genossenschaftsbank and their coconspirators, petitioner had filed a claim for damages in a

For instance, the United States District Court for the Eastern District of New York in 2020 granted the §1782 application of German pasta manufacturer ALB-GOLD that sought discovery in aid of a proceeding before the Federal Supreme Court of Switzerland to overturn an arbitral award rendered against ALB-GOLD. The individual from whom discovery was sought disputed that he "*resided*" or was "*found*" in the district, but the district court held that *In re del Valle Rui* foreclosed any further inquiry into his geographical whereabouts since the district court had personal jurisdiction over him. The district court held that it had specific personal jurisdiction over the individual based on the fact "*that he engaged in all of the transactions and occurrences that are the subject of ALB-GOLD's application while in this District*." Accordingly, the district court concluded that the individual "*resided or is found*" in the Eastern District of New York.

Likewise, also in 2020, the United States District Court for the Southern District of New York granted a §1782 application made by petitioner Union Fenosa Gas, S.A. (*UFG*) as an ex parte petition for judicial assistance.[19] UFG had obtained a USD 2 billion arbitral award against Egypt from a tribunal constituted under the Agreement on the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Arab Republic of Egypt and the ICSID Convention for impairment of investments made by UFG in Egypt. Egypt had refused to voluntarily comply with the award.

UFG filed a petition under §1782 against an agent in the payment chain between Egypt and the holders of notes issued by Egypt under a sovereign bond program. UFG hoped to execute funds belonging to Egypt that would be sued to service and/or redeem the notes. After confirming that the statutory requirements of §1782 were met, the district court explicitly referred to the *Intel* test. Again, the fourth factor, whether a request is unduly intrusive or burdensome, was considered the most important.

The district court explicitly relied on *In re del Valle Ruiz* to hold that the location of documents and other evidence is important when considering the burden or appropriateness of a request for documents located outside the United States.[20] In

German court. During the proceedings, petitioner then filed for an order permitting him to take discovery from respondents Deutsche Bank AG, DZ Bank AG Deutsche Zentral-Genossenschaftsbank, and Commodity Exchange Inc., for use in the proceedings pending in Germany. The court applied the test devised by the Second Circuit, making reference to *In re del Valle Ruiz* throughout its decision. Since the banks had "purposeful[ly] and regular[ly] use[d] the precious metals markets in New York to conduct" their business, especially by trading through COMEX, which operates in New York, New York, the court found that there were sufficient contacts and consequently, a sufficient basis for the court to exercise specific personal jurisdiction over the banks. Next, the court applied the *Intel* test. While affirming the presence of the three first factors of the *Intel* test, the court found that the fourth factor, i.e., whether the discovery sought would be unduly intrusive or burdensome, stood in fact in the way of granting the request in its entirety, since the discovery requests made were too broad. However, quoting to the Second Circuit and its instruction that "it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright," the court granted the request in part. *See,* United States District Court: *Pfaff v. Deutsche Bank AG*, 2020 WL 3994824 (S.D.N.Y. 2020).

19. United States District Court: *Unión Fenosa Gas, S.A. v. Depository Trust Co.*, 2020 WL 2793055 (S.D.N.Y. 2020).

20. United States District Court: *Unión Fenosa Gas, S.A. v. Depository Trust Co*, 2020 WL 2793055 (S.D.N.Y. 2020), at 24.

conclusion, the mere fact that the documents were located abroad did not hinder the district court from granting the request, although it did limit its breadth.

[C] Impact on Multinational Companies in the District of the Second Circuit

The Second Circuit's reasoning was largely the result of a textual and literal reading of the statute. The Second Circuit determined that the language did not create a per se bar on extraterritorial application. Under this interpretation, companies—regardless of whether they are incorporated or have their principal place of business within the court's district—are subject to §1782 if they have minimum contacts with the United States and those contacts relate to the discovery sought.

The *In re del Valle Ruiz* decision by the Second Circuit could have significant consequences for all financial institutions or other multinational corporations that fall under the jurisdiction of the Second Circuit and have documents or other evidence in another country. The broadening in scope is likely to result in an increase in the potential burden domestic entities must bear when responding to discovery requests in aid of foreign proceedings. Entities may assert that the request is overly burdensome or unduly intrusive to correct this course. They can also argue that the respective court dealing with the request does not have personal jurisdiction for lack of a sufficient nexus between the target's contact with the forum and the actual discovery sought. The mere maintaining of an office and conducting a business in the district of the Second Circuit will not be enough for a request for discovery under §1782 to be successful.

Therefore, even for arbitration proceedings held abroad, discovery under §1782 could provide a useful tool to obtain evidence located in another third country. That only is the case, however, if private international arbitration proceedings were to be considered as proceedings before a foreign tribunal within the meaning of §1782.

The question of the applicability of §1782 to private international arbitration proceedings is different, but not less important than the question of the extraterritorial reach of a U.S. court's §1782 order. This question has become a hotly debated issue, with an interesting recent development of note that will be discussed hereafter and which is of relevance for every arbitrator and litigant involved in private arbitration proceedings held abroad.

§6.06 THE APPLICABILITY OF 28 U.S.C. §1782 IN PRIVATE INTERNATIONAL ARBITRATION PROCEEDINGS

Over the past two years, the issue of whether §1782 assistance may extend to private arbitral tribunals has become the subject of a cascade of federal circuit court decisions, actually creating a deep circuit split among the courts.

While it is undisputed that state courts and arbitral tribunals established by public entities (e.g., ICSID arbitrations) constitute "tribunals,"[21] there has long been a difference in opinion among U.S. district courts as to whether §1782 also allows for obtaining information for use in private arbitration proceedings.

[A] The Circuit Split: Different Decisions by the United States Courts of Appeals

Following the U.S. Supreme Court's *Intel* decision, more courts seemed to adopt the opinion that the term "tribunal" in §1782 comprises arbitral tribunals as well.[22] For example, the Sixth Circuit in 2019 decided in *Abdul Latif Jameel Transportation Company Ltd. v. FedEx Corporation* that requests for discovery under §1782 may be filed by parties to international private arbitration proceedings.[23]

Other U.S. Court of Appeals, however, denied the application of §1782 for international private arbitration proceedings. For instance, in *Republic of Kazakhstan v. Biedermann International* in 1999, the Fifth Circuit denied the request for discovery under §1782, citing the legislative history of the legal provision.[24] Again, in 2009, in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, the Fifth Circuit decided against the petitioner, arguing that a private arbitration tribunal in Switzerland was not a tribunal within the meaning of §1782.[25]

The split among the Circuit Courts seeped through to the lower courts, creating all-around uncertainty. Referring to the dicta of the U.S. Supreme Court's *Intel* decision, a number of district courts granted applications filed by foreign individuals under §1782 for international private arbitral proceedings,[26] even within the Second

21. *Jane Wessel & Peter J. Eyre, U. S. Discovery in Aid of Foreign or International Proceedings: The Rise of 28 U.S.C. Sec. 1782*, TDM 2007 Vol. 4/5, 8; *David Zaslowsky & Kristina Fridman*, *Use of Section 1782 in Aid of Arbitration*, in Edward M. Mullins & Lawrence W. Newman (eds.), *Obtaining Evidence for Use in International Tribunals under 28 U.S.C. § 1782, 2020*, pp. 173 et seq.
22. For instance, in 2012, the U.S. Court of Appeals for the Eleventh Circuit was open to the idea that §1782 could be invoked in international private arbitration proceedings: In *Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 685 F.3d 987 (11th Cir. 2012), the U.S. Court of Appeals for the Eleventh Circuit cited the U.S. Supreme Court's *Intel* decision and found the *Intel* decision to have good arguments to include private arbitration tribunals in the term "*tribunal*" of §1782. However, later, the Eleventh Circuit reversed its decision sua sponte in 2012 and issued a decision with a much narrower reading, leaving open the question of the scope of application but allowing discovery in the specific case at hand, *see* United States Court of Appeals: *In Re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, 2014 WL 104132 (11th Cir. 2014).
23. United States Court of Appeals: *Abdul Latif Jameel Transportation Company Ltd. v. FedEx Corporation*, 2019 WL 4509287 (6th Cir. 2019).
24. United States Court of Appeals: *Republic of Kazakhstan v. Biedermann International,* 168 F.3d 880 (5th Cir. 1999).
25. United States Court of Appeals: *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 Fed. Appx. 31 (5th Cir. 2009).
26. Cases allowing application of §1782 for private international arbitrations are, e.g., United States District Court: *In re Roz Trading Ltd., 469 F.Supp.2d 1221 (N.D. Ga. 2006);* United States District Court: *In re Hallmark Capital Corp., 534 F.Supp.2d 951 (D. Minn. 2007);* United States District Court: *Ukrnafta v. Carpatsky Petroleum Corp., 2009 WL 2877156 (D. Conn.)*; United States District Court: *In re Winning (HK) Shipping Co. Ltd.*, 2010 WL 1796579 (S.D. Fla. 2010). In these

Circuit.[27] Other district courts denied such requests. For instance, in *EWG Gasspeicher GMBH v. Halliburton Co.* in 2020, the United States District Circuit in Delaware held that the term "tribunal" in §1782 does not cover private commercial arbitrations.[28] In that case, the arbitration proceedings were in accordance with the rules of the German Arbitration Institute (DIS). The district court held, however, that the arbitration proceeding arising from a private commercial contract was not one before a foreign court or a quasi-judicial agency and that the merits of an award were not subject to judicial review before a public body.[29]

In 2020 alone, three different circuit courts issued three different decisions with regard to arbitration proceedings pending abroad, thus deepening the circuit split and adding to the confusion.

On May 10, 2021, the U.S. District Court for the District of Columbia granted a request for discovery under §1782, ordering a law firm that was a third party to arbitration proceedings pending before the Dubai International Finance Centre–London Court of International Arbitration (DIFC-LCIA) to produce certain nonprivileged documents and a detailed privilege log of any privileged documents. In its opinion, the court noted the circuit split, but noted it did not have to take sides, as the DIFC-LCIA even passed the narrower standard of a state-sponsored tribunal, as followed by the Second, Fifth and Seventh Circuits. The court considered the DIFC-LCIA to be sanctioned, regulated, and overseen by the UAE government, and hence a state-sponsored arbitral tribunal, for the following reasons: The DIFC-LCIA is a joint venture between the DIFC and the LCIA. The DIFC itself was established by a United Arab Emirates decree, as was the DIFC Arbitration Centre. The Arbitration Centre is funded by the Dubai government and governed by a board of trustees appointed by a dispute resolution authority within the DIFC. The DIFC Arbitration Institute also staffs the DIFC-LCIA, including legal counsel, case work managers and administrators.[30]

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cases, the courts in general held that the Supreme Court's *Intel* decision, with its reference to the Smit article and the famous footnote, meant that private international arbitral tribunals were indeed "tribunals" within the §1782 definition of "*foreign and International tribunals.*" A majority of district courts addressing the issue, however, followed the rationale of the *NBC and Biedermann* decisions and did not allow for an application of §1782 for private international arbitrations: e.g., United States District Court: *In re Operadora DB Mexico, S.A. De C.V., 2009 WL 2423138 (M.D. Fla.);* United States District Court: *In re Norfolk Southern Corp., 626 F.Supp.2d 882 (N.D. Ill. 2009);* United States District Court: *In re Dubey, 949 F. Supp.2d 990 (C.D.Cal. 2013)*; and United States District Court: *In re Grupo Unidos Por Canal S.A., 2015 WL 1810135 (D.Colo.)*.

27. United States District Court: *In re Children's Inv. Fund Found. (UK), 363 F. Supp. 3d 361, 370 (S.D.N.Y. 2019);* United States District Court: *In re Ex Parte Application of Kleimar N.V., 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016)* ("[w]hile the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in [Intel], suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782").
28. United States District Court: *EWG Gasspeicher GMBH v. Halliburton Co., Case No. 20*-1830 (D Del. 2020).
29. This decision has since been appealed with the Third Circuit in April 2020.
30. United States District Court: *In re Application of Food Delivery Holding S.A.R.L v. DeWitty and Associates CHTD*, Case No. 1:21-mc-0005 (GMH), available at https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2021mc0005-20.

[B] The Fourth Circuit's *Servotronics* Decision

On March 30, 2020, the Fourth Circuit joined the Sixth Circuit in allowing the use of §1782 in the context of private arbitration in the *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC* case.[31] The *Servotronics* case involved a private arbitration between Servotronics, Inc. and Rolls-Royce PLC under the rules of the Chartered Institute of Arbitrators (CIArb). After the engine of the new Boeing 787 Dreamliner aircraft caught fire, causing significant damage to the aircraft itself, Rolls-Royce settled Boeing's claim for damages. Rolls-Royce thereafter alleged that Servotronics had supplied it with defective engine valves that Rolls-Royce used when building the engine for the Boeing 787 Dreamliner, seeking indemnification from Servotronics. Servotronics rejected Boeing's indemnification claim, and Rolls-Royce commenced the arbitration in the United Kingdom (U.K.) pursuant to the parties' contract.

During the arbitration, Servotronics argued it had not received critical documents from Rolls-Royce and Boeing. To resolve these discovery issues, Servotronics brought an ex parte application pursuant to §1782 in the United States District Court for the District of South Carolina to obtain testimony of South Carolina residents, i.e., the chair of Boeing's Incident Review Board, which had investigated the fire, as well as two other Boeing employees involved in troubleshooting the engine issues for use in the U.K. arbitration. The South Carolina Federal District Court, however, declined to apply §1782, finding the CIArb was not a "tribunal" under the statute.

On appeal, the Fourth Circuit reversed the decision, holding that §1782 can be used in a private "foreign or international" arbitration. The Fourth Circuit refused to follow *NBS* and *Biedermann*. Instead, the Fourth Circuit found that the 1964 change of wording from "in any judicial proceeding pending in any court in a foreign country" to the current phrase, "in a proceeding in a foreign or international tribunal," reflected Congress' policy to increase international cooperation "by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international tribunals."[32] Thus, according to the Fourth Circuit, the term "*tribunal*" in §1782 includes arbitral tribunals.

Lastly, the Fourth Circuit held that even if following *NBS* and *Biedermann*, the outcome would not have been different, as CIArb was "acting within the authority of the state" because the arbitration is subject to the U.K. government's sanctions, regulations, and oversight.[33]

[C] The Ninth Circuit Has Been Asked for a Decision, but Is Still in the Determination Stage

Less than a week after the Fourth Circuit's *Servotronics* decision, appellants in *HRC-Hainan Holding Co., et al. v. Yihan Hu et al.* asked the Ninth Circuit to reverse the

31. United States Court of Appeals: *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC*, 954 F.3d 209, 212 (4th Cir. 2020).
32. *Ibid*, at 213.
33. *Ibid,* at 213-214.

Northern District of California's decision to allow discovery pursuant to §1782 for use in an arbitration before the China International Economic and Trade Arbitration Commission (CIETAC).[34]

In *HRC-Hainan Holding Co., LLC v. Yihan Hu,* a group of Delaware and Chinese companies initiated ex parte §1782 proceedings in the Northern District of California seeking leave to serve document and deposition subpoenas on nonparties to a CIETAC arbitration residing within the court's jurisdiction. The district court granted the applications.[35] With regard to the question of whether the language used in §1782, i.e., "foreign or international tribunal," covers a private arbitral tribunal, such as the one in the CIETAC proceedings, the Northern District of California followed the Sixth Circuit's approach in light of *Intel*. Specifically, it found that: (a) the ordinary meaning of "tribunal" is unambiguous; (b) the legislative history does not indicate Congress' intent to exclude private arbitral tribunals; and (c) policy concerns raised by the Second Circuit such as the popularity of arbitration based on its asserted efficiency and cost-effectiveness being "at odds with the broad-ranging discovery" that is possible under the Federal Rules of Civil Procedure (FRCP) were unpersuasive. Accordingly, the Northern District of California largely compelled respondents to provide the requisite documents and deposition testimony. Respondents filed an appeal with the Ninth Circuit, and the Ninth Circuit heard the case in September 2020 but has yet to render a decision.

[D] The Second Circuit's Decision in *In Re Application and Petition of Hanwei Guo*

On July 8, 2020, the Second Circuit decided in *In Re Application and Petition of Hanwei Guo* that §1782 is applicable to arbitration proceedings before private international tribunals.[36]

The petitioner, a Chinese businessman named Hanwei Guo, filed a request for discovery against several banks (such as Deutsche Bank, JPMorgan Chase, Bank of America Corp, and Morgan Stanley) pursuant to §1782 in the U.S. District Court for the Southern District of New York. Hanwei Guo intended to use the requested documents in the arbitral proceedings with the Chinese music streaming company *Tencent Music Entertainment* (at the time known as *Ocean Music*) pending before CIETAC. The district court denied the petition, and Hanwei Guo filed an appeal in the Second Circuit Court of Appeals.

The question of §1782's applicability arose against the background of the Second Circuit's decision *NBC v. Bear Stearns & Co.* issued in 1999, which dealt with

34. United States Court of Appeals: *HRC-Hainan Holding Co., et al. v. Yihan Hu, et al.*, No. 20-15371 (9th Cir. 2020).
35. United States District Court: *HRC-Hainan Holding Co., LLC v. Yihan Hu,* No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. 2020).
36. United States Court of Appeals: *Hanwei Guo v. Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC.*, 965 F.3d 96 (2nd Cir. 2020).

commercial arbitration.[37] In *NBC v. Bear Stearns & Co.*, the Second Circuit decided that the term "tribunal" did not extend to private arbitration tribunals, but only covered "state sponsored adjudicatory bodies," i.e., tribunals acting as state instrumentalities or with the authority of the state. In reaching this conclusion, the Second Circuit mainly relied on legislative history.[38]

In *Hanwei Guo*, the Second Circuit confirmed its *NBC v. Bear Stearns & Co.* decision and held that *NBC v. Bear Stearns & Co.* was not overruled by the U.S. Supreme Court's *Intel* decision.[39] In the view of the Second Circuit, the U.S. Supreme Court had not decided the question of whether the term "tribunal" covered private arbitral tribunals as well. Since private arbitral tribunals were only mentioned in passing via dictum, it could not have the effect of abrogating the Second Circuit's *NBC v. Bear Stearns & Co.* precedent.[40] *NBC v. Bear Stearns & Co.* therefore remains good law in the Second Circuit, and the term "tribunal" covers "state-sponsored arbitral bodies," but not private arbitral tribunals.[41]

Consequently, the Second Circuit analyzed and developed a test for whether CIETAC qualified as a private international arbitral tribunal or a state-sponsored arbitral body. The test included factors such as the degree of state affiliation and functional independence from the state possessed by the entity as well as the degree to which the parties' arbitration clause controls the panel's jurisdiction.[42]

After applying these factors to CIETAC, the Second Circuit concluded that any CIETAC arbitration proceedings were private arbitration proceedings, despite CIETAC having been originally created through state action. According to the Second Circuit, the Arbitration Center operated independently of the Chinese government in the administration of its arbitration cases and the arbitrators were not affiliated with the Chinese government but, rather, independent from the state.[43] The Chinese government is unable to influence the outcome of the proceedings and, pursuant to Chinese law, is unable to set aside an arbitration award except on grounds that "overlap extensively" with the grounds under U.S. law.[44] Lastly, the Second Circuit found that CIETAC derives its jurisdiction exclusively from the parties' arbitration agreement.[45]

37. United States Court of Appeals: *National Broadcasting Co. v. Bear Stearns & Co.* 165 F.3d 184 (2nd Cir. 1999).
38. *Ibid*, at. 189: "In sum, the legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies. The legislative history's silence with respect to private tribunals is especially telling because we are confident that a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."
39. United States Court of Appeals: *Hanwei Guo v. Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC.*, 965 F.3d 96 (2nd Cir. 2020), at 105: "(…) we conclude that NBC's holding remains good law."
40. *Ibid.*, at 105.
41. *Ibid.*, at 107.
42. *Ibid*.
43. *Ibid.*
44. *Ibid*.
45. *Ibid.*, at 108.

Thus, the Second Circuit concluded that CIETAC is a private arbitral tribunal and denied the application under §1782.

[E] The Seventh Circuit's *Servotronics* Decision

On September 22, 2020, the Seventh Circuit unanimously ruled in *Servotronics, Inc. v. Rolls-Royce PLC, et al.* that §1782 cannot be invoked in aid of foreign private commercial arbitrations.[46] This decision marks the first time the Seventh Circuit has spoken on the issue of whether §1782 authorizes a district court to provide discovery assistance to foreign arbitral tribunals. Since the Seventh Circuit directly contradicted its colleagues from the Fourth Circuit in the same arbitration, thus involving the same parties, its decision dramatically further deepened the circuit split on the issue.

The basic facts of the Seventh Circuit's *Servotronics* decision are the same as in the case before the Fourth Circuit. After filing the aforementioned ex parte application in South Carolina, Servotronics filed an application in the U.S. District Court for the Northern District of Illinois asking the court to issue a subpoena compelling Boeing to produce documents for use in the CIArb arbitration proceedings pending in the U.K.

The U.S. District Court for the Northern District of Illinois denied the ex parte application and held that §1782 cannot be used in aid of private commercial arbitrations. Servotronics appealed.

In its decision, the Seventh Circuit aligned with the Second and Fifth Circuits, upholding the U.S. District Court's decision and finding that §1782 does not authorize a U.S. District Court to compel discovery for use in private foreign arbitration. First, the Seventh Circuit observed that the term "tribunal" is not defined in the statute. Turning to statutory interpretation, the Seventh Circuit then held that even considering dictionary definitions does not resolve the issue of whether or not the term "tribunal" covers private commercial arbitration panels—notwithstanding the fact that some dictionary definitions are "more expansive, leaving room for both competing interpretations." Due to the plausibility of both interpretations, the Seventh Circuit found this approach to be inconclusive.

The Seventh Circuit then assessed §1782 in its statutory context. To this end, the Seventh Circuit compared §1782's use of the phrase "foreign and international tribunal" to the phrase's use in 28 U.S.C. §1696 (assistance regarding service-of-process) and §1781 (letters rogatory). The Seventh Circuit concluded that the phrase "foreign or international tribunal" in these statutes undoubtedly refers to state-sponsored tribunals only—not private commercial arbitration tribunals. As a result, the Seventh Circuit considered a more expansive reading of the term "tribunal" in 28 U.S.C. §1782 even "*far less plausible*."[47]

Furthermore, the Seventh Circuit also cautioned against an interpretation of §1782 that would provide more than what is permitted under the Federal Arbitration

46. United States Court of Appeals: *Servotronics, Inc. v. Rolls-Royce PLC, et al.*, 975 F.3d 689 (7th Cir. 2020).
47. *Ibid.*, at 694.

Act (FAA).[48] Section 7 of the FAA only permits the arbitration panel, but not the litigating parties, to summon witnesses before the panel to testify at arbitration hearings and to petition district courts to enforce those summonses. 28 U.S.C. §1782 does not have such a limitation, but allows both the panel and the litigating parties to obtain discovery orders from U.S. district courts. The Seventh Circuit considers this to be a distinction without any good rationale. According to the Seventh Circuit, it is untenable that a broad application of. §1782 could result in litigating parties in foreign arbitrations having "access to much more expansive discovery than litigants in domestic arbitrations." Moreover, because the FAA applies to some foreign arbitrations, the Seventh Circuit concluded that there would be a potential conflict between a broad interpretation of §1782 and the FAA.[49] Thus, the Seventh Circuit supports a more narrow reading of the term "tribunal" and consequently a narrower scope of application of §1782.

Finally, the Seventh Circuit analyzed the Supreme Court's analysis of §1782 in *Intel Corp. v. Advanced Micro Devices, Inc*. The Seventh Circuit found that, in the absence of any explicit indication that the term "tribunals" was meant to include private arbitral tribunals, there was "no reason to believe" that the U.S. Supreme Court by quoting a law-review article in a passing intended to broaden the scope of application of §1732 to provide discovery assistance in private foreign arbitrations. The Seventh Circuit found that the quote had "taken on outsized significance" as a mere "part of an explanatory parenthetical" and thus should not be used to justify discovery assistance for private foreign arbitration proceedings.[50]

[F] Servotronics' Petition for a Writ of Certiorari with the U.S. Supreme Court

On December 7, 2020, Servotronics appealed the Seventh Circuit's decision to the Supreme Court, filing a petition for a writ of certiorari. In its petition, Servotronics cited the Fourth and Seventh Circuit decisions and pointed to other circuit court decisions exacerbating the inconsistent application of §1782. Warning that the "*3-2 circuit split*" may only deepen and with appeals pending in other circuit courts on the same issue, Servotronics asked the U.S. Supreme Court to "remove uncertainty" over the issue and provide a "uniform standard" on whether the discretion granted to district courts under 28 U.S.C. §1782 includes evidence gathering for "private commercial arbitral tribunals." On March 22, 2021, the U.S. Supreme Court agreed to hear the appeal filed by Servotronics. Both the petition and the U.S. Supreme Court's decision to agree to hear the appeal were met with great interest in the litigation and arbitration community, as a decision by the U.S. Supreme Court promised to do away with the topic once and for all. In fact, several amicus curiae briefs were filed, some in favor of one of the parties,

48. *Ibid.*, at 695.
49. *Ibid.*, at 695.
50. *Ibid.*, at 696.

some neutral.[51] However, for reasons unknown, in the first week of September 2021, Servotronics unexpectedly filed a motion to dismiss with the U.S. Supreme Court, effectively withdrawing its petition. Consequently, the U.S. Supreme Court dropped the case from its calendar.

[G] The Impact of an Enduring Circuit Split: An Outlook

From an arbitration standpoint, the motion to dismiss filed by Servotronics resulting in the U.S. Supreme Court no longer deciding this case can only be considered regrettable. Instead of providing clarity, the insecurity with regard to what constitutes a tribunal under §1782 now continues. There is a risk that this issue will never be settled by the U.S. Supreme Court at all, as proceedings require a litigant willing to see their dispute all the way through to the U.S. Supreme Court.

But the missed opportunity is also felt by the Circuit Courts themselves, which had been waiting for the U.S. Supreme Court to clarify the matter. Indeed, as laid out above, both the Third and Ninth Circuit have pending cases on this very issue. In March 2021, the Ninth Circuit even explicitly stated that in view of Servotronic's petition for a writ of certiorari, it was holding off on a decision regarding the issue of §1782 until the U.S. Supreme Court had provided guidance on this matter. Both Circuit Courts will now decide the cases on their own, potentially deepening the Circuit split. An enduring and deepened Circuit split, however, cannot be in anyone's interest.

51. For instance, the Federal Arbitration, a U.S.-based alternative dispute resolution provider, filed an amicus curia brief, arguing that the petitioner's appeal should be upheld and that private arbitral bodies should qualify for discovery. The amicus curiae brief is available at https://www.supremecourt.gov/DocketPDF/20/20-794/179032/20210512164053430_20-794_Amicus%20Brief.pdf. Likewise, Prof. George Bermann filed an amicus curiae brief in support of the petitioner, arguing that the "plain meaning of Section 1782 compels the conclusion that the statute applies to proceedings before international commercial arbitral tribunal," and thus a broad application of the provision was warranted. According to Prof. Bermann, the term "tribunals" used in §1782 is a term used to identify the bodies that conduct international arbitral proceedings. The distinction between state-sponsored and private tribunals does not find any backing in neither the wording nor the history of the legal provision. The amicus curiae brief is available at https://www.supremecourt.gov/DocketPDF/20/20-794/179133/20210513153854699_20-794tsacProfessorGeorgeA.Bermann.pdf. In a separate amicus curiae brief, the ICC focused on the relationship between the arbitral tribunal and the U.S. court and whether the opinion of the arbitral tribunal regarding discovery should be taken into account by the U.S. court faced with a petition under §1728. In the ICC's view, the U.S. court "should afford a very high degree of deference to the arbitral tribunal's view on the discovery sought" for the following reason: "Affording a very high degree of deference to the tribunal would also be in line with the fundamental principle in private international commercial arbitrations that the arbitral tribunal has the primary authority and control over the proceedings, including discovery matters. As a result of this authority and an arbitral tribunal's familiarity with the governing arbitration rules and the underlying dispute, the arbitral tribunal constituted for a particular dispute is best placed to assess the propriety and utility of evidence that may result from a Section 1782 application." The amicus curiae brief is available at https://www.supremecourt.gov/DocketPDF/20/20-794/179108/20210513141908841_2021.05.13%20ICC%20Amicus%-20Brief.pdf.

In any event, the enduring Circuit split will have a huge impact on litigants' approach to discovery in international arbitration and their strategy with regard to obtaining evidence in the United States and actually might lead to an increase in evidentiary forum shopping.