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GATHERING CROSS-BORDER EVIDENCE IN SUPPORT OF ARBITRATION AFTER ZF AUTOMOTIVE

by Michael Arada Greenop and Augusto García Sanjur

I. INTRODUCTION

Evidence gathering is critical to success in international arbitration. The more relevant documentary evidence a party has access to, the better positioned its legal team will be to assess the strength of its claims and establish the elements necessary for that party to succeed in its claims.

Commencing an arbitration is an important strategic decision which involves risks and costs. Before doing so, a party should carefully consider the prospects of success and the potential risks of failing, including any risk of counterclaims and liability for costs. This involves a detailed assessment of the factual and legal basis for a claim. In doing so, a party will need to identify what documentary evidence is available to support its claim, and what additional evidence might be required.

The challenge is that important evidence is sometimes outside of the parties' reach. In international arbitration, parties can face difficulties whilst obtaining or compelling the production of evidence, especially where the seat of arbitration is in a jurisdiction other than where the evidence is located. Part of the difficulty is that arbitral tribunals do not have the coercive means to force a party to produce documents or evidence in the same way that a court might. It is doubtful whether a tribunal can enforce a disclosure order against a third party, because it has no jurisdiction over third parties: The parties' agreement to arbitrate creates *inter partes* rights and obligations but does not generally bind third parties to the arbitration. Instead, a tribunal's powers are typically limited to encouraging or urging a third party to assist voluntarily. Further, it is now generally accepted in international arbitration that disclosure should be limited. For these reasons, international litigants can face

difficulty obtaining evidence for use in international arbitration proceedings.

So what tools are available to parties involved in international arbitration proceedings? Until recently, the United States (US) left the door open for procuring evidence from persons located in its territory in support of foreign arbitral proceedings via Section 1782 of Title 28 of the US Code ("Section 1782"). Section 1782 allows interested parties to a foreign proceeding to seek an order for production of a document or testimony from a person or entity in aid of the proceeding before a foreign or international tribunal. This enables parties to strategically collect evidence before commencing an arbitration, as well as during ongoing proceedings. However, it resulted in a controversy as to whether it was right for US domestic courts to allocate resources in support of private foreign arbitrations. It also raised the issue as to whether it had the counterproductive effect of undermining the efficiency of international arbitration if parties ended up fighting over burdensome discovery requests in a foreign jurisdiction.

In *ZF Automotive US, Inc. v. Luxshare, Ltd.* ("*ZF Automotive*"),[1] the US Supreme Court addressed the issue as to whether Section 1782 includes within its scope arbitral tribunals formed by a commercial arbitration agreement and arbitral tribunals constituted under the United National Commission of International Trade Law (UNCITRAL) Rules in accordance with a Bilateral Investment Treaty (BIT). The Supreme Court unanimously decided that it does not. At the time the judgment was rendered, there were suggestions that the door could still be open in relation to arbitrations under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"). However, subsequent to *ZF Automotive*, courts in the US shut that door too.

This article considers the implications of *ZF Automotive* for parties attempting to gather evidence for use in international arbitrations. It also aims to provide practical guidance on a range of tools that remain available to parties, especially from national courts located in jurisdictions other than the arbitral seat. Section II begins by describing the legislative and judicial evolution of Section 1782. Section III covers the

[1] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078 (U.S. 2022).

circuit split that Section 1782 gave rise to in relation to international arbitrations. It then outlines the use of Section 1782 in international practice before addressing the US Supreme Court's decision in *ZF Automotive*. In doing so, it also analyzes the US court decisions issued post-*ZF Automotive*, which have rejected the argument that International Centre for Settlement of Investment Disputes (ICSID) arbitrations fall within Section 1782's scope, and considers whether procedures before a Multilateral Investment Court ("MIC") may qualify. Section IV considers some of the tools that remain available to international litigants to collect evidence from the US and other jurisdictions for use in international arbitration proceedings. In particular, it analyzes the 2020 IBA Rules on the Taking of Evidence in International Arbitration ("IBA Rules"), selection of arbitral seats, international conventions, and recourse to national courts, as well as other special mechanisms to gather evidence.

The article concludes by addressing the concern in US courts that Section 1782 enabled parties to international arbitration proceedings to request evidence without the pre-authorization of an arbitral tribunal. This was said to have caused international arbitration proceedings to have an advantage over domestic ones when it came to the issue of evidence gathering from foreign jurisdictions. This was perceived as leading to a situation of a lack of uniformity. By way of a solution to this, this article explains that the typically "pro-arbitration" jurisdictions require the arbitral tribunal's consent before seeking assistance from a national court (except in the case of an interim measure that necessitates a degree of urgency). This approach could provide a blueprint for the US and other jurisdictions to follow in order to achieve greater uniformity.

II. EVOLUTION OF SECTION 1782

A. *Historical Background*

By way of a brief historical overview, the US Congress first began providing assistance to foreign institutions in the form of letters rogatory as early as 1855.[2]

[2] LUCAS V. M. BENTO, THE GLOBALIZATION OF DISCOVERY: THE LAW AND PRACTICE UNDER 28 U.S.C. § 1782, 31 (2019); Rebeca Mosquera, *La Obtención De Evidencia Bajo La Sección 1782 Del Título 28 Del Código De Los Estados Unidos Y Su Uso En Disputas Internacionales* in MÉTODOS ALTERNOS DE SOLUCIÓN DE CONFLICTOS EN PANAMÁ 152 (2016).

However, US assistance to foreign proceedings finds its origins in a 1930 dispute submitted to an international commission between the US and Canada involving a ship sinking. At the time, there was no mechanism available to the international commission to compel testimony of witnesses. The US Congress therefore approved a statute "authorizing commissioners or members of international tribunals to administer oaths, to subpoena witnesses and records and to punish for contempt".[3]

In 1948, the US Congress expanded its support to international proceedings and enacted Section 1782. This section eliminated the requirement for the requesting party to be a country participating in the proceedings.[4] However, it did not include the possibility to request tangible documents.[5] In 1949, the scope of the statute was expanded by replacing the term "civil action" with "judicial proceeding" in order to also capture criminal investigations.[6]

Following an upsurge in international commerce and the advent of several issues relating to evidence gathering in international litigation, the US Congress in 1958 decided to amend Section 1782.[7] The commission responsible for drafting worked closely with the Columbia Law Project on International Procedure, led by Professor Hans Smit.[8] The text of the new Section 1782 was enacted in 1964.

The most significant changes to Section 1782 included: (i) removal of the need for a proceeding to be pending or have commenced in order to qualify; and (ii) the inclusion of administrative and quasi-judicial proceedings, as well as investigative magistrates.[9] Further, the statute also allowed the production of tangible documents, whereas in the past it only allowed parties to request oral depositions.[10]

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[3] Hans Smit, *Assistance Rendered by the United States in Proceedings before International Tribunals*, 62 COLUM. L. REV. 1264, 1264 (1962); *see also* Mosquera (n 2) 153-154.

[4] Bento, *supra* note 2, at 32.

[5] *Id.* at 37.

[6] Mosquera, *supra* note 2, at 153-54.

[7] Bento, *supra* note 2, at 33-35.

[8] *Id.* at 35.

[9] *See* S. REP. NO. 88-1580, at 7 (1964).

[10] *Id.* The section was last reformed in 1996 that added "criminal investigations conducted before formal accusation" to the text of the statute.

One year later, in 1965, Professor Hans Smit, the principal drafter of the amendments to Section 1782, published an article, *International Litigation under the United States Code*, in which he suggested that the term "tribunal" as used in Section 1782 should be understood as including arbitral tribunals.[11]

B. *Text of the Current Section 1782*

By way of historical background, the subsections that follow explore some of the concerns raised regarding the Section 1782 criteria in the context of arbitration proceedings and will provide more context when compared to other jurisdictions. These concerns may reappear when Section 1782 requests reach US courts.

Since its inception, Section 1782's principal function has been to gather evidence in the format of "US style discovery".[12] However, Section 1782 does not provide for full discovery as it is understood in the context of domestic US litigation. Rather, unlike the US discovery process where litigants conduct discovery without court intervention, evidence gathering under Section 1782 is authorized and controlled by the courts.[13]

Section 1782 prescribes certain elements that need to be complied with before a court will be able to grant an application. Specifically, Section 1782 provides that "an interested person"[14] may request a district court of "the district in which a person resides or is found" to order that person "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". These elements are discussed further below.

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[11] Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026 (1965).

[12] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247-49 (2004); *see also generally* S. I. Strong, *Discovery under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 370-72 (2013).

[13] *See* John Fellas, *Obtaining Evidence From Persons or Entities In The United States For Use In An International Arbitration Proceeding In Another Country*, 12(1) INT'L J. OF ARAB ARB. 153, 166 (2020); PEDRO J. MARTINEZ-FRAGA, THE AMERICAN INFLUENCE ON INTERNATIONAL COMMERCIAL ARBITRATION – DOCTRINAL DEVELOPMENTS AND DISCOVERY METHODS 155 (2nd ed. 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214-15 (4th Cir. 2020); Caroline Simson, *Questions Remain About Powerful Foreign Discovery Tool*, LAW360 (Jun. 14, 2022), https://www.law360.com/articles/1502698/questions-remain-about-powerful-foreign-discovery-tool.

[14] The request can also be made by the foreign or international tribunal. However, we analyze whether tribunals of an international commercial or ad hoc arbitration under the UNCITRAL Rules in accordance with a BIT are covered by Section 1782 in Section III below.

1. An Interested Person

A Section 1782 request may be submitted *ex parte* by a party to the proceeding or by a non-party. The Supreme Court has expressed its view that an "interested person" is someone that "merely possess[es] a reasonable interest in obtaining the assistance".[15]

2. The District in Which a Person Resides or is Found

A Section 1782 request must be submitted to the district court of the relevant district in which the individual or company from whom discovery is sought resides regardless if it is a party or not to the proceedings.[16] For an individual, it is the place of residence or business.[17] In the case of a corporation, some district courts have decided that they either have general jurisdiction according to the place where a corporation is at home (where it was incorporated or where it has its principal place of business) or specific jurisdiction (in the place where its activities are continuous and systematic).[18]

Additionally, a Section 1782 request may be filed in the district where an individual may be "found" – meaning that a district court will have jurisdiction even if the relevant person is merely in transit within its territorial district.[19] For corporations conducting business in multiple states, the court will determine whether such a corporation can be "found" within a particular district and if it can be a target of service of process. This exercise involves examining the nexus or connection between the corporation and the forum where the application was made to determine if the connection is continuous and systematic.[20]

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[15] *Intel*, 542 U.S. at 257.

[16] *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 189 (2d Cir. 1999).

[17] *See* In re: Application of Gazprom Latin Am. Servicios, C.A., 2016 WL 3654590, at *10 (S.D. Tex. July 6, 2016); In re Hallmark Cap. Corp., 534 F. Supp. 2d 951, 952 (D. Minn. 2007); In re Escallon, 323 F. Supp. 3d 552, 557 (S.D.N.Y. 2018).

[18] Bento, *supra* note 2, at 87-91.

[19] *See* In re Edelman, 295 F.3d 171, 180 (2d Cir. 2002); In re Eli Lilly & Co., No. JKB-20-0150, 2022 WL 152376, at *3 (E.D. Va. Jan. 18, 2022).

[20] *See* Fellas, *supra* note 13, at 158 (discussing In re Del Valle Ruiz, 939 F.3d 520, 533 (2d Cir. 2019); *In re Eli Lilly*, 2022 WL 152376, at *8.

3. To Give His Testimony or Statement

A district court may subpoena an individual to render testimony through a deposition. Section 1782 follows the Federal Rules of Civil Procedure. Depositions in the US are conducted by the applicant's attorneys while the attorneys of the deposed individual may also be present during the deposition.[21]

4. To Produce a Document or Other Thing

A district court may also require the requested target to produce documents. This aspect of Section 1782 is significant because of the practice by international companies of storing documents within the servers of third parties often located in the US,[22] such as cloud computing providers (e.g., Google, Microsoft, AWS, and others).

5. Use in a Proceeding

The proceeding need not have commenced, nor must it be imminent (only within "reasonable contemplation").[23] As the application to a court may be filed even before the arbitral tribunal has been constituted, scholars expressed concerns that Section 1782 could lead to fishing expeditions[24] that will be outside of the arbitral tribunal's control. To avoid this outcome, the US Supreme Court decided that Section 1782 requests that would be unduly intrusive or burdensome could be trimmed or even

[21] H. M. Elul & R. E. Mosquera, *28 U.S.C. Section 1782: U.S. Discovery in Aid of International Arbitration Proceedings*, *in* INTERNATIONAL ARBITRATION IN THE UNITED STATES 393, 394 (Laurence Shore et al. eds., 2017).

[22] *See* GOOGLE DATA CENTERS, https://www.google.com/about/datacenters/locations/ (last visited Jul. 28, 2023); AWS GLOBAL INFRASTRUCTURE, AWS GLOBAL INFRASTRUCTURE MAP, https://aws.amazon.com/about-aws/global-infrastructure/ (last visited Jul. 28, 2023); MICROSOFT AZURE, AZURE GEOGRAPHIES, https://azure.microsoft.com/en-gb/global-infrastructure/geographies/#customer-stories (last visited Jul. 28, 2023); *see also* In re Grupo Unidos Por El Canal, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *9 (D. Colo. Apr. 17, 2015). Case law has expressed the view that there needs to be a nexus with the digital evidence and the United States for a Section 1782 request for digital evidence located in the United States to be successful. In re Kreke Immobilien KG, No. 13 Misc. 110, 2013 WL 5966916, at *4 (S.D.N.Y. Nov. 8, 2013).

[23] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004); *see also* In re Hattori, No. 21-MC-80236-TSH, 2021 WL 4804375, at *3 (N.D. Cal. Oct. 14, 2021) ("Applicant has shown a 'reasonable contemplation' of litigation because the discovery sought is for purposes of a civil lawsuit to be filed in Japan, and for a criminal complaint to be filed in Japan that will initiate a criminal investigation."); In re Med. Corp. Seishinkai, No. 21-mc-80160-SVK, 2021 WL 3514072, at *2 (N.D. Cal. Aug. 10, 2021) ("Applicant requests this discovery for use in a civil action that it intends to file in Japan once it learns the identity of the Google account users responsible for the relevant postings.").

[24] Giorgio Sassine, *There Should be an Answer to § 1782(a) – as to whether its scope includes private arbitral tribunals*,'3(1) MCGILL J. OF DISP. RES. 1, 32 (2016).

rejected by the court determining the application.[25]

The fact that Section 1782 enables an interested person to request discovery from a court without the permission of the arbitral tribunal or even prior to the tribunal being constituted has been a controversial issue. This approach is said to conflict with the notion that, in accordance with the arbitration agreement, the arbitral tribunal, and not a court, should direct and control the evidentiary procedure. Some scholars have suggested that, if a litigant acts unilaterally in this way, it may circumvent the arbitration agreement,[26] while others do not share this view.[27]

Arguing in favour of the use of such tools prior to the commencement of an arbitration, scholars have suggested that there may be advantages to pre-arbitration production of evidence, such as helping the parties reach a settlement rather than commencing protracted arbitration proceedings.[28]

6. In a Foreign or International Tribunal

This statutory element is the most debated issue in relation to Section 1782 – i.e., whether an arbitral tribunal appointed by the parties qualifies as a "foreign or international tribunal". This discussion is addressed below in Section III.

C. *Intel Test*

Even if all of the elements required by the text of Section 1782 are satisfied, a district court can exercise its discretion to either grant or decline the application.[29] In 2004, the US Supreme Court provided four factors to be considered when deciding on a Section 1782 request, discussed in turn below.[30]

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[25] *See Intel*, 542 U.S. at 245; In re Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 730 (6th Cir. 2019).

[26] FRANZ T. SCHWARZ AND CHRISTIAN W, KONRAD, THE VIENNA RULES: A COMMENTARY ON INTERNATIONAL ARBITRATION IN AUSTRIA ¶¶ 20-256 (2009).

[27] TOBIAS ZUBERBÜHLER ET AL., IBA RULES OF EVIDENCE: COMMENTARY ON THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION 91 (2d ed. 2022) ("Art. 3(9) [of the IBA Rules on Taking of Evidence] does not expressly prohibit parties from involving a local court without first seeking leave from arbitral tribunal.").

[28] Martinez-Fraga, *supra* note 13, at 155, 164.

[29] In re Google Inc., No. 14-mc-80333-DMR, 2014 WL 7146994, at *2 (N.D. Cal. Dec. 15, 2014).

[30] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 264 (2004); In Re Application of Pola Mar., Ltd., No. CV 416-333, 2017 WL 3714032, at *3 (S.D. Ga. Aug. 29, 2017).

1. Whether the Person From Whom Discovery is Sought is a Participant in the Foreign Proceeding

The Supreme Court expressed the view that most foreign tribunals have jurisdiction over the parties appearing before them. Accordingly, arbitral tribunals may order the parties to produce evidence. On the other hand, tribunals do not usually have jurisdiction over non-parties to the proceedings, and it is not possible to order discovery from such non-parties.[31] Accordingly, if the requested target of the order is not a party to the dispute, this will tend to favor the application being granted.

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 US Federal-Court Judicial Assistance

A court shall also assess whether the relevant foreign or international tribunal will accept the evidence requested by the Section 1782 application. In this regard, "the party resisting discovery must point to 'authoritative proof' that the foreign tribunal would reject the evidence sought".[32] Such a standard is generally met where: "a representative of the foreign sovereign or the foreign tribunal itself has made clear its opposition to the petitioner's request";[33] "the parties arrived at the foreign tribunal with 'bargained-for expectations' based on a deliberative process concerning the governing procedural process and discovery rule";[34] and "the foreign proceedings . . . are the type that would otherwise bar petitioners from presenting evidence and engaging in discovery" (e.g., evidence in criminal proceedings that are under the responsibility of public authorities).[35]

3. Whether the Section 1782 Request Conceals an Attempt to Circumvent Foreign Proof-Gathering Restriction or Other Policies of a Foreign Country or the US

A district court may reject the Section 1782 request when the party opposing the discovery proves that the foreign tribunal has a "definitive determination" to not

[31] *Intel*, 542 U.S. at 244; *In re Google Inc*., 2014 WL 7146994 at *3.

[32] In re Veiga, 746 F. Supp. 2d 8, 23-24 (D.D.C. 2010).

[33] In re Barnwell Enterprises Ltd., 265 F. Supp. 3d 1, 10-11 (D.D.C. 2017).

[34] In re Application of Caratube Int'l Oil Co.., LLP, 730 F. Supp. 2d 101, 106; *In re Barnwell Enterprises*, 265 F. Supp. 3d at 11.

[35] Lazaridis v. Int'l Ctr. for Missing & Exploited Child., Inc., 760 F. Supp. 2d 109, 114 (D.D.C. 2011).

accept the evidence obtained in discovery.[36] For instance, when the parties try to circumvent the arbitration agreement or the applicable law – e.g., when a Section 1782 application constitutes an attempt to circumvent the arbitral tribunal's control over the arbitration's procedure.[37] Nevertheless, it is not a requirement for the evidence sought to be discoverable in the foreign country for a Section 1782 application to be granted.[38]

4. Whether the Request is Otherwise Unduly Intrusive or Burdensome

This factor protects the requested party from overly broad discovery requests that may become fishing expeditions.[39] It also addresses situations in which the requested information includes material that is protected by attorney-client privilege or attorney work-product.[40]

In summary, this section has described the historical evolution of Section 1782 and the key elements that must be satisfied. Assuming the elements are met in a particular case, a district court has the discretion to grant the request and will be guided by the *Intel* test. It is important to note that neither the statutory elements of Section 1782 nor the *Intel* test require exceptional circumstances or a degree of urgency for a party to seek assistance from a court before the arbitral tribunal is formed.[41] This differs from other jurisdictions that only allow a party to directly request assistance from a court through an interim measure which involves a degree of urgency.

The next section will address the circuit split regarding the availability of Section 1782, as well as the decision in *ZF Automotive*, in which the Supreme Court held that the Section 1782 procedure is not available for international commercial and ad hoc

[36] In re Chevron Corp., 633 F.3d 153, 163 (3d Cir. 2011).

[37] *In re Application of Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d at 107.

[38] *In re Chevron Corp*, 633 F.3d at 163; In re Hallmark Cap. Corp., 534 F. Supp. 2d 951, 958 (D. Minn. 2007).

[39] In re Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 730 (6th Cir. 2019).

[40] In re Application for an Order Pursuant to 28 U.S.C. § 1782, 286 F. Supp. 3d 1, 6-7 (D.D.C. 2017).

[41] Several US courts, based on section 7 of the Federal Arbitration Act (FAA), have held that a court is allowed to grant a request for evidence gathering before an arbitration has started. These requests are similar to provisional measures, as they require proof of an exceptional circumstance. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2580-81 (3d ed. 2021).

arbitration under the UNCITRAL Rules according to a BIT. The analysis will then turn to the post-*ZF Automotive* judgments that have stated that ICSID tribunals are not included within the scope of Section 1782. Additionally, it will analyze whether proceedings before a MIC might be included within the scope of Section 1782.

III. DEBATE AND USE OF SECTION 1782

A. *Circuit Split*

Between 1964 and 2004, the accepted rule was that Section 1782 did not apply to arbitral tribunals.[42] One of the most exemplary decisions analyzing this issue was the judgment in *NBC v. Bear Stearns*, issued by the United States Court of Appeals for the Second Circuit.[43]

1. *NBC v. Bear Stearns & Co.*

The US broadcasting company NBC had a dispute with the Mexican television channel TV Azteca. After NBC's claim was registered with the International Chamber of Commerce (ICC) but before the tribunal was appointed, NBC requested financial documents of TV Azteca that were in possession of different banks located in the US, including Bear Stearns. The US District Court for the Southern District of New York quashed the requests, and NBC appealed.

The question before the Court of Appeals was whether an ICC arbitration, seated in Mexico, was a proceeding in a foreign or international tribunal as those words are used in Section 1782. The Second Circuit answered the question in the negative.

The starting point of the court's analysis was that the term "foreign or international tribunals" neither unambiguously excluded nor included private arbitral panels. Accordingly, the Second Circuit looked to the legislative history and purpose of Section 1782 to determine the meaning of the term "foreign or international tribunals". In doing so, the Second Circuit decided to adopt a restrictive view of the term such that arbitral tribunals of this type were not included within the scope of

[42] *See* Strong, *supra* note 12, at 302; Fellas, *supra* note 13, at 155; La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008) ("Prior to 2004, the prevailing view was that § 1782 did not encompass private, international arbitration proceedings.").

[43] Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).

the section.[44] According to the Second Circuit, the legislative history showed that the revisers in 1964 "had in mind only governmental authorities, such as administrative or investigative courts, acting as state instrumentalities or within the authority of the state."[45] The court concluded that when the statute mentions an international tribunal, it only refers to intergovernmental tribunals as this term derived from provisions referring to the US-German Mixed Claims Commission.[46] The Second Circuit noted that "those international arbitrations were intergovernmental, not private arbitrations."[47]

The approach taken by the Second Circuit in *NBC* was later followed by other courts.[48] However, in 2004, the Supreme Court in *Intel* opened the door of Section 1782 to international arbitration proceedings.

2. *Intel Corporation v. Advanced Micro Devices, Inc.*

In *Intel*,[49] the company Advanced Micro Devices ("AMD") filed a complaint against Intel with the European Commission. To support its complaint, AMD applied under Section 1782 to the US District Court for the Northern District of California for an order requiring Intel to produce potentially relevant documents.

Although the case was not related to an international arbitration, the US Supreme Court appeared to invite the application of Section 1782 to arbitral tribunals.[50] The Supreme Court had to decide whether the European Commission acted as a tribunal for purposes of Section 1782. The Supreme Court decided in the affirmative. Importantly for international arbitration, the Supreme Court's judgment cited Professor Hans Smit's article of 1965. In this article, Professor Smit expressed his view

[44] *See* Lawrence Shore, *State Courts and Document Production*, *in* 6 WRITTEN EVIDENCE AND DISCOVERY IN INTERNATIONAL ARBITRATION: NEW ISSUES AND TENDENCIES, DOSSIERS OF THE ICC INSTITUTE OF WORLD BUSINESS LAW 61-62 (Teresa Giovannini & Alexis Mourre eds., 2009).

[45] *Nat'l Broad. Co.*, 165 F.3d at189.

[46] *Id.*

[47] *Id. See also* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).

[48] *See* Strong, *supra* note 12, at 302 ("Initially, U.S. courts opposed the use of section 1782 in arbitration-related matters."); Fellas, *supra* note 13, at 155.

[49] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

[50] *See* Shore, *supra* note 44, at 63.

that the term "tribunal" in Section 1782 included arbitral tribunals.[51]

It should be noted that the Supreme Court stated that the authority to grant a Section 1782 application did not mean that the district court was required to do so. Instead, district courts were expected to exercise their discretion, considering the factors discussed above.

Post-*Intel*, Section 1782 placed the US in somewhat of an "outlier" position in terms of the level of national court assistance available to foreign arbitral tribunals and parties for the purpose of evidence gathering.[52] This was because Section 1782 allowed interested persons to circumvent the arbitral tribunal's control of the process when seeking the assistance of a national court to gather evidence.

After the *Intel* decision, US federal courts interpreted this judgment inconsistently in relation to the question as to whether Section 1782 includes arbitral tribunals. Whereas the Fourth and Sixth Circuits included arbitral tribunals within the scope of Section 1782,[53] the Second, Fifth, and Seventh Circuits decided to exclude them.[54]

3. *Servotronics, Inc. v. Boeing Co. and Servotronics, Inc. v. Rolls-Royce PLC*

The circuit split in relation to Section 1782 can be illustrated by the *Servotronics* cases. In a case before the Court of Appeals for the Fourth Circuit, Servotronics filed an *ex parte* request to obtain testimony from three Boeing employees residing in South Carolina to be used in a London-seated arbitration administered by the

[51] *Intel*, 542 U.S. at 258.

[52] *See* Shore, *supra* note 44, at 66-67.

[53] *See* Linda H. Martin et al. , *The Circuit Split on the Scope of Section 1782 Discovery in the United States: Will it Ever Get Resolved?*, KLUWER ARBITRATION BLOG (Sept. 14, 2021), https://arbitrationblog.kluwerarbitration.com/2021/09/14/the-circuit-split-on-the-scope-of-section-1782-discovery-in-the-united-states-will-it-ever-get-resolved/; Abdul Latif Jameel Transp. Co. v. Fedex Corp., 939 F.3d 710 (6th Cir. 2019); In re P.T.C. Prod. & Trading Co., AG, No. 1:20-mc-00032-MR-WCM, 2020 WL 7318100, at *2 (W.D.N.C. Dec. 11, 2020); Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 211 (4th Cir. 2020).

[54] *See* Martin et al., *supra* note 53; In re Dubey, 949 F. Supp. 2d 990, 995 (C.D. Cal. 2013); In re Arb. between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins. Co. & Ace Bermuda Ltd., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009); La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008).

Chartered Institute of Arbitrators.[55] The Court of Appeals granted the request after indicating that Section 1782 reflected a purposeful decision by Congress to "authorize U.S. district courts to provide assistance to foreign tribunals as a matter of public policy".[56]

However, in a separate application involving the same facts, Servotronics filed an *ex parte* request to obtain documents from Boeing's headquarters in Illinois.[57] The Court of Appeals for the Seventh Circuit took a different approach and rejected the request. It found that Section 1782 does not include arbitral tribunals and that, if arbitral tribunals were included, this would conflict with the Federal Arbitration Act (FAA). The court pointed out that Section 1782 would confer greater rights on international arbitration tribunals than to domestic ones. In particular, subject to Chapter 1 of the FAA, only the arbitral tribunal may request a court to order the production of documents or issue subpoenas in domestic arbitrations, while Section 1782 allows a party to the proceedings (and even an interested non-party) to petition a court to do so unilaterally.[58]

Due to this circuit split, whether the targets of the request were located or found in a circuit with a favorable interpretation of the statute became an important consideration for applicants to determine the viability of a Section 1782.[59] As the Second Circuit did not include arbitral tribunals within the scope of Section 1782, the targets that resided or were found in New York, Vermont and Connecticut would not be compelled to produce evidence.[60] The same situation would occur in relation to

[55] *Servotronics, v. Boeing*, 954 F.3d at 211.

[56] *Id.* at 215.

[57] Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 695 (7th Cir. 2020).

[58] *Id.*

[59] *See* Simson, *supra* note 13.

[60] *See* Fellas, *supra* note 13, at 166. In one case, the Second Circuit held that a private arbitration was considered as a foreign tribunal. In re Ex parte Application of Kleimar N.V., 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) ("The Court also finds that the LMAA is a 'foreign tribunal' within Section 1782.") Then, in a later judgment the Second Circuit held that NBC still constituted good law. In re Petrobras Sec. Litig., 393 F. Supp. 3d 376, 385 (S.D.N.Y. 2019).

targets located in the Fifth Circuit (i.e. Mississippi, Louisiana, and Texas)[61] and the Seventh Circuit (i.e. Indiana, Illinois, and Wisconsin).[62]

The circuits where Section 1782 requests in relation to arbitration were successful included the Fourth Circuit (i.e. West Virginia, Virginia, Maryland, North Carolina and South Carolina) and the Sixth Circuit (i.e. Ohio, Michigan, Tennessee and Kentucky).[63]

B. *Use of Section 1782 in International Practice*

Section 1782 has been used in relation to international arbitrations seated in a multitude of countries.[64] However, Section 1782 requests in connection with international arbitration proceedings have been criticized for having given rise to widespread satellite or separate litigations on discovery issues.[65] These satellite litigations were said to have damaged the purpose of arbitration as a "one-stop shop" for parties to resolve their disputes. Further, these satellite litigations could jeopardize confidentiality as requests for evidence in public courts may result in the dispute becoming public knowledge.

The fact that a subject could be compelled to produce evidence located in the US and the foreign counterparty did not have the same obligation – because of the evidentiary rules of the court where its documents or information were located – was

[61] *See* La Comision Ejecutiva Hidroelecctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008).

[62] *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, (July 6, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/14/how-should-the-united-states-supreme-court-have-decided-in-the-controversy-over-28-u-s-c-%C2%A7-1782a/.

[63] *See* Fellas, *supra* note 13, at 166.

[64] *See* Aymeric Discours & Nisrin Abelin, *France: Foreign Discovery Under 28 US Code Section 1782 In French Proceedings*, MONDAQ (Dec. 15, 2016), https://www.mondaq.com/france/civil-law/553304/foreign-discovery-under-28-us-code-section-1782-in-french-proceedings; Yanbai Andrea Wang, *Exporting American Discovery*, 87 UNIV. CHICAGO L. REV. 2089, 2115 (2020) ("[Between 2005 and 2017] a steady number are for use in commercial arbitrations (approximately 9.9 percent) . . . and investor state arbitrations (approximately 2.5 percent)."); Louis Christe, *The Use of 28 U.S.C. § 1782 in Swiss Seated Arbitrations*, 39(3) ASA BULL. 521, 533-44 (2021); Lawrence S. Schaner & Brian S. Scarbrough, *The Arbitration Procedure – U.S. Discovery in Aid of International Arbitration and Litigation: The Expanded Role of 28 U.S.C. § 1782*, AUSTRIAN Y.B. INT'L ARB. 299, 299, 305-14 (2008); Karsten Faulhaber & Ilka H. Beimel, *The Best of Both Worlds? The Power of 28 U.S.C. § 1782 in International Commercial Arbitration*, 20(1) SCHIEDSVZ|GERMAN ARB. J. 1, 2 (2022); Calvin A. Hamilton, *What U.S.C. §1782 means for International Commercial Arbitrations in Spain*, 3 SPAIN ARB. REV. 23, 31-33 (2008).

[65] BORN, *supra* note 41, at 2586.

perceived as a comparative disadvantage for US companies involved in international arbitration proceedings.[66] It was also a risk for international companies with significant information or data stored within the US on third-party servers. For instance, as mentioned earlier, due to the use of cloud computing for international companies to store their information on third-party servers, certain documents could be subject to a Section 1782 request.[67] The benefits of using US cloud services to store data made companies vulnerable to requests for discovery under Section 1782. If companies stored their data on cloud services providers located in US territory, then their counterparties could request a district court to order the cloud service company to produce documents without the pre-authorization of the arbitral tribunal or even before it was formed.

The circuit split created the need for certainty in the international arbitration community. Scholars expressed the need for a pronouncement from the Supreme Court as to whether Section 1782 applied to international arbitration.[68] The call was answered by the Supreme Court in June 2022, as discussed below.

C. *ZF Automotive US, Inc. v. Luxshare, Ltd.*

In *ZF Automotive*, the Supreme Court resolved the circuit split and decided that private adjudicatory bodies (i.e., arbitral tribunals) constituted for an international commercial arbitration and under the UNCITRAL Rules pursuant to a BIT did not count as "foreign or international tribunals" for the purposes of Section 1782. The Supreme Court consolidated two cases where this issue was debated: the first case was related to an international commercial arbitration tribunal, and the second related to an investment tribunal.

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[66] *See* Anthony B. Ullman & Diora M. Ziyaeva, *Section 1782: can arbitration parties come to the US to obtain information located abroad?*, 2023 ARB. REV. OF THE AMS. 2023, 148-50 (2023), *available at* https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2023/article/section-1782-can-arbitration-parties-come-the-us-obtain-information-located-abroad.

[67] *See generally* Christophe Guibert de Bruet & Johannes Landbrecht, *Cloud computing and US-style discovery: new challenges for European companies*, 32 ARB. INT'L 297 (2016); Gabriela B. Clark, *Interpretative Challenges of 28 U.S.C. § 1782 in the Aftermath of* Intel Corp. v. Advanced Micro Devices, Inc., 53 VAND. L. REV. 1377 (2021).

[68] *See* Fellas, *supra* note 13, at 169; Martin et al., *supra* note 53.

The first case, between ZF Automotive US, Inc. (a company located in Michigan) and Luxshare, Ltd. (a company located in Hong Kong), related to a contract providing for arbitration before the German Institution of Arbitration ("DIS"). Whilst preparing the DIS arbitration, Luxshare filed an *ex parte* request to the US District Court for the Eastern District of Michigan[69] seeking evidence from ZF Automotive and two of its senior officers. The request was granted. ZF Automotive then requested a stay from the Court of Appeals for the Sixth Circuit, which was rejected. However, the Supreme Court overturned that decision and granted the stay and judicial review of the decision.

The second case related to a dispute between Lithuania and a Russian investor who argued that Lithuania expropriated his investment in a Lithuanian bank. Then, a Russian corporation, The Fund for Protection of Investors' Rights in Foreign States, became the investor's assignee. Based on the BIT between Lithuania and Russia, the Fund initiated an ad hoc arbitration under the UNCITRAL Rules against Lithuania.[70] Prior to the arbitral tribunal being constituted, the Fund filed an *ex parte* request in the US District Court for the Southern District of New York. The application was granted. Even though the Second Circuit had previously rejected the notion that arbitral tribunals were included within the scope of Section 1782, it then concluded that an ad hoc panel under the UNCITRAL Rules in accordance with a BIT was "foreign or international" rather than private in nature. Thus, an ad hoc tribunal could be (and was) included within the scope of Section 1782.

The Supreme Court first analyzed whether the phrase "foreign or international tribunal" in Section 1782 included private adjudicatory bodies or only governmental

[69] The US District Court for the Eastern District of Michigan belongs to the Sixth Circuit that usually includes arbitral tribunals within the scope of Section 1782.

[70] Noah Rubins & Evgeniya Rubinina, *Investment Treaty Arbitration: Russia*, GLOBAL ARBITRATION REVIEW (last updated July 28, 2022), https://globalarbitrationreview.com/insight/know-how/investment-treaty-arbitration/report/russia (citing Fund for the Protection of Investors' Rights in Foreign States v. Lithuania, PCA Case No. 2019-48, Award (Jul. 1, 2022) (not public)). There have been different reports that have indicated that the arbitration was administered by the Permanent Court of Arbitration. For this reason and due to its similarities with the elements of an ad hoc arbitration mentioned in the decision, we consider that the US Supreme Court decision also leaves arbitrations administered by the PCA outside of the scope of Section 1782. *See id.*

or intergovernmental bodies.[71] Finding that it only included governmental or intergovernmental bodies,[72] the Supreme Court then proceeded to determine whether arbitral panels qualified as either governmental or intergovernmental.

As to the first part of its analysis, the Supreme Court indicated that if the term "tribunal" was taken in isolation that "would be a good case for including private arbitral panels."[73] However, the Supreme Court then interpreted Section 1782 based on the surrounding context.[74] The Supreme Court held that "'foreign' takes on its more governmental meaning when modifying a word with potential governmental or sovereign connotations"[75] and that "tribunal" is a word with governmental or sovereign connotations.[76] When these two are combined, they represent a tribunal belonging to a foreign nation rather than just simply "located in a foreign nation."[77]

Analyzing the term "foreign tribunal", the Supreme Court held that it is a body that follows the practice and procedures prescribed by the government that conferred authority upon it instead of a private adjudicative body created by a parties' contract.[78] The Supreme Court expressed the view that a foreign tribunal is a tribunal imbued with governmental authority by one nation and that an international tribunal is imbued with governmental authority by multiple nations.[79]

Moreover, the Supreme Court decided that according to the statutory history of Section 1782, the range of governmental and intergovernmental bodies included in Section 1782 shall be based on the principle of comity.[80] The Supreme Court asked why Congress would lend the resources of the district courts to aid purely private

[71] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022).

[72] *Id.* at 2089.

[73] *Id.* at 2086.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 2087.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2088.

bodies.[81] Further, similar to the Second Circuit in *NBC*, the Supreme Court indicated that Section 1782 would conflict with the FAA approach, as it would grant greater rights to parties in international arbitrations than in domestic ones. The Supreme Court stated that Section 1782 allows a pre-arbitration request from an interested party and that the FAA only allows a request once an arbitration has commenced, and the request needs to be made by the arbitral tribunal instead of an interested party.[82]

After the Supreme Court decided that the phrase "foreign or international tribunal" in Section 1782 included only governmental or intergovernmental bodies, the Supreme Court analyzed the second question, namely whether private adjudicative bodies (such as the tribunal of the DIS arbitration) are governmental or intergovernmental.[83] The Supreme Court found the DIS tribunal not to be a governmental body since no government is involved in its creation or in setting its procedures.[84]

In the situation of the ad hoc tribunal provided for in the BIT between Lithuania and Russia, the Supreme Court indicated that the question was more complex. The Supreme Court asked whether States intended to confer governmental authority on an ad hoc panel.[85] The Supreme Court decided that an ad hoc arbitration panel does not have governmental authority, as the BIT does not in itself create the panel, and its members are not public officials or officially affiliated with Lithuania or Russia.[86] The Supreme Court held that a body does not possess governmental authority just because parties to a treaty agree to arbitrate before it.[87] The Supreme Court

[81] *Id.*

[82] *Id.*

[83] *Id.* at 2089.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 2090.

[87] *Id.* at 2090-91. *See also* Dana McGrath, *"I Can See Clearly Now the Rain Is Gone . . . " U.S. Supreme Court Definitively Holds that Section 1782 Does Not Permit Discovery Assistance from U.S. Courts for Private Foreign or International Arbitrations*, KLUWER ARBITRATION BLOG (Jun. 14, 2022), https://arbitrationblog.kluwerarbitration.com/2022/06/14/i-can-see-clearly-now-the-rain-is-gone-u-s-supreme-court-definitively-holds-that-section-1782-does-not-permit-discovery-assistance-from-u-s-courts-for-private-foreign-or-i/.

established that the main question is whether the Contracting States intended that the tribunal should exercise governmental authority.[88]

The Supreme Court decided that only governmental or intergovernmental authorities can be considered as a "foreign or international tribunal" under Section 1782. Therefore, a private adjudicative body such as a commercial arbitral tribunal or a tribunal constituted under the UNCITRAL Rules according to a BIT is not a "foreign or an international tribunal" because it does not constitute a governmental or intergovernmental authority. As such, evidence to be used in a proceeding before these arbitral tribunals cannot be obtained through Section 1782.

D. *Implications for International Arbitration*

As the judgment precluded the use of Section 1782 for commercial and ad hoc arbitrations under the UNCITRAL Rules according to a BIT, the legal community started to question whether arbitrations under the ICSID Convention and proceedings before a MIC may still fall within the scope of Section 1782 as delimited by the US Supreme Court.[89]

The judgment left the door of Section 1782 open only for cases before governmental and intergovernmental adjudicatory bodies. To determine whether an entity complies with this criterion, one must consider whether the Contracting States intended for the tribunal to exercise governmental authority.

On this topic, the Supreme Court expressed that it did not attempt to prescribe how governmental and intergovernmental bodies should be structured as they may take many forms, but it referred to the following factors which may provide guidance as to what a court will take into consideration: 1) whether the treaty itself creates the decision-making body;[90] 2) the involvement of government funding;[91] 3) official affiliation of the members of the tribunal with the Contracting Parties or any other

[88] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2091 (2022).

[89] Simson, *supra* note 13.

[90] Instead of just providing for the rules of appointment as the UNCITRAL Rules.

[91] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2090 (2022).

governmental or intergovernmental entity;[92] 4) State involvement in the formation of the bodies;[93] and 5) whether the instrument indicates the place where the decision-making body will meet.[94]

1. Arbitrations under the ICSID Convention and Arbitrations under the ICSID Additional Facility Rules

The ICSID Convention is a multilateral treaty ratified by 158 parties.[95] It was created to increase and protect foreign investment while addressing a concern that national courts may have a potential bias in favour of the host States in the event of a dispute with foreign investors.[96] As a consequence, several States agreed to develop a mechanism in which the financial interests of investors in host States could be protected in an international forum.[97] The ICSID Convention created an intergovernmental centre called ICSID. Although ICSID itself does not adjudicate disputes, it provides the centre under whose authority arbitration panels may be convened to adjudicate disputes between international investors and host governments in Contracting States.[98]

The Contracting States to the ICSID Convention recognize an ICSID's tribunal power to adjudicate disputes. The Contracting States empowered ICSID tribunals to render a judgment of mandatory enforcement – an award rendered by a tribunal acting under the ICSID Convention receives the same treatment as if "it w[as] a final judgment of a court" in a State that has ratified the ICSID Convention.[99] Awards issued under the ICSID Convention are not subject to review in a Contracting State other than to confirm the authenticity of the award. On the other hand, awards

[92] *Id.*

[93] *Id.* at 2090-91.

[94] *Id.* at 2091.

[95] Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

[96] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION A COMMENTARY 4 (2d ed. 2009).

[97] *See* James C. Baker & Lois J. Yoder, *ICSID and the Calvo Clause: a Hindrance to Foreign Direct Investment in LDCs*, 5(1) OHIO STATE J. DISP. RES. 75, 76-80 (1989).

[98] Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela, 863 F.3d 96, 101 (2d Cir. 2017).

[99] ICSID Convention, *supra* note 95, art. 54; SCHREUER ET AL., *supra* note 96, at 1142-43.

where the New York Convention applies, for example non-ICSID Convention awards including the ones issued under the Additional Facility Rules or the UNCITRAL Rules, are subject to review before national courts and may be set aside or annulled based on the domestic law or the New York Convention.[100]

Owing to these types of considerations, prior to the decision on *ZF Automotive*, US courts regularly recognized ICSID tribunals as international tribunals for the purposes of Section 1782.[101] However, *ZF Automotive* appeared to have caused a paradigm shift. In two recent judgments, district courts located in New York have recognized that arbitral tribunals created by a BIT and by ICSID are not foreign or international tribunals. Thus, they are not within the scope of Section 1782.

(i) *In Re Alpene Ltd.*

In October 2022, the first judgment post-*ZF Automotive* was issued *In Re Alpene Ltd.*[102] Whilst interpreting *ZF Automotive*, the US District Court for the Eastern District of New York decided that ICSID tribunals fell outside of the scope of Section 1782.

Alpene Ltd., a corporation from Hong Kong, requested discovery from a New York resident in connection with an ICSID arbitration against Malta. The arbitration was based on the Malta-China BIT.[103] The court recognized that, before *ZF Automotive*, "federal courts uniformly held that investor-state arbitrations were eligible for § 1782 discovery."[104] However, it decided that an ad hoc panel constituted under the UNCITRAL Rules pursuant to a BIT and an ICSID tribunal are different.[105] This difference stemmed from the fact that the ICSID Convention creates a permanent institution and ICSID awards "are binding as a matter of public law in all ICSID

[100] SCHREUER ET AL., *supra* note 96, at 1142-43.

[101] In re Ex parte Application of Eni S.p.A. for an Ord. Pursuant to 28 U.S.C. § 1782 Granting Leave to Obtain Discovery for Use in Foreign Proc., No. 20-mc-334-MN, 2021 WL 1063390, at *3 (D. Del. Mar. 19, 2021); Islamic Republic of Pak. v. Arnold & Porter Kaye Scholer LLP, Misc. Action No. 10-103 (RMC), 2019 WL 1559433, at *7 (D.D.C. Apr. 10, 2019).

[102] In re Alpene, Ltd., No. 21 MC 2547 (MKB) (RML), 2022 WL 15497008 (E.D.N.Y. Oct. 27, 2022).

[103] *Id.* at *2.

[104] *Id.* at *4.

[105] *Id.* at *3.

member states."[106] However, the court held that the fact that courts play a role in the enforcement of awards "does not give an arbitral panel 'governmental authority'."[107] It further held that the principal purpose of Section 1782 was "comity,"[108] and stated that the "statute was intended to promote assistance and cooperation between the United States and foreign countries."[109] The court opined that it was hard to imagine ICSID tribunals providing "reciprocal discovery assistance for United States proceedings."[110] It also stated that "ICSID (and investor-state arbitration generally) did not yet exist in 1964 when § 1782 was amended to include the phrase 'foreign or international tribunals'."[111]

(ii) *In Re Webuild S.p.A.*

In December 2022, in another case post-*ZF Automotive*, it was also decided that ICSID tribunals fell out of the scope of Section 1782. In the case *In Re WeBuild S.p.A.*, the US District Court for the Southern District of New York decided a motion to vacate an order granting Webuild an *ex parte* application for discovery pursuant to Section 1782 related to an ICSID arbitration pursuant to the Panama-Italy BIT.[112] The issue before the court was whether the arbitration panel at issue – an ICSID panel – was a foreign or international tribunal according to Section 1782. The court held that it was not.[113] The court analyzed the factors mentioned in *ZF Automotive* and established that an ICSID tribunal formed in accordance with a BIT and the ICSID Convention was similar to an ad hoc arbitral tribunal created under the UNCITRAL Rules pursuant to a BIT.[114]

In their submissions, the parties compared ad hoc arbitral tribunals and ICSID

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] In re Webuild S.p.A., No. 1:22-mc-00140-LAK, 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

[113] *Id.*

[114] *Id.*

tribunals constituted under the ICSID Convention. Webuild attempted to draw a distinction between an ICSID arbitral tribunal and an ad hoc tribunal created under the UNCITRAL Rules pursuant to a BIT – such as the UNCITRAL arbitration of *ZF Automotive*.[115] Webuild argued that, unlike the ICSID Convention and the ICSID Arbitration Rules, the "UNCITRAL Rules do not regulate the jurisdiction or the annulment and enforcement of ad hoc awards."[116] The UNCITRAL Rules did not create a permanent body such as the ICSID Convention.[117] ICSID plays a greater role in administering disputes than the Permanent Court of Arbitration (PCA) in ad hoc arbitrations under its administration.[118] In comparison to ICSID (which may designate panels to review awards and mandate rules different from those selected by the parties), the PCA only provides for administrative support to the arbitral tribunal.[119]

Moreover, ICSID is funded by governments.[120] Its centre, and thus, its Member States, retain a measure of control over the jurisdiction of ICSID because the Secretary General (appointed by the ICSID Member States) has a duty of jurisdictional screening of all requests for arbitration.[121] In cases where parties are unable to agree on the appointment of an arbitrator, an arbitrator will be appointed by the "ICSID's Chairman from the Panel of Arbitrators designated by the Member States."[122] Additionally, all arbitrators sitting on an annulment committee are appointed by the Chairman from this panel.[123] Further, the immunity granted by ICSID is broader than the one granted in private arbitrations.[124] While private arbitrations only limit the

[115] Consolidated Sur-Reply in Opposition to (i) The Republic of Panama's Motion to Intervene, to Vacate the Court's May 19, 2022 Order, and to Quash the WSP USA Subpoena and (ii) WSP USA's Motion to Quash the Subpoena and Vacate the Court's May 19, 2022 Order, In re Webuild S.p.A., No. 1:22-mc-00140-LAK (S.D.N.Y. Sept. 15, 2022), ECF No. 56.

[116] *Id.* at 2.

[117] *Id.*

[118] *Id.* at 3.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 3-4.

[122] *Id.* at 4.

[123] *Id.*

[124] *Id.* at 5.

liability of arbitrators, ICSID grants them absolute immunity.[125]

Webuild further argued that, unlike ad hoc tribunals, ICSID proceedings require that both Contracting Parties be signatories to the ICSID Convention.[126] Regarding confidentiality, not all governmental courts publish their decisions, whereas the 2022 edition of the ICSID Arbitration Rules has a presumption in favor of publication of awards, unless the parties object.[127] Regarding the difference in enforceability of an award issued by an ICSID tribunal and one issued by an ad hoc tribunal, Webuild argued that the ICSID Convention authorized ICSID tribunals to issue awards that must be enforced by Member States.[128] For instance, in the US, the award debtor can only challenge the jurisdiction of the US court, but it cannot challenge the award based on the grounds present in the New York Convention that can be used to set aside other arbitral awards.[129] Further, an ICSID award can only be annulled by an ICSID annulment committee that are appointed by the Chairman of the Panel of Arbitrators designated by the Member States.[130]

In its decision, the court rejected Webuild's arguments and held that, first, the ICSID panel "does not have standing or pre-existing arbitration panels."[131] Thus, it is only formed upon a request for arbitration.[132] Second, the BIT does not create the panel. Rather, the arbitration panel is only created "if an investor chooses that forum."[133] Third, none of the arbitrators of the panel are affiliated with either of the Contracting Parties of the BIT.[134] Fourth, the tribunal does not receive government funding, but it is only funded by the parties to the dispute – an investor and the

[125] *Id.*

[126] *Id.*

[127] *Id.* at 6.

[128] *Id.* at 7-9.

[129] *Id.* at 9.

[130] *Id.*

[131] In re Webuild S.p.A., No. 1:22-mc-00140-LAK, 2022 WL 17807321, at *1 (S.D.N.Y. Dec. 19, 2022).

[132] *Id.*

[133] *Id.* at *2.

[134] *Id.*

respondent State.[135] Fifth, the proceedings may remain confidential if the parties so choose, and this characteristic is "more akin to private commercial than adjudication by a governmental body."[136] Sixth, the tribunal only derived its authority from the consent of the parties (the investor and the State) and not because the Contracting Parties "clothed the panel with governmental authority."[137] As such, the court held that Panama and Italy "did not intend to imbue the ICSID Panel with governmental authority, and therefore the ICSID tribunal did not constitute a 'foreign or international tribunal' within the meaning of Section 1782."[138]

Although these post-*ZF Automotive* decisions provide a very clear signal of the direction that will be taken by New York courts to such applications, other courts may have different interpretations as to whether ICSID tribunals are considered foreign or international tribunals. If contradictory decisions are then issued by the circuit courts (appeal courts), this may cause another circuit split focused on the ICSID tribunals. However, at the time of this article, the post-*ZF Automotive* decisions have adopted the approach that: (1) ICSID tribunals would not be in a position to act in comity and reciprocity to a US proceeding to assist it in the gathering of evidence; and (2) ICSID tribunals are only constituted to resolve a specific dispute and not before a dispute arises.

Additionally, arbitral tribunals under the ICSID Additional Facility Rules are constituted when parties decide to resolve their dispute before this type of tribunals when one of the States involved is not a party to the ICSID Convention.[139] As these tribunals are only created to resolve a particular dispute and only come into existence as a result of the parties' agreement, this makes them similar to tribunals constituted under the UNCITRAL Rules and in accordance with a BIT. They are thus similar to the UNCITRAL tribunal present in *ZF Automotive*, and a district court would likely rule

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.* at *3.

[139] INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID), ICSID ADDITIONAL FACILITY RULES AND REGULATIONS, art. 2 (2022).

that they are out of the scope of Section 1782.

2. Multilateral Investment Court

In recent years, the European Union (EU) announced its intention to establish a permanent standing MIC to replace the current investor-State dispute settlement system, with judges appointed by the Contracting Parties.[140] The decisions of the MIC would be subject to appeal before an Appellate Tribunal.[141] The EU has included this type of court in its treaties with Canada,[142] Singapore,[143] and Vietnam.[144]

The EU's proposal of a MIC would appear to comply with the factors that the Supreme Court considered when determining whether a body is governmental or intergovernmental in nature, but it remains to be seen whether a MIC sufficiently reciprocates the judicial assistance offered by US courts via Section 1782 (for the purposes of establishing comity). The EU proposes to create - through international agreements - a permanent MIC that will decide different disputes that may arise out of its numerous treaties. The MIC will be created according to an international convention and will function as a permanent body.

According to the EU's proposal, the judges appointed to the MIC will be chosen

[140] *See* Danielle Morris et al., *The U.S. Supreme Court Rules That U.S. Discovery Under 28 U.S.C. 1782 Is Unavailable For Use in Most International*, WILMERHALE (Jun. 15, 2022), https://www.wilmerhale.com/insights/client-alerts/20220615-the-us-supreme-court-rules-that-us-discovery-under-28-usc-1782-is-unavailable-for-use-in-most-international-arbitrations; *see generally* Andrea K. Bjorklund, *Arbitration, the World Trade Organization, and the Creation of a Multilateral Investment Court*, 37(2) ARB. INT'L 433 (2021).

[141] Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part art. 8.28, Oct. 30, 2016, 2017 O.J. (L 11/23).

[142] *Id.*

[143] Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part, Oct. 19, 2018, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/singapore/eu-singapore-agreement/texts-agreements_en. *See also* Lino Torgal, *The Multilateral Investment Court Project: The "Judicialization" of Arbitration?*, GARRIGUES (July 24, 2019), https://www.garrigues.com/en_GB/new/multilateral-investment-court-project-judicialization-arbitration.

[144] Investment Protection Agreement between the European Union and its Member States and the Socialist Republic of Viet Nam, Jun.30, 2019, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/vietnam/eu-vietnam-agreement/texts-agreements_en.

by all Contracting States, will be funded by States[145] and will have full-time employment in the court.[146] Thus, in principle, an interested person involved in a proceeding before a MIC should be able to pursue a Section 1782 request.

IV. MECHANISMS AVAILABLE FOR INTERNATIONAL LITIGANTS TO OBTAIN EVIDENCE

The recent *ZF Automotive* judgment has limited the scope of application of Section 1782 in relation to international arbitration. However, after considering this development, this section of the article aims to provide practitioners with guidance on the tools available to parties to obtain evidence for use in their international arbitrations.

A. *IBA Rules on the Taking of Evidence in International Arbitration* ("IBA Rules")

1. Evidence from Counterparties

To obtain documents or testimony in international arbitration, parties could use the procedure established in the IBA Rules (provided that such rules have been adopted in their arbitration). Under these rules, a party can request the tribunal to order the other party to the arbitration to produce certain documents or categories of documents under Article 3 and to order the testimony of a witness under Article 4. If the counterparty refuses to produce a document or testimony ordered to be produced by the tribunal, then the tribunal may draw a negative inference that such document or testimony was adverse to the interests of that party.[147]

2. Evidence from Third Parties

According to Article 3(9) of the IBA Rules, if a party asks the tribunal to request a document in possession of a third party, the tribunal may take whatever steps are

[145] Submission of the European Union and its Member States to UNCITRAL Working Group III (18 January 2019) Establishing a standing mechanism for the settlement of international investment disputes § 3.13, *available at* https://circabc.europa.eu/ui/group/7fc51410-46a1-4871-8979-20cce8df0896/library/467c4df7-8596-4a2e-bcae-5e2d9fa98742/details; Gary Born, "*Court-Packing*" *and Proposals for an EU Multilateral Investment Court*, KLUWER ARBITRATION (Oct. 25, 2021), https://arbitrationblog.kluwerarbitration.com/2021/10/25/court-packing-and-proposals-for-an-eu-multilateral-investment-court/.

[146] Decision No 1/2021 of the CETA Joint Committee 29 January 2021 setting out the administrative and organisational matters regarding the functioning of the Appellate Tribunal [2021/264], 2021 O.J. (L 59/41).

[147] INTERNATIONAL BAR ASSOCIATION (IBA), IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION arts. 9(6)-(7) (2020).

legally available to obtain the requested documents or authorize the party to take such steps itself. Article 4(9) provides a similar procedure for the attendance of witnesses who would not appear voluntarily at the request of a party.

The text of the IBA Rules indicates that a tribunal's prior authorization is required before making a request to a court to order the production of evidence.[148] Interpreting the IBA Rules, the High Court of Singapore indicated that the IBA Rules require the parties to obtain the permission of the arbitral tribunal if they would elect to subpoena a witness into the arbitration. The Singaporean court expressed its view that, when parties agree to the IBA Rules, they enter into a contractual commitment and that "to circumvent and sidestep these directions seemed to obviate the very purpose of entering into such detailed directions with the Arbitrator in the first place."[149]

Scholars have also argued that the IBA Rules do not expressly forbid a party to request assistance from a national court for gathering evidence from third parties without seeking prior authorization from the arbitral tribunal.[150] Additionally, there is case law supporting the view that the IBA Rules do not forbid a party from unilaterally applying to a court without the prior permission of the arbitral tribunal.[151]

Other scholars argue that the IBA Rules only authorize an applicant to request evidence from a national court without prior tribunal authorization in certain exceptional circumstances where "it may be impossible or impractical to seek the tribunal's permission."[152] For example, this will be the case when "a tribunal has not yet been formed or cannot, for some reason, act effectively"[153] or when "the

[148] NATHAN D. O'MALLEY, RULES OF EVIDENCE IN INTERNATIONAL ARBITRATION: AN ANNOTATED GUIDE ¶ 3.94 (2d ed. 2019).

[149] ALC v. ALF [2010] SGHC 231, [34]. *See also* In re Grupo Unidos Por El Canal, S.A., No. 14-mc-00226-MSK-KMT, 2015 WL 1810135, at *11 (D. Colo. Apr. 17, 2015) ("Further, the IBA Rules, under which the parties have agreed to arbitrate, expressly limit third-party discovery, requiring advance authorization from the panel of arbitrators for its collection and use.").

[150] Zuberbühler et al., *supra* note 27, at 129.

[151] *See e.g.*, In re Application of Republic of Ecuador, 2011 WL 10618727, at *2 (N.D. Fla. Aug. 24, 2011).

[152] ROMAN MIKHAILOVICH KHODYKIN ET AL., A GUIDE TO THE IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION ¶ 6.321 (2019).

[153] *Id.* at ¶ 6.322.

documents are held by a third party connected in some way to one of the parties to the arbitration."[154]

B. *Selection of Seats Depending on the Location of the Evidence*

Parties may also consider the selection of the seat of arbitration more carefully when entering into arbitration agreements. If a party is likely to require access to evidence located in the US, it may strategically agree on an arbitration seated within US territory. Section 7 of the FAA establishes that the arbitral tribunal may order any person to attend before the arbitral tribunal and/or bring the required evidence with them. In case the requested person does not comply with the order, the arbitral tribunal may request the assistance of a district court which will then have the discretion to compel or punish the person for contempt for non-compliance.[155]

C. *Recourse to National Courts*

After *ZF Automotive*, parties in international arbitration may consider seeking documentary evidence through international conventions such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970 ("Hague Convention") and the Inter-American Convention on Letters Rogatory of 1975 ("Inter-American Convention"). In addition, parties still have the option to petition a variety of state courts in jurisdictions which allow evidence requests from arbitral tribunals. This approach is possible in jurisdictions which have adopted the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law"), as well as jurisdictions that have not. However, the possible scope of these requests varies from jurisdiction to jurisdiction.[156]

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[154] *Id.*

[155] FAA,9 U.S.C. § 7a. Scholars have expressed the view that an arbitration under Section 7 of the FAA may activate Section 1783 to collect evidence. The purpose of Section 1783 is for a court to request a US citizen located overseas to produce a document or testimony. *See* Rekha Rangachari et al., *Evolution of 28 U.S.C. § 1783: An Unexplored Tool to Support International Arbitration?*, 38(4) J. INT'L ARB. 483, 489-91, 492-94 (2021).

[156] An example would be Germany, which does not allow broad discovery requests. *Cf.* Klaus Sachs & Torsten Lörcher *Commentary on the German Arbitration Law (10th Book of the German Code of Civil Procedure), Conduct of the Arbitral Proceeding, § 1050 – Court Assistance in Taking Evidence and Other Judicial Acts*, *in* ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 298 (Patricia Nacimiento et al. eds., 2nd ed. 2015).

1. Hague Convention

A resource that parties have available to obtain evidence located in the US and elsewhere is through the Hague Convention.[157] This convention provides that a court may request judicial assistance in evidence gathering to another country.[158] The court has to request the assistance from the central authority of the requested country. The central authority will then transmit the request to the authority competent (i.e., a national court) to execute the order.[159] International litigants may request the arbitral tribunal to request the help of the court located in the arbitral seat.[160] Access to this convention would depend on whether the arbitral seat and the country where the evidence is located are parties to this convention.[161]

The Special Commission on practical operation of the Hague Convention indicated that, in accordance with national law, the Hague Convention has been used to gather evidence for international arbitration.[162] As the convention is available to collect evidence to be used in "judicial proceedings, commenced or contemplated,"[163] it is a matter of the national law whether arbitration is considered as a judicial proceeding. The website of the Hague Convention provides for the form that may be

[157] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231 [hereinafter Hague Convention].

[158] *Id.* at art. 1. *See also* Don Hawthrone, *Discovery, Jurisdiction and Service: Changes in U.S. Law and Implications for Japanese Companies*, CURTIS (Jun. 29, 2022), https://www.curtis.com/our-firm/news/discovery-jurisdiction-and-service-changes-in-u-s-law-and-implications-for-japanese-companies.

[159] Hague Convention, *supra* note 157, at arts. 2-3.

[160] BORN, *supra* note 41, at 2599-2600.

[161] Currently, the Hague Convention has 64 contracting parties. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (HCCH), STATUS TABLE - CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, https://www.hcch.net/en/instruments/conventions/status-table/?cid=82 (last visited Jan. 14, 2023).

[162] HCCH, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE APOSTILLE, EVIDENCE AND SERVICE CONVENTIONS, Conclusion and Recommendation 38 (2003).

[163] Hague Convention, *supra* note 157, at art. 1; *see also* HCCH, SUMMARY OF RESPONSES TO THE QUESTIONNAIRE OF MAY 2008 RELATING TO THE EVIDENCE CONVENTION, WITH ANALYTICAL COMMENTS (SUMMARY AND ANALYSIS DOCUMENT) ¶¶ 131-132. (2009).

used as a guide for the request.[164] In court proceedings, this form is filed as an exhibit of the request to the court.[165]

The Hague Convention also allows the pre-trial discovery of information. Article 23 of this convention establishes that a party to the convention can file a reservation to not grant pre-trial discovery of information as it is applied in common law countries. However, the Special Commission clarified that the convention does not allow fishing expeditions as the request "must be *sufficiently substantiated* so as to avoid requests whereby one party merely seeks to find out what documents may generally be in the possession of the other party to the proceeding."[166] The commission also clarified that, for purposes of the convention, pre-trial discovery includes requests before the start of the proceeding, and it also includes "evidence requests submitted after the filing of a claim but before the final hearing on the merits."[167]

Whether this approach remains feasible for international arbitral tribunals for evidence located in the US remains to be seen. Part of the reasoning of the Supreme Court in *ZF Automotive* was that it would not have been the intention of Congress to extend the rights granted in Section 1782 (and therefore also the resources of district courts) to private bodies.[168] An approach under the Hague Convention as described would, prima facie, only shift the availability of those resources from a direct to an indirect access of the arbitral tribunal. This might give ground to refuse the execution of a letter of request as provided by Article 12(a) of the Hague Convention. However,

[164] HCCH, MODEL FORMS -CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, https://www.hcch.net/en/instruments/conventions/publications1/?dtid=65&cid=82 (last visited Jan. 16, 2023).

[165] Marc Zell & Noam Schreiber, *The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, LEXOLOGY (Sept. 11 2019), https://www.lexology.com/library/detail.aspx?g=b1fe07db-9032-44e1-95ba-b37d30013d21.

[166] HCCH, CONCLUSIONS AND RECOMMENDATIONS, *supra* note 162, at Conclusion and Recommendation 29 (emphasis in original).

[167] *Id.* at Conclusion and Recommendation 31.

[168] ZF Automotive US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2088-89 (U.S. 2022).

the Supreme Court identified comity as the animating purpose of Section 1782.[169] Under this aspect, US courts would have to execute a letter of request if it came from a foreign state court, if this court in turn was approached by an arbitral tribunal seated in that foreign jurisdiction.

2. Inter-American Convention

Spain, the US, and countries in Latin America may seek to take advantage of the Inter-American Convention for the collection of evidence from courts located in these jurisdictions. The convention may be useful when a court of the arbitral seat sends a letter rogatory to the central authority of the country where the evidence is located.[170] The central authority then will transmit the request to the authorized entity for its execution. Unlike the Hague Convention, the Inter-American Convention only allows evidence requests once the proceedings have started.[171] The request must be legalized – unless it is issued through diplomatic channels – and it must contain an authenticated copy of the complaint with its exhibits and additional supporting documentation.[172]

If a State expressly agrees, the convention also provides that arbitral tribunals may directly transmit a letter rogatory to the authority of another State. This thus eliminates the requirement for the arbitral tribunal to first request help to the national court where the tribunal is seated. However, to date, only Chile has made such a declaration.[173]

3. Non-Model Law Jurisdictions

Some of the most popular arbitral seats – from jurisdictions whose arbitration laws are not based on the UNCITRAL Model Law – provide that national and also foreign seated arbitral tribunals may require the production of evidence from persons

[169] *Id.* at 2088.

[170] Inter-American Convention on Letters Rogatory art. 4, Jan. 30, 1975, 14 I.L.M. 339; *see also* In re Clerici, 481 F.3d 1324, 1329 (11th Cir. 2007).

[171] Inter-American Convention, *supra* note 170, at art. 8.

[172] *Id.* at arts. 5-8.

[173] DEPARTMENT OF LAW, ORGANIZATION OF AMERICAN STATES (OAS), B:36: INTER-AMERICAN CONVENTION ON LETTERS ROGATORY - GENERAL INFORMATION OF THE TREATY: B-36, https://www.oas.org/juridico/english/sigs/B-36.html.

located in their territory.[174] The section that follows explores the approaches taken by England and Wales,[175] Sweden,[176] Brazil,[177] and Switzerland.[178]

(i) England and Wales

In England and Wales, an application can be made under section 43 of the English Arbitration Act 1996 ("Arbitration Act") to permit a targeted request to a witness to produce specific documents, provided that these are identified with sufficient certainty.[179] This is not the same as the court ordering disclosure. If the request for documents is too widely drawn, the application will be refused because it will be regarded as tantamount to disclosure. One drawback to section 43 is that it requires permission of the tribunal or the agreement of the other party.[180]

In rare cases, section 44 can also be used, provided that the parties have not excluded it by agreement in writing (in their arbitration agreement). Section 44 deals with interim measures and may be used to obtain documents from third parties.[181] However, the availability of section 44 of the Arbitration Act has also recently been called into question by a consistent line of first instance authority.[182] The court may

[174] France only allows for production of documentary evidence from a third party when the arbitral tribunal is seated in France according to Article 1469 of its civil procedure code. *See* Dilara Khamitova, *Document Production in International Arbitration in France - a smoking gun or puff of smoke?*, CLYDE & CO. (May 19, 2022), https://www.clydeco.com/en/insights/2022/05/document-production-in-international-arbitration-i.

[175] Arbitration Act 1996, c. 23, § 43 (Eng.). Other authors opine that the arbitral procedure must have its venue in England. *See* Robert Bradshaw, *How to Obtain Evidence from Third Parties: A Comparative View*, 36(5) J. INT'L ARB. 629, 650-51 (2019).

[176] Lagen om skiljeförfarande, §§ 26, 50 (SFS: 1999:116, amended by SFS: 2018:1954) (Swed.) (Swedish Arbitration Act); Bradshaw, *supra* note 175, at 656.

[177] Lei Nº 9.307 de 23 de Setembro de 1996, art. 22-C (Braz.) (Brazilian Arbitration Act).

[178] Schweizerische Zivilprozessordnung [ZPO], Civil Procedure Code [CPC], art. 166 (Switz.) (Swiss Civil Procedure Code); Zuberbühler et al., *supra* note 27, at 90.

[179] *See e.g.*, BNP Paribas & Ors v. Deloitte & Touche LLP [2003] EWHC 2874 (Comm); Tajik Aluminium Plant v. Hydro Aluminium AS [2005] EWCA (Civ) 1218, [2006] 1 WLR 767 (Eng.).

[180] MINISTRY OF JUSTICE, CIVIL PROCEDURE RULES (CPR) – RULES AND DIRECTIONS, Part 34 (UK).

[181] *See e.g.*, Assimina Maritime Ltd. v. Pakistan Shipping Corp. and HR Wallingford Ltd. [2004] EWHC (Comm) 3005.

[182] *See* LOUIS FLANNERY & ROBERT MERKIN, MERKIN AND FLANNERY ON THE ARBITRATION ACT 1996 § 44.7.5 (6th ed. 2019). In *A & Another v. C & Others* [2020] EWHC (Comm) 258, the issue was whether section 44 could provide the basis for an order for a deposition from a witness in England and Wales for a US-seated

order production of documents in order to preserve the evidence and, in exceptional cases, can even do so before the commencement of the arbitration, but not as part of a disclosure order.[183] Sections 43 and 44 of the Arbitration Act may be used even where the seat of the arbitration is, or is likely to be when designated, outside the jurisdiction of England and Wales and Northern Ireland, but only if it is deemed appropriate to do so.[184]

(ii) Sweden

In Sweden, the Swedish Arbitration Act provides that a party with the tribunal's consent may request a national court to order the other party or a third party to produce a document.[185] This provision applies regardless of whether the arbitral tribunal is seated in Sweden or abroad.[186] Regarding the attendance of a witness to the proceedings, national courts cannot intervene.[187] However, if the witness or expert has agreed to testify, if a party would like a witness or expert to testify under oath, a party needs to obtain the consent of the tribunal and then request permission to the national court.[188]

(iii) Brazil

The Brazilian Arbitration Act provides the parties and the arbitral tribunal with a valuable tool for direct assistance before Brazilian courts named *carta arbitral* or

arbitration. Following the dicta in *Cruz City 1 Mauritius Holdings v. Unitech Ltd. & Ors* [2015] 1 All ER (Comm) 305, and *DTEK Trading S.A. v. Morozov* [2017] EWHC (Comm) 94, Justice Foxton held that section 44 could not be used against non-parties to the arbitration. The current line of authorities is only at first instance, and the position reached by them is a matter of significant academic debate.

[183] *See* Cetelem S.A. v. Roust Holdings [2005] EWCA (Civ) 618.

[184] *See* FLANNERY & MERKIN, *supra* note 182, at §§ 43.5, 44.7.1.

[185] Swedish Arbitration Act, *supra* note 176, at §§ 26, 50.

[186] *Id.* at § 50.

[187] *See* Lina Bergqvist & Maria Zell, *International Arbitration Law and Regulations Sweden 2021-2022*, ICLG (Aug. 20, 2021), https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/sweden.

[188] Swedish Arbitration Act, *supra* note 176, at § 26.

arbitral letter.[189] An arbitral tribunal located in Brazil[190] may require through a *carta arbitral* to Brazilian courts to enforce its decisions, including interim relief, exhibition/production of documents and coercive orders to testify.[191] The applicability of *carta arbitral* for decisions issued by arbitral tribunals located outside Brazil is still debatable.[192] Thus, litigants may also request the arbitral tribunal to demand assistance from the court of the seat, so the court of the seat can, in turn, send a rogatory letter to the Brazilian court to obtain the required evidence.[193] Moreover, the arbitral tribunal may also request a national court to order a third party to testify before the arbitral tribunal.[194] This request may be made by an interim measure (in case of urgency) or through a request to compel the appearance of the defaulting witness (*condução coercitiva*).[195]

(iv) Switzerland

In Switzerland, until recently, courts only provided assistance to collect evidence to arbitral tribunals seated in Switzerland. In 2021, Switzerland modified its Swiss Private International Law Act and incorporated article 185a that now authorizes an "arbitral tribunal seated abroad or a party to a foreign arbitral proceeding with the consent of the arbitral tribunal" to seek assistance from a Swiss court.[196] However,

[189] Brazilian Arbitration Act, *supra* note 177, art. 22-C.

[190] *See* Leonardo Ohlrogge & Bernardo Borchardt, *Aspectos práticos sobre pedidos de exibição de documentos em arbitragens internacionais à luz das regras da* IBA, 70 REVISTA BRASILEIRA DE ARBITRAGEM 46, 66-74 (2022).

[191] Brazilian Arbitration Act, *supra* note 177, art. 22; *see also* Ted Rhodes, *International Arbitration Law and Rules in Brazil*, CMS (Nov. 3, 2021), https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/brazil.

[192] *See* Selma Ferreira Lemes & Aécio de Oliveira, *Carta arbitral para execução de tutelas de urgência estrangeiras*, CONSULTOR JURÍDICO (Jun. 12, 2022), https://www.conjur.com.br/2022-jun-12/opiniao-carta-arbitral-execucao-tutelas-proferidas-exterior?pagina=2; *see generally* Aécio de Oliveira & Caroline de Moura, *A aplicação da carta arbitral para execução direta de tutela de urgencia estrangeira no foro de efetivação da medida*, 73 REVISTA BRASILEIRA DE ARBITRAGEM 34 (2022).

[193] *See* Ferreira Lemes & de Oliveira, *supra* note 192.

[194] *See* Ohlrogge & Borchardt, *supra* note 190, at 64-67.

[195] *See* de Oliveira & de Moura, *supra* note 192, at 45.

[196] Switzerland Code of Civil Procedure, *supra* note 178, at art. 166; *see also* Evin Durmaz & Yves Klein, *Switzerland: A Swiss § 1782? Article 185a PILA and the Assistance of Swiss Courts to Obtain Evidence In Support Of Foreign Arbitral Proceedings*, MONDAQ (Jun. 20, 2022),

some third parties have a limited right to refuse to cooperate, e.g., due to banking secrecy.[197] In theory, the arbitral tribunal may request the court to order a witness to appear before the arbitral tribunal, testify in front of the court or to produce a document.[198] However, requests for a witness to appear in an arbitration are not usual in practice.[199]

4. Model Law Jurisdictions

The UNCITRAL Model Law provides that an arbitral tribunal, and parties that have obtained the tribunal's consent, may request court assistance for obtaining evidence in certain circumstances.[200] Even though the text of the Model Law indicates that its provision on court assistance in taking evidence only applies to domestic arbitrations,[201] different jurisdictions allow national courts to help with the gathering of evidence for tribunals seated outside of their territory. This section now analyzes four of the most popular arbitral seats that permit this type of assistance, including Austria, Germany, Singapore, and Hong Kong.

(i) Austria

In Austria, sections 577(1) and (2) of the Code of Civil Procedure provide that parties (with the tribunal's consent) or arbitral tribunals seated in Austria or in another country can request the help of Austrian courts for the production of evidence, including from third parties.[202] Scholars have expressed the view that in Austria, the court only provides the framework for the production of the evidence,

https://www.mondaq.com/arbitration-dispute-resolution/1203910/a-swiss-1782-article-185a-pila-and-the-assistance-of-swiss-courts-to-obtain-evidence-in-support-of-foreign-arbitral-proceedings; Zuberbühler et al, *supra* note 27, at 90.

[197] Durmaz & Klein, *supra* note 196.

[198] *See* Alexandra Johnson & Nadia Smahi, *International Arbitration Law and Regulations Switzerland* 2021-2022, ICLG (Aug. 20, 2021), https://iclg.com/practice-areas/international-arbitration-laws-and-regulations/switzerland.

[199] *See id.*

[200] United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, art. 27, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[201] *Id.* at art. 1(2).

[202] Austrian ZPO, section 602, 577(2); Bradshaw, *supra* note 175, at 655.

but it is the arbitral tribunal that asks the questions to the witnesses and experts.[203]

(ii) Germany

Under German law, sections 1033 and 1050 of the German Code of Civil Procedure provide for court assistance in the gathering of evidence in international arbitration. The court assistance applies to arbitrations seated in Germany as well as overseas.[204] According to section 1033, a party may request to a court an interim measure for the preservation of evidence.[205] While according to section 1050, the tribunal or a party to the arbitration with the consent of the tribunal must make a petition to a local court to obtain court assistance in the taking of evidence.[206] The assistance is only granted for measures which the arbitral tribunal is not allowed to take by itself[207] and may not be abusive.[208] The assistance is subject to the German Code of Civil Procedure as applied in civil proceedings.[209] The arbitrators are entitled to take part in the taking of evidence and can ask questions.[210] Evidence can also be obtained from a third party unless that party has the right to refuse to give evidence under other rules of the Code of Civil Procedure (*Zeugnisverweigerungsrecht*) and the request is not unreasonable.[211]

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[203] SCHWARZ & KONRAD, *supra* note 26, at ¶¶ 20-253-255.

[204] According to the German Code of Civil Procedure, section 1025(2), the provisions of sections 1033 and 1050 also apply if the seat of arbitration is outside of Germany or not yet determined. *See* Elliot Friedman et al., *National Court Assistance in the Taking of Evidence in Support of Commercial Arbitral Proceedings*, *in* FRANCO FERRARI & FRIEDRICH ROSENFELD, HANDBOOK OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION 403 (2022).

[205] *See* Friedman et al., *supra* note 204, at 402.

[206] *See* Joachim Münch, § 1050, *in* MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG ¶ 13 (Wolfgang Krüger ed., 6th ed. 2022); Sachs & Lörcher, *supra* note 156, at 298.

[207] *See* Wolfgang Voit, § 1050, *in* MUSIELAK & VOIT ZIVILPROZESSORDNUNG ¶ 7 (eds., 19th ed. 2022).

[208] *See* Friedman, *supra* note 204, at 403 ("for example where a tribunal lacks the power to carry out the specific act requested but could obtain the desired evidence through other means, court assistance would be inappropriate").

[209] *See* Sachs & Lörcher, *supra* note 156, at 299.

[210] *See* Voit, *supra* note 207, at ¶ 7.

[211] *See* Jörn Fritsche, §§ 142-144, *in* MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG ¶ 14 (Wolfgang Krüger ed., 6th ed. 2020) ("a request is unreasonable, if inter alia time, costs and disruptions of the third party outweigh the interests of the requesting party").

(iii) Hong Kong

In Hong Kong, evidence for an arbitration may be obtained before the start of an arbitration through an interim measure, during an ongoing arbitration, or from a request for inspection, photographing and protection of property.[212] An interim measure is available for arbitrations seated in Hong Kong and foreign seated arbitrations that render an award that may be subject to enforcement in Hong Kong. The request for evidence may be before the start of an arbitration. Courts, exceptionally, compel third parties to produce documents or give testimony.[213] The request for assistance in the taking of evidence in an ongoing arbitration is only available if the arbitration is seated in Hong Kong.[214] The inspection, photographing and protection of property must be made a by a party to the arbitration and not by the arbitral tribunal. This type of request can only be made in respect of a third party, and it is only available for arbitrations seated in Hong Kong and arbitrations seated abroad that render an award that may be enforceable in Hong Kong.[215]

(iv) Singapore

In Singapore, the International Arbitration Act provides that national courts may compel the production of a document or testimony from a party or a third party to an arbitration.[216] This order may be made through an interim measure (in case of urgency) or through a subpoena.[217] In the case of an interim measure based on urgency, it can be requested directly by the requesting party to the court even before the tribunal has been constituted, but only for an affidavit or preservation of evidence.[218] The court will take into account the fact that the arbitral tribunal is

[212] *See* Friedman, *supra* note 204, at 407.

[213] *Id.*

[214] Arbitration Ordinance (2011), Cap. 609, § 55 (H.K.).

[215] *Id.* at § 60.

[216] International Arbitration Act 1994, Cap. 143A, § 13 (amended by International Arbitration (Amendment) Act 2020) (Singapore) (Singapore IAA).

[217] *Id.* at § 12A.

[218] *Id.* at § 12A(5).

seated outside of Singapore in determining whether to grant the interim measure.[219] In the case of a subpoena, arbitral tribunals seated in Singapore or abroad can request a subpoena to Singaporean courts.[220] Even though the statute does not explicitly provide that permission from the tribunal is necessary, it is requested in practice.[221] The requests in Singapore must be defined with sufficient precision.[222] It is worth noting that the International Arbitration Act does not allow discovery from third parties.[223]

The analysis of these eight jurisdictions suggests that there is uniformity in the requirements for a court to assist a foreign seated arbitral tribunal. These jurisdictions require the arbitral tribunal's consent to accept a request for evidence located in its territory.

One common exception to this rule derives from an interim measure request. However, interim measures require the interested party to prove an exceptional circumstance or certain degree of urgency. As mentioned above, Section 1782 did not require an exceptional circumstance for a US court to grant request to gather evidence before starting the arbitration. In *ZF Automotive*, the US Supreme Court criticized that parties could request assistance from a national court without the approval of the arbitral tribunal, while this advantage was not available for domestic arbitrations.

For this reason, if the international pattern to request the tribunal's authorization – except in cases of interim measures – is followed (in the US and in other countries) and the evidentiary scope of a request is also uniformized, this will then provide greater uniformity and level the playing field for the different parties in the evidence gathering in international arbitration.

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[219] *Id.* at § 12A(2).

[220] The Lao People's Democratic Republic v. Sanum Investments Ltd. and another and another matter [2013] SGHC 183.

[221] Singapore IAA, *supra* note 216, at § 13; Friedman, *supra* note 204, at 409.

[222] The Lao People's Democratic Republic, *supra* note 220, at § 23.

[223] *Id.*

D. *Additional Mechanisms*

Other scholars have also mentioned additional options for parties to obtain evidence for use in international arbitration. Some of these options include the use of data subject requests under privacy laws such as the EU General Data Protection Regulation ("GDPR") and freedom of information requests.[224]

First, regarding data subject requests under different data privacy laws, this may become relevant to request information on the personal data that the counterparty may have about the interested party.[225]

Second, regarding freedom of information requests, they could be used to collect evidence from State companies or relating to government procurement acts, such as public bids. Scholars have suggested filing this request early in an arbitration (or before the arbitration), as these requests usually take months for a State to process.[226] Moreover, combining a request for document production with a freedom of information request under the State's own legislation may give rise to a potential claim of a human rights violation against the right to access information.[227]

V. CONCLUSION

The recent judgment of the Supreme Court in *ZF Automotive* has effectively brought an end to Section 1782 requests in support of international commercial arbitration and ad hoc investment-treaty arbitration cases under the UNCITRAL Rules pursuant to a BIT. Subsequent decisions have since clarified that ICSID tribunals too fall out of the scope of Section 1782. Whether a MIC will qualify as a foreign or international tribunal for the purpose of a Section 1782 request remains to be seen.

As well as exploring the *ZF Automotive* decision, this article draws attention to the fact that several popular arbitral seats empower their national courts to assist

[224] *See* Anna Masser et al., *Special Mechanisms for Obtaining Evidence*, *in* GLOBAL ARBITRATION REVIEW - THE GUIDE TO EVIDENCE IN INTERNATIONAL ARBITRATION 190, 197-204 (Amy C. Kläsener et al. eds., 1st ed. 2021).

[225] *See* Markus Burianski, *Data Privacy in International Arbitration*, WHITE & CASE (Oct. 19, 2018), https://www.whitecase.com/publications/alert/data-privacy-international-arbitration.

[226] *See* Masser et al., *supra* note 224, at 200.

[227] *Id.* at 199.

arbitration proceedings seated domestically or internationally in the practice of evidence gathering.

While the ability of a national court to help local or foreign seated tribunals varies from jurisdiction to jurisdiction, parties should bear in mind the place(s) where relevant persons or evidence may be located when selecting an arbitral seat for the purposes of their arbitration agreements. Such a decision may impact whether a seat's national court will be supportive of evidence gathering activities or whether it will be able to secure the assistance of another national court to assist.

As explained above, Section 1782 gave access to evidence gathering to parties without requiring the pre-authorization of a tribunal or to prove an exceptional circumstance or urgency. These characteristics of Section 1782 gave rise to a concern that it created an unequal playing field depending on the nationalities of the parties in dispute. The lack of the requirement for tribunal's pre-authorization prior to seeking assistance from the courts was one of the issues which US courts identified as an unfair advantage for international arbitrations over domestic ones.

This article has shown, from a comparative law perspective, that there are common grounds in the evidence gathering process for foreign seated arbitral tribunals, which may serve as a guide for other jurisdictions and eventually provide for greater uniformity in assisting international arbitration proceedings.

For the moment, parties to international arbitrations still have a number of mechanisms provided in conventions and other instruments through which they can seek assistance in obtaining relevant evidence – from their counterparties or third parties – located in States other than the arbitral seat.

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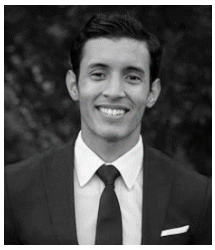

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