U.S. DISCOVERY IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION: A MYTH OR REALITY?

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INTRODUCTION

Most states' national arbitration legislation provides for a process whereby national courts can force the provision of evidence in support of an international commercial arbitration.[1] Additionally, a number of international rules on taking of evidence provide an opportunity for litigants to request assistance from national courts in taking such evidence. Thus, the International Bar Association Rules on the Taking of Evidence in International Arbitration[2] and Rules on Conduct of the Taking of Evidence in International Arbitration[3] implicitly authorize the arbitral tribunals to apply for assistance from the relevant national courts in taking evidence, provided that it is not prohibited by applicable law.[4] The rules

1. In very broad terms, international commercial arbitration is a dispute settlement mechanism for the final and binding determination of international commercial disputes involving state parties, corporations, and individuals. The proceedings are conducted by an arbitral tribunal in accordance with a procedure chosen by the parties on the basis of the agreement between them. The arbitral tribunal may consist of one or more independent and impartial arbitrators; the appointment procedure differs depending on the number of arbitrators and the parties' agreement. Among the main advantages for which parties choose international commercial arbitration instead of national courts are the worldwide enforceability of the arbitral awards, the neutrality of the arbitral tribunal, and the flexibility and confidentiality of the procedure. *See generally* NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1–70 (6th ed. 2015); JULIAN D.M. LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 1–15 (2003). For the provisions of national arbitration legislation providing evidentiary support mechanisms, see U.N. Comm'n on Int'l Trade Law, *Model Law on International Commercial Arbitration*, art. 27, U.N. Doc. A/40/17, annex I and A/61/17, annex I (1985) ("The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence."); *see also* English Arbitration Act 1996, c. 23 § 44(1)–(4) (national courts "unless otherwise agreed by the parties . . . for the purposes of and in relation to arbitral proceedings" have the power to make orders related to taking evidence. If the case is urgent, the court may make the order on taking evidence "on the application of a party or proposed party to the arbitral proceedings." If not, "the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.").

2. Int'l Bar Ass'n, *IBA Rules on the Taking of Evidence in International Arbitration*, Preamble (May 29, 2010) [hereinafter *IBA Rules*].

3. Int'l Bar Ass'n, *Rules on the Efficient Conduct of Proceedings in International Arbitration* (Dec. 14, 2018) [hereinafter *Prague Rules*].

4. According to Article 3.2 of the Prague Rules, "[T]he arbitral tribunal may, after having heard the parties, at any stage of the arbitration and at its own initiative . . . for the purposes of fact finding, take any other actions which it deems appropriate." *Prague Rules*, art. 3, ¶ 2. According to Article 3.10 of the IBA Rules, "At any time before the arbitration is concluded, the Arbitral Tribunal may . . . itself take, any step that it considers appropriate to obtain Documents from any person or organization." *IBA Rules*, art. 3, ¶ 10.

on taking evidence primarily deal with requests through arbitral tribunals whereas national legislation allows parties to the arbitral proceedings to request taking evidence from the court directly, albeit with the approval of the arbitral tribunal (provided that the case is not urgent).

In the United States, procedures for requesting the courts' assistance in taking evidence in such cases is established by the Federal Arbitration Act[5] and other elements of the United States Code. While Section 7 of the Federal Arbitration Act regulates the procedure of taking evidence in U.S.-seated arbitrations,[6] 28 U.S.C. § 1782 contains a mechanism granting U.S. courts a power to order discovery of material located in the United States "for use in a proceeding in a foreign or international tribunal."[7] It should be noted that the request for assistance of the U.S. courts can be made by a foreign or international tribunal or even by "any interested person" without approval from the tribunals. However, the wording of 28 U.S.C. § 1782 is ambiguous and, as a result, many interpretational problems arise in relation to these provisions in practice. The pitfalls of 28 U.S.C. § 1782 are repeatedly discussed by professionals and academics; however, there is still no single solution to the existing issues.[8]

The relevant portion of 28 U.S.C. § 1782 (entitled "Assistance to foreign and international tribunals and to litigants before such tribunals") provides the following:

5. 9 U.S.C. §§ 1-14 (2018).

6. 9 U.S.C. §7 (2018). *See also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2326–27 (2d ed. 2014). The rules of Section 7 of the Federal Arbitration Act and how they relate to taking evidence in U.S. domestic arbitration are beyond the scope of this paper.

7. 28 U.S.C. § 1782 (1996).

8. *See generally* Kevin E. Davis, Helen Hershkoff & Nathan Yaffe, *Private Preference, Public Process: U.S. Discovery in Aid of Foreign and International Arbitration*, *in* LIMITS TO PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL ARBITRATION 233 (Franco Ferrari ed., 2016); John Fellas, *Enforcing Orders Against Third Parties (and Parties) for the Taking of Evidence in International Arbitration*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 151–52 (Franco Ferrari ed., 2013); Daniel J. Rothstein, *A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration*, 19 AM. REV. INT'L ARB. 61 (2008); Hans Smit, *American Judicial Assistance to International Arbitral Tribunals,* 8 AM. REV. INT'L ARB. 153 (1997); N.Y.C. BAR COMM. INT'L COM. DISPS., 28 U.S.C. § 1782 AS A MEANS OF OBTAINING DISCOVERY IN AID OF INTERNATIONAL COMMERCIAL ARBITRATION–APPLICABILITY AND BEST PRACTICES 1 (2008) [hereinafter N.Y.C. Report].

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

This wording raises two critical questions: 1) does "foreign or international tribunal" include arbitral tribunals in international commercial arbitration?; and 2) does 28 U.S.C. § 1782, which grants the right to request judicial assistance to any "interested person" without the approval of an arbitral tribunal in international commercial arbitration, clash with arbitral tribunal's control over discovery? The analysis starts with a brief overview of legislative history of 28 U.S.C. § 1782.

I. OVERVIEW OF THE LEGISLATIVE HISTORY OF 28 U.S.C. § 1782

In 1855, Congress enacted "An Act to Prevent Mis-Trials in the District and Circuit Courts of the United States, in Certain Cases" which established that circuit courts, by the request of foreign courts, could appoint a commissioner with the power to force witnesses to appear in the circuit court and depose them.[9] However, this Act has never been utilized by the circuit courts of the United States.[10] In furtherance of the 1855 Act, Congress passed a number of laws providing U.S. courts with the right to support foreign courts in taking evidence, usually through taking depositions of U.S. persons for foreign matters.[11] In 1958, Congress established the Commission on International Rules of Judicial Procedure, in order to propose improvements to judicial assistance practices between the United States and foreign countries.[12] In 1963, this Commission (supported by the Columbia Law School Project on International Procedure in order to assist the International Rules Commission) produced a report which led to the revision of 28 U.S.C. § 1782 by Congress in

9. N.Y.C. Report, *supra* note 8, at 2.

10. *Id.*

11. *Id.* at 2–8.

12. Rothstein, *supra* note 8, at 68; N.Y.C. Report, *supra* note 8, at 9.

1964.[13] Prior to this revision, 28 U.S.C. § 1782 "permitted a district court to provide discovery assistance only to a party involved in judicial proceedings pending before a 'court in a foreign country.'"[14] The amended version of the statute replaced the phrase "judicial proceeding" with "proceeding in a foreign or international tribunal."[15] The amended version of the statute also eliminated the requirement for the proceedings to be pending, expanded the scope of the statute by adding a request for documentary evidence, and granted persons (rather than courts or tribunals) with the right to request assistance from U.S. courts in taking evidence.[16] Notwithstanding the fact that the term "judicial proceeding" has been replaced with "a foreign or international tribunal," there are a number of arguments that the latter does not include arbitral tribunals. First, at the time of the revisions to 28 U.S.C. § 1782 in 1964, the U.S. was not a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[17] and therefore, 28 U.S.C. § 1782 did not provide for any implied ability for courts to assist arbitration tribunals.[18] Second, during its work on the Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters in 1968, the U.S. did not propose any amendments related to the provision of assistance by national courts to arbitral proceedings.[19] Finally, the matter of assistance to foreign arbitral tribunals was not discussed in the professional literature during 1958–1970.[20] Therefore, one may argue that the legislative history of 28 U.S.C. § 1782 suggests that Congress had no intention of treating an arbitral tribunal as "a foreign or international tribunal."

II. EVOLUTION OF THE U.S. FEDERAL CASE LAW ON ASSISTANCE IN TAKING EVIDENCE

13. Rothstein, *supra* note 8, at 68–69; N.Y.C. Report, *supra* note 8, at 9–10.

14. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999).

15. *Id.* at 880–81.

16. Davis, Hershkoff & Yaffer, *supra* note 8, at 248.

17. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S 4739.

18. Rothstein, *supra* note 8, at 72–74.

19. *Id.* at 74–75.

20. *Id.* at 75–76.

The U.S. courts first encountered the question of whether 28 U.S.C. § 1782 could be used for assisting foreign arbitral tribunals in taking evidence in the 1990s. In *In re Technostroyexport*, the applicant argued that 28 U.S.C. § 1782 allowed the parties to an arbitration to go to court for assistance in taking evidence without first seeking a ruling from the arbitral tribunal.[21] The court found that an arbitrator or an arbitral panel constituted a "tribunal" under 28 U.S.C. § 1782, but still denied the application on the grounds that the applicant had made no effort to request a ruling from the arbitral tribunal that discovery should take place. This was noncompliant with the wording of 28 U.S.C. § 1782, because the above provisions established that the interested party may directly request the U.S. courts for assistance in taking evidence.[22] In *In re Medway Power*, the court considered a request for the production of documentary evidence for use in a United Kingdom arbitration and concluded that "an arbitration is not a tribunal for the purposes of 28 U.S.C. § 1782."[23]

In 1999, the Second and Fifth Circuits both held that 28 U.S.C. § 1782 does not apply to international commercial arbitration. In *National Broadcasting Co. v. Bear Stearns & Co.*, the Second Circuit considered a motion to enforce subpoenas in anticipation of an International Chamber of Commerce arbitration in Mexico and held that "when Congress in 1964 enacted the modern version of [28 U.S.C. § 1782], it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[24] Therefore, according to the Second Circuit, 28 U.S.C. § 1782 did not establish a process by which U.S. courts could provide assistance in taking evidence for international commercial arbitration.[25] The Fifth Circuit came to a similar conclusion. In *Republic of Kazakhstan v. Biedermann International*, the applicant requested the court to assist in taking evidence for arbitration proceedings in the Arbitration Institute of the Stockholm Chamber of Commerce. However, the court denied the application, holding that "the term 'foreign and international tribunals' [in 28 U.S.C. §

21. *In re* Application of Technostroyexport, 853 F. Supp. 695, 697 (S.D.N.Y. 1994).

22. *Id.* at 695.

23. *In re* Medway Power, 985 F. Supp. 402, 402–03 (S.D.N.Y. 1997).

24. Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999).

25. *Id.* at 191.

1782] was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations."[26]

As is evidenced from the above case law, prior to 2004, the courts generally refused to apply 28 U.S.C. § 1782 to international commercial arbitration. However, in 2004, the Supreme Court of the United States rendered a well-known decision in *Intel Corp. v. Advanced Micro Devices, Inc.*,[27] which led many courts to apply 28 U.S.C. § 1782 to provide assistance in taking evidence to arbitral tribunals in international commercial arbitration. In *Intel*, the U.S. Supreme Court considered whether the Directorate-General for Competition of the Commission of the European Communities (hereinafter "Directorate") can qualify as a "foreign or international tribunal" for the purposes of 28 U.S.C. § 1782.[28] Advanced Micro Devices, Inc. (hereinafter "AMD") applied to the Supreme Court with a request for its assistance in forcing the production of documents in aid of the antitrust investigation against Intel Corporation by the Directorate.[29] In the majority opinion in *Intel* by Justice Ginsburg, the Supreme Court came to a number of important conclusions. First, provisions of 28 U.S.C. § 1782 have the twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts."[30] Second, 28 U.S.C. § 1782 authorizes, but does not require, the federal district courts to provide assistance in taking evidence in aid of a "foreign or international tribunal" (though this is clear from the text of 28 U.S.C. § 1782, the Supreme Court provided confirmation of this conclusion).[31]

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26 Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 880–81, 883 (5th Cir. 1999).

27. Intel Corp. v. Advanced Micro Devices, 542 U.S. 241 (2004).

28. *Id.* at 241, 246.

29 *Id.* at 246.

30. *Id.* at 252.

31. In *Intel*, the Supreme Court specifically mentioned the factors that courts should consider in exercising their discretionary authority under 28 U.S.C. § 1782: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (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 United States federal-court assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a foreign country or the United States"; and (4) the court can reject "unduly intrusive or burdensome requests." *Intel*, 542 U.S. at 264–65.

Third, a proceeding does not need to be "pending" before a tribunal to invoke 28 U.S.C. § 1782.[32] Fourth, as the Directorate was a "foreign or international tribunal" within the meaning of 28 U.S.C. § 1782 because it was acting as a "first-instance decisionmaker," it could impose liability and its final deposition was reviewable by the European Union courts.[33] The U.S. Supreme Court based its conclusions on the analysis of the history of 28 U.S.C. § 1782. In particular, Justice Ginsburg referred to an article by Professor Hans Smith who was a principal draftsman of the revised 28 U.S.C. § 1782.[34] Based on his article, the Court concluded, albeit in dicta, that the term "tribunal" includes "investigating magistrates," "quasi-judicial agencies," and "administrative and arbitral tribunals."[35] Finally, the Supreme Court held that the term "interested party" does not necessarily mean a party to the proceedings but may include any person which "possess[es] a reasonable interest in obtaining [judicial] assistance."[36]

In his dissent in *Intel*, Justice Breyer focused on the differences between the process of discovery in the U.S. and the processes in other countries. He also analyzed the additional costs and delays related to U.S. discovery proceedings and the admissibility of the results of U.S. discovery in foreign arbitration proceedings. According to Justice Breyer, discovery should comply with some "categorical limits," which he described as follows: First, "when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word "tribunal" is in serious doubt, then a court should pay close attention to the foreign entity's own view of its "tribunal"-like or non-"tribunal"-like status"; and second, "a court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, and (2) the discovery would not be available under domestic law in analogous circumstances."[37]

Unfortunately, Justice Breyer's dissent does not contain a deep analysis of 28 U.S.C. § 1782 with respect to assistance to foreign arbitral tribunals. Moreover, the decision of the U.S. Supreme Court in *Intel* does not contain a clear answer to the question of whether or not the phrase

32. *Id.* at 246.

33 *Id.* at 246, 254.

34. *Id.* at 257–58.

35. *Id.* at 258.

36. *Id.* at 256.

37. *Intel*, 542 U.S. at 269–70.

"foreign or international tribunal" includes arbitral tribunals in international commercial arbitration. The Directorate being a state-sponsored adjudicative body itself was a quasi-judicial body and not a private arbitral tribunal (as was the conclusion that the U.S. Supreme Court specified in *dicta*), which provides an argument that the U.S. Supreme Court did not in fact conduct a thorough analysis of the issue.

Notwithstanding the fact that the decision in *Intel* does not clearly establish the possibility of a litigant being able to request assistance from U.S. courts in taking evidence in aid of international commercial arbitration, case law after *Intel* has developed in that direction. Following the *Intel* decision, a number of courts started to apply 28 U.S.C. § 1782 to assist arbitral tribunals,[38] while some courts' decisions have continued to follow the approaches of the Second and Fifth Circuits, holding that 28 U.S.C. § 1782 does not apply to international commercial arbitration.[39]

Although more than 15 years have passed since the decision in *Intel*, there is still no uniform approach to application of 28 U.S.C. § 1782 to international commercial arbitration. The recent case law shows that there have been no significant developments in this area since *Intel*. In *In re Application of Pola Maritime, Ltd.*, the applicant filed a claim before the London Maritime Arbitrators Association (hereinafter "LMAA") seeking subpoenas to be served in the United States. The court referred to *Intel* and concluded that the term "arbitral tribunal" comprises the type of bodies that 28 U.S.C. § 1782 meant to address.[40] In particular, the decision mentioned that the court in *Intel* emphasized the judicial reviewability of the decision of the Directorate on the question of whether the body was a "foreign or international tribunal."[41] After the court found that any awards

38. *See, e.g.*, *In re* Roz Trading Ltd., 469 F. Supp. 2d 1221, 1224–25 (N.D. Ga. 2006); *In re* Hallmark Capital Corp., 534 F. Supp. 2d 951, 957 (D. Minn. 2007); *In re* Application of Babcock Borsig AG, 583 F. Supp. 2d 233, 235 (D. Mass. 2008); *In re* Winning (HK) Shipping Co., No. 09-22659-MC, 2010 U.S. Dist. LEXIS 54290, at *30–32 (S.D. Fla. Apr. 30, 2010).

39. *See, e.g.*, La Comisión Ejecutiva Hidroelécctrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 482 (S.D. Tex. 2008); *In re* Operadora DB Mex., S.A., No. 6:09-cv-383-Orl-22GJK, 2009 U.S. Dist. LEXIS 68091, at *38 (M.D. Fla. Aug. 4, 2009); *In re* Norfolk S. Corp., 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009); La Comisión Ejecutiva Hidroelécctrica Del Rio Lempa v. El Paso Corp., 341 F.App'x. 31, 32 (5th Cir. 2009).

40. *In re* Pola Mar. Ltd., No. CV416-333, 2018 U.S. Dist. LEXIS 62980, at *5 (S.D. Ga. Apr. 12, 2018).

41. *Id.*

rendered by the LMAA are reviewable by a true judicial body—the national courts of England—in accordance with the English Arbitration Act of 1996, the court concluded that 28 U.S.C. § 1782 should apply.[42] In *In re Kleimar N.V. v. Benxi Iron & Steel Am., Ltd.*, and *In re Application of Pola Maritime, Ltd.*, the applicants argued that the LMAA is a "foreign or international tribunal" for the purpose of issuing subpoenas.[43] The court stated that there was no precedent that led to the conclusion that the LMAA should fall outside the 28 U.S.C. § 1782 provision.[44] The applicant provided the court with evidence confirming that the LMAA is the first instance decisionmaker and its awards can be appealed in the English High Court of Justice, the Court of Appeal, and the Supreme Court on the basis of a lack of jurisdiction and procedural or material breaches.[45] On this basis, the application for assistance in issuing subpoenas was granted.[46]

In a recent case, *Abdul Latif Jameel Transportation Co. v. FedEx Corporation*, the Sixth Circuit considered an application for discovery in support of an international commercial arbitration seated in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration.[47] The district court denied the application "holding that the phrase 'foreign or international tribunal' in [28 U.S.C. § 1782]" did not encompass the arbitration.[48] The Sixth Circuit, referring to the statutory context and history of 28 U.S.C. § 1782 and its textual interpretation, reversed the district court's order and held that "this provision permits discovery for use in the private commercial arbitration at issue."[49] In particular, the Sixth Circuit first held that there are no doubts insofar as the "foreign or international" nature of the Dubai arbitration goes.[50] Further, the Sixth Circuit found that "the text, context, and structure of [28 U.S.C. § 1782] provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant

42. *Id.* at *5–6.

43. *In re* Kleimar N.V v. Benxi Iron & Steel Am., No. 17-CV-01287, 2017 WL 3386115, at *1–3 (N.D. Ill., 2017).

44. *Id.* at *6.

45. *Id.* at *6.

46. *Id.* at *6–7.

47. *In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 713–14 (6th Cir. 2019).

48. *Id.* at 714.

49. *Id.* at 714, 732.

50. *Id.* at 719.

to contract and having the authority to issue decisions that bind the parties."[51]

In *Servotronics I*, the applicant, Servotronics, Inc., sought the assistance of the U.S. court in serving subpoenas on three southern California residents to give testimony in aid of an arbitration in England.[52] Rolls Royce and Servotronics, Inc. signed a Long-Term Agreement which provided arbitration as a mechanism for resolution of any disputes under the agreement in accordance with the following provision: "[T]he dispute shall be referred to and finally resolved by arbitration in Birmingham, England, under the rules of the Chartered Institute of Arbitrators."[53] Later, a dispute arose in relation to the agreement and the parties agreed to an arbitration held in London.[54] The issue in this case was whether the private arbitral body falls within the scope of 28 U.S.C. § 1782. The court of first instance concluded that the decision in *Intel* does not affect the holdings of the Second and Fifth Circuits and that 28 U.S.C. § 1782 does not apply to private international arbitrations.[55] However, the Fourth Circuit reversed the first instance court's order, concluding that the arbitral tribunal was operating as a "foreign tribunal" and an "entit[y] acting with the authority of the State" for purposes of 28 U.S.C. § 1782, referring, in particular, to the decision of the Sixth Circuit in *Abdul Latif Jameel Transportation*.[56]

In *In re Government of the Lao People's Democratic Republic*, the applicant requested discovery pursuant to 28 U.S.C. § 1782 specifically "for use in private international commercial arbitration" administered by the Singapore International Arbitration Centre.[57] The court held that the U.S. Supreme Court in *Intel* did not abrogate the decisions of the Second and Fifth Circuits, and that private arbitral tribunals are "categorically excluded" from the scope of 28 U.S.C. § 1782.[58] In particular, the court concluded that the Supreme Court in *Intel* did not provide guidance as to

51. *Id.* at 723.

52. *In re* Servotronics, No. 2:18-MC-00364-DCN, 2018 WL 5810109, at *1 (D.S.C., 2018) [hereinafter *Servotronics I*].

53. *Id.* at *1.

54. *Id.* at *1.

55. *Id.* at *2.

56. *See* Servotronics v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

57. *In re* Gov't of the Lao People's Democratic Republic, No. 1:15-MC-00018, 2016 U.S. Dist. LEXIS 47998, at *1–2 (D. N. Mar. I. Apr. 7, 2016).

58. *Id.* at *11.

whether or not a foreign private arbitral tribunal falls within the scope of 28 U.S.C. § 1782.[59] In a recent case, *In re Application of Hanwei Guo*, the petitioner applied for an order permitting him to take discovery for use in pending international commercial arbitration proceedings before the China International Economic and Trade Arbitration Commission (hereinafter "CIETAC").[60] The U.S. District Court for the Southern District of New York (which is within the Second Circuit), applying *National Broadcasting*, concluded that CIETAC arbitration cannot be considered "a proceeding in a foreign or international tribunal," because 28 U.S.C. § 1782 was intended to cover only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies," but not the arbitral bodies established by private parties.[61] The district court specifically noted that CIETAC "was originally established by the Chinese Government but now operates as largely private commercial arbitration body."[62] The Second Circuit affirmed the district court's denial of the petition for discovery pursuant to 28 U.S.C. § 1782 and held that after more than 20 years, the Second Circuit ruling in *NBC v. Bear Stearns & Co.* remains good law. [63] In particular, the Second Circuit, following the analysis of various factors, held that CIETAC qualified as a private international commercial arbitration, which "possesses a high degree of independence and autonomy, and, conversely, low degree of state affiliation" and functions "in a manner nearly identical to that of private arbitration panels in the United States."[64] Therefore, the Second Circuit held that 28 U.S.C. § 1782 was unavailable. [65]

In *Servotronics II*, which involved the same underlying arbitration as in *Servotronics I*, Servotronics, Inc. sought the assistance of the U.S. district court in issuing a subpoena to compel a non-party to the arbitration

59. *Id.* at *17.

60. *In re* Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782, No. 18-MC-561 (JMF), 2019 WL 917076, at *1 (S.D.N.Y., 2019), *aff'd sub nom*. *In re* Guo, 965 F.3d 96 (2d Cir. 2020).

61. *Id.*

62. *Id.*

63. Hanwei Guo v Deutsche Bank Sec., 965 F.3d 96, 104-05 (2d Cir. 2020).

64. *Id.* at 107-08.

65. *Id.* at 108.

to produce documents for use in the arbitration.[66] The district court held that 28 U.S.C. § 1782 did not authorize the court to order discovery for use in private international commercial arbitration.[67] The Seventh Circuit affirmed the decision of the district court.[68] In particular, the Seventh Circuit, following an analysis of the statutory framework and context, in considering the split between the U.S. courts and the definitions of a "tribunal," held that a "foreign or international tribunal" under 28 U.S.C. § 1782 is a "state-sponsored, public, or quasi-governmental tribunal."[69]

As can be seen from the above case law, even after the decision in *Intel*, there is a split between the U.S. courts, in particular, the circuit courts, on the issue of whether the arbitral tribunals in international commercial arbitration could be considered as "foreign or international tribunal" under 28 U.S.C. § 1782. The Second, Fifth, and Seventh Circuits decided this issue in the negative. However, the Sixth and Fourth Circuits held in favor of arbitral tribunals as tribunals for the purposes of 28 U.S.C. § 1782. Even more, in *Servotronics I* and *II* that involved the same underlying arbitration, the Fourth and Seventh Circuits reached opposite results. Three more appeals related to discovery under 28 U.S.C. § 1782 in aid of international commercial arbitration remain pending in the Third and Ninth Circuits.[70] Finally, a clash between the right of an interested party to request judicial assistance and an arbitral tribunal's control over discovery should be analyzed. The arbitral tribunals in international commercial arbitration have broad powers to determine the appropriate arbitral procedure and, in particular, generally have discretion to order

66. *See In re* Servotronics, No. 18-cv-7187, 2019 U.S. Dist. LEXIS 232894 (N.D. Ill. Apr. 22, 2019) [hereinafter *Servotronics II*].

67. *Id*. at *10.

68. *See* Servotronics v. Rolls-Royce PLC, 975 F.3d 689, 690 (7th Cir. 2020).

69 *Id.*

70. *See In re* EWE Gasspeicher GmbH, No. CV 19-MC-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17, 2020), *appeal filed sub nom*. *In re* Application of EWE Gasspeicher GmbH, No. 20-01830 (3d Cir. May 8, 2020) (the district court denied discovery); *In re* Storag Etzel GmbH, No. CV19-MC-209-CFC, 2020, WL 1849714 (D. Del. Apr. 13, 2020), *appeal filed sub com*. *In re* Application of Storag Etzel GmbH, No. 20-01833 (3d Cir. May 7, 2020) (the district court denied discovery); HRC-Hainan Holding Co. v. Yihan Hu, No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020*), appeal filed sub nom. In re* Application of HRC-Hainan Holding Co., LLC, No. 20-15371 (9th Cir. Feb. 28, 2020) (the district court granted discovery).

discovery and to determine its scope (unless the parties agree otherwise).[71] National legislation of some countries permits the courts to provide assistance in taking evidence only with the consent of the arbitral tribunal or in accordance with the agreement of all parties to the arbitral proceedings.[72] Under 28 U.S.C. § 1782, the request for assistance of the courts can be made "upon the application of any interested person." In *Intel*, the Supreme Court concluded that the term "interested party" means any person (including corporations) that has a reasonable interest in obtaining judicial assistance.[73]

The arguments may be raised in support of the interested party's right to apply directly for judicial assistance to U.S. courts without the approval of an arbitral tribunal. Thus, the U.S. courts can always have "discretion to deny the application altogether or to limit the scope of evidence-gathering based on considerations specific to the international arbitration context."[74] Another argument is that such application is possible in exceptional circumstances where no arbitral tribunal exists and urgent assistance of the U.S. courts is required.[75]

However, one may argue that such an approach is incorrect and that the requests for assistance in taking evidence should be sent to the U.S. courts by arbitral tribunals or with the approval of the arbitral tribunals. Allowing requests to be sent by "interested parties" without the arbitral tribunal's approval may have the following disadvantages: (1) requests for evidence without approval of the arbitral tribunal is a breach of the fundamental rule in international arbitration that the arbitral tribunal decides all procedural issues related to the proceedings;[76] (2) the party may

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71. *See, e.g.*, U.N. Comm'n on Int'l Trade Law, *UNCITRAL Arbitration Rules*, arts. 17(1), 27(3); Int'l Chamber of Commerce, *Rules of Arbitration*, arts. 22, 25 (Mar. 1, 2017); London Court of Int'l Arbitration, *Arbitration Rules*, arts. 14.1, 22.1 (Oct. 1, 2020).

72. *See, e.g.*, English Arbitration Act of 1996 c. 23, § 43(1)-(2) ("A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence. This may only be done with the permission of the tribunal or the agreement of the other parties.").

73 *Intel*, 542 U.S. at 256.

74 Fellas, *supra* note 8, at 197.

75 GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 199 (2d ed. 2015).

76 Rothstein, *supra* note 8, at 64.

abuse its right to request evidence and go on a "fishing expedition" which would risk a loss of control over the arbitral proceedings and significant delays; (3) any requests granted before initiation of arbitration proceedings may result in one of the parties being greatly disadvantaged (it could have a relative lack of leverage in settlement negotiations, suffer from delays where it cannot procure such a favorable order, or just from the tribunal's loss of power to impact the procedure). In contrast, only allowing requests to be made through or with the permission of the arbitral tribunal has the following advantages: (1) there is little to no risk that the arbitral tribunal would reject the evidence obtained with the participation of the arbitral tribunal; (2) the arbitral tribunal may maintain control over the list of evidence to be requested and ensure that the arbitration proceedings remain efficient and simple, thus reducing costs for discovery and saving time.

The case law regarding the court's discretion to deny the application of the interested party, if the latter made no effort to request assistance from an arbitral tribunal, also varies. For instance, the court in *In re Technostroyexport* denied the application because the applicant did not seek assistance from the arbitrators,[77] but other courts may not deny the application on such a basis.[78]

III. PRACTICAL ISSUES AND SOLUTIONS RELATED TO U.S. COURTS' APPLICATION OF 28 U.S.C. §1782

The importance of judicial assistance in taking evidence in aid of international commercial arbitration cannot be overemphasized. Although legislative history does not provide a clear answer about whether the U.S. courts can assist foreign arbitral tribunals in taking evidence, one could argue that this issue should be resolved in favor of such assistance. The general intention of Congress was to grant U.S. courts broad discretion in assisting "foreign and international tribunals" in taking evidence and that "foreign and international tribunals" should include "arbitral tribunals."[79] The lack of a unified approach of U.S. courts to taking evidence in aid of international commercial arbitration causes negative consequences for parties to foreign arbitration proceedings.

First, a lack of a single approach may lead to forum shopping. Under 28 U.S.C. § 1782, evidence may be taken from a person (natural person, corporation, etc.) who resides or is found in the United States

77 *In re* Application of Technostroyexport, 853 F. Supp. at 697.

78 *See, e.g.*, *In re* Roz Trading Ltd., 469 F. Supp. 2d at 1224–31.

79 N.Y.C. Report, *supra* note 8, at 28–30.

through a particular U.S. district court for the district in which the U.S. person is resident or is found. This may lead to a situation in which parties to foreign arbitration proceedings will lodge their application in a particular court to utilize their interpretation of 28 U.S.C. § 1782, risking an overload of its docket. At the same time, this could lead to a situation in which key witnesses or documents could be situated in a district in which the courts will not grant the applications under 28 U.S.C. § 1782.

Second, this approach creates situations of inconsistency in which some courts will grant applications in support of the foreign arbitration proceedings under 28 U.S.C. § 1782 in accordance with *Intel* while other courts will not. This would arguably breach a party's right to fair and effective arbitration proceedings.[80] Such a scenario would lead an arbitral tribunal to make a decision based on an analysis of an incomplete set of facts which may result in an unfair or incorrect finding.

Another problem that arises in case law is that courts could deny applications for assistance in taking evidence under 28 U.S.C. § 1782, since the relevant foreign arbitral tribunals render awards that are not judicially reviewable. "Judicial review" in the understanding of the U.S. courts means plenary judicial review, which is, for example, stipulated by the English Arbitration Act.[81] By denying applications under 28 U.S.C. § 1782 on the basis that the arbitral awards are not subject to judicial review, U.S. courts fail to consider the decisions to either set aside or recognize and enforce an arbitral award. However, there is no clear reason as to why this is not an acceptable level of review and where the line might exist between these decisions and plenary review. One could argue that the requirement of a procedure for judicial review should be satisfied where a court has the opportunity to set aside or recognize and enforce an arbitral award for the purposes of 28 U.S.C. § 1782.

As discussed in section three above, under 28 U.S.C. § 1782, an interested person can request judicial assistance without approval of the

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80 *See, e.g.*, U.N. Comm'n on Int'l Trade Law, *UNCITRAL Arbitration Rules*, art. 17(1); Int'l Chamber of Commerce, *Rules of Arbitration*, arts. 22, 25 (Mar. 1, 2017); London Court of Int'l Arbitration, *Arbitration Rules*, art. 14.1 (Oct. 1, 2020); Hong Kong International Arbitration Center [HKIAC], *Administered Arbitration Rules*, art. 13.5 (Nov. 1, 2018).

81 *See* English Arbitration Act of 1996 c. 23, § 69(1) ("Unless otherwise agreed by the parties, a party to arbitral proceedings may . . . appeal to the court on a question of law arising out of an award made in the proceedings."). However, as it follows from the text, the parties can waive judicial review by their agreement.

arbitral tribunal, which may lead to a clash with said arbitral tribunal's control over discovery in international arbitration proceedings.

There are a number of potential solutions that could be proposed. The abovementioned issues may be resolved by way of amendments to 28 U.S.C. § 1782. The amended provisions should clearly specify that judicial assistance of the U.S. courts in taking evidence to aid international commercial arbitration is within the scope of 28 U.S.C. § 1782. The amended provisions should also specify that judicial assistance should be requested by the foreign arbitral tribunal directly or with the assistance or approval of a foreign arbitral tribunal. Another way to implement these amendments is to clarify the above approach in a decision of the Supreme Court.

CONCLUSION

The latest amendments to 28 U.S.C. § 1782 were implemented in 1964. Since then, more than fifty years have passed and the economic, political, and legal context has changed significantly. Notwithstanding the changes, there is still considerable uncertainty in the interpretation of aspects of 28 U.S.C. § 1782 in relation to international commercial arbitration. In particular, there are doubts with respect to whether U.S. courts can provide assistance in taking evidence in international commercial arbitration.

Legislative history sheds little light on the issue of whether the arbitral tribunals in international commercial arbitration fall into the definition of a "foreign or international tribunal" under 28 U.S.C. § 1782, and U.S. courts seem split on this issue. Such a lack of certainty may lead to forum shopping and might lead to a decreasing standard of what a fair and effective arbitral proceeding means. On the other hand, recognizing that the U.S. courts have powers under 28 U.S.C. § 1782 in taking evidence to aid international commercial arbitration may benefit international arbitration in general. After all, parties to an arbitration would have an additional instrument for protection of their rights in arbitration proceedings, certainty in creating the strategy for arbitration disputes, and the ability to promote the United States as a pro-arbitration jurisdiction.

Another issue is the power of the arbitral tribunal to control arbitration proceedings and, particularly, its control over discovery. Although U.S. courts are not required to grant applications for judicial assistance filed by interested persons, recognizing that such a right may be exercised with the approval of the arbitral tribunals or by arbitral tribunals themselves may further benefit international arbitration for the following

reasons: 1) U.S. courts should not interfere with the arbitration proceedings, otherwise legal assistance would not be in aid of international arbitration and would contradict the goal of 28 U.S.C. § 1782 to provide the parties to arbitration with efficacious mechanisms; 2) an arbitral tribunal may reject the documents or witnesses related to the judicial assistance request, which would lead to loss of time and funds by both parties to the arbitration. However, approval or making a request for judicial assistance by the tribunal would prevent these situations; and 3) an arbitral tribunal may narrow the scope of discovery, therefore reducing costs for discovery and saving time.

These issues related to the definition of a "foreign or international tribunal" and arbitral tribunal's control over discovery may arguably be resolved through an amendment by Congress or, failing such an amendment, the Supreme Court may clarify any vagueness through its next decision in this area.