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The newsletter of the Illinois State Bar Association's Section on International & Immigration Law

Editor's Comments

BY LEWIS F. MATUSZEWICH

We all recognize the unique impact the coronavirus is having. Is there any other occurrence in the history of the country where the legal profession has tolerated state governors closing down the court system? It will take years to understand the full impact of this on the lives of individuals who had been in the midst of divorce proceedings, adoptions, civil rights disputes, as well as delays in determining contract, patent and other rights.

We asked attorneys who have contributed to *The Globe* in the past to provide their initial views of the impact of the virus on their practice. Patrick M. Kinnally, former chair of the Section Council and a frequent contributor to *The Globe*, describes his concern if it is eventually determined that the governor

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Immigration and Litigation Practice While Dealing with Coronavirus

BY PATRICK M. KINNALLY

My interests are somewhat different than most lawyers and have been impacted by the governor's order.

Frankly, I do not believe the governor has the authority to shut down businesses and I wish he would have use the model undertaken in Japan, which was voluntary and heeded by 80 percent of that nation. I teach a class at NIU Law school, and have for over two decades. Teaching on Outlook is foreign to me and I have to wonder how meaningful to my students. It does not promote interaction. It is an unfriendly way to impart information.

As far as the litigation side of my practice is concerned, in the last month I have made two court appearances in person on emergency matters. I have conducted several zoom or telephone conferences with state court judges. Also, we have had several Zoom depositions and one citation proceeding. But for the most part very little is going on. In part this is due to the fact we are not having in person meetings with clients until the governor's order is lifted.

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Editor's Comments

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did not have the authority to shut down businesses.

Susan Goldberg, secretary of the Section Council, describes how she is adjusting to working from home.

Florian Jörg and Mirco Ceregato, attorneys with Bratschi, Ltd. in Zurich, Switzerland and frequent contributors to *The Globe*, explained the impact on their practice in Switzerland.

In the last issue of *The Globe*, we published part one of, "Discovery in the United States in Support of International Arbitrations" provided by Hyun Yung (Julia) Lee. Her material continues in this issue with part two.

Thank you to all the authors who have provided a wide range of topics and material for the eight issues of *The Globe* for this year.■

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Immigration and Litigation Practice While Dealing with Coronavirus

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Also, 80 percent of our staff are working remotely, although one or two do come by the office once or twice a week. We have 10 support staff and six attorneys

Of course, the governor's order granting immunity to nursing home and medical providers during the duration of his order is beyond his power. The General Assembly tried to do this and the Illinois Supreme Court struck that down.

As for my immigration clients, there is anxiety and despair. The government has blocked immigration for the next month. Consulates are closed. USCIS is not interviewing individuals so little is being accomplished. The government has shut the border and for the most part immigration courts are closed. USCIS is doing less, although I did get one decision granting my client SIJ status, having worked on the case for three to four years. Maybe this result was because I sued USCIS in federal court for mandamus and violations of the Administrative Procedures Act and it finally received a real lawyer's attention.

Since we are not meeting with clients we are working over the telephone, Skype, and other communication systems. I find these protocols to be impersonal and inauthentic. Also, they do not lend themselves easily to assessing the strengths and potential weaknesses of my client's cases.

Even with these experiences, I am quite thankful to see how the American people have endured a very trying time in our history. Their achievements have been many. Although there has been protracted criticism, I think the federal government has helped individuals, small businesses, and hospitals.■

The Globe

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Impact of Coronavirus on the Practice of Law

BY LEWIS F. MATUSZEWICH

The coronavirus is unique in many ways, including that it has had an impact on virtually every country in the world and people throughout the world are communicating the response, questions, factual information and factual misinformation.

I was curious as to the impact on the judicial systems and the practice of law. I sent an inquiry to members of the ISBA's International and Immigration Law Section Council and also to other attorneys who have submitted material to *The Globe*. My inquiry included, "In Illinois, for example, virtually all court matters are being delayed and it is almost impossible to meet directly with clients. We have had to learn how to use more video conferencing and are struggling with the mechanics of obtaining notary seals or witness signatures on documents."

A change in a routine procedure that I experience, on behalf of a client, I arranged a wire transfer from the client's Trust to a beneficiary in Europe. It is the first time I was required to do all of the paperwork and approve the transfer through the drive-up facility of the bank involved. The bank was not allowing anyone into the branch.

In a different matter, we are discussing with the bank the client's need to access certain documents in their safety deposit box while the bank policy is to allow no one inside the bank.

Florian Jörg practices with Bratschi Ltd in Zurich, Switzerland. Over the past several years, he has contributed numerous articles to The Globe. His response included, "There is not much to report, I am afraid.

Our office has enabled most of the lawyers and the staff to work from home. Several health measures have been implemented. I get accustomed to working from home about three days a week and I realize that this can be trained.

Our courts react differently. Some conduct hearings by video conference and present their judgments in telephone conferences while others seem to organize themselves in a way that they can observe the necessary health measures. In general, deadlines have been postponed and so called "court holidays" (time of the year during which judicial deadlines do not run, e.g., around Easter) have been extended by decree.

My next hearing is on 8 May with the Commercial Court of Zurich and I do not yet know how it will be conducted."

Mirco Ceregato also practices with Bratschi Ltd in Zurich, Switzerland. His reply was, "As Florian explained, our law firm has enabled the staff to work from home and several health measures have been implemented at our different locations. I am still commuting to my office which is close from my home.

Litigation, which is my area of expertise, has been put on an emergency level only but will restart with the measures Florian explained beginning of next week. Overall, the pandemic was managed quite well by the people and by the authorities. However, a lack of digitalization in the judicial system became apparent."

Susan M. Goldberg is secretary of the International and Immigration Law Section Council of the ISBA and is managing attorney with UAW Legal Services in Belvidere, Illinois. Her description is:

"I work for a national organization (the UAW Legal Services Plan). Even though our Illinois governor has designated legal services as "essential services", my employer has issued a directive to all Plan attorneys and staff to work from home unless we have gotten explicit prior approval in very limited situations. This has made my work more inefficient; my remote computer connection is much slower than the direct connection in my office; I brought the postage meter home and walk my letters out to the mailbox; I am making work phone calls from my cell phone (but using "*67" before dialing the number, so that no clients can see my cell phone number); and I am checking my voice mail remotely. My office mail is forwarded to my home, leading to a several-day delay in receiving it. I have told clients that they will have to be creative in figuring out how to get their wills and power of attorney documents executed. All in all, it has been an adjustment, but I am glad to follow these extra precautions to stay safe and healthy."■

Discovery in the United States in Support of International Arbitrations: Part 2

BY HYUN YUNG (JULIA) LEE

The Aftermath

Confusion Among Courts

Unfortunately, the *Intel* decision stirred more questions that it provided clarity for the lower courts that remain divided over the question of whether § 1782 applies to international arbitration bodies. In *In re Roz Trading Ltd.*, the court found that "although the Supreme Court in *Intel* did not address the precise issue of whether private arbitral panels are 'tribunals' within the meaning of the statute, it provided sufficient guidance for this Court to determine that arbitral panels convened by the [private arbitral institution] are 'tribunals' within the statute's scope."[1] Likewise, the court in *In re Winning (HK) Shipping Co. Ltd.* concluded that a private international arbitration conducted by the London Maritime Arbitrators Association constituted a 1782(a) tribunal because the arbitration arose pursuant to a private agreement and could collect evidence and issue a decision on the merits.[2] The fourth circuit also chimed in, albeit with hesitation, noting that a German penal conducting a private arbitration "might be considered" a "tribunal" under § 1782.[3] Three years later, in *In re Operadora DB Mexico, S.A. de C.V.*, a district court in Florida found that "the *Intel* Court was not faced with – and did not address – the question of whether a private arbitral tribunal is a foreign or international tribunal under § 1782" and independently concluded that the ICC International Court of Arbitration was not a § 1782(a) tribunal because it issued decisions that derived power from a private agreement, was tasked with resolving disputes independently of state-sponsored tribunals, and were not judicially reviewable.[4]

Confusion Within Courts

After *Intel*, the eleventh circuit revisited the meaning of "tribunal" under § 1782 in 2012 in *In re Consorcio Ecuatoriano de Telecomunicaciones S.A.* The eleventh circuit was initially receptive to applying § 1782 to private international arbitrations, stating that *Intel* provided substantial guidance in favor of adopting a broader definition of "tribunal" to include arbitration proceedings.[5] Accordingly, the court concluded that the Ecuadorian arbitral tribunal was a foreign tribual because "it act[ed] as a first-instance decisionmaker; it permit[ed] the gathering and submission of evidence; it resolve[d] the dispute; it issue[d] a binding order; and its order [was] subject to judicial review."[6] Following this decision, the eleventh circuit became the first and only circuit court of appeals to affirmatively conclude that arbitral tribunals qualify under § 1782.[7]

This decision, however, was ephemeral. Unprompted by either of the parties, two years later, the eleventh circuit reconsidered the issue in the very same case and *sua sponte* vacated its 2012 opinion.[8] Although the court reached the same result, it did so on substantially narrower grounds. The court expressly withheld judgment by "declin[ing] to answer" the "substantial question" of whether an arbitral tribunal constituted a "foreign or international tribunal" for purposes of the statute.[9] The ultimate decision was sustained with the weak policy reason that the petitioner may bring contemplated civil and private criminal suits.[10] Contrary to the 2012 decision which advanced the cause of § 1782's application in arbitration proceedings, the reversal thereafter invited a surge of new uncertainty to the scope of the statute and brought back the ongoing debate concerning the application of § 1782 to international arbitration proceedings.

Re-Visitation

Recently, the District Court for the District of South Carolina raised a very practical question that addressed the elephant in the room: does § 1782 apply to private international arbitration? Long story short, the answer was "no."[11]

The dispute arose from an arbitration related to a fire at Boeing's facilities in Charleston, South Carolina.[12] On January 16, 2016, Boeing was conducting testing on a plane when a tailpipe fire occurred in the plane's engine.[13] The engine, which was manufactured by Rolls-Royce, contained valve manufactured by Servotronics.[14] During testing, a piece of metal got lodged in the valve, which affected the engine fuel flow.[15] To address the issue, the Boeing ground crew began troubleshooting the engine, and subsequently the fire occurred.[16] The fire caused several million dollars of damage to the plane and the testing facility.[17] Boeing sought compensation for the damage from Rolls-Royce, to which Rolls-Royce settled the claim.[18] Rolls-Royce, in turn, demanded indemnity from Servotronics. Servotronics refused the demand.[19] Referencing to the arbitration agreement in a Long-term Agreement that Rolls-Royce and Servotronics had signed, Rolls-Royce initiated an arbitration in London.[20] Maintaining that it is not liable for the fire or the damage caused by the fire, Servotronics sought testimonies from three Boeing employees residing in Charleston to be used in support of Servotronic's defense.[21] When Boeing refused to voluntarily produce the testimonies, Servotronics filed an action under § 1782 in the U.S. District Court in South Carolina requesting that the court issue an order allowing Servotronics to serve subpoenas on the three Boeing employees.[22] In the alternative, Servotronics asked that the

court issue an order to show cause why the application should not be granted.[23]

While Servotronics does not explicitly allege that arbitration under the rules of the Chartered Institute of Arbitrators is not a state-sponsored arbitration and instead a private arbitration, Servotronic's legal argument brings to surface the fact that arbitration at issue here is a private one or should be considered a private one. Squaring with the decisions of the second and fifth circuits, the *Servotronics* court concluded that a private arbitral body does not qualify as foreign or international "tribunal" for purposes of § 1782 and denied Servotronics's request to compel discovery for use in a foreign proceeding.[24]

Abdul Latif Jameel Transportation Company Limited v. FedEx Corporation[25]

The ALJ Case

Abdul Latif Jameel Transportation Company Limited ("ALJ") is a Saudi corporation that that contracted with FedEx International Inc. ("FedEx Int'l") to serve as its delivery-services partner in Saudi Arabia.[26] Under the supply-chain contract agreement, disputes were to be arbitrated in Dubai pursuant to the rules of the Dubai International financial Centre-London Court of International Arbitration ("DIFC-LCIA").[27] In March 2018, ALJ initiated arbitration before the DIFC-LCIA against FedEx Int'l, asserting breach of contract.[28] In connection with the arbitration, ALJ filed a § 1782(a) petition to compel discovery from U.S.-based FedEx Corporation ("FedEx") in the United States District Court for the Western District of Tennessee, the district in which FedEx is headquartered.[29] Although FedEx was neither a party to the ALJ-FedEx Int'l service contract nor a party to the international arbitration, ALJ issued a subpoena requesting documents and deposition testimony of a corporate representative for FedEx in its application.[30]

The U.S. District Court for the Western District of Tennessee denied ALJ's application, "holding that the phrase 'foreign or international tribunal' in § 1782 did not encompass […] the […] arbitrations" on the ground that the commercial arbitration in question was not an administrative or "state-sponsored" arbitral proceeding. [31]

ALJ appealed the District Court ruling to the sixth circuit, arguing that the phrase "foreign or international tribunal" does in fact include such proceedings and that its discovery request should be granted.[32] FedEx argued that the commercial arbitration at issue did not constitute a "foreign international tribunal" and relied on precedents, most notably the Supreme Court ruling in *Intel Corp v. Advanced Micro Devices Inc*.

The Sixth Circuit's Decision

There being no dispute as to the "foreign or international" nature of the arbitration proceeding in Dubai, the sixth circuit addressed the issue of whether the commercial arbitral body in question properly constitutes a "tribunal" for purposes of § 1782(a).[33] In the decision written by Circuit Judge Bush, the court conducted an extensive analysis and found that private commercial arbitration panels including the DIFC-LCIA Arbitration Panel constituted a "foreign or international tribunal" under § 1782.[34]

Textualist Interpretation

In the absence of a definition of the term "tribunal" in the statute, Chief Judge Cole and Judge Griffin sought the plain meaning of the word "tribunal" at the time the term was added by amendment to § 1782(a) - 1964. Specifically, the judges examined (i) definitions of the word "tribunal" in both legal and non-legal dictionaries; (ii) use of the word "tribunal" in legal writings near that time; and (iii) the application of the word "tribunal" in 28 U.S.C. 1782 as a whole.[35] The judges concluded that the ordinary meaning of the word in standard and legal dictionaries embraced private arbitrations.[36] Likewise, the judges found that jurists, lawyers, and legal scholars at the time used the term broadly to encompass private commercial arbitration panels, including an 1853 treatise written by Justice Joseph Story and various U.S. Supreme Court opinions.[37] Finally, The Court found that the "text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract."[38]

Precedent – Intel

FedEx argued that the DIFC-LCIA arbitration panel did not constitute a "foreign or international tribunal" because the statute includes only arbitrations that are state sponsored and "permanently maintained by a national or international government."[39] To support its argument, FedEx relied on the Supreme Court's decision in *Intel*.[40] The Sixth circuit instead used the Supreme Court decision in *Intel* to conclude the very opposite opinion. The Court reasoned that the 1964 amendment expanded § 1782(a)'s scope to include administrative and quasi-judicial proceedings abroad, including the European Union antitrust commission.[41] Although the Supreme Court in *Intel* did not address whether § 1782(a) extends to private commercial arbitration, the circuit court applied the relatively expansive construction of the statute's language in its analysis.

Contrary Decisions

The circuit court's decision is in direct opposition to the earlier decisions of the second and fifth circuits, both of which found that § 1782(a) is not available to parties of international private commercial arbitrations and instead limited discovery opportunities to government proceedings.

The sixth circuit addressed the conflict, explaining that it was unpersuaded by its sister courts' analysis and reasoning. Judge Bush commented that their opinions "turned to legislative history too early in the interpretive process"[42] Specifically, the sixth circuit found the term "tribunal" to be unambiguous and therefore found no justification to rely on the statute's legislative history.[43] Even if the legislative history provided guidance, the court reasoned that it would not contradict its textual-based conclusion.[44] Therefore, the legislative reasoning provided by the sister courts were deemed null.[45] The sixth circuit further disagreed in their analysis of Congress's intent.[46]

More importantly, many disregarded the sister courts' decision entirely because they were rendered prior to the Supreme Court's decision in *Intel*.[47]

Policy Arguments

FedEx also addressed policy implications of expanding the definition by identifying the risk to interests at stake, some of which the court acknowledged but nevertheless remained unconvinced.

(1) Proportionality with Federal Arbitration Act (FAA)

FedEx argued that a broader definition of "tribunal" would cause § 1782(a) to be at odds with the Federal Arbitration Act.[48] FedEx raised the concern that, under the broader interpretation, U.S. discovery made available to parties arbitrating commercial disputes abroad would be more extensive than the discovery available to parties in domestic commercial arbitrations as afford by the Federal Arbitration Act.[49] While acknowledging that FedEx "may be correct in its assessment," the court held that the alignment of the FAA and § 1782(a) with respect to the discovery the two laws permit was "a task for Congress, not the courts." [50]

(2) Efficiency of Arbitration

FedEx also highlighted the difference in costs and efficiency of international arbitration with the U.S. discovery process.[51] FedEx argued that allowing arbitrating parties abroad to utilize § 1782(a) would violate an asserted U.S. policy favoring "efficient" arbitration procedures whose objective is to minimize resources and time.[52] In response, the court noted that district courts have considerable discretion in ordering discovery under § 1782(a) and can limit discovery that becomes "unduly intrusive or burdensome."[53] Therefore, the court held that discovery requests under § 1782(a) cannot be assumed to "inevitably become unduly burdensome."[54]

(3) Policy Objectives

FedEx further argued that § 1782(a) should not apply to commercial arbitrations held abroad because providing U.S. discovery in such instances would not further the statute's alleged aim, as identified by FedEx, of enticing foreign governments to provide reciprocal assistance to parties involved in U.S. domestic arbitrations.[55] The sixth circuit dismissed the argument as irrelevant.[56] FedEx then contended that permitting U.S. discovery to assist foreign commercial arbitral proceedings would contravene the federal policy favoring enforcement of private arbitration agreements according to their terms, especially in cases where an arbitration agreement restricts the scope and/or means of discovery.[57] The Court rejected the argument, reiterating that the district court has discretion to consider the terms of the arbitration agreement when specifying discovery to be permitted under § 1782(a).[58]

Han Smit and His Commentaries

Hans Smit was a towering figure in the realm of International Arbitration and is a hot subject in the discussion § 1786. He was a distinguished Columbia Law School professor and a leading scholar and practitioner in the fields of international arbitration and international procedure.[59] Under his directorship of the Project on International Procedure, Smit's team prepared a revised version of § 1782 of title 28 of the United States Code together with the U.S. Commission and Advisory Committee on International Rules of Judicial Procedure.[60] The Congress enacted the revision in 1964.[61]

Smit revisited the amendment in his 1998 law journal article in the *Syracuse Journal of International Law and Commerce* 35 years after the enactment.[62] In it, Smit explains that, while the precursor of § 1782 allowed assistance only in aid of a judicial proceeding in a court, the post-amendment version expands the application with its deliberate substitution of the word "tribunal" for court.[63]

The legislative history, he argues, further reaffirm this definition. The post-amendment § 1782 was expanded also to cover the assistance provided for in § 270-270C of Table 22 of the United States Code.[64] This assistance was available to international tribunals established pursuant to an international agreement to which the United States was a party.[65] The tribunals, in that context, included international arbitral tribunals, and § 270-270C were in fact enacted especially for the purpose of providing for assistance to an international arbitral tribunal.[66] § 1782 not only intended to support the provision for this assistance but also eliminated the requirement that the international tribunals be established by agreement to which the United States is a party.[67] Conclusively, "international tribunal" was intended to cover broadly all international arbitral tribunals.

Criticisms and Opinions

Discovery in international arbitrations can be problematic for several reasons, one of which recently received spotlight by the Seventh Circuit Court of Appeals during oral argument in *Servotronics Inc. v. Rolls-Royce PLC*.[68] It raised a policy-based concern in opposition to the extension of judicial cooperation to private commercial arbitrations. That is, if a commercial arbitration is deemed to be a "tribunal" for § 1782 purposes, with the Federal Rules of Civil Procedure likely governing, then parties in a foreign or international commercial arbitration would arguably have wider access to discovery from non-parties than would participants in a domestic commercial arbitration, whose limited means of such "discovery" are restrictively governed by the Federal Arbitration Act.[69] The same concern was brought to the sixth circuit, which drew on the Supreme Court's analysis in *Intel* and found it unavailing.[70] In direct opposition, the District Court for the District of South Carolina held that the *Intel* decision did nothing to alter the second and fifth circuit precedent and concluded that "the language of *Intel* to apply to private arbitration is simply too far of a reach absent more explicit language from Congress or the Supreme Court."[71]

Others criticize the broad interpretation due to lack of certainty. Whether the amended expansion included private arbitral tribunals is still debatable, as international commercial arbitration was little to what it is today. The legislative history indicates that Congress wasn't even aware of that field of law at the time, which plants doubts in the truth of Han's commentaries and in the appropriateness of sixth circuit's textualist interpretation.[72]

Some courts have also raised an ancillary concern that further complicates the application of § 1782. The decision in *Intel* required that the foreign body exercise adjudicative power and have an adjudicative purpose.[73] This prerequisite compels courts considering § 1782 requests to first

determine whether the arbitration is an alternative to or the equivalent of litigation.[74] However, this is a controversial issue that has not yet been fully resolved even outside the context of § 1782.[75]

Other courts have completely rejected the application of *Intel* to define the term "tribunal" and instead concluded that the tribunal in *Intel* had no relevance to the issue at hand. The tribunal in *Intel* was not chosen in accordance to a written agreement between the parties to settle their disputes through private arbitration. Instead, the tribunal was initiated unilaterally through a complaint by one of the parties, and the complaint was filed in a quasi-governmental body that enforces and investigates violations of certain European Union antitrust laws.[76] Therefore, according to these courts, the Supreme court in *Intel* never had the "cause to address any distinctions between private or quasi-governmental entities for purposes of [§] 1782, because there was no non-governmental or nonstate-sponsored body at issue in that case."[77] Courts that have adopted this analysis typically follow the approach used in that circuit prior to *Intel*.[78]

Lastly, the primary strength of arbitration is its faster and cheaper method of conflict resolution. One of the ways arbitration achieves this is by streamlining and limiting the discovery process. By inviting a U.S.-style discovery that is both lengthy and costly, the efficiency and cost saving benefits evaporate. The fifth circuit expressly addressed this concern, noting that the empowerment to seek ancillary discovery in international arbitrations could destroy arbitration's principal advantage as "a speedy, economical, and effective means of dispute resolution" if the parties "succumb to fighting over burdensome discovery requests far from the place of arbitration."[79]

Conclusion

Closing the Flood Gates

The opportunity to file § 1782 does not, by no means, promise discovery. Supreme Court's 2001 decision in *Intel* identified four discretionary factors to determining whether trial judges should compel discovery in support of a foreign tribunal under § 1782(a), even when the law allows it:

(i) First, "when the person from whom discovery is sought is a participant in the foreign proceeding…, the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad." The Court justified this factor by noting that "a foreign tribunal has jurisdiction over those appearing before it and can itself order them to produce evidence…"

(ii)Second, "a court… may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance…"

(iii) Third, "a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States."

(iv) Fourth, "unduly intrusive or burdensome requests may be rejected or trimmed."[80]

As such, although a privately constituted arbitral tribunal may be qualified as a "tribunal" for purposes of § 1782, a district court may still refuse to compel discovery based on its discretionary authority.

Considerations

The sixth circuit's broader interpretation can be used powerfully. Litigants engaged in foreign commercial arbitrations now have a direct vehicle to expand their discovery options in foreign arbitrations within the sixth circuit. That being said, the split decisions on whether § 1782 provides for discovery in private international arbitration makes the geographic location of the sought-after information important. Because the statute allows a § 1782 applicant to bring its request in any district court in a district where the respondent "resides or is found," the likelihood of success for a § 1782 application in international commercial arbitration cases now depends on whether the applicant can show that the respondent resides or can be found in the sixth circuit.[81]

U.S. business with international arbitration clause should pay close attention to the ramifications of this opinion and be aware that international arbitration can potentially lead to U.S. discovery. The *ALJ* decision is binding for business in the states of the sixth circuit, Kentucky, Michigan, Ohio, and Tennessee. As such, persons residing or found within these states should cautiously consider the option of resolving contractual disputes before a private arbitral panel, especially in situations where the other parties involved in the arbitration are either foreign, or a non-resident, of that circuit. The availability of § 1782 may put them at a significant disadvantage. Should parties wish to contract around this eventuality, the parties should address the possibility of § 1782 discovery in an early procedural hearing with the arbitrators. In addition, all parties that have agreed to resolve disputes through private commercial arbitration should check for any connection to the sixth circuit. If so, the parties should consider including contractual provisions that expressly exclude the possibility of resort to U.S. discovery in the event of an arbitrated dispute. Although it is questionable as to how the courts would view such provisions, the Supreme Court in *Stolt-Nielsen* held that parties to international arbitration proceedings may obtain only what they have expressly bargained for

Holders of arbitration awards stuck in the waiting period for confirmed judgment may be able to expedite the judgement process, which often prolongs over years before foreign *vacatur* proceedings, by filing a § 1782 discovery in the United States to begin locating assets.

Going forward, the sixth circuit's *ALJ* decision will have ramifications on other circuits, including the second and fifth circuits that may reconsider their pre-*Intel* decisions. The question outside of the second, fifth, and sixth circuits continues to remain unaddressed and open. Until the Supreme Court address the issue directly, the use of § 1782 in international arbitration proceedings is conclusively uncertain but certainly remains a strategic option that parties should take advantage of while the opportunity remains viable.■

1. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006).
2. *In re Application of Winning (HK) Shipping Co Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at *7 (SD Fla 30 April 2010).

3. *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411, 419 (4th Cir. 2014).
4. *In re Operadora DB Mexico, S.A. de C.V.*, 2009 WL 2423138, at *6.
6. C*onsorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012) (*CONECEL I*)
7. C*onsorcio Ecuatoriano de Telecomunicaciones*, 685 F.3d at 990.
8. Harout J. Samra, *US Court of Appeals backtracks from application of §1782 discovery in international commercial arbitration*, DLA Piper International Arbitration Newsletter (June 25, 2014), https://www.dlapiper.com/en/us/insights/publications/2014/06/international-arbitration-newsletter-q2-2014/us-court-of-appeals-backtracks-from-application/.
30. C*onsorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, No. 11-12897, 2014 WL 104132 (11th Cir. Jan. 10, 2014) (*CONECEL II*).
9. C*onsorcio Ecuatoriano de Telecomunicaciones*, 2014 WL 104132 at 1270 n.4.
10. Harout, *supra* note 29.
11. *In re Servotronics, Inc.*, No. 2:18-MC-00364-DCN, 2018 WL 5810109 (D.S.C. Nov. 6, 2018).
12. *Id*. at 1.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*.
23. *Id*.
24. *Id*. at 2-5.
25. *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 2019 U.S. App. LEXIS 28348, 939 F.3d 710 (6th Cir. 2019).
26. *Id.* at *1-4.
27. *Id.* at *4.
28. *Id.* at *6.
29. *Id.* at *7-8.
30. *Id.* at *8.
31. *Id.* at *2-3.
32. *Id.* at *3.
33. *Id*. at *15.
34. *Id*. at *3, *47.
35. *Id.* at *16-18.
36. *Id.* at *15-18.
37. *Id.* at *18-23.
38. *Id.* at *23-26.
39. *Id.* at *30.
40. *Id.* at *30-31.
41. *Id.* at *28, *31-32.
42. *Id.* at *32.
43. *Id.* at *34.
44. *Id.* at *35-36.
45. *Id.* at *34
46. *Id.* at *36-37.
47. *Id.* at *39.
48. *Id.* at *39-42.
49. *Id.* at *39.
50. *Id.* at *38-41.
51. *Id.* at *42-43.
52. *Id*. at *42.
53. *Id.* at *42-43.
54. *Id*.
55. *Id.* at *43.
56. *Id*.
57. *Id.*
58. *Id.* at *44.
59. *Hans Smit '58, Towering Figure in International Arbitration, Dies at 84*, Columbia Law School (Jan. 8, 2012), https://www.law.columbia.edu/media_inquiries/news_events/2012/january2012/hans-smit-obit.
60. *Id.*
61. *Id.*
62. Hans Smit, *American Assistance to Litigation In Foreign And International Tribunals: Section 1782 Of Title 28 Of The U.S.C. Revisited*, 25 Syracuse J. of Int'l L. & Com. 1 (1998).
63. *Id.* at 5.
64. *Id.*
65. *Id*.
66. *Id*.
67. *Id*.
68. Transcript of Oral Argument, *Servotronics, Inc. v. Rolls-Royce PLC*, No. 1:18-cv-07187.
69. *Id*.; Gilbert A. Samberg and Todd Rosenbaum, *Calling SCTOUS: Sixth Circuit Re-Establishes Circuit Split Re U.S. Discovery In Aid of Foreign Commercial Arbitration (28 U.S.C. § 1782)*, Mintz (Oct. 4, 2019), https://www.mintz.com/insights-center/viewpoints/2196/2019-10-calling-scotus-sixth-circuit-re-establishes-circuit-split.
70. *ALJ*, 939 F.3d at *39-42.
71. *In re Servotronics, Inc.*, 2018 WL 5810109 at 4.
72. Giorgio Sassine, *Raising the Stakes of the 28 U.S.C. § 1782(a) Debate: the U.S. Court of Appeals for the Sixth Circuit Holds § 1782(a) Applies to Private Arbitral Tribunals*, Kluwer Arbitration Blog (Sept. 27, 2019), http://arbitrationblog.kluwerarbitration.com/2019/09/27/raising-the-stakes-of-the-28-u-s-c-§-1782a-debate-the-u-s-court-of-appeals-for-the-sixth-circuit-holds-§-1782a-applies-to-private-arbitral-tribunals/?print=print.
73. *In re* Letters to Examine Witnesses From Court of Queen's Bench for Manitoba, Canada, 59 F.R.D. 625, 629 (N.D. Cal. 1973) (footnote omitted), *aff'd*, 488 F.2d 511, 512 (9th Cir. 1973); *see also Intel*, 542 U.S. at 241.
74. *See* 28 U.S.C. § 1782.
75. *See id.*; Larry E. Edmonson, Domke On Commercial Arbitration § 1:1, 1-3 (2010) (noting arbitration coexists with litigation as "part of the American system of administering justice"); Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration,* 79 St. John's L. Rev. 59, 93-94 (2005) (identifying the differences between arbitration and litigation); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, ICCA CONG. SER. NO. 7, 24, 26 (1996) (concluding that arbitration is sometimes considered "a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends"); Jeffrey W. Stempel, *Keeping Arbitrations From Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (noting "arbitration is a substitute for adjudication by litigation"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (finding that arbitration is not equivalent to litigation); Strong, First Principles, *supra* note 32, at 241-45 (describing the nature of arbitration).
76. *Ex rel Winning (HK) Int'l Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *7 (S.D. Fla. Apr. 30, 2010); *see also In re Dubey*, No. SACV 13-677 JVS (sHX), 2013 U.S. Dist. LEXIS 83972, at *9-10 (C.D. Cal. June 7, 2013) (referring to the court in *Intel* which "stopped short of declaring that any foreign body exercising adjudicatory power falls within the purview of the statute") (citation omitted); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1224 (N.D. Ga. 2006).
77. *Ex rel Winning*, 2010 WL 1796579 at *7.
78. *See* 28 U.S.C. § 1782; *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009) (affirming continued relevance of *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 2009)); *In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at *14-15 (affirming continued relevance of *Biedermann Int'l*, 168 F.3d at 880, and Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999)).
79. *El Paso Corp*., 341 F. App'x at 34 (citations omitted); *see also* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; *In re Dubey*, 2013 U.S. Dist. LEXIS 83972 at *14-15 ("Construing § 1782 to apply to private contractual arbitrations would defeat the timeliness and cost- effectiveness of arbitration, and would place a heavy burden on the federal courts to determine discovery requests."); *In re Rhodianyl S.A.S.*, No. 11-1026-JTM, 2011 U.S. Dist. LEXIS 72918, at *31 (D. Kan. Mar. 25, 2011) ("Interpreting §1782 to apply to voluntary, private international arbitrations would be a body blow to such arbitration, since it would create a tremendous disincentive to engage in such arbitration . . . ."); *In re Application of Caratube Int'l Oil Co.*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010); Alford, *supra* note 3, at 136.
80. *Intel*, 542 U.S. at 244-45.
81 28 U.S.C. § 1782(a)