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The U.S. Supreme Court Finally Limits the Scope of Judicial Assistance in Private International Arbitral Proceedings Pursuant to 28 U.S.C. § 1782 in its Recent Decision of *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 596 U.S. ___ (2022)

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Until recently, there has been a circuit split as to whether parties to foreign private arbitral proceedings could seek assistance from the U.S. courts for discovery pursuant to 28 U.S.C. §1782. The circuit courts have differed on the issue of whether a private arbitral proceeding may be considered a "proceeding in a foreign or international tribunal" in terms of the statute, which would ultimately allow or disallow judicial assistance in taking of evidence by the U.S. district courts for use in the requested proceedings. While the U.S. Supreme Court has addressed the applicability of §1782 in its Intel decision in 2004, it had not established a test as to what constitutes a foreign or international tribunal for the purposes of §1782, thereby leaving it open for lower courts to continue to interpret §1782 in their own ways, as requests for judicial assistance in taking of evidence are filed.

In the recent decision of ZF Auto. US, Inc., v. Luxshare, Ltd., the Supreme Court has finally clarified that in order for an arbitral panel to be a "foreign or international tribunal" under §1782, such panels must exercise governmental authority conferred by one nation or multiple nations. Therefore, private commercial arbitral panels are not "foreign or international tribunal(s)" for the purposes of §1782 because they do not constitute governmental or intergovernmental adjudicative bodies. Such holding is necessary and legitimate for interested parties in international arbitration, as well as, potential parties of arbitration who are contemplating alternative dispute resolution for their dispute(s).

Key Words : judicial assistance in taking of evidence, international commercial arbitration, 28 U.S.C. §1782, international tribunal, foreign tribunal.

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Ⅰ. Introduction

Arbitration is an alternative dispute resolution mechanism based on parties' mutual consent to resolve any dispute(s) that may arise between them through arbitration by arbitral tribunals appointed according to their arbitration agreement(s). International arbitration has been an effective and preferred dispute resolution mechanism, especially because parties are often reluctant to be subjected to foreign national courts, among other beneficial characteristics arbitration has to offer. While arbitration is well-known for its numerous advantages, such as, party autonomy and flexibility in arbitral proceedings, time and economic efficiency, readily enforceable and recognized arbitral awards in other nations, and minimal court intervention, among many, it is inevitable that national courts must get involved in order to provide some assistance with certain aspects of arbitral proceedings, primarily due to lack of compulsory authority of arbitral tribunals. One instance in which national courts intervene in arbitral proceedings is to render judicial assistance in taking of evidence, such as, ordering someone to submit relevant documents or provide testimony, among others. At the same time, the actual scope and limits of judicial assistance in aid of international arbitration vary depending on each nation's arbitration legislations and respective attitudes and policies about arbitration.

More in particular, U.S. courts have not been consistent in providing judicial assistance in aid of foreign-seated arbitrations pursuant to 28 U.S.C. §1782 (hereinafter §1782), which describes the kind of assistance that U.S. courts may render to foreign or international tribunals and to litigants before such tribunals. Such inconsistency in federal case law has continued even after the U.S. Supreme Court's 2004 decision of *Intel Corp. v. Advanced Micro Devices, Inc.* although in such case, the Supreme Court had construed the term "tribunal" liberally and concluded that such term included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts ."[1] While some courts have since then relied on the Intel decision to provide assistance in foreign-seated arbitrations pursuant to §1782, other courts have decided

1) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004).

that foreign private arbitral tribunals are not included in the scope of §1782 and therefore have denied requests for assistance in discovery. Therefore, the Supreme Court's recent decision in the *ZF Auto. US, Inc., v. Luxshare, Ltd.*, making it abundantly clear that a foreign private arbitral tribunal fails to constitute a "foreign or international tribunal" in the text of the §1782, was necessary in order to prevent any more production of inconsistent case law and the consequent conflicting attitudes of U.S. federal courts regarding judicial assistance with respect to taking of evidence in aid of foreign arbitral proceedings. Thus, in this article, the Supreme Court's recent decision in *ZF Auto. US, Inc., v. Luxshare, Ltd.* is discussed next in section II, with implications of such decision provided in section III, and concluding remarks are included in section IV.

Ⅱ. The Supreme Court's Decision in ZF Auto. US, Inc., v. Luxshare, Ltd.[2)]

1. Summary of Background of the Decision at Issue

The U.S. Supreme Court has recently held in the consolidated cases of *ZF Auto. US, Inc., v. Luxshare, Ltd, and AlixPartners, LLP, et al. v. The Fund for Protection of Investors' Rights in Foreign States* that private adjudicatory bodies do not count as "foreign or international tribunals" in terms of 28 U.S.C. §1782,[3)] the statute which

2) Together with No. 21-518, *AlixPartners, LLP, et al. v. Fund for Protection of Investors' Right in Foreign States*, 596 U.S. ___, 142 S. Ct. 2078, 213 L. Ed. 2d 163 (2022).

3) 28 U.S. Code Section 1782 provides the following: "Assistance to foreign and international tribunals and to litigants before such tribunals.
(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or

permits U.S. district courts to order testimony or the production of evidence "for use in a proceeding in a foreign or international tribunal." Such decision has clarified that the statute only reaches governmental or intergovernmental adjudicative bodies, and therefore, arbitral tribunals involved in either case at issue did not fall under the auspices of such adjudicative bodies. Both cases dealt with parties who sought discovery in the United States for use in arbitration proceedings abroad, invoking §1782. While the arbitral tribunal or panel involved in the two cases differed in particularities, the Court's holding applies in the same way: the requests for discovery pursuant to §1782 in both cases are denied, as the Court has made it clear that private arbitral panels at issue do not qualify as "foreign or international tribunals" under the statute. This decision has clarified the long-existing confusion and finally resolved the split of authorities in the lower federal courts because the Court's 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*[4] had not addressed the issue of private international arbitral tribunals directly but had construed the term "tribunal" liberally in holding that such term included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[5] Relying on such broad interpretation in Intel, some lower courts have held that parties may invoke §1782 to foreign or international private arbitrations, which is exactly what the parties seeking discovery in the cases at issue had done.

The Supreme Court's decision at issue was unanimous and straight-forward. Therefore, only the relevant contexts of the two cases, mainly the nature and/or character of the arbitral tribunal and/or panel will be discussed in this article. In the first case, *ZF Auto. US, Inc.*, the parties had an agreement that all of their disputes

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statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure. A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him. (underlined emphasis added by the author.)"

4) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241.

5) *Id.* at 258.

would be "exclusively and finally settled by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e. V. (DIS)." DIS is a private dispute resolution organization based in Berlin. The parties' agreement provided that the arbitration panel be formed by Luxshare and ZF each choosing one arbitrator and those two arbitrators choosing a third.[6]

In the second case, The Fund for Protection of Investors' Rights in Foreign States initiated a proceeding against Lithuania under a bilateral investment treaty between Lithuania and Russia. The Fund chose "an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)," with each party selecting one arbitrator and those two choosing a thir d.[7] After initiating arbitration, but before the selection of an arbitral tribunal, the Fund filed a §1782 application in the U.S. District Court for the Southern District of New York seeking information, but the opposing party resisted discovery arguing that the ad hoc arbitration panel is a private adjudicative body that is not a "foreign or international tribunal" under §1782. The District Court rejected such argument and granted the discovery request pursuant to §1782, which the Second Circuit affirmed. The Second Circuit had previously held that a private arbitration panel does not constitute a "foreign or international tribunal" under §1782, but in the particular case at issue, it had concluded that the ad hoc arbitral panel was indeed a "foreign or international" tribunal after employing a multifactor test.[8] While the Second Circuit's

6) *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 596 U.S. ___, 142 S. Ct. 2078, 213 L. Ed. 2d 163 (2022).
7) *Id.* at 170.
8) The Second Circuit applied the multifactor test to determine "whether the body in question possesses the functional attributes most commonly associated with private arbitration" and concluded that the ad hoc panel at issue was "foreign or international" rather than private. *In re Fund for Prot. of Investor Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 225, 228 (2d Cir. 2021). This multifactor test is whether the so-called *Intel* factors weighed in favor of granting the requesting party's discovery application. The *Intel* factors are the following: (1) the district court has discretion to grant any discovery application and that it is not required to do so; (2) the district court must consider whether the foreign arbitral tribunal would be receptive to judicial assistance from a U.S. court; (3) the district court must consider whether the person from whom discovery is sought is a participant in the foreign proceeding, as an order pursuant to §1782 would be less justified than if the party is a non-participant because the arbitral tribunal may lack the ability to compel non-parties to produce evidence without judicial assistance; (4) the district court must also consider the nature of the foreign tribunal and the character of the proceedings underway abroad; (5) the district court must consider whether the requested disclosure is "unduly intrusive or burdensome"; and (6) whether a request for judicial assistance seeks to "circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." *Intel Corp.*, 542 U.S. 241.

stance on this issue will be brought up again later in the article with discussion of a split of authorities in the U.S., when addressing this particular ad hoc arbitral panel, the Second Circuit had considered the fact that the arbitration at issue was between an investor and foreign State party to a bilateral investment treaty, and that the arbitration took place before an arbitral panel established by that same treaty, thereby affirming the District Court's decision of concluding that the arbitration was a "proceeding in a foreign or international tribunal"[9] in terms of §1782.

2. The U.S. Supreme Court's Construction of the Key Phrase of "foreign or international tribunal" of § 1782

To be clear, the parties were not disputing whether the arbitral tribunals at issue were sufficiently adjudicatory. Thus, the Court narrowed the issue to decide whether the §1782 requires "tribunals" to be governmental or intergovernmental bodies. The Court distinguished this very issue from the one in Intel because there, the Court concluded that the Commission of the European Communities was a §1782 tribunal in part because it was a "first-instance decisionmaker" that rendered dispositive rulings reviewable in court.[10]

In this decision, the Court began with the Black's Law Dictionary definition of the word "tribunal" and the natural impression the term gives off as having some governmental characteristics and/or nature, as a synonym for "court."[11] Then, the Court also considered that the term may be used more broadly to refer to any adjudicatory body that has the power of determining or judging and concluded that such broad definition is fitting for interpreting "foreign or international tribunal" in §1782 in light of its legislative history since a prior version of §1782 had covered "any judicial proceeding" in "any court in a foreign country," 28 U.S.C. §1782 (1958 ed.), but in 1964, Congress expanded the provision to cover proceedings in a "foreign or international tribunal." In addition to the legislative history, the Supreme Court

9) *In re Fund for Prot. of Investor Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216.

10) *Intel Corp.*, 542 U.S. at 254-55, 258.

11) *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 213 L. Ed. 2d at 171. "[t]he seat of a judge" or "a judicial court; the jurisdiction which the judges exercise", quoting Black's Law Dictionary 1677 (4th ed. rev. 1968).

previously noted in the *Intel* decision that the shift created "'the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad.'"[12] As a result, the Court reiterated that a "tribunal" in terms of §1782 is not only referring to a formal court, and the expansive meaning of the term does not necessarily exclude private adjudicatory bodies.[13] At the same time, the Court continued to elaborate on how if the Court only had the single term "tribunal" to interpret and work with, then private arbitral panels would be covered by such ter m.[14] Thus, the Court drew attention to the context surrounding the term "tribunal," which are the modifiers of "foreign or international," leading to its conclusion that the phrase together should be understood as an adjudicatory body that exercises governmental authority.[15] The Court elaborated on what a "foreign tribunal" means first, by analogizing with what we think of when we see the phrase "foreign leader," which brings to mind an "official of a foreign state," so that is what a "foreign tribunal" should bring to mind – potential governmental or sovereign connotations, and thereby the more natural interpretation would be a "tribunal belonging to a foreign nation than to a tribunal that is simply located in a foreign nation."[16] From this, the Court reached the conclusion that for a tribunal to belong to a foreign nation, that tribunal must possess sovereign authority conferred by that nation.[17] In further support of the Court's interpretation of the "foreign tribunal," the Court stated that the statute itself presumes that a "foreign tribunal" follows the "practice and procedure of the foreign country," and therefore, to have such assumption be made about a private adjudicatory body that is typically created based on an agreement made by private parties would be

12) *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. at 258.
13) *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 213 L. Ed. 2d at 172.
14) *Id.*
15) *Id.*
16) *Id.*
17) *Id.* The author does not find the analogy between a foreign leader and a foreign tribunal as natural as the Supreme Court seems to have found them somehow very analogous, other than the immediate, natural impression that a foreign leader and a foreign tribunal bear some governmental and/or sovereign authority. While the author is of the opinion that the Supreme Court has skipped a few steps of reasoning to support such a narrow conclusion (i.e., others, especially users of private commercial arbitration, may refer to arbitral tribunals as "foreign tribunals" due to their locality rather than because they necessarily bear some sovereign authority of a foreign nation, etc.), the author is limiting the scope of this article to highlight the significant meaning of this decision to the arbitration community with respect to judicial assistance in taking of evidence, rather than raising issues with the Supreme Court's interpretation of any particular terms.

odd, whereas it would make sense to assume such about a foreign court, quasi-judicial body, or any other governmental adjudicatory body following the practice and procedures prescribed by the government that conferred authority on it.[18)]

Then, the Court turned to the next modifier "international" tribunal and concluded that a tribunal is "international" when it "involves or is of two or more nations, meaning that those nations have imbued the tribunal with official power to adjudicate disputes."[19)] Hence, the Court concluded that phrases "foreign tribunal" and "international tribunal" complement one another in that "the former is a tribunal imbued with governmental authority by one nation, and the latter is a tribunal imbued with governmental authority by multiple nations."[20)]

Furthermore, the Court reasoned that statutory history of §1782, as well as, comparison to the Federal Arbitration Act (FAA), 9 U.S.C. §1 would confirm the Court's interpretation. The Court highlighted that until 1964, §1782 covered assistance only to foreign courts, and a separate provision covered assistance to "any international tribunal or commission . . . in which the United States participate[d] as a party."[21)] Combining the two statutory lines began with the Congressional establishment of the Commission on International Rules of Judicial Procedure, which was charged with improving the process of judicial assistance, specifying that the "assistance and cooperation" was "between the United States and foreign countries" and that "the rendering of assistance to foreign courts and quasi-judicial agencies" should be improved.[22)] Congress adopted the Commission's proposed legislation in 1964, which became the modern version of §1782. The Court, in having reviewed statutory history, concluded that the amendment to §1782 did not mean to expand from public to private adjudicatory bodies, but to broaden the range of governmental and intergovernmental bodies included in §1782 in order to serve the Congressional purpose of increasing the assistance and cooperation rendered by the U.S. to foreign nations.[23)]

Moreover, the Court highlighted comity as one of primary purposes underlying

18) *ZF Auto. US, Inc.*, 213 L. Ed. 2d at 173.
19) *Id.*
20) *Id.*
21) *ZF Auto. US, Inc.*, 213 L. Ed. 2d at 174.
22) *Id.*
23) *Id.*

§1782, in that allowing federal courts to assist foreign and international *governmental bodies* would promote respect for foreign governments and thereby encourage reciprocal assistance. In the Court's view, rendering assistance to private adjudicatory panels by the U.S. district courts would not serve the purpose of encouraging such reciprocity in judicial assistance to the U.S. from foreign nations.[24] Additionally, the Court noted that covering private adjudicatory bodies under §1782 would open U.S. district courts to any *interested person* seeking judicial assistance for private proceedings before any private adjudicatory body, for instance, private commercial arbitration, and this has been a legitimately noted concern post *Intel*.[25] The Court also discussed the differences with scope of discovery allowed by the Federal Arbitration Act in domestic arbitral proceedings with that if a district court granted the §1782 request.[26] Such disparities and implications were also pointed out prior to this decision[27] and now are resolved by the clarity of today's holding. In light of such discussion, the Court concluded that §1782 requires a "foreign or international tribunal" to be governmental or intergovernmental, meaning that a "foreign tribunal" is one that exercises governmental authority conferred by a single nation, and an "international tribunal" being one that exercises governmental authority conferred by two or more nations. Therefore, the Court made its holding clear in that private adjudicatory panels are not covered by §1782.[28]

Next, the Court then analyzed whether the decision-making panel in each of the cases at issue was governmental or intergovernmental. In *ZF Auto. US, Inc.*, the discussion is simple and straight-forward on this issue because the arbitral panel at issue was a typical private arbitration based on parties' private contract that DIS would arbitrate any dispute between the parties. As DIS arbitral panels are constituted according to the rules of parties' choice, and no government is involved in

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24) *Id.* at 174.

25) *Id. See also*, Jung Won Jun, "Judicial Assistance in Taking of Evidence in International Commercial Arbitration," 32 Commercial Cases Rev. 297, 317-18 (2019).

26) The Court mentioned that the FAA permits only the arbitration panel to request discovery pursuant to 9 U.S.C. § 7, while district courts can entertain §1782 requests from foreign or international tribunals or any "interested person," and the fact that "prearbitration is off the able" under the FAA whereas it is broadly available under §1782, among other differences. *ZF Auto. US, Inc., v. Luxshare, Ltd.*, 213 L. Ed. 2d at 174.

27) *See supra* note 26.

28) *ZF Auto. US, Inc., v. Luxshare*, Ltd., 213 L. Ed. 2d at 175.

composition of such panels, the Court concluded that such adjudicatory body does not qualify as a governmental body.[29] In doing so, the Court rejected the party's argument that DIS panels should be considered governmental because laws govern them, and courts enforce their contracts – even the broadest reading of §1782 would not allow such interpretation because then, there would be no distinction between governmental and private adjudicatory bodies.[30]

In the *AlixPartners, LLP* case, an ad hoc arbitration panel was at issue, coupled with the facts that a sovereign, Lithuania, being on one side of the dispute, and such arbitration was based on an international treaty rather than a private dispute resolution agreement. While the Fund argued that such factors should render the ad hoc panel intergovernmental, the Court held that neither the presence of a sovereign as a party to the dispute, nor the international treaty's existence is dispositive because the analysis should go to the substance of their agreement, which is whether the two nations intended to confer governmental authority on an ad hoc panel formed pursuant to the treaty.[31] The Court therefore examined the relevant provision of these parties' ad hoc arbitration and decided that while they had the option of electing "[a] competent court or court of arbitration of the Contracting Party in which territory the investments are made,"[32] which is clearly governmental, these parties chose "d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL),"[33] among other options, which they had total autonomy to do so. Nothing in the treaty indicated intent either by Russia or Lithuania that an ad hoc panel bear governmental authority; rather, the ad hoc panel should "function independently" of, is unaffiliated with either Lithuania or Russia, and is formed for the purpose of adjudicating the particular investor-state dispute between the particular parties. The Court noted further that the ad hoc panel lacks other "possible indicia of a governmental nature."[34] Additionally, the Court compared ad hoc panels composed in pursuant to Article 10 of the treaty with those formed in accordance with Article 11, which provides that each country is involved in forming the arbitral body and also

29) *Id.*
30) *Id.*
31) *Id.* at 175.
32) *Id.* at 176, quoting Article 10 of the treaty at issue.
33) *Id.*
34) *Id.* at 176.

funds its operations.[35] To the contrary, the Court found that the dispute at issue between the Fund and Lithuania is not any different from the DIS panel in the first case in both form and function because essentially, the authority of the ad hoc panel originated from the parties' consent to arbitrate, and whether the parties' consent was manifest in a private arbitration agreement or an international treaty is not relevant. The Supreme Court made it abundantly clear in this decision that a mere inclusion of an option to arbitrate before an ad hoc panel does not automatically render such panel or that proceeding governmental. Rather, such inclusion demonstrates countries' choice to offer investors potentially appealing options of resolving their disputes before private arbitration panels in order to provide favorable conditions for investments.[36] Therefore, finding no intent by either nation to confer governmental authority to ad hoc panels, the Court confirmed its conclusion, despite the Fund's argument that such adjudicatory body shares some features of others that look governmental.

Ⅲ. The Significance of the Supreme Court's Decision in *ZF Auto. US, Inc.*

1. Finally Resolving the Circuit Split from Varying Interpretations of "foreign or international tribunals"

Prior to this decision, the Supreme Court's *Intel* decision in 2004 holding that a European Commission competition proceeding was a "proceeding in a foreign . . . tribunal" under §1782, had further caused a circuit split on the issue of whether arbitral tribunals in international commercial arbitral proceedings should be considered "tribunals" in terms of §1782. On one hand, some courts have held that the Supreme Court's liberal reading of the term "tribunal" would extend to foreign-seated private arbitral tribunals, while on the other hand, other courts have held that foreign arbitral

35) *Id.* at 176, fn. 4. Under some circumstances, countries invite officials of the International Court of Justice to appoint the arbitral body's members, and because such details are lacking in Article 10's ad hoc arbitration option at issue, the Court concluded that arbitral bodies formed pursuant to Article 11 have a much higher level of government involvement.

36) *Id.* at 177.

tribunals do not fall within the scope of §1782. In this subsection, the inconsistent patterns of the U.S. courts having provided assistance with taking of evidence in aid of foreign-seated arbitrations before foreign or international arbitral tribunals and therefore having caused a split of authorities in federal case law – prior to this decision by the Supreme Court has been issued – are discussed.

First of all, the Second Circuit was the first to address this issue back in 1999, and it had begun from the text of §1782 and how it does not clearly exclude private arbitral panels, while it does not clearly include them either.[37] It then had concluded that the phrase "foreign or international tribunal" was limited to state-sponsored foreign and international tribunals after reviewing statutory and legislative history, and more specifically because having district courts compel discovery in private foreign arbitrations would be in "stark contrast to" the limited role that courts play in domestic arbitrations.[38] After the Fifth Circuit also agreed with this interpretation in 1999[39] and up until 2019 when the Sixth Circuit broadly held that the district court's authority to compel discovery for use in foreign litigation extends to private foreign arbitrations in *In re Application to Obtain Discovery*,[40] no other appellate court has addressed this issue.

Hence, in the meantime, parties to arbitration have availed themselves of assistance from some federal district courts with their discovery requests before foreign arbitral tribunals. For instance, the U.S. District Court for the Northern District of Georgia has held that an arbitral panel of the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna was an arbitral body whose panels functioned in accordance with the widely accepted definition of the term "tribunal" and therefore was a foreign or international tribunal within the meaning of §1782. The court reasoned that because the panels were first-instance decision makers that issued decisions both responsive to the complaint and reviewable in court, it was indeed a tribunal. Particularly, in that case, the respondent was not a participant in the foreign proceeding at issue, and the court found such fact weighed in favor of ordering

37) *Nat'l Broad. Co. v. Bear Sterns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999).
38) *Nat'l Broad. Co.*, 165 F.3d at 191.
39) *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).
40) *In re Application to Obtain Discovery for United States in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019).

discovery because the foreign tribunal could not itself compel production of evidence, let alone, from a non-participant in the arbitral proceeding.[41] Some courts have also held that international private arbitration tribunals fall within the ambit of a foreign or international tribunal under §1782 but nevertheless have declined to grant discovery requests.[42] Courts' decisions denying discovery applications may be legitimate as their decisions have been made exercising judicial discretion.

Thus, again, the issue has remained as to how some courts have classified private international arbitral tribunals as foreign or international tribunals within the meaning of §1782, whereas others have found otherwise, further creating a circuit split. For instance, the Second Circuit and the Fifth Circuit have ruled that the phrase "foreign and international tribunals" in the statute was not intended to authorize resort to U.S. district courts to assist discovery in private international arbitral proceedings, as aforementioned. The Second Circuit in *National Broadcasting Co.* concluded that international arbitral panels created exclusively by private parties were not "foreign or international tribunal(s)" in light of legislative history of §1782.[43] Therefore, it affirmed the district court's order quashing subpoenas and denying a motion to enforce subpoenas.[44] At issue was a private commercial arbitration administered by the International Chamber of Commerce under ICC rules and Mexican law, lacking any governmental element in the tribunal.[45] Moreover, the Fifth Circuit concluded that there was no evidence that Congress contemplated extending §1782 to the arena of

41) *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006).

42) *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008), in which a German corporation moved to produce documents and give testimony pursuant to §1782(a) for use in a potential arbitration between the German corporation and a Japanese corporation in the International Chamber of Commerce International Court of Arbitration (hereinafter "ICC"). While the court found that the International Chamber of Commerce International Court of Arbitration was a "tribunal" within the meaning of §1782, and so that §1782 would permit discovery for proceedings before the ICC, the court nonetheless denied the German corporation's motion to compel.

43) The Second Circuit concluded that the language "foreign or international tribunal" is ambiguous, so it examined the statute's legislative history in order to determine legislative purpose more perfectly. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d at 188. After an examination of Congressional intent to broaden the scope of repealed statutes and expanding their reach to intergovernmental tribunals, yet finding no indication by Congress to reach private international tribunals, the Court decided against resolving the ambiguity of the phrase to include the arbitral panel in the ICC arbitration at issue. *Id.* at 189-90.

44) *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184.

45) *Id.* at 188.

international commercial arbitration, and so, the phrase "foreign and international tribunals" in §1782 was not intended to authorize resort to federal district courts to assist discovery in private international arbitration and thus reversed the decision that ordered the non-party to the arbitration to submit to a deposition and produce certain documents that related to the party.[46)]

Furthermore, the Seventh Circuit, in *Servotronics, Inc. v. Rolls-Royce PLC*, agreed with the Second and Fifth Circuits' holdings that §1782(a) does not authorize district courts to compel discovery for use in a private foreign arbitration, as this particular issue was of first impression for the Seventh Circuit.[47)] In this particular case, the arbitration at issue was a binding arbitration pursuant to a long-term agreement between Rolls-Royce and Servotronics under the rules of the Chartered Institute of Arbiters, in which Servotronics filed an ex parte application in the U.S. District Court for the Northern District of Illinois asking the court to issue a subpoena compelling Boeing to produce documents for use in the London arbitration invoking §1782(a), and the judge had initially granted the request and issued the subpoena. But, Rolls-Royce intervened and moved to quash the subpoena, in which Boeing joined, arguing that §1782 does not permit a district court to order discovery for use in a private foreign commercial arbitration. The court agreed that §1782 does not authorize the court to provide discovery assistance in private foreign arbitrations, which was consistent with the Supreme Court's holding in *ZF Auto. US, Inc*. The Seventh Circuit also highlighted that the narrower understanding of the term "tribunal" avoids a serious conflict with the FAA, and because of the court's duty to construe statutes in ways to avoid such conflicts with one another when encountered with possibilities to do so, it would be reasonable to apply such method of interpretation.[48)] As a result, the court concluded

46) *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

47) The court noted that the Sixth Circuit and Fourth Circuit have reached the opposite conclusions. *Servotronics, Inc. v. Rolls-Royce*, PLC, 975 F.3d 689, 690 (7th Cir. 2020).

48) *Servotronics, Inc. v. Rolls-Royce*, PLC, 975 F.3d 695. "When a statute is susceptible of two interpretations, one that creates a conflict with another statute and another that avoid it, we have an obligation to avoid the conflict 'if such a construction is possible and reasonable.' *Prescision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003)." *Servotronics, Inc. v. Rolls-Royce*, 975 F.3d at 695. The court also noted that the FAA permits the arbitration panel, and not the parties, to summon witnesses before the arbitral panel to testify and produce documents and to petition the district court to enforce the summons, while §1782 permits both foreign tribunals and "other interested persons" to obtain discovery orders from district courts, and access to a much more expansive discovery than their counterparts in domestic arbitration, among other reasons, in

that it would be reasonable to find that §1782 does not apply to private foreign arbitrations, considering the relationship between the FAA and §1782, which is discussed further in the next subsection.

Finally, the Third Circuit affirmed the district court's order denying discovery under §1782 because the private arbitration panel at issue failed to qualify as a governmental body, about a week after the Supreme Court's issuance of the *ZF Auto. US, Inc.* decision.[49] Therefore, the much anticipated Supreme Court's holding on this issue is already in the works of resolving a longstanding split of authorities among the federal courts and also promoting judicial efficiency by rendering a straight-forward analysis.

2. Avoiding a Stark Conflict with the Federal Arbitration Act § 7 as to Discoverability in Arbitral Proceedings

Section 7 of the Federal Arbitration Act ("§7" hereinafter) provides statutory authority for invoking the powers of a federal district court to assist arbitrators in obtaining evidence. Under such provision, arbitrators may subpoena witnesses and direct those witnesses to bring material documentary evidence to an arbitral hearing, and if witnesses fail to comply, the district court for the district in which the arbitrators are sitting may compel compliance with such subpoenas.[50]

Ways of obtaining evidence under §7 are greatly more limited than those available under §1782 because first, §7 authorizes only arbitrators to subpoena documents or

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pointing out the stark differences, similar to other courts. *Id.*

49) *In re EWE Gasspeicher GmbH*, No. 20-1830, 2022 U.S. App. LEXIS 17149 (3rd Cir. 2022).

50) 9 U.S.C. § 7. The text of §7 provides the following: "The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."

witnesses, so the parties may not avail themselves of such authority under the provision. Secondly, §7 explicitly confers enforcement authority only upon the district court for the district in which such arbitrators, or a majority of them, are sitting, and third, the express language of §7 refers only to testimony before the arbitrators and to material physical evidence, such as, books and documents, brought before them by a witness, and it remains questionable as to whether §7 may be invoked as authority for compelling pre-hearing depositions and pre-hearing discovery.

On the other hand, disclosure available pursuant to §1782 is vastly more expansive. To name only a few differences, for one, any "interested person" may apply for judicial assistance directly from a district court, meaning that any party or even a non-party may submit discovery applications directly to the court without approval from the pertinent arbitral tribunal, which may ultimately run contrary to the parties' arbitration agreement(s). Additionally, §1782 requests may be made even prior to foreign arbitral proceedings having begun, possibly allowing parties to take control over the proceedings.[51] Also, U.S. courts may allow a broad range of discovery that is generally common in litigation under the Federal Rules of Civil Procedure, while a much narrower discovery is the norm in international arbitration. Therefore, continuing to allow discovery requests pursuant to §1782 in private arbitral proceedings would not only be inconsistent with disclosure allowed in domestic arbitration pursuant to the FAA, but it would also unfairly provide an extensive amount of discovery to (foreign) counterparties, inadvertently placing U.S. parties in an unequal playing field as a result.[52]

Ⅳ. Concluding remarks

In the recent decision of *ZF Auto. US, Inc., v. Luxshare, Ltd.*, the Supreme Court has finally clarified that in order for an arbitral panel to be a "foreign or international

51) Jun, *supra* note 26, at 317, also citing to Daniel J. Rothstein, "A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration," 19 Am. Rev. of Int'l Arb. 61, 64 (2009).

52) For more discussion on this issue, *see* Jun, *supra* note 26, at 318, as well as, Kenneth Beale, Justin Lugar, Franz Schwarz, "Solving the §1782 Puzzle: Bringing Certainty to the Debate over 28 U.S.C. §1782's Application to International Arbitration," 47 Stan. J. Int'l L. 51, 91-93 (2011).

tribunal" under §1782, such panels must exercise governmental authority conferred by one nation or multiple nations. Therefore, private commercial arbitral tribunals do not constitute a "foreign or international tribunal" for the purposes of §1782 because they do not constitute governmental or intergovernmental adjudicative bodies. Such holding was necessary and legitimate for interested parties in international arbitration, as well as, potential parties of arbitration who may be contemplating alternative dispute resolution for their dispute(s). This clear holding by the U.S. Supreme Court would unambiguously guide federal courts in the U.S. in their decisions to provide assistance in aid of taking of evidence for use in a proceeding in a foreign or international tribunal – as private foreign or international arbitral tribunals are manifestly excluded from the scope of §1782 application, unless parties and counsel could perhaps show that their arbitral panels somehow have elements of governmental authority and/or are "imbued with governmental authority." Therefore, this unanimous holding was not only legitimate but necessary as the longstanding circuit split can now finally be put to rest in favor of establishing more of a uniformity in the federal case law of judicial assistance in taking of evidence in international arbitration.

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