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Limiting 28 U.S.C. § 1782: A Changed Landscape for Discovery in Private Commercial Arbitration Abroad

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LIMITING 28 U.S.C. § 1782: A CHANGED LANDSCAPE FOR DISCOVERY IN PRIVATE COMMERCIAL ARBITRATION ABROAD

ABSTRACT

For decades 28 U.S.C. § 1782 has been used by foreign entities looking to compel discovery in the United States for use in commercial arbitration proceedings abroad. Despite the statute being in force since 1948, many federal courts were unsure of whether § 1782 could actually be used in international private commercial arbitration. The Supreme Court tried and failed to clarify the statute's scope in 2004, leading to a circuit court split as to § 1782's applicability. Looking to end the controversy once and for all, during the Summer of 2022, the Supreme Court clearly stated that § 1782 might not be used by parties involved in private commercial arbitration abroad. This decision leaves foreign companies with one less option to compel discovery in arbitration proceedings against parties from the United States. These companies may decide to file suit in a United States Federal Court to obtain discovery, then drop the case to pursue arbitration. They may also try to compel Congress to pass an amendment to § 1782 that explicitly allows discovery in such proceedings. Finally, they may redraft arbitration clauses in their contracts to contain more explicit rules for discovery. While all three options have advantages, drafting effective discovery clauses in agreements to arbitrate is the best way to fill the gap left by the inapplicability of § 1782.

INTRODUCTION

Many people mistakenly believe arbitration to be some modernly created "quasi-judicial process," but it has been around for centuries with roots dating back as far as 600 B.C.[1] Unfortunately, arbitration was out of favor in the United States until the 1920s, as disputes were primarily resolved through litigation.[2] With the creation of the American Arbitration Association (AAA), the United States formally recognized increased interest in arbitration, as many other countries began creating similar specialized institutions focused on international commercial arbitration.[3] During this "Age of Institutionalization," the modern system of international commercial arbitration grew as new rules were created to increase effectivity.[4] This period of time laid the groundwork for international commercial arbitration

1. Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 156–57 (1970).

2. *Id*. at 160.

3. Mikaël Schinazi, Commentary, *The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System*, 2 ICC DISP. RESOL. BULLETIN 66, 75 (July 2020).

4. *Id.*

as we know it today,[5] leading to the establishment of the New York Convention.[6]

Today, various statutes exist in the United States that codify international treaties on arbitration, setting ground rules for the enforcement of proceedings abroad and the governance of the scope of arbitration agreements.[7] In addition to these statutes, the United States enacted 28 U.S.C. § 1782. [8] This statute permits district courts to compel discovery[9] for use in a "foreign or international tribunal."[10] Often considered a powerful weapon for foreign entities seeking discovery against United States entities,[11] § 1782 has troubled United States federal courts in its possible application in private commercial arbitration abroad.[12]

In 2004, the Supreme Court tried to clarify the interpretation of the scope of § 1782 in *Intel Corporation v. Advanced Micro Devices Inc.*, 124 S.Ct. 2466 (2004).[13] This decision, however, was too vague, resulting in a circuit court split over whether § 1782 applied to private international commercial arbitration.[14] After much turmoil and confusion among the circuit and district courts, the Supreme Court finally decided to rule on § 1782's applicability in June 2022.[15] Ending the circuit court split, the Court held in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S.Ct. 2078 (2022) that private international commercial arbitration tribunals are not within the scope of § 1782.[16] This decision prevents foreign companies from taking advantage of broad United

5. *Id.*

6. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (known as the New York Convention) was held to correct issues with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on Execution of Foreign Arbitral Awards of 1927. *History 1923-1958*, N.Y. ARB. CONVENTION, https://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958 (last visited Oct. 9, 2022). It is applicable to "nondomestic arbitral awards," meaning awards made in accordance with foreign law or among parties not within the "enforcing jurisdiction." Thomas H. Oehmke, *Arbitrating International Claims—At Home and Abroad*, 81 AM. JUR. TRIALS 1, 36 (Sept. 2022).

7. *See* 9 U.S.C. §§ 1–307 (2018).

8. 28 U.S.C. § 1782 (2018).

9. Discovery includes ordering a person to give testimony or to produce a document for use in such proceeding as defined in the statute. *Id*.

10. *Id*.

11. Luis A. Perez & Frank Cruz-Alvarez, *28 U.S.C. § 1782: The Most Powerful Discovery Weapon in the Hands of a Foreign Litigant*, 5 FIU L. REV. 117, 191 (2009).

12. *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Intel Corp. v. Advanced Micro Devices, Inc., 124 S.Ct. 2466 (2004); Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020); *In Re* Guo, 965 F.3d 96 (2d Cir. 2020).

13. *See Intel Corp.,* 124 S.Ct. 2466.

14. *See Abdul*, 939 F.3d 710; *Boeing*, 954 F.3d 209; *Rolls-Royce*, 975 F.3d 689; *In Re Guo*, 965 F.3d 96; El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31, 34 (5th Cir. 2009).

15. *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S.Ct. 2078 (2022).

16. *See id.*

States discovery rules to the detriment of American companies and third parties.[17]

While the Supreme Court was justified in determining that § 1782 should not apply to private arbitral tribunals abroad in an attempt to protect domestic companies and third parties, this decision leaves foreign parties in a vulnerable position when arbitrating against American parties.[18] The parties intending to rely on § 1782 in the case of a dispute are now left with a discovery problem in need of a solution.[19] While it would be easy to say that these parties should now "deal with" this lack of discovery and forget about § 1782 entirely, foreign parties will continue to be motivated by their desire to obtain a fair arbitral judgment through broad discovery.[20] There are a variety of ways these foreign parties may decide to "make up" for this loss of discovery, but the best solution is to draft or redraft contracts containing more creative arbitration clauses to ensure desired discovery in fairness to both parties.[21]

This Note contains four parts, beginning with an exploration of the origins of § 1782, the process for invoking § 1782, and previous case law leading up to the *ZF Automotive* case, including the Supreme Court decision in *Intel* and the subsequent circuit court split. Part II analyzes the *ZF Automotive* case and details the Court's justifications for limiting § 1782. Part III will describe the problem parties may now face given the limited ability to compel discovery in private international commercial arbitration. Finally, Part IV will detail possible solutions to this limited discovery, with the most favorable being a focus on broad discovery contract provisions.

I. BACKGROUND

A. ORIGINS OF § 1782

During the last part of the nineteenth century, many countries moved for the codification of various international legal practices and procedures, with the United States finally joining in the movement in the mid-1900s.[22] Difficulties in international legal proceedings relating to different systems of

17. *See id.*

18. *See id.*

19. *US Supreme Court Closes the Door on § 1782 Discovery in Aid of Foreign International Arbitrations*, AKIN GUMP (June 14, 2022), https://www.akingump.com/en/news-insights/us-supreme-court-closes-the-door-on-1782-discovery-in-aid-of-foreign-international-arbitrations.html.

20. *Id.*

21. *See* Gregory M. Williams et al., *The Door Closes on Section 1782 Discovery: U.S. Supreme Court Interprets Controversial Law with Decisive Consequences for International Arbitration*, WILEY (June 13, 2022), https://www.wiley.law/alert-The-Door-Closes-on-Section-1782-Discovery-US-Supreme-Court-Interprets-Controversial-Law-with-Decisive-Consequences-for-International-Arbitration.

22. Harry Le Roy Jones, *Commission and Advisory Committee on International Rules of Judicial Procedure*, 8 AMER. J. OF COMPAR. L. 341, 342 (1959).

law prompted Congress to pass 28 U.S.C. § 1782 in 1948 to better facilitate external discovery.[23] This statute was later rewritten in 1964.[24] It was at this point that the term "foreign or international tribunal" was added to the statute's definition for proceedings within § 1782's scope.[25] This revision sought to improve United States judicial procedures for "obtaining evidence in the United States in connection with proceedings before foreign and international tribunals."[26] While a 1996 amendment was made to include criminal investigations, § 1782 has not since been amended.[27] Since its creation, § 1782 has been used to compel discovery within the United States for use in various proceedings around the world.[28]

B. PROCESS FOR USING § 1782

The process for using § 1782 begins when a party or tribunal petitions a district court to produce an order directing a person or entity to provide evidence for use in a proceeding outside of the United States.[29] From there, the court reviews the petition and determines whether to grant it.[30] When determining whether requested discovery is subject to § 1782, courts are typically faced with two steps.[31] First, the court must consider whether it has statutory authority to grant the petition.[32] Second, the court determines whether it should "exercise its discretion" to grant the petition.[33]

The statutory authority required for a district court to grant the petition contains three elements: (1) the petition must be made by "any interested

23. *See* Yanbai Andrea Wang, *Exporting American Discovery*, 87 U. CHI. L. REV. 2089, 2103 (2020); 28 U.S.C. § 1782 (1948).

24. "(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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. The 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 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." 28 U.S.C. § 1782 (1964).

25. *See* 28 U.S.C. § 1782 (1964).

26. JUDICIAL PROCEDURES IN LITIGATION WITH INTERNATIONAL ASPECTS, S. Rep. No. 88-1580, 88th Cong, 2d Sess. at 1 (1964).

27. *See* 28 U.S.C. § 1782 (2018).

28. Edward F. Maluf et al., *The Expanding Use of 28 USC § 1782*, SEYFARTH (June 7, 2021), https://www.seyfarth.com/news-insights/the-expanding-use-of-28-usc-1782.html.

29. Mark Wegener et al., *Obtaining Discovery in the U.S. For Use in Foreign Litigation*, PRACTICAL LAW UK, Jan. 1, 2005, 2005 WL 5-200-4305.

30. *Id.*

31. Lawrence S. Schaner & Brian S. Scarbrough, *Obtaining Discovery in the USA for Use in German Legal Proceedings*, 4 ANWBL 320, 320 (2012).

32. *Id.*

33. *Id.*

person" or by a "foreign or international tribunal"; (2) the petition must be filed in the district where the person or entity being sought for discovery "resides or is found in"; and (3) the discovery is to be used in a "foreign or international tribunal" proceeding.[34] The discretionary elements the court must consider include (1) the receptivity, nature, and character of the proceedings of the foreign government, agency, or court abroad; (2) whether the person that discovery is being sought from is a third party or participant to the proceeding abroad; (3) whether requesting § 1782 is an attempt to work around foreign proof-gathering restrictions; and (4) whether such request is excessively oppressive or invasive.[35] If the petition meets all the above requirements, the district court will grant the request and compel discovery.[36]

C. INTEL CORP V. ADVANCED MICRO DEVICES, INC.

Until recently, the primary case determining § 1782's scope as to use "in a foreign or international tribunal" was the 2004 Supreme Court case of *Intel Corporation v. Advanced Micro Devices, Inc*.[37] This suit began when Advanced Micro Devices (AMD) filed an antitrust complaint against Intel Corporation (Intel) for allegedly violating European competition law.[38] AMD petitioned under § 1782 in the District Court for the Northern District of California for an order directing Intel to produce documents for the antitrust proceeding in an adjudicative branch of the European Commission.[39] The District Court rejected the argument that § 1782 authorized this discovery while the Ninth Circuit reversed, holding that it "authorizes, but does not require, the District Court to provide discovery."[40]

After a review of the history of § 1782, the Supreme Court agreed with the Ninth Circuit's previous holding.[41] The Court determined that a "foreign or international tribunal" is not limited to foreign courts and that a branch of the European Commission met this requirement.[42] The Court, in its opinion, however, did not clarify the full scope of § 1782.[43] Instead, it set forth the discretionary factors that district courts should consider when determining whether to approve a request for a § 1782 discovery.[44]

34. Matthew J. Soroky, *Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications*, 39 FRANCHISE L. J. 185, 188 (2018); 28 U.S.C. § 1782 (1964); 28 U.S.C. § 1782 (2018); Weiler et al., *Are United States Courts Receptive to International Arbitration?*, AM U. INT'L L. REV. 869, 890 (2019).

35. Soroky, *supra* note 34.

36. *See* Wegener, *supra* note 29.

37. *See* Intel Corp. v. Advanced Micro Devices, Inc., 124 S.Ct. 2466 (2004).

38. *Id.* at 2468–69.

39. *Id.* at 2469.

40. *Id.*

41. *See id.*

42. *See* Intel Corp. v. Advanced Micro Devices, Inc., 124 S.Ct. 2466 (2004).

43. *See id.*

44. *See id.*

D. 3-2 CIRCUIT COURT SPLIT AGAINST EXTENSION OF § 1782

While Intel determined that § 1782 included more than foreign courts, United States Circuit Courts were left without guidance as to the statute's applicability in cases of private international commercial arbitration.[45] As a result, the circuit courts soon began to split in their determinations as to whether § 1782 should be applied broadly. Three circuit courts held that § 1782 does not extend to private international commercial tribunals, while two circuit courts held that it does.[46]

The Fourth and Sixth Circuits both found that private international commercial tribunals are "foreign or international tribunal[s]" within the meaning of § 1782.[47] One of the more well-known cases in the Fourth Circuit was *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).[48] This case involved a value supplier that filed an *ex parte* application for discovery under § 1782 for documents located in the United States to use in private arbitration proceedings in the United Kingdom.[49] The district court denied the request.[50] On appeal, the Fourth Circuit held that a "private arbitral panel in [the] United Kingdom was [a] 'foreign or international tribunal'" under § 1782.[51] When making this decision, the Fourth Circuit qualified the United Kingdom arbitral panel as an "entit[y] acting with the authority of the State."[52] Upon making that determination, the Fourth Circuit reversed the district court's decision and remanded the case.[53]

In *Abdul Latif Jameel Transportation Company Limited v. FedEx Corporation,* 939 F.3d 710 (6th Cir. 2019), the Sixth Circuit was asked to determine whether a Saudi corporation could use § 1782 to compel discovery for use in a private commercial arbitration proceeding in Dubai.[54] While the district court denied the request, the Sixth Circuit held that an "arbitration panel operating under the rules of the Dubai International Financial Centre-London Court of International Arbitration . . . qualified as [a] 'foreign or

45. *See generally id.* (holding that the decision was limited to specific tribunal before it; did not address whether international commercial arbitral tribunal is a "foreign or international tribunal" within the scope of § 1782).

46. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020); *In Re* Guo, 965 F.3d 96 (2d Cir. 2020); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31(5th Cir. 2009).

47. *See Abdul*, 939 F.3d 710; *Boeing*, 954 F.3d 209.

48. *See Boeing*, 954 F.3d at 209.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 214 (quoting rule used in Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999) and Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999).).

53. *Id.* at 216; It is important to note that the Fourth Circuit denied the request to order the district court to issue the requested discovery despite holding that the tribunal in question was within the scope of § 1782. *Id.* The court declined to do so because § 1782 gives district courts the discretion to "manage any assistance that may be provided to a foreign tribunal." *Id.*

54. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 713–715 (6th Cir. 2019).

international tribunal'" under § 1782.[55] To reach this decision, the Sixth Circuit relied on a variety of interpretation methods, including dictionary definitions, use of language in legal writing, the *Intel* decision, other Circuit Court decisions, and policy considerations.[56] After determining the private international arbitral tribunal was within the scope of § 1782, the Sixth Circuit reversed the district court's decision and remanded it for the district court to determine whether discretionary elements are met to grant the discovery request.[57]

In contrast, the Second, Fifth, and Seventh Circuits held that private international commercial tribunals are not "foreign or international tribunal[s]" within the meaning of § 1782.[58] The Fifth Circuit upheld this limited scope of § 1782 in *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 F. App'x 31 (5th Cir. 2009).[59] In this case, a state-owned utility company in El Salvador requested two district courts to compel discovery from third parties for use in a Swiss arbitral tribunal under § 1782.[60] The district courts both granted the requests.[61] On appeal, the Fifth Circuit held that a "private Swiss arbitral tribunal did not constitute 'tribunal' within meaning of [§ 1782]."[62] The Fifth Circuit made this determination to avoid overruling its prior decision in *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999).[63]

The Second Circuit also declined to extend § 1782 for use in private international commercial arbitration.[64] In *In Re Guo*, 965 F.3d 96, 101 (2d Cir. 2020), Guo filed an application to the district court to compel discovery from four United States investment banks under § 1782 for use in an arbitration proceeding at China International Economic and Trade Arbitration Commission (CIETAC).[65] The district court denied the application.[66] On appeal, the Second Circuit held that CIETAC was a "private

55. *Id.* at 714.

56. *See Abdul*, 939 F.3d 710.

57. *Id.* at 732. As with the Fourth Circuit, the Sixth Circuit left the final determination of whether to grant the discovery request to the discretion of the district court as required in § 1782. *Id.*; *See generally* Intel Corp. v. Advanced Micro Devices, Inc., 124 S.Ct. 2466 (2004) (providing factors left to the discretion of the district court when determining whether to approve request for discovery under § 1782).

58. *See* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020); *In Re* Guo, 965 F.3d 96 (2d Cir. 2020); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31(5th Cir. 2009).

59. *See* El Paso, 341 F. App'x 31.

60. *Id.* at 32.

61. *Id.*

62. *Id.* at 31.

63. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999) (holding that "foreign and international tribunals" did not include private international arbitration).

64. *See In Re* Guo, 965 F.3d 96 (2d Cir. 2020).

65. *Id.* at 101.

66. *Id.*

international commercial arbitration outside the scope of [§ 1782]."[67] Here, the Second Circuit declined the argument that *Intel* overruled its previous caselaw concluding private international commercial arbitration was outside § 1782's scope.[68] Instead, the Second Circuit reasoned that § 1782 does not "sweep so broadly."[69] This decision, along with similar holdings by the Fifth and Seventh Circuits, was clearly in conflict with the decisions of the Fourth and Sixth Circuits.[70]

II. ZF AUTOMOTIVE US, INC. V. LUXSHARE, LTD.[71]

The three to two circuit court split following the *Intel* decision made it clear to the Supreme Court that a ruling on the issue of § 1782's applicability was necessary to ensure the proper function of the statute going forward.[72] Though the Court intended to decide on this issue, it was not until December 2021 that a case finally presented itself for review.[73]

ZF Automotive US (ZF) is a Michigan-based subsidiary of a German corporation that manufactures car parts.[74] Luxshare, Ltd. (Luxshare) is a company based in Hong Kong that purchased two business units worth almost $1 billion from ZF.[75] Both parties agreed in their sales contract that disputes would take place in Munich, Germany.[76] These disputes would be governed by German law and settled "by three (3) arbitrators in accordance with the Arbitration Rules of the German Institution of Arbitration e.V. (DIS)," a Berlin private dispute-resolution organization.[77] Following their purchase, Luxshare claimed ZF concealed information about the business units sold to it, resulting in Luxshare overpaying by millions.[78] Luxshare,

67. *Id.* at 96.
68. *Id.* at 105–07.
69. *Id.* at 109.
70. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020); *In Re* Guo, 965 F.3d 96 (2d Cir. 2020); El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, 341 F. App'x 31(5th Cir. 2009).
71. ZF Automotive US v. Luxshare was consolidated with AlixPartners v. The Fund for Protection of Investors' Rights in Foreign States, but for the purposes of this note only ZF Automotive US v. Luxshare will be discussed. ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078 (2022). AlixPartners v. The Fund for Protection of Investors' Rights in Foreign States involves a Russian corporation that was assigned the rights of a Russian investor after an insolvent Lithuanian bank was nationalized by Lithuanian authorities. *Id.* at 2080. The Russian corporation initiated ad hoc arbitration against Lithuania claiming the country had expropriated investments. *Id*. The corporation then filed a § 1782 application seeking discovery from a New York consulting firm and their CEO. *Id.* The Supreme Court found that § 1782 was not applicable to this ad hoc panel because there is no evidence of intent for the panel to exercise "governmental authority." *Id.*
72. *See ZF Auto.,* 142 S.Ct. 2078.
73. *See id.*
74. *Id.* at 2084.
75. *Id.*
76. *Id.*
77. *Id.*
78. *See ZF Auto.,* 142 S.Ct. at 2084.

wishing to arbitrate and needing information from ZF and two of its senior officers, filed a § 1782 *ex parte* application in the United States District Court for the Eastern District of Michigan.[79] The District Court sided with Luxshare, granting its request for discovery.[80] The Sixth Circuit subsequently denied ZF's request for a stay but was unable to finish its review as the Supreme Court swiftly decided to review the case before the Sixth Circuit reached a decision.[81]

The Supreme Court took on this case in hopes of resolving the circuit court split as to the applicability of § 1782, specifically on the issue of whether "'foreign or international tribunal'. . . includes private arbitral panels."[82] In a unanimous decision, the Court determined that private international commercial arbitration tribunals are not within the scope of § 1782.[83] The Court begins its ruling with an interpretation of the meaning of "tribunal," determining that this word alone does not exclude private arbitral panels from § 1782's application.[84] However, the Court used a variety of interpretations to determine that when this word is attached to "foreign or international," "tribunal" is modified to mean "an adjudicative body that exercises governmental authority."[85]

The Court also used congressional intent to justify limiting § 1782's scope.[86] Reviewing previous amendments to § 1782 along with the creation of the Commission on International Rules of Judicial Procedure, the Court found that § 1782 has expanded "the types of public bodies covered" but has not expanded to include "private bodies."[87] The Court found that § 1782's primary purpose is to encourage assistance from foreign governments and offer them respect.[88] Expanding § 1782's scope in the way requested, the Court reasoned, would allow broader discovery than the Federal Arbitration Act and allow almost anyone to use § 1782.[89]

Once determining this limitation to the scope of § 1782, the Court readily concluded that DIS is not a "foreign or international tribunal" within the meaning of the statute.[90] It is important to note that the Court stated private entities are not governmental simply because "laws govern them and courts

79. *Id.*
80. *Id.*
81. *Id.* at 2078.
82. *Id.* at 2084.
83. *ZF Auto.,* 142 S.Ct. 2078.
84. *Id.* at 2086.
85. *Id.* at 2084–87.
86. *Id.* at 2088–89.
87. *Id.* at 2088.
88. *Id.*
89. *Id*.
90. *Id.* at 2089.

enforce their contracts."[91] In making this determination, Luxshare was denied the ability to obtain its requested discovery.[92]

III. THE NEED FOR DISCOVERY REMAINS

The Supreme Court's decision in the *ZF Automotive* case is clearly favorable to American entities and third parties.[93] However, this decision will have wide implications on foreign parties' ability to obtain necessary evidence from individuals or entities in the United States for use in private international commercial arbitration.[94] In order to fully grasp the impact this decision will have on parties involved in private international commercial arbitration, it is important to understand what discovery is in this context and how it can be used to benefit parties during any dispute.

Discovery is known as the formal process of exchanging evidence and other important information between parties which will then be presented at trial.[95] This process allows parties to become aware of evidence before the chosen form of dispute resolution begins.[96] With proper discovery, the dispute resolution can be considered fair as neither party will be able to "ambush" the other with surprise information.[97] Discovery can take many forms, one of the most common being depositions.[98] Depositions are statements "given under oath by any person involved in the case."[99] These statements can then be used during the dispute resolution to aid parties in pleading their case.[100] Another type of discovery is a request for production of evidence.[101] This type of discovery, somewhat self-explanatory, involves a formal request of another party to produce physical evidence for use in the dispute resolution.[102]

In a formal trial, discovery is often considered to be quite broad, especially in courts within the United States.[103] In arbitration proceedings,

91. *Id.*

92. *Id.* at 2091.

93. Limiting discovery in international commercial arbitration prevents American parties from having to disclose additional information, allowing them more privacy and providing what can be considered a more even playing field against foreign parties in a dispute. *See generally ZF Auto.*, 142 S.Ct. 2078.

94. *See generally id.*

95. *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. Paul Bergman, *Formal Discovery: Gathering Evidence for Your Lawsuit*, NOLO, https://www.nolo.com/legal-encyclopedia/formal-discovery-gathering-evidence-lawsuit-29764.html (last visited Nov. 19, 2022).

101. *Id.*

102. AM. BAR ASS'N, supra note 95.

103. A party can "obtain any information that pertains . . . to any issue in the lawsuit" provided it is not "legally protected." Bergman, *supra* note 100; Fed. R. Civ. P. 26.

however, discovery is limited to the parties' agreement, the chosen forum's rules, and the particular law being used to settle the dispute.[104] With the passage of § 1782, parties disputing issues through arbitration were granted an additional mechanism to compel discovery.[105] A majority of discovery requests under § 1782 come from foreign parties, with about 9.9 percent of those requests being intended for use in private international commercial arbitration.[106] Prior to the *ZF Automotive* decision, these parties could have obtained § 1782 discovery from various district courts.[107] This mechanism for discovery could have allowed some parties to gain valuable information that may have led to their success in arbitration.[108] Following the *ZF Automotive* decision, those foreign parties that would have previously used § 1782 must find alternative solutions to supplant the discovery they would have received if § 1782 still included private international commercial arbitral tribunals.[109]

Industry experts suggest limiting § 1782 to exclude private international commercial arbitration will have negative effects on both the arbitral tribunals and the parties involved in that form of dispute resolution.[110] Limited access to information may lead to lowered chances of fair dispute resolution and can create a system of hiding information that would be detrimental to fair dispute resolution.[111] No party attempting to resolve a dispute wants to lose it simply because they could not gain the necessary information to prove they experienced an injury caused by the other party. While it is not anticipated that this decision will cause a significant decline in the use of private international commercial arbitration, it certainly calls into question the fairness of these proceedings going forward.[112]

IV. HOW CAN COMPANIES STILL OBTAIN DISCOVERY?

A. BAITING COURTS INTO GRANTING DISCOVERY

Because discovery is often crucial in any legal determination, the desire for increased discovery may lead foreign parties down unfavorable routes to

104. *Discovery in Arbitration: Agreement, Plans, and Fairness*, AM. BAR ASS'N (Apr. 10, 2019) https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/discovery-in-arbitration-agreement-plans-and-fairness/.

105. *See* 28 U.S.C. § 1782 (1948).

106. Wang, *supra* note 23, at 2115.

107. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019); Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020).

108. *See generally*, ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S.Ct. 2078 (2022).

109. *See id.*

110. Michele Rogers, *International Arbitration Experts Discuss ZF Automotive US, Inc. v. Luxshare, Ltd.*, MEALY'S INT'L ARBITRATION REPORT (July 2022), https://www.mckoolsmith.com/assets/htmldocuments/2022%2007%2027%20Mealeys%20International%20Arbitration%20Experts%20Discuss%20ZF%20Automotive%20US.pdf.

111. Rogers, *supra* note 110.

112. *Id.*

offset the loss of § 1782's newly limited scope. One option foreign parties may consider to account for diminished discovery is what can be described as a "bait and switch" style of litigation. For example, a foreign party intending to arbitrate a dispute, but knowing that discovery will be limited, may decide to file suit in a foreign federal court. This would effectively "bait" the court into granting discovery for the foreign party before that party drops the case and "switches" to arbitration. This method would allow parties to take advantage of foreign courts' ability to compel discovery in the United States through three different mechanisms: letters rogatory, the Hague Convention, and § 1782.[113] This discussion will focus on § 1782.

Under § 1782, the foreign court is able to submit an application to a United States District Court to compel discovery as requested.[114] While private international commercial arbitral tribunals may not be covered under § 1782, a foreign court does qualify as a "foreign or international tribunal" within the statute's scope.[115] Provided that all discretionary requirements are met, the district court will grant the discovery to the foreign court for the benefit of the foreign party.[116] The Supreme Court has even recognized that § 1782 is not limited to "pending" proceedings which further allows foreign parties to gain discovery through the exploitation of foreign courts.[117] After obtaining discovery, the foreign party may then drop the case and instead bring their claim to arbitration, taking with them the discovery gained from the court proceeding.

This bait and switch method of gaining discovery has risen in popularity since 2017 after the Second Circuit held that § 1782 "does not prevent an applicant who lawfully has obtained discovery under the statute with respect to one foreign proceeding from using the discovery elsewhere unless the district court orders otherwise."[118] This means that any discovery a foreign party obtained through a court proceeding may be used in an arbitration proceeding.[119] Because of this, there is a large incentive for foreign parties to file court proceedings to gain discovery, then dismiss the case and use that discovery in an arbitration proceeding. Though filing court proceedings and funding the discovery process can be both costly and complicated, parties that need discovery in the United States to provide an adequate argument in arbitration proceedings will be willing to pay the price; $5,000 for discovery is insignificant when you stand to win over $100,000. [120] While this is an

113. Wang, *supra* note 23, at 2100–05.

114. *See* 28 U.S.C. § 1782 (2018); ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078, 2091 (2022).

115. 28 U.S.C. § 1782 (2018).

116. *See* Soroky, *supra* note 34.

117. *See* Intel Corp. v. Advanced Micro Devices, Inc., 124 S.Ct. 2466 (2004).

118. *In re* Accent Delight International Ltd, 869 F.3d 121, 135 (2d Cir 2017).

119. *See id.*

120. *See* Laws. for Civ. Just. et al., Litigation Cost Survey of Major Companies (May 10-11, 2010); Atif Khawaja, *INSIGHT: Discovery Process, Costs Can Confuse Foreign Companies*

attractive solution to regain discovery, it is certainly not the most effective or the best ethical decision.

There are a few reasons why this solution is ineffective. First, and most obviously, this method will not be effective in cases where parties have a contract containing a valid arbitration clause.[121] Under the New York Convention, signatory countries recognize arbitration agreements if they (1) are in writing, (2) deal with existing or future disputes connected to a legal relationship, (3) concern matters capable of arbitrational settlement, (4) are between parties that have legal capacity under applicable laws, and (5) are valid under the law parties chose or the law of where the arbitration is located.[122] If the arbitration clause contained in a valid contract meets these requirements, then a party bringing a dispute to a foreign court will likely be unsuccessful.[123] Rather than allowing the case and providing for discovery, the court is more likely to dismiss the case and compel the parties to file at their chosen arbitral tribunal.[124]

This solution is also an unwise choice because it is widely believed that allowing parties to seek discovery through federal courts for use in private international commercial arbitration goes against the very intentions of arbitration – to be a "speedy, economical, and effective means of dispute resolution."[125] Discovery through federal courts can often be expensive and time consuming.[126] The same reasons why parties would agree to arbitrate in the first place also demonstrate why filing in court just to obtain discovery would be unwise.[127]

There are also a variety of ethical implications in choosing this method. While the United States has "Model Rules of Professional Responsibility" to guide lawyers on the ethical standards they must adhere to when practicing law, many other countries have similar codes of conduct that their lawyers are expected to follow.[128] For example, the European Union has its own

Caught in U.S. Litigation, BLOOMBERG LAW (March 12, 2019, 4:01 AM), https://news.bloomberglaw.com/us-law-week/insight-discovery-process-costs-can-confuse-foreign-companies-caught-in-u-s-litigation.

121. Jesús Saracho Aguirre, *Validity of the Arbitration Agreement*, JUS MUNDI (Aug. 25, 2022), https://jusmundi.com/en/document/publication/en-validity-of-the-arbitration-agreement-ground-to-refuse-recognition-and-enforcement-of-non-icsid-awards.

122. *Id.*

123. *Id.*

124. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. I (1), Jun. 7, 1959, 330 U.N.T.S. 38. [hereinafter *NY Convention*].

125. Weiler et al., *supra* note 34.

126. *Id.*

127. Robert Fojo, *12 Reasons Businesses Should Use Arbitration Agreements*, LEGAL IO (Apr. 1, 2015), https://www.legal.io/articles/5170762/12-Reasons-Businesses-Should-Use-Arbitration-Agreements.

128. MODEL RULES OF PRO. CONDUCT Preamble and Scope (AM. BAR ASS'N 2020); MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020); Council of Bars and L. Societies of Eur. [CCBE], *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers* (2013), https://www.ccbe.eu/NTCdocument/EN_CCBE_CoCpdf1

"Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers."[129] This code of conduct, and others like it, recognizes the importance of lawyers as administrators of justice.[130] One key element of the Code of Conduct for European Lawyers details a lawyer's obligation to both courts and arbitrators.[131] Specifically, a lawyer must demonstrate "due regard for the fair conduct of proceedings" and shall never "knowingly give false or misleading information to the court."[132] Though each country may have its own specific rules related to conduct of lawyers, the same basic principles of fairness and transparency to the court are prevalent across the globe.[133]

Codes of conduct are meant to hold lawyers liable for unethical actions, which then allows for the preservation of the integrity of the legal profession.[134] Going against these codes can be seen as unethical and result in disciplinary action, likely in the form of sanctions, by the court.[135] This bait and switch method for obtaining discovery is a clear violation of general codes of conduct for lawyers. By filing in court to gain discovery and then immediately dropping the case for arbitration, little to no consideration has been given to the court's time; if consideration had been given, the party would have sought a different method for gaining discovery that did not waste the court's time. Additionally, by abusing the court's power to compel discovery, the party is giving no regard for the "fair conduct of proceedings."[136] Given the ethical considerations tied to this method, bait and switch litigation is an unwise choice.

As it is unethical, likely to be unsuccessful, and goes against the fundamentals of arbitration, a bait and switch style of litigation is a poor solution for foreign parties wishing to compel discovery in the United States.[137]

_1382973057.pdf; Int'l Bar Ass'n [IBA], *International Principles on Conduct for the Legal Profession* (2011), https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_the_legal_prof.pdf.

129. CCBE, *supra* note 128.

130. *Id.* at 7–8.

131. *Id.* at 19.

132. *Id.*

133. *See id.*; IBA, *supra* note 128.

134. Int'l Comm. of Jurists, *Legal Opinion, Disciplinary Action Against Lawyers in CIS Countries: Analysis of International Law and Standards* (June 18, 2013), https://icj2.wpenginepowered.com/wp-content/uploads/2013/06/icj_opinion_lawyers_discipline_law_ENG.pdf.

135. *Id.* at 3.

136. *See* CCBE, *supra* note 128, at 19.

137. *See generally id.*; MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020); *NY Convention, supra* note 124; Weiler, *supra* note 34.

B. PASSAGE OF A NEW STATUTE BY CONGRESS

One notable solution to ensure sufficient discovery for foreign parties in international commercial arbitration is for Congress to create a new statute devoted to discovery in such proceedings. It is possible that Congress will review § 1782, given the recency of the *ZF Automotive* decision, and decide whether to pass new legislation specifically intended to protect discovery in private commercial arbitration abroad. In the past, Congress has amended statutes to include more specific language following a limitation by a Supreme Court ruling.[138] This can be considered an effective way to ensure the desired element, in this case, private international commercial arbitral tribunals, is included in the statute's interpretation in future application.[139] However, this solution is entirely dependent on Congress's initial intent in the creation and subsequent amendments of § 1782 and, if the intent was to include international private commercial arbitral tribunals, whether that initial intent still remains.

Some have suggested that the Supreme Court's decision to make § 1782 inapplicable to private international commercial arbitration is indicative of Congress's intent to prevent broad discovery from being used in this context, especially since the Court relied on congressional intent as reasoning for its limitation.[140] However, an argument can be made that when § 1782 was amended in 1964 to include "foreign or international tribunal," it was intended to replace "any judicial proceeding" to broaden the statute's scope to include international private commercial arbitral tribunals.[141] In fact, the 1964 Senate Report supports this idea stating that "[t]he word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts."[142] The Report goes so far as to mention the increasing popularity of "quasi-judicial proceedings" and the distaste of limited discovery in such proceedings as motivation for the amendment.[143] While the 1964 amendment left discretion to the federal courts on whether to grant discovery under § 1782, the Senate Report demonstrates that Congress intended to include private international commercial arbitral tribunals within the statute's scope.[144]

While the legislative history may suggest that Congress intended to include private commercial arbitral tribunals within § 1782's scope at the

138. *See* Neal Devins, *Congressional Responses to Judicial Decisions, in* ENCYCLOPEDIA OF THE SUPREME COURT 400–03 (Mark Graber et al. eds., Gale MacMillan, 2008).

139. *See* 28 U.S.C. § 1782 (1964).

140. *See* ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078 (2022).

141. *See* Brandon Hasbrouck, *If It Looks Like a Duck..: Private International Arbitral Bodies Are Adjudicatory Tribunals Under 28 U.S.C. § 1782(a)*, 67 WASH. & LEE L. REV. 1659, 1687–90 (2010).

142. JUDICIAL PROCEDURES IN LITIGATION WITH INTERNATIONAL ASPECTS, S Rep No 88-1580, 88th Cong, 2d Sess at 7 (1964).

143. *Id.* at 7–8.

144. *See id.*

time of its 1964 amendment, there is still a question of whether the current Congress has that same intention. [145] Congress's possible intention can be evidenced through related domestic rules and regulations.[146] The best source to reference would be the Federal Arbitration Act (FAA).[147] The FAA contains various rules for how arbitration proceedings will be held within the United States.[148] It was first enacted by Congress in 1925 and automatically applied to agreements to arbitrate among United States parties involved in domestic arbitration unless parties have expressly contracted for the Act not to apply.[149] The FAA's rules for discovery illustrate Congress's intent for domestic arbitral discovery. Congress's intent for domestic arbitral discovery can be used to demonstrate its possible intent for international arbitral discovery.

The FAA is located under Title 9 of the United States Code, with Section 1 containing "General Provisions" applicable to arbitration proceedings.[150] Section 7 relates specifically to evidence within such proceedings.[151] This section gives arbitrators the power to summon witnesses and obtain evidence from them in the form of documents.[152] If the person being summoned does not comply, arbitrators have the power to petition the district court for a motion to compel that person to appear or release evidence.[153] Courts have generally held that "[a]n arbitrator's power to compel the production of documents is limited to production at an arbitration hearing.[154] Limits imposed on arbitrators' abilities to compel discovery are generally considered a matter of public policy, as "a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition" when they agree to arbitrate.[155] It can be said that Congress specifically enacted the FAA to ensure arbitration would alleviate common burdens attached to court proceedings, including lengthy and expansive discovery.[156]

145. *See id.*
146. *See* 9 U.S.C. §§ 1–16 (2006).
147. *Id.*
148. *See id*.
149. Terry L. Trantina, *What Law Applies to an Agreement to Arbitrate?*, DISP. RESOL. MAGAZINE 29 (Fall 2015), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/fall-2015/7_trantina_what_law_applies.authcheckdam.pdf.
150. 9 U.S.C. §§ 1–16 (2006).
151. *Id.* at § 7.
152. *Id.*
153. *Id.*
154. *When Parties Arbitrate: The Powers and Limitations of Discovery in Arbitration under the Federal Arbitration Act*, GORDON & REES SCULLY MANSUKHANI (Aug. 2021), https://m.grsm.com/publications/2021/when-parties-arbitrate-the-powers-and-limitations-of-discovery-in-arbitration-under-the-federal-arbitration-act (quoting CVS Health Corp. v. Vividus, LLC, 878 F.3d 703, 706 (9th Cir. 2017)).
155. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).
156. Gabriel Herrmann, *Discovering Policy under the Federal Arbitration Act*, 88 CORNELL L. REV. 779, 785–88 (2003).

Knowing the scope of the FAA, it is then important to compare how its discovery methods are viewed in comparison to § 1782. By comparing the two, it will be clear whether Congress generally believes arbitration is meant to have broad discovery abilities or if they instead intend for the scope of discovery to be limited. The biggest difference between the FAA's procedures under section 7 and that of § 1782 is who is able to compel discovery.[157] Under the FAA, only the arbitrator is able to compel discovery, whether on their own or through a district court.[158] Under § 1782, however, "any interested person" or a "foreign or international tribunal" is able to petition a district court for discovery.[159] Many circuit courts have criticized this difference, noting that § 1782 allows for parties in international arbitration to obtain much broader discovery than parties in domestic arbitration.[160] This is due to the fact that previously, the parties themselves could ask district courts for discovery under § 1782 without regard from the arbitrators.[161] As courts have stated, it is hard to find a coherent rationale for why Congress would allow a broader method of discovery for foreign parties than it gives to domestic parties.[162]

Under general principles of nationalism, it can be argued that Congress today would have no real incentive to expand § 1782 to explicitly include private international commercial arbitration tribunals without first expanding its own FAA to include similar broad discovery offered by § 1782.[163] An additional factor that would likely dissuade Congress from amending § 1782 would be the lack of a similar statute abroad.[164] While some European countries have discovery procedures closer to those available in the United States, the United States still offers the most expansive discovery.[165] As it stands, United States parties are not given broad reciprocal discovery in the country of a foreign party, even if that foreign party were to gain discovery through § 1782.[166] Additionally, the Supreme Court previously held that the requested evidence under § 1782 does not need to be discoverable within the

157. *Compare* 9 U.S.C. § 7 (2006) *with* 28 U.S.C. § 1728 (2018).

158. 9 U.S.C. § 7 (2006).

159. 28 U.S.C. § 1728 (2018).

160. *See* Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999); Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999); Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020).

161. *See Nat'l Broad Co.*, 165 F.3d 184; *Biedermann*, 168 F.3d 880; *Rolls-Royce*, 975 F.3d 689.

162. *Rolls-Royce*, 975 F.3d at 695.

163. *See generally Nationalism*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/nationalism (last visited Feb. 7, 2022); *compare* 9 U.S.C. § 7 (2006) *with* 28 U.S.C. § 1728 (2018).

164. *See* Bruce J. Berman & John E. Clabby, *Foreign Arbitration and Discovery in the U.S. Under Section 1782: Servotronics Inc. v. Boeing Co.*, CARLTON FIELDS (Apr. 16, 2020), https://www.carltonfields.com/insights/publications/2020/foreign-arbitration-and-discovery-in-the-u-s-under.

165. *See* Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

166. Perez & Cruz-Alvarez, *supra* note 11, at 187–88.

jurisdiction of the foreign tribunal.[167] This lack of reciprocity for broad discovery demonstrates a low probability that Congress would be willing to amend § 1782 to continue allowing broad discovery for foreign parties in private international commercial arbitration.[168]

It is clear that Congress would have no intention to make an amendment to § 1782 explicitly expanding its discovery provisions to private international arbitral tribunals when the same discovery is unavailable to domestic parties involved in arbitration.[169] There is little to no incentive for Congress to favor foreign parties over domestic ones.[170]

C. STRATEGIC CONTRACT PROVISIONS

In the absence of a statute providing discovery methods similar to § 1782, the most logical solution for foreign parties still looking to obtain discovery in the United States would be to turn to contract drafting. Commercial contracts between parties of different countries often contain arbitration clauses because arbitration is thought to be a simpler and more neutral forum than traditional courts.[171] Arbitration clauses in international commercial contracts were made even more appealing in the last 100 years with the New York Convention, which has allowed arbitral awards to be enforced in a vast majority of countries around the world.[172] These arbitration clauses can be seen as "private statutes" that govern most aspects of the relationship between applicable parties to the contract.[173]

Generally, international arbitrators are without extensive discovery abilities, so it is important for parties to explicitly state evidentiary rules within their arbitration clauses to account for these limited abilities.[174] To the extent such discovery is included in the parties' contract, the arbitrators can order the parties to produce specific documents in their possession and provide testimony for use in the proceeding.[175] Failure to include particular discovery provisions will result in the automatic implementation of procedures created by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration or

167. *Id.*
168. *See generally id.*
169. *Compare* 9 U.S.C. § 7 (2006) *with* 28 U.S.C. § 1728 (2018).
170. *See* Subrin, *supra* note 165.
171. Patrick Hogan Crosby, *Servotronics and Certiorari: The Imminent Supreme Court Decision and Why Private International Arbitrations Are "Foreign or International Tribunals" under 28 U.S.C. Sec. 1782*, 30 TUL. J. INT'L & COMP. L., 171, 184 (2022).
172. *Id.*
173. Oliver Dillenz, *Drafting International Commercial Arbitration Clauses*, 21 SUFFOLK TRANSNAT'L L. REV. 221, 223 (1998).
174. *Id.*
175. Crosby, *supra* note 171, at 185.

any other relevant rules of arbitration the parties broadly agreed to or that exist in the chosen tribunal.[176]

The issue with allowing disputes to simply be bound by general rules of arbitration is that often times these rules are very limited in scope and leave a great deal of discretion to the arbitrators when it comes to discovery.[177] UNCITRAL Arbitration Rules, for example, contain very limited rules related to discovery.[178] Under Article 27, pertaining to evidence, arbitral tribunals may require parties to produce evidence and grants tribunals the discretion to determine whether such evidence is applicable for use in the deliberation of the issue.[179] Similarly, Judicial Arbitration and Mediation Services (JAMS) has its own International Arbitration Rules & Procedures.[180] Article 24, pertaining to evidence, also provides arbitral tribunals with broad discretion when requiring evidence and determining its applicability.[181] Many other general rules of arbitration are likely to default to similar evidentiary rules.[182] Since arbitrators are bound to the parties' agreement, a specific discovery clause included in a contract will allow parties a guarantee that evidence they feel may be necessary for a fair dispute is properly obtained.[183]

The following is a basic example of a discovery clause that could be added to new or existing contract:

> ***Discovery.*** The arbitrator(s), consistent with the expedited nature of arbitration, shall permit discovery only if there is clear and convincing evidence that discovery is necessary. If the arbitrator(s) so determine, they may permit limited document discovery and no more than three depositions

176. UNCITRAL was created in 1966 as the United Nations recognized the need for a legal body related to international trade law. U. N. COMM. ON INT'L TRADE L., A GUIDE TO UNCITRAL, at 1 (2013), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/12-57491-guide-to-uncitral-e.pdf. Its model laws are recognized as "appropriate vehicles for modernization and harmonization of national laws". *Id.* at 14; *See* U. N. COMM. ON INT'L TRADE L., UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, U.N. Sales No. E.08.V.4 (2008) [hereinafter UNCITRAL MODEL LAW]; Int'l Centre for Disp. Resol. [ICDR], *International Dispute Resolution Procedures,* at 17–40 (2021), https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules_1.pdf?utm_source=icdr-website&utm_medium=rules-page&utm_campaign=rules-intl-update-1mar; JAMS, JAMS INTERNATIONAL ARBITRATION RULES & PROCEDURES (2021).

177. *See* U. N. COMM. ON INT'L TRADE L., UNCITRAL ARBITRATION RULES, at 19–20 (2021), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/21-07996_expedited-arbitration-e-ebook.pdf.; ICDR, *supra* note 176, at 28–29; JAMS, *supra* note 176, at 14.

178. UNCITRAL ARBITRATION RULES, *supra* note 177.

179. *Id.*

180. JAMS, *supra* note 176, at 14.

181. *Id.*

182. *See* ICDR, *supra* note 176, at 28–29; Int'l Chamber of Commerce [ICC], *ICC Arbitration Rules*, at 32–33 (2021), https://cdn.iccwbo.org/content/uploads/sites/3/2020/12/icc-2021-arbitration-rules-2014-mediation-rules-english-version.pdf.

183. Robert Donald Fischer & Roger S. Haydock, *International Commercial Disputes Drafting an Enforceable Arbitration Agreement*, 21 WILLIAM MITCHELL L. REV. 941, 946–47 (1996).

> per party of no more than 8 hours each. Notwithstanding the foregoing, each Party will, upon the written request of the other Party, promptly provide the other with copies of documents on which the producing Party may rely in support of a claim or defense or which are relevant to the issues raised in the Agreement Dispute. All discovery, if any, shall be completed within 90 days following the appointment of the arbitrator(s). Adherence to formal rules of evidence shall not be required and the arbitrator(s) shall consider any evidence and testimony that the arbitrator(s) determine to be relevant, in accordance with the Rules and procedures that the arbitrator(s) determine to be appropriate. In resolving any Agreement Dispute, the Parties intend that the arbitrator(s) shall apply the substantive Laws of _____, without regard to any choice of law principles thereof that would mandate the application of the laws of another jurisdiction. The Parties intend that the provisions to arbitrate set forth herein be valid, enforceable and irrevocable, and any award rendered by the arbitrator(s) shall be final and binding on the Parties. The Parties agree to comply and cause the members of their applicable Group to comply with any award made in any such arbitration proceedings and agree to enforcement of or entry of judgment upon such award, in any court of competent jurisdiction.[184]

This discovery clause, or one similar to it, would allow parties to still obtain somewhat broad discovery even if they are contractually obligated to arbitrate. A similar clause could be broad enough to encompass various types of discovery, such as depositions and requests for documents, and may not limit arbitrators to specific rules of evidence.[185] A party that may be in opposition to broad discovery could also be given the opportunity to contest certain types of discovery requested by the other party.[186] A clause similar to this example would provide a better balance for both parties involved in arbitration.[187] The foreign party will be satisfied that they are able to gain broader discovery to fairly argue their side of the dispute; the domestic party will be satisfied that they are not susceptible to discovery as broad as what is offered under § 1782.[188] While this is just an example, parties are still free to engage in negotiations to determine exactly how specific they would like their discovery clauses to be, especially in relation to documents that can be obtained by opposing parties. This could include specific documents and witnesses each party would like to use in the case of a future dispute.

It is important to note, however, that this method does not make up for third-party discovery that is no longer allowed by employing § 1782. The "desire for fundamental fairness" between parties of a contract and third parties requires that third parties are not dragged into arbitration proceedings

184. *Discovery Sample Clauses,* LAW INSIDER, https://www.lawinsider.com/clause/discovery (last visited Oct. 24, 2022).

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* Perez & Cruz-Alvarez, *supra* note 11, at 179.

when they did not have a chance to participate in negotiating the contract containing an arbitration clause.[189] This essentially means that discovery clauses will not bind third parties to explicit discovery methods without the parties' explicit agreement.[190]

Previously, § 1782 could be used by foreign parties involved in private international commercial arbitration to gain documents and records from third parties located in the United States.[191] Since § 1782 is no longer applicable to private international commercial arbitral tribunals, parties to these disputes may not have the ability to compel any discovery from anyone who is not a party to the dispute.[192] Arbitrators may have limited powers to subpoena third parties to provide testimony or documents under specific rules of arbitration, but if the third party does not comply, judicial enforcement of the subpoena will be necessary.[193] Of course, a court will only enforce the subpoena if it has statutory power to do so; without § 1782, courts that are petitioned to aid in obtaining discovery for use in private commercial arbitration abroad will not have that necessary power.[194] Thus, parties in private international commercial arbitration can only gain third-party discovery under limited circumstances without the use of § 1782.[195]

Since § 1782 cannot currently be used for private commercial arbitration and third parties cannot be reached by discovery clauses in contracts they are not privy to, it follows that foreign parties will not be able to receive all of the discovery they may have previously been entitled to under § 1782 with this solution; some limits to discovery given the limited scope of § 1782 will certainly be unavoidable.[196] Though this is not ideal, given the current state of the United States' legislature and ethical considerations, this solution remains the best choice to allow parties to control the level of discovery

189. Pedro J. Martinez-Fraga, *The Dilemma of Extending International Commercial Arbitration Clauses to Third Parties: Is Protecting Federal Policy While Accommodating Economic Globalization a Bridge to Nowhere?*, 46 CORNELL INT'L L. J. 291, 294 (2013).

190. *Id.*

191. *See In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006); *In re* Ex Parte Application of Kleimar N.V., 220 F. Supp. 3d 517 (S.D.N.Y. 2016); *In re* Hallmark Cap. Corp., 534 F. Supp. 2d 951 (D. Minn. 2007).

192. *See* ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078 (2022).

193. Nicholas A. Gowen, *Obtaining Third-Party Discovery in Arbitration Is Not Guaranteed*, 27 IN THE ALTERNATIVE 4 (Jan. 2021), https://www.burkelaw.com/media/publication/89_Arbitration%20Third-Party%20Discovery.pdf.

194. *See* ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078 (2022) (holding that § 1782 does not authorize the enforcement of subpoenas to obtain evidence for use in "private adjudicatory bodies").

195. *See* Duncan Speller, et al., Client Alert, *Obtaining Evidence from Non-Parties in International Arbitration: A Comparative Analysis*, WILLKIE FARR & GALLAGHER (Sept. 26, 2022), https://www.willkie.com/-/media/files/publications/2022/obtainingevidencefromnonparties ininternationalarbi.pdf; UNCITRAL ARBITRATION RULES, *supra* note 177; ICDR, *supra* note 176, at 28–29; JAMS, *supra* note 176.

196. *See* Speller, *supra* note 195.

involved in their disputes without being limited by general arbitration rules.[197]

CONCLUSION

After decades of uncertainty surrounding § 1782's application in private international commercial arbitration, the Supreme Court has finally decided that such tribunals do not fall within the scope of § 1782's "foreign or international tribunal."[198] This decision is an important one, as it eliminates ambiguity in interpretation that led to the previous circuit court split over § 1782's applicability. While it was necessary for the Supreme Court to clarify the scope of § 1782, this decision is not without its drawbacks. Excluding private international commercial arbitral tribunals from the scope of § 1782 leaves foreign entities that are contractually obligated to arbitrate disputes at risk for less discovery and may affect the way private international commercial arbitration is viewed.

Foreign entities may hope that Congress will respond to the Supreme Court's decision with an amendment specifying that § 1782 includes private international commercial arbitral tribunals. An amendment to § 1782 would certainly be effective in providing broader discovery to foreign parties involved in international commercial arbitration. However, the lack of both similar discovery procedures for domestic arbitration and reciprocal broad discovery procedures in other countries is likely to dissuade Congress from making an amendment. Instead of hoping for a statutory amendment or resorting to unethical tactics, it is paramount for affected foreign entities to leverage contract negotiations to ensure they can agree on terms that will allow them to utilize the best discovery methods available.

It is important to keep in mind that companies often choose arbitration as their desired method of dispute resolution because it is generally faster, cheaper, and more private.[199] Extensive discovery, on the other hand, is known to be expensive, time consuming, and intrusive.[200] Following the limitation of § 1782, parties must redraft agreements to clarify the scope of discovery and avoid being stuck with general arbitration rules. While drafting more broad and effective discovery provisions for arbitration clauses in commercial contracts is not a one hundred percent effective solution, it is clear that this method will provide the best possible outcome and protections for parties looking to retain proper discovery and ensure fair and less costly

197. *See generally When Parties Arbitrate: The Powers and Limitations of Discovery in Arbitration under the Federal Arbitration Act*, GORDON & REES SCULLY MANSUKHANI (Aug. 2021), https://m.grsm.com/publications/2021/when-parties-arbitrate-the-powers-and-limitations-of-discovery-in-arbitration-under-the-federal-arbitration-act; Subrin, *supra* note 165; CCBE, *supra* note 128; IBA, *supra* note 128; MODEL RULES OF PRO. CONDUCT r. 3.4 (AM. BAR ASS'N 2020).

198. *See* ZF Auto. US, Inc. v. Luxshare, Ltd. 142 S.Ct. 2078 (2022).

199. Fojo, *supra* note 127

200. *Id.*

arbitration proceedings. After such amendments, if parties are still looking for additional discovery that cannot be provided for within an arbitration agreement, they should simply avoid arbitration altogether and settle their disputes in a United States court.[201]

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201. *Id.*

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