Compelling U.S. Discovery in International Franchise Arbitrations: The (F)utility of Section 1782 Applications

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With the increasingly globalized franchise market comes an increasing number of international disputes among franchisors, master franchisees, franchisees, and developers. The rules and procedures of cross-border arbitration have been said to be "tailor-made" to resolve such international franchise disputes.[1] So it is no surprise that international arbitration is on the rise. A 2018 survey shows 92% of in-house lawyers report international arbitration as their preferred method of dispute resolution.[2] Leading global arbitral institutions report year-over-year increases in cases filed, including a 28% increase from 4,130 in 2012 to 5,661 in 2016.[3] As of 2018, over 150 countries including the United States are signatories to the New York Convention,[4] which provides that arbitration awards involving foreign parties are enforceable by federal courts.[5] New York and California have recently spearheaded efforts to attract and capture larger shares of the international arbitration market.[6]

1. *See* Craig R. Tractenberg, *Nuts and Bolts of International Arbitration*, 38 Franchise L.J. 451 (2019).

2. Eric Z. Chang, *Golden Opportunities for the Golden State: The Rise of International Arbitration in California*, 31 Cal. Litig. 28 (2018).

3. *See* Markus Altenkirch & Jan Frohloff, *International Arbitration Statistics 2016—Busy Times for Arbitral Institutions*, Global Arb. News (June 26, 2017).

4. New York Arbitration Convention, Contracting States, www.newyorkconvention.org, Contracting States, http://www.newyorkconvention.org/contracting-states (last visited May 26, 2019).

5. 9 U.S.C. §201 *et seq*.

6. *See* Tractenberg, *supra* note 1, at 452 ("For example, the New York International Arbitration Center (NYIAC) was launched in 2013 to provide needed space to conduct arbitrations administered by other agencies. Only three months later, the International Chamber of Commerce (ICC) established a presence in New York."). In 2018, California passed new rules—and designedly one of the most inclusive sets of such rules in the worldto permit out of state and foreign attorneys to appear in international commercial arbitrations seated in California. *See* Chang, *supra* note 2, at 31–32.

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But international arbitration is markedly different from commercial arbitration in the United States.[7] Unless the franchisor's arbitration clause provides for the arbitrator's authority to issue document subpoenas, compel witnesses to testify in a deposition, and other facets of broad American-style discovery, such evidence gathering is limited and often restricted entirely by most international arbitration rules.[8] The default provisions under most of these rules require parties to exchange the information they intend to rely on, but the procedure involves little to no adversarial or third-party discovery.[9]

This article examines a disparity among U.S. courts on the question whether discovery in the United States may be compelled in aid of international franchise arbitrations pursuant to 28 U.S.C. §1782 (§1782). The origin of the split can be traced to the U.S. Supreme Court's only opinion on §1782, and the limits of discretion courts may exercise under it, *Intel v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (*Intel*). As described by one district court, the split is rooted in disagreement over "[t]wo words from a law review article quoted by the Supreme Court in support of a different proposition. . . ."[10] Following *Intel*'s broad interpretation of the statute, substantial numbers of requests for judicial assistance under §1782 in aid of international arbitrations have been litigated in U.S. courts.[11] Understanding the reasons courts have chosen to either grant or deny such assistance to international arbitrations is critical for franchise counsel tasked with drafting the arbitration clause in international franchise agreements, or gathering evidence located in the United States that bears on the outcome of a franchise dispute between two foreign parties.

I. Section 1782 Text and Policy

Titled "Assistance to foreign and international tribunals and to litigants before such tribunals," the text of §1782 provides, in relevant part:

> 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 . . . upon the application of any interested person and may direct that

7. *See* Tractenberg, *supra* note 1.

8. *See* Cedric Chao, Kerry Bundy, Isaac Hall & Jay Munisteri, *It's All Greek to Me—Navigating the Unfamiliar Waters of International Arbitration*, Int'l Franchise Ass'n 49th Ann. Legal Symposium (2016) ("International arbitration is generally characterized by limited discovery (called 'disclosures' in the international arbitration world), finding its roots in civil law traditions, which eschew the sweeping discovery characteristic of litigation in the United States.").

9. *Id.*

10. *In re* Application of Grupo Unidos Por El Canal S.A., 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015) (*Grupo Unidos CA*).

11. 2 Gary B. Born, International Commercial Arbitration 2410, §16.03[A] (2d ed. 2014).

> the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . .[12]

The "twin aims" of §1782 are (1) to provide efficient judicial assistance from federal district courts in gathering evidence for litigants outside of the United States, and (2) to encourage, by example, foreign countries to provide similar means of assistance to U.S. courts.[13] In addition to other factors announced in *Intel*, courts are ultimately guided by these twin aims in exercising discretion to provide appropriate assistance to international litigants.[14]

A. *The Conundrum of Section 1782 in Franchise Transactions*

In the fifteen years since the Court's seemingly liberalized interpretation of §1782, courts have grappled with §1782's application to various government-based and contract-based arbitral proceedings. When the "international tribunal" is investor-state arbitration tribunal (i.e., proceedings conducted pursuant to bilateral or multilateral investment treaties), lower courts uniformly hold such a "tribunal" is eligible for §1782 aid.[15] But in an international franchise arbitration between private parties, where a government or state sponsor is absent, they remain divided on whether Intel's expansive reading of §1782 and its policy goals are sufficient for the term "tribunal" to encompass contractual arbitral proceedings.[16] Although courts have sharply disagreed over the precedential effect of *Intel* on the question of whether a "foreign or international tribunal" under §1782 includes private commercial arbitration, there has been a remarkable shift in recent cases, including document requests in an international franchise dispute,[17] ushering a new prevailing view that private arbitration is not a proper §1782 tribunal. Then, just this fall, the Court of Appeals for the Sixth Circuit reinvigorated the debate by holding that private arbitration *is* a proper § 1782 tribunal.[18] Several other Courts of Appeals are set to address the issue.[19]

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12. 28 U.S.C. §1782(a).

13. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 252 (2004).

14. Schmitz v. Bernstein Liebhard & Lifshitz, LLP, 376 F.3d 79, 84 (2d Cir. 2004).

15. *See* S.I. Strong, *Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 Stan. J. Complex Litig. 295 (2013).

16. Multiple courts have concluded that even if state-sponsored arbitrations were within the scope of §1782, purely private arbitrations are not. *See*, *e.g.*, *In re* Arbitration, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("I interpret the Intel Court's reference to 'arbitral tribunals' as including state-sponsored arbitral bodies but excluding purely private arbitrations."); *In re* Application of Prabhat K. Dubey, 949 F. Supp. 2d 990 (C.D. Cal. 2013) ("[T]he Court is convinced that a 'reasoned distinction' can be made between purely private arbitrations established by private contract and state-sponsored arbitral bodies. . . .").

17. *In re* Operadora DB Mexico, S.A. de C.V., 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009), discussed *infra*, Part V.A.

18. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710 (6th Cir. 2019), discussed *infra*, Part V.D.

19. *In re* Application of Hanwei Guo, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019), *appeal docketed*, No. 19-781 (2d Cir. Mar. 27, 2019); Servotronics, Inc. v. Rolls-Royce PLC, No. 1:18-cv-07187 (N.D. Ill. Apr. 22, 2019), *appeal docketed*, No. 19-1847 (7th Cir. Apr. 30, 2019); *In re* Servotronics, Inc., 2018 WL 5810109 (D.S.C. Nov. 6, 2018), *appeal docketed*, No. 18-2454 (4th Cir. Dec. 7, 2018).

Conflict in the courts is a challenge for any international "outbound" or "inbound" franchise transaction that relies on arbitration to resolve disputes, where the likelihood of documents and witnesses being located in the United States is high. The uncertainty of judicial assistance from a U.S. district court makes it difficult to predict whether a franchisor's affiliate, an operating company, a domestic franchisee association, a master franchisee tasked with local development of a foreign brand, its local affiliates, or any number of interested parties likely to be found in the United States can be compelled to release discovery. A historical review of § 1782 jurisprudence can reveal the insights and trends that suggest whether an application to take discovery in the United States will be granted or denied.

B. *Section 1782 Procedure and Requirements*

Three mandatory elements of §1782 must be satisfied for a federal district court to compel discovery within the U.S. in aid of a foreign proceeding: (1) the person or entity from whom discovery is sought "resides or is found in" the district in which the application is filed; (2) the discovery is "for use in a proceeding in a foreign or international tribunal"; and (3) the application is made by a foreign or international tribunal, or by "any interested person."[20]

If these statutory requirements are satisfied, district courts then examine four factors, outlined in *Intel*, to guide them in exercising discretion to grant or deny a §1782 application: (1) whether the person from whom the discovery is sought is a participant in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal court assistance; (3) whether the §1782 request conceals an attempt to circumvent foreign proof-gathering restrictions or policies; and (4) whether the request is unduly intrusive or burdensome.[21]

II. 1999: Pre-*Intel* Precedent

In 1999, two courts of appeals ruled against the application of §1782 to arbitral tribunals. In *NBC v. Bear Stearns & Co.* (*NBC*),[22] the Second Circuit held that private arbitrations are not foreign or international tribunals under §1782. The Fifth Circuit followed suit in *Republic of Kazakhstan v. Biedermann International* (*Biedermann*).[23] Each sets forth the principal reasons for excluding private arbitration from §1782 often relied upon by the district courts.

20. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 246 (2004).
21. *Id.* at 264–65.
22. NBC v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).
23. Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880 (5th Cir. 1999). *NBC* involved a commercial arbitration panel in Mexico administered by the International Chamber of Commerce under ICC rules and Mexican law, and *Biedermann* involved a proceeding before the Arbitration Institute of the Stockholm Chamber of Commerce.

First, the Second Circuit noted the absence of any reference to private arbitration tribunals. It held that "the fact that the term 'foreign or international tribunals' is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in §1782, does include both."[24] Section 1782's legislative history reveals that Congress intended to cover "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[25] Reviewing a reference in the 1964 revisions to a "foreign administrative tribunal or quasi-judicial agency," the court concluded "there is no indication that Congress intended for the [statute] to reach private international tribunals" and that this "silence with respect to private tribunals is especially telling because . . . a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention."[26]

Other bases to exclude private international arbitration from §1782 is that the discovery afforded by §1782 would be at odds with the fundamental purposes of private arbitration.[27] The Fifth Circuit noted that "[e]mpowering arbitrators, or worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process. Arbitration is intended as a speedy, economical, and effective means of dispute resolution."[28] Finally, the Second Circuit also noted the apparent conflict §1782 would pose with limited evidence gathering mechanisms in domestic arbitrations provided under section 7 of the Federal Arbitration Act.[29]

III. 2004: U.S. Supreme Court Interprets Section 1782

The Supreme Court explored the parameters of §1782 in the *Intel* case. AMD filed an antitrust complaint against Intel with the Directorate-General for Competition of the Commission of the European Communities (DG-Competition).[30] The DG-Competition is the EU's primary enforcer of antitrust regulations.[31] In pursuit of its antitrust complaint—and when the DG-Competition declined to request discovery in its investigation—AMD applied to the U.S. District Court for the Northern District of California, invoking §1782 for an order requiring Intel to produce documents that Intel

24. *NBC*, 165 F.3d at 188.
25. *Id.* at 190.
26. *Id.* (citing H.R. Rep. No. 88-1052, at 9 (1963); S. Rep. No. 88-1580, at 3788–89 (1964)).
27. *Id.*
28. *Biedermann*, 163 F.3d at 883.
29. *NBC*, 165 F.3d at 191.
30. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 250 (2004).
31. *Id.*

produced in another domestic antitrust lawsuit.[32] The district court concluded §1782 did not authorize such discovery.[33] The Ninth Circuit reversed and remanded with instructions to rule on the application's merits.[34] On petition for certiorari, the Supreme Court considered four questions regarding the scope of §1782: (1) whether a non-litigant complainant before the European Commission is an "interested person" under §1782; (2) whether the proceeding before the European Commission qualified as a "tribunal"; (3) whether a proceeding must be pending or imminent for an applicant to invoke §1782; and (4) whether §1782 contains a foreign-discoverability requirement.[35]

Justice Ginsburg, writing for a 7-to-1 majority, answered the first two questions in the affirmative and the latter two questions in the negative.[36] Each analyzed element broadened the general reach of §1782 in international litigation. An "interested person" need not be a named litigant or party to a proceeding before the international tribunal. It includes anyone, such as litigants and foreign officials, who has a reasonable interest in obtaining the information requested.[37] A "proceeding" for which discovery is sought must be within reasonable contemplation, but need not be "pending" or "imminent."[38] And a district court may order discovery despite the fact that the documents would not be discoverable if they were located in the foreign jurisdiction.[39]

In determining the second question—whether the proceeding before the European Commission qualified as a "tribunal"—the *Intel* court described the "complete revision" §1782 had undergone in 1964: "Congress deleted the words 'in any judicial proceeding pending in any court in a foreign country,' and replaced them with the phrase 'in a proceeding in a foreign or international tribunal.'"[40] The Court reasoned that "Congress understood that change to provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad."[41] As further support for this proposition, the decision cited the Senate report and two footnotes from a law review article authored by Professor Hans Smit, who served as

32. *Id.*at 250–51.
33. *Id.* at 246.
34. *Id.* (citing Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 665 (9th Cir. 2002)).
35. *Intel*, 542 U.S. at 246–47, 253.
36. Justice Breyer authored a dissenting opinion, suggesting an added limitation that courts "should pay close attention to the foreign entity's own view of its 'tribunal'-like or non-'tribunal'-like status to better achieve Congress' cooperative objectives in enacting the statute." *Intel*, 542 U.S. at 267–73. Justice Scalia's single-paragraph concurrence emphasized "the statute—the only sure expression of the will of Congress—says what the Court says it says" but criticized the majority for relying on words of a Senate Committee Report when the text of the statute was sufficient to arrive at the majority's conclusion. *Id.* at 267. Justice O'Connor took no part in the consideration or decision of the case.
37. *Id.* at 256.
38. *Id.* at 258–59.
39. *Id.* at 260–63.
40. *Id.* at 248–49 (emphasis omitted).
41. *Id.* at 257–58 (formatting and quotation omitted).

the Reporter to the International Rules Commission.[42] The citation to Smit, a former law school colleague of Justice Ginsburg[43] and primary drafter of §1782's current incarnation,[44] included a parenthetical in which the Court quoted the following language: "[T]he term 'tribunal' . . . includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts."[45] With this interpretation of "tribunal" in §1782, the *Intel* court found that the DG-Competition's role as a first-instance decision-maker, its ability to permit the gathering and submission of evidence, its authority to determine liability and impose penalties, its ability make a final disposition, and the judicial reviewability of the final decisions were key factors in holding that it had "no warrant to exclude the European Commission . . . from §1782(a)'s ambit."[46] Thus, the Supreme Court ruled that AMD was authorized to seek §1782 aid from the district court in connection with the Commission's investigation, and the Court remanded the case for weighing of the discretionary factors.[47]

IV. 2004–2009: Early Post-*Intel* Treatment of Contractual International Arbitrations as "Foreign Tribunals"[48]

In the first years after *Intel*, district courts encountering §1782 applications in aid of private international arbitrations found that such proceedings

42. *Id.* at 258 (citing Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026–27 nn.71, 73 (1965)).

43. Tribute to Hans Smit by U.S. Supreme Court Justice Ruth Bader Ginsburg, Columbia Law School (Jan. 12, 2012), https://www.law.columbia.edu/media_inquiries/news_events/2012/january2012/Justice-Ginsburg-on-Hans-Smit.

44. *See* Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095, 1099 (2d Cir. 1995) (describing Smit as "a chief architect" of §1782).

45. *Id.* (emphasis added)

46. *Intel*, 542 U.S. at 258

47. *Id.* at 266. On remand, the district court denied AMD's amended §1782 application in full, finding that none of the four discretionary factors weighed in AMD's favor, and noting that the application appeared to be an attempt to circumvent the DG-Competition's decision not to pursue such discovery. *See* Advanced Micro Devices v. Intel Corp., 2004 WL 2282320, at *2–3 (N.D. Cal. Oct. 4, 2004).

48. For early post-*Intel* cases holding that an arbitral tribunal falls under §1782, see, for example, *In re* Winning (HK) Shipping Co., Ltd., 2010 WL 1796579, at *9–10 (S.D. Fla. Apr. 30, 2010) (noting that private arbitration in London subject to the English Arbitration act constituted a foreign tribunal under §1782); OJSC Ukrnafta v. Carpatsky Petroleum Corp., 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009) (granting discovery in aid of an arbitration before the Stockholm Chamber of Commerce on the grounds that the tribunal was a first-instance decision-maker whose decision may be subject to judicial review); Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. Nejapa Power Co. LLC, 2008 WL 4809035 (D. Del. Oct. 14, 2008) (*Intel* and post-*Intel* decisions indicate that §1782 applies to private foreign arbitrations); *In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 239 (D. Mass. 2008) (private ICC arbitral panel falls within the meaning of §1782, but denying the motion to compel discovery on other grounds); *In re* Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007) (granting discovery in aid of an Israeli arbitration proceeding); *In re* Oxus Gold PLC, 2007 WL 1037387, at *5 (D.N.J. Apr. 2, 2007) (magistrate judge's conclusion that arbitration between private litigants within a framework defined by investment treaty and governed by UNCITRAL Arbitration Rules not

under *Intel*'s analysis are per se "tribunals" within the plain meaning of §1782[49] or come within the scope of the statue if the arbitral body in question satisfies the "functionality" test applied by *Intel*.[50] These courts relied heavily on *Intel*'s attention to the substituted word "tribunal" in the 1964 revision of the statute, a broad interpretation of *Intel* as a whole, and *Intel*'s citation to Professor Smit's view that the term "tribunal" includes "arbitral tribunals."[51] They found the Second and Fifth Circuits' wholesale exclusions of private arbitration from §1782 applicability no longer persuasive after *Intel*[52] and inconsistent with the Supreme Court's aversion to imposing "categorical limitations" on §1782.[53] In support of the "plain meaning" argument, one leading international arbitration scholar takes a practical approach to the argument that the plain language of §1782 extends to arbitral "tribunals":

clearly erroneous or contrary to law); *In re* Roz Trading, Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (international commercial arbitral panel located in Austria was a tribunal under §1782 because the body acted as a first-instance decision-maker and issued decisions both responsive to a complaint and reviewable in court).

49. *See*, *e.g.*, *Hallmark*, 534 F. Supp. 2d at 954 (opining that it is "best read not to impose any restrictive definitional exclusions that would necessarily preclude assistance to all private arbitral bodies").

50. For post-2009 cases applying the functionality test, see, for example, *Kleimar*, *N.V. v. Benxi Iron & Steel Am.*, 2017 WL 3386115, at *6 (N.D. Ill. Aug. 7, 2017) (concluding arbitration body was a §1782 tribunal because the decisions are judicially reviewable under English law); *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 995 (11th Cir. 2012) (holding in later vacated opinion that "[t]he pending arbitration between JASE and CONECEL meets the functional criteria articulated in *Intel*."), *vacated*, *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262 (11th Cir. 2014); *Winning*, 2010 WL 1796579, at *7–9 (S.D. Fla. Apr. 30, 2010) (applying functional analysis to determine that an LMAA arbitration is §1782 tribunal); *In re Owl Shipping, LLC*, 2014 WL 5320192, at *2 (D.N.J. Oct. 17, 2014) (same; relying on *Winnng*); *In re Pola Mar. Ltd.*, 2018 WL 1787181, at *2 (S.D. Ga. Apr. 13, 2018) (same; relying on the vacated opinion in *Consorcio*); *In re Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) (same; relying on *Winning*, *Owl Shipping*, and the vacated *Consorcio* opinions).

51. *See* cases cited *supra* note 48. Early post-*Intel* opinions afford great weight to the Supreme Court's frequent citations to multiple articles written by Professor Hans Smit, specifically his statement that "arbitral tribunals" are included under the statute. *Intel*, 542 U.S. at 258 (citing Smit, *supra* note 42, at 1026–27 nn.71, 73). In a now-vacated opinion, the Eleventh Circuit in *Consorcio I* attributed the Supreme Court's deference to the fact that Professor Smit is "more than a leading scholar in the field" and was "the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. §1782," as acknowledged by then-Judge Ginsburg in an earlier D.C. Circuit opinion. *Consorcio Ecuatoriano*, 685 F.3d at 996 (quoting *In re* Letter of Request from the Crown Prosecution Serv. of the U.K., 870 F.2d 686, 689 (D.C. Cir. 1989)).

52. *See*, *e.g.*, *Babcock*, 583 F. Supp. 2d at 239 ("I do not find the reasoning in [*NBC*] and [*Biedermann*] to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*."); *Roz Trading*, 469 F. Supp. 2d at 1226 ("Both of these cases were decided five years before *Intel*. Their reasoning, and particularly that of [*NBC*], is materially impacted by *Intel*."); *Winning*, 2010 WL 1796579 at *7; *Hallmark*, 534 F. Supp. 2d at 956.

53. *See*, *e.g.*, *Babcock*, 583 F. Supp. 2d at 240 ("[T]he Supreme Court in *Intel* repeatedly refused to place 'categorical limitations' on the availability of §1782(a). . . ."); *Hallmark*, 534 F. Supp. 2d at 956–57 ("*Intel*'s emphasis on giving district court's discretion in evaluating merits of 1782 application is a means of achieving its legislative purpose, which is to disfavor categorical rules or exclusions.").

> Indeed, the contrary suggestions strikes most international arbitration practitioners as odd: it goes almost without saying that an arbitral tribunal, vested with adjudicatory powers and obligations, is a tribunal and that, in international matters, it is an international tribunal. There is nothing in the statue's legislative history that would suggest a contrary interpretation.[54]

To date, at least one appellate court has adopted this argument.[55] Similarly, in 2008, the Committee on International Commercial Disputes of the New York City Bar asserted in a report that "foreign or international tribunal" should be construed to include all international arbitral tribunals irrespective of location, with suggested "best practices" for how district courts might exercise their discretion under the *Intel* factors.[56]

V. 2009 to Present: Changing, Uneven Trends

Five years after *Intel*, the Fifth Circuit affirmed *Biedermann* in an unpublished decision.[57] This apparently set the stage for a turning point, as other district courts receiving §1782 applications, both around this time and subsequently, have overwhelmingly denied aid because the private arbitrations were not "foreign tribunals" under §1782. These courts cite *Intel's* silence on the matter, the fundamental differences between private arbitration and governmental or state-sponsored adjudicatory bodies (with emphasis on the limits or absence of judicial review), and the practical consequences of finding that private arbitration qualifies for §1782 aid.[58] One of the first

54. Born, *supra* note 11, §16.03[A].

55. *See* Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 722 (6th Cir. 2019) ("American lawyers and judges have long understood, and still use, the word 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties.").

56. *28 U.S.C. §1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration—Applicability and Best Practices* N.Y.C. Bar Ass'n (Comm. on Int'l Commercial Disputes), at 25, 29, http://www.nycbar.org/pdf/report/1782_Report.pdf (last visited Aug. 12, 2019).

57. *See* El Paso Corp. v. La Comision Ejecutiva Hidroeléctrica del Río Lempa, 341 Fed. App'x 31, 34 (5th Cir. 2009) (finding that none of the concerns regarding the application of §1782 to private international arbitrations was at issue or considered in *Intel*).

58. *Id.* at 34; *In re* Arbitration, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) ("[A]lthough the *Intel* Court acknowledged the ways in which Congress has progressively broadened the scope [of] §1782, it stopped short of declaring that any foreign body exercising adjudicatory power falls within the purview of the statute."); *In re* Operadora DB Mexico, S.A. DE C.V., 2009 WL 2423138, at *11 (M.D. Fla. Aug. 4, 2009) ("This Court is confident that the Supreme Court would not have expanded §1782 to permit discovery assistance in private arbitral proceedings and reversed *NBC* and *Biedermann*—without even acknowledging their existence—in a parenthetical quotation supporting an unrelated proposition."); La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481, 485 (S.D. Tex. 2008) ("[T]he Supreme Court has not addressed the application of §1782 to arbitral tribunals, not even in dicta."); *In re* Grupo Unidos Por El Canal, 2015 WL 1810135, at *7 (D. Colo. Apr. 17, 2015) (*Grupo Unidos CO*)("It is completely implausible that the Supreme Court would have, in a parenthetical quotation supporting an unrelated proposition involving an quasi-judicial governmental body, expanded §1782 to permit discovery assistance in private arbitral proceedings and reverse the only two circuits addressing this issue *sub silentio*, without even acknowledging the existence of the circuit precedent."); *In re* Application by Rhodianyl S.A.S., 2011 U.S. Dist. LEXIS 72918, (D. Kan. Mar. 25, 2011) ("Because the ICC Panel's authority derives from the parties' agreement, its purpose is fundamentally different than that of a governmental or state-sponsored proceeding.").

post-*Intel* cases, *In re Operadora DB Mexico, S.A. DE C.V.* (*Operadora*),[59] denied §1782 aid to an international dispute over franchise rights to the "Hard Rock" brand in Mexico.

A. *Operadora Court Denied Section 1782 Aid to Hard Rock Franchisee*

The franchisee in *Operadora* was an entity incorporated under Mexico law. It entered into a Master Franchise Agreement (MFA) with Hard Rock Limited, a Jersey Channel Islands corporation.[60] Both parties claimed exclusive franchise rights in Mexico to the "Hard Rock" mark.[61] Hard Rock Limited initiated an arbitration constituted under the International Chamber of Commerce (ICC)'s International Court of Arbitration in Mexico City.[62] The franchisee asserted that many of its communications and transactions regarding its franchise rights were with Hard Rock Limited's Florida-based U.S. affiliate, Hard Rock Café International (HRCI), not Hard Rock Limited, and that HRCI was in possession of communications regarding the franchisee's payment of royalties, participation in audits, and general correspondence.[63] The franchisee invoked §1782 to seek an order from the U.S. District Court for the Middle District of Florida, authorizing issuance of a subpoena to HRCI for discovery relevant to the arbitration. It argued the arbitrator had no jurisdiction over HRCI to compel HRCI to produce documents to show that HRCI and Hard Rock Limited acknowledged the franchisee's rights under the MFA. HRCI, on the other hand, urged the magistrate to follow pre-*Intel* precedent from the Second and Fifth Circuits to deny the franchisee's application.[64] The magistrate issued a report and recommendation to the district court to find that the private ICC panel qualified as a proper §1782 tribunal, entitling the franchisee to seek documents from HRCI.[65]

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59. *In re* Operadora DB Mexico, S.A. DE C.V. 2009 WL 2435750 (M.D. Fla. May 28, 2009), *report and recommendation adopted in part, rejected in part sub nom. In re* Operadora DB Mexico, S.A. de C.V., 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009).

60. *Id.* at *1.

61. *Id.*

62. *Id.* The franchisee's subpoena sought (1) Any and all documents which relate to, describe, summarize, constitute, or mention, the holder of any rights under the Master Franchise Agreement from January 1, 1994 to the present; (2) Any and all non-privileged documents which relate to, describe, summarize, constitute, or mention, in whole or in part, any royalties or payments made to Hard Rock Limited pursuant to the Master Franchise Agreement from January 1, 1994 to the present; (3) Any and all documents which relate to . . . internal communications between [HRCI] or Hard Rock Limited employees, agents, attorneys, or representatives pertaining to Operadora's rights, or lack thereof, under the Mater [sic] Franchise Agreement from January 1, 1994 to the present; (4) Any and all documents which relate to . . . communications between Hard Rock Limited and any third party pertaining to Operadora's rights, or lack thereof, under the Master Franchise Agreement from November 20, 2006 to the present; (5) Any and all documents which relate to . . . communications and agreements between Hard Rock Limited and any third party, [as to] franchise rights for hotels in Mexico under the "Hard Rock" brand from November 20, 2006 to the present. *Id.* at *1, n.2.

63. *Id.*

64. *Id.* at *2.

65. *Id.* at *10. The magistrate declined to authorize a subpoena on Request No. 5 for communications and agreements Hard Rock Limited had with any third party concerning franchise rights for hotels in Mexico under the "Hard Rock" brand, finding such communications "likely,

The district court declined to adopt the magistrate's recommendation. Relying on *NBC* and *Biedermann*'s "reasoned distinction" between purely private arbitrations established by private contract and state-sponsored arbitral bodies, the district court held that *Intel*'s reasoning is appropriately limited to state or governmental adjudicatory bodies.[66] It rejected the emphasis that earlier post-*Intel* courts placed on the Supreme Court's quotation of Professor Smit,[67] reasoning that the reference to Professor Smit's definition of "tribunal" was included only for the proposition that §1782 applies to quasi-judicial agencies and administrative courts.[68] The district court went so far as quote Professor Smit elsewhere, asserting that "an international tribunal owes both its existence and its powers to an international agreement," further suggesting that Congress did not contemplate private arbitral proceedings when it used that term.[69]

B. *Eleventh Circuit Reverses Itself on §1782 Applications.*

Since *Intel*, the Eleventh Circuit was the first appellate court to decide this question.[70] It initially concluded in 2012 that a private arbitration was a "foreign or international tribunal"[71] because it met "the functional criteria articulated in *Intel*."[72] Two years later, the court withdrew this opinion on its own motion and substituted a new decision affirming the grant of discovery on alternative grounds. It held that the applicant's pre-suit investigation to

but not relevant to the issue of who owns the rights to the brand under the franchise agreement." *Id.* at *1.

66. *In re* Operadora DB Mexico, S.A. de C.V., 2009 WL 2423138, at *11 (M.D. Fla. Aug. 4, 2009) (stating that *Intel* merely considered whether tribunal includes "quasi-judicial agencies" such as the European Commission, but not private international arbitrations); *see also*, *Arbitration in London*, 626 F. Supp. 2d at 885 (same); *Dubey*, 949 F. Supp. 2d at 993–994 (same).

67. *Operadora*, 2009 WL 2423138 at *11 ("This Court is confident that the Supreme Court would not have expanded §1782 to permit discovery assistance in private arbitral proceedings and reversed *NBC* and *Biedermann*—without even acknowledging their existence—in a parenthetical quotation supporting an unrelated proposition. . . ."); *see also In re* Grupo Unidos Por El Canal, 2015 WL 1810135, at *8 (D. Colo. Apr. 17, 2015) ("This court finds that [*Roz Trading*, *Hallmark* and *Babcock*] relied too heavily on the Supreme Court's inclusion of the phrase 'arbitral panel' in a parenthetical quotation and a definition in one treatise which would make sweeping changes to the jurisprudence surrounding §1782 not presented squarely to the Supreme Court in its case."); *Dubey*, 949 F. Supp. 2d at 994–95 (same); *El Paso Corp.*, 341 Fed. App'x at 34 ("Nothing in the context of the quote suggests that the Court was adopting Smit's definition of 'tribunal' in whole."); *In re* Application of Grupo Unidos Por El Canal S.A., 2015 WL 1815251, at *11 (N.D. Cal. Apr. 21, 2015) ("[T]he Supreme Court cited [Smit] merely to support the proposition that §1782 applies to administrative and quasi-judicial proceedings.").

68. *La Comision*, 617 F. Supp. 2d at 486–487.

69. *Operadora*, 2009 WL 2423138 at *9.

70. The Seventh Circuit noted that a German arbitration panel might be considered a §1782 "tribunal," but did not decide the issue. *See* GEA Grp. AG v. Flex-N-Gate Corp., 740 F.3d 411, 419 (7th Cir. 2014). In August 2019, the Sixth Circuit heard oral argument on an appeal from a denial of a §1782 application in the United States District Court for the Western District of Tennessee. Abdul Latif Jameel Trans. Co. Ltd, v. FedEx Corp., No. 2:18-MC-00021 (W.D. Tenn. Mar. 13, 2019), *appeal docketed*, No. 19-5315 (6th Cir. Apr. 2, 2019).

71. *In re* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 685 F.3d 987, 996 (11th Cir. 2012).

72. *Id.*

develop potential criminal and civil claims in a separate foreign tribunal was within reasonable contemplation under *Intel*.[73] In escaping the hotly contested "tribunal" issue, the Eleventh Circuit expressly declined to answer the question of whether a private arbitration can be considered a tribunal under §1782 because it did not have a sufficiently developed record on the nature of the arbitration tribunal in question.[74]

C. *Recent Conflict Within the Southern District of New York*

Dating back to the Eleventh Circuit's now-vacated opinion, the number of post-*Intel* cases that would deny §1782 aid to international franchise arbitrations appears to be growing.[75] As one example, in 2015, two district courts responding to a coordinated request for discovery located in California and Colorado for the same arbitration, decided within days of each other that a contract-based arbitral tribunal is not the type of "tribunal" Congress intended in 1964 when it substituted "foreign or international tribunal" in place of "foreign judicial proceedings."[76] Other recent decisions concur in the holdings of *NBC* and *Biedermann* regarding the ambiguity of the statutory language, the clearer instruction of the legislative history, and policy considerations in those opinions.[77]

In spite of this tendency, four post-*Intel* cases in the Southern District of New York—three of them decided within last year—are evenly split in examining the question of whether *Intel* overruled *NBC*'s holding that a

73. *In re* Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1270 (11th Cir. 2014) (*Consorcio II)*. Conecel, a supplier of cell phones and accessories, was defending a pending arbitration that arose from a billing dispute with its foreign logistics company and sought discovery from the respondent's affiliate in Miami. Conecel's § 1782 application contemplated civil and private criminal suits against two of its former employees who, Conecel claimed, may have violated Ecuador's collusion laws in processing the respondent's allegedly inflated invoices.

74. *See id.* at 1270 n.4 ("We decline to answer [whether the arbitration is a 'tribunal' on the sparse record found in this case. The district court made no factual findings about the arbitration and made no effort to determine whether the arbitration proceeding in Ecuador amounted to a §1782 tribunal . . . Thus we leave the resolution of the matter for another day.").

75. *See* cases cited *supra* note 58 and *infra* note 77.

76. *In re* Grupo Unidos Por El Canal, 2015 WL 1810135, at *6 (D. Colo. Apr. 17, 2015); *In re* Application of Grupo Unidos Por El Canal S.A., 2015 WL 1815251, at *11 (N.D. Cal. Apr. 21, 2015).

77. *In re* Dubey, 949 F. Supp. 2d 990 (C.D. Cal. 2013); *In re* Servotronics, Inc., 2018 WL 5810109, at *4 (D.S.C. Nov. 6, 2018) ("And other than its passing mention when defining the word 'tribunal,' the *Intel* Court did not specifically discuss arbitral tribunals, much less private arbitral tribunals. As such, the Intel decision did nothing to alter [*NBC*] and [*Biedermann*] holdings that §1782 does not apply to private international arbitrations."); *In re* Gov't of the Lao People's Democratic Republic, 2016 WL 1389764, at *4 (D. N. Mar. I. Apr. 7, 2016) ("This Court does not agree that *Intel* abrogated *NBC* and *Biedermann*, and instead holds that private arbitral bodies are categorically excluded from §1782's coverage"); TJAC Waterloo, LLC ex. rel. Univ. of Notre Dame (USA) in England, 2016 WL 1700001, at *2 (N.D. Ind. Apr. 27, 2016) (holding that purely private nature of proceeding and lack of available judicial review dictated private arbitration was "not a tribunal within the scope of §1782 and this Court lacks jurisdiction to order discovery. . . .").

private arbitral body is not a §1782 tribunal.[78] In *Ex parte Application of Kleimar N.V.*, the district court was asked to determine whether a series of arbitrations before the London Maritime Arbitrators Association (LMAA) were eligible §1782 tribunals.[79] The court relied on *Consorcio I* and other decisions specifically holding the LMAA qualifies a foreign tribunal.[80] Recognizing the post-*Intel* skepticism among district courts, a second judge in the Southern District of New York followed *Kleimar* in holding that the London Court of International Arbitration (LCIA) likewise was covered by §1782.[81]

The latter two cases in this district went the other way and held *NBC* remains good law in the Second Circuit,[82] relying on precedent that on-point decisions in the court of appeals may not be abrogated *sub silencio*.[83] The most recent, *In re Petrobras Securities Litigation*,[84] notably disavows the weight afforded by other cases to Professor Smit, highlighting that Professor Smit wrote another law review article two years before Congress revised the statute, in which he expressed the view that "an international tribunal owes both its existence and its powers to an international agreement."[85] The court said the statement reflects an apparent belief that §1782 did not apply to private arbitral bodies at the time he wrote the words that the Supreme Court would later quote. It is implausible, then, to read the Supreme Court's approving quotation of him as an endorsement of the opposite view.[86] With multiple conflicting decisions in a relatively short period, the Second Circuit was recently asked to revisit its holding in *NBC* to resolve post-*Intel* uncertainty.[87]

D. *Sixth Circuit Creates a Split of Authority Among Circuit Courts*

Diverging from the reasoning of *NBC* and *Biedermann*, the *Fedex Corp.* decision is the first post-*Intel* case to hold that a private arbitral tribunal was

78. *Ex Parte* Application of Kleimar N.V., 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) ("[D]ictum of the Supreme Court in [*Intel*] suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of §1782."); *In re* Application of the Children's Inv. Fund Found. (UK), 363 F. Supp. 3d 361, 364 (S.D.N.Y. 2019) (finding the London Court of International Arbitration satisfies the statutory requirement).

79. *Kleimar N.V.*, 220 F. Supp. 3d at 518.

80. *Id.* at 521–22.

81. *In re* Children's Inv. Fund Found. (UK), 363 F. Supp. 3d 361, 369–70 (S.D.N.Y. 2019).

82. *In re* Application of Hanwei Guo, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) (holding *NBC* remains governing Second Circuit precedent post-Intel); *In re* Petrobras Sec. Litig., 393 F. Supp. 3d 376 (S.D.N.Y. July 29, 2019) (same).

83. *See* Monsanto v. United States, 348 F.3d 345, 351 (2d Cir. 2003) (stating that district courts are "required to follow" on-point Second Circuit precedent "unless and until that case is reconsidered by [the Second Circuit] sitting in banc (or its equivalent) or is rejected by a later Supreme Court decision").

84. *Petrobras*, 393 F. Supp. 3d 376.

85. Smit, *supra* note 44 at 1267, *cited in* NBC v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999), and *Petrobras*, 393 F. Supp. 3d at 386.

86. *Petrobras*, 393 F. Supp. 3d at 386.

87. *In re* Application of Hanwei Guo, 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019), *appeal docketed*, No. 19-781 (2d Cir. Mar. 27, 2019).

eligible for § 1782 discovery.[88] The appellant, Abdul Latif Jameel Transportation Company (ALJ), was a delivery services partner of Fedex International in Saudi Arabia.[89] A dispute arose when ALJ claimed that it was tricked into entering the relationship and that FedEx wrongly failed to renew their first contract.[90] ALJ filed a discovery application under Section 1782 for discovery in aid of two foreign arbitrations—one that ALJ commenced in Saudi Arabia under Saudi law and rules, and the other FedEx International commenced in Dubai under DIFC-LCIA rules.[91] ALJ sought documents and a deposition from FedEx Corp., the parent company of Fedex International.[92]

In reversing the district court's decision to deny ALJ's application and remanding for consideration of the *Intel* discretionary factors, the Sixth Circuit held that § 1782(a) permitted discovery for use in the private DIFC-LCIA arbitration at issue, after consideration of the statutory text, the meaning of the text based on legal and English definitions and usage of the term "tribunal" in 1964, and the statutory context and history of § 1782.[93] Even if the reference to the two words "arbitral tribunals" in Professor Smit's article was mere dicta, the Sixth Circuit's reasoning was supported by *Intel* because the Supreme Court primarily focused the substitution of a broader phrase "foreign or international tribunal" for the specific phrase "judicial proceeding in a foreign country," and emphasized the decision-making power of the DG-Competition to conclude the proceeding in *Intel* was a "tribunal."[94] The Sixth Circuit believed *NBC* and *Biedermann* "turned to legislative history too early in the interpretation process,"[95] and that policy and efficiency implications of expanding discovery to private international arbitral tribunals, in view of the permissive nature of § 1782 and the discretionary factors to be considered, were insufficient to categorically bar private international arbitrations.[96]

VI. How Does the Tribunal Function?

Setting aside the debate over § 1782's plain meaning and whether a bright-line rule includes or excludes private international arbitration, recall that *Intel* examined the function and procedures of the European Commission

88. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 714 (6th Cir. 2019).
89. *Id.*
90. *Id.* at 715.
91. *Id.* at 716. The arbitration seated in Saudi Arabia was dismissed, while the Dubai arbitration would proceed to a hearing in November 2019. ALJ requested an expedited appeal of the district court decision.
92. *Id.*
93. *See id.* at 717-23.
94. *Id.* at 725 & n.9.
95. *Id.* at 726.
96. *Id.* at 728-730.

in determining whether it qualified as a §1782 tribunal.[97] Relying on this approach, lower courts have conducted a "functional" analysis to determine whether the arbitration contains the characteristics of a tribunal.[98] The functionality test examines the following factors:

- Whether the arbitral panel acts as a first-instance adjudicative decision-maker;
- Whether it permits the gathering and submission of evidence;
- Whether it has the authority to determine liability and impose penalties; and
- Whether its decision is subject to judicial review.[99]

Courts primarily disagree on the judicial review factor, particularly the degree of judicial reviewability that is appropriate to constitute a tribunal.[100] According to some cases, the limited review afforded for procedural irregularities is sufficient.[101] The Eleventh Circuit mentioned that "[o]ne could not seriously argue that, because domestic arbitration awards are only reviewable in court for limited reasons (notably excluding a second look at the substance of the arbitral determination), this amounts to no judicial review at all,"[102] and found "no sound reason to depart from the commonsense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances."[103] The Sixth Circuit similarly noted that review of awards under the FAA is considered "judicial review."[104] Under this view, enforcement of any international arbitration award under the New York Convention is a kind of judicial review that may enable any arbitration between parties hailing from signatory nations to satisfy the functionality test.

97. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258 (2004) (The Commission's role "as a first-instance decisionmaker," subject to judicial review, did not exclude it "from §1782(a)'s ambit.").

98. *See* cases cited *supra* notes 48, 50.

99. *Intel*, 542 U.S. at 258

100. *In re* Pola Mar., Ltd., 2017 WL 3714032, at *2 (S.D. Ga. Aug. 29, 2017), *objections overruled sub nom. In re* Pola Mar., 2018 WL 1787181 (S.D. Ga. Apr. 13, 2018) ("The *Intel* court, in setting forth a functional description of a 'foreign tribunal' under §1782, focused on the judicial reviewability of the decisions of the European Commission. . . .").

101. *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 996 (11th Cir. 2012); *see also Roz Trading*, 469 F. Supp. 2d at 1225 (because the arbitration proceeding was a first-instance decision-maker that issues decisions "both responsive to the complaint and reviewable in court," it must necessarily be considered a tribunal); *Winning*, 2010 WL 1796579, at *8–10 (S.D. Fla. Apr. 30, 2010) (conducting functional analysis and concluding that arbitration in London was a foreign tribunal because the arbitration award is reviewable by English courts); *OJSC Ukrnafta*, 2009 WL 2877156, at *4 (because the Stockholm arbitration governed by UNCITRAL is subject to judicial review, it is a first-instance decision maker falling under the purview of §1782).

102. *Consorcio Ecutoriano*, 685 F.3d at 996.

103. *Id.* at 996–97.

104. Abdul Latif Jameel Transp. Co. v. FedEx Corp., 939 F.3d 710, 730 n.11 (6th Cir. 2019) (citing Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 585 (2008)).

On the opposite extreme, other courts require a more in-depth, appellate-level review of the merits.[105] In *Operadora*, the trial court applied this functional analysis to the ICC panel and found that "[t]he ICC Court is itself a creature of contract and may only modify the form of the ICC panel's award, not its substance . . . The ICC panel is the product of the parties' contractual agreement and its authority to issue binding decisions arises from that contract."[106] This group of opinions presumes that an international arbitration award is generally enforceable under the New York Convention. True judicial review is met, for purposes of §1782, where an arbitration award may be "set aside in extremely limited circumstances, such as for a lack of jurisdiction, a failure of the tribunal to abide by its mandate, or a violation of due process or international public policy."[107] Some §1782 decisions have altogether declined to apply this test.[108]

VII. Takeaways for Franchisors, Franchisees, and Developers

Lower court decisions on the type of international arbitral tribunals encompassed by §1782 have been characterized as "divergent and, in a number of instances, confused and the international arbitral process would benefit from clarification of the meaning of §1782 by U.S. appellate courts."[109] Until that day comes, there are several measures one can take to increase

105. *In re* Operadora DB Mexico, S.A. de C.V., 2009 WL 2423138 at *9–10 (M.D. Fla. Aug. 4, 2009) (While some *Intel* attributes applied—such as the arbitrator's ability to gather evidence, apply the law, and enter a binding decision—the arbitration did not function as a tribunal because the final decision was not judicially reviewable and the *Intel* court did not consider the source of the arbitration panel's authority, which was the product of a contractual agreement.); *In re* Arbitration, 626 F. Supp. 2d 882, 886 (N.D. Ill. 2009) (noting that the arbitral tribunal did not fall within the *Intel* definition because "private arbitrations are generally considered alternatives to, rather than precursors to, formal litigation" and "the very narrow circumstances in which the Board's decisions may be subject to review does not allow for judicial review of the merits of the parties' dispute"); *In re* FinserveGrp., 2011 U.S. Dist. LEXIS 121521, at *3 (D.S.C. Oct. 20, 2011) (Because London Court of International Arbitration Rules waives judicial review, "the Court questions whether [it] would be considered a 'foreign tribunal' under the statute. . . .").

106. *Operadora*, 2009 WL 2423138, at *12.

107. *Grupo Unidos CO*, 2015 WL 1810135, at *12 (D. Colo. Apr. 17, 2015); *see also* New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards, art. V, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 30.

108. *See, e.g.*, *Dubey*, 949 F. Supp. 2d at 994 n.3 ("[T]he Court is not convinced that *Intel* authorizes §1782 to apply to *any* type of proceeding that falls within its 'functional' definition of a tribunal, as suggested by some post-*Intel* decisions."); *Grupo Unidos CA*, 2015 WL 1815251, at *11 n.8 ("A federal court should be able to determine that certain types of decision-making forums are outside the purview of §1782 without having to engage in an inefficient, resource-consuming functional analysis. For example, a federal court should be able to reject a §1782 application from a caucus of Belgian private school students empowered to arbitrate a dispute arising under their academic rules without having to first consider the caucus' role as a first-instance decisionmaker.").

109. Born, *supra* note 11, §16.03[A]. Regarding confusion among the lower courts, Born criticizes suggestions in *OJSC Ukrnafta* and *Oxus Gold* that international arbitrations conducted pursuant to UNCITRAL Arbitration Rules are "public" and encompassed by §1782, because such rules have no legal force unless incorporated into the parties' arbitration agreement. *Id.* at 2414 n.440.

the likelihood that courts will aid in evidence gathering for international franchise disputes.

For the international franchisor or master franchisee engaging in a transaction with a person or entity that has nonsignatory affiliates in the United States, the foreign party would want to insist that the arbitration clause should provide for an institution and accompanying set of rules that enable review of the panel's award by the local court, and for limited reasons. For example, there is precedent for the argument that proceedings before the London Maritime Arbitrators Association (LMAA) constitutes a foreign tribunal under §1782 because awards by the LMAA are reviewable by the English Courts.[110] An award issued by an LMAA panel can be challenged or appealed if a "serious irregularity" can be shown,[111] or on a question of law arising out of an award.[112] Such limited rights of appeal should not be excluded by the international arbitration clause if the circumstances of the franchise transaction suggests a §1782 application is likely to be sought. In contrast to the LMAA, default rules of the ICC's International Court of Arbitration and the LCIA exclude the right of appeal on the merits, without further provision in the agreement. The ICC is perhaps one of the most widely known international commercial arbitration institutions,[113] but carries risk of precedent adverse to a master franchisee holding that ICC panels do not constitute proper §1782 tribunals.[114] For franchisors anticipating matters in Asia and India, no §1782 cases have scrutinized whether the Hong Kong International Arbitration Centre (HKIAC) or the Singapore International Arbitration Centre (SIAC) function as foreign tribunals under the statute.

Depending on the institution selected, a foreign franchisor or a master franchisee occupying the same position as the one in *Operadora* may have an interest in augmenting the arbitration clause to specify that the arbitral award may be reviewed for limited purposes (e.g., procedural irregularities, jurisdictional issues, failure to accord due process). The International Centre for Dispute Resolution (ICDR)—the international affiliate of the American Arbitration Association (AAA)—permits the parties to agree to an option

110. *In re* Pola Mar., Ltd., 2017 WL 3714032, at *2 (S.D. Ga. Aug. 29, 2017); *Ex rel* Application of Winning (HK) Shipping Co. Ltd., 2010 A.M.C. 1761, 1773–74 (C.D. Cal. 2010); s*ee also Ex parte* Application of Kleimar N.V., 220 F. Supp. 3d 517, 521–22 (S.D.N.Y. 2016) (a proceeding before the LMAA constitutes a foreign tribunal under §1782); *In re Owl Shipping, LLC*, 2014 WL 5320192, at *6 (D.N.J. Oct. 17, 2014) (same, relying on *Winning*).

111. Arbitration Act 1996, c. 23, §68 (Eng.).

112. *Id.* §69. The LMAA cautions, however, that such challenges are rarely made. Appeals based on de novo questions of law are rarely taken, and even when leave appeal is granted, a substantial proportion of awards are upheld. London Maritime Arbitrators Ass'n, *Appeals, Challenges and Precedents*, available at http://lmaa.org.uk/appeals-challenges-precedents.aspx (last visited Aug. 8, 2019).

113. Tractenberg, *supra* note 1.

114. *Compare In re* Operadora DB Mexico, S.A. de C.V., 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009), and NBC v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) (ICC panel not within the scope of §1782), *with In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 239 (D. Mass. 2008) (private ICC arbitral panel falls within the meaning of §1782).

of appellate review.[115] Bear in mind that the party on the other side of the transaction may be less likely to trade finality of the award and substantial cost of appeal to increase the chance of satisfying the functionality test for purposes of securing §1782 assistance.

For the franchisor, master franchisee, or developer filing a petition or *ex parte* application to take discovery under §1782, consider making the "plain meaning" argument that the term "tribunal" in §1782 includes private contractual arbitrations and is not ambiguous.[116] In arriving at the contrary conclusion, the *NBC* court considered court cases, international treaties, congressional statements, academic writings, and commentaries to conclude the statute did not plainly include or exclude private arbitral bodies.[117] Subsequent decisions adopted *NBC*'s reasoning.[118] Notably absent from it was consideration of other national arbitration statutes, where references to "arbitral tribunal[s]" are commonplace.[119] With the proliferation of arbitration statutes from other countries that use the same word, there may be merit to the notion that the practical, ordinary meaning of tribunal has changed since §1782 was revised in 1964.[120]

In addition, the district court receiving the request can be critical. Federal district courts in Connecticut,[121] Delaware,[122] Georgia,[123] Massachusetts,[124] Minnesota,[125] and New Jersey,[126] and most recently the Sixth Circuit,[127] have considered private international arbitrations as either per se "tribunals" or meeting the Supreme Court's functionality test. However, courts

115. Tractenberg, *supra* note 1, at 454.

116. The recent *FedEx Corp*. decision takes perhaps the most comprehensive approach to this argument in its consideration of use of the word "tribunal" in legal and English dictionaries, legal writing around the time § 1782 was amended in 1964, and other uses of the word "tribunal" in the statute. *See FedEx Corp*., 939 F.3d at 719–23.

117. *NBC*, 165 F.3d at 188.

118. *See*, *e.g.*, Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999); *Operadora*, 2009 WL 2423138, at *9 ("For the reasons articulated in *NBC*, the Court finds that the term "foreign or international tribunal" is sufficiently broad that it could include private arbitral proceedings, but is not sufficiently precise to dictate such a conclusion.").

119. Born, *supra* note 11 at n.424 (citing UNCITRAL Model Law Chapters III, IV; English Arbitration Act, 1996, §15; Swiss Law on Private International Law, Art. 176 *et seq.*).

120. The Fifth Circuit described international commercial arbitration as a "then-novel arena" at the time of §1782's expansion. *Biedermann*, 163 F.3d at 882.

121. OJSC Ukrnafta v. Carpatsky Petroleum Corp., 2009 WL 2877156, at *4 (D. Conn. Aug. 27, 2009).

122. Comision Ejecutiva, Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC, 2008 WL 4809035 (D. Del. Oct. 14, 2008).

123. *In re* Roz Trading, Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006); *In re Pola Mar. Ltd.*, 2018 WL 1787181, at *2 (S.D. Ga. Apr. 13, 2018).

124. *In re* Babcock Borsig AG, 583 F. Supp. 2d 233, 239 (D. Mass. 2008).

125. *In re* Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007).

126. *In re* Oxus Gold PLC, 2007 WL 1037387 (D.N.J. Apr. 2, 2007); *In re Owl Shipping, LLC*, 2014 WL 5320192 (D.N.J. Oct. 17, 2014).

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

in California,[128] Kansas,[129] Indiana,[130] Colorado,[131] South Carolina,[132] Texas,[133] and the Northern Mariana Islands[134] have not shown willingness to give such aid. Illinois,[135] Florida,[136] and New York[137] have gone both ways. The application itself should stress the availability and scope of judicial review in the foreign jurisdiction.

Finally, if the facts of a particular franchise dispute suggest the potential for other civil, criminal, or administrative proceedings before a foreign government, such as international corruption, collusion, or antitrust laws, consider *Intel*'s mandate that the foreign proceeding need not be "pending" or "imminent" but merely "within reasonable contemplation."[138] These circumstances may obviate the need to make the "foreign tribunal" argument in jurisdictions where the district court has a history of denying §1782 applications in support of discovery for private arbitrations. The Eleventh Circuit employed this analysis in *Consorcio II* to affirm §1782 discovery on grounds that were unrelated to whether private arbitral body was a foreign tribunal.[139]

VIII. Conclusion

"Two words from a law review article"[140] in the Supreme Court's sole opinion on §1782 continue to spawn disharmony in the courts fifteen years later, against the backdrop of increasing use of private international arbitration. Although resolution of a new circuit split would benefit franchisors, master franchisees, developers, and other businesses with a propensity to

128. *In re* Application of Prabhat K. Dubey, 949 F. Supp. 2d 990 (C.D. Cal. 2013); *In re* Application of Grupo Unidos Por El Canal S.A., 2015 WL 1815251 (N.D. Cal. Apr. 21, 2015).

129. *In re* Application by Rhodianyl S.A.S., 2011 U.S. Dist. LEXIS 72918 (D. Kan. Mar. 25, 2011).

130. TJAC Waterloo, LLC ex. rel. Univ. of Notre Dame (USA) in England, 2016 WL 1700001 (N.D. Ind. Apr. 27, 2016).

131. *In re* Grupo Unidos Por El Canal, 2015 WL 1810135 (D. Colo. Apr. 17, 2015).

132. *In re* FinserveGrp., 2011 U.S. Dist. LEXIS 121521 (D.S.C. Oct. 20, 2011); *In re* Servotronics, Inc., 2018 WL 5810109 (D.S.C. Nov. 6, 2018), *appeal docketed*, No. 18-2454 (4th Cir. Dec. 7, 2018).

133. La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp., 617 F. Supp. 2d 481 (S.D. Tex. 2008), *aff'd in* El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 341 Fed. App'x 31 (5th Cir. 2009).

134. *In re* Gov't of the Lao People's Democratic Republic, 2016 WL 1389764 (D. N. Mar. I. Apr. 7 2016).

135. *Compare In re* Arbitration, 626 F. Supp. 2d 882 (N.D. Ill. 2009), *with Kleimar*, *N.V. v. Benxi Iron & Steel Am.*, 2017 WL 3386115 (N.D. Ill. Aug. 7, 2017).

136. *Compare In re* Winning (HK) Shipping Co., Ltd., 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010), *with In re* Operadora DB Mexico, S.A. DE C.V., 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009).

137. *See supra* Part V.C.

138. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 258–59 (2004).

139. *See supra* Part V.B.

140. *In re* Application of Grupo Unidos Por El Canal S.A., 2015 WL 1815251, at *8 (N.D. Cal. Apr. 21, 2015).

enter into international arbitration agreements, available means remain to enable §1782 applications to be useful to foreign litigants rather than futile, while staying in tune the "twin aims" of the statute.