THE IBERIAN CHAPTER MEETS WITH THE SCOTUS

July, 21 2022 | 16:00 - 17:30:00 CET (Madrid)

THEME: The future of US Discovery in Support of International Arbitration

INDEX:

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WELCOME

This new event will address the SCOTUS decision that, finally[1] answers the controversy over the availability of US discovery to international arbitration. Section 1782 of Title 28 of the United States Code is a federal statute that allows a U.S. district court to order a person who "resides or is found" in its jurisdiction to provide document discovery or deposition "…for use in a proceeding in a foreign or international tribunal,…".

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[1] Well, you should weigh 'finally' word sense as 'never' in politics: a very long-lasting time for human concerns.
— Some people have considered the sentence a new chance for widening discussions based on its reading from a home perspective: has the SCOTUS drawn its decision with only the arbitral US national system in mind? They have a controversial issue here: chances for discovery when local arbitration procedures ask for a US judicial system helping hand are not as friendly (they said) as in the international scope. That would be tagged as a local or inner dimension trouble.
— Others (for instance, non-US practitioners) have claimed and pointed to difficulties in international arbitration procedures to promote collaboration in private commercial arbitral matters (the case of AZ Automotive) if this approach got finally successful in other jurisdictions. But also -specifically in this case- when applying to investment conflicts in which American parties or pieces of evidence located in the US were engaged (the case of Alixpartners v. the Fund). Let's say the challenging international dimension of the US Supreme Court opinion, and a reasonable source for worrying abroad the US.

It is a powerful tool that allows foreign litigants to use American-style discovery to obtain evidence that in many instances is unavailable to litigants in the foreign forum. The use of this section has grown exponentially over the years.

Until now, the Supreme Court has never decided whether §1782 authorizes discovery for use in private arbitrations. In *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004)*, the Court considered whether §1782(a) authorized discovery in connection with a proceeding pending before the European Commission, which held to be a foreign tribunal. It held so, to the extent the Commission "acts as a first-instance decisionmaker." Id.at 243. Since Intel US federal circuits split over the scope and reach of the section with the U.S. Court of Appeals for the Second, Fifth, and Seventh Circuits limiting Section 1782's application to proceedings only before governmental or quasi-governmental bodies, versus the Sixth and Fourth Circuits permitting the statute to extend to private commercial arbitral tribunals.

Why is this important?

The U.S. Supreme Court has just ruled on this question in two consolidated cases:

- *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401 (private arbitration), and
- *AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States*, No. 21-518 (investor-state arbitration).

ruling that 28 U.S.C. § 1782 does not encompasses private commercial arbitral tribunals or investor-state arbitration tribunals. The Supreme Court´s decision will have important consequences for international arbitration. Was the Supreme Court putting upside down a long lasting understanding on the collaboration between the Courts and Arbitral Tribunals with this last opinion?

In this edition, we will discuss the background of the controversy, and the possible implications of the ruling on international arbitration. Certainly, the two cases subject to US Supreme Court consideration have different derivative consequences. Both sorts of the two above former concerns (private commercial issues, the investor-state grounds) have not a simple and unique valid perspective; on the contrary, with double-side arguments in favour and against, involving either geostrategy perspectives or a pretty binary approaching to these themes. And that is another hazard within to deal with when doing projections for the future of the ADR ecosystem in its international dimension. Living in a Global world makes you take unexpected risks we would tackle during the talk with *Mr Nahmias*.

Some tips for this meeting

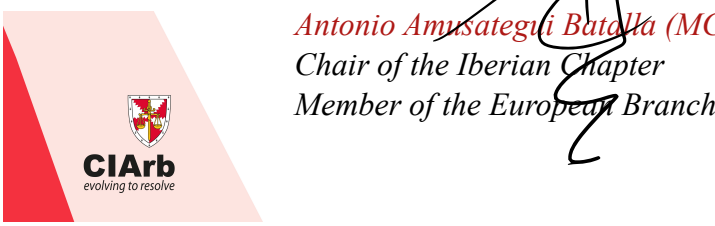
Peter Nahmias (FCIArb), a member of our Chapter´s steering committee is going to lead this session and provide us with the benefit of his unique perspective as both a US attorney and Spanish abogado (admitted to the bars of NY, NJ and Madrid).

Accompanying these introductory remarks, we also include a draft article written by this edition lead speaker entitled "*The US Supreme Court settles the debate over the reach of Section 1782*"; and, as in previous editions, we also include a short list of relevant background materials in the *Documentae* section that attendees may find helpful in formulating their questions and comments.

It is undoubtedly a matter of several concernings this opinion from the SCOTUS for the International Arbitration industry and many of its practitioners. A matter of concern which deserves to be attended to; this event is the part for the debate arises from the Iberian Chapter within the European Branch of CIArb.

There is a big Q to make here, having in mind my lines where the first footnote above: has the SCOTUS clarified the matter for good (the national dimension in the nature of the discovery and the coordination of the federal and estate judicial system and Courts)?, or has it got into an unexpected hive (the international dimension)?

With my best wishes and expectations of being *Mr Nahmias*' explanations and thoughts a source for inspiration, knowledge and learning for either our CIArb peers in the Iberian Chapter and the European Branch, the rest of our colleague's members of CIArb worldwide, and all the attendees interested in the topics we will tackle in this new edition of our 'Meets With' Talk, here.



Antonio Amusategui Batalla (MCIArb)
Chair of the Iberian Chapter
Member of the European Branch Committee of CIArb

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THE US SUPREME COURT SETTLES THE DEBATE OVER THE REACH OF SECTION 1782

by *FCIArb Peter Nahmias Reiss*[2]

The Landmark decision of the US Supreme Court in ZF Automotive US, Inc. v. Luxshare, Ltd: The US Supreme Court rules on the accessibility of US discovery in support of international arbitration.

Section 1782 of Title 28 of the United States Code is a powerful tool that allows foreign litigants to use American-style discovery to obtain evidence that in many instances is unavailable to them in their home forum. Indeed, Section 1782 allows a U.S. district court to order a person who "resides or is found" in its jurisdiction to provide document discovery or deposition "for use in a proceeding in a foreign or international tribunal."

There had been a circuit split on the scope and reach of the section with the U.S. Court of Appeals for the Second, Fifth, and Seventh Circuits limiting Section 1782's application to proceedings only before governmental or quasi-governmental bodies, versus the Sixth and Fourth Circuits permitting the statute to extend to private commercial arbitral tribunals. This was due in part to the Supreme Court´s having left the issue open in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004) (hereinafter "Intel") , where the Court considered that §1782(a) authorized discovery in connection with a proceeding pending before the European Commission, which it held to be a foreign tribunal.

The U.S. Supreme Court has just ruled on this question in two consolidated cases:

- ZF Automotive US, Inc. v. Luxshare, Ltd., No. 21-401 (private arbitration), and
- AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States, No. 21- 518 (investor-state arbitration)[3].

At issue was whether 28 U.S.C. § 1782(a), encompasses private commercial arbitral tribunals and investor-state arbitration or is the section limited only to proceedings before governmental bodies?

The Court has just ruled that only a governmental or intergovernmental adjudicative body

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[2] Peter Nahmias Reiss is a Fellow of the Chartered Institute of Arbitrators, and a member of the Steering Committee of the Iberian Chapter of Ciarb. He is both a US attorney-at-law and Spanish abogado (admitted to the bars of New York, New Jersey and Madrid, Spain). He is in private practice based in Madrid where he focuses on international commercial dispute resolution.

[3] ZF AUTOMOTIVE US, INC., ET AL. *v.* LUXSHARE, LTD. CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT , United States Supreme Court 596 U. S. ____ (2022) Slip Op. No. 21–401. Argued March 23, 2022—Decided June 13, 2022.

constitutes a “foreign or international tribunal” under §1782. “Such bodies are those that exercise governmental authority conferred by one nation or multiple nations. Neither the private commercial arbitral panel in the first case nor the ad hoc arbitration panel in the second case qualifies”. Justice Barrett, writing for the Court, 596 U. S. ____ (2022) Slip OP at 17

From a non-US perspective, the section may seem odd insofar as it allows federal court compelled disclosure of evidence (both documents and witness testimony) prior to the commencement of litigation and at the instance of an “interested person. Under section 1782 “foreign parties” may make an application directly to the federal court (sitting in the jurisdiction where the object of the application. resides) without having made the request through their local foreign court. Indeed some courts have granted § 1782 petitions where documents may be held outside the United States so long as the documents are in the possession, custody or control of a person that falls within the jurisdiction of the court.

Unsurprisingly, the use of Section 1782 by non-US litigants has become increasingly popular. And due to the flexibility of §1782, some might say, it is easier for foreign attorneys and interested parties to request data within the U.S. under §1782 than it is for U.S. lawyers to request discovery in other countries.

On June 13, 2022 the U.S. Supreme Court decided the consolidated cases of ZF Auto. US v. Luxshare, Ltd. and AlixPartners v. The Fund for Prot. of Inv. Rights in Foreign States. The facts of the two cases were briefly as follows:

- AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States, arises from a dispute between two foreign parties — the Fund for Protection of Investors Rights in Foreign States ("Fund"), a Russian investment entity, and the Republic of Lithuania — which were engaged in international ad hoc arbitration pursuant to a treaty between Russia and Lithuania. The fund initiated arbitration in 2019 after Lithuania nationalized the AB Bankas Snoras. To assist in the merits phase of arbitration, the Fund filed for an application under §1782 for discovery from a New York-based consulting firm, AlixPartners, who in turn challenged the Second Circuit´s grant of discovery to the for use in the investor state arbitration with Lithuania. AlixPartners and its CEO Simon Freakley, appealed the decision after the court granted discovery of AlixPartners’ internal documents to The Fund.

- ZF Automotive US Inc. (ZF) v. Luxshare, Ltd. involves a challenge brought by a Michigan-based automotive parts manufacturer, ZF, seeking reversal of an order from the Eastern District of Michigan granting discovery to Luxshare Ltd., a Hong Kong-based electronics manufacturer, for use in a private commercial arbitration in Germany between ZF Friedrichshafen AG, a German corporation, and Luxshare, a Hong Kong limited liability company. Luxshare filed an ex parte application in federal district court in Michigan for §1782 discovery from a U.S. subsidiary of ZF Friedrichshafen AG. The application was originally granted and eventually appealed to the 6th Circuit. In response, ZF Automotive, sought a determination as to whether §1782 applies to private

parties conducting international commercial arbitration.

The Decision

The Court, in a unanimous decision, penned by Justice Barrett focused almost exclusively on the definitions of the terms "international" and "foreign" in relation to the term "tribunals" relying primarily on gramatical and dictionary definitions. It found that being a "foreign tribunal" or "international tribunal" requires that the tribunal be imbued with some form of governmental power.

The Court ignored the judicial safeguards on international arbitration, the international enforceability of arbitral awards through the York Convention as well as all the safeguards built into International arbitration (e.g. UNCITRAL Rules and Model Law, international arbitral institutional rules, etc) to ensure that disputes are resolved fairly without compromising due process and fundamental fairness.

The Decision did not explain why it deviated from the Intel reasoning namely that international arbitral panels are final adjudicators, whose rulings are subject to judicial review. And that Courts may exercise their discretion to tailor discovery requests to avoid abuse so as not to undermine the process. Interestingly, the Court did not overrule Intel (as it's support for international arbitration was obiter dicta).

In the context of investor state arbitration the Court did not consider the surrender of sovereignty inherent in the signing and ratification of an international bilateral investment treaty. The Court stated that unless a BIT panel is expressly embued with some form of governmental power it is not a foreign tribunal under §1782.

It's not clear what international or foreign tribunals would qualify. Nor for that matter would one want to see the apparition of standing government-controlled investor-state arbitration tribunals, with government appointed arbitrators. The EU´s hostility towards investor state arbitration and resulting proposal for a multilateral investment court comes to mind. Perhaps just as ominous is the prospect of having to bring a BIT claim before such a tribunal in an autocratic non-democratic regime.

Perhaps the best hint at the underlying reason for the decision was the argument at the hearing that the present ambiguity is for Congress to remedy, not for the Court to impart a broad interpretation.

Implications of the Ruling

The Supreme Court has now held that private international arbitrations and investor state arbitration are not covered by §1782. This severely curtails what had once been a very powerful tool for obtaining discovery across the United States. There are several broad implications for arbitration practitioners.

The way forward

The Supreme Curt´s ruling does not necessarily mean that parties to international arbitration may no longer pursue discovery in the US. Indeed §1782 will continue to allow "interested parties" to request judicial assistance to obtain discovery where legal proceedings are reasonably contemplated in a foreign jurisdiction. In order to show "reasonable contemplation", applicants must show some 'objective indicia' of their intent to commence proceedings (ie hiring legal counsel, demand letters, etc.)[4]. In Intel, the Supreme Court held that a proceeding may be within 'reasonable contemplation' and rejected the requirement that the proceedings be 'imminent'. The Intel court clarified that the evidence requested need only be 'eventually . . . used in such a proceeding'.

As such §1782 does not require that the petitioner be a party or that proceedings be currently under way[5]. Indeed, Courts have applied a deminimis standard on applicants requiring merely a showing of a good faith intention to use the evidence to assert claims or defenses in a foreign proceeding[6]. Courts have applied a "some relevance' standard which requires applicants to show only that the information has "some relevance" as a general matter to the foreign proceedings[7]. Further, the "use in" language in the section does not require applicants to show that the evidence sought is admissible or even discoverable in the foreign proceeding[8].

It is noteworthy that the Supreme Court did not mention the "dual process" line of cases which held that as long as there is a contemplated parallel non-US proceeding in the foreign jurisdiction, parties might still be able to make §1782 applications for US discovery as long as they apply the Intel factors in their application. Cases along the lines of In re del Valle Ruiz[9] come to mind. (The case involved discovery against the US affiliate of the Banco Santander under §1782 for use in several concurrent international proceedings, namely the EU Court of Justice, an investment arbitration tribunal under the Mexico-Spain bilateral investment treaty, and a Spanish criminal proceeding). Indeed, where a district

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[4] See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., 747 F.3d 1262, 1270 (11th Cir. 2014) (finding that a detailed explanation of its prospective claim as well as a declaration of its intent to file a civil action to be sufficient to bring a claim within the realm of reasonable contemplation).

[5] Section 1782 applications have even been granted in support of post adjudicative enforcement proceedings (and in proceedings naming an administrator of an estate).In re Clerici, 481 F.3d 1324 (11th Cir. 2007); In re Esses, 101 F.3d 873 (2d Cir. 1996).

[6] In re Veiga, 746 F. Supp. 2d 8 (D.D.C. 2010), In re Application of Republic of Ecuador, 2010 WL 4027740 (E.D. Cal. Oct. 14, 2010),

[7] Fleischmann v. McDonald's Corp., 466 F. Supp. 2d 1020, 1029 (E.D. Ill. 2006).

[8] In re Veiga, 746 F. Supp. 2d 8, 17-18 (D.D.C. 2010), Brandi-Dohrn v. IKB Deutsche Industriebank AG, 673 F.3d 76, 77 (2d Cir. 2012), Euromepa S.A. v. R. Esmerian, Inc., 51 F.3d 1095,1099 (2d Cir. 1995).

[9] 939 F.3d 520 (2d Cir. 2019).

court is to consider an application under §1782, it may very well be able to proceed in the same manner as the second circuit did in that case, as long as the application seeks discovery related to concurrent international proceedings that qualify as a "foreign or international tribunals".

So in the context of international arbitration, one could reasonably interpret that while SCOTUS has ruled that interested parties in such proceedings may not use the section to pursue discovery for those proceedings, they are by no means barred from using the section to pursue US discovery for related proceedings before bodies imbued with governmental power that are either running in parallel or that are reasonably contemplated by interested parties. Going forward, parties to international arbitral proceedings, may indeed consider employing these concurrent or anticipated parallel proceedings, to form the basis of their section 1782 applications. Far from closing access to the section, SCOTUS has only invited more complexity to international dispute resolution.

Some issues spring from the Supreme Court decisions:

- *Level Playing field?* By not allowing §1782 to apply in international arbitration, some would argue that US parties to international arbitration are presumably now on the same footing as foreign parties. This oversimplifies the reality of international arbitration where parties and their affiliates are located around the world. Many non-US multinationals have US affiliates and subsidiaries. Consider the very case the Supreme Court ruled on, which involved a US affiliate of a non US company engaged in non-US arbitration. Consider, as well the In re del Valle Ruiz case, mentioned previously, where §1782 discovery was ordered against the US affiliate of a Spanish company. Indeed the Second Circuit seemed to suggest that §1782 could have reached the Spanish company itself had the facts of the case been different. Clearly the Supreme Court´s decision cuts both ways, as all parties to foreign arbitrations will be incumbered in their use of § 1782 discovery and may now find, in many instances, critical evidence inaccessible to them.

- *Consistency with FAA?* By disallowing access to § 1782, international arbitration is not necessarily on the same footing as domestic US arbitration in relation to the scope of available discovery. As mentioned earlier, parties are rarely entirely "foreign" or US based. Furthermore, the power of arbitrators under US law is far from uniform and is also far from being entirely clear. And non-US jurisdictions are not quite as unfriendly to discovery as some claim. In the UK for example, it was recently held that parties to a foreign seated arbitration may use section 44 of the Arbitration Act 1996 to obtain an order from the English courts for the taking of evidence of witnesses in support of that foreign arbitration[10].

- *Confidentiality?* Some have argued that barring access to §1782 serves the interest of maintaining privacy and confidentiality, insofar as applications for §1782 discovery often contain extensive disclosure and background in support of the filing, which in

[10] In *A v C* [2020] 1 WLR 3504.

many cases is publicly available information. While this is a fair point, the ruling only bars direct access to §1782. It does not ban discovery by foreign parties for use before qualifying foreign and international tribunals. It is fair to assume that the same confidentiality concerns will continue to hound those applications as well.

- *Less Access to evidence/less cost?* Some have argued that limiting the scope of §1782 discovery, may benefit parties by limiting the cost of international proceedings. It may very well have the opposite effect, as parties are forced to bring dual proceedings before qualifying international and foreign tribunals, to obtain needed discovery. It should also be noted that there remain other means of obtaining evidence in the US. Freedom of information requests, for example, remain available to obtain documents held by public authorities. Similarly, personal data held in jurisdictions with data protection laws (along the lines the EU´s GDPR) such as California, may also be accessed through data subject access requests. Another, perhaps more aggressive manner of obtaining evidence, might involve filing a parallel criminal complaint and joining the proceeding as a private prosecutor.

- *Arbitration provisions.* Parties may now need to consider redrafting the text of arbitration provisions in their agreements to adapt to this new state of play. Indeed, Arbitral organizations may also need to consider making changes to their rules and procedures on the production of evidence.

Conclusion

The decision is a blow to the prestige of international arbitration. One cannot help but cringe when one reads how the US Supreme Court likened international arbitration to a "university's student disciplinary tribunal". Indeed, it is quite concerning that the Court demonstrated such hostility towards international arbitration. Would it indeed be happy to grant access to §1782 discovery to a (possibly) autocratic state-controlled investment tribunal as opposed to an impartial ICSID panel, as long as it is imbued with state power?

On the other hand, the Court, has neither overturned Intel nor banned US discovery to foreign litigants. Perhaps the decision merely curtails to some degree, the use of the section, forcing parties to go through parallel proceedings to obtain US discovery. Time will tell whether this actually works to improve the process.

Peter Nahmias Reiss (FCIArb)

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DOCUMENTAE

The SCOTUS opinion in the 'ZF Automotive', and the 'Alixpartners' cases

Description: These consolidated cases involve arbitration proceedings abroad for which a party sought discovery in the United States pursuant to 28 U.S.C. §1782(a)-a provision authorizing a district court to order the production of evidence "for use in a proceeding in a foreign or international tribunal."

- *In the first case, Luxshare, Ltd., a Hong Kong-based company, alleges fraud in a sales transaction with ZF Automotive US, Inc., a Michigan-based automotive parts manufacturer and subsidiary of a German corporation.*
  - *The SCOTUS Blogpost*
- *The second case involves AB bankas SNORAS (Snoras), a failed Lithuanian bank declared insolvent and nationalized by Lithuanian authorities. The Fund for Protection of Investors' Rights in Foreign States-a Russian corporation assigned the rights of a Russian investor in Snoras-initiated a proceeding against Lithuania under a bilateral investment treaty between Lithuania and Russia ...*
  - *The SCOTUS Blogpost*

*(**Court:** Supreme Court of the United States*
***Date** published: Jun 13, 2022)*
Read the opinion here or here

The 'in re: Antonio del Valle Ruiz and others'

Description: Banco Santander S.A. ("Santander") acquired Banco Popular Español, S.A. ("BPE") after a government-forced sale. Petitioners, a group of Mexican nationals and two investment and asset-management firms, initiated or sought to intervene in various foreign proceedings contesting the legality of the acquisition.
*(**Court**:United States Court of Appeals For the Second Circuit)*
*(**Date** published: Oct 7, 2019)*
Read here the decision

The Intel Case (Intel Corporation vs. Advanced Micro Devices, Inc.)

Description: The Intel case originated from Advanced Micro Devices's antitrust claims against Intel in Europe. AMD filed a complaint against Intel in the European Union's antitrust enforcement agency (the Directorate-General for Competition), and

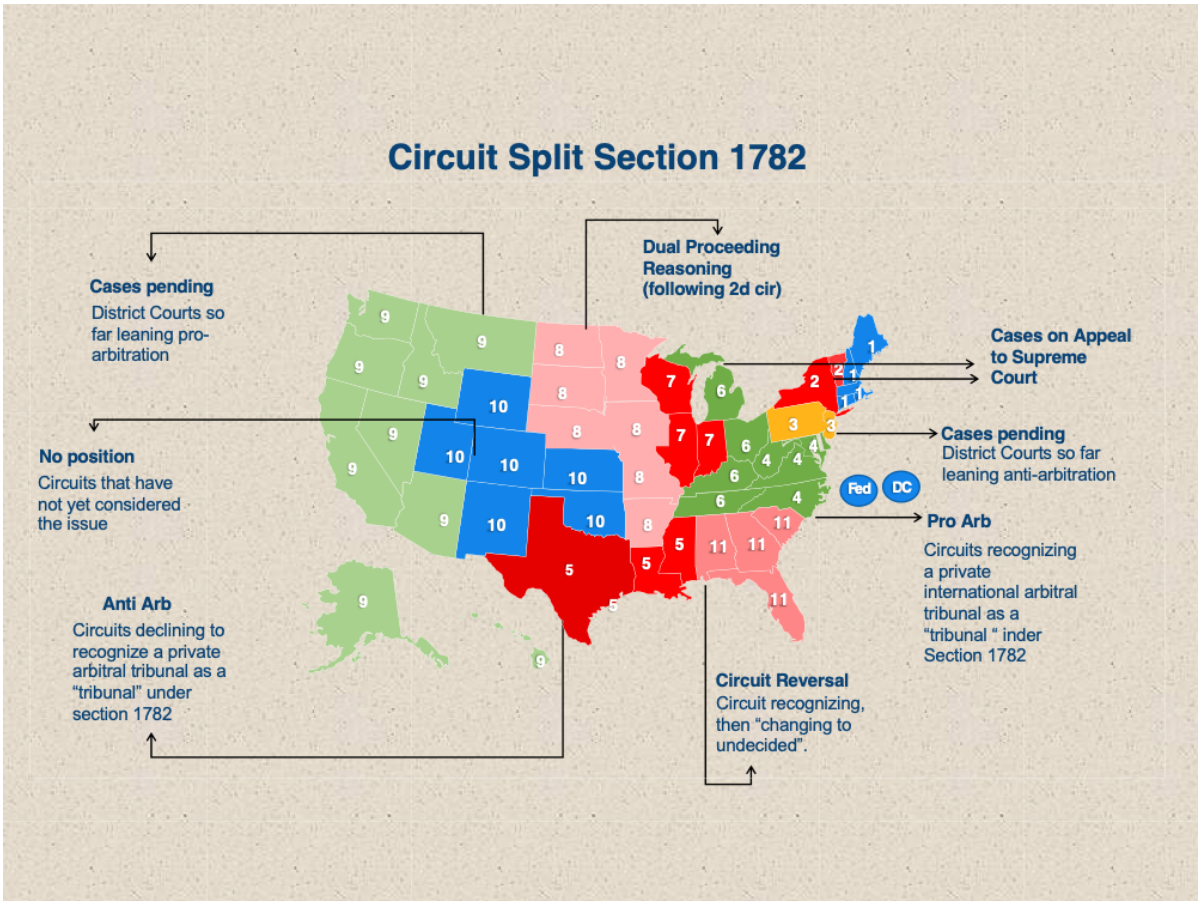
then filed a lawsuit in the U.S. for discovery of certain Intel documents in order to further their complaint.
*(**Court:** Supreme Court of the United States*
***Date** published: Jun 21, 2004)*
Read here the opinion

The Norm under scrutiny: 28 U.S.C. § 1782

Current through P.L. 117-148 (published on www.congress.gov on 06/16/2022)
Read here the full text and some historical an revision notes

The US Circuit Split

The explanation in a graph: this graphic has been provided by Peter Nahmias©.



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