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Is an Arbitrator a "Tribunal" Under Section 1782? – The FAA Red Herring

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The United States Supreme Court is on the verge of deciding whether a "private," non-US arbitrator (or arbitral panel) may qualify as a “tribunal” within the meaning of the statute entitled "Assistance to foreign and international tribunals and to litigants before such

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His other works on Section 1782 discovery include: (a) the chapter "Discovery In Aid of Foreign Proceedings: 28 U.S.C. § 1782" (hereinafter, the "Sherby Chapter") in *INTERNATIONAL ASPECTS OF U.S. LITIGATION* (ABA 2017); (b) "*Forum Non Conveniens Dismissal: The Quieter Side of Section 1782 Discovery*," 24 INT'L LITIG. Q. 1 (ABA 2008); and (c) "*Is An Arbitrator A 'Tribunal' Under Section 1782? – The Second Circuit's House of Cards*," INT'L DISP. RESOL. NEWS (ABA, Aug. 27, 2021).

tribunals," 28 U.S.C. § 1782 ("Section 1782").[1] On December 10, 2021, the Court granted certiorari in two Section 1782 cases – *ZF Automotive US, Inc. v. Luxshare, Ltd.* ("*ZF Automotive*"),[2] and *AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States* ("*AlixPartners*").[3]

Oral argument in these consolidated cases took place before the Supreme Court on March 23, 2022.[4]

To date the only decision issued by the Supreme Court interpreting Section 1782 was in 2004, in *Intel Corp. v Advanced Micro Devices, Inc*. ("*Intel*").[5] But *Intel* did not directly address whether the term "tribunal" in Section 1782 includes a private, non-US arbitrator.[6]

It is expected that, in the consolidated appeals of *ZF Automotive* and *AlixPartners*, the Supreme Court will soon resolve the issue.[7]

This article does *not* address every argument put forth by those courts that have held that section 1782 does not apply to "private" arbitrations. Rather, this article focuses on *one* argument that has been put forward by three appellate courts[8] that have held that a private, non-U.S. arbitrator should not be considered a "tribunal" within the meaning of Section 1782 – namely, the contention that allowing Section 1782 discovery in connection with a foreign or international private arbitration would stand in "stark contrast" to the limited

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[1] 28 U.S.C. § 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," provides (in relevant part):

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. . . .

[2] 142 S. Ct. 637 (U.S. No. 21-401 (2021)).

[3] 142 S. Ct. 638 (U.S. No. 21-518 (2021)).

Prior to the filing of the certiorari petitions in *ZF Automotive* and *AlixPartners*, the issue of the applicability of Section 1782 to non-U.S. arbitrations had (for several months) been pending before the Supreme Court. *See Servotronics, Inc. v. Rolls-Royce et al*, 141 S. Ct. 1684 (Mar. 22, 2021, U.S. No. 20-794), *appeal dismissed per stipulation*, *see* https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/20-794.html (Sept. 29, 2021; last visited Mar. 28, 2022).

[4] Transcript of Oral Argument at 58-59, 61-62, 92-93, *ZF Automotive* and *AlixPartners* (U.S. No. 21-401, U.S. No. 21-518; consolidated).

[5] 542 U.S. 241 (2004).

[6] *See* Sherby Chapter, *supra*, n.* 590-98 (summarizing various decisions holding that the analysis in *Intel* supports the conclusion that a private, non-U.S. arbitrator *is* a "tribunal" within the meaning of Section 1782).

[7] Two Circuits Courts of Appeal have held that a private, non-U.S. arbitrator *may* be considered a "tribunal" within the meaning of Section 1782. *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 216 (4th Cir. 2020; involving the same non-U.S. arbitration as in U.S. No. 20-794); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710, 729-31 (6th Cir. 2019, hereinafter "*Abdul Latif*"). Those circuit court decisions conflict with *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999, hereinafter "*NBC*"), *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (1999, hereinafter "*Biedermann*"), and *Servotronics, Inc. v. Rolls-Royce*, 975 F.3d 689 (7th Cir. 2020, hereinafter "*Servotronics*"). The Seventh Circuit decision in *Servotronics* was the subject of the above referenced appeal to the U.S. Supreme Court in U.S. No. 20-794.

[8] *See infra* notes 27-36 and accompanying text.

evidence-gathering procedures for domestic arbitrations under the Federal Arbitration Act (the "FAA").[9] This position is referred to below as the "FAA Inconsistency Objection."

As explained below, the FAA Inconsistency Objection is belied by (a) *Intel*'s admonition against engaging in "comparative analyses" to determine whether the non-U.S. proceeding is analogous to American proceedings; and (b) public policy considerations that were articulated in at least two Supreme Court cases[10] on international arbitration – considerations that were central to the 1964 amendments to Section 1782.

Part I of this article discusses the purposes of the 1964 amendments to Section 1782. Part II describes the case law that has articulated the FAA Inconsistency Objection. Part III describes the flaws in the FAA Inconsistency Objection – with an emphasis on the failure of that position to recognize the common policy objectives underlying both Section 1782 and the enforcement of arbitration clauses in international commerce.

Part I: The Policy(ies) Underlying Section 1782 – Growth of International Commerce:

Although the first occasion for the US Supreme Court to address Section 1782 arose only in 2004, many years earlier, the statute was the subject of several appellate court decisions – including several from the Second Circuit, which was also the first appellate court (in 1999) to articulate the FAA Inconsistency Policy.

In 1992, in *In re Malev Hungarian Airlines*,[11] the Second Circuit observed that the congressional intent in amending Section 1782 in 1964 was to "to liberalize the assistance provided by American courts to foreign and international tribunals."[12] In reviewing the purposes of the 1964 amendments to the statute, the *Malev* court cited to a 1965 law review article authored by Professor Hans Smit,[13] who served as the Reporter of the Commission on International Rules of Judicial Procedure.[14]

In his 1965 article, Professor Smit addressed the growth in post-World War II international commerce – specifically he cited to the increases in each of (a) international travel, (b) imports and exports, (c) U.S. assets and investments abroad, and (d) foreign assets and investments in the U.S.[15] Professor Smit proceeded to state that the previously "unmatched intensification of international" commerce led Congress to create a commission to study the rules of procedure regarding international judicial assistance.[16] It was that commission that recommended the "liberalizing" amendments to Section 1782, which were enacted in 1964.[17]

In 1999, in *NBC*, the Second Circuit again addressed the purposes of the 1964 amendments to the statute. The *NBC* decision was the same case in which the court

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[9] 9 U.S.C. §7.

[10] The two cases discussed below are *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974, hereinafter "*Scherk*"), and *Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985, hereinafter "*Mitsubishi*").

[11] 964 F.2d 97 (2d Cir. 1992).

[12] *Id*. at 101.

[13] *Id*. at 99-100 (*citing* Hans Smit, International Litigation under the United States Code, 65 COLUM. L. REV. 1015 (1965, hereinafter the "1965 Smit Article")).

[14] *Malev*, *supra*, 964 F.2d at 100.

[15] 1965 Smit Article, *supra*, 65 COLUM. L. REV. at 1015, n.1.

[16] *Id*. at 1015.

[17] *Malev*, *supra*, 964 F.2d at 99-100.

articulated the FAA Inconsistency Objection. In *NBC* the Second Circuit acknowledged that the 1964 amendments to Section 1782 were intended to "broaden the scope" of the statute.[18]

That observation was echoed, in that same year, by the Fifth Circuit in *Biederman*.[19] In *Biederman*, the court observed that "[t]he decision to substitute the term 'tribunal' for 'court' was deliberate, evidencing Congress's intention to expand the discovery provision beyond 'conventional courts' to include 'foreign administrative and quasi-judicial agenc[ies]."[20]

In summary, years before the U.S. Supreme Court addressed Section 1782 (in *Intel*), appellate courts recognized that the purpose of the 1964 amendments was to liberalize the authorization set forth in statute.

In *Intel* (2004), the Supreme Court echoed the observation that the use of the term "tribunal" in Section 1782 was intended to ensure that judicial assistance is not confined to proceedings before conventional courts."[21] The Court further observed:

> In 1958, *prompted by the growth of international commerce*, Congress created a Commission on International Rules of Judicial Procedure (Rules Commission) to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." . . . . Six years later, in 1964, Congress unanimously adopted legislation recommended by the Rules Commission; the legislation included a complete revision of § 1782.[22]

In reaching the conclusion that the 1964 amendments to Section 1782 came about due to the growth of international commerce, the Court cited to the 1965 Smit Article.[23] As noted above, in that 1965 article, Professor Smit cited to the post-World War II increases in each of (a) international travel, (b) imports and exports, (c) U.S. assets and investments abroad, and (d) foreign assets and investments in the U.S.[24]

In summary, the Supreme Court and appellate courts have recognized that the liberalization of Section 1782 – which primarily involved the broadening of assistance beyond that of conventional courts – was largely the result of the growth of international commerce.

Part II: The Cases that Have Adopted
The FAA Inconsistency Objection:

Section 1782 clearly authorizes the issuance of a discovery order either at the request of a non-US tribunal *or* at the request of an "interested" person. Accordingly, it is well settled that, under Section 1782, a federal district court may grant an order for producing evidence *regardless* of whether the non-U.S. tribunal has expressed the view that it favors the application or is indifferent to it.[25]

No comparable authority exists with respect to seeking court-ordered discovery in connection with domestic (purely American) arbitrations. Rather, section 7 of the FAA

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[18] *NBC*, *supra*, 165 F.3d at 190.

[19] *Biedermann*, *supra*, 168 F.3d 880.

[20] *Id*. at 881-82.

[21] *Intel*, *supra*, 542 U.S. at 249.

[22] *Id*. at 248 (emphasis added; citations and footnote omitted).

[23] *Id*.

[24] 1965 Smit Article, *supra*, 65 COLUM. L. REV. 1015, 1015.

[25] It is also well settled that any expressed opposition by the non-U.S. tribunal to the Section 1782 application may serve as a grounds for its denial. *See* Sherby Chapter, *supra*, 582-86 (summarizing the post-*Intel* cases that have discussed "foreign receptivity"). These cases demonstrate that the law is less than clear regarding the burden of proof upon the applicant as to "foreign receptivity" – the burden of proof has not been held to be particularly onerous. *Id*. at 583-84.

confers upon the *arbitrator* – not the litigants (participants) in the arbitration – the authorization to petition for court intervention to order the production of evidence by non-parties.[26]

While it is clear that, in the domestic U.S. context, a party to an arbitration does not have the right to seek (federal) court-ordered discovery without the blessing of the arbitrator(s), if the term "tribunal" in Section 1782 were to be interpreted as including a non-U.S. (private) arbitrator, then a participant in a *non*-U.S. arbitration would have the right to seek court-ordered discovery even *without* the blessing of the arbitrator(s).

As described below, at least three appellate courts have observed that the difference described in the preceding paragraph is *a* grounds for holding that Congress did not intend to include a private, non-U.S. arbitrator within the definition of a "tribunal" under Section 1782. Those courts have held that, because a party to a *domestic* arbitration is required to seek the approval of the arbitrator(s) before a federal court may become involved in ordering the taking of evidence from a non-party, it is unlikely that, in enacting the 1964 amendments to Section 1782, Congress intended to confer upon a party to a *non*-U.S. arbitration the ability to seek federal court assistance without involving the foreign arbitrator(s).

This view was first articulated in 1999, in *NBC*,[27] in which the Second Circuit observed that "[t]he methods for obtaining evidence under § 7 [of the FAA] are more limited than those under [Section] 1782."[28] The *NBC* court then concluded that affording "broad [1782] discovery" in connection with private, non-U.S. arbitrations "would stand in stark contrast to the limited evidence gathering . . . for proceedings before domestic arbitration panels."[29]

The *NBC* court held that a private, non-U.S. arbitrator is not a "tribunal" within the meaning of Section 1782.[30]

Shortly thereafter, in *Biedermann*,[31] the Fifth Circuit addressed the issue of whether a non-U.S. arbitrator may qualify as a tribunal under Section 1782. Citing to *NBC*, the Fifth Circuit answered that question in the negative.[32]

In 2020, in *Servotronics*,[33] the Seventh Circuit relied in large part on the Second Circuit's decision in NBC.[34] The Seventh Circuit articulated the FAA Inconsistency Objection as follows:

> The discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA. Most significantly, the FAA permits the arbitration panel— but not the parties—to summon witnesses . . . to testify and produce documents and to petition the district court to enforce the summons. 9 U.S.C. § 7. Section 1782(a), in contrast, permits both foreign tribunals *and litigants* (as well as other ‘‘interested persons’’) to obtain discovery orders from district courts. If § 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then *litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations*. It’s hard to conjure a rationale for giving parties to private foreign arbitrations

[26] 9 U.S.C. § 7.

[27] *NBC*, *supra*, 165 F.3d 184.

[28] *Id.* at 187.

[29] *Id*. at 187-91.

[30] *Id.* at 190-91.

[31] *Biedermann*, *supra*, 168 F.3d 880.

[32] *Id*. at 882-83.

[33] *Servotronics*, *supra*, 975 F.3d 689.

[34] *Id*. at 692-96.

> such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations.[35]

The *Servotronics* court held that Section 1782 does not apply to arbitration.[36]

Part III The Flaws of The FAA Inconsistency Objection:

As explained below, the FAA Inconsistency Objection ignores (a) the admonition in *Intel* against engaging in a "comparative analysis" and (b) the common policy considerations on which (i) the amendments to Section 1782 were made, *and* (ii) Supreme Court decisions enforcing foreign arbitration clauses have been based.

A. The FAA Inconsistency Objection And Intel's Admonition Against Comparative Analyses:

The courts that have adopted the FAA Inconsistency Objection have ignored the admonition in *Intel* to refrain from precisely the kind of comparison that is inherent in that position.

In *Intel*, the Supreme Court expressly *rejected* the argument that an applicant under Section 1782 must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. The Court held:

> Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.[37]

In *Abdul Latif*[38], in which the Sixth Circuit Court of Appeals held that a non-U.S. arbitrator may qualify as a "tribunal" under Section 1782, the court cited to the above quoted admonition from *Intel* not to engage in comparative analysis.[39] Relying on that statement from *Intel*, the Sixth Circuit rejected the argument that the FAA requires an interpretation of Section 1782 that excludes a private, non-U.S. arbitrator from the ambit of a "tribunal."[40] The Sixth Circuit essentially held that any possible "inconsistency" with the FAA should be disregarded in determining whether a non-U.S. proceeding is one before a foreign or international tribunal

Shortly after the Sixth Circuit rendered its decision in *Abdul Latif*, the Seventh Circuit Court of Appeals issued its decision in *Servotronics*, in which (as summarized above), the court adopted the FAA Inconsistency Objection.[41] In *Servotronics*, the Seventh Circuit referred to the Sixth Circuit's decision in *Abdul Latif*.[42] The Seventh Circuit rejected the Sixth Circuit's conclusion[43] but without addressing the observation made by the Sixth Circuit that *Intel* admonishes against engaging in a comparative analysis.

Similarly, in *Guo v. Deutsche Bank Securities*,[44] the Second Circuit had occasion to revisit its holding in *NBC* and (*inter alia*) the FAA Inconsistency Objection. In *Guo* the

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[35] *Id*. at 695 (emphasis added).

[36] *Id*. at 696.

[37] *Intel*, *supra*, 542 U.S. at 263.

[38] *Abdul Latif*, *supra*, 939 F.3d 710.

[39] *Id*. at 729.

[40] *Id*.

[41] *Servotronics*, *supra*, 975 F.3d at 695-96.

[42] *See id*. at 690, 693.

[43] *See id*.

[44] 965 F.3d 96 (2d Cir. 2020).

Second Circuit referred to the Sixth Circuit's decision in *Abdul Latif*[45] and its analysis – which the Second Circuit rejected.[46] Like the Seventh Circuit in *Servotronics*, the Second Circuit in *Guo* ignored the observation by the Sixth Circuit (in *Abdul Latif*) that *Intel* admonished *against* engaging in comparative analyses.

The FAA Inconsistency Objection is, in essence, a "comparative analysis" of (a) proceedings before a non-U.S. arbitrator, and (b) proceedings before a U.S. arbitrator.[47] The FAA Inconsistency Objection directly contradicts the Supreme Court's admonition in *Intel* to *refrain* from engaging in such an analysis.

B. The FAA Inconsistency Objection Ignores The Purposes of International Arbitration, As Recognized By The U.S. Supreme Court:

Even if the FAA Inconsistency Objection were not violative of the admonition in *Intel* against engaging in "comparative analysis" of proceedings, the FAA Inconsistency Objection ignores the function and purpose of international arbitration – as has been recognized in at least two Supreme Court decisions.

Specifically, the FAA Inconsistency Objection ignores the fact that parties to cross-border business transactions often chose international arbitration as a *jurisdictional compromise* in order (a) to avoid (in the words of the Supreme Court, in *Scherk*), the "dicey atmosphere" of a "legal no-man's land,"[48] and (b) to increase (in the words of the Supreme Court in *Mitsubishi*) "predictability in the resolution of disputes."[49]

As explained below, both in *Scherk* and in *Mitsubishi*, (a) an American plaintiff attempted to avoid enforcement of an international arbitration clause, on the grounds that enforcement would be contrary to domestic public policy, (b) the Supreme Court acknowledged that, in the purely domestic context, the party opposing enforcement of the arbitration clause would likely prevail (on public policy grounds), and (c) nonetheless, because of the international nature of the dispute, the Court ordered the enforcement of the arbitration clause.

In *Scher*k, the plaintiff argued that enforcement of the arbitration clause should be denied because the arbitration of securities law claims is contrary to public policy,[50] and in *Mitsubishi*, the plaintiff argued that enforcement of the arbitration clause should be denied because the arbitration of antitrust claims is contrary to public policy.[51]

The first of these two cases, *Scherk*, was decided a mere two years after the Supreme Court's landmark case on forum selection clauses, *The Bremen v. Zapata Off-Shore Co.*,[52] in which the Court observed:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have

[45] The *Guo* decision refers to the *Abdul Latif* case by the name *In re Application to Obtain Discovery for Use in Foreign Proceedings*. *See Guo*, *supra*, 965 F.3d at 104.

[46] *Id*. at 104-05.

[47] In *Biedermann* – which was decided years before *Intel* – the Fifth Circuit expressly stated that it was engaging in "a comparison with domestic United States arbitration procedure." *Biedermann*, *supra*, 168 F.3d at 882-83.

[48] *Scherk*, *supra*, 417 U.S. at 517.

[49] *Mitsubishi*, *supra*, 473 U.S. at 629, 631.

[50] *Scherk*, *supra*, 417 U.S. at 510, 513.

[51] *Mitsubishi*, *supra*, 473 U.S. at 620-21, 628-29.

[52] 407 U.S. 1 (1972).

> trade and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts.
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> [I]n the light of *present-day commercial realities and expanding international trade* we conclude that the forum clause should control absent a strong showing that it should be set aside. . . . The correct approach [is] to enforce the forum clause specifically unless [the American party] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.[53]

In *The Bremen*, the Court based its holding regarding the "solemnity" of forum selection clauses upon the desire for the "expansion of American business and industry" and the "present-day commercial realities and expanding international trade."[54] *The Bremen* was decided by the Supreme Court a mere *eight* years after the liberalizing amendments to Section 1782 were enacted. The observations in *The Bremen* regarding "the *present-day commercial realities and expanding international trade*" did not arise for the first time in 1972. Those phenomena were known to international business people and their lawyers long before 1972.

The themes articulated in *The Bremen* were echoed (to say the least) in the Court's decision in *Scherk*.

In *Scherk*, an American company had purchased business entities from a German citizen who resided in Switzerland.[55] Those entities were organized under the laws of Germany and Lichtenstein.[56] Negotiations took place in Europe and in the U.S.[57] The contract of sale was signed in Austria, and it included a clause calling for any controversy or claim to be referred to arbitration before the International Chamber of Commerce, in Paris.[58]

Eventually the American purchaser concluded that it was defrauded by the German seller, and the American company sued in federal court in Illinois for violations of the Securities Exchange Act of 1934.[59] The German defendant sought a stay, pending the arbitration in Paris.[60]

The American plaintiff both opposed that motion for a stay and sought an injunction against the arbitration.[61] The stated grounds for seeking the injunction was a 1953 decision of the Supreme Court, which held that an agreement to arbitrate could not preclude a buyer of a security from seeking judicial remedy under the Securities Act of 1933.[62]

The district court denied the motion to stay the litigation and granted the stay against the arbitration.[63] The Court of Appeals affirmed.[64]

On appeal the Supreme Court in *Scherk* held that the arbitration agreement should be enforced and that the litigation in the US should be stayed.[65]

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[53] *Id*. at 15 (emphasis added).

[54] *Id*. at 9, 15.

[55] *Scherk, supra*, 417 U.S. at 508.

[56] *Id*.

[57] *Id*.

[58] *Id*.

[59] *Id*. at 509.

[60] *Id*.

[61] *Id*. at 509-10.

[62] *Id*. at 510 (*citing Wilko v. Swan*, 346 U.S. 427 (1953, hereinafter, "*Wilko*").

[63] *Id*.

[64] *Id*.

[65] In *Scherk*, the Supreme Court observed that, in *Wilko*, the claims had been for violations of the Securities Act of 1933. Nonetheless, in *Scherk*, the Court assumed that the same policy concerns that

Of particular importance on the issue of the applicability of Section 1782 to arbitration is the manner in which the Court in *Scherk* described international arbitration as a ***substitute*** for litigation before national courts. The Court in *Scherk* observed that, when the parties signed their contract, there was "considerable uncertainty" concerning the law applicable to the resolution of disputes arising out of that contract.[66] The Court further observed:

> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[67]

The *Scherk* Court then stated that a failure to enforce an international arbitration agreement would "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."[68] The Court proceeded to explain the application of these principles to the facts before it:

> In the present case, for example, it is not inconceivable that if [the European defendant] had anticipated that [the American plaintiff] would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining [the American plaintiff] from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the *dicey atmosphere of such a legal no-man's-land* would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[69]

After explaining why both parties to an international agreement could often benefit from agreeing upon arbitration, the *Scherk* Court tied its holding to the rule set forth in *The Bremen*. The Court explained that, as was recognized in *The Bremen*, the "elimination of [the] uncertainties" regarding possible litigation in multiple forums is "an indispensable element in international trade."[70] The Court then connected the principles underlying *The Bremen* to the field of international commercial arbitration:

> An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.[71]

In making the observation that an arbitration agreement (before a "specified tribunal") is a *specialized* forum selection clause, the *Scherk* Court essentially stated that, from the perspective of *eliminating the uncertainties* of possible litigation in multiple forums, in the international context, there is *no difference* between an arbitration clause and a forum selection clause.

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controlled in *Wilko*, would -- in the domestic context -- apply to the claims under the Securities Exchange Act of 1934. *See Scherk*, *supra*, 417 U.S. at 513-15.

[66] *Id*. at 516.

[67] *Id*. at 516 (footnote omitted).

[68] *Id*. at 516-17.

[69] *Id*. at 517 (emphasis added; footnote omitted).

[70] *Id*. at 518.

[71] *Id*. at 519.

Just as in *The Bremen* the enforceability of a forum selection clause was mandated by the desire for the "expansion of American business and industry,"[72] in *Scherk* any concern regarding the enforceability of an arbitration agreement in the securities law context took a back seat to the public policy of *eliminating uncertainties* (for international business people) of possible litigation in multiple fora.

Eleven years later, in *Mitsubishi*, the Supreme Court addressed a very similar objection to the enforceability of an arbitration clause in an international agreement, and, as was the case in *Scherk*, the Court in *Mitsubishi* held that the international nature of the dispute mandated that the arbitration clause be enforced – even though a similar arbitration agreement involving a domestic case might be unenforceable.

In *Mitsubishi*, an American distributor sued a Japanese manufacturer, asserting (*inter alia*) claims under the Sherman Act.[73] The Court treated its decision in *Scherk* as controlling, observing:

> Even before *Scherk*, this Court had recognized the utility of forum-selection clauses in international transactions. [citing *The Bremen*]
>
> * * * *
>
> Recognizing that "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," . . . the decision in *The Bremen* clearly eschewed a provincial solicitude for the jurisdiction of domestic forums.
>
> Identical considerations governed the Court's decision in *Scherk*, which categorized "[a]n agreement to arbitrate before a specified tribunal [as], in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute."[74]

The Court in *Mitsubishi* summarized:

> As in *Scherk v. Alberto-Culver Co.* . . . , we conclude that concerns of international comity, *respect for the capacities of foreign and transnational tribunals*, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context*.[75]

The Court's decision in *Mitsubishi* to favor the enforceability of an international arbitration clause is – from a public policy perspective – even more remarkable than was the Court's ruling in *Scherk*. The claims in *Mitsubishi* involved violations of the federal antitrust laws, and the Court acknowledged that a "plaintiff asserting his rights under the [Sherman] Act has been likened to a private attorney-general who protects the public's interest."[76] Notwithstanding such "elevated" status, in *Mitsubishi* the Court held that it is sometimes necessary "for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."[77]

The Supreme Court's observations and reasoning both in *Scherk* and in *Mitsubishi* relate directly to the underpinnings of the FAA Inconsistency Objection. Implicit in the FAA Inconsistency Objection is the view that Congress would not knowingly create circumstances under which a party in a *non*-U.S. arbitration might receive different – arguably advantageous – treatment over a party in a purely domestic (American) arbitration.

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[72] *See supra* nn.52-54 and accompanying text.

[73] *Mitsubishi*, *supra*, 473 U.S. at 616.

[74] *Id*. at 629-30.

[75] *Id*. at 629 (emphasis added).

[76] *Id*. at 635 (*citing Hawaii v. Standard Oil Co*., 405 U.S. 251, 262 (1972)).

[77] *Id*. at 639.

But the U.S. Supreme Court has *twice rejected* that approach – in the securities law context and in the antitrust law context. In both contexts, the Court assumed that, *if* the issue of enforcement of an arbitration clause had arisen in connection with a purely domestic dispute, then the clause would *not* be enforceable – on public policy grounds. Nonetheless, the Court twice held that, in connection with international commerce, such domestic policy considerations must take a back seat to the need for "predictability in the resolution of disputes."[78]

Both in *Scherk* and in *Mitsubishi*, the "conflict" was one between substantive U.S. law and the demands of the international trade system, and, in both cases, the Court ruled in favor of the international trade system.

But it *cannot* be said that the FAA Inconsistency Objection involves a conflict regarding substantive law. Rather, under the FAA Inconsistency Objection, the only possible "conflict" is that a participant in a purely domestic American arbitration might feel disadvantaged knowing that participants in *non*-U.S. arbitrations (which presumably are *un*related to the American case) may seek discovery from a federal court *without* first having to convince the arbitrator that there is a justification for requesting judicial assistance.

Such an inconsistency pales in comparison to the significance of the enforcement of the antitrust laws and of the securities laws.

If the demands of the international trade system are sufficient to override two aspects of *substantive* domestic law, then *a fortiori* those demands are sufficiently consequential to override any feeling of "disadvantage" that a participant in a purely American arbitration might experience.

This conclusion is especially clear when considering the background to and purpose of the 1964 liberalizing amendments to Section 1782. As noted above, in *Intel* the Supreme Court identified the *same* public policy consideration that was central to its decisions in *Scherk* and *Mitsubishi* – namely, that American law and procedure should accommodate themselves to the growth of international commerce – as the reason for the liberalizing amendments to Section 1782.[79]

Conclusion:

As the Supreme Court is about to determine whether a non-U.S. (private) arbitrator may qualify as a "tribunal" within the meaning of Section 1782, to the extent that the Court applies the reasoning of *Scherk*, *Mitsubishi*, and *Intel*, it should *reject* the FAA Inconsistency Objection.

[78] *See Mitsubishi*, *supra*, 473 U.S. at 629.

[79] *See* text accompanying notes 21-23; 52-54. In *Intel* the Supreme Court observed that the desire for U.S. law to *improve cooperation* with foreign countries was a major reason for the 1964 amendments to Section 1782. *See Intel*, *supra*, 542 U.S. at 248.