haynesboone

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U.S. Supreme Court to Decide, Can Federal Courts Order Discovery in Foreign Arbitrations?

By Michael L. Hood

It is a common occurrence in international arbitrations with a U.S. element. There is a pending arbitration outside of the United States. One of the parties wants to ask a U.S. federal district court to order discovery from someone in the court's district for use in the foreign arbitration. Can the district court order the discovery? In the Second, Fifth and Seventh Circuits, the answer is no. In the Fourth and Sixth Circuits, the answer is yes. On March 22, 2021, the U.S. Supreme Court granted certiorari to resolve the split in authority.

The case is *Servotronics, Inc. v. Rolls-Royce PLC et al*., (7th Cir. 2020), *cert. granted,* _ S.Ct. _, 2021 WL 1072280 (U.S. Mar. 22, 2021) (No. 20-794). The Court framed the issue as, "Whether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals."

How the Court rules could have implications for certain private commercial arbitrations being conducted outside of the U.S because U.S. courts typically allow for more discovery than international arbitration tribunals.

Background – the *Servotronics* cases

Servotronics manufactured and provided engine valves to Rolls-Royce. The valves were part of aircraft engines that Rolls-Royce manufactured and provided to Boeing to incorporate into Boeing's 787 Dreamliner aircraft. In January 2016, while Boeing was testing one of its new aircraft, a stray piece of metal became lodged in the engine valve. The engine caught fire and damaged the aircraft. Rolls-Royce paid Boeing a $12.8 million settlement. Rolls-Royce sought indemnification from Servotronics, contending that a malfunction of Servotronics' valve caused the fire. Pursuant to their contract, Rolls-Royce and Servotronics proceeded with arbitration in the United Kingdom, under the rules of the Chartered Institute of Arbitrators("CIArb").

Thereafter Servotronics applied to the U.S. District Court in South Carolina to subpoena testimony from Boeing employees residing in South Carolina for use in the UK arbitration. Servotronics also applied to the U.S. District Court in Illinois for a subpoena compelling Boeing to produce documents in Illinois for use in the arbitration. Servotronics' applications invoked 28 U.S.C. § 1782(a). Section 1782(a) allows federal courts to order entities in their districts to turn over evidence to be used in certain foreign proceedings. Rolls-Royce and Boeing objected, arguing that Section 1782(a) does not permit a district court to order discovery for use in a private foreign commercial arbitration.

In the South Carolina case, the Fourth Circuit court of appeals ruled that Section 1782(a) allowed the district court to order discovery for use in the UK arbitration. In the Illinois case, however, the Seventh Circuit ruled the opposite - that Section 1782(a) did not allow the district court to order discovery for use in the UK arbitration. Servotronics appealed the Seventh Circuit decision by filing a petition for writ of certiorari with the U.S. Supreme Court. Servotronics asked the Court to address the issue of whether parties may seek discovery in the United States for use in foreign private commercial arbitration under Section 1782(a). By granting the writ on March 22, 2021, the U.S. Supreme Court signaled it is ready to resolve the split between the circuit courts.

Section 1782(a)

Section 1782(a) grants the district court discretion to order a person within the district to give testimony or provide evidence for use in certain foreign litigation. The statute reads:

> 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 proceeding *in a foreign or international tribunal*, including criminal investigation conducted before formal accusation.

Id. § 1782(a) (emphasis added). Any "interested person" may apply to the district court for the order. Servotronics invoked the statute as an "interested person" in its private commercial arbitration against Rolls-Royce pending in the UK.

The dispute

The dispute centers on the meaning of the statutory phrase "foreign or international tribunal" – and more precisely, whether a private commercial arbitral tribunal appointed by the CIArb fits the definition of "tribunal" under Section 1782(a). Section 1782(a) does not define the word "tribunal." The issue is: Should "tribunal" be interpreted narrowly so that Section 1782(a) applies only to foreign courts and other government-sponsored tribunals? That is the view of the Second Circuit,[1] the Fifth Circuit,[2] and the Seventh Circuit.[3]

[1] *National Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999).

[2] *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

[3] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020).

Or should the word "tribunal" be interpreted broadly so that Section 1782(a) extends to private commercial foreign arbitral tribunals? That is the view of the Sixth Circuit,[4] the Fourth Circuit,[5] and was the view of the Eleventh Circuit before it withdrew its decision.[6] The Third and Ninth Circuit have cases pending on the issue.[7]

Competing positions

The issue was ripe for U.S. Supreme Court review. The *Servotronics* Fourth and Seventh Circuit cases involve the same parties, same facts and same legal issue. Yet, the Fourth Circuit held that Section 1782(a) applies to private commercial foreign arbitrations, and the Seventh Circuit held it does not.

There are four (4) primary arguments advanced by circuit courts for support that Section 1782(a) should be interpreted narrowly and does not grant district courts power to order discovery in private commercial foreign arbitrations: (1) The phrase "foreign or international tribunal" does not unambiguously include *private* foreign arbitration. (2) The statutory and legislative history of Section 1782(a) indicates the word "tribunal" is limited to state-sponsored foreign and international tribunals. Congress drafted Section 1782(a) to meld its predecessor with other statutes facilitating discovery for international *government-sanctioned* tribunals. There is no contemporaneous evidence that Congress contemplated extending Section 1782(a) to private foreign arbitrations. (3) Applying Section 1782(a) to private commercial foreign arbitrations conflicts with the U.S. domestic arbitration statute, the Federal Arbitration Act ("FAA"). The FAA permits the arbitration panel, not the parties, to petition the district court in which the arbitrators, or a majority of them, are sitting to enforce the panel's subpoenas. Section 1782(a) should not be interpreted to provide parties to an international arbitration with readier access to U.S. discovery than they would have in a U.S. arbitration. (4) Arbitration is supposed to be a speedy, economical, and effective means to resolve disputes, which would be thwarted if parties in private commercial foreign arbitration use Section 1782(a) to seek burdensome, "broad-ranging" federal discovery and "full-scale litigation" through the federal courts far from the place of arbitration.

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[4] *In re Application to Obtain Discovery*, 939 F.3d 710, 714 (6th Cir. 2019).

[5] *Servotronics, Inc. v. Boeing Co*., 954 F.3d 209, 214 (4th Cir. 2020).

[6] *Consorcio Ecuatoriano de Telecomunicaciones S.A. v JAS Forwarding (USA), Inc*., 685 F.3d 987, 993-98 (11th Cir. 2012), *vacated and superseded by Consorcio Ecuatoriano de Telecominicaciones S.A. v. JAS Forwarding (USA) Inc*., 747 F.3d 1262, 1270 n.4 (11th Cir. 2017) (Eleventh Circuit withdrew its initial decision ruling that Section 1782(a) applied to private foreign arbitrations, and issued a replacement opinion that took no position on the question "leav[ing] the resolution of the matter for another day").

[7] *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-mc-80277-TSH, 2020 U.S. Dist. LEXIS 32125, at *2 (N.D. Cal. Feb. 25, 2020), *appeal filed sub nom. In re: Application of HRC-Hainan Holding Co., LLC*, No. 20-15371 (9th Cir. Feb. 28, 2020); *In re Storag Etzel GmbH*, No. CV-19-MC-209-CFC, 2020 WL 1849714 (D. Del. Apr. 13, 2020), *appeal filed sub nom. In re: Application of Storag Etzel GmbH*, No. 20-01833 (3d Cir. May 7, 2020); *In re EWE Gasspeicher GmbH*, No. CV-19-MC-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17, 2020), *appeal filed sub nom. In re: Application of EWE Gasspeicher GmbH*, No. 20-01830 (3d Cir. May 8, 2020). These cases have been, or likely will be, held in abeyance pending the U.S. Supreme Court's disposition of the *Servotronics* case.

In contrast, there are four (4) primary arguments advanced by circuit courts for support that Section 1782(a) should be interpreted broadly to grant district courts power to order discovery in private commercial foreign arbitrations: (1) Section 1782(a), as originally enacted, applied to "any *judicial* proceeding pending in any *court* in a foreign country" (emphasis added), but was amended to apply to "a proceeding in a foreign or international tribunal." Congress adopted the unambiguous word "tribunal" to evidence its intent to expand the scope of Section 1782(a) to private commercial arbitral panels. (2) Nothing in Section 1782(a)'s legislative history excludes private commercial foreign arbitration from the meaning of "tribunal." (3) Congress has elevated arbitration of claims as a favored alternative to litigation when the parties agree in writing to arbitration. Congress revised Section 1782(a) to confer on the district courts supervisory authority to regulate the arbitration process. Section 1782(a) grants the district court discretion to function effectively as a surrogate for a foreign tribunal by taking testimony and statements for use in the foreign proceeding. Section 1782(a) furthers arbitration as an expedited, efficient means to resolve disputes because the district court has discretion to limit or reject unduly intrusive or burdensome discovery requests. (4) Private commercial contractual arbitrations are the product of government-conferred authority, because they are sanctioned, regulated and overseen by the government and its courts and ratified by international conventions, such as the New York Convention.

The *Intel* footnote

The U.S. Supreme Court has addressed Section 1782(a) only once, in the 2004 case *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004). *Intel* did not involve private commercial foreign arbitration. In *Intel*, the Court held, among other things, that the proceeding at issue – before the Directorate General for Competition of the Commission of the European Communities – was a "tribunal" under Section 1782(a) because it was a public agency with quasi-judicial authority. While discussing its holding, the Court examined Section 1782(a)'s legislative history. The Court quoted from a 1962 law review article cited in the legislative history. The law review article was written by Hans Smit, a law professor who served as the reporter for the commission that proposed what eventually became Section 1782(a). The Court quoted the footnote in Professor Smit's law review article stating, in part, "The term 'tribunal' [in Section 1782(a)] … includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, … (emphasis added)".By referring to the professor's inclusion of "arbitral tribunals," did the Court signal that district courts should interpret Section 1782(a) broadly, to allow them to order discovery in private commercial foreign arbitrations? Or was the Court's quote from the professor's article merely dicta found in an explanatory parenthetical? When the Court rules on the issue, expect it either to embrace its prior cite or distinguish it.

Conclusion

The issue in the *Servotronics* cases - whether Section 1782(a) applies to private foreign commercial arbitration - has caused much debate among the courts and arbitration community. There are persuasive arguments on both sides of the debate. All agree that the U.S. Supreme Court's decision could make a significant impact on private commercial foreign arbitrations with a U.S. element. In *Intel,* the Court ruled that where Section 1782(a) applies, the district court has discretion to order production of materials discoverable under the federal rules, even if they would not be discoverable in the foreign jurisdiction.[8] Depending on how the Court rules, its decision will either

[8] *Intel*, 542 U.S. at 260.

clarify, once and for all, that parties can seek discovery in U.S. courts for use in their private commercial foreign arbitration or will make clear that U.S. courts are not available to them. [9]

[9] Depending on how the U.S. Supreme Court rules in *Servotronics*, there may still be a question whether the opinion applies to foreign investor – state arbitrations.