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Section 1782 Is Back

Will SCOTUS allow American discovery in private international arbitration?

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The U.S. Supreme Court (SCOTUS) is primed to resolve a decades-old dispute concerning whether 28 U.S.C. § 1782(a) applies to private international arbitrations. Its decision could open a world of discovery options to participants in international commercial arbitration.

Section 1782 allows persons participating in certain kinds of legal proceedings abroad to take discovery of witnesses and documents located in the United States. This statute potentially would allow parties to circumvent the procedural hurdles put in place by the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. However, the extent of section 1782's reach is ill-defined.

Section 1782 reads, 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, including criminal investigations conducted before formal accusation.

Much rests on how U.S. courts define "foreign or international tribunal." There is much disagreement. To date, *Intel Corp. v. Advanced Micro Device, Inc.* provides the only authoritative guidance. There, SCOTUS approached the question of whether a foreign governmental tribunal in the European Union (created under treaty) arbitrating an EU competition claim could apply Section 1782 to enforce discovery against a company headquartered in California.

Intel produced several notable outcomes. Importantly, SCOTUS defined "tribunal" as including "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004). Under this definition, the Commission of the European Communities (considered a judicial arm of the European Union) could utilize the statute to aid in discovery requests.

In the decision, Justice Ginsberg identified the factors "that bear consideration in ruling on a §1782 request."

The *Intel* factors are (1) whether "the person from whom 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, court, or agency to U.S. federal-court judicial assistance"; (3) "whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the request is "unduly intrusive or burdensome." *In re Fund for Prot. of Inv'r Rights in Foreign States v. AlixPartners, LLP*, 5 F.4th 216, 220 (2d. Cir. 2021) (quoting *Intel*, 542 U.S. at 263).

The *Intel* factors provided a base framework for evaluating section 1782 petitions from governmental entities (such as the European Commission). However, the Court left parties questioning whether section 1782 applies to private, commercial international arbitration.

Circuits Disagreed on When Section 1782 Applies

In the 17 years since *Intel*, circuits have split over this question. The Second, Fifth, and Seventh Circuits have held that section 1782 does not apply to private, commercial international arbitrations, because these tribunals are not encompassed within the definition of "foreign or international tribunal." The Fourth and Sixth Circuits, conversely, have allowed private international arbitration parties to obtain discovery as long as the arbitral body shows some governmental origin or endorsement.

In 2019, the Sixth Circuit decided *Abdul Latif Jameel Transp. Co. v. FedEx Corp*. There, ALJ, a Saudi Arabian corporation, sought discovery from U.S.-based FedEx for use in an arbitration in Dubai. Turning to the plain language of section 1782 and citing the Supreme Court's decision in *Intel*, the Sixth Circuit concluded that there was no evidence that the phrase "foreign tribunal" or "international tribunal" is a term of art. The Court also referenced the 1964 amendment to section 1782, in which Congress replaced the phrase "in any judicial proceeding pending in any court in a foreign country," with "in a proceeding in a foreign or international tribunal." The Court held that:

Congress understood that change to "provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]." . . . Thus, on the Supreme Court's reasoning, the word "tribunal" applies to non-judicial proceedings. *Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710, 724 (6th Cir. 2019).

The Fourth Circuit joined the Sixth with its 2020 ruling in *Servotronics v. Boeing Co.* Deciding an indemnity dispute between Rolls Royce and Servotronics, the court concluded "[t]he current version of the statute, as amended in 1964 . . . manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international tribunals." It also agreed with the Sixth Circuit's interpretation of *Intel*, finding that case "reject[ed] [the] suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding." The Fourth Circuit took a softer stance than the Sixth Circuit, however, noting that where an arbitral tribunal is subject to governmental sanctions, regulations, and oversight, the panel acts "within the authority of the state," thus meeting the requirements for discovery aid under section 1782.

Those circuits declining to apply section 1782 to private arbitrations point to the same legislative history and

statutory analysis but reach a different conclusion. In *NBC v. Bear Stearns & Co.*, the Second Circuit declined to grant section 1782 discovery in a Mexican commercial arbitration conducted under the rules of the International Chamber of Commerce (a private French organization). Although the court found the term "tribunal" was "sufficiently ambiguous" as not to lend itself to one interpretation or another, it pointed to House and Senate Committee reports surrounding the statute's passage as evidence that the section 1782 authors "had in mind only governmental entities" acting with the authority of the state when detailing its application. *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 188-189 (2d Cir. 1999). Furthermore, while the Second Circuit agreed that the 1964 amendment of the statute was meant to broaden its scope, the broadening extended only to intergovernmental tribunals not involving the United States. It wrote:

The legislative history's silence with respect to private tribunals is especially telling because we are confident that 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. *Id.* at 190.

The Fifth Circuit reached the same conclusion in *Republic of Kazakhstan v. Biedermann Int'l*. There, the court rejected a discovery aid request from Kazakhstan in its arbitration against Biedermann International under the rules of the Arbitration Institute of the Stockholm Chamber of Commerce (ISCC). Kazakhstan sought discovery from a Texas-based third party. The Fifth Circuit held that the ISCC was a private institution ineligible to use section 1782. The Court also noted the potential conflict between allowing private international commercial arbitrations to use section1782 for discovery and the limited discovery available in domestic arbitrations under the Federal Arbitration Act (FAA):

[It] is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart. There is also a possibility that Federal Arbitration Act § 7 and 28 U.S.C. § 1782 conflict, if the latter section encompasses foreign and international private arbitrations." *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 882-83 (5th Cir. 1999), see also *NBC v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999).

The Seventh Circuit also joined against allowing private commercial arbitration tribunals access to section 1782. In *Servotronics v. Rolls Royce* 975 F. 3d 689 at 695, it agreed: "[i]t's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations."

A Chance at Resolution

Practitioners were initially eager to see SCOTUS resolve this heated debate after granting cert in the case of *Servotronics, Inc. v. Rolls-Royce PLC* in 2020. But, in 2021, Servotronics ultimately settled with Rolls Royce and withdrew its petition.

Another opportunity arose on December 10, 2021, after SCOTUS consolidated two petitions from the Second and Sixth Circuits seeking to clarify Section 1782's application.

In *AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States*, SCOTUS granted cert to assess

the Second Circuit's decision granting discovery to a Russian workers' rights group under section 1782 for use in an arbitration with Lithuania. AlixPartners LLP, a third-party New York consulting firm, and its CEO Simon Freakley, appealed the decision after the court granted discovery of AlixPartners' internal documents to The Fund for Protection of Investor Rights in Foreign States. The fund initiated arbitration in 2019 after Lithuania nationalized the AB Bankas Snoras, an organization Freakley had administrated since 2011.

Careful to not to upset its long-held interpretation since *NBC v. Bear Stearns & Co.*—that international arbitral panels created exclusively by private parties are ineligible for discovery aid under section 1782—the court distinguished *AlixPartners* from its recent 2018 case *In re: Application and Petition of Hanwei Guo*. In *Guo*, the court held that a private commercial arbitration administered by the China International Economic and Trade Arbitration (CIETAC) was not a "proceeding in a foreign or international tribunal," because, though it had originated through state action, CEITAC had evolved such that it functioned as a private organization.

Conversely, the court held that the arbitral tribunal in *AlixPartners* was not a private commercial tribunal, but rather an international tribunal created by treaty, placing it within the context section 1782. In reaching this conclusion, the Second Circuit looked to the so-called *Guo* factors, which include weighing state affiliation, the degree to which a state possesses the authority to intervene or alter the outcome of an arbitration, the nature of the jurisdiction possessed by the panel, and the ability of the parties to select their own arbitrators. It ultimately decided because the arbitral panel was authorized and created by treaty, it qualified as an international tribunal. The court further pointed to the arguments on plain language and policy touted by the Fourth and Sixth Circuits.

In their petition, AlixPartners argued that the lower court ruled incorrectly for three reasons. First, AlixPartners argued that "the text, purpose, and history of section 1782 demonstrate that congress did not intend the phrase "foreign or international tribunal" to include foreign arbitral bodies that do not exercise some measure of governmental or quasi-governmental authority." Second, AlixParters raised the issue that interpreting section 1782 to allow private discovery conflicts with the FAA. Finally, AlixParters also took issue specifically with the Second Circuit's use of the *Guo* factors in determining whether to grant discovery, calling them uniquely "unsound." In response, the fund argued that there is no conflict between courts with respect to the application of section 1782 to arbitral tribunals constituted pursuant to bilateral investment treaties, and that the Second Circuit was correct in finding the tribunal in question was created by such a treaty.

The second consolidated petition was *ZF Automotive US Inc. (ZF) v. Luxshare, Ltd.* from the Sixth Circuit. Here, a Michigan-based automotive parts manufacturer, ZF, sought 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 Munich arbitration. Applying the *Intel* factors, the district court found that ZF and its supervisors from which respondents sought discovery were, in fact, participants in the foreign proceedings. There was no proof that the German tribunal would reject discovery. German tribunals, though not keen on extensive discovery, were receptive to foreign judicial assistance and the request ultimately did not attempt to circumvent German proof gathering restrictions. Therefore, the requests were not unduly intrusive. Resultantly, the court found in favor of discovery under section 1782. The Sixth Circuit declined to examine the matter beyond refusing to stay the Michigan federal district court's order, despite ZF's pending Court petition.

In its petition, ZF argued that the Sixth Circuit's interpretation to allow discovery to entirely private parties under section 1782 was "unmoored from [the] statute's text, contemporaneous dictionary definitions, this Court's

precedent, legal scholarship, and compelling policy concerns." In response, Luxshare argued that the case was a poor vehicle to address the question presented; the opinion granted would likely be advisory, because the underlying case would be dismissed substantively under *Abdul Latif*.

Implications and Applications of the Expected SCOTUS Decision on Section 1782

Though SCOTUS consolidated these two section 1782 cases, they present separate questions. *AlixParters* asks whether section 1782 applies to what is essentially an investor-state arbitration—in this instance, does a treaty signed by Russia and Lithuania stipulating arbitration between parties doing business with a now-nationalized bank constitute an international tribunal? *ZF Automotive*, on the other hand, asks whether section 1782 applies to strictly private parties conducting international commercial arbitration. By bringing these two separate cases together, the Court will likely set the tone for arbitral discovery in both private and investor-state arbitrations to come.

Should SCOTUS ultimately find that section 1782 applies to private, commercial international arbitration, there are several broad implications for arbitration practitioners.

- **Inconsistency and Inefficiency.** Allowing section 1782 to apply in private arbitration will open the door to discovery previously unavailable outside the United States, including in foreign court cases. If such discovery is now allowed into international arbitration, it may cause confusion and unilaterally hurt U.S.-based companies. And while the chance of previously-unavailable discovery may attract some parties to arbitration, it may also deter those who value arbitration for the efficiency it provides.

- **Discord With the FAA.** If the Court grants parties in private arbitration access to section 1782, the discovery allowed in international arbitration may exceed the discovery available to domestic parties under the FAA. The optics of this are intriguing—foreign tribunals will have to contend with discovery that even domestic arbitration does not have.

- **Confidentiality.** If section 1782 applies to private commercial arbitration, more parties may bring section 1782 petitions before U.S. courts. If this happens, parties who choose arbitration for its privacy may find themselves open to more publicity, as applications explaining the background and need for discovery aid are filed in U.S. federal courts.

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