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# Servotronics, Inc. v. Rolls-Royce PLC: What the US Supreme Court's Upcoming Decision on 28 U.S.C § 1782 Means for International Construction Arbitration

**WRITTEN BY**

R. Zachary Torres-Fowler | Hailey Barnett

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On March 22, 2021, the U.S. Supreme Court announced that it would consider the hotly contested issue of whether 28 U.S.C. § 1782 ("**Section 1782**") grants parties to international commercial arbitrations seated outside the United States the right to seek U.S.-style discovery from the federal courts. The Supreme Court's decision in *Servotronics, Inc. v. Rolls-Royce PLC* will ostensibly put to rest a matter that has roiled the international arbitration community for the last several years and may have profound implications for modern international arbitration practice.

Given the role international arbitration serves in connection with international construction projects, construction practitioners and industry representatives should pay close attention to the Supreme Court's upcoming decision. The following article seeks to introduce the current debate to construction practitioners and offer some insight into what the Supreme Court's decision may mean for the field of international construction arbitration.

***28 U.S.C. § 1782 and the "Foreign or International Tribunal"***

Section 1782 is a procedural device that permits an applicant to petition the U.S. courts to order document disclosure or compel testimony "for use in a proceeding in a foreign or international tribunal." As a result, Section 1782 is a potentially powerful tool to gather evidence in the United States for use in a proceeding located abroad. This is particularly true for international arbitration proceedings where document exchange practices are significantly more constrained than in U.S. discovery.

Importantly, Section 1782 does not define the phrase "foreign or international tribunal" and the question of whether the statute applies to international commercial arbitral tribunals seated in jurisdictions outside the United States has caused a circuit split. Specifically, case law dating back to the late 1990s from the Second and Fifth Circuits answered this question in the negative and remained unchallenged for two decades. However, in 2019 the Sixth Circuit reached the opposite conclusion in the case of *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019) and held that the phrase "foreign or international tribunal" in Section 1782 encompassed private commercial arbitral tribunals seated abroad.

The latest iteration in this saga arrived in March 2020 and September 2020 when the Fourth and Seventh Circuits, respectively, reached opposite conclusions on precisely the same set of facts in the case of *Servotronics*. As

explained below, the Fourth and Seventh Circuit's inconsistent holdings only broadened the circuit split and almost necessarily required the Supreme Court to review the matter.

***Servotronics, Inc. v. Rolls-Royce PLC***

Servotronics arose from a fire that occurred during a ground engine test of a Boeing 787 in Charleston, South Carolina. (*In re Servotronics, Inc.*, No. 18-CV-7187, 2019 WL 9698535, at *1 (N.D. Ill. Apr. 22, 2019), aff'd sub nom. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), cert. granted, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).) Rolls-Royce, the engine manufacturer, settled with Boeing and then sought indemnity from Servotronics—the entity that manufactured an engine valve that Rolls-Royce alleges caused the fire. (*Id*.) Accordingly, pursuant to an arbitration agreement between Rolls-Royce and Servotronics, Rolls-Royce initiated arbitration in London under the arbitration rules of the Chartered Institute of Arbitrators (more commonly referred to a CIArb).

In connection with those proceedings, Servotronics filed an application under Section 1782 in the U.S. federal district court for the District of South Carolina seeking testimony from Boeing's employees that resided in South Carolina. In addition, Servotronics also sought document discovery from Boeing pursuant to Section 1782 through a separate ex parte application in the U.S. federal district court for the Northern District of Illinois. (*Id*. at *2.)

The federal district court for District of South Carolina initially denied Servotronics's application. (*Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 211 (4th Cir. 2020).) However, on March 30, 2020, the Fourth Circuit Court of Appeals reversed the lower court's decision. After reviewing the language and legislative history of Section 1782, the Fourth Circuit concluded that Congress intended the phrase "foreign or international tribunal" to encompass private commercial arbitral tribunals seated abroad and applied the broader interpretation of Section 1782 espoused by the Sixth Circuit. (*Id*. at 216.)

In the Northern District of Illinois, the court initially granted Servotronics' application, but later vacated its decision after Rolls-Royce and Boeing intervened in the case. (2019 WL 9698535 at *3.) The district court concluded it lacked the authority to grant Servotronics' request because the London-based arbitration proceeding between Servotronics and Rolls-Royce was not a "proceeding in a foreign international tribunal" within the meaning of Section 1782. (*Id*.) Servotronics subsequently appealed the decision to the Seventh Circuit court of appeals.

On September 22, 2020, the Seventh Circuit affirmed the lower court's decision. In doing so, it rejected the conclusions the Fourth Circuit reached on the very same set of facts just sixth months prior. The Seventh Circuit made two significant findings.

First, according to the Seventh Circuit, neither the plain language nor the statutory context underlying Section 1782 supported an interpretation that "foreign or international tribunals" included foreign commercial arbitral tribunals. Instead, according to the Seventh Circuit, Section 1782 the term "foreign or international tribunal" only encompassed foreign courts and quasi-judicial agencies. (*Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020), cert. granted, No. 20-794, 2021 WL 1072280 (U.S. Mar. 22, 2021).)

Second, the Seventh Circuit raised concerns over a potential conflict with the Federal Arbitration Act. (*Id*. at 695–96 (7th Cir. 2020).) Specifically, the Federal Arbitration Act only permits arbitration *panels*—but not parties—to

seek third-party discovery. By contrast, if Section 1782 were read to apply to foreign private arbitrations, litigants in a foreign arbitration proceeding as well as any other "interested persons" (as set forth in Section 1782) would have access to much more expansive discovery than would otherwise be the case in U.S. seated arbitrations governed by the FAA. (*Id*. at 695.)

***Implications of a Supreme Court Decision***

Given the circuit split, and with similar cases pending in the Third and Ninth Circuits, the Supreme Court's decision to consider the issues presented in *Servotronics* is not surprising. However, depending on whether the Supreme Court sides with the Fourth and Sixth Circuits or Second, Fifth, and Seventh Circuits, the decision could broaden the otherwise narrow document exchange practices commonly used in international arbitration proceedings.

One of the defining features of international arbitration is its relatively narrow approach to document exchange and similarly limited access to third-party discovery. Should the Supreme Court follow the Fourth and Sixth Circuits, it seems likely that the U.S. courts will become ripe for Section 1782 discovery requests. Moreover, given that applications made under Section 1782 are governed by the discovery standards set out the Federal Rules of Civil Procedure, parties to international arbitration proceedings may very well may gain access to U.S. discovery practices that would not otherwise be available in international arbitration. As a result, construction practitioners may have to rapidly adjust how they procedurally and strategically approach international construction arbitrations going forward.

Ultimately, the future of Section 1782 practice is far from certain. Even if the current legal framework associated with Section 1782 shifts as the result of a Supreme Court decision, the U.S. courts and international arbitral tribunals will retain significant discretion over the breadth and viability of document requests under Section 1782. As a result, notwithstanding the current focus on the Supreme Court, much remains to be written about Section 1782 in practice. In the meantime, international construction arbitration practitioners should pay careful attention to the Supreme Court in *Servotronics* and consider what strategic implications the Court's decision in that case may have on the current international arbitration practices.

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