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Supreme Court Asked to Decide Circuit Split on Allowing US Discovery in Private, International Arbitrations

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On December 7, the Supreme Court received a request to decide whether parties in private, commercial, international arbitrations can avail themselves of 28 U.S.C. § 1782(a) (Section 1782) to obtain discovery through U.S. federal courts.[1] [2] Section 1782 provides in pertinent 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…"

Circuits split as to the definition of a "foreign or international tribunal." The Fourth and Sixth Circuits read the definition broadly — finding Section 1782 does authorize U.S. discovery for private international arbitrations.[3] However, the Second, Fifth, and Seventh Circuits narrowly interpret the definition, holding the opposite.[4] [5] For additional information regarding the circuit split and *Servotronics I*, please see our previous articles on the subject.[6]

In *Servotronics II*, the Seventh Circuit found that Section 1782 does not authorize a district court to compel discovery for use in private international arbitration.[7] Siding with the Second and Fifth Circuits, the court found "canvassing dictionary definitions" to define the word tribunal inconclusive,[8] and instead turned their focus to statutory context. The court evaluated the text proposed in 1958 by the Commission on International Rules of Judicial Procedure, a study group created by Congress, and found "noticeably absent from this statutory charge [] any instruction to study and recommend improvements in judicial assistance to private foreign arbitration."[9] The court found it meaningful that, six years later, Congress "unanimously adopted legislation recommended by the Rules Commission."[10] Finally, the court reasoned that a narrow interpretation of "tribunal" avoids running afoul of the Federal Arbitration Act (FAA) because "[t]he discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA."[11] The court explained that the FAA permits an arbitration panel, not the parties, to summon witnesses to testify and produce documents, while Section 1782, in contrast, permits both tribunals and litigants (and "interested persons") to obtain discovery orders.[12] [13] The court opined: "It'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."[14]

In its recently filed Supreme Court petition, Servotronics, Inc., a maker of components, challenges the Seventh Circuit's rejection of its petition to subpoena Boeing for documents in an arbitration brought by Rolls-Royce PLC in London.[15] The arbitration relates to the Boeing 787 Dreamliner aircraft, which was subject to engine fires

within Rolls-Royce engines in 2016.[16] Servotronics argues that the Second, Fifth, and Seventh Circuits incorrectly departed from the Supreme Court's broad approach to Section 1782 in *Intel* and urges the Court to adopt the conclusions of the Fourth and Sixth Circuits.[17] Asserting that the Seventh Circuit misapplied canons of statutory construction, Servotronics argues there is no express intention to exclude private commercial arbitrations from Section 1782, and there are substantial indications of congressional intent to expand the types of proceedings contemplated by Section 1782 as recognized in *Intel*.[18]

While the Seventh Circuit in *Servotronics II* found the dictionary meanings of the word "tribunal" inconclusive, Servotronics argues that it should be afforded its plain meaning in the absence of clearly expressed legislative intent to the contrary.[19] Relying upon the Sixth Circuit's decision in *FedEx Corp*, Servotronics advocates that "tribunal" has been used to describe private, commercial arbitrations for years, dating back to 1853.[20] [21]

Servotronics is similarly critical of the Fifth and Seventh Circuits' reliance on the Second Circuit's statutory construction in *Bear Stearns*.[22] In *Bear Stearns*, appellant NBC submitted numerous and varied examples that referred to private arbitral bodies as "tribunals," however, the Second Circuit concluded that this showed only that the "statute did not unambiguously *exclude* [arbitral tribunals]" from the scope of Section 1782.[23] Citing to *Intel*, Servotronics asserts that courts should not read exceptions into legislation that are not expressed in the language of the statute.[24]

As for Section 1782's legislative history, Servotronics argues that history supports an inclusive interpretation of the word "tribunal."[25] In 1964, Congress selected the phrase "a proceeding in a foreign or international tribunal" to replace "a judicial proceeding pending in a foreign country." Servotronics argues this decision reflects Congress' intent to expand the statute's reach.[26] Also telling, according to Servotronics, Congress deleted provisions previously found in the Foreign Relations Code that applied only to "governmental tribunals."[27] In this way, Servotronics questions the Fifth Circuit's holding in *Biedermann* that a "foreign or international tribunal" must be public, state-sponsored, or governmental.[28] Additionally, Servotronics challenges the notion articulated by the Fifth and Seventh Circuits that private commercial arbitrations were so novel in 1964 that the drafters could not have intended it as such.[29] Servotronics argues that the reverse is true, and in 1964, Congress knew of the growth of private commercial arbitration and intended to remove limitations so that Section 1782 could keep pace with modern-era means of resolving international commercial disputes.[30]

Servotronics believes this case "presents a rare opportunity" for the Court to provide a uniform standard for responding to applications under Section 1782 because private international arbitrations, by their nature, tend to have time constraints that prevent the parties from pursing appeals.[31] The issue is also pending in the Third and Ninth Circuits,[32] so there is certainly potential for the chasm to widen. Whether the Supreme Court will grant certiorari remains to be seen.

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[1] *See Servotronics, Inc. v. Rolls-Royce, PLC and The Boeing Company*, Petition for a Writ of Certiorari, December 7, 2020.

[2] *See* https://www.law360.com/articles/1335429/attachments/0.

[3] *See Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209 (4th Cir. 2020) (*Servotronics I*); *Abdul Latif Jameel v. FedEx Corp.,* 939 F.3d 710 (6th Cir. 2019).

[4] *See In re Application of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020)*; Nat'l Broad. Co.v. Bear Stearns & Co.,* 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999); *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 694 (7th Cir. 2020) (*Servotronics II*).

[5] Although both cases involve the same underlying arbitration, the Seventh Circuit's decision of September 22, 2020 in *Servotronics II* was in direct contravention to the decision issued by the Fourth Circuit in *Servotronics I*.

[6] *See* https://www.troutman.com/insights/supreme-court-may-decide-if-litigants-can-conduct-us-discovery-for-private-international-arbitrations.html; https://www.troutman.com/insights/circuits-remain-split-on-allowing-us-discovery-in-private-international-arbitrations.html.

[7] *Servotronics II*, 975 F.3d at 690.

[8] *Id.* at 694.

[9] *Id.*

[10] *Id.* citing *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 248 (2004); Act of Oct. 3, Pub.L. 88-619, § 9, 78 Stat. 997.

[11] *Id.* at 695.

[12] *Id.*

[13] While circuits also split on whether the FAA permits parties to summon witnesses pre-hearing, the Seventh Circuit here propounds the view of the majority. For additional information on the FAA and third-party discovery, please see our previous article at https://www.troutman.com/insights/when-where-and-whether-the-confusing-law-of-third-party-evidence.html.

[14] *Id.*

[15] Petition, p 3.

[16] *Id.*

[17] Petition, p 11.

[18] *Id. at* 18.

[19] *Id.* at 14.

[20] *Id.* citing *FedEx Corp*, 939 F3d at 721), including the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985).

[21] *Id.* at 14.

[22] *Id.* at 15.

[23] *Id.* citing *Bear Stearns*, 165 F.3d at 188 (emphasis added).

[24] *Id.,* and that doing so would be legislating. (*Id. citing City of Chicago v. Env't Defense Fund*, 511 U.S. 328, 338 (1994).

[25] *Id.* at 16.

[26] *Id.*

[27] *Id.*

[28] *See Biedermann,* 168 F.3d at 880.

[29] Petition, p 17 *citing Biedermann* at 882.

[30] Petition, p 17.

[31] *Id.* at 13.

[32] *See In re EWE Gassepeicher GMBH*, Docket No. 19-mc-109-RGA, 2020 WL 1272612 (D. Del. March 17, 2020), appeal docketed, No. 20-1830 (3d Cir. April 24, 2020); *HRC-Hainan Holding Co. LLC v. Yihan Hu*, Docket No. 19-mc-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), appeal docketed sub nom., *In re HRC-Hainan Holding Co. LLC*, No. 20-15371 (9th Cir. March 4, 2020).

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