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Supreme Court Grants Certiorari to Determine When Parties Can Obtain U.S.-Discovery in Aid of International Arbitrations

On March 22, 2021, the United States Supreme Court granted review in *Servotronics, Inc. v. Rolls-Royce PLC* to decide whether 28 U.S.C. § 1782(a), which authorizes federal district courts to grant discovery “for use in a foreign or international tribunal,” can be used to obtain discovery in aid of a foreign private commercial arbitration. For decades, litigants have used Section 1782 to obtain sometimes-broad discovery from individuals and entities in the United States to aid in ongoing foreign international arbitrations.

The Supreme Court’s decision in this case will have broad ramifications for any company that routinely engages in international arbitration as well as companies that may have documents responsive to matters involved in an international arbitration, even if they are only third parties.

Key Takeaways

- The Supreme Court will determine whether parties in foreign private commercial arbitrations can obtain discovery in the United States to aid a foreign proceeding during the 2021-2022 term, which begins in October of 2021.
- Parties in Investor-State Arbitrations can still use Section 1782 to obtain discovery regardless of the outcome of the *Servotronics* case.

Legal Background

Section 1782 authorizes, but does not require, a federal district court in the United States to grant discovery in aid of proceedings before “a foreign or international tribunal” at the request of “any interested person.”¹ Increasingly, litigants have used Section 1782 to obtain discovery that would not have otherwise been available to litigants in foreign courts or arbitration proceedings.

In 2004, the Supreme Court held in *Intel Corp. v. Advanced Micro Devices, Inc.* that the Directorate-Generate for Competition of the European Communities qualified as a “tribunal” under Section 1782.² The Court noted that, by enacting Section 1782, Congress had sought to provide “assistance to foreign courts and quasi-judicial agencies.”³ Since *Intel*, however, the Supreme Court has not provided lower courts with further guidance about the scope of the phrase “foreign or international tribunal.”

The federal courts of appeals have come to different conclusions as to whether Section 1782 permits discovery in aid of a foreign private commercial arbitration.⁴ In 1999, the Second Circuit held that the

phrase “foreign or international tribunal” in Section 1782 is “sufficiently ambiguous that it does not necessarily include or exclude” foreign private commercial arbitration.⁵ Turning to the legislative history, the Second Circuit concluded that Congress “had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state.”⁶ That same year, the Fifth Circuit arrived at the same conclusion, rejecting a Section 1782 application brought in aid of a Stockholm Chamber of Commerce arbitration.⁷

In 2019, the Sixth Circuit rejected the approach taken by the Second and Fifth Circuits, concluding that there is “no reason to doubt that the word ‘tribunal’ includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties.”⁸ The issue is currently pending before the Third and Ninth Circuits, with a decision expected in both cases in the coming months.⁹

Notwithstanding the current dispute as to whether international commercial arbitration qualifies as a “foreign or international tribunal” under Section 1782, courts generally agree that parties may use Section 1782 for investor-state arbitrations.¹⁰ One district court explained that unlike a “tribunal established by private parties,” investor-state arbitrations are established by international treaties and thus satisfy the requirements of Section 1782.¹¹

The *Servotronics* Dispute

Amidst the circuit split, Servotronics filed applications in the district courts for the Northern District of Illinois and the District of South Carolina to obtain Section 1782 discovery from Rolls-Royce and Boeing for use in an ongoing private commercial arbitration in London under the Chartered Institute of Arbitrators. In the arbitration proceeding, Rolls-Royce alleged that Servotronics provided defective engine valves that precipitated a fire during a test flight of a Boeing 787 Dreamliner aircraft. The district courts in both Illinois and South Carolina denied Servotronics’s parallel applications. However, the Fourth Circuit (which includes South Carolina) reversed the District of South Carolina decision, authorizing the application on appeal, while the Seventh Circuit (which includes Illinois) affirmed the Northern District of Illinois decision and rejected Servotronics’s application for discovery.¹²

The Seventh Circuit reasoned that the dictionary definition of the word “‘tribunal’ means ‘a court,’” and not an arbitral panel.¹³ In contrast, the Fourth Circuit held that foreign private commercial arbitration qualifies as a “foreign or international tribunal” because arbitration is a “product of ‘government-conferred authority.’”¹⁴

In December 2020, Servotronics filed a petition for certiorari to appeal the Seventh Circuit’s denial of discovery. The question presented is “[w]hether 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. . . .”¹⁵

The Importance of This Issue

As the use of Section 1782 discovery in international arbitration has grown,¹⁶ litigants have continued to test the boundaries of discovery under the law. The Supreme Court's expected decision in *Servotronics* will provide uniformity among the federal courts of appeals and prevent forum shopping.

However, the Court will not resolve all questions regarding the scope of Section 1782. First, even after the Supreme Court rules in *Servotronics*, we may not know whether an international arbitration seated in the United States qualifies as a "foreign or international tribunal" under Section 1782.¹⁷ In addition, regardless of the outcome, courts may continue to find that investor-state arbitrations qualify for Section 1782 discovery.

We will closely follow the *Servotronics* proceedings and share relevant updates, as courts continue to consider the scope of discovery available to interested parties in international commercial arbitration.

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This Client Memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ 28 U.S.C. § 1782(a).

² 542 U.S. 241 (2004).

³ *Id.* at 258 (quoting Act of Sept. 2, Pub. L. 85–906, § 2, 72 Stat. 1743) (emphasis added).

⁴ Compare *Servotronics, Inc. v. Rolls-Royce PLC*, 2020 WL 5640466 (7th Cir. Sept. 22, 2020) (denying discovery), *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d Cir. 1999) (same), and *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) (same), with *In re Application to Obtain Discovery for Use in Foreign Proceedings (FedEx)*, 939 F.3d 710, 723 (6th Cir. 2019) (granting discovery), and *Servotronics Inc. v. Boeing Co.*, 954 F.3d 209, 210 (4th Cir. 2020) (same).

⁵ *Nat'l Broad. Co.*, 165 F.3d at 188.

⁶ *Id.* at 189.

⁷ *Biedermann*, 168 F.3d at 882.

⁸ *Fedex*, 939 F.3d at 723.

⁹ See *In re EWE Gassepeicher GMBH*, Docket No. 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*, 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).

¹⁰ See *In re Veiga*, 746 F. Supp. 2d 8, 23 (D.D.C. 2010) (approving discovery for investor-state arbitration), *Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer LLP*, 2019 WL 1559433 (D.D.C. Apr. 10, 2019) (same), and *In re Application of Chevron Corp.*, 709 F. Supp. 2d 283, 291 (S.D.N.Y. 2010), *as corrected* (May 10, 2010), *aff'd sub nom. Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (same).

- ¹¹ See *In re Application of Chevron Corp.*, 709 F. Supp. 2d at 291 (S.D.N.Y. 2010).
- ¹² Compare *Servotronics*, 2020 WL 5640466 (denying discovery) with *Servotronics*, 954 F.3d at 210 (granting discovery).
- ¹² 28 U.S.C. § 1782(a).
- ¹³ *Servotronics*, 2020 WL 5640466 at *693.
- ¹⁴ *Servotronics*, 954 F.3d at 214.
- ¹⁵ Pet. For Writ of Cert., *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794 (U.S.).
- ¹⁶ § 21:195. Court-ordered discovery in aid of international arbitration, 8 Bruner & O'Connor Construction Law.
- ¹⁷ See *In re Dubey*, 949 F. Supp. 2d 990 (C.D. Cal. 2013).