Servotronics and the U.S. Supreme Court: Is an Answer to the Circuit Split on § 1782 Requests for Private International Commercial Arbitration on the Horizon?

Introduction

Parties to private international commercial arbitrations outside of the United States occasionally need help when it comes to evidence production in their arbitral proceedings. One tool to help these parties, particularly if such documents, materials, or individuals sought for deposition are located in the United States, has been § 1782 actions in U.S. courts. To date, there has been a circuit split among courts in the United States as to whether a "private international arbitration" falls within the scope of § 1782(a) to allow for parties to such an arbitration to utilize § 1782 actions. However, that may all change soon, as the U.S. Supreme Court has granted cert to hear a case that may be pivotal to resolving the circuit split – *Servotronics v. Rolls-Royce PLC*.

What Is A § 1782 Request?

A "§ 1782" request is a reference to a type of motion brought in U.S. federal court by a party to a foreign or international tribunal (or the foreign or international tribunal itself) seeking assistance by U.S. courts for the collection of testimony, statements, or documents for use in proceedings in that foreign or international tribunal. The basis and rule for this action is spelled out in 28 U.S.C. § 1782. Specifically, § 1782(a) states that "[t]he 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[.]" In plain terms, it is a tool that can be used by parties to a dispute being heard by a foreign tribunal to collect evidence located in the United States through U.S. courts. Section 1782 actions require that the respondent (i.e., the person from whom discovery is sought) is present in the district of the court, and not the documents sought (if documents are what is

sought from discovery). *See Schmitz v. Berstein Liebhard & Lifshitz, LLP*, 376 F.3d 79, 83 (2nd Cir. 2004).

A key decision guiding § 1782 actions in the United States is *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) ("*Intel*"). In *Intel*, the U.S. Supreme Court articulated a mandatory three-factor test and additional four-question discretionary test for courts to use in determining whether to grant a § 1782 motion. The mandatory three-factor test that a court must consider when deciding whether to grant a § 1782 request states that for a § 1782(a) motion to be granted:

- The respondent should have residency or be found within the court's district;
- The discovery sought should be for use in a foreign tribunal proceeding; and
- The person seeking discovery should be an "interested person, which may be a third party in addition to the actual litigants or parties to the proceeding.

Additionally, the four discretionary question factors that a court may consider when deciding whether to grant a § 1782 request are:

- Is the person from whom discovery is sought a participant in the foreign proceeding?
- What is the nature of the foreign tribunal and character of the proceeding underway abroad, and is the foreign government or the court or agency abroad receptive to U.S. federal court assistance?
- Is the sole purpose of the 1782(a) request to attempt to circumvent foreign proof-gathering restrictions of policies?
- Is the request unduly intrusive or burdensome?

While *Intel* is considered a guiding decision for § 1782 requests in U.S. courts, it is the second factor of the mandatory test that *Intel* failed to resolve, namely what constitutes a "foreign tribunal" and specifically whether private international arbitration tribunals can be considered a "foreign tribunal." This has led to the current circuit split among U.S. courts, and the potential resolution of this issue by the U.S. Supreme Court in *Servotronics*.

The Circuit Split

Post-*Intel*, parties have argued that the decision has broadened the scope of whether a private international arbitral tribunal is considered a "foreign international tribunal" for purposes of § 1782(a), and whether discovery assistance is permitted under § 1782 for private commercial international arbitration. However, both pre-*Intel* and now post-*Intel*, different U.S. federal circuits have taken different views of this question, which has led to the current circuit split on whether a private international arbitral tribunal is a "tribunal" under § 1782.

In 1999, the Second Circuit applied a restrictive definition of "foreign international tribunal" and took the position that a private international arbitral tribunal is not a "tribunal" for purposes of § 1782. *See National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2nd Cir. 1999). The Second Circuit reaffirmed its position post-*Intel* in *Hanwei Guo v. Deutsche Bank Sec*., 965 F.3d 96, 100 (2nd Cir. 2020). Also in 1999, pre-*Intel*, the Fifth Circuit similarly found that the language in § 1782 was ambiguous and that the legislative history and policy supported a finding that private arbitral tribunals were outside the scope of § 1782. *See Republic of Kazakhstan v. Bidermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999). Then, post-*Intel*, the Fifth Circuit followed its pre-*Intel* decision in 2009. *See El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009). Lastly, and most currently, the Seventh Circuit adopted the Second Circuit's reasoning in finding that a private international arbitral tribunal is not within the definition of a "foreign international tribunal" for purposes of § 1782 requests. *See Servotronics Inc., v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020). It is this last case that forms the basis of the current *Servotronics* case that was granted cert before the U.S. Supreme Court. It is worth noting that before the Seventh Circuit's decision in *Servotronics*, it previously espoused that a private arbitration panel in Germany "might be considered to be a § 1782 tribunal"; however, this was merely dicta and not a formal holding, and the Seventh Circuit made clear its position of following the Second and Fifth Circuit's reasoning after *Servotronics* in 2020. *See GEA Group, AG v. Flex-N-Gate Corp*., 740 F.3d 411, 419 (7th Cir. 2014).

While the Second, Fifth, and Seventh Circuits have found that a private international arbitral tribunal is not a "foreign international tribunal" for purposes of § 1782, at least two circuits have come to the opposite conclusion post-

Intel. The Fourth Circuit disagreed with the holdings in the Second and Fifth Circuits, finding that § 1782 provides for a broad interpretation of "foreign international tribunal" that would include a private international arbitral tribunal, and that discovery assistance can be rendered for purposes of private commercial arbitration. *See Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020). This case also forms part of the current *Servotronics* case that was granted cert before the U.S. Supreme Court. The Sixth Circuit holds a similar position to that of the Fourth Circuit, finding that "foreign international tribunal" can include private international arbitral tribunals, and discovery assistance can be rendered for purposes of private commercial arbitration. *See Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019). It is also worth noting that in 2012, the Eleventh Circuit relied on the *Intel* decision in finding that the word "tribunal" in § 1782 includes private international arbitral tribunals and that § 1782 can be used for discovery assistance for private commercial arbitration; however, this decision was later vacated for issues unrelated to the arbitration. *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA) Inc*., 685 F.3d 987, 994-995 (11th Cir. 2012), *vacated and superseded*, 747 F.3d 1262 (11th Cir. 2014).

It is also worth noting that the issue is currently pending in the Third and Ninth Circuits, who have yet to render a decision. *See In re EWE Gassepeicher GMBH*, Docket No. 19-mc-109-RGA, 2020 WL 1272612 (D. De. March 17, 2020), *appeal docketed*, No. 20-1830 (3rd 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 mon., In re HRC-Hainan Holding Co. LLC*, No. 20-15371 (9th Cir. March 4, 2020).

For those keeping score at home, that is three circuits (Second, Fifth, and Seventh) finding that a privateinternational arbitral tribunal is *not* a "foreign international tribunal" for purposes of § 1782 and against allowingdiscovery assistance for private commercial arbitration; two circuits (Fourth and Sixth) finding that a privateinternational arbitral tribunal *is* a "foreign international tribunal" for purposes of § 1782 and for allowing discoveryassistance for private commercial arbitration; one circuit (Eleventh) that has gone back and forth and not yet madea final conclusion; and two circuits (Third and Ninth) where the issue is still pending. Thus, the *Servotronics*case has perfectly set up this issue for resolution by the U.S. Supreme Court.

Servotronics V. Rolls-Royce

The *Servotronics* case granted cert at the U.S. Supreme Court is an appeal of the case from the Seventh Circuit (*Servotronics Inc., v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020)), holding that § 1782 does not cover assistance for private international commercial arbitrations. However, both the Seventh Circuit and Fourth Circuit (*Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020)) decisions are relevant to the current case.

According to Servotronics' cert petition, Servotronics is the respondent in an arbitration commenced by Rolls-Royce in London, England under the Rules of the Chartered Institute of Arbitrators, pursuant to the dispute resolution clause of an agreement between Servotronics and Rolls-Royce. The dispute stemmed from an aircraft engine tail-pipe fire that occurred during a customer demonstration and acceptance flight test at a Boeing facility in South Carolina in the United States. As a result of the fire, Boeing sought compensation from Rolls-Royce for damage to the aircraft, and their insurers settled for USD 12 million. Rolls-Royce sought reimbursement of the settlement amount from Servotronics, and when negotiations and mediation failed between them, Rolls-Royce initiated the arbitration in London. During document exchange in the arbitration, Rolls-Royce and Boeing refused to provide materials that Servotronics considered critical to its case. As a result, it launched *ex parte* § 1782 requests. The first was a document subpoena request against Boeing in the Northern District of Illinois (Seventh Circuit), and the second was three deposition requests against Boeing employees in the District of South Carolina (Fourth Circuit).

In the District of South Carolina case, the district court denied Servotronics' request, holding that private arbitral bodies are not "foreign tribunals" for purposes of § 1782(a). Servotronics then appealed to the Fourth Circuit and

both Boeing and Rolls-Royce filed motions to intervene and participate in the appeal (both of which were granted). On appeal, the Fourth Circuit reversed the district court decision, and found that the legislative history behind § 1782, the *Intel* decision, and interpretation of the Federal Arbitration Act supported the inclusion of private arbitral bodies as "foreign tribunal[s]" for purposes of § 1782(a). In the Northern District of Illinois case, the district court initially held in favor of Servotronics in granting the § 1782 request. However, Rolls-Royce filed a motion to intervene, vacate, and quash the subpoena, which Boeing joined. The district court then reversed course and granted the motion to quash the subpoena. Servotronics appealed to the Seventh Circuit, which affirmed the district court decision to grant the motion to quash, stating that it was joining the Second and Fifth Circuit's interpretation of excluding private arbitral tribunals from the scope of "foreign tribunal" for purposes of § 1782(a).

Servotronics filed a cert petition with respect to the Seventh Circuit decision to the U.S. Supreme Court on December 7, 2020. In its petition, it argued that part of the unique issue presented in this case is that this case itself is a clear demonstration of the circuit split – specifically, the different decisions Servotronics received on its § 1782 requests in the Seventh and Fourth Circuits. On March 22, 2021, Servotronics' cert petition was granted, and the case is set to be heard by the U.S. Supreme Court. Now that the U.S. Supreme Court has granted cert, Servotronics has attempted to adjourn the hearings with respect to the ongoing connected arbitration in London. However, on March 23, 2021, the arbitral tribunal denied Servotronics' request for adjournment, and a hearing in front of the arbitration tribunal is scheduled for May 2021. It appears unlikely that the U.S. Supreme Court case will be completed before then, which raises an issue of mootness for the *Servotronics* case. However, it is still possible that, given the circuit split and extraordinary issues presented in *Servotronics*, the U.S. Supreme Court may be sufficiently motivated to hear the case despite possible mootness of the issue. Only time will tell.

What It Means For Now

Since *Servotronics* is still pending cert, that means that the circuit split on whether § 1782 requests can be used for discovery assistance in private international commercial arbitrations remains. As a result, parties to private international commercial arbitrations should make several considerations when determining whether a § 1782 request in the U.S. court system may be the best course of action for document discovery or even compelling a deposition:

- Where is the party against whom discovery is sought located?
- What type of discovery is sought?
- What is the timeline of the discovery sought compared to the arbitration proceedings (issue of mootness)?
- How critical is the discovery sought to the arbitration and how will it be used in the foreign arbitration?
- Are there alternative means of obtaining discovery?
- How to consider the *Intel* mandatory and discretionary factors?

Once *Servotronics* is resolved, we may finally have an answer and consistent applicable standards for the use of § 1782 requests for private international commercial arbitration. Until then, be wary of where your § 1782 request is being filed.

Members of the combined team at Winston & Strawn LLP and YuandaWinston China Law Office are experienced dispute-resolution professionals who are capable of navigating complex cross-border dispute-resolution strategies, like § 1782 requests, in private international commercial arbitrations. Our international team can work across borders and stands ready to assist.

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