SERVOTRONICS ENIGMA: DOES § 1782(a) EXTEND TO PRIVATE INTERNATIONAL ARBITRAL TRIBUNALS?

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I. INTRODUCTION

Parties to cross-border business transactions often consent to private international arbitration[1] to avoid the possibility of having to resolve a dispute in a foreign legal system or State courts. When a U.S. party is involved, the incentives to avoid domestic litigation are even greater since the scope of discovery in U.S litigation tends be much more expansive than in international arbitration.[2] While this explicit choice to opt out from litigating a dispute in a court provides the parties with the comfort of being able to resolve the dispute before a neutral panel of arbitrators, it comes with certain disadvantages. One of the largest procedural setbacks in international arbitration is the lack of power by an arbitral tribunal to coerce a third party to appear or produce evidence in the arbitration proceedings.[3] In cases in which only a third party has access to important evidence, but is unwilling to appear in the proceedings, an arbitral tribunal's hands are tied. As a result, an arbitral tribunal is often inevitably dependent on courts to compel a third party to produce such evidence in such cases.[4] Parties in private international arbitration have relied on § 1782(a) of Title 28 of the United States Code to obtain such evidence in U.S. district courts. The pertinent section provides:

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1. The term means international commercial arbitration and is to be distinguished from investor-state arbitration.

2. FRANCO FERRARI & FRIEDRICH ROSENFELD, INTERNATIONAL COMMERCIAL ARBITRATION: A COMPARATIVE INTRODUCTION 14 (John Fellas consultant ed., 2021).

3. *Id.* at 15-16, 125.

4. *Id.* at 125, 127-128.

> 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. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.[5]

If successfully utilized, this statute can allow "any interested person" to obtain documents and/or testimony that they would otherwise not be privy to, even if the U.S. individual is not a witness in the arbitration and the rules governing the discovery process in the arbitration are narrower than the scope that is afforded by U.S. courts in § 1782 proceedings.[6]

However, U.S. courts' inconsistent application of the statute at the trial and appellate levels has created much uncertainty as to the practicability of the statute. More specifically, over a span of twenty years, different courts that have grappled with the issue of whether a "foreign or international tribunal" in § 1782(a) covers an arbitral tribunal in private international arbitration, as opposed to foreign public courts, and have rendered conflicting decisions. The most recent decision on the issue by the Seventh Circuit in *Servotronics Inc. v. Rolls Royce PLC* created even greater confusion because the Fourth Circuit had previously held the opposite on essentially the same case in *Servotronics, Inc. v. Boeing Co.* six months earlier, creating a circuit split within the same case. This comment will examine the significance of the issue in the practice of international commercial arbitration and argue that a "foreign or international tribunal" in § 1782(a) should not include private international arbitral tribunals based on the legislative intent,

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5. 28 U.S.C. § 1782 (emphasis added).

6. Danielle Morris & Sam Winter-Barker, *Will the Uncertainty Around the Availability of Section 1782 Discovery in International Arbitration Proceedings Ever Be Resolved?*, JDSUPRA (September 21, 2021), https://www.jdsupra.com/legalnews/will-the-uncertainty-around-the-7983948/.

its compatibility with the Federal Arbitration Act (FAA), and policy considerations.

II. Background

In 1999, the Second Circuit[7] and the Fifth Circuit[8] each held that a private international arbitral tribunal is not a "tribunal" for the purposes of § 1782. Such a restrictive reading of § 1782(a) was settled law for about twenty years. In 2004, in *Intel Corp. v. Advanced Micro Devices, Inc.*, though not directly addressing the issue of private international arbitration, the Supreme Court held that the Commission of the European Communities is a "tribunal" as it "acts as a first-instance decision maker."[9] The Supreme Court's recognition of the Commission as a "tribunal" in *Intel* led some courts to interpret § 1782(a) broadly. In 2019, the Sixth Circuit held in *In re Application to Obtain Discovery for Use in Foreign Proceeding* that a private foreign arbitral tribunal is a "foreign or international tribunal" under § 1782(a), followed by the Fourth Circuit's decision in *Servotronics, Inc. v. Boeing Co.*[10] in March 2020. As mentioned above, the circuit split was further deepened when the Seventh Circuit ruled the opposite on essentially the same facts and parties in *Servotronics, Inc. v. Rolls-Royce, PLC* six months later.

The underlying dispute in the two *Servotronics* cases arose out of an engine fire that occurred in a Boeing 787 aircraft. Rolls-Royce PLC, the manufacturer of the aircraft engine, settled damages claims with Boeing Company. In an international arbitration seated in the United Kingdom, Rolls-Royce then sought indemnity from Servotronics Inc., the maker of engine components. On October 26, 2018, before the arbitral panel was constituted, Servotronics filed a § 1782(a) application seeking permission to serve broad document discovery on Boeing in the Northern District of Illinois. The subpoena was

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7. National Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).

8. Republic of Kazakhstan v. Bidermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) (addressing "private international arbitration" in general rather than referencing the investment-treaty nature of the dispute).

9. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 242 (2004).

10. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 216 (4th Cir. 2020).

served on a third party holding the relevant records and Rolls-Royce and Boeing later intervened to quash the subpoena. On the same day, in a parallel proceeding, Servotronics also applied for subpoenas directed at former and current employees of Boeing in the District of Southern Carolina. The district court of Southern Carolina denied the application based on the reasoning that § 1782(a) does not extend to private international arbitration, but the Fourth Circuit later reversed. On the other hand, the Illinois district court quashed the subpoena based on the same reasoning as the district court of Southern Carolina. On an appeal by Servotronics, the Seventh Circuit affirmed the district court's ruling. Having lost in the Seventh Circuit, Servotronics filed a petition for writ of certiorari, which was granted on March 21, 2021.

The Supreme Court's grant of a petition for writ of certiorari was expected to provide much-needed clarity by settling the deep circuit split and providing uniformity among federal courts, but as the case was withdrawn on September 8, 2021 after settlement.[11] The question on the scope of 28 U.S.C. § 1782(a) remains unanswered.

III. Significance of the Case

Undoubtedly, the Supreme Court's decision on whether §1782(a) discovery assistance extends to private arbitral tribunals was expected to have significant implications for both U.S. and foreign parties involved in cross-border commercial disputes.

From a practical standpoint, the present circuit split has forced parties and practitioners to analyze their ability to obtain discovery in support of their case in private commercial arbitration on a circuit-by-circuit basis. This practice has urged parties to forum-shop openly, which may result in inequitable circumstances where an outcome of a case is determined solely upon the location of the relevant evidence in the United

11. Bryanna Rainwater, *Case Dismissed: Supreme Court Lightens its Arbitration Load as Servotronics is Removed from 2021-22 Docket,* The Blog of the CPR Inst., (September 8, 2021), https://blog.cpradr.org/2021/09/08/case-dismissed-supreme-court-lightens-its-arbitration-load-as-servotronics-is-removed-from-2021-22-docket/.

States, a consequence certainly unintended by Congress.[12] For instance, post-*Intel*, the use of § 1782(a) for discovery in aid of international proceedings increased dramatically: "Between 2005 and 2017, the number of discovery requests received nationwide for use in international civil or commercial (as opposed to criminal) proceedings quadrupled from approximately 50 to 200 annually."[13] By providing a uniform standard in federal law, the Supreme Court's decision was expected to prevent this type of forum shopping and docket crowding.

In addition, the Supreme Court's decision was expected to decrease the potential for protracted litigation on a collateral matter even before the arbitral tribunal gets to the merits of the case. According to the International Institute for Conflict Prevention & Resolution, the average length from the initial filing of the § 1782 application until decision on the application of ten § 1782 cases involving an international arbitration decided by circuit courts of appeal or still pending before them was 16.8 months.[14] This number demonstrates that parties are spending considerable time and expense litigating a threshold question on discovery, devoting resources that could instead be used to resolve the underlying dispute on the merits. In cases where an arbitral tribunal issues a final award for the underlying arbitration while a § 1782 case is pending in the district or appellate court, the cases become moot and the resources of the party are wasted.[15] This lag and increased cost are contrary to the intended goal of international arbitration: effective and efficient resolution of disputes.

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12. Brief of the Int'l Inst. for Conflict Prevention & Resol. as Amicus Curiae in Support of Petitioner at 3, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

13. Brief of Professor Yanbai Andrea Wang as Amicus Curiae in Support of Neither Party at 5, Servotronics, Inc. v. Rolls-Royce, PLC , (U.S. dismissed 2021) (No. 20-794).

14. Brief of the International Inst., *supra* note 12, at 7.

15. *Id.* at 6.

IV. § 1782(A) DISCOVERY DOES NOT EXTEND TO PRIVATE INTERNATIONAL ARBITRAL TRIBUNALS

a. *Legislative history supports restrictive interpretation of the term "tribunal"*

The plain meaning of the word "tribunal" does not provide a clear answer to whether § 1782(a) discovery extends to private international arbitral tribunals and such lack of clarity is at the heart of the debate. As the Second, Fifth, and Seventh Circuits correctly pointed out, the term "tribunal" is ambiguous and, if given its ordinary definition, the term may be broad enough to include an international arbitral tribunal.[16] For that reason, the courts have turned to the legislative history and surrounding statutory scheme for further guidance in interpreting § 1782(a).

It is undisputed that the original goal of § 1782(a) and its predecessors was to promote government-to-government judicial cooperation.[17] Congress first provided for federal-court aid to foreign tribunals in 1855 and unanimously adopted legislation recommended by the Commission on International Rules of Judicial Procedure in 1958.[18] In 1964, Congress replaced the words "in any judicial proceeding pending in any court in a foreign country" with "in a proceeding in a foreign or international tribunal," the current language of the statute. The Senate Report explains that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings."[19] While the Fourth and Sixth Circuits viewed this amendment as a deliberate choice made by Congress to broaden the scope of the statute to include private international arbitration tribunals,[20] the Second, Fifth, and Seventh Circuits viewed it as a "measured

16. *See* National Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 188 (2nd Cir. 1999); Republic of Kazakhstan v. Bidermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999); Servotronics, Inc. v. Rolls-Royce, PLC, 975 F.3d 689, 692 (7th Cir. 2020).

17. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 247 (2004).

18. *Id.*

19. *Id.*at 249.

20. *See* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 213 (4th Cir. 2020); *In re* Application to Obtain Discovery for Use in Foreign Proc., 939 F.3d 710, 728 (6th Cir. 2019).

expansion" to capture quasi-judicial entities and certain intergovernmental bodies.[21]

The Second, Fifth, and Seventh Circuits' understanding is in line with the original purpose of the statute. Private international arbitration is essentially an independent regime that exists outside the court system. Against the backdrop of the legislative history, the expansive interpretation of § 1782(a) does not further the intended goal of government-to-government judicial assistance. It is also notable that there was no specific mention of private international arbitral tribunals in either the text or the legislative history. Had Congress intended to open up discovery assistance to a whole new adjudicatory regime, at least a passing reference to it would likely have been made. Therefore, it follows that the more reasonable reading of the term "tribunal" would include foreign "governmental" tribunals but not private international arbitral tribunals.

In *Servotronics, Inc. v. Boeing Co.*, the Fourth Circuit came up with a novel reasoning that private international arbitration is a "product of government-conferred authority."[22] It argued that because private international arbitration in the United Kingdom is subject to the governmental regulation and supervision of the U.K. Arbitration Act, it can be viewed as a government-sponsored endeavor.[23] This characterization is misguided. While national courts may exercise limited supervisory and supportive functions with regard to arbitration proceedings, virtually all national arbitration regimes provide arbitral tribunals with broad inherent authority over the fact-finding process, which generally includes discovery.[24] By conferring adjudicatory power upon arbitrators, parties indicate their intent to exclude their dispute from being subject to the decision-making authority of courts.[25] Therefore, characterizing "private" international arbitration in such way would be at best a leap.

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21. Brief for The United States as Amicus Curiae Supporting Respondents at 20, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

22. Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 214 (4th Cir. 2020).

23. *Id.*

24. GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2506 (3d ed. 2020).

25. FERRARI, *supra* note 1, at 2.

b. *Broad interpretation of § 1782(a) conflicts with the Federal Arbitration Act (FAA)*

Broad interpretation of a "foreign or international tribunal" in § 1782(a) to cover private international arbitration would result in two incompatible discovery regimes for domestic arbitration and international or foreign arbitration as § 1782(a) would allow discovery not contemplated under the FAA.[26] Enacted in 1925, the FAA provides judicial facilitation of private dispute resolution through arbitration by laying out the legal principles specifically applicable to all arbitrations in the United States involving interstate or foreign commerce.[27]

In terms of discovery, § 7 of the FAA expressly addresses the arbitrators' powers to govern the discovery process with respect to both parties and non-parties to the arbitration.[28] The discovery standard under § 7 is more limited than that of § 1782(a) in three ways: first, the authority to obtain discovery orders from district courts is conferred on the arbitrators, not on any "interested persons"; second, the enforcement authority is only conferred upon the district court of the district in which such arbitrators, or a majority of them, are sitting, not anywhere evidence is located; and third, discovery can be allowed after an arbitral tribunal has been constituted since only arbitrators can order discovery while § 1782(a) allows pre-trial discovery.[29] Therefore, as the Second, Fifth, and Seventh Circuits repeatedly highlighted, allowing § 1782 discovery in private international arbitration would lead to a strange outcome where parties in foreign arbitration would have access to broader discovery than parties in domestic arbitration even though both involve "foreign or international tribunals."[30]

The above limitations are purposefully placed to prevent expansive discovery, thereby ensuring speed, efficiency, and economy of arbitration, the principal advantages of arbitra-

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26. *See* National Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184, 187-188 (2nd Cir. 1999); Rolls-Royce, PLC, 975 F.3d 689 (7th Cir. 2020) at 695-696.

27. See UNDERSTANDING THE FEDERAL ARBITRATION ACT, Practical Law Practice Note 0-500-9284 (Westlaw).

28. Born, *supra* note 25, at 2500.

29. National Broadcasting Co., 165 F.3d 184 (2nd Cir. 1999) at 187-188.

30. See National Broadcasting Co., 165 F.3d 184 (2nd Cir. 1999) at 187-188; Servotronics, Inc. v. Rolls-Royce, PLC, 975 F.3d 689, 695-696 (7th Cir. 2020).

tion.[31] Therefore, construing § 1782, a general federal statute that governs international judicial assistance, to override § 7 of the FAA, a carefully calibrated arbitration-specific statute, would not only undermine the advantages of international arbitration, but also be inconsistent with the intent of the parties opting for specific advantages of arbitration.[32] In fact, in international arbitration, the norm is that the parties only disclose a limited amount of documents related to issues, claims, and defenses that are core to the dispute[33] and expansive American-style discovery is generally considered inappropriate.[34] If § 1782 discovery is allowed in private arbitration, federal courts could "unintentionally subvert the parties' bargained-for arbitration agreement and provide a tactical advantage to one party over another by enabling discovery that would have otherwise been disallowed in the arbitration."[35]

c. *Policy Considerations*

Based on the broad interpretation of the term "foreign or international tribunal" in § 1782(a) to cover private international arbitration, any third party located in the United States may be ensnared into a dispute by being subpoenaed to produce evidence. In moving to quash the subpoena or vacate the district court's grant of the § 1782(a) application, the burden is on the target of the subpoena, which is likely to be a U.S. corporation or resident, to show that discovery is unwarranted.[36] This raises a concern that companies based in the

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31. Brief for The United States as Amicus Curiae Supporting Respondents at 27, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

32. *Id.*, 28.

33. John Jay Range & Armando Cordoves, Jr., *Alternative Dispute Resolution*, AM. BAR ASS'N, (December 9, 2020), https://www.americanbar.org/groups/infrastructure-regulated-industries/publications/recent-dev-iris-2020/i-alternative-dispute-resolution/.

34. 1999 IBA WORKING PARTY & 2010 IBA RULES OF EVIDENCE REV. SUBCOMM., COMMENTARY ON THE REVISED TEXT OF THE 2010 IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION (2020), https://www.ibanet.org/MediaHandler?id=DD240932-0E08-40D4-9866-309A635487C0.

35. Range & Cordoves, *supra* note 33.

36. Brief of Inst. of Int'l Bankers as Amicus Curiae in Support of Respondents at 5, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

United States engaged in international business may be disproportionately affected by § 1782 actions.[37] For instance, in a dispute involving a party based in the United States and a foreign party located overseas, because § 1782 authority is limited to the district where "a person resides or is found," the party based in the United States may be subject to subpoena, while the counterparty likely will not.[38] This asymmetry is amplified in situations where a company based in the United States being summoned into the § 1782 action is not even a party to the underlying arbitration and the dispute bears no relationship to the United States in any way.[39] In fact, the Institute of International Bankers stated that banks are often forced to engage legal counsel and foreign-law experts due to broad and unduly burdensome § 1782(a) requests asking them to produce overwhelming number of documents.[40]

It has been argued that because district courts have discretion to grant or deny § 1782 applications, even in granting such requests they have "ample latitude to narrow, limit, or condition discovery."[41] However, district courts' discretion to deny § 1782 requests does not provide appropriate safeguards for unnecessary protracted litigation. District courts are forced to engage in at least preliminary analysis of the "fuzzy multifactor test"[42] of *Intel* including factors like, among others, the nature of the foreign tribunal, the character of the proceeding abroad, the receptivity of the foreign court or agency to federal court judicial assistance, whether the request is an attempt to circumvent foreign proof-gathering restrictions or other policies of the foreign country, and whether the request is unduly intrusive or burdensome.[43] As a remedy, the Committee on International Commercial Disputes of the New York City

37. Brief Amicus Curiae of the Int'l Ct. of Arb. of the Int'l Chamber of Com. in Support of Neither Party at 13, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

38. *Id.* at 2.

39. *Id.* at 19.

40. Brief of Inst. of Int'l Bankers, *supra* note 36, at 4-5.

41. Brief Amicus Curiae of Professor George A. Bermann in Support of Petitioner at 6, Servotronics, Inc. v. Rolls-Royce, PLC, (U.S. dismissed 2021) (No. 20-794).

42. Linda J Silberman, *Discovery, Arbitration, and 28 USC §1782: Rules or Standards?* 27 (N.Y.U, Public Law Research Paper No. 21-21, 2021).

43. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 244-5 (2004).

Bar has suggested a "best practice" where § 1782 application in aid of a foreign arbitration can be made only with the approval of the arbitrators.[44] However, the Supreme Court has been reluctant to impose such restrictions when the text of the statute does not warrant so.[45] In addition, because § 1782 applications are handled by district courts *ex parte*, in many cases, the respondent in the proceedings does not know whether the arbitral tribunal in the underlying arbitration will consider the requested evidence. Considering that the parties have agreed not to resolve their dispute in the court, such an investment of judicial resources makes no sense.[46]

V. Conclusion

Although the *Servotronics* case was withdrawn from the Supreme Court's docket, the Court will likely have other opportunities in the near future to weigh in on the issue, as there are pending cases in the dockets of the Supreme Court[47] and the Ninth Circuit.[48]

When parties consent to resolve disputes through arbitration, they agree that the arbitral tribunal will adjudicate their dispute and that it has authority to govern the process through which that dispute is adjudicated. Therefore, it follows that in most cases, discovery occurs only within the context of the arbitration, under the control of the arbitral tribunal, and only involving the parties to the arbitration.[49] This reflects the general principle of judicial non-interference in the arbitral pro-

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44. The Comm. on Int'l Com. Disputes, N.Y.C. Bar Ass'n, 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration – Applicability and Best Practices 35 (2008).

45. Silberman, *supra* note 43, at 28.

46. *Id.* at 5.

47. Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216 (2d Cir. 2021). The case concerns investor-state arbitration, but the same logic would extend to investor-state arbitration as it shares salient features of private international arbitration: that it is a relatively recent development of alternative dispute resolution mechanism where parties voluntarily submit their dispute to a nonjudicial body of arbitrators empowered by the parties' consent in the interest of fairness and efficiency.

48. HRC-Hainan Holding Co.v. Hu, No. 20-15371 (9th Cir. filed March 4, 2020) (WestLaw).

49. Born, *supra* note 25, at 2456.

cess.[50] Construing § 1782(a) to cover private international arbitration is at odds with the purpose of the statute illustrated by the legislative history and intent of the parties that agreed to resolve the dispute in an expeditious and streamlined manner. As such, taking into consideration the legislative history, the scope of the FAA, and policy implications, the Supreme Court should find that § 1782(a) does not extend to private arbitral tribunals.

50. *Id.* at 2353-2354