Kluwer Arbitration Blog

The Circuit Split on the Scope of Section 1782 Discovery in the United States: Will it Ever Get Resolved?

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Much has been written about the U.S. Supreme Court case *Servotronics Inc. v. Rolls-Royce PLC*, which concerns the scope of 28 U.S.C. § 1782 ("***Section 1782***"). This interest is not surprising given this was set to be the first time in 17 years that the U.S. Supreme Court (the "***Court***") would consider the scope of discovery permitted under Section 1782, a U.S. statute allowing parties to obtain discovery from those in the U.S. for use in a proceeding "in a foreign or international tribunal." The case was expected to resolve a 3-2 split (discussed in several prior posts) amongst the United States Courts of Appeals regarding whether Section 1782 could be used to obtain discovery in connection with international commercial arbitrations. It was scheduled to be one of the first cases argued in the Court's upcoming term, with a hearing scheduled for October 5, 2021.

That all changed last week, when Servotronics filed a notice of its intention to dismiss the case and the Court subsequently dropped the case from its oral argument calendar. While the dismissal resolves this particular case, it leaves unresolved the fundamental question the Court was set to answer. What impact will this uncertainty have on the growing use of Section 1782—particularly in connection with private international arbitrations? And can or will the circuit split ever be resolved?

The Unanswered Question

The question before the Court in *Servotronics* was whether Section 1782 extends to international commercial arbitral tribunals. The issue comes down to the construction of the term "foreign or international tribunal" contained in the text of the statute itself.

The underlying commercial arbitration in *Servotronics* arose out of a dispute between Servotronics and Rolls-Royce regarding liability for an engine fire during a Boeing test flight. Servotronics sought discovery from Boeing in two different circuit courts in aid of that commercial arbitration, but the two circuit courts issued diverging rulings on Servotronics' separate requests. The Seventh Circuit barred the discovery, holding that Section 1782 "does not authorize the district court to compel discovery for use in a private foreign arbitration." Meanwhile, the Fourth Circuit allowed the discovery, reasoning that the "private" arbitral tribunal was indeed a "foreign tribunal" within the meaning of Section 1782.

Some courts have tried to draw a distinction between so-called "private" and "state-sponsored" arbitral tribunals—based on the apparent theory that Section 1782 was designed to assist foreign governments with their state-sponsored legal processes, and Section 1782 thus extends to investment arbitral tribunals (as being "state-sponsored") and perhaps to some commercial tribunals if they are clearly state-sponsored, but that Section 1782 does not extend to the majority of commercial arbitral tribunals (which they say are "private"). This issue was not directly relevant in *Servotronics*. Indeed, *Servotronics* concerned the same underlying commercial arbitration, with the same "private" arbitral tribunal. Yet, the two Circuit courts reached divergent results.

This divergence illustrates the existing 3-2 Circuit split on this issue. The Second, Fifth and Seventh Circuit have held that Section 1782 *does not* allow for the taking of discovery in aid of private commercial arbitrations taking place abroad; meanwhile—for the first time at a circuit court level—the Sixth Circuit held in 2019 in *ALJ v. Federal Express* (litigated on behalf of ALJ by our firm, and some of this post's authors) that Section 1782 *does* apply to private arbitrations. The Fourth Circuit later reached the same result.

The Circuit Split Endures

The uncertainty created by that divergence exists—and now endures—amidst an explosive increase in the number of Section 1782 applications being filed. Based on our quick search of electronic dockets, applications have increased 6-fold in the last fifteen years: from 55 in 2004, to almost 330 in 2020. And the 2020 number represents a more than 50% *single-year* increase over the approximately 215 applications filed in 2019. Certainly not all of those applications (or even the vast majority) seek discovery for use in private international arbitrations, but the number that do has not been insignificant.

It also is clear that because of the existing split, some Circuit courts have held off on answering the question. Both the Third and Ninth Circuit have pending cases on this very issue. The Ninth Circuit explicitly stated in March of this year that it was holding in abeyance its case on this issue pending the resolution of *Servotronics* (after a September 2020 oral argument, followed by a round of supplemental briefing on the issue). *In re Application of HRC-Hainan Holding Co., LLC*, Case No. 20-15371 (9th Cir.). The Third Circuit also has a case pending on this issue, with the question fully briefed and oral argument held in December 2020. *In re Application of EWE Gasspeicher GmbH*, Case No. 20-1830 (3d Cir.). Both courts will now need to decide their cases without the guidance of the Court, potentially deepening the Circuit split.

The split and the accompanying uncertainty could endure for years. It's possible that once the Third and Ninth Circuit cases are decided, they could make their way to the Court. But that will take time, and there is no certainty any case will ever make it back to the Court on this issue.

First, litigants need an appetite to see a case all the way through to a Supreme Court decision. But if the underlying arbitration is resolved, either via settlement or a final award, the parties may not wish to continue litigating about discovery that is no longer needed. This may be what happened in *Servotronics*, as the arbitration hearing took place in May and a decision apparently was expected in August. (The parties to the Ninth Circuit case mentioned above appear willing to continue litigating the issue even though the underlying arbitration has concluded).

Second, even if the parties to an underlying arbitration that has ended wish to continue litigating a

Section 1782 case, courts may consider the case to be moot and refuse to decide it on the merits. We believe courts still could decide the issue based on an exception to the mootness doctrine for cases that are "capable of repetition, yet evading review."

What Question Will Be At Issue When The Court Next Addresses Section 1782?

Not only are we unsure *when* the Court will next address Section 1782, we also don't know exactly *what* the Court will address. The question presented to the Court in *Servotronics* was, as phrased in Servotronics' petition, whether Section 1782 "should be…applied to evidence sought in connection with proceedings before foreign and international private commercial arbitral tribunals." It did not directly include whether Section 1782 should be applied to investment arbitral tribunals.

That could change, especially if the *Servotronics* briefing is any indication. A total of 11 *amici* (*i.e.*, friends of the court) filed briefs, including professors, arbitrators, arbitral institutions, trade associations and a private company. Some of them were in support of one of the parties; others remained neutral. Our firm submitted briefs on behalf of Professor George Bermann and the International Court of Arbitration of the International Chamber of Commerce.

A quite notable *amicus* was filed by the U.S. government, which had also been allotted fifteen minutes of oral argument time. Significantly, the U.S. appeared to try to expand the scope of the question before the Court—contending not only that Section 1782 should not apply to commercial arbitral tribunals, but also that it should not apply to investment arbitral tribunals, including those administered by ICSID.

The U.S. acknowledged that Servotronics did not directly address the investment arbitration context but argued that the logic of Servotronics' position would extend Section 1782 to encompass investment arbitration, which it says is "problematic and would raise significant policy concerns." Therefore, the U.S. expressly asked the Court to reject the conclusion that Section 1782 extends to investment arbitration or, at a minimum, expressly reserve judgment on that question.

Prior to this briefing, there was consensus among federal courts that have decided the issue that Section 1782 discovery is available in aid of investment treaty arbitrations. Even the Second Circuit—which on multiple occasions has expressly refused to grant 1782 applications in aid of international commercial arbitrations—has stated that a different rule applies for investment treaty arbitrations. *See In re Application of Fund for Prot. of Inv. Rts. In Foreign States v. AlixPartners, LLP*, 5 F.4th 216 (2d Cir. 2021) (holding investor-state arbitration before an arbitral panel established pursuant to a BIT constituted a "proceeding in a foreign or international tribunal" under Section 1782), *petition for reh'g en banc denied*.

Interestingly, *amici* who otherwise took very different positions agreed on one issue: there is no meaningful distinction between commercial and investment arbitration for purposes of Section 1782. Of the five *amici* that discussed investment arbitrations—including two in favor of Servotronics (Professor Bermann, and Federal Arbitration, Inc.), two in favor of Rolls-Royce and Boeing (the U.S., and the International Arbitration Centre in Tokyo) and one neutral *amicus* (Professor Yanbai Andrea Wang) —all argued that the distinction between "state-sponsored" and "private" arbitral tribunals is flawed since commercial arbitrations share many of the salient features of investment arbitrations.

Given the briefing on this issue, it is possible that the next time the Court takes up Section 1782 it will not be limited to the question of commercial arbitration.

Hopefully, we will not have to wait another 17 years before the Supreme Court (or possibly even our legislative branch?) takes another crack at Section 1782. Until then, stay tuned!

As disclosed above, the authors' firm submitted two *amicus* briefs in *Servotronics Inc. v. Rolls-Royce PLC*, on behalf of Professor George Bermann and the International Court of Arbitration of the International Chamber of Commerce.

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