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Legal Update

Client Alert: The Seventh Circuit Picks a Side in the Debate Regarding Section 1782(a)

In *Servotronics Inc. v. Rolls-Royce PLC*,[1] the United States Court of Appeals for the Seventh Circuit deepened the circuit split on the question of whether 28 U.S.C. § 1782(a) authorizes district courts to order a person or entity to give testimony or documents for use in private foreign arbitrations. The Seventh Circuit sided with the Second and Fifth Circuits, holding that Section 1782(a) permits courts to provide discovery assistance only to state-sponsored foreign tribunals, not private international arbitrations.

Servotronics had asked the court to issue a subpoena compelling The Boeing Company to produce documents for a private London arbitration. The Seventh Circuit rejected that request. But in *Servotronics Inc. v. Boeing Co.*,[2] the Fourth Circuit took the opposite approach in a case involving the same parties and the same underlying private arbitration.

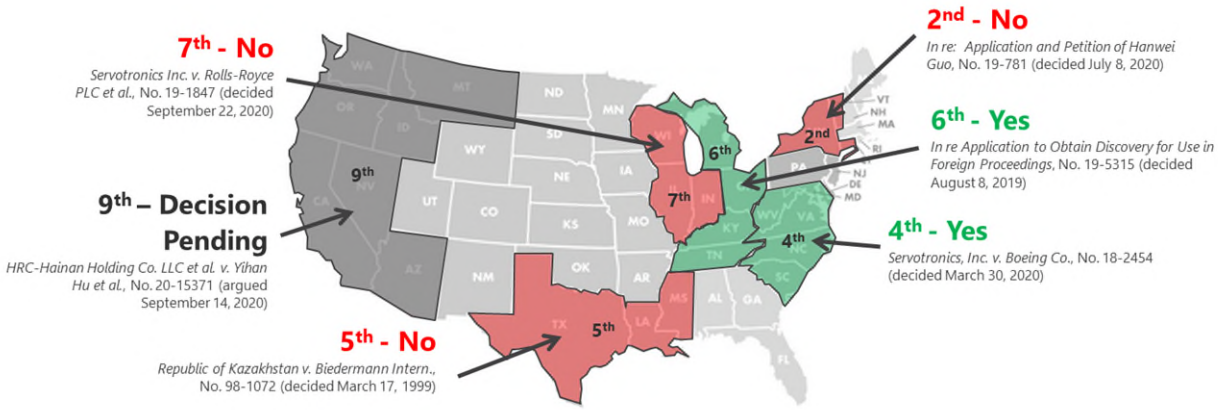
With the clear disagreement in the circuits, the issue is ripe for review by the US Supreme Court.

The Circuit Split

Section 1782(a) authorizes an interested party to petition a district court where a person resides for an order requiring the person to provide testimony or documents "for use in a proceeding in a foreign or international tribunal."[3] The question is whether a private foreign arbitration is a "foreign or international tribunal" for the purposes of Section 1782(a).

About 20 years ago, this question seemed settled. The Second and Fifth Circuits had held, based on their reading of Section 1782(a)'s text and legislative history, that the statute does not apply to a private foreign arbitration.[4] No other court of appeals addressed the question until last year, when the Sixth Circuit decided in *In re Application to Obtain Discovery for Use in Foreign Proceedings* that a private foreign arbitration is a "foreign or international tribunal " under Section 1782(a).[5] The Sixth Circuit relied on *Intel Corp. v. Advanced Micro Devices, Inc.*,[6] where the US Supreme Court held that a government agency with quasi-judicial powers was a "foreign tribunal" under Section 1782(a). As we discussed in a prior Legal Update, the Sixth Court read *Intel* as espousing a broad interpretation of "foreign or international tribunal," one that could include foreign international arbitrations.

In *Boeing Co.*,[7] the Fourth Circuit agreed with the Sixth Circuit's view. But then in *In Re Guo*, the Second Circuit reiterated its long-standing position that Section 1782(a) *does not* cover private international arbitrations (as we noted in a prior Legal Update).[8] This was the legal landscape as the Seventh Circuit considered *Rolls-Royce*. And, as we discuss below, the Ninth Circuit is poised to decide this issue soon.



The Dispute in *Rolls-Royce*

The arbitration in *Rolls-Royce* was about whether Servotronics must bear the loss for damage to a Boeing airplane. The plane caught on fire as Boeing employees tried to dislodge a piece of metal caught in an engine valve. Rolls-Royce paid Boeing $12 million for the damage and sought indemnity from Servotronics, the maker of the valve. Per the parties' long-term supply agreement, Rolls-Royce commenced an arbitration under the auspices of the Chartered Institute of Arbitrators. The parties' contract specified that Birmingham, England, was the arbitral seat, but the parties agreed to hold the arbitration in London.

Servotronics filed an *ex parte* application in the Northern District of Illinois under Section 1782(a), asking the court to issue a subpoena directing Boeing to produce documents for use in the London arbitration. The court initially granted the motion but changed course after both Boeing and Rolls-Royce objected to Servotronics' application on the ground that Section 1782(a) does not authorize a district court to order discovery for use in a private foreign arbitration. The district court agreed and quashed the subpoena. Servotronics appealed.[9]

The Seventh Circuit's Decision

The Seventh Circuit's decision relied primarily on what it described as "statutory context" and its belief that a broad interpretation of "foreign or international tribunal" under Section 1782(a) would conflict with the Federal Arbitration Act (FAA).[10] The court declined to rely on dictionary definitions of "tribunal" or the ruling in *Intel* to resolve the issue at hand.

Statutory Context. The court first noted that Section 1782(a)'s text was written by a group Congress created in 1958, the Commission on International Rules of Judicial Procedure. The Commission's charge included recommending legislation to improve "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." The Seventh

Circuit found it telling that the charge did not require the Commission to "study and recommend improvements in judicial assistance to private foreign arbitration."[11]

Second, the court relied on the principle that "[i]dentical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning."[12] It noted that when Congress adopted the Commission's proposed legislation revising Section 1782 in 1964, the same legislation included revisions to two other statutes that use "foreign or international tribunal" in the context of judicial assistance in a foreign country—one statute concerns service of process in foreign litigation and the other, letters rogatory.[13] The court concluded that "[s]ervice-of-process assistance and letters rogatory … are matters of comity between governments," suggesting that "the phrase 'foreign or international tribunal' as used in this statutory scheme means state-sponsored tribunals and does not include private arbitrations."[14]

Lastly, the court found that the use of "tribunal" within Section 1782(a) suggested that "tribunal" in this context means a "governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.'"[15] In particular, the court stated that:

> [T]he operative sentence authorizing the district court to order discovery 'for use in a proceeding in a foreign or international tribunal,' and again in the next sentence, which authorizes the court to act on a letter rogatory issued by 'a foreign or international tribunal.' Two sentences later the word 'tribunal' appears again where the statute provides that the court's discovery order 'may prescribe the practice and procedure, which may be in whole or part the *practice and procedure of the foreign country or the international tribunal*.'[16]

The Potential FAA Conflict. The court also favored a narrow interpretation of Section 1782(a) to avoid any conflict with the FAA. Section 7 of the FAA permits arbitrators to summon a person to appear before them to testify and produce documents; a party may petition the court to enforce the summons.[17] The court viewed the discovery available under Section 1782(a) as more far-reaching because it permits "both foreign tribunals *and litigants* (as well as other 'interested persons') to obtain discovery orders."[18] It stated that "litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations" if Section 1782(a) were construed to cover private foreign arbitrations, and it is "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."[19]

Definitions and Intel. The court held that neither legal nor non-legal definitions of "tribunal" "unambiguously resolve" whether the term encompasses private international arbitrations because some definitions are more expansive and some are more narrow. The court was also not convinced the holding in *Intel* helps resolve the present issue. *Intel* is the only US Supreme Court case addressing Section 1782(a). In Intel, the Court held that a proceeding before the Directorate General for Competition of the Commission of the European Communities was a "foreign or international tribunal." The Seventh Circuit characterized *Intel* as addressing "a public agency with quasi-judicial authority," not a private international arbitral body. The Seventh Circuit also was unmoved by a footnote in *Intel* that quoted a law review article suggesting that "tribunal" under Section 1782(a) included "arbitral tribunals." The Seventh Circuit "s[aw] no reason to believe that the Court, by quoting a law-review article in a passing parenthetical, was signaling its view that § 1782(a) authorizes district courts to provide discovery assistance in private foreign arbitrations."[20]

The Ninth Circuit's Pending Case

The Ninth Circuit may soon have to pick a side because the issue about the scope of Section 1782(a) is presented in *HRC-Hainan Holding Co., LLC v. Yihan Hu*.[21] The district court in *HRC-Hainan* held that a private arbitration before the China International Economic and Trade Arbitration Commission was a "foreign or international tribunal" for purposes of Section 1782(a).[22] The parties argued the case on September 14, 2020, and the appellant filed a supplemental brief on September 24, 2020, bringing the *Rolls-Royce* decision to the Ninth Circuit's attention.

Conclusion

As it stands, there is a clear split in the circuits about the scope of Section 1782(a). Either *Guo* (in the Second Circuit) or *Servotronics* (in the Seventh Circuit) could file a certiorari petition and ask the US Supreme Court to decide the issue. Whether either will do so remains to be seen. But if a certiorari petition is filed with the US Supreme Court, there will no doubt be many interested parties urging the Court to take the case and provide certainty about whether Section 1782(a) applies to private international arbitrations.

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Endnotes

[1] __ F.3d at __ (7th Cir. Sept. 22, 2020).

[2] 954 F.3d 209 (4th Cir. 2020).

[3] 28 U.S.C. § 1782(a).

[4] *See Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l,* 168 F.3d 880, 883 (5th Cir. 1999).

[5] 939 F.3d 710 (6th Cir. 2019).

[6] 542 U.S. 241 (2004).

[7] 954 F.3d at 210.

[8] 965 F.3d 96 (2d Cir. 2020), *as amended* (July 9, 2020).

[9] *Rolls-Royce*, __ F.3d at __.

[10] 9 U.S.C. § 1 *et seq*.

[11] *Rolls-Royce*, __ F.3d at __.

[12] *Id.* (citation omitted).

[13] See 28 U.S.C. § 1782(a); 28 U.S.C. § 1696; 28 U.S.C. § 1781.

[14] *Rolls-Royce*, __ F.3d at __.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *Id*.

[21] No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), *appeal docketed*, No. 20-15371 (9th Cir. Mar. 4, 2020)

[22] *Id*. at *8.