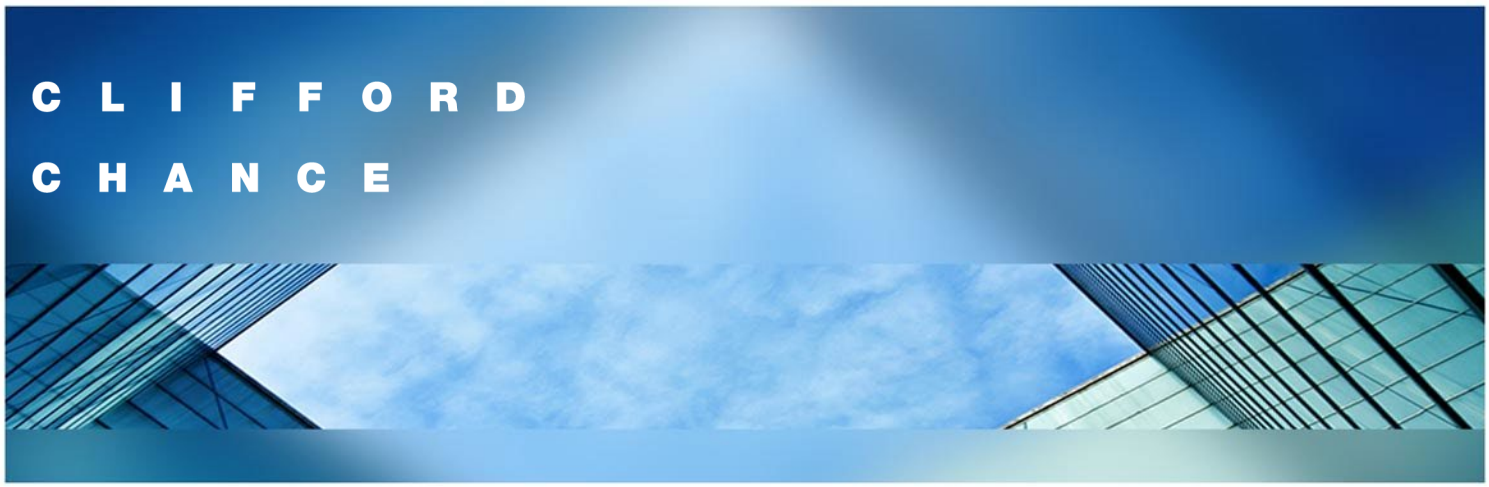

SUPREME COURT TO DECIDE WHETHER SECTION 1782 ALLOWS DISCOVERY FOR USE IN FOREIGN ARBITRATIONS

Participants in foreign arbitrations often seek evidence by taking advantage of U.S.-style discovery practices, potentially expanding discovery far beyond the rules of the arbitration tribunal. The U.S. Supreme Court has just agreed to hear whether this use of U.S. discovery is permissible, in *Servotronics, Inc. v. Rolls-Royce PLC et al.*, No. 20-794.

The issue centers around the scope of 28 U.S.C. § 1782, which permits interested persons to seek discovery in the U.S. for use in "a proceeding in a foreign or international tribunal." The Supreme Court has agreed to decide whether a "foreign or international tribunal" includes private arbitrations, or is instead limited to court proceedings.

To date, the issue has divided U.S. courts, with some concluding that only courts count as tribunals, while others include arbitration tribunals within the scope of "international tribunals." That broad interpretation would permit parties in foreign arbitrations to direct wide-ranging U.S. style discovery requests to persons and entities in the U.S. in connection with that arbitration, including document requests and depositions, whether or not such discovery requests were contemplated by arbitration procedures.

The case will be argued in the Term beginning in October, and the issue is expected to be decided within the next year.

Factual Background

The discovery application in *Servotronics* arose from an aircraft indemnification dispute. The manufacturer sold an engine to the Boeing Company ("Boeing") for inclusion in a 787 Dreamliner aircraft. During a test conducted by Boeing, a piece of metal became lodged in an engine valve, and during an attempted repair, the engine caught fire, damaging the aircraft. The manufacturer and Boeing settled a dispute relating to the losses.

The manufacturer then sought indemnification from the valve manufacturer ("Servotronics"). Pursuant to the parties' agreement, the manufacturer commenced a private arbitration against Servotronics before the Chartered

Institute of Arbiters in London. Thereafter, Servotronics sought third-party discovery from Boeing by commencing proceedings in the U.S. (including in Illinois) under 28 U.S.C. § 1782. The U.S. District Court for the Northern District of Illinois denied the application, and the Seventh Circuit affirmed. *See Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020).

Section 1782 General Framework

Section 1782 allows discovery through U.S. federal courts when (1) the person from whom discovery is sought "resides or is found" in the district where the application is made; (2) the discovery is for use in "a proceeding in a foreign or international tribunal"; and (3) the application is made by that tribunal or any interested person. *See* 28 U.S.C. § 1782.

If the statutory requirements are met, a federal court has discretion to grant the requested discovery. In making this decision, courts generally consider: (1) whether "the person from whom discovery is sought is a participant in the foreign proceeding"; (2) "the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance"; (3) whether the Section 1782 request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and (4) whether the discovery request is "unduly intrusive or burdensome." *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 264-65 (2004).

Circuit Split Over the "Foreign or International Tribunal" Requirement

At issue in *Servotronics* is whether the language of Section 1782 referencing "a proceeding in a foreign or international tribunal" includes private foreign arbitrations. Several federal courts of appeals have split on this question.

For instance, the Second Circuit and the Fifth Circuit held 20 years ago that Section 1782 does not apply to private arbitrations. *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 (5th Cir. 1999). This was based on those courts' analysis of the statutory structure and relevant legislative history, which in their view showed Congress's interest in providing assistance only in connection with foreign court or state-sponsored proceedings.

In 2004, the Supreme Court addressed the scope of Section 1782 generally in the *Intel* case. *Intel* did not involve a foreign arbitration, but rather proceedings before the Commission of European Communities. The Supreme Court ruled that the "tribunal" requirement was satisfied because the Commission was an administrative agency and "first-instance decisionmaker." 542 U.S. at 257-258. The Court reasoned that a predecessor statute had allowed foreign judicial assistance only in connection with "any *judicial* proceeding," whereas the language of Section 1782 is clearly broader. Citing the legislative history, the Court explained that "Congress understood that change" to allow judicial assistance in connection with "administrative and quasi-judicial proceedings abroad." *Id*. The Court also quoted a law review article by one of the principal drafters of Section 1782, in which the author described arbitral tribunals as among the covered "tribunals": "*[t]he term 'tribunal' . . . includes* investigating magistrates,

administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Id*. (emphasis added; quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1046 n.71 (1965)).

Since that time, relying in part on *Intel*, the Fourth and Sixth Circuits have read Section 1782's reference to "tribunal" to cover private arbitration. *See Servotronics, Inc. v. Boeing Co*., 954 F.3d 209 (4th Cir. 2020); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019). (The Fourth Circuit did so in the context of another application by Servotronics to take depositions of Boeing personnel in South Carolina, relating to the same arbitration.) In these cases, the parties seeking discovery (and in some instances the courts) have relied at least in part on the law review article cited by the Supreme Court.

However, not all courts agree with that analysis. Indeed, the Second and Fifth Circuits have since re-affirmed their position that Section 1782 does not cover private arbitrations. *See In Re Guo*, 965 F.3d 96 (2d Cir. 2020); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31 (5th Cir. 2009). These courts have emphasized that the Supreme Court in *Intel* was not addressing the issue of arbitration. And the Second Circuit noted that, even if the law review article cited by the Supreme Court were relevant, it is not clear that the article referred to private, as opposed to state-sponsored, arbitration. *Guo*, 965 F.3d at 105.

The Seventh Circuit's Decision in *Servotronics*

In *Servotronics*, the Seventh Circuit agreed with the Second and Fifth Circuits that Section 1782 does *not* apply to foreign arbitrations. The Court found that dictionary definitions of "tribunal" are inconclusive, but offered several other reasons for its interpretation (consistent with the Second and Fifth Circuit), including:

- The legislative history and statutory scheme of Section 1782 and related statutes concerning foreign judicial assistance reflect a legislative desire to further international comity with state-sponsored — *not* private — tribunals. *See* 975 F.3d at 693-95.
- A contrary interpretation would conflict with certain provisions of the Federal Arbitration Act (the "FAA"). For instance, for arbitrations in the U.S., the FAA allows judicially-assisted discovery only when the request comes from the arbitration panel itself—not a request from the parties (as permitted by Section 1782). *See* 9 U.S.C. § 7. The Seventh Circuit explained: "It's 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." 975 F.3d at 695.
- The Seventh Circuit did not view the Supreme Court's decision in *Intel* as requiring a different result because *Intel* addressed only proceedings before a foreign "public agency with quasi-judicial authority." *Id*. at 696. As to the above-referenced law review article cited by the Supreme Court, the Seventh Circuit reasoned: "There is no indication that the phrase

> 'arbitral tribunals' includes *private* arbitral tribunals. Even if there were such an indication, we see no reason to believe that the [Supreme] 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." *Id*.

Petition for *Certiorari*

Following the Seventh Circuit's decision, Servotronics filed a petition for a writ of *certiorari*, asking the Supreme Court to review the case. The Court granted the petition on March 22, 2021.

Conclusion

The Supreme Court will now resolve the growing Circuit split over the availability of Section 1782 in the private arbitration context. The Court's decision will determine to what extent (if any) the parties to private foreign arbitration may seek judicial assistance from U.S. courts under Section 1782.

In the meantime, whether parties to foreign arbitration can seek such judicial assistance likely will depend on where in the U.S. the evidence is located. For now, such evidence likely could not be sought in the Second, Fifth, and Seventh Circuits, but might be sought in the Fourth and Sixth Circuits, and potentially elsewhere. As a practical matter, courts may defer granting broad discovery requests until the Supreme Court issues its decision.

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