

## Outside Counsel

# SCOTUS To Decide If §1782 Discovery Procedures Apply to Private Arbitration

**O**n March 22, 2021 the U.S. Supreme Court granted Servotronics’s petition for writ of certiorari to review the U.S. Court of Appeals for the Seventh Circuit’s decision in *Servotronics v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020) and resolve the current divide among circuit courts as to whether 28 U.S.C. §1782(a)’s discovery procedures are available for private arbitration proceedings. The statute allows a party before a “foreign or international tribunal” to circumvent the traditional procedural burdens of the Hague Convention and obtain discovery of witnesses and documents in the United States by petitioning a federal district court. Circuit courts disagree, however, as to whether a private arbitration panel is a “tribunal.” Servotronics’s petition puts before the court whether a private arbitration is considered a “tribunal” under §1782.

The court’s intervention may provide much needed clarity to a legal



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issue that has seen increasing debate in recent years as private arbitration in foreign forums has been on the rise. Servotronics’s petition has the attention of many eager for a resolution amidst circuit discord, and has resulted in two amicus briefs to date. Brief for Int’l Inst. for Conflict Prevention & Resolution as Amicus Curiae Supporting Petitioner, *Servotronics v. Rolls-Royce PLC*, No. 20-794 (U.S. Jan. 5, 2021); Brief for Atlanta Int’l Arbitration Soc’y as Amicus Curiae Supporting Petitioner, *Servotronics v. Rolls-Royce PLC*, No. 20-794 (U.S. Jan. 11, 2021).

The court’s decision could either open the floodgates of U.S. discovery to foreign arbitration proceedings or prevent the use of §1782 to obtain discovery in the U.S. in these proceedings altogether. Either way, a decision would impact the way

contracting parties think about agreements to arbitrate abroad. Servotronics’s petition may be mooted and the court will be denied the opportunity to weigh in at this time if Servotronics’s underlying arbitration is resolved at the upcoming May 20, 2021 hearing. It thus remains to be seen whether the court will resolve the circuit split on this important legal issue.

### Background

As way of background, §1782 is a procedural device that allows an applicant to obtain discovery in the United States for use in “a proceeding in a foreign or international *tribunal*”:

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

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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...

28 U.S.C. §1782(a). Servotronics's petition follows conflicting opinions issued from the U.S. Court of Appeals for the Fourth and Seventh Circuits on its two §1782 applications to obtain discovery in the U.S. for use in a private arbitration proceeding in England. See *Servotronics*, 975 F.3d at 696 (Seventh Circuit Court affirming district court's order granting motion to quash Servotronics's subpoena); *Servotronics v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) (reversing and remanding district court's denial of Servotronics's §1782 application). While the subject of Servotronics's petition is the Seventh Circuit's denial of its request for discovery under §1782, together, the two decisions highlight the deepening divide among circuit courts on the question presented by Servotronics's petition:

Whether the discretion granted to district courts in 28 U.S.C. §1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as Second, Fifth, and, in the case below, the Seventh Circuit, have held.

Pet. for Writ of Cert., *Servotronics v. Rolls-Royce PLC*, 20-794 (U.S. Dec. 7, 2020). Significantly, the Supreme Court

is unlikely to hear this case before the fall of 2021, while the underlying arbitration between Servotronics and Rolls-Royce is scheduled to go forward in May. Therefore, by the time the Supreme Court hearing is scheduled to take place, the underlying arbitration may already have been resolved, and the issue may therefore become moot.

### Circuit Split

The current circuit split as to the scope of the meaning of "tribunal" in §1782 has resulted in increasing uncertainty for parties agreeing to arbitrate abroad. In the U.S. Court of Appeals for the Sixth and Fourth Circuits, parties can apply for documentary and

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deposition discovery in the U.S. for use in foreign arbitration under §1782 to the same extent such discovery is available to U.S. court litigants. *Servotronics v. Boeing Co.*, 954 F.3d at 216; *Abdul Latif Jameel Transp. Co. v. FedEx (In re Application to Obtain Discovery for Use in Foreign Proceedings)*, 939 F.3d 710, 731 (6th Cir. 2019) (finding a private arbitration panel is a "foreign or international tribunal" under §1782(a)). In contrast, in the Second, Fifth, and Seventh Circuits, §1782 cannot be used as a procedural tool to obtain discovery in such proceedings

at all. See *Servotronics*, 975 F.3d at 696; *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96, 109 (2d Cir. 2020) (affirming district court denial of §1782 application); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (reversing district court order granting §1782 application).

For parties seeking U.S. discovery that may not otherwise be obtainable in a foreign arbitration proceeding, this tumultuous landscape may promote forum shopping. It may also thwart benefits that parties agreeing to arbitrate abroad are likely counting on—such as efficient dispute resolution and/or protection from discovery in the United States. These very considerations are the underpinnings of the Seventh Circuit's ruling on Servotronics's §1782 application and the instant appeal.

In denying Servotronics's §1782 discovery, the Seventh Circuit agreed with the Second and Fifth Circuits' interpretation that §1782 was not intended to apply to private arbitrations. These rulings found that allowing §1782 discovery in private arbitration proceedings would be at odds with the Federal Arbitration Act (FAA) and the core policy reasons for arbitration. The Second Circuit, the first to confront the question, explained that applying §1782 to foreign arbitral proceedings would be inconsistent with the discovery limitations of the FAA, "undermine one of the most significant advantages of arbitration," and deprive parties of their "bargained-for efficient process by the opposition's tactical use of

discovery devices.” *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188-191 (2d Cir. 1999) (“[o]pening the door” to §1782 discovery in the private arbitration context would “arguably conflict with the strong federal policy favoring arbitration as an alternative means of dispute resolution.”). In *Biedermann*, the Fifth Circuit quickly agreed, expressing that “[a]rbitration is intended as a speedy, economical, and effective means of dispute resolution” and that its “principal advantages may be destroyed if the parties succumb to fighting over burdensome discovery requests far from the place of arbitration.” 168 F. 3d at 883.

Following these rulings, the Seventh Circuit similarly held that allowing Servotronics §1782 discovery for use in its foreign arbitration proceeding would be in clear conflict with the FAA. *Servotronics*, 975 F.3d at 695. Further, the court commented it would be irrational to allow parties to private arbitrations abroad access to federal-court discovery tools in the United States while precluding the same to litigants in domestic arbitrations. *Id.*

The Fourth and Sixth Circuits, however, have ruled that “tribunals” under §1782 could encompass private arbitral proceedings. In addressing the opposing court rulings, the Sixth Circuit concluded that the unavailability of similar discovery devices in domestic private arbitration proceedings is not a basis to categorically deny §1782 discovery in foreign private arbitration proceedings, and was “unpersuaded” by the FAA and efficiency concerns

of its sister courts. See *Abdul Latif Jameel Transp. Co.*, 939 F.3d at 729-30. Rather, the court’s analysis began and ended with the language of the statute itself. *Id.* at 723. (“Therefore, we need look no further...”). The court found that “tribunal” includes private commercial arbitral panels because there is nothing in the text, context, and structure of §1782 to indicate

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otherwise. *Id.* (specifically finding that the terms of §1782 do not require the foreign arbitration proceeding to be a governmental entity or be governed by evidence-gathering procedures).

In finding that Servotronics could seek discovery under §1782, the Fourth Circuit also dismissed concerns involving conflict with the FAA. *Servotronics*, 954 F.3d at 215. The court noted that a district court’s role under §1782 “functions effectively as a surrogate for a foreign tribunal” and, “in this light, the district court functions no differently.” *Id.*

While the cornerstone of the court’s opinion—that §1782 does not exclude private arbitrations—is consistent with the Sixth Circuit’s, the reasoning varied. The Fourth Circuit’s analysis went beyond the text of the statute and looked at the federal policy served by

§1782, i.e. international cooperation, as well as long standing federal policy in favor of arbitration agreements. *Id.* at 213. The court also noted that, even under the narrow view that “tribunal” requires “government conferred authority,” U.S. arbitration proceedings “clearly” qualify due to the FAA and congressional endorsement, as did Servotronics’s arbitration due to the governmental regulation conferred by the U.K. Arbitration Act. *Id.* at 214.

### Implications of a Decision

Section 1782 remains ambiguous when it comes to foreign arbitration proceedings. Supreme Court intervention would provide much-needed clarity for this issue should it remain ripe for the court to resolve. Will U.S. discovery become widely available to arbitration abroad or will the main tool for obtaining U.S. discovery in such proceedings be stripped away? It is yet to be seen whether the court will finally be able to weigh in, but the granting of Servotronics’s petition signals that the court recognizes the significance of the issue.