Litigation Alert


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Introduction

On December 7, 2020, parties and practitioners in international commercial arbitration came one step closer to resolving the threshold question of the applicability of 28 U.S.C. § 1782 to international commercial tribunals. Section 1782 is a distinctive procedural device which potentially allows an applicant who is a party to an international commercial arbitration to petition a U.S. federal district court with competent jurisdiction to order the disclosure of documentary or deposition evidence for use in the foreign arbitration proceeding. Parties to international commercial arbitrations seeking to rely upon 28 U.S.C. § 1782 to obtain documents or evidence in the possession, custody or control of a U.S. entity face a tumultuous landscape. The deepening circuit split on the question of whether international commercial arbitral tribunals are “foreign or international tribunals” for the purposes of 28 U.S.C. § 1782(a) makes the issue ripe for U.S. Supreme Court resolution.

The Seventh Circuit recently ruled in Servotronics Inc. v. Rolls Royce PLC, 975 F.3d 689 (7th Cir. 2020) that 28 U.S.C. § 1782 did not provide parties to a foreign seated international commercial arbitration with recourse to obtain documentary or witness evidence (by virtue of a deposition) in the possession, custody or control of a party subject to jurisdiction in a U.S. federal district court. Indeed, Servotronics represents a rare instance where the same parties are affected by a circuit split on the same issue. Servotronics successfully obtained evidence under § 1782 in the Fourth Circuit in Servotronics Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020). Accordingly, on December 7, 2020, Servotronics filed a petition for writ of certiorari to the U.S. Supreme Court seeking to overturn the Seventh Circuit decision. Currently, an applicant’s threshold ability to obtain evidence in the possession, custody or control of a party under the jurisdiction of a U.S. federal district court will be largely determined by the circuit in which the district court is sitting. That is a surprising and unsatisfactory position for international counsel and clients who are seeking to obtain relevant and material information in the possession, custody and control of a party subject to U.S. federal court jurisdiction (and those seeking to defend against such petitions).
The § 1782 Discovery Device

Briefly by way of background, 28 U.S.C. § 1782(a)—last amended in 1964—provides that:

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.

[...]

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

In order for the District Court to consider whether to grant the request for discovery, the applicant must show:

• The District Court has jurisdiction over the person from whom disclosure is sought
• The proceedings are in a foreign or international tribunal
• A request for discovery is being made by a “foreign or international tribunal” or by “an interested person” in the foreign proceedings.

This multipart test has been the subject of increasing debate across the circuits in light of increased reliance on international commercial arbitration as a dispute resolution mechanism. The main issue in the debate focuses on the last element: whether a foreign international commercial arbitral tribunal qualifies as a “foreign tribunal” for purposes of the statute. The U.S. Supreme Court, in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), ruled that the Commission of the European Communities (a quasi-judicial arm of the European Union) was a foreign or international tribunal under § 1782(a), such that recourse to documents/evidence under that statute was appropriate. However, as described below, the circuits are split as to whether international commercial arbitral tribunals fall within the purview of § 1782.

The Circuit Split

The circuits have split on the question of whether an international arbitral tribunal is a foreign or international tribunal under § 1782(a):

• The Second, Fifth and Seventh Circuits have held that the phrase “foreign or international tribunal” does not include international commercial arbitral tribunals. These courts have come to this conclusion for the following reasons:
  – **Second Circuit**: The Second Circuit was the first jurisdiction to hold that 1782 did not apply to discovery in aid of international commercial arbitrations in its 1999 decision in Nat’l Broadcasting Co. v. Bear Stearns & Co. In Bear Stearns, the Second Circuit held that “(1) the statutory text, namely the phrase ‘foreign or international tribunal,’ was ambiguous as to the inclusion of private arbitrations; (2) the legislative and statutory history of the insertion of the phrase ‘foreign or
international tribunal’ into § 1782(a) demonstrated that the statute did not apply
to private arbitration; and (3) a contrary reading would impair the efficient and
expeditious conduct of arbitrations.”3

The Second Circuit was asked to revisit its holding in In Re Guo4 in light of the
U.S. Supreme Court’s decision in Intel (holding that the European Commission
qualified as a “foreign tribunal” under § 1782(a)).5 The Second Circuit concluded
that the question of whether an “arbitration tribunal qualifies as a ‘tribunal’ under
§ 1782 – was not before the Intel Court.”6 The Second Circuit thus reaffirmed its
holding in Bear Stearns. The Second Circuit observed contrary findings in the
Fourth and Sixth Circuits, but noted that the decision in those cases were not
based upon Intel.

Biedermann International, that “‘foreign and international tribunals’ in § 1782 was
not intended to authorize resort to United States federal courts to assist
discovery in private international arbitrations.”7 The court reasoned that the
reference to “foreign and international tribunals” was meant “to further comity
among nations, not to complicate and undermine the salutary device of private
international arbitration.”8 In 2009, the Fifth Circuit held it was bound by its ruling
in Biedermann despite the Supreme Court’s decision in Intel, because Intel did
not consider use of 1782 in private international arbitration.9 “We cannot overrule
the decision of a prior panel,” the Fifth Circuit explained, “unless such overruling
is unequivocally directed by controlling Supreme Court precedent.”10

– Seventh Circuit: The applicability of § 1782 to international commercial
arbitrations was a matter of first impression in the Seventh Circuit in 2020. The
Seventh Circuit held, joining the Second and Fifth Circuits, that “1782(a) does not
authorize the district court to compel discovery for use in a private foreign
arbitration.” The Seventh Circuit reached its conclusion noting the ambiguity in
the definition of “tribunal” (as to whether that term could be understood to mean
only state sponsored tribunals or broader), but finding that the context of the
statute led to a narrower reading of the word “tribunal” in § 1782.11 The Seventh
Circuit also noted that the narrower interpretation avoids a conflict with the
Federal Arbitration Act (FAA) in that the scope of discovery under § 1782 should
not be broader than under the FAA and that Intel had not squarely decided the
issue.12 The Seventh Circuit therefore joined the Second and Fifth Circuits in
spite of contrary rulings in the Fourth and Sixth Circuits as described below.

• Standing on the other side of the circuit split, the Sixth and Fourth Circuits have
held that international commercial arbitral tribunals are covered by the term “foreign
tribunals” in § 1782.

– Sixth Circuit: The interpretation of 1782 was an issue of first impression in
2019.13 The Court construed the text of § 1782 based on common definitions of
the words used therein, the statutory context and its history to construe that §
1782 permits discovery for use in foreign commercial arbitral tribunals.14
Because the Sixth Circuit addressed the issue after a number of other circuits
had decided it—including the Second and Fifth Circuit decisions, which held that
international commercial arbitral tribunals were not covered by the term “tribunal”
in § 1782—the Court addressed those competing decisions. The Sixth Circuit
reasoned that the Second and Fifth Circuits had not found that arbitral tribunals
were excluded from the word “tribunal,” but merely that the use of the word
“tribunal” in § 1782 was ambiguous. Thus, the Sixth Circuit found that the ambiguity in the term “foreign tribunal” should be resolved in favor of permitting the use of § 1782 for proceedings before international commercial tribunals.\textsuperscript{15}

- **Fourth Circuit**: Relying to some extent on the Sixth Circuit’s reasoning, the Fourth Circuit\textsuperscript{16} was persuaded that the language and purpose of 1782 led to the conclusion that international commercial arbitral tribunals could fall within the statute’s definition of foreign tribunals and that an application for discovery under § 1782 could proceed in the District Court. The Fourth Circuit also explained that even under the stricter test laid out in *Biedermann* (5th Cir.) and *Bear Stearns* (2d Cir.), which focused on whether the tribunal in question “exercises government conferred authority,” the U.K. seated arbitral tribunal at issue qualified. According to the Fourth Circuit, the U.K. arbitral tribunal, like an arbitral tribunal seated in the U.S., was subject to court control—in this case control by the U.K. Supreme Court under the English Arbitration Act.\textsuperscript{17}

The Third and Ninth Circuits have appeals pending on this issue.\textsuperscript{18} The First, Eighth, Tenth, Eleventh and D.C. Circuits have not yet addressed the point.

**Client considerations in the shifting landscape**

Outside of the issue to be potentially resolved by the Supreme Court, there is no doubt that parties to international arbitrations are increasingly relying on § 1782 to obtain documents/evidence which might not otherwise have been obtainable in the scope of the arbitration. Indeed, it appears that parties’ increased reliance on § 1782 has led to the recent and deepening circuit split (with more than seven cases relating to the scope of § 1782 before the various circuits in the last three years). With the increase in § 1782 petitions, parties to international commercial arbitrations should bear the following in mind:

- **Scope of Disclosure**. Unless and until the interpretation of § 1782 is clarified by the U.S. Supreme Court, there are still avenues to obtain documents/evidence by filing petitions in “§ 1782 friendly” jurisdictions. Section 1782 only requires that the person or entity from whom disclosure is sought is subject to the District Court’s jurisdiction and that the documents or information sought are in the possession, custody or control of the entity over which disclosure is sought. Section 1782 does not require that the documents or evidence sought are present in the District Court jurisdiction—merely that the possessor or controller of those documents/evidence is under the Court’s jurisdiction. In light of the digital storage of information and access to such information electronically from a number of “remote” locations, there are still significant opportunities to obtain (at least) documentary evidence from the “§ 1782 friendly” jurisdictions.

- **Section 1782 Petition Confidentiality**. Most users of international commercial arbitration rely on the fact that the process, documents and arguments of the parties in the arbitration will remain confidential. Applications under § 1782 bring potentially unwanted publicity to the arbitration including explanations as to the parties, claims and relevant evidence sought for the purposes of arbitration. Confidentiality is very difficult to maintain in the context of § 1782 petitions. A party making a § 1782 petition may find itself at odds with its other confidentiality obligations. A careful analysis of the confidentiality obligations and exceptions remains necessary.
• **Implications for the Arbitral Process.** Parties must recall that § 1782 petitions are not always welcome by international arbitral tribunals. They can be seen by some arbitrators as a means of potentially disruptive court interference in the arbitral process. In light of the current trends toward providing arbitrators in international arbitrations with more power and discretion, parties must carefully consider whether or not (and how) to approach the arbitral tribunal for permission to make a 1782 petition. In this context, it is worth noting that some of the newer arbitral rules, like the 2020 London Court of International Arbitration (LCIA) Rules, require parties to seek leave from the tribunal before seeking interim measures from any court. The principle of party autonomy may be curtailed.

Thoughtful consideration of these points can lead to strategic advantages despite the current uncertain landscape.

1. *Servotronics*, 954 F.3d at 216 (“At bottom, we conclude that the UK arbitral panel convened to address the dispute between Servotronics and Rolls-Royce is a ‘foreign or international tribunal’ under § 1782(a) and, therefore, that the district court has authority to provide, in its discretion, assistance in connection with the UK arbitration.”).

2. 165 F.3d 184 (2d Cir. 1999).

3. *Nat’l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188-191 (2d Cir. 1999). The Second Circuit also noted that a party seeking to rely on § 1782 needed to demonstrate that the “foreign or international tribunal” was acting as a state instrumentality or with government conferred authority. *Id.* at 189.

4. *In Re Guo*, 965 F.3d 96 (2d Cir. 2020).

5. *Id.*

6. *Id.* at 106.


8. *Id.*


10. *Id.* (quoting *Cain v. Transocean Offshore USA Inc.*, 518 F.3d 295, 300 (5th Cir. 2008)).

11. *Servotronics Inc. v. Rolls Royce PLC*, 975 F.3d 689, 695 (7th Cir. 2020).

12. *Id.* at 695-96.


14. *Id.*

15. *Id.* at 726-727.


17. *Id.* at 214.


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