

Circuit Split on 28 U.S.C. § 1782: Are U.S. Courts Trending Against Discovery for Foreign Private Arbitrations?

Kluwer Arbitration Blog

October 4, 2020

Dana MacGrath, Nilufar Hossain (Omni Bridgeway)

Please refer to this post as: Dana MacGrath, Nilufar Hossain, ‘Circuit Split on 28 U.S.C. § 1782: Are U.S. Courts Trending Against Discovery for Foreign Private Arbitrations?’, Kluwer Arbitration Blog, October 4 2020, <http://arbitrationblog.kluwerarbitration.com/2020/10/04/circuit-split-on-28-u-s-c-%c2%a7-1782-are-u-s-courts-trending-against-discovery-for-foreign-private-arbitrations/>

On 22 September 2020, the U.S. Court of Appeals for the Seventh Circuit joined the Second and Fifth Circuits^[fn]The Seventh Circuit includes the U.S. federal district courts of Illinois, Indiana, and Wisconsin.^[/fn] in narrowly interpreting the statutory language “foreign or international tribunal” in 28 U.S.C. § 1782(a), holding that Section 1782 does not authorize U.S. discovery for private foreign arbitrations. ***Servotronics, Inc. v. Rolls-Royce PLC***, No. 19-1847, — F.3d. –, 2020 WL 5640466 (7th Cir. Sept. 22, 2020) (“***Servotronics II***”). See also ***In re Application of Hanwei Guo for an Order to Take Discovery for Use in a Foreign Proceeding Pursuant to 28 U.S.C. § 1782***, 965 F.3d 96 (2d Cir. 2020) (“***Hanwei Guo***”); ***Nat’l Broad. Co. v. Bear Stearns & Co.***, 165 F.3d 184, 191 (2d Cir. 1999) (“***NBC***”); ***Republic of Kazakhstan v. Biedermann Int’l***, 168 F.3d 880, 883 (5th Cir. 1999) (“***Biedermann***”). The ***Servotronics II*** decision diverges from an earlier Fourth Circuit decision, ***Servotronics, Inc. v. Boeing Co.***, 954 F.3d 209 (4th Cir. 2020) (“***Servotronics I***”), involving the same underlying arbitration, in which the court broadly interpreted Section 1782 to permit U.S. discovery.

Servotronics II cements the circuit split (discussed in several prior [posts](#)) on the meaning of “foreign or international tribunal” in Section 1782, increasing the likelihood that the U.S. Supreme Court will address this issue – which it did not do in its seminal decision, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) (holding that the EU’s Directorate General-Competition, a public entity, constituted a “tribunal” under Section 1782). This post reviews ***Servotronics II*** and places it in context among the deepening circuit split, highlighting the need for the U.S. Supreme Court to weigh in.

The Seventh Circuit Declined to Apply Section 1782 in *Servotronics II*

In ***Servotronics II***, the underlying private arbitration, seated in London, adjudicated an indemnification claim by Rolls-Royce PLC against Servotronics, Inc. Servotronics filed an *ex parte* application in the U.S. District Court for the Northern District of Illinois (“District Court”) seeking a subpoena compelling non-party Boeing to produce documents for the London arbitration. Rolls-Royce moved to quash. The District Court quashed the subpoena, holding that Section 1782 does not authorise discovery assistance in aid of private foreign arbitrations. Servotronics appealed.

The Seventh Circuit upheld the decision. The court first examined the statutory framework of Sections 1781 and 1782. It observed that Section 1781 addresses letters rogatory issued by one court requesting that a foreign court take evidence within the foreign jurisdiction for use in the pending case. Section 1782 “works in tandem with and supplements” Section 1781, empowering a U.S. district court to order a person to provide testimony or evidence for use in foreign proceedings. ***Servotronics II***, 2020 WL 5640466 at *2. Under Section 1782, the judge has “discretion to prescribe the procedures for the collection of evidence, including the option to require adherence to the practice and procedure of the foreign country or international tribunal” *Id.*

The Seventh Circuit noted that several other circuit courts have scrutinised the phrase “foreign or international tribunal” in Section 1782 extensively, resulting in the recent circuit split.

The Seventh Circuit surveyed dictionary definitions of the word “tribunal,” concluding that such analysis was inconclusive because “[i]n both common and

legal parlance, the phrase ‘foreign or international tribunal’ can be understood to mean only state-sponsored tribunals, but it also can be understood to include private arbitration panels.” *Id.* at *4.

It then turned to the broader statutory context. The court found that a harmonious and coherent reading of Section 1782 led to the conclusion that ‘foreign tribunal’ “means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country’s ‘practice and procedure’ [and that] [p]rivate foreign arbitrations . . . are not included.” *Id.* at *5. The court explained that its reading of Section 1782 “avoids a serious conflict with the Federal Arbitration Act,” in particular 9 U.S.C. § 7. ***Servotronics II***, 2020 WL 5640466 at *5. It noted that “[w]hen a statute is susceptible of two interpretations, one that creates a conflict with another statute and another that avoids it, we have an obligation to avoid the conflict” *Id.*

Applying this to the relationship between Section 1782 and the Federal Arbitration Act (“FAA”) confirms that Section 1782 “does not apply to private foreign arbitrations.” *Id.* Discovery authorised by Section 1782 for foreign proceedings is far broader than discovery authorised by the FAA for domestic arbitrations. *Id.* at *6. Construing Section 1782 broadly would lead to the non-sensical result that parties in private foreign arbitrations would have access to more expansive discovery in the U.S. than parties to U.S. domestic arbitrations. *Id.* (“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.”). Accordingly, the court concluded that a “foreign or international tribunal” under Section 1782 is “a state-sponsored, public or quasi-governmental tribunal” and not a private foreign arbitration. *Id.* at *6.

The Fourth Circuit Reached the Opposite Result in *Servotronics I*

On 30 March 2020, the Fourth Circuit analysed the scope of Section 1782 in a decision involving the same arbitration that was before the Seventh Circuit. *Servotronics* sought testimony from non-party Boeing Corp. in South Carolina. The Fourth Circuit held that the foreign private arbitration fell within Section 1782, reasoning that the UK arbitration was the “product of government-conferred

authority” under both U.S. and UK law. **Servotronics I**, 954 F.3d at 214. It rejected the concerns of a statutory collision with the FAA, quoting *Intel* for the proposition that the U.S. Supreme Court had “rejected the suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding.” *Id.* at 215-16. However, the U.S. Supreme Court did not address whether Section 1782 applies to private foreign arbitrations. *Intel*, 542 U.S.241 (2004). See also **El Paso Corp. v. La Comision Ejecutiva Hidroelectrica de Rio Lempa**, 341 Fed.Appx. 31, 34 (5th Cir. 2009) (“The question of whether a private international arbitration tribunal also qualifies as a ‘tribunal’ under § 1782 was not before the [Supreme] Court [in *Intel*.].”).

The Fourth Circuit Aligned with The Sixth Circuit to Apply Section 1782 to Private Foreign Arbitrations

On 19 September 2019, the Sixth Circuit had similarly interpreted Section 1782 to encompass private foreign arbitrations. See **In re Application to Obtain Discovery for Use in Foreign Proceedings**, 993 F.3d 710 (6th Cir. 2019) (discovery sought by Saudi Arabian corporation from a U.S. corporation in Tennessee in aid of a Dubai-seated private arbitration). The Sixth Circuit surveyed definitions of “tribunal” and reasoned that “American lawyers and judges have long understood . . . the word ‘tribunal’ to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties.” *Id.* at 718-21. The court also analysed *Intel* and concluded that the U.S. Supreme Court decision “contain[ed] no limiting principal [such] that the ordinary meaning of ‘tribunal’ does not apply here.” *Id.* at 726. See prior post [addressing](#) this Sixth Circuit decision.

The broad interpretations of Section 1782 by the Fourth and Sixth Circuits are quite recent, compared to the earlier decisions by the Second and Fifth Circuits interpreting “foreign or international tribunal” narrowly to exclude private foreign arbitrations. See **NBC**, 165 F.3d at 191 and **Biedermann**, 168 F.3d at 883. However, the Second and Fifth Circuits more recently reaffirmed their narrow interpretations in **Hanwei Guo**, 965 F.3d at 106-108 (affirming **NBC**) and **El Paso Corp.**, 341 Fed.Appx. at 33-34 (affirming **Biedermann**). The Second Circuit decided **Hanwei Guo** in July 2020, just months before the Seventh Circuit decided

Servotronics II in September 2020.

Significance of *Servotronics II*

Servotronics II highlights the stakes if the U.S. Supreme Court adopts the minority view: a statutory collision between Section 1782 and the FAA concerning the scope of discovery available for foreign and domestic arbitrations, respectively.

It is ripe for the U.S. Supreme Court to rule definitively on the meaning of “foreign or international tribunal” in Section 1782. The circuit split puts the Second, Fifth and Seventh Circuits on one side (Section 1782 excludes foreign private arbitrations) and the Sixth and Fourth Circuits on the other (Section 1782 encompasses foreign private arbitrations).

The circuit split is most pronounced in the *Servotronics* cases, where the Seventh and Fourth Circuits reached opposite results concerning the same arbitration. Compare **Servotronics II**, 2020 WL 5640466 at *7 (“[W]e join the Second and Fifth Circuits in concluding that § 1782(a) does not authorize the district courts to compel discovery for use in private foreign arbitrations.”) with **Servotronics I**, 954 F.3d at 216 (“[W]e conclude that the UK arbitral panel . . . is a ‘foreign or international tribunal’ under § 1782(a) . . .”).

However, the scorecard on this issue may change quickly. There are at least two pending appeals involving the meaning of “foreign or international tribunal” in Section 1782 – before the Third Circuit and the Ninth Circuit, respectively. The decision in **In re EWE Gasspeicher GmbH**, No. CV 19-MC-109-RGA, 2020 WL 1272612, at *2 (D. Del. Mar. 17, 2020), where the Delaware district court denied discovery for an arbitration in Germany holding that a private commercial arbitration is not a “tribunal” under Section 1782, has been appealed to the Third Circuit. By contrast, the decision in **HRC-Hainan Holding Co., LLC v. Yihan Hu**, No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), where the district court for the Northern District of California granted discovery in aid of a CIETAC arbitration, agreeing with the Sixth Circuit that a private arbitration is a “foreign or international tribunal” under Section 1782, has been appealed to the Ninth Circuit, with oral argument held on 14 September 2020. See prior post addressing HRC-Hainan.

Concluding Remarks

The narrow interpretation of “foreign or international tribunal” in Section 1782 adopted by the Second and Fifth Circuits – and now the Seventh Circuit – appears to be the more defensible position. Why would the U.S. Congress authorize broader U.S. discovery for foreign private arbitrations than for U.S. domestic arbitrations? However, the Fourth and Sixth Circuits have cited *Intel* for the proposition that the U.S. Supreme Court rejected the suggestion that a Section 1782 applicant must show that U.S. law would allow discovery in domestic litigation analogous to the foreign proceeding. *Intel*, 542 U.S. at 263.

Until the U.S. Supreme Court defines “foreign or international tribunal” in Section 1782, parties can seek U.S. discovery for private foreign arbitrations in circuits that interpret Section 1782 broadly or may attempt to seek such discovery in circuits that have not yet ruled on its scope. If the U.S. Supreme Court ultimately interprets Section 1782 broadly, we will likely see a substantial increase in discovery applications within the U.S. for evidence to be used in foreign private arbitrations.