Supreme Court Set to Decide Whether Section 1782 Discovery Can Be Compelled in Foreign-Seated Arbitrations

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A. Introduction

Under 28 U.S.C. § 1782, a District Court may compel a resident individual or company to provide discovery for use "in a proceeding in a foreign or international tribunal." There is presently a circuit court split over what qualifies as a "foreign or international tribunal," including whether Section 1782 can be used to compel discovery in aid of international arbitrations seated abroad.

The Supreme Court previously examined the scope of Section 1782 in *Intel v. AMD*, albeit in a non-arbitration context, where the Court held, in an opinion by Justice Ginsburg, that discovery could be obtained in connection with proceedings before the European Commission's Directorate General for Competition on the basis that the Directorate General exercises "quasi-judicial" powers and acts as a "first-instance decisionmaker."[1] However, the Court left open the question of whether Section 1782 applies to foreign-seated arbitrations. Circuit courts have since relied on *Intel* to reach opposing conclusions with respect to whether discovery may be obtained for use in such arbitrations.

In a highly anticipated move, on December 10, 2021, the U.S. Supreme Court granted certiorari to two petitions challenging the authority of federal courts to compel U.S. persons to comply with discovery requests for use in foreign seated arbitrations.

B. The Disputed issues in ZF Automotive and AlixPartners

The dispute in *ZF Automotive US, Inc. v. Luxshare, Ltd.* surfaced after Luxshare accused ZF of misrepresenting the profitability of two of ZF's overseas businesses, which Luxshare intended to acquire. Luxshare filed for arbitration before the German Institution of Arbitration. During the proceedings, it sought and obtained from the U.S. District Court for the Eastern District of Michigan a Section 1782 discovery order against certain ZF executives.[2] On appeal, the Sixth Circuit denied ZF's request to quash the order and stay the discovery subpoenas. ZF applied for certiorari to resolve the question of whether Section 1782 can be used to obtain discovery in connection with foreign arbitration proceedings, highlighting the split in the Second, Fourth, Fifth, Sixth and Seventh Circuits—and district courts in many jurisdictions—on this issue. The Supreme Court granted ZF's petition for a writ of certiorari.

AlixPartners, LLC v. Fund for Protection of Investor Rights in Foreign States arose from an UNCITRAL arbitration initiated by the Fund for Protection of Investor Rights in Foreign States against the Republic of Lithuania pursuant to a Bilateral Investment Treaty between Russia and Lithuania. The fund is an alleged assignee of a former shareholder's claim against Lithuania regarding AB Bankas Snoras (Snoras), a failed Lithuanian bank.

On July 8, 2020, the U.S. District Court for the Southern District of New York granted the Fund's request to order AlixPartners, which had investigated and prepared a report regarding Snoras' solvency that had led to Lithuanian bankruptcy proceedings against the bank, to comply with discovery requests in the investment arbitration. The district court reasoned that the arbitration fell within the scope of Section 1782 as it "was convened under the authority of the Treaty" and that the Fund "seeks to enforce rights established by that treaty against Lithuania as a state."[3] The same day, the Second Circuit decided a separate case, finding that commercial arbitration between private parties does not fall within Section 1782.[4] AlixPartners moved for reconsideration in light of the Second Circuit decision, but the District Court denied the motion, holding that arbitration under a treaty involving a State is different from commercial arbitration.[5] The Second Circuit affirmed.[6]

AlixPartners applied for certiorari to the Supreme Court, highlighting that the petition, like the one in *ZF Automotive*, concerns the scope of Section 1782, but also noting that it does so in a particularly important context, namely whether the provision applies to an investor-State arbitration. The Supreme Court granted the certiorari.

These cases are not the first time that the Supreme Court has agreed to address the scope of the phrase "foreign or international tribunal" in Section 1782. The Court was poised to decide the issue earlier this year in *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794. However, the case was voluntarily withdrawn pursuant to the parties' Rule 46 motion shortly before oral argument.

C. The Circuit Split on Whether a Foreign Arbitration Is a "Tribunal"

Five Circuit Courts have come to varying conclusions as to whether international arbitration proceedings seated abroad constitute a "foreign or international tribunal" under Section 1782.

The Fifth and Seventh Circuits have held that a foreign arbitral tribunal is not a "tribunal" under Section 1782. In *Republic of Kazakhstan v. Biedermann Int'l*, the Fifth Circuit held that the word "tribunal" applies almost uniformly to an "adjunct of a foreign government or international agency," which a private foreign tribunal is not.[7] The Seventh Circuit reached a similar conclusion in *Servotronics, Inc. v. Rolls-Royce PLC*, finding that Section 1782 only applies to "a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.'"[8]

Both Circuits approached Section 1782 with caution because it permits broader discovery than that available to domestic arbitration tribunals under Section 7 of the Federal Arbitration Act (FAA). The FAA permits an arbitral tribunal—but not the parties—to summon witnesses to testify and to produce documents in an arbitration seated in the U.S. In contrast, Section 1782 grants this authority to the parties in connection with actions pending before a "foreign or international tribunal." Moreover, according to *Biedermann*, extending Section 1782 would undermine one of the principal advantages of arbitration if the parties were to "succumb to fighting over burdensome discovery requests far from the place of arbitration."[9]

The Fourth and the Sixth Circuits have taken the opposite view. In *Servotronics, Inc. v. Boeing Co.*, which arose from the same underlying arbitration as in the Seventh Circuit, the Fourth Circuit found that an arbitration under the UK Arbitration Act of 1996 is "sanctioned, regulated, and overseen by the government and its courts" and thus falls within Section 1782.[10] Similarly, in *Abdul Latif Jameel Transp. Co. v. FedEx Corp*, the Sixth Circuit interpreted "foreign or international tribunal" to include all arbitral panels that are "established pursuant to contract" and have "the authority to issue decisions that bind the parties."[11]

The Second Circuit has taken a slightly different approach. In *NBC v. Bear Stearns & Co.*, it held that "foreign or international tribunal" does not encompass "arbitral bod[ies] established by private parties" and a contrary reading would impair the efficient and expeditious conduct of arbitrations.[12] In *Guo v. Deutsche Bank Sec. Inc.*, the court affirmed *NBC*, ruling that an arbitration administered by the China International Economic and Trade Arbitration Commission is a private commercial arbitration outside the scope of Section 1782's "proceeding in a foreign or international tribunal" requirement.[13]

Guo, however, left open the possibility that an investor-State arbitration tribunal may be a "foreign or international tribunal" on the basis that one of the parties is a State, and that the arbitration is initiated under a treaty entered into by the State.[14] The Second Circuit resolved that question in *In re Fund for Prot. of Inv. Rts. In Foreign States v. AlixPartners*, the case now on appeal before the Supreme Court.[15] The Second Circuit ruled that an investor-State arbitration falls within the scope of Section 1782 as it is "expressly contemplated by the Treaty" and "necessarily required that the foreign State consent to subject itself to binding dispute resolution."[16] Because an investor-State tribunal derives its adjudicatory authority by virtue of a State's consent to arbitration contained in a treaty, the tribunal qualifies as a "foreign or international tribunal."

D. The Divergence Within the Arbitration Community

Interested parties have taken divergent positions as to the scope of Section 1782. These disagreements were on full display in the amicus briefs filed in *Servotronics*.

In *Servotronics*, the Department of Justice expressed its "substantial interest in the proper construction" of Section 1782 and argued that "Congress did not intend 'a proceeding in a foreign or international tribunal' to include a private commercial arbitration."[17] Even though *Servotronics* related to commercial arbitration, in its amicus brief, the Department of Justice also argued against Section 1782's applicability to investor-State arbitration. It expressed the view that Congress did not envision the application of Section 1782 to investor-State arbitration when it enacted the provision in 1964, "because that type of arbitration did not exist in 1964."[18] Further, the

Department of Justice opined that construing Section 1782 to reach investment arbitration would jeopardize many of the advantages it affords, including "undermining the predictability and efficiency of investor-state arbitration proceedings."[19]

The U.S. Chamber of Commerce argued that an expansive construction of Section 1782 risks upending what it considered to be the contractual foundations and practice of international commercial arbitration.[20] The General Aviation Manufacturers Association and the Aerospace Industries Association of America, Inc. supported this view, arguing that applying Section 1782 to contract-based international arbitration would "fundamentally conflict" with parties' contractual choices to bargain for the benefits arising from alternative dispute resolution.[21]

The ICC International Court of Arbitration submitted an amicus brief on the matter. Although it did not take a position on whether Section 1782 applies to foreign arbitral tribunals, it urged the Court to rule that, in the event that it does apply, "a U.S. court weighing a Section 1782 petition should afford a very high degree of deference to the arbitral tribunal's views on the discovery sought" because arbitral tribunals are best placed to assess the propriety and utility of such discovery assistance.[22] The International Institute for Conflict Prevention & Resolution, Inc. likewise refrained from taking a substantive position, but urged the Court to resolve the split among the circuit courts.

Professor George Bermann of Columbia Law School argued that the phrase "foreign or international tribunal" in Section 1782 does not support a reading that excludes international commercial tribunals. To the contrary, the legislative history of Section 1782 shows that Congress deliberately used a term of "great generality" to cover any "court or other body authorized to authoritatively resolve disputes by adjudicatory means."[23] He pointed out that Congress drew no carve-outs for international tribunals, when it could easily have done so by using a different expression in Section 1782––such as "foreign or international judicial bodies"––in place of the general term "tribunal."[24]

The late Professor Hans Smit, Professor Emeritus at Columbia Law School, who is recognized as the lead drafter on the 1964 revision of 28 U.S.C. § 1782, advocated that Section 1782's "legislative history… demonstrates overwhelmingly that the purpose of Section 1782 was to make the assistance for which it provides available on the most liberal and comprehensive basis."[25] Professor Smit expressed the view that Section 1782 applies to both commercial and investor-state arbitrations as there is "no difference of substance between arbitral proceedings under ordinary arbitration agreements and those commenced under bilateral investment treaties that would justify treating the former differently."[26] Professor Smit's views were quoted extensively in *amici* submissions before the Court.[27]

E. Conclusion

As documented by the diversity of views presented in *Servotronics*, clarity regarding the scope of Section 1782 is of significant importance to the international arbitration community. Unlike certain other jurisdictions, the U.S. has an expansive approach to discovery. Section 1782 provides a powerful tool to engage the authority of a federal district court in aid of arbitration. Because of the uncertainty surrounding the scope of the phrase "foreign or international tribunal," Section 1782 applications have often resulted in protracted litigation with the result dependent upon the Circuit in which the petition is filed. The Supreme Court has an opportunity to provide much needed clarity and uniformity.

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[1] *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

[2] *Luxshare, Ltd. v. ZF Auto. US, Inc. 20-mc-51245 (E.D. Mich.,17 Aug. 2021).*

[3] *Fund for Protection of Investors' Rights in Foreign States v. The Republic of Lithuania*, Order of the United States District Court Southern District of New York (8 July 2020).

[4] *In re 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), as amended (9 July 2020) ("Guo ").*

[5] *Fund for Protection of Investors' Rights in Foreign States v. The Republic of Lithuania, Order of the United States District Court for the Southern District of New York (25 Aug. 2020).*

[6] *Fund for Protection of Investors' Rights in Foreign States v. The Republic of Lithuania*, No. 20-2653 (2d Cir. 15 July 2021).

[7] *Republic of Kazakhstan v. Biedermann Int'l, F.3d 880 (5th Cir. 1999).*

[8] *Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020).*

[9] *Republic of Kazakhstan v. Biedermann Int'l*, F.3d 880(5th Cir. 1999).

[10] *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).

[11] *Abdul Latif Jameel Transp. Co. v. FedEx Corp, 939 F.3d 710 (6th Cir. 2019)*

[12] *National Broadcasting Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999).*

[13] *Guo v. Deutsche Bank Sec. Inc. (In re Hanwei Guo)*, 965 F.3d 96 (2d Cir. 2020)

[14] *Id.* at n. 7.

[15] *In re Fund for Prot. of Inv. Rts. In Foreign States v. AlixPartners, LLP, — F.4th —, No. 20-2653-cv, 2021 WL 2963980 (2d Cir. 15 July 2021).*

[16] *Id.*

[17] *Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, Brief of the United States as Amicus Curiae in Support of Respondents, at 17.*

[18] *Id.*, at 15.

[19] *Id.*, at 16.

[20] *Servotronics, Inc. v. Rolls-Royce PLC, No. 20-794, Brief of the Chamber of Commerce of the United States of America and Business Roundtable as Amicus Curiae in Support of Respondents.*

[21] *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, Brief of the General Aviation Manufacturers Association, Inc. and the Aerospace Industries Association as Amici Curiae in Support of Respondents, at 3.

[22] *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, Brief Amicus Curiae of the International Court of Arbitration of the International Chamber of Commerce in Support of Neither Party, at 4, 5, 11.

[23] *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, Brief Amicus Curiae of Professor George A. Bermann in Support of Petitioner, at 3.

[24] *Id.*.

[25] Hans Smit, *The Supreme Court Rules on the Proper Interpretation of Section 1782: Its Potential Significance for International Arbitration*, 14 Am. Rev. Int'l arb. 295, 305-06.

[26] *Id.*, at 310.

[27] *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, Brief of Federal Arbitration, Inc. (FEDARB) as Amicus Curiae in Support of Petitioner, at 14-25.

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