Seventh Circuit prohibits § 1782 discovery in international commercial arbitration

International Arbitration Alert

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By: Kiera S. Gans | Harout J. Samra | Charlotte Westbrook

Whether 28 U.S.C. § 1782 permits discovery in connection with an international commercial arbitration has been the subject of considerable disagreement among US federal courts in recent months. On September 22, 2020, the US Court of Appeals for the Seventh Circuit issued a decision in which it declined a request for discovery assistance in connection with a private arbitration. The decision further cements a circuit split on the issue, and likewise makes the issue ripe for resolution by the Supreme Court.

Legal background

As noted in our prior alert, 28 U.S.C. § 1782(a) permits any party or other interested person involved in proceedings before a foreign or international tribunal, or the tribunal itself, to make a request to a US federal district court to compel discovery from a person or entity found in the district in which the court sits. For years, however, there have been disagreements as to whether or not international arbitration proceedings constitute "foreign or international tribunals" under the statute.

Prior to the landmark decision in *Intel*, the Second and Fifth Circuits ruled that § 1782 could not be used to obtain discovery in aid of private arbitration. This year, the Second Circuit had an opportunity to revisit the issue in its recent

decision of *In re: Application and Petition of Hanwei Guo*, Case No. 19-781 (2d Cir. 2020), in which it determined, consistent with its past precedent, to decline a request for discovery assistance in connection with a commercial arbitration. Our prior alert on *In re: Guo* can be found here.

By contrast, the Fourth and Sixth Circuits have held that § 1782 applies to private arbitral tribunals. Specifically, earlier this year, the Fourth Circuit in *Servotronics, Inc. v. The Boeing Company; Rolls-Royce Plc*, No. 18-2454 (4th Cir. 2020) held that a private UK arbitral panel qualified as a "tribunal" under § 1782. Our prior alert on *Servotronics* (4th Cir.) can be found here.

The Seventh Circuit has now weighed in on the issue in its decision in *Servotronics Inc. v. Rolls-Royce PLC*, Case No. 19-1847 (7th Cir. 2020), which concerns the same parties and arbitration as the Fourth Circuit decision. Notably, the Seventh Circuit reached the opposite conclusion to the Fourth Circuit, thereby aligning itself with the Second and Fifth Circuits in determining that § 1782 does not apply to private arbitral tribunals.

The Seventh Circuit case

The underlying arbitration arose out of an indemnification dispute between Servotronics, Inc. and Rolls-Royce Plc. Rolls-Royce commenced an arbitration in the United Kingdom pursuant to the parties' agreement. During the arbitration, Servotronics filed an application in the district court for the Northern District of Illinois under § 1782 requesting that the court issue a subpoena compelling Boeing to produce documents for use in the UK arbitration. The district court denied Servotronics' application and Servotronics appealed.

The Seventh Circuit affirmed the decision of the district court. The court's reasoning turned on three main grounds.

First, the court observed that the word "tribunal" is not defined in the statute, and dictionary definitions do not unambiguously resolve whether private arbitral panels would be included in the term. In both common and legal parlance, the phrase "foreign or international tribunal" can be understood to mean only state-sponsored tribunals, but it can also be understood to include private arbitration panels. Thus, the court noted that both interpretations are plausible.

Second, the court read the word "tribunal" in context, and with a view to its place in the statutory scheme recommended by the Commission on International Rules of Judicial Procedure and adopted by Congress. This statutory scheme not only included a complete revision to § 1782, but also revisions to § 1696 and § 1781, which govern service-of-process assistance and letters rogatory, respectively. The court found that the identical phrase "foreign or international tribunal" is used in all three statutes and reasoned that the term should be given the same meaning in each instance. Based on this analysis, the court concluded that the phrase "foreign or international tribunal" in § 1782 refers only to state-sponsored tribunals and does not include private arbitration panels. Thus, by harmonizing this statutory language and reading it as a whole, the court concluded that a more limited reading of § 1782 – one that excludes private foreign arbitrations – was the correct construction.

Third, the court found that the narrower understanding of the word "tribunal" avoids a conflict with the Federal Arbitration Act (FAA). The discovery assistance authorized by § 1782 is broader than that afforded by the FAA, insofar as it permits both the arbitration panel *as well as* litigants and other "interested persons" to obtain discovery orders from district courts. In contrast, the FAA only permits the arbitration panel, but not the parties, to summon witnesses. If § 1782 were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in those arbitrations would have access to more expansive discovery than litigants in domestic arbitrations. The court could not identify a policy rationale that would justify this distinction.

On these bases, the court joined the Second and Fifth Circuits in holding that § 1782 does not authorize district courts to compel discovery for use in private foreign arbitrations.

The significance of the Seventh Circuit's decision

The Seventh Circuit's decision cements the circuit split on the issue of whether § 1782 applies to private arbitrations. There are varying aspects of this split that are notable. First, the Court's opinion, authored by Judge Diane Sykes, engages in a similar textual analysis to that of the Sixth Circuit, but reaches the opposite conclusion. Likewise, it involves the same parties and underlying facts as those in the Fourth Circuit decision but results in directly conflicting outcomes for the parties. The result being that litigants seeking such discovery will continue to be incentivized to engage in strategic

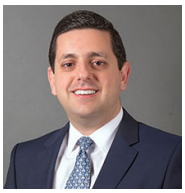
forum shopping, but that outcomes and results will continue to be unpredictable and uneven.

With similar cases currently pending in the Third and Ninth Circuits, the issue is ripe for intervention by the Supreme Court to bring some harmonization to a legal landscape that has long been fractured.

Find out more about the implications of this decision by contacting the authors or your usual DLA Piper relationship lawyer.

AUTHORS

Kiera S. Gans
Partner
New York | T: +1 212 335 4500
kiera.gans@dlapiper.com



Harout J. Samra
Of Counsel
Miami | T: +1 305 423 8500
harout.samra@dlapiper.com

Charlotte Westbrook
Associate
New York | T: +1 212 335 4500
charlotte.westbrook@dlapiper.com