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## Fourth Circuit Allows Discovery in Support of Private Arbitration

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On March 30, 2020, the United States Court of Appeals for the Fourth Circuit ruled in *Servotronics Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) that U.S. federal courts may order parties to produce documents and testimony in aid of foreign private commercial arbitrations pursuant to 28 U.S.C. § 1782 (Section 1782). The decision deepens the existing circuit split on the subject, and comes on the heels of the Sixth Circuit's recent decision in *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019), which similarly held that Section 1782 may be utilized in aid of foreign private commercial arbitration proceedings. The Courts of Appeals for the Second and Fifth Circuits have held the opposite.

### BACKGROUND

The *Servotronics* case involved a private arbitration between Servotronics, Inc. (Servotronics) and Rolls-Royce PLC (Rolls-Royce). Rolls-Royce alleged that Servotronics supplied it with defective engine valves which caused significant damage to engines it manufactured and supplied to The Boeing Company (Boeing) for the Boeing 787 Dreamliner aircraft. Rolls-Royce initiated arbitration proceedings against Servotronics in the United Kingdom (UK) pursuant to the parties' contract. The arbitration was commenced under the rules of the Chartered Institute of Arbitrators.

Servotronics filed an application in the United States District Court for the District of South Carolina to obtain evidence for use in the arbitration. The *ex parte* application sought discovery from three South Carolina residents, all current or former Boeing employees. The district court denied Servotronics' application on the basis that Section 1782 may not be used in aid of private commercial arbitrations. It relied on prior cases like *Nat'l Broad. Co., Inc., v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2d. Cir. 1999) and *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999), both of which held that private arbitral bodies do not constitute "foreign tribunals" under Section 1782. Servotronics appealed.



## THE DECISION

On March 30, 2020, the Fourth Circuit, addressing the issue as one of first impression, found that the arbitral tribunal constituted under the rules of the Chartered Institute of Arbitrators was a foreign tribunal for purposes of Section 1782.

In reaching its decision, the Fourth Circuit examined the purpose and history of Section 1782, including U.S. Congress' policy to "increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign courts but before all foreign and international *tribunals*."<sup>1</sup> Citing the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which post-dated the Second and Fifth Circuit decisions in *NBC* and *Biedermann*, and which has been perceived as broadening the scope of Section 1782, the Fourth Circuit held that the statute's articulated purpose to provide foreign assistance clearly included all "foreign and international *tribunals*" as a matter of public policy.<sup>2</sup>

The Fourth Circuit rejected Boeing's argument that the word "tribunal" in Section 1782 refers only to an "entity that exercise[s] government-conferred authority."<sup>3</sup> It further clarified that, even if a more restrictive definition of "foreign or international tribunal" was adopted, tribunals deriving their authority from parties' agreement were nevertheless acting within the "government-conferred authority" of the state to the extent that such tribunals were given authority and regulated by the arbitration laws of the country in which the arbitration was seated.<sup>4</sup> To illustrate, the Fourth Circuit discussed the features of the U.S. Federal Arbitration Act (FAA), which both endorses and regulates arbitrations under the supervisory authority of U.S. district courts. Similarly, the Fourth Circuit found that the UK Arbitration Act of 1996 also provided governmental regulation and oversight of arbitrations taking place in the UK.

## PRACTICAL CONSIDERATIONS

Section 1782 discovery is a unique feature of U.S. law that permits discovery in aid of foreign proceedings. The issue of whether and to what extent the statute may be deployed in aid of international arbitration is an issue with which the federal courts continue to struggle. Some courts have concluded that *NBC* and *Biedermann* are no longer good law.<sup>5</sup> Other courts, however, continue to recognize the early precedent established by the Second and Fifth Circuits.<sup>6</sup>

Notably, the Ninth Circuit may soon weigh in on the issue as well. While the Northern District of California had previously held that Section 1782 discovery does not extend to private arbitrations,<sup>7</sup> it recently reached the opposite conclusion in February 2020 in *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-MC-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), when it held that Section 1782 could be used to seek discovery in a private commercial arbitration.<sup>8</sup> The *HRC-Hainan Holding* decision has been appealed to the Ninth Circuit, which has established a briefing schedule that will commence in early May.

While it remains to be seen whether some courts will continue to follow *NBC* and *Biedermann*, parties to private arbitration should nonetheless consider using Section 1782 discovery in aid of their arbitral proceedings as appropriate. The Fourth Circuit's *Servotronics* decision and the Sixth Circuit's *Abdul Latif* decision appear to signal a trend toward permitting the use of Section 1782 discovery for use in private arbitration, though the Fifth Circuit's refusal to overrule *Biedermann* suggests that the circuit split is likely to persist until the Supreme Court considers the issue,<sup>9</sup> which has been recurring with frequency given the increased use of Section 1782. This case may, in fact, be the vehicle that leads to Supreme Court review, as Rolls-Royce announced in a brief filed with the Fourth Circuit that it intends to petition for certiorari.<sup>10</sup>



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<sup>1</sup> *Servotronics*, 954 F.3d 209, 213 (emphasis original).

<sup>2</sup> *Id.* (emphasis original).

<sup>3</sup> *Id.* at 211.

<sup>4</sup> *Id.* at 210-11.

<sup>5</sup> See *In re Children’s Inv. Fund Found. (UK)*, 363 F. Supp. 3d 361, 370 (S.D.N.Y. 2019) (following *Kleimar* to conclude that “foreign tribunal” should be interpreted broadly in light of *Intel* to include private arbitration); *In re Ex Parte Application of Kleimar N.V.*, 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016) (finding that “[w]hile the Second Circuit has previously excluded private foreign arbitrations from the scope of qualifying Section 1782 proceedings, dictum of the Supreme Court in [*Intel*], suggests the Supreme Court may consider private foreign arbitrations, in fact, within the scope of Section 1782.”); *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1227 (N.D. Ga. 2006) (finding that “[t]he Supreme Court’s decision in *Intel* undermines the reasoning of [*NBC*]”).

<sup>6</sup> See *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App’x 31, 34 (5th Cir. 2009) (finding that it “remain[s] bound by our holding in *Biedermann*”); *In re Application of Hanwei Guo*, No. 18-mc-561 (JMF), 2019 WL 917076 (S.D.N.Y. Feb. 25, 2019) (finding that it was bound by *NBC* “unless and until it is overruled.”); *In re China Petrochemical Dev. Corp.*, No. 3:17-mc-00157 (SRU) 2017 WL 10841339, at \*3 (D. Conn. Nov. 28, 2017) (denying discovery under Section 1782 and finding that *Intel* did not overturn Second and Fifth Circuit precedent because “private foreign arbitration tribunal[s]” were “not at issue in *Intel*”).

<sup>7</sup> See *In re Grupo Unidos por el Canal, S.A.*, No. 14-mc-80277-JST (DMR) 2015 WL 1815251, at \*7 (N.D. Cal. Apr. 21, 2015).

<sup>8</sup> *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-MC-80277-TSH, 2020 WL 906719, at \*7 (N.D. Cal. Feb. 25, 2020).

<sup>9</sup> See *El Paso Corp.*, 341 F. App’x at 34 (finding that it “remain[s] bound by our holding in *Biedermann*”).

<sup>10</sup> See Mot. of Intervenor-Appellee Rolls-Royce PLC to Stay Issuance of the Mandate Pending the Filing of a Petition for Writ of Certiorari, *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC*, No. 18-2454 (4th Cir. 2020).