

**MARCH 23, 2021**

For more information,
contact:

James Berger
+1 212 556 2202
jberger@kslaw.com

Charlene Sun
+1 212 556 2107
csun@kslaw.com

Erin Collins
+1 212 556 2350
ecollins@kslaw.com

Vivasvat Dadwal
+1 212 556 2223
vdadwal@kslaw.com

King & Spalding

New York
1185 Avenue of the Americas
New York, New York 10036-
4003
Tel: +1 212 556 2100

U.S. Supreme Court Will Rule on Whether Section 1782 Discovery is Available for Use in Private Foreign Commercial Arbitrations

In a highly anticipated decision, the U.S. Supreme Court has granted certiorari in *Servotronics, Inc. v. Rolls-Royce PLC, et al.* and agreed to address the question of whether federal courts may authorize discovery pursuant to 28 U.S.C. § 1782(a) (“**Section 1782**”) in aid of private foreign commercial arbitrations.¹ Section 1782 provides in part, that a district court of competent jurisdiction may order the production of “testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .”² However, as we reported in December 22, 2020, there currently exists a Circuit split between the Second,³ Fifth,⁴ and Seventh⁵ Circuits – which have found that Section 1782 may not be used for discovery in aid of foreign private arbitrations – and the Fourth⁶ and Sixth Circuits,⁷ which have held the opposite.

Servotronics, Inc. v. Rolls-Royce involves an arbitration between Servotronics, Inc. (“**Servotronics**”) and Rolls-Royce PLC (“**Rolls-Royce**”) which was commenced under the rules of the Chartered Institute of Arbitrators in the United Kingdom.⁸ Servotronics sought discovery pursuant to Section 1782 in aid of the arbitration; the district court denied the application, and Servotronics appealed to the Seventh Circuit, which affirmed the ruling. The Seventh Circuit held that Section 1782 may not be used in aid of private commercial arbitrations.⁹ In particular, the Court found that when Section 1782 is analyzed in context, the “more expansive reading of the term [tribunal] – the one that includes private arbitrations – becomes less plausible.”¹⁰ The Court also wished to avoid “serious conflict” between Section 1782 and the Federal Arbitration Act, and noted that the “outsized significance” to Hans Smit’s quote in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, (2004) (that “[t]he term ‘tribunal’ [in § 1782(a)] . . . includes investigating



magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”) did not authorize district courts to provide discovery assistance in private foreign arbitrations.¹¹ The ruling aligned the Seventh Circuit with the courts of appeals for the Second and Fifth Circuits, each of which had held that Section 1782 may not be used in aid of private commercial arbitrations.¹²

The Petition asked the U.S. Supreme Court to address whether Section 1782’s “for use in a proceeding in a foreign or international tribunal” requirement encompasses private commercial arbitral tribunals, as the Fourth and Sixth Circuits have held, or excludes such tribunals without expressing an exclusionary intent, as the Second, Fifth, and, in the case below, the Seventh Circuit, have held.¹³ In opposing the Petition, Rolls-Royce argued that the “minor” circuit split did not as yet warrant the Court’s review, and noted its view that any intervention now would be “premature” since courts of appeals should be permitted to “further consider the issue.”¹⁴ Rolls-Royce also alleged that even if the Court wished to review the question presented, the instant case offered a poor vehicle for doing so. Specifically, it contended that the case risked becoming moot since the arbitration for which Servotronics seeks discovery is scheduled to conclude before the case can be fully briefed, argued, and decided in Court.¹⁵

The issue of whether Section 1782 may be used in aid of foreign arbitrations has been the subject of a longstanding and intense debate due to increased reliance on international commercial arbitration as a dispute resolution mechanism, and the issue currently pending before several other U.S. courts, including courts in the Third, Ninth, and District of Columbia Circuits.¹⁶ If the Supreme Court reverses the Seventh Circuit’s decision, users of commercial arbitration will more easily be able to use this powerful discovery device to assist their efforts. If the Court affirms, it would then fall to Congress to consider whether Section 1782 should be available to parties engaged in arbitration outside the United States.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,200 lawyers in 22 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	GENEVA	MOSCOW	RIYADH	TOKYO
ATLANTA	CHICAGO	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
AUSTIN	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
BRUSSELS	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE	



¹ See [Supreme Court Asked to Rule on Whether 28 U.S.C. § 1782 May be Used in Support of Private Arbitration](#) for a detailed discussion of the Servotronics Cert Petition.

² 28 U.S.C. § 1782(a) (emphasis added).

³ *Hanwei Guo v. Deutsche Bank Securities Inc., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Morgan Stanley & Co. LLC.*, No. 19-781, 2020 WL 3816098 (2nd Cir. July 8, 2020); *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999); for further analysis of the Second Circuit's *Hanwei* decision see [Second Circuit Denies Discovery in Support of Private Arbitration](#).

⁴ *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31 (5th Cir. 2009); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

⁵ *Servotronics, Inc. v. Rolls-Royce PLC, et al*, No. 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020); for further analysis of the Seventh Circuit's Servotronics decision see [Seventh Circuit Denies Discovery in Support of Private Arbitration](#).

⁶ *Servotronics Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020); for further analysis of the [Fourth Circuit's Servotronics decision see Fourth Circuit Allows Discovery in Support of Private Arbitration](#).

⁷ *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019); for further analysis of the Sixth Circuit's Abdul Latif Jameel decision see [Sixth Circuit Allows Discovery In Support of DIFC Arbitration](#).

⁸ *Servotronics, Inc. v. Rolls-Royce PLC, et al*, No. 19-1847, 2020 WL 5640466 (7th Cir. Sept. 22, 2020).

⁹ *Id.* at *4.

¹⁰ *Id.*

¹¹ *Id.* See [Seventh Circuit Denies Discovery in Support of Private Arbitration](#) (discussing the Seventh Circuit's decision in more detail).

¹² See *supra* notes 2-3.

¹³ Pet. For Writ of Cert., *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794 (U.S.) at i.

¹⁴ Br. in Opp'n, *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794 (U.S.) at 7.

¹⁵ *Id.* at 20.

¹⁶ See e.g., *Food Delivery Holding 12 S.A.R.L. v. DeWitty & Assocs. CHTD*, No. 1:21-MC-0005 (GMH), 2021 WL 860262, at *3 (D.D.C. Mar. 8, 2021) (noting the Circuit split, and allowing petitioner to submit supplemental briefing on the issue); *In re EWE Gasspeicher GmbH*, No. CV 19-MC-109-RGA, 2020 WL 1272612 (D. Del. Mar. 17, 2020), appeal filed sub nom. *In re: Application of EWE Gasspeicher GmbH*, No. 20-01830 (3d Cir. May 8, 2020); *HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 19-mc-80277-TSH, 2020 U.S. Dist. LEXIS 32125, at *2 (N.D. Cal. Feb. 25, 2020), appeal filed sub nom. *In re: Application of HRC-Hainan Holding Co., LLC*, No. 20-15371 (9th Cir. Feb. 28, 2020).