

## International Arbitration

# Supreme Court to Decide Whether US Courts Can Assist Discovery in Private International Commercial Arbitrations

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The Supreme Court agreed last week to consider whether a federal statute allowing courts to assist “foreign or international tribunal[s]”<sup>[1]</sup> gather evidence applies to private commercial arbitral tribunals, or whether it merely concerns state-sponsored arbitral bodies.<sup>[2]</sup> This decision will resolve a long-running question about the extent to which 28 U.S.C. § 1782(a) can bring US courts into private foreign disputes.

The case arises from a UK arbitration over liability for a \$12.8 million settlement for a Boeing aircraft’s engine failure.<sup>[3]</sup> The engine’s ultimate manufacturer, Rolls-Royce, PLC (Rolls-Royce), commenced arbitration proceedings against the company behind the engine’s valve, Servotronics, Inc. (Servotronics), under the UK’s Rules of the Chartered Institute of Arbitrators.<sup>[4]</sup>

In a bid for further discovery, given the limited nature of document production in international arbitration, Servotronics petitioned an Illinois district court to compel Boeing’s production of certain documents for the London arbitration under 28 U.S.C. § 1782(a), which allows district courts to order testimony or document production “for use in a proceeding in a foreign or international tribunal.” The statute also gives courts discretion to prescribe foreign procedures or US rules for the collection of evidence.<sup>[5]</sup> The subpoena request was initially granted, but Rolls-Royce moved to quash it on the grounds that section 1782(a) does not allow a district court to order discovery for use in a private foreign commercial arbitration.<sup>[6]</sup> Boeing joined the motion to quash and the district court complied, reversing course on its prior decision.<sup>[7]</sup>

On appeal, the Seventh Circuit agreed with Rolls-Royce and Boeing, holding as a matter of first impression that 28 U.S.C. § 1782 does not apply to private foreign arbitrations. In reaching its decision, the court analyzed the use of the term “foreign or international tribunal” in its statutory context, concluding that a “more limited reading” is in harmony with the statute and avoids “a serious conflict” with the Federal Arbitration Act (FAA), which the court construed as permitting much more limited discovery assistance.<sup>[8]</sup> Most significantly, the court noted, the FAA allows the arbitration panel, but not the parties, to summon witnesses to testify and produce documents.<sup>[9]</sup> Section 1782, by contrast, allows both foreign tribunals and *litigants* (as well as other “interested parties”) to obtain discovery orders.<sup>[10]</sup>

“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,” the court noted.<sup>[11]</sup>

In addition, the court reviewed the Supreme Court’s only decision interpreting section 1782(a), *Intel Corp. v. Advanced Micro Devices, Inc.*,<sup>[12]</sup> and determined that there is “no indication that the phrase ‘arbitral tribunals’ includes *private* arbitral tribunals.”<sup>[13]</sup>

While the Second<sup>[14]</sup> and Fifth<sup>[15]</sup> Circuits have also adopted a narrow reading of section 1782(a), the Fourth<sup>[16]</sup> and Sixth<sup>[17]</sup> Circuits previously determined that the statute *does* apply to private commercial arbitral disputes. (The Fourth Circuit’s decision also arose in the course of Servotronics’ arbitration

proceeding with Rolls-Royce,<sup>[18]</sup> saddling the arbitrators with conflicting appeals court decisions on the same, unresolved issue.)

Litigants in foreign arbitrations have long looked to section 1782 as a potential avenue for obtaining something close to US-style discovery. The Supreme Court's decision in *Servotronics* could shut that door permanently. Alternately, even if the Court interprets section 1782 as allowing discovery in aid of private commercial arbitrations, it could provide guidance to district courts as to how to exercise their discretion over such petitions. In any case, resolving the current circuit split will reduce the opportunity for forum shopping and attendant uncertainty.



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[1] 28 U.S.C. § 1782(a).

[2] *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, 2021 WL 1072280 (U.S. Mar. 22, 2021) (No. 20-794).

[3] *Servotronics, Inc. v. Rolls-Royce PLC*, 954 F.3d 209, 210 (4th Cir. 2020).

[4] *Id.* at 691.

[5] 28 U.S.C. § 1782(a).

[6] *Servotronics, Inc.*, 975 F.3d at 691.

[7] *Id.*

[8] *Id.* at 695.

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] 542 U.S. 241 (2004).

[13] *Id.* at 696.

[14] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

[15] *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).

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

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

[18] *Servotronics, Inc.*, 954 F.3d at 210.