CARLTON FIELDS

Foreign Arbitration and Discovery in the U.S. Under Section 1782: Servotronics Inc. v. Boeing Co.

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A recent decision by the U.S. Court of Appeals for the Fourth Circuit has expanded the circuit split over whether a foreign arbitration is a "foreign or international tribunal" in order to support an ancillary proceeding for discovery in the United States under 28 U.S.C. § 1782.

The statute was conceived to develop reciprocity between nations by offering discovery in the United States in aid of legal proceedings in other countries, hoping that other countries would return the favor by making discovery available overseas that would assist litigants in U.S. legal proceedings. Section 1782 thus provides for any U.S. district court to make discovery available (under U.S. discovery rules) from any person or entity found within the district for use in proceedings before a "foreign or international tribunal."

U.S. courts have differed, however, on whether Section 1782 applies only to proceedings before a foreign *court* or whether it also applies to an *arbitration tribunal* conducting proceedings in a foreign country. That is, the courts of appeals disagree regarding whether a private commercial arbitration proceeding conducted outside the United States qualifies as a "foreign or international tribunal" such that an entity found in the United States might be compelled under Section 1782 to produce documents or testimony in aid thereof.

The Second [i] and Fifth Circuits [ii] have long held that private commercial arbitration proceedings outside the United States are not proceedings in a "foreign or international tribunal."

In 2019, the Sixth Circuit reached the opposite conclusion in *Abdul Latif Jameel Transportation Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)*.[iii] In that case, the Sixth Circuit considered the seminal Section 1782 case *Intel Corp. v. Advanced Micro Devices*

Inc.,[iv] in which the Supreme Court allowed an application for Section 1782 discovery for use in a nonjudicial proceeding (a proceeding before the European Commission). The Sixth Circuit concluded from this that "tribunal" should be interpreted broadly to encompass private arbitrations empowered to bind the parties before them by agreement.[v] Two years later, the Eleventh Circuit agreed that an arbitral panel was a "tribunal" under Section 1782,[vi] but that decision was later vacated and superseded, leaving the question unaddressed on review.[vii]

This brings us to the present. In March 2020, the Fourth Circuit reexamined *Intel* to determine whether a party to a private arbitration in the United Kingdom can take the testimony of South Carolinians under Section 1782. In *Servotronics Inc. v. Boeing Co.*,[viii] the Fourth Circuit noted — as Justice Ginsberg previously noted in *Intel* — that Congress replaced the phrase "in any judicial proceeding pending in any court in a foreign country" in an earlier version of the legislation with the phrase "in a proceeding in a foreign or international tribunal." From this, the court reasoned that Congress specifically intended to aid the resolution of disputes pending not only before foreign *courts* but also before foreign and international *tribunals*.[ix]

The Fourth Circuit then compared the Federal Arbitration Act with its U.K. analog, the Arbitration Act 1996, and found arbitrations arising under both acts to be endorsed by their respective congressional bodies, duly regulated, and judicially supervised.[x] The Fourth Circuit concluded that the U.K. arbitration panel was a "tribunal," enabling the taking of the South Carolina residents' testimony pursuant to a Section 1782 subpoena.[xi]

Perhaps the Supreme Court will soon be called upon to provide some clarity. Until then, and depending on the circuit, parties to foreign arbitrations will face uncertainty as to their applications for discovery in the United States under Section 1782, and entities "found in" the United States, or otherwise fighting such requests, will continue to have some grounds to oppose them.

[i] *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).
[ii] *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999).
[iii] 939 F.3d 710 (6th Cir. 2010).
[iv] 542 U.S. 241 (2004).
[v] *Abdul Latif Jameel Transp. Co.*, 939 F.3d at 717–28.
[vi] *In re Consorcio Ecuatoriano de Telecommunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012).
[vii] *Application of Consorcio Ecuatoriano de Telecommunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 747 F.3d 1262, 1270–71 (11th Cir. 2014).
[viii] 954 F.3d 209 (4th Cir. 2020).
[ix] *Id.*
[x] *Id.*
[xi] *Id.*

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