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The door remains open for discovery in support of international commercial arbitration in the U.S.

In September 2021, the opportunity vanished for the Supreme Court of the United States to resolve the highly debated issue of whether parties to international commercial arbitrations are entitled to seek discovery from U.S. courts. The present contribution provides a brief overview of the question and its implications for parties to an envisaged or ongoing arbitration seated in Switzerland.

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The Supreme Court will not decide on the application of 28 U.S.C. § 1782 to international commercial arbitration in *Servotronics Inc. v. Rolls-Royce PLC*

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A few weeks before the oral arguments in the proceeding *Servotronics Inc. v. Rolls-Royce PLC* pending before the Supreme Court of the United States, the parties submitted a joint stipulation to dismiss the case. The case was accordingly dismissed on 29 September 2021. This means that the Supreme Court will not render a decision on the issue of whether parties to an international commercial arbitration can benefit from the discovery tool provided under Section 1782 of Title 28 U.S.C. In absence of a uniform standard to be followed, the U.S. Circuit Courts remain divided on this question. Hence, parties to a commercial arbitration still have the opportunity to seek discovery in support of their proceeding in certain U.S. jurisdictions.

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The relevant facts of the case *Servotronics Inc. v. Rolls-Royce PLC*

The background of the dispute before the U.S. courts is an indemnification claim brought by Rolls-Royce PLC ("**Rolls-Royce**") against Servotronics, Inc. ("**Servotronics**") for losses incurred in a project with the aircraft company Boeing. Rolls-Royce had manufactured and sold an engine to Boeing that caught fire during a test conducted in a Boeing's facility and damaged Boeing's aircraft. Following the incident, Rolls-Royce paid a settlement of around USD 12 million to Boeing. In turn, Rolls-Royce sought indemnification from Servotronics, claiming that a valve manufactured by Servotronics had caused the failure of the engine. As Rolls-Royce and Servotronics could not reach an agreement, Rolls-Royce instituted arbitration under the CIArb Arbitration Rules in the UK. In the course of the arbitration proceeding, Servotronics held that Rolls-Royce failed to produce documents relevant to the case and filed *ex parte* applications against Boeing's current and former employees in the District Court for the Northern District of South Carolina (the "**U.S. Proceeding 1**") as well as against Boeing itself in the District Court for the District of Illinois (the "**U.S. Proceeding 2**"), seeking discovery for use in the UK arbitration. Both applications were based on Section 1782 of Title 28 of the United States Code ("**Section 1782**"). In a nutshell, Section 1782 entails three statutory requirements, i.e., an application *(i)* from a foreign or international tribunal or a person with a valid interest, *(ii)* against a person residing or found in the jurisdiction of the U.S. courts, and *(iii)* seeking evidence for its use in a foreign proceeding. If the statutory requirements are met, the U.S. court has wide discretion over whether to grant discovery under Section 1782.

In the U.S. Proceeding 1, the District Court considered that the third statutory requirement under Section 1782, i.e., that Servotronics was seeking evidence *"for [its] use in a proceeding in a foreign or international tribunal"*, was not fulfilled, because private arbitrations *"are not before a 'tribunal' as required by [Section] 1782"*. The District Court thus denied Servotronics' application. Upon Servotronics' appeal, **the Court of**

Appeals for the Fourth Circuit concluded, on the contrary, **that the arbitral tribunal in the UK arbitration was *"a foreign tribunal for purposes of § 1782"*** and reversed the lower court's decision.

In contrast, in the U.S. Proceeding 2, the District Court initially granted Servotronics' request and issued the subpoena. Boeing and Rolls-Royce (which intervened in the proceeding) filed a motion to quash the subpoena. The District Court eventually agreed with the argument raised in the motion to quash by Boeing and Rolls-Royce that Section 1782 does not authorize U.S. courts to provide discovery assistance in private foreign arbitrations and quashed the subpoena. Upon Servotronics' appeal, the Court of Appeals for the Seventh Circuit upheld the decision of the District Court. **The Court of Appeals held in substance that only *"a state-sponsored, public or quasi-governmental tribunal"* falls within the definition of *"foreign or international tribunal"* under Section 1782**, and not a tribunal in a private foreign arbitration. On 7 December 2020, Servotronics filed a writ of certiorari before the Supreme Court of the United States and presented the following question:

> *"[w]hether the discretion granted to district courts in 28 U.S.C. §1782(a) to render assistance in gathering evidence for use in "a foreign or international tribunal" 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."*

On 22 March 2021, the Supreme Court granted certiorari. Following the Supreme Court's decision, numerous authorities, institutions and professors filed *amicus curiae* briefs with the Supreme Court. Before the oral arguments could take place, however, Servotronics' counsel reported to the Supreme Court that Servotronics anticipated filing a dismissal motion. On 8 September 2021, the case was removed from the Supreme Court's argument calendar. On 24 September 2021, the parties submitted a joint stipulation requesting to enter an order of dismissal and the case was dismissed on 29 September 2021.

The impact of the dismissal motion for arbitrations seated abroad

Eventually, the proceeding *Servotronics Inc. v. Rolls-Royce PLC* did not provide the much-awaited answer to a question that had been heatedly discussed within the legal community. The case provides, however, a very illustrative example of the problem at issue, in the absence of a standard at the federal level: The division on the application of Section 1782 to private arbitration is such that the same question pertaining to **the same arbitration before two different U.S. courts can lead to two opposite decisions**.[1]

Since the current split between the Circuits on the applicability of Section 1782 to private arbitration remains unsettled, parties seeking evidence in the U.S. have to pay attention to the relevant case-law of the Circuit or the District in which they intend to file their application.[2]

As of today, the interpretation of **Section 1782** on this point **divides**, on one side, the **Sixth and Fourth Circuits** (holding that Section 1782 encompasses foreign private arbitrations) and, on the other side, the **Second, Fifth and Seventh Circuits** (holding that Section 1782 excludes foreign private arbitrations). The same issue is pending before other Circuits. The **ongoing proceedings in the Third and Ninth Circuits**[3] could prove particularly relevant for parties and practitioners around the world, as the respective Courts of Appeal might set an important precedent in jurisdictions where numerous companies offering services internationally have their seat, such as California (in the Ninth Circuit) and Delaware (in the Third Circuit).

It follows from the above that access to the mechanism under Section 1782 for parties to international private arbitrations will depend on which person[4] is deemed to *(a)* hold the evidence sought and *(b)* reside or be found in a specific district. In order to determine that question, U.S. courts apply various and sometimes (at least for foreign practitioners) quite creative tests. As an illustrative example, in *In re Edelman*, the Court of Appeal of the Second Circuit, by holding that Section 1782 *"supports a flexible reading of the phrase 'resides or is found'"*, concluded that a French citizen working and living in France could be validly served with a subpoena while he was visiting an art gallery in New York City.[5] In another recent case, the same Court of Appeal considered that Section 1782 *"does have extraterritorial reach"*, and thus confirmed that, at least in certain Circuits, parties can use the discovery tool to reach documents located outside the U.S. that are deemed under the control of a person residing in the U.S.[6] As shown in these and other examples, Section 1782 can be quite far-reaching.

In this context, the exchange and storage of information and documents in electronic form may open new ways for obtaining evidence in the U.S. Not only did the digital revolution exponentially increase the exchange of information, but also its accessibility from different parts of the world, including of course the U.S. In addition to the usual targets of discovery under Section 1782, such as affiliates, business partners, (legal) representatives, (former) employees, etc. of a party to the foreign proceeding, parties may try to file applications towards providers of digital services (such as clouding, e-communication, data centers or analysis, etc.) and/or other subjects holding information related to the dispute in digital form. Especially since individuals and companies all around the globe often rely on market leaders specialized in digital services seated (or having servers located) in the

U.S., the chance that information and data of parties residing or seated abroad are located in the U.S may be higher than expected. Even though applications for subpoena on such data are subject to various conditions under U.S. law,[7] recent cases show that parties are already trying (sometimes with success) to exploit the new ways of sharing data to obtain evidence.

The possible measures that Swiss parties may consider (even before arbitration)

As the sharp increase in applications in recent years indicates,[8] Section 1782 can be a very effective tool, and a careful analysis of where third parties holding evidence connected to a dispute are located can prove unexpectedly useful in the context of legal proceedings. Especially in the current digitalized world, a physical seat or residence outside the U.S. may no longer be sufficient to ensure that documents or information do not become the target of subpoenas under Section 1782. Even Swiss companies and individuals are thus well-advised to monitor where exactly their documents and information are stored or accessible and, where possible, to adopt measures for mitigating the risk that the discovery of such documents and information will become the subject of a dispute before the U.S. courts.

For this purpose, choosing to resolve commercial disputes through arbitration in Switzerland can entail several advantages. As seen above, courts in certain U.S. Circuits will not qualify private arbitral tribunals as "tribunals" for the purpose of Section 1782 and will reject applications under Section 1782. More importantly, parties to a (potential) international arbitration seated in Switzerland can set specific rules for the admissibility of evidence in the arbitration. In this respect, various possibilities are open to the parties. Notably, the parties can agree on limiting the admissibility of evidence sought in proceedings against third parties, abroad and/or outside the framework of the arbitration. Also, the parties can decide to completely renounce these mechanisms, or else agree that parties can make use of them only under certain conditions, such as, e.g., the arbitral tribunal's prior approval. As for the timing of the agreement, the parties may determine specific rules in the arbitration clause included in their contract (which is rarely the case), or agree on such measures at a later stage after the commencement of the arbitration, such as, for instance, during the case management conference. In this context, the parties are well-advised to carefully review whether the procedural rules set for the arbitration (by special agreement or reference to institutional rules) provide a clear solution to this specific issue.

Arbitration is only one among various measures that parties can implement to mitigate the risk of being targeted by discovery applications. Parties may consider additional solutions, especially for the cases where disputes cannot be submitted to arbitration. Companies may address the problem in their contract with the data services provider, e.g. by including a clause that the company's data must be stored in a specific location.[9] Companies may also implement stricter measures for their most sensitive data, such as an alternative way to store it (e.g., only locally), to limit access to such data to specific subjects, and/or use another service provider for such data. There does not seem to be a one-size-fits-all solution to this issue. Companies are thus well-advised to determine the most appropriate measures to their specific situation, based on a proper technical and legal assessment of how and where the company's data is stored and of what the company's potential exposures are.

The international echo of *Servotronics Inc. v. Rolls-Royce PLC* was (alas merely) a useful reminder of the benefits and risks for parties seeking discovery under Section 1782. Despite the open questions about its interpretation, Section 1782 remains a potentially very effective tool for parties to an international dispute, and not surprisingly, the number of discovery applications increased significantly in recent years. A solid knowledge of this mechanism can represent a real advantage for parties seeking evidence in support of a dispute or willing to mitigate the risks of being the target of proceedings before U.S. courts.

Endnotes

1. See the decision of the Court of Appeals for the Seventh Circuit, Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689 (7th Cir. 2020): *"[W]e join the Second and Fifth Circuits in concluding that § 1782(a) does not authorize the district courts to compel discovery for use in private foreign arbitrations.")* and the decision of the Court of Appeals for the Fourth Circuit Servotronics, Inc. v. Boeing Co., 954 F.3d 209 (4th Cir. 2020): *"[W]e conclude that the arbitral panel in the United Kingdom is indeed a foreign tribunal for purposes of § 1782"*.
2. Regarding the organization of the U.S. Courts, see also: https://www.uscourts.gov/about-federal-courts/federal-courts-public/court-website-links#districtbankruptcy.
3. Appeal to the Third Circuit Court against the decision of the Delaware district court denying discovery in support of a commercial arbitration in Germany under the DIS Rules of Arbitration, see *In re Application of EWE Gasspeicher GmbH, Civ. No. 19-mc-109-RGA (D. Del. Mar. 17, 2020)* and Appeal to the Ninth Circuit Court against the decision of the Northern District of California granting discovery in support of an

arbitration in China under the CIETAC arbitration rules, see *HRC-Hainan Holding Co. v. Yihan Hu, Case No. 19-mc-80277-TSH (N.D. Cal. Mar. 17, 2020)*.

4. In the context of Section 1782, the term "person" includes *"corporations, companies, associations, as well as individuals"* (In re Apple Inc., Civil No. 15cv1780 BAS(RBB) (S.D. Cal. Oct. 7, 2015)).

5. In re Edelman, 295 F.3d 171 (2d Cir. 2002).

6. In Accent Delight Int'l Ltd. v. Sotheby's, Inc. (In re Accent Delight Int'l Ltd.).

7. Including the Stored Communications Act, which provides rules for the disclosure of communications and records held by internet service providers.

8. See also the numbers reported in: http://arbitrationblog.kluwerarbitration.com/2021/09/14/the-circuit-split-on-the-scope-of-section-1782-discovery-in-the-united-states-will-it-ever-get-resolved/.

9. See also C. Guibert de Bruet and J. Landbrecht, Cloud computing and US-style discovery: new challenges for European companies, in: W. Park (ed), Arbitration International, 2016, Vol. 32/2, pp. 297 – 311, p. 309 et seq.