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Into the Fray: Seventh Circuit Holds That Foreign and International Commercial Arbitrations Do Not Receive U.S. Judicial Assistance In Discovery Under 28 U.S.C. §1782(a)

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The Seventh Circuit is the latest Court of Appeals to enter the fray concerning the scope of application of 28 U.S.C. §1782(a), finding additional reasons to hold that a foreign or international commercial arbitration is not a "foreign or international tribunal" for purposes of the statute and hence not entitled to its benefits. *See, Servotronics, Inc. v. Rolls-Royce, PLC*, 2020 U.S. App. LEXIS 30333 (7th Cir. Sept. 22, 2020). The Seventh Circuit thus joins the Second and Fifth Circuits in so holding, while the Fourth and Sixth Circuits have held to the contrary. Cases teeing up the same issue are pending before the Third and Ninth Circuit Courts of Appeals.

28 U.S.C. § 1782(a) authorizes a federal district court to order a witness residing or "found" within its jurisdiction to give testimony or documents "for use in a proceeding in a foreign or international tribunal." *See* 2020 U.S. App. LEXIS 30333 at *1. Until SCOTUS resolves the issue, parties in international commercial arbitrations can only hope that helpful witnesses "reside[] or [are] found" in federal districts within circuits that have ruled in favor of lending such assistance or at least have not ruled at all on the issue of the scope of the statute's applicability.

Interestingly, this holding by the Seventh Circuit is exactly contrary to the Fourth Circuit's recent holding in *Servotronics Inc. v. Boeing Co*, 954 F.3d 209 (4th Cir. 2020). The two cases arise from the same arbitration in London and concern requests by the same petitioner for evidence from the same non-party witness (Boeing) – seeking deposition testimony in the Fourth Circuit and documents in the Seventh Circuit. (We previously described the roots of the underlying dispute and commented on the Fourth Circuit's March 30, 2020 decision. *See* "Momentum Building for Applicability of 28 U.S.C. §1782(a) to Obtain Discovery for Use in Foreign or International Private Arbitrations", Mintz ADR Blog, April 30, 2020.)

The Fourth Circuit had largely followed the analysis and conclusion of the Sixth Circuit in the latter's September 19, 2019 decision that a foreign private commercial arbitration is a "foreign or international tribunal" for purposes of 28 U.S.C. §1782(a) and therefore should receive judicial assistance. The Sixth Circuit had based its decision on (i) the ordinary dictionary definition, and the meaning in particular in a legal context, of the word "tribunal"; (ii) its interpretation of the significance of pertinent *dictum* by SCOTUS in a related case (*Intel)*; and (iii) the power of federal district courts to exercise considerable discretion regarding the extent and nature of judicial assistance to be provided

under the statute. The Fourth Circuit concurred in *Servotronics, Inc. v. Boeing.*

The Seventh Circuit, on the other hand, followed the lead of the Second and Fifth Circuits in holding that 28 U.S.C. §1782(a) does *not* authorize judicial assistance to private international commercial arbitrations. The Seventh Circuit based its decision primarily on the application of two canons of statutory construction: (i) that a court should endeavor to harmonize the meaning of a word ("tribunal") that is used in several places in the same statute or related statutes; and (ii) that a court should endeavor to avoid an interpretation that "creates a conflict with another statute" – in this case, the Federal Arbitration Act ("FAA"). It also discounted the significance of the Intel *dictum*.

Rolls-Royce was seeking indemnification from Servotronics in an arbitration in London regarding damage to a Boeing aircraft that occurred during the testing of a Rolls-Royce engine, which damage was allegedly due to a defective Servotronics valve in that engine. *Id.* at *2-*3. Servotronics made an *ex parte* application in the District Court for the Northern District of Illinois for a *subpoena duces tecum* to Boeing. Rolls-Royce then intervened to move to quash the *subpoena*, a motion in which Boeing joined. The District Court quashed the *subpoena* based upon its decision that 28 U.S.C. § 1782(a) *does not* apply vis-à-vis a private foreign commercial arbitration. Servotronics appealed, and the Seventh Circuit affirmed. *Id.* at *3-*4.

First, the Seventh Circuit noted that the word "tribunal" for present purposes is ambiguous. It is not defined in the focal statute, and canvasing dictionary definitions -- both current and those in use when the current version of the statute in question was adopted (*i.e.*, 1964) – led the court to the conclude that both proffered interpretations of the scope of the word "tribunal" are plausible; that is, it could mean (a) "only state-sponsored" adjudicative bodies or (b) any adjudicative body including a private arbitration panel. *See id.* at *9-*11.

Second, the Court invoked the "fundamental canon of statutory construction" that legislative language must be read in context "with a view to their place in the overall statutory scheme." *Id.* at *11. And the Court invoked a related canon of statutory construction to the effect that "[i]dentical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning." *Id.* at *13. In that regard, the Court noted that 28 U.S.C. § 1782(a) was enacted at the same time as 28 U.S.C. §§ 1696 and 1781, both of which use the identical phrase "foreign or international tribunal" to describe the beneficiary of other U.S. judicial assistance. *Id.* at *13. The Court thereupon opined that harmonizing all of that statutory language while reading those three provisions as a coherent whole suggests that "a 'foreign tribunal' in this context means a governmental, administrative, or quasi-governmental tribunal operating pursuant to the foreign country's 'practice and procedure.' Private and foreign arbitrations…are not included." *Id.* at *14.

Third, the court sought to interpret § 1782(a) so as to avoid disharmony with the terms of the FAA, 9 U.S.C. §§ 1-15. The FAA applies to commercial arbitrations generally and affords only limited discovery from non-party witnesses in accordance with distinctly limiting procedures. The discovery obtainable under 28 U.S.C. §1782(a), on the other hand, would be governed by the Federal Rules of Civil Procedure and thus far more extensive. The court opined that the assistance authorized by § 1782(a) was not intended to benefit parties in a foreign or international commercial arbitration with discovery that is far more expansive than that afforded to parties in domestic commercial arbitrations, there being no apparent rationale for distinguishing the treatment of the two variations of private dispute resolution. *See id.* at *14-*15. (Put another way, as a matter of policy, a dispute with cross-international border elements is not different in species from a dispute with only cross-state border elements, and there is no apparent rationale for distinguishing the kind or degree of U.S. judicial assistance that should be provided to private proceedings to resolve either sort of dispute.)

In sum, the Seventh Circuit thought it better to construe the phrase “foreign or international tribunal,” for purposes of § 1782(a), to mean only “a state-sponsored, public, or quasi-governmental tribunal.” *Id.* at *16.

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