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INTERNATIONAL ARBITRATION

Expert Analysis

Section 1782 and Private Arbitrations: SCOTUS To Resolve Split

On March 22, 2021, the U.S. Supreme Court granted certiorari in *Servotronics v. Rolls-Royce PLC* in order to resolve a circuit split on the question of whether 28 U.S.C. §1782 can be relied upon to obtain evidence for use in private arbitration proceedings seated outside of the United States. The U.S. Court of Appeals for the Second, Fifth and Seventh Circuits have held it cannot, the Fourth and Sixth Circuits that it can.

The genesis of this circuit split can be traced back to the Supreme Court's decision in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004), the only other time the court has considered §1782. Prior to *Intel*, it seemed settled, based on the Second Circuit's decision in *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), and the Fifth Circuit's in *Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881-83 (5th Cir. 1999), that §1782 could not be used to obtain evidence for private arbitrations. While *Intel* itself did not involve the arbitration context, the late Justice Ruth Bader Ginsburg, who wrote the opinion of the court, cast some doubt on the decisions of the Second and Fifth Circuits when she quoted an article by

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the late Professor Hans Smit—a principal draftsman of the 1964 amendments to §1782—stating that the term "tribunal" in §1782 included "investigating magistrates, administrative and *arbitral tribunals,* and quasi-judicial agencies" (emphasis added).

In the years since *Intel*, district courts and circuit courts have divided regularly on the question of whether §1782 can be used for private arbitration proceedings seated outside of the United States. Those of us who have been following the diverging decisions of the courts look forward to the Supreme Court settling the question of whether §1782 can be used in the private arbitration context.

In this article, I do not intend either to try to predict how the Supreme Court might decide the issue or to rehearse the specific arguments considered by the courts to date for reading §1782 one way or the other. Rather, I want to address three considerations that bear on the question before the Supreme Court that have not received the attention they deserve.

Federal Policy In Favor of Arbitration

A vast number of Supreme Court decisions in the field of arbitration in recent years have been based upon the federal policy in favor of the arbitration. Yet, when it comes to court decisions about §1782, other than in passing, courts have barely mentioned that policy at all, let alone tried to grapple fully with the question of whether reading §1782 to allow for its use in private arbitration would advance or undermine it. This omission is striking in the light of the prominent role played by the federal policy in the development of arbitration law and its routine invocation by the courts as a basis for decisions in the field.

While courts are not always consistent about the underlying rationale for the federal policy in favor of arbitration, it is possible to tease out of the cases three important themes: (1) to encourage "the expeditious and inexpensive resolution of disputes through arbitration," *Metz v. Merrill Lynch, Pierce, Fenner Smith,* 39 F.3d 1482 (10th Cir. 1994); (2) "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible," *Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015); and (3) to make arbitration "meaningful," as illustrated by *Blumenthal v. Merrill Lynch, Pierce, Fenner & Smith*, 910 F.2d 1049 (2d Cir. 1990), where the court relied on the "the pro-arbitration policies reflected

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in the foregoing Supreme Court decisions" to justify a decision "to preserve the meaningfulness of the arbitration through a preliminary injunction."

A proponent of using §1782 for private arbitrations would likely seize on the third rationale—allowing the use of §1782 for private arbitration proceedings makes those proceedings more meaningful, by allowing a party to gather evidence that may be relevant to the outcome of the case. But while this argument may have some surface appeal, it does not withstand scrutiny. This is because, on its face, §1782 permits a party to apply for evidence even when the arbitrators have given no indication that the evidence sought would be relevant or material to their decision and even if they might view it to have no utility at all. The reason for this is that §1782 permits "any interested person"—which has been held to include a party to the foreign arbitration—to apply directly to a U.S. district court for evidence, without seeking the approval of, or even giving notice to, the arbitrators charged with deciding the case.

This is in contrast with §7 of the Federal Arbitration Act (FAA), which addresses U.S. court assistance in evidence-gathering for arbitrations seated in the United States. Section 7 authorizes U.S. district courts to enforce an arbitrator's "summons" for evidence. Thus, under §7, court assistance in evidence-gathering for arbitrations seated in the United States is premised on the requirement that the evidence sought has been requested by the arbitrators themselves who, presumably, made some assessment of its relevance and materiality before issuing the summons in the first place. And court-assistance to gather evidence determined to be relevant and material by the arbitrators would indeed make the arbitration more "meaningful"—and in that way promote the federal policy in favor of arbitration—by providing them with evidence that they themselves have concluded may be helpful to their decision. This is not the case when it comes to §1782, which permits a party to a foreign arbitration to apply to a U.S. court for evidence, without any indication that the arbitrators have any interest in the evidence sought.

A proponent of the use of §1782 in the private arbitration context might respond that any concerns about an application for irrelevant evidence can be addressed by a court through the exercise of its discretion. If the evidence sought is irrelevant, the court can deny the §1782 application outright or grant it only in part. But that argument fails to confront the reality that a §1782 application is meant to be a simple procedure, *Euromepa S.A. v. R. Esmerian*, 51 F.3d 1095 (2d Cir. 1995), and that, without hearing from the arbitrators themselves—something not required by §1782—a court is unlikely ever to know for sure whether the arbitrators themselves believe the evidence sought to be useful.

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In the litigation context, U.S. courts address the concern that a foreign court might ultimately decide that the evidence obtained through §1782 is irrelevant by invoking that lofty principle—no harm, no foul. If the evidence obtained through a §1782 application has no utility, the foreign court "can simply refuse to consider any evidence" obtained. Id. But whatever force this argument has in the litigation context, it simply cannot be deployed in the arbitration context. This is because it flies in the face of the federal policy in favor of arbitration when understood in terms of encouraging "the expeditious and inexpensive resolution of disputes through arbitration" and moving "the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible."

Rather than moving parties out of court and into arbitration, permitting parties to use §1782 in the private arbitration context invites them to go to court and to devote time and expense to obtaining evidence, without any certainty that the evidence sought will be used in, or make any meaningful difference to, the arbitration proceeding. The response that an arbitral tribunal "can simply refuse to consider any evidence obtained" is simply no answer to concern that allowing the use of §1782 in the private arbitration context undermines the federal policy in favor of arbitration, when viewed in terms of promoting an efficient dispute resolution process; §1782 invites parties to devote time and expense to engage in the very court proceedings that they sought to avoid by agreeing to arbitrate in the first place, all for the sake of gathering evidence that the arbitrators might decide has no bearing on the outcome of the case they have to decide.

While there will no doubt be some individual cases where the evidence sought by a §1782 application will be relevant, there is nothing to suggest that the collateral litigation required to address a §1782 application—which can be made without notice to or the approval of the arbitrators—will systematically make arbitration more meaningful. And it creates the risk that a party might pursue a §1782 application, not because it seeks evidence relevant to a case, but as a tactic to exert pressure on the opposing party.

Text of §1782

The main argument in favor of reading §1782 to permit the taking of evidence for private arbitrations has always been a textual one. Section 1782 permits an application to be made for evidence for use in a "proceeding in a foreign or international tribunal," and, so the argument runs, if those words mean anything, they surely include a private arbitration tribunal. Whatever force this argument may have when construing the quoted words in isolation is diminished when they

are examined in context. Thus, §1782 requires that the evidence sought be "for use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation."*

No court has fully grappled with the import of the emphasized words that immediately follow the words "foreign or international tribunal." However, if the words "foreign or international tribunal" include a *private* arbitral tribunal, this arguably entails that the emphasized words immediately following include a foreign *private* detective investigating a crime that took place abroad. But it would surely be an anomalous result for such a person to be permitted to apply to a U.S. court for evidence in the United States, when a U.S. private detective investigating a domestic crime would not per se have any standing to seek evidence from a U.S. court.

A proponent of the use of §1782 for private arbitrations may respond that there is a difference between a private arbitration tribunal seated outside the United States and a private detective carrying out a criminal investigation outside the United States, in that only the former operates under the sanction of the law. But that is not necessarily the case. In the United States, for example, the vast majority of states require private investigators to be licensed.

While not every country may require private detectives to be licensed, even if §1782 applications could be made only by private detectives licensed by a foreign government, the anomaly described above would still remain. A private detective licensed by a foreign government investigating a crime abroad could arguably apply directly to a U.S. court for evidence located in the United States, whereas his or her U.S. counterpart investigating a crime in the United States could not.

One way to avoid this anomalous result would be to accept that the reference to "criminal investigations" in §1782 is to such investigations by *governmental* bodies, and not private ones—an interpretation buttressed by the reference to a "*formal* accusation" in the same sentence. But accepting this argument comes at some expense to the position that the term "foreign or international tribunal" includes a private arbitral tribunal.

An important canon of statutory interpretation is *noscitur a sociis*—the concept that words are defined by the company they keep. If the reference to "criminal investigations" is to governmental ones alone, then the words "foreign or international tribunal" have only one known associate —criminal investigations conducted solely by *governmental* authorities, which lends some textual support to the argument that the reference to a "foreign or international tribunal" in §1782 is only to governmental tribunals and not private ones.

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NY Convention And Courts of Primary, Secondary Jurisdiction

If §1782 is read to permit its use in the private arbitration context, as a practical matter, most §1782 applications are likely to involve the taking of evidence for use in an arbitration proceeding in one of the over 160 countries that, like the United States, is a party to the New York Convention. It is well-recognized both in the United States and elsewhere that, under the New York Convention, there is a difference between the authority of the courts at the seat of the arbitration and the authority of courts elsewhere. U.S. courts have framed the distinction as one between courts of primary jurisdiction, i.e., the courts at the seat of the arbitration, and courts of secondary jurisdiction, i.e., every other court.

While, in *Karaha Bodas Co. v. Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004), the Fifth Circuit invoked the distinction to explain the exclusive authority of the courts at the seat to set aside an arbitration award, that distinction rests on the well-settled view that courts at the seat of an arbitration possess oversight authority over that arbitration that courts in other countries do not have. See Gary B. Born, *International Commercial Arbitration* §11.01, Vol. II, pages 1647-1669 (3d ed. 2021).

Section 7 of the FAA furnishes an example of a U.S. district court's primary jurisdiction with respect to arbitrations in the United States, providing that if a person refuses to comply with the arbitrators' summons for evidence, "upon petition the United States district court *for the district in which such arbitrators… are sitting* may compel the attendance of such person" (emphasis added).

In every case involving §1782, a U.S. court is, ex hypothesi, a court of secondary jurisdiction. But recognizing this recalls the anomaly already alluded to above. If §1782 can be used in the private arbitration context, then, as noted above, a U.S. court would have broader evidence-gathering authority under §1782 when sitting as a court of secondary jurisdiction, than it does under §7 of the FAA when sitting as a court of primary jurisdiction. While not discussing the issue in terms of the contrast between courts of primary and secondary jurisdiction, in *NBC v. Bear Stearns*, the Second Circuit highlighted this precise anomaly as one reason for its decision to hold that an ICC arbitration proceeding in Mexico was not a "foreign or international tribunal" for the purposes of §1782.

Those of us who have followed the decisions of the lower courts on the question of whether §1782 can be used in the private arbitration context look forward to the Supreme Court finally settling that question once and for all.