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International Arbitration Focus Team

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Waiting for the much-desired Supreme Court's clarification of Section 1782 discovery applications in international commercial arbitration

The U.S. Supreme Court has agreed to consider whether discovery, as provided for under Title 28 of the U.S. Code, Section 1782, may be relied upon in private international arbitration, thereby potentially putting an end to the long debate whether federal courts may rule on applications stemming from international commercial arbitrations.

The recent case Servotronics Inc. v. Rolls-Royce PLC

After granting a petition for a writ of certiorari in Servotronics Inc. v. Rolls-Royce PLC et al, the Supreme Court will review the ruling of the U.S. Court of Appeals, Seventh Circuit, which denied service of a subpoena on Boeing to produce documents for use in an arbitration brought by Rolls-Royce in London before the Chartered Institute of Arbitrators.

The dispute arises from a settlement agreement, entered into by Boeing and Rolls-Royce after an engine fire caused damage to a Boeing aircraft, with Rolls-Royce seeking from Servotronics the reimbursement of the settlement amount. Boeing is not party in the arbitration, and Servotronics alleges that Rolls-Royce and Boeing refused to provide critical documents for the arbitration.

Section 1782 and the lack of certainty

Section 1782 has proved to be a never-ending story for the US courts, which have adopted different views as to whether U.S. law allows federal courts to order discovery in support of private international arbitrations.[1]

Section 1782 is attractive to arbitration participants as it allows for the U.S.-style discovery, which is generally broader than the discovery provided for in international commercial arbitration (and the guidelines in the IBA Rules on Taking of Evidence), allowing applicants to obtain more documents, including types of financial documents.

[1] For more information on document production in the United States, please see here.

Section 1782 allows a federal court to order discovery "for use in a proceeding in a foreign or international tribunal". The Supreme Court will hopefully resolve the split of the Circuit Courts regarding the statute and the different views as to what should be considered an "international tribunal". For example, the Fourth and Sixth Circuits have adopted a broader interpretation, granting Section 1782 discovery in the context of international commercial arbitrations, finding that private international arbitral tribunal can be included in "foreign or international tribunal". Conversely, the Second, Fifth and Seventh Circuits have adopted a narrow interpretation, whereby an arbitral tribunal does not qualify as a "foreign or international tribunal".

This lack of certainty has made applicants aware that similar arbitration cases will receive a different treatment from the federal courts. In fact, Servotronics filed three Section 1782 applications in connection with the same arbitration: the first was granted by the Fourth Circuit in March 2020, the second was denied by the Seventh Circuit in December, and the third one is still pending before the U.S. District Court for the District of Minnesota.

Further, with the Supreme Court granting of certiorari, Servotronics attempted to adjourn the hearing in the arbitration proceedings in London, but the arbitral tribunal denied the application. It appears unlikely that the U.S. Supreme Court will rule before the London hearing, raising potential concerns of mootness for the Servotronics case.

Conclusion

With conflicting decisions from the Circuit Courts, the Supreme Court's decision in Servotronics may finally provide certainty to all arbitration practitioners regarding the proper ambit of Section 1782.

International Arbitration Focus Team

The Focus Team is a constellation of skills in different practice areas with a focus on International Arbitration.

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