Alert

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COZEN O'CONNOR

Rolls-Royce Petitions U.S. Supreme Court to Block Discovery in Aid of International Arbitration

On April 16, 2020, Rolls-Royce PLC filed a motion to stay proceedings in the U.S. Court of Appeals for the Fourth Circuit while it prepares the filing of a petition for a writ of certiorari to the U.S. Supreme Court. In the petition, the U.S. Supreme Court will be asked to decide whether orders from U.S. courts compelling the production of documents and testimony of witnesses are potentially available to parties involved in private international arbitrations.

The dispute arises from a fire within a Rolls-Royce engine during testing of a new Boeing 787 Dreamliner aircraft in 2015. Rolls-Royce claims that the proximate cause of the engine fire was a malfunctioning valve supplied by Servotronics. After settling Boeing's claim for damages in the amount of $12.8 million, Rolls-Royce demanded indemnity in 2017 from Servotronics, which Servotronics rejected claiming "numerous improper, inadequate, and incorrect actions and failures to act of Boeing and Rolls-Royce personnel constitute the legal cause of the damage." In 2018, Rolls-Royce commenced arbitration in Birmingham, England under the rules of the Chartered Institute of Arbitrators pursuant to its contract with Servotronics. The discovery dispute before the U.S. courts arises from Roll-Royce's efforts to prevent Servotronics, Inc. from compelling three Boeing employees to give testimony for use in the UK arbitration.

In support of its defense in the UK arbitration, Servotronics filed an ex parte application in the U.S. District Court for the District of South Carolina pursuant to 28 U.S.C. §1782 to obtain a court order permitting the subpoena of three Boeing employees to give oral testimony. Two of the employees were troubleshooting the Rolls-Royce engine prior to the fire and the third was the chair of the Boeing Incident Review Board, which investigated the fire.

Titled "Assistance to foreign and international tribunals and to litigants before such tribunals," 28 U.S.C. §1782 provides in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a **foreign or international tribunal**, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
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> 28 U.S.C. § 1782(a) (emphasis added).

The district court denied Servotronics' application because it held that a private arbitration panel was not a "tribunal" as defined by § 1782(a). In support of this holding, the district court relied upon *National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2nd Cir. 1999) and *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999) which held that a tribunal needed to be public, state-sponsored, or governmental in order to fall within the ambit of §

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1782(a).

Servotronics appealed to the U.S. Court of Appeals for the Fourth Circuit, arguing that *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) and *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (6th Cir. 2019) required a different result. *Intel* involved whether an arbitration before the Commission of the European Communities constituted a tribunal for the purpose of § 1782(a). In ruling that it did, the Supreme Court reasoned that "an arbitral tribunal is a 'tribunal' in both the legal and everyday sense of the word." Interestingly, in arriving at this decision, the Supreme Court did not mention *Bear Stearns* or *Biedermann*, and did not address whether private arbitral panels qualify as tribunals. Rolls-Royce argued this left the issue unsettled; whereas Servotronics interpreted this omission as confirmation that an inquiry into whether an arbitral proceeding is public or private may no longer be a meaningful distinction under § 1782(a). The Sixth Circuit effectively endorsed the latter point of view in its holding in *In re Application*.

We now have a clear split between the circuits. On the one hand, *National Broadcasting Company, Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184 (2nd Cir. 1999) and *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999) have held that in order to be considered a tribunal for the purpose of § 1782(a), the proceeding must be public or governmental in nature. On the other hand, *Servotronics, Inc. v. The Boeing Company and Rolls-Royce PLC*, Docket No. 18-2454 (4th Cir. 2020) and *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (6th Cir. 2019) hold that a private arbitration panel does constitute a tribunal for the purpose of § 1782(a).

Rolls-Royce has until June 28, 2020, to file its petition for writ of certiorari, but it remains to be seen whether the Supreme Court agrees to take this case in order to resolve this clear circuit split. If the Supreme Court ultimately agrees to permit U.S. discovery in international private arbitration, it is likely private litigants will increasingly employ § 1782(a) to take advantage of the potential discovery tools not normally available outside of the United States. Many foreign companies want to do business in the United States but do not want to engage with the U.S. legal system. As a result, they often demand that their contracts contain dispute resolution clauses that require binding arbitration outside of the United States, which are not bound by U.S. rules. If the Supreme Court rules in favor of Servotronics' request to subpoena Boeing employees, it is likely many of those same companies may nevertheless find themselves embroiled with U.S. discovery tools and procedures.