No. 20-

IN THE

Supreme Court of the United States

SERVOTRONICS, INC.,

Petitioner,

v.

ROLLS-ROYCE PLC AND THE BOEING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 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.

PARTIES TO THE PROCEEDING

Petitioner Servotronics, Inc., was the Petitioner-Appellant below.

Respondents Rolls-Royce PLC and The Boeing Company were Intervenors-Appellees below.

RULE 29.6 STATEMENT

Petitioner Servotronics, Inc., hereby states that it has no parent corporation and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

In the United States Court of Appeals for the Seventh Circuit:

Docket No. 19-1847, *Servotronics, Inc., Petitioner-Appellant v. Rolls-Royce PLC and The Boeing Company, Intervenors-Appellees*

Judgment Entered: September 22, 2020

In the United States District Court for the Northern District of Illinois:

Civil Docket No. 1:18-cv-07187

Judgment Entered: April 22, 2019

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OTHER AUTHORITIES

Petitioner Servotronics respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Seventh Circuit Court of Appeals, reported at 975 F.3d 689, is reprinted in the Appendix (Pet. App.) at 1a. The opinion of the Northern District of Illinois was not published in the Federal Supplement but is available at 2019 WL 9698535; it is reprinted at Pet. App. 17a.

JURISDICTION

The judgment was entered on September 22, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28 of the United States Code, Section 1782 is reproduced in the Appendix at Pet. App. 26a. Section 1782(a) of Title 28 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….

STATEMENT OF THE CASE

A. Introduction

Section 1782 of Title 28 of the United States Code embodies a more than 150-year Congressional policy of facilitating cooperation with foreign countries by providing the assistance of federal district courts in gathering evidence for use in foreign tribunals. *Intel Corp. v. Advanced Micro Devices,* 542 U.S. 241, 247 (2004) (*"Intel"*). Prompted by a growth in international commerce, Congress created a Commission on International Rules of Procedure in 1958 to study then-existing practices of judicial assistance between the United States and foreign countries with a view toward achieving improvements. Congress adopted this Commission's recommendation of a complete revision of Section 1782 unanimously in 1964. This marked a substantial expansion of the statute's scope by providing for assistance in obtaining documentary and other tangible evidence as well as testimony and by replacing the words "in any judicial proceeding pending in any court in a foreign country" with the significantly broader phrase "in a proceeding in a foreign or international tribunal." The accompanying Senate Report explains that Congress used the word "tribunal" to ensure that assistance is not confined to conventional courts, but instead extends to administrative and quasi-judicial proceedings. *Id.* at 248-49. Despite this clear expression of Congressional intent to expand assistance to include quasi-judicial proceedings, and this Court's thorough analysis of that expansive intent in *Intel,* the Circuit Courts of Appeals are split on the issue of whether an exception of one particular type of quasi-judicial proceedings—private commercial arbitrations—should be read into Section 1782.

The stark division in interpretation of Section 1782 and the uncertainty it engenders have been brought into sharp relief in the two circuit court opinions rendered by the Fourth and Seventh Circuits in connection with a single arbitration pending before an English arbitral tribunal to which Petitioner is a party. Following the reasoning in *Intel,* the Fourth Circuit granted Petitioner's Section 1782 request to depose Boeing personnel who have first-hand knowledge of the incident that forms the basis of the claims asserted against Petitioner in the arbitration, which took place in South Carolina. *Servotronics, Inc. v. Boeing Co.,* 954 F.3d 209, 210 (4th Cir. 2019). The Seventh Circuit denied Petitioner's Section 1782 request to subpoena documents critical to the arbitration from Boeing at its headquarters in Chicago. *Servotronics, Inc., v. Rolls Royce,* 975 F.3d 689, 690 (7th Cir. 2020). The decision in the Seventh Circuit is the subject of this Petition.

B. The Underlying Claim and Proceedings Below

Servotronics is the respondent in an arbitration proceeding commenced by Rolls-Royce in London, England. The arbitration arose from a January 16, 2016, aircraft engine tail pipe fire that occurred during the course of Customer Demonstration and Acceptance Flight Tests at a Boeing facility in South Carolina. Rolls-Royce manufactured the Trent 1000 engine damaged by the fire and installed on the Boeing 787-9 Dreamliner aircraft that was the subject of the flight tests. Servotronics manufactured a Metering Valve Servo Valve component of the engine.

Representatives of Boeing, Rolls-Royce, and Boeing's customer (Virgin Atlantic Airways) attended the testing. No representative of Servotronics witnessed the event.

Testing on the day of the incident revealed a disruption in the aircraft's fuel flow, warning signs for which had been observed but not investigated or properly documented prior to and during tests on the day of the fire. Personnel on the scene responded to the disruption by "troubleshooting" the engine. During the final troubleshooting, a fire ignited in the tail pipe of the engine which caused damage to the engine and aircraft. Boeing sought compensation from Rolls-Royce for damage to the aircraft. Rolls-Royce and its insurers settled the claim with Boeing for over $12 million, without Servotronics' participation.

Rolls-Royce has taken the position that it is entitled to reimbursement from Servotronics, in response to which Servotronics has cited failures on the part of Boeing and Rolls-Royce personnel to follow their own procedures for the proper response to warning signs of fuel flow issues that would have averted the fire. After settlement and mediation efforts failed, Rolls-Royce commenced an arbitration proceeding under the Rules of the Chartered Institute of Arbitrators in England in accordance with the dispute resolution provisions of the applicable Rolls-Royce/Servotronics Long Term Agreement.

The parties exchanged some documents and other materials, but Rolls-Royce and Boeing refused to produce materials that are critical to Servotronics' causation defense. Because of unresolved discovery issues, Servotronics filed an *ex parte* application pursuant to Section 1782 for leave to serve a document subpoena on Boeing in the Northern District of Illinois, where it is headquartered and an application in the District of South Carolina to depose three Boeing employees involved in the event and the following investigation by Boeing.

The district court in the Northern District of Illinois granted the application to serve the document subpoena. After its service, Rolls-Royce filed a successful motion to intervene, vacate, and quash, in which Boeing joined. The Seventh Circuit affirmed the order.

Boeing's objection to the subpoena relied primarily on the Second Circuit's narrow interpretation of Section 1782 in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999). Specifically, the Second Circuit determined that the undefined term "foreign or international tribunal" appearing in Section 1782(a) "does not unambiguously *exclude* private arbitration panels" but the fact that the term is broad enough to include both state-sponsored and private tribunals nevertheless fails to mandate a conclusion that, as used in the statute, such term does include both. *Bear Stearns*, 165 F.3d at 188 (emphasis in original). Having found an ambiguity, the court then reviewed the legislative history and concluded that "the absence of any reference to private dispute resolution proceedings strongly suggests that Congress did not consider them in drafting the statute." *Id.* at 189. The Second Circuit cited "contemporaneous academic literature" but at the same time dismissed as "unpersuasive" a later article in which Columbia Law Professor Hans Smit, who was instrumental in crafting the language of the statute, stated that the term private arbitral tribunals clearly comes within the term "tribunal" used in Section 1782.[1] Boeing also relied on

1. Professor Smit was a reporter to the Commission on International Rules of Procedure that recommended the statutory language which garnered the unanimous approval of Congress. His original article on the statute, published a year after Section 1782 became law, stated that the word "tribunal" includes arbitral

the Fifth Circuit's decision in *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999), decided two months after *Bear Stearns* in which the panel "elect[ed] to follow the Second Circuit's … decision that Section 1782 does not apply to private international arbitrations." 168 F.3d at 881.

In the lower courts, Servotronics argued that the restrictive interpretation of Section 1782 employed in *Bear Stearns* and followed in *Biedermann* contravenes the plain language of the statute and is inconsistent with the clear Congressional intent, which was examined and explained in detail in *Intel* (542 U.S. at 264-66), the single case to date in which this Court has analyzed Section 1782(a).[2]

C. The *Intel* Decision

In *Intel*, the Court traced the history of Section 1782, noting the continuum over which Congress repeatedly expanded the scope of the assistance federal courts are

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tribunals. Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 and nn. 71 & 73 (1965). In a subsequent article, under the heading "The Tribunals and Litigants to Which Assistance May Be Granted," Professor Smit stated: "Clearly, private arbitral tribunals come within the term the drafters used." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited,* 25 SYRACUSE J. INT'L L. & COMM. 1, 5 (Spring 1998).

2. *Intel* did not involve private arbitration but instead arose out of a request for discovery in aid of an antitrust proceeding before the Commission of European Communities, a body charged with responsibility over various areas covered by the European Union treaty. 542 U.S. at 250. Thus, the Court had no occasion to address *Biedermann* or *Bear Stearns* in the *Intel* opinion.

authorized to provide in the way of evidence-gathering for foreign proceedings. Before Section 1782 was enacted in 1948, circuit courts were authorized to appoint commissioners to examine witnesses in response to letters rogatory from foreign courts forwarded through diplomatic channels. The authority was further limited to cases in which a foreign government was a party or had an interest. Section 1782, in its original 1948 form, eliminated this restriction and allowed district courts to designate persons to preside at depositions to be used in "any civil action pending" in any court in a foreign country with which the United States is at peace. The next year, Congress further broadened the scope of Section 1782 by substituting "judicial proceeding" for "civil action." 542 U.S. at 247-48.

In 1958, prompted by the growth of international commerce, Congress created the Commission on International Rules of Judicial Procedure. Six years later, in 1964, Congress unanimously adopted legislation recommended by the Commission and made a "complete revision of § 1782." *Id.* at 248. As recast and expanded by the 1964 amendments, Section 1782's provision for assistance in obtaining documentary and other tangible evidence as well as testimony "in any judicial proceeding pending in any court in a foreign country" was replaced with "a proceeding in a foreign or international tribunal," thus eliminating the words "judicial," "court" and "pending". *Id.* at 248-49. The *Intel* Court noted that the accompanying Senate Report "explains that Congress introduced the word 'tribunal' to ensure that assistance is not confined to proceedings before conventional courts, but extends also to administrative and quasi-judicial proceedings." *Id.* at 249 (internal quotation marks omitted).

Professor Hans Smit, at the time Director of the Project on International Procedure at Columbia Law School, has been called the "dominant drafter" of the 1964 amendment. *See In re Letter of Request from the Crown Prosecution Serv.*, 870 F.2d 686, 689 (D.C. Cir. 1989). Congress accepted all of Professor Smit's suggestions and the Commission's proposed legislative reforms resulting in the current 28 U.S.C. § 1782. *Id.*

The *Intel* decision includes numerous references to Professor Smit's writings and analysis in interpreting the legislative intent of Section 1782. *Intel*, 542 U.S. at 258. According to Professor Smit, the word "tribunal" as used in Section 1782 "includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional, civil, commercial, criminal, and administrative courts." Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 and nn. 71 & 73 (1965).[3] In a subsequent article, Professor Smit elaborated, stating: "Clearly, private arbitral tribunals come within the term the drafters used." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited,* 25 SYRACUSE J. INT'L L. & COMM. 1, 5 (Spring 1998).

Thus, the *Intel* Court endorsed a broad interpretation of Section 1782 that is consistent with the statute's evolution and the contemporaneous expressions of congressional intent summarized above. 542 U.S. at 257-

3. Section 1782 was last amended in 1996 with a reference to "including criminal investigations conducted before formal accusation" after the reference to foreign and international tribunals. *Intel,* 542 U.S. at 249.

58. In this regard, the Court concluded that the legislative history of the 1964 revision "reflects Congress' recognition that judicial assistance would be available whether the foreign or international proceeding or investigation is of a criminal, civil, administrative or other nature." 542 U.S. at 259 (internal quotation marks and emphasis omitted).

D. The Post-Intel Circuit Split

While this action was pending in the Seventh Circuit, the Fourth and Sixth Circuit Courts of Appeals issued opinions on the same issue. Taking guidance from the *Intel* analysis, which supports a broad interpretation of the scope of Section 1782, the Fourth and Sixth Circuits held that the statute permits district courts to render discovery assistance for use in private commercial arbitration.[4] *Servotronics,* 954 F.3d at 210; *Abdul Latif Jameel Transp. Co. v. FedEx Corp.,* 939 F.3d 710 (6th Cir. 2019).[5]

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4. Similar results were reached by a number of district courts. Thus, in 2006 the Northern District of Georgia concluded that the reasoning in *Biedermann* and *Bear Stearns* was inconsistent with the *Intel* decision and granted an application under Section 1782 to a party to a privately-constituted arbitration proceeding. *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1228 (N.D. Ga. 2006). Others followed suit. *See e.g., In re Babcock Borsig AG*, 583 F. Supp. 2d 233, 239 (D. Mass. 2008); *In re Hallmark Cap. Corp.*, 534 F. Supp. 2d 951, 955 (D. Minn. 2007).

5. In 2012, the Eleventh Circuit relied on the reasoning in *Intel* and found that the word "tribunal" as used in Section 1782 includes a private arbitral tribunal (in that case one convened in Ecuador). However, this opinion was vacated two years later when new issues were presented relating not to an arbitration, but to a contemplated foreign civil action. *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.,* 685 F.3d 987, 994-95 (11th Cir. 2012) ("*Consorcio I*"), *vacated and superseded,* 747 F.3d 1262 (11th Cir. 2014) ("*Consorcio II*").

Addressing the issue of whether a private arbitral tribunal presiding over an international commercial arbitration is a tribunal within the meaning of Section 1782 as a matter of first impression, the Fourth Circuit began its analysis with a review of the history of the statute presented in *Intel. Servotronics,* 954 F.3d at 201-214. This review led the court to observe that the current version of the statute, as amended in 1964, "manifests Congress' policy to increase international cooperation by providing U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*." *Id.* at 213 (emphasis in original). The Fourth Circuit rejected Boeing's contention that "tribunal," as used in Section 1782, is confined to an entity that exercises government-conferred authority, concluding that it "represents too narrow an understanding of arbitration, whether it is conducted in the United Kingdom or the United States." *Id.* The Fourth Circuit recognized that arbitration "is a congressionally endorsed and regulated process that is judicially supervised" and that arbitration has been developed as a "favored alternative to the judicial process for the resolution of disputes" in the United States. *Id.* at 214. Therefore, the Fourth Circuit stated that arbitration "clearly is" a "product of 'government-conferred authority,' under U.S. law…." *Id.* Furthermore, the court pointed out, the UK Arbitration Act of 1996 "provides *more* governmental regulation and oversight than does the [Federal Arbitration Act]." *Id.* (emphasis in original). On this basis, the court determined:

> even if we were to apply the more restrictive definition of "foreign international tribunal" adopted by *Bear Stearns* and *Biedermann,* and now advanced by Boeing—that the term only refers to "entities acting with the authority

> of the state"—we would conclude that the UK arbitral panel charged with resolving the dispute between Servotronics and Rolls-Royce meets that definition.

Id.

As a result, the Fourth Circuit concluded that the proceeding to resolve the dispute between Servotronics and Rolls-Royce is pending in a "foreign or international tribunal" within the meaning of Section 1782 and that the district court has authority to provide, in its discretion, assistance in connection with that arbitration. *Id.* at 216.

However, other Circuit Courts of Appeals have departed from the *Intel* approach to interpreting Section 1782, thereby establishing a clear split among the circuits. The Second Circuit reaffirmed its *Bear Stearns* holding and rationale in *Hanwei Guo v. Deutsche Bank Sec.,* 965 F.3d 96, 100 (2d Cir. 2020), and in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009), the Fifth Circuit declined to depart from its pre-*Intel* holding in *Biedermann*. The Seventh Circuit followed the Second Circuit in the case that is the subject of this Petition. *Servotronics,* 975 F.3d at 690. Thus, the Fourth and Seventh Circuit Courts of Appeals have viewed a single international proceeding as pending before a tribunal that is both within and outside the scope of Section 1782.[6]

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6. At present, the Third and Ninth Circuits have the issue under consideration. *See In re EWE Gassepeicher GMBH,* Docket No. 19-mc-109-RGA, 2020 WL 1272612 (D. Del. March 17, 2020), *appeal docketed, No. 20-1830 (3d Cir. April 24, 2020); HRC-Hainan Holding Co. LLC v. Yihan Hu,* Docket No. 19-mc-80277-TSH, 2020 WL 906719 (N.D. Cal. Feb. 25, 2020), *appeal docketed sub nom., In re HRC-Hainan Holding Co. LLC,* No. 20-15371 (9th Cir. March 4, 2020).

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Divided on the Question Presented and Will Remain So Without this Court's Review

As detailed above, there currently is a 3-2 split among the courts of appeals on the question presented in this petition and cases pending before the Third and Ninth Circuits will compound the situation. District courts around the country in circuits that have yet to rule on the issue continue to grapple with new applications, reaching disparate results.[7] Moreover, it is anticipated that this issue will continue to be raised in various district courts with increasing frequency.

Some courts that have denied applications submitted by parties to arbitral proceedings have allowed that a party to a "governmental" proceeding, such as an arbitration sponsored by a government agency or established under a treaty, might be eligible to seek judicial assistance under Section 1782. The Fourth Circuit, in the decision involving the same parties and same arbitration proceeding as the one at issue herein, concluded that to the extent some governmental participation is a prerequisite to federal court assistance under Section 1782, such requirement was satisfied because the government of the United Kingdom,

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7. *See In re CMPC Cellulose Riograndense LTDA,* Docket No. 19-MC-00005 WES, 2019 WL 2995950 (D. R. I. July 9, 2019); *In re Winning (HK) Shipping Co.,* Docket No. 09-22659-MC, 2010 WL 1796579 (S.D. Fla. April 30, 2010); *In re Operadora DB Mexico,* Docket No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009). These are in addition to the recently-decided cases in districts within the Third and Ninth Circuits where the issue is pending in their respective courts of appeals.

through its U.K. Arbitration Act, endorses arbitration as an alternative to litigation and has regulated its process and conferred supervisory authority on its courts. *See Servotronics,* 954 F.3d at 213-14. This view struck the Seventh Circuit as "mistaken." *See Servotronics,* 975 F.3d at 693 n.2.

II. The Present Case Is Ideally Suited to Resolving the Question Presented

It took thirteen years for the Sixth Circuit to issue the first post-*Intel* appellate decision on this issue and this Court has not made any rulings on Section 1782 since the 2004 *Intel* decision.

The issue is narrow and clearly-defined: whether a party to a private, commercial foreign arbitration proceeding, such as one governed by the U.K. Arbitration Act and Rules of the Chartered Institute of Arbitrators, may apply for an order under Section 1782. Some courts have held yes, and some no, with each side using substantially similar methodologies. Given the ever-increasing usage of private international arbitrations which, by their nature, tend to have time constraints that prevent the parties from pursuing appeals and petitioning this Court for review, this case presents a rare opportunity for this Court to provide the district courts with a uniform standard for responding to applications for assistance under Section 1782.

III. The Seventh Circuit Incorrectly Decided the Question Presented Due to Misapplication of Time-Honored Canons of Statutory Construction

Consistency in approach to statutory construction is essential for a shared understanding of the rights, obligations, and privileges prescribed in legislation. The plain meaning of the unambiguous term "tribunal" should be regarded as conclusive, in the absence of clearly expressed legislative intent to the contrary. *See U. S. v. Turkette*, 452 U.S. 576, 580 (1981).

Courts have used the term "tribunal" to "describe private, contracted-for commercial arbitrations for many years before Congress added the relevant language to Section 1782(a) in 1964." *FedEx Corp.,* 939 F.3d at 721. In support of this point, the Sixth Circuit collected cases dating back as far as 1853,[8] as well as cases decided by this Court both prior to and after 1964.[9] *Id.* at 721-22. Notably, the Sixth Circuit pointed out that this Court used the term "international arbitral tribunal" to describe a private arbitration in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985). In fact, the term

8. *See, e.g., Henry v. Lehigh Valley Coal Co.,* 215 Pa. 448, 64 A. 635, 636 (1906) (panel of three engineers chosen by a method prescribed by the parties' contract referred to as a special tribunal to settle their dispute); *Susong v. Jack,* 48 Tenn. 415, 416-17 (1870) (referencing the voluntary act of the parties in submitting their case to arbitration as "submitting their cause to another tribunal"); *Montgomery Cty. Comm'rs v. Carey,* 1 Ohio St. 463, 468 (1853).

9. *See, e.g., Bernhardt v. Polygraphic Co. of America,* 350 U.S. 198, 199 (1956) (referring to agreed arbitration under New York law by the American Arbitration Association when discussing the "nature of the tribunal where suits are tried").

was used repeatedly throughout the opinion to describe, not only the arbitration at issue in the case before it, but international and transnational arbitrations that were the subject of other opinions rendered by this Court. From this review of historical and contemporary usage of the word "tribunal" to refer to arbitrations, the Sixth Circuit concluded "that American lawyers and judges have long understood, and still use, the word 'tribunal' to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties." 939 F.3d at 722.

In *Bear Stearns*, appellant NBC submitted "numerous references" to "court cases, international treaties, congressional statements, academic writings and even the Commentaries of Blackstone and Story" that refer to private arbitration bodies as "tribunals". 165 F.3d at 188. The Second Circuit nonetheless concluded that this only showed the "statute did not unambiguously *exclude* [arbitral tribunals]" from the scope of Section 1782. *Id.* (Emphasis added). The Fifth Circuit in *Biedermann* and the Seventh Circuit in the case below both placed substantial reliance on the Second Circuit's reasoning. However, this approach contravenes the time-honored canon of statutory construction that cautions courts against reading exceptions into legislation that are not expressed in the language of a statute. *See Intel*, 542 U.S. at 260 (if Congress had intended to impose sweeping restrictions to the district court's discretion at a time when it was enacting liberalizing amendments to a statute it would have included statutory language to that effect); *Maxwell v. Moore,* 63 U.S. (1 Wall.) 185 (1859) ("where the Legislature makes a plain provision, without making any exception, the courts of justice can make none, as it would be legislating to do so."). *See also City of Chicago v. Env't Defense Fund,* 511 U.S. 328, 338 (1994).

The arbitral tribunal is a "tribunal" in both the everyday and legal sense of the term. As the Fourth Circuit concluded, the proceeding to which Servotronics and Rolls-Royce are parties qualifies as a "tribunal," even under a "government-conferred authority" requirement that was suggested in *Bear Stearns* and *Biedermann,* due to the degree to which the UK Arbitration Act sanctions, regulates and provides for governmental and judicial oversight for such proceedings. 954 F.3d at 214.

To the extent statutory language is deemed to be ambiguous, reference to its drafting and legislative history is appropriate. In the case of Section 1782, the legislative history lends further support to an inclusive interpretation of the term "tribunal" that encompasses private arbitration tribunals. *See Intel,* 542 U.S. at 247-49. Congress introduced the term "tribunal" with the 1964 amendment to Section 1782 (*id.*), which replaced the phrase "a judicial proceeding pending in a foreign country" with one that reflected the Congressional intent to expand the reach of the statute: "a proceeding in a foreign or international tribunal." *Id.* at 248-249. In addition, the 1964 amendment deleted provisions previously found in the Foreign Relations Code at 22 U.S.C. § 270-270g, making Section 1782 applicable in their place. S. Rep. No. 88-1580 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3784-85. The Foreign Relations Code provisions had applied only with respect to "governmental" tribunals. *See* former 22 U.S.C. §§ 270-270g, Act of July 3, 1930, ch. 851, §§ 1-4, 46 Stat. 1005, 1006, Amendment of June 7, 1933, ch. 50, 48 Stat. 117, 118 (repealed 1964).

The Second Circuit in *Bear Stearns* held that because the Foreign Relations Code applied only to such "governmental" tribunals, or those established by a

treaty to which the United States was a party, the same limitations should be read into Section 1782, as amended in 1964, even though Congress left them out. *See Bear Stearns*, 165 F.3d at 189-90. By so doing, the Second Circuit ignored the fundamental precept of statutory interpretation, which is to enforce clearly-expressed legislative intent. *See Turkette*, 452 U.S. at 580 (concluding that, if Congress had intended the more circumscribed approach to the RICO definition of criminal enterprise espoused by the court of appeals, there would have been some "positive sign" of such limiting intent). As this Court has stated time and again, "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

Biedermann also suggested, and the Seventh Circuit agreed, that private commercial arbitration was so "novel" in 1964 that the drafters could not have intended to refer to arbitration tribunals that were not part of government agencies or established by treaty as "tribunals" in the 1964 amendments. 168 F.3d at 882. However, this is the reverse of what the legislative history suggests was the congressional intent. Congress, whose members were undoubtedly aware of the growth of private commercial arbitration, wanted to remove limitations in order to make Section 1782 sufficiently flexible and useful to keep pace with modern-era means of resolving international commercial disputes. *See Intel*, 542 U.S. at 259-61. The Sixth Circuit's analysis of case law predating the amendment to Section 1782 demonstrates that private commercial arbitration was not a novelty in 1962. 939 F.3d at 720-722. The narrow construction also is inconsistent with this Court's interpretation in *Intel*, which acknowledged that Section 1782's legislative history could not discuss every conceivable nuance. *See generally Intel*, 542 U.S. at 248-49.

Thus, the absence of an express intention to exclude private commercial arbitrations from the ambit of Section 1782, together with the substantial indications of a congressional intent to expand the types of proceedings for which federal court assistance could be rendered, as recognized in *Intel,* leads to the conclusion that the Fourth and Sixth Circuit Courts of Appeals held correctly that Section 1782 applies to private commercial arbitral tribunals and the holdings of the Second, Fifth and Seventh Circuits are incorrect.

CONCLUSION

In order to resolve the split of authority among the Circuit Courts of Appeals and remove uncertainty on an issue repeatedly presented to district courts, Petitioner respectfully submits that this petition for a writ of certiorari should be granted.

Dated: New York, New York
December 7, 2020

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED SEPTEMBER 22, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 19-1847

SERVOTRONICS, INC.,

Petitioner-Appellant,

v.

ROLLS-ROYCE PLC
AND THE BOEING COMPANY,

Intervenors-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 18-cv-7187 — **Elaine E. Bucklo**, *Judge.*

September 19, 2019, Argued
September 22, 2020, Decided

Before SYKES, *Chief Judge*, and HAMILTON and BRENNAN, *Circuit Judges.*

SYKES, *Chief Judge*. Section 1782(a) of Title 28 authorizes the district court to order a person within the district to give testimony or produce documents "for use

in a proceeding in a foreign or international tribunal." This case asks whether a private foreign arbitration is "a proceeding in a foreign or international tribunal" within the meaning of the statute. Two decades ago, the Second and Fifth Circuits answered this question "no," holding that § 1782(a) authorizes the district court to provide discovery assistance only to state-sponsored foreign tribunals, not private foreign arbitrations. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999).

More recently, the Sixth Circuit reached the opposite conclusion, *Abdul Latif Jameel Transp. Co. v. FedEx Corp.* (*In re Application to Obtain Discovery for Use in Foreign Proceedings*), 939 F.3d 710, 714 (6th Cir. 2019), and the Fourth Circuit agreed, *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209, 214 (4th Cir. 2020). We join the Second and Fifth Circuits and hold that § 1782(a) does not authorize the district court to compel discovery for use in a private foreign arbitration.

I. Background

The backdrop for this case is an indemnification dispute over losses incurred when an aircraft engine caught fire during testing in South Carolina. Rolls-Royce PLC manufactured and sold a Trent 1000 engine to the Boeing Company for incorporation into a 787 Dreamliner aircraft. In January 2016 Boeing tested the new aircraft at its facility near the Charleston International Airport. A piece of metal became lodged in an engine valve, restricting

the flow of fuel to the engine. As Boeing employees attempted to fix the problem, the engine caught fire, damaging the aircraft. Boeing demanded compensation from Rolls-Royce, and in 2017 the companies settled for $12 million. Rolls-Royce then sought indemnification from Servotronics, Inc., the manufacturer of the valve.

Under a long-term agreement between Rolls-Royce and Servotronics, any dispute not resolved through negotiation or mediation must be submitted to binding arbitration in Birmingham, England, under the rules of the Chartered Institute of Arbiters ("CIArb"). Negotiations did not bear fruit, so Rolls-Royce initiated arbitration with the CIArb. For convenience, the parties agreed to conduct the arbitration in London.

Servotronics thereafter filed an ex parte application in the U.S. District Court for the Northern District of Illinois asking the court to issue a subpoena compelling Boeing to produce documents for use in the London arbitration. The application invoked 28 U.S.C. § 1782(a), and the judge initially granted it and issued the requested subpoena. Rolls-Royce intervened and moved to quash the subpoena, arguing that § 1782(a) does not permit a district court to order discovery for use in a private foreign commercial arbitration. Boeing intervened and joined the motion to quash. The judge reversed course and quashed the subpoena. She agreed with Rolls-Royce and Boeing that § 1782(a) does not authorize the court to provide discovery assistance in private foreign arbitrations. Servotronics appealed. Rolls-Royce and Boeing jointly defend the judge's ruling.

II. Discussion

A. Statutory Framework

Sections 1781 and 1782 of Title 28 govern the district court's authority to provide discovery assistance in litigation in foreign and international tribunals. Section 1781 describes a formal judicial instrument known as a "letter rogatory"—a letter of request "issued by one court to a foreign court, requesting that the foreign court (1) take evidence from a specific person within the foreign jurisdiction ... and (2) return [it] ... for use in a pending case." *Letter of Request*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Letters rogatory are transmitted through diplomatic agencies; the statute provides that the State Department may, either "directly, or through suitable channels, ... receive a letter rogatory issued, or request made, by a foreign or international tribunal, to transmit it to the tribunal, officer, or agency in the United States to whom it is addressed," and "receive and return it after execution." 28 U.S.C. § 1781(a)(1). The assistance is reciprocal; tribunals in the United States may issue letters rogatory through the State Department to a "foreign or international tribunal, officer, or agency."[1] *Id.* § 1781(a)(2).

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1. A State Department regulation elaborates:

> In its broader sense in international practice, the term letters rogatory denotes a formal request from a court in which an action is pending, to a foreign court to perform some judicial act. Examples are requests

Appendix A

Section 1782 works in tandem with and supplements § 1781, empowering the district court to order a person within the district to give testimony or provide evidence for use in foreign litigation, either in response to a letter rogatory or on application of a person with an interest in the litigation. The key portion of the statute reads as follows:

> 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.*

Id. § 1782(a) (emphasis added). The link to § 1781 comes in the next sentence:

> 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

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> for the taking of evidence, the serving of a summons, subpoena, or other legal notice, or the execution of a civil judgment. In United States usage, letters rogatory have been commonly utilized only for the purpose of obtaining evidence. Requests rest entirely upon the comity of courts toward each other, and customarily embody a promise of reciprocity.

22 C.F.R. § 92.54.

> document or other thing be produced, before a person appointed by the court.

Id.

The statute also gives the judge the discretion to prescribe procedures for the collection of evidence, including the option to require adherence to the practice and procedure of the foreign country or international tribunal in question:

> 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.

Id. (emphasis added).

This case involves a § 1782(a) application filed by a party to a private commercial arbitration in the United Kingdom; there is no letter rogatory or request from a foreign or international tribunal. Rather, Servotronics invoked the statute by virtue of its status as an "interested person" in the London arbitration. The judge issued the subpoena ex parte but later quashed it after concluding

that § 1782(a) does not authorize federal courts to provide discovery assistance to private foreign arbitrations. Servotronics takes issue with that interpretation of the statute, so we're asked to resolve a purely legal question and our review is de novo. *United States v. Titan Int'l, Inc.*, 811 F.3d 950, 952 (7th Cir. 2016).

B. Applicability to Private Foreign Arbitrations

This is a question of first impression for our circuit, but several other circuits have addressed it and a split has recently emerged. The disagreement centers on the meaning of the statutory phrase "foreign or international tribunal"—or more particularly, the word "tribunal."

The Second Circuit was the first to confront the question more than 20 years ago. The court began by observing that although the phrase "foreign or international tribunal" does not unambiguously *exclude* private arbitral panels, neither does it unambiguously *include* them. *Nat'l Broad. Co.*, 165 F.3d at 188. After reviewing the statutory and legislative history, the court concluded that the phrase, considered in context, is limited to state-sponsored foreign and international tribunals. *Id.* at 188-91. The court added that a contrary interpretation would create an inexplicable conflict with the Federal Arbitration Act. More specifically, a broad grant of federal-court authority to compel discovery in private foreign arbitrations "would stand in stark contrast to" the extremely limited judicial role in domestic arbitrations. *Id.* at 191. Accordingly, the court held that the statute does not authorize district courts to order discovery for use in private foreign arbitrations. *Id.*

The Fifth Circuit quickly agreed with that interpretation, *Biedermann Int'l*, 168 F.3d at 883, and that's where things stood for many years. No other appellate court weighed in until last year when the Sixth Circuit read the word "tribunal" broadly and held that the district court's authority to compel discovery for use in foreign litigation extends to private foreign arbitrations. *In re Application to Obtain Discovery*, 939 F.3d at 714.

A few months later, the Fourth Circuit aligned itself with the Sixth Circuit in a case involving a § 1782(a) application by Servotronics in a district court in South Carolina seeking discovery for use in this same London arbitration. *Servotronics*, 954 F.3d at 212-13. The Fourth Circuit's decision differs in one respect from the Sixth Circuit's; it rests in part on the court's view that contractual arbitration is the "product of government-conferred authority" both in the United Kingdom and the United States.[2] *Id.* at 214.

Finally, and more recently still, the Second Circuit reaffirmed its interpretation of § 1782 notwithstanding the contrary views of the Sixth and Fourth Circuits. *In re Guo*, 965 F.3d 96, 104 (2d Cir. 2020). The court also

2. That view strikes us as mistaken. Contractual arbitration is private dispute resolution. The source of a private arbitral panel's adjudicative authority is found in the parties' contract, not a governmental grant of power. A private arbitral body does not exercise governmental or quasi-governmental authority. But we need not explore this point further. No one here argues that arbitration in the United Kingdom (or the United States) is the product of government-conferred authority.

held that nothing in the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004), required a course correction. *In re Guo*, 965 F.3d at 105-06. We'll return to *Intel* in a moment; for now, it's enough to say that the Court's decision does not tip the scales in favor of either side of the circuit split.

For several reasons, we side with the Second and Fifth Circuits in this interpretive debate. First, the word "tribunal" is not defined in the statute, and dictionary definitions do not unambiguously resolve whether private arbitral panels are included in the specific sense in which the term is used here. All definitions agree that the word "tribunal" means "a court," but some are more expansive, leaving room for both competing interpretations.

For example, in 1964 when the present-day version of the statute was adopted, *Black's Law Dictionary* defined "tribunal" as: "The seat of a judge; the place where he administers justice. The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise." *Tribunal*, Black's Law Dictionary (4th ed. 1951). That definition appears to exclude private arbitral panels. Today the legal definition of "tribunal" is broader: "A court of justice or other adjudicatory body." *Tribunal*, Black's Law Dictionary (11th ed. 2019).

Nonlegal definitions are similar. *See, e.g.*, *Tribunal*, The Concise Oxford Dictionary of Current English (5th ed. 1964) (defining "tribunal" as "[j]udgement-seat ...; court of justice"); *Tribunal*, Webster's New Twentieth

CENTURY DICTIONARY (2d ed. 1964) (defining "tribunal" as "the seat of a judge; ... a court of justice"); *Tribunal*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed 2018) (defining "tribunal" as "[a] law court[;] ... [a] committee or board appointed to adjudicate in a particular matter"); *Tribunal*, MERRIAM-WEBSTER'S DICTIONARY AND THESAURUS (2020) (defining "tribunal" as "the seat of a judge[;] a court of justice[;] something that decides or determines, [as in] the ~ of public opinion ...").

In short, canvassing dictionary definitions is inconclusive. In both common and legal parlance, the phrase "foreign or international tribunal" can be understood to mean only state-sponsored tribunals, but it also can be understood to include private arbitration panels. Both interpretations are plausible.

C. Statutory Context

As always, context is key to unlocking meaning. After all, statutory words and phrases "cannot be construed in a vacuum. ... It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748, 204 L. Ed. 2d 34 (2019) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)). Once we situate the word "tribunal" in its proper statutory context, the more expansive reading of the term—the one that includes private arbitrations—becomes far less plausible.

As we've noted, the language of present-day § 1782 dates to 1964. *See Intel*, 542 U.S. at 247-49 (describing the statutory history of § 1782). The text was proposed by the Commission on International Rules of Judicial Procedure, a study group created by Congress in 1958 with the following statutory charge:

> The Commission shall investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements. To the end that procedures necessary or incidental to the conduct and settlement of litigation in State and Federal courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law, may be more readily ascertainable, efficient, economical, and expeditious, and that the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies be similarly improved, the Commission shall—
>
> > (a) draft for the assistance of the Secretary of State international agreements to be negotiated by him;
> >
> > (b) draft and recommend to the President any necessary legislation;

> (c) recommend to the President such other action as may appear advisable to improve and codify international practice in civil, criminal, and administrative proceedings; and
>
> (d) perform such other related duties as the President may assign.

Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743. Noticeably absent from this statutory charge is any instruction to study and recommend improvements in judicial assistance to private foreign arbitration.

"Six years later, in 1964, Congress unanimously adopted legislation recommended by the Rules Commission," which "included a complete revision of § 1782." *Intel*, 542 U.S. at 248; Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997. The legislation also revised 28 U.S.C. § 1696, pertaining to service of process in foreign litigation, and § 1781, regarding letters rogatory. Act of Oct. 3, § 4, 78 Stat. 995; *id.* § 8, 78 Stat. 996. All three statutes use the identical phrase "foreign or international tribunal" to describe the object of the district court's litigation assistance.

Identical words or phrases used in different parts of the same statute (or related statutes) are presumed to have the same meaning. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006). Service-of-process assistance and letters rogatory—governed by §§ 1696 and 1781—are

matters of comity between governments, which suggests that the phrase "foreign or international tribunal" as used in this statutory scheme means state-sponsored tribunals and does not include private arbitration panels.

Within § 1782(a) itself, the word "tribunal" appears three times—first in the operative sentence authorizing the district court to order discovery "for use in a proceeding in a foreign or international tribunal," and again in the next sentence, which authorizes the court to act on a letter rogatory issued by "a foreign or international tribunal." Two sentences later the word "tribunal" appears again where the statute provides that the court's discovery 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*." (Emphasis added.)

The highlighted phrase parallels the earlier phrase "foreign or international tribunal." Harmonizing this statutory language and reading it as a coherent whole suggests that a more limited reading of § 1782(a) is probably the correct one: 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 foreign arbitrations, in other words, are not included.

D. Conflict with the Federal Arbitration Act

This narrower understanding of the word "tribunal" avoids a serious conflict with the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-15 (amended 1988). We "interpret

Congress's statutes as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 200 L. Ed. 2d 889 (2018). When a statute is susceptible of two interpretations, one that creates a conflict with another statute and another that avoids it, we have an obligation to avoid the conflict "if such a construction is possible and reasonable." *Precision Indus., Inc. v. Qualitech Steel SBQ, LLC*, 327 F.3d 537, 544 (7th Cir. 2003). Applying this principle to the relationship between the FAA and § 1782 confirms that the latter does not apply to private foreign arbitrations.

The discovery assistance authorized by § 1782(a) is notably broader than that authorized by the FAA. Most significantly, the FAA permits the arbitration panel—but not the parties—to summon witnesses before the panel to testify and produce documents and to petition the district court to enforce the summons. 9 U.S.C. § 7. Section 1782(a), in contrast, permits both foreign tribunals *and litigants* (as well as other "interested persons") to obtain discovery orders from district courts. If § 1782(a) were construed to permit federal courts to provide discovery assistance in private foreign arbitrations, then litigants in foreign arbitrations would have access to much more expansive discovery than litigants in domestic arbitrations. It's hard to conjure a rationale for giving parties to private foreign arbitrations such broad access to federal-court discovery assistance in the United States while precluding such discovery assistance for litigants in domestic arbitrations.

Moreover, the FAA applies to some foreign arbitrations under implementing legislation for the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards and the Inter-American Convention on International Commercial Arbitration. *See* 9 U.S.C. §§ 201-208, 301-307; *Nat'l Broad. Co.*, 165 F.3d at 187. Reading § 1782(a) broadly to apply to all private foreign arbitrations creates a direct conflict with the Act for this subset of foreign arbitrations.

In sum, what the text and context of § 1782(a) strongly suggest is confirmed by the principle of avoiding a collision with another statute: a "foreign or international tribunal" within the meaning of § 1782(a) is a state-sponsored, public, or quasi-governmental tribunal.

E. *Intel* and Legislative History

Intel was the Supreme Court's first—and to date only—occasion to address § 1782(a). The Court held that the statute may be invoked by a nonlitigant "interested person," *Intel*, 542 U.S. at 256-57, and also that a foreign proceeding need not be pending or imminent but only "within reasonable contemplation," *id.* at 259. And the Court clarified that § 1782(a) does not contain an implicit foreign-discoverability requirement. *Id.* at 260-63. Finally, and most pertinent here, the Court considered whether the proceeding at issue in the case—before the Directorate General for Competition of the Commission of the European Communities—was a "proceeding in a foreign or international tribunal." The Court had no difficulty concluding that the Directorate, as a public agency with quasi-judicial authority, qualified as a "foreign tribunal" within the meaning of § 1782(a).

Along the way to this last holding, the Court sketched the legislative history of § 1782 and as a part of its discussion quoted from a footnote in a law-review article written by the law professor who served as the reporter for the commission that proposed what eventually became § 1782. This passage in *Intel* has taken on outsized significance here, so we quote it in full: "The term 'tribunal' [in § 1782(a)] ... includes investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." *Id.* at 258 (emphasis added) (quoting Hans Smit, *International Litigation Under the United States Code*, 65 COLUM. L. REV. 1015, 1026 n.71 (1965)).

Servotronics relies heavily on the professor's inclusion of "arbitral tribunals" in this footnoted list, but this reliance is misplaced. The quotation from the professor's article appears in the Court's opinion as part of an explanatory parenthetical. There is no indication that the phrase "arbitral tribunals" includes *private* arbitral tribunals. Even if there were such an indication, we see no reason to believe that the Court, by quoting a law-review article in a passing parenthetical, was signaling its view that § 1782(a) authorizes district courts to provide discovery assistance in private foreign arbitrations.

In short, this passage cannot bear the weight Servotronics places on it. For the foregoing reasons, we 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.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED APRIL 22, 2019

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 18-cv-7187

In re Application of SERVOTRONICS, INC., for an Order Pursuant to 28 U.S.C. § 1782 to Take Discovery for Use in a Foreign Proceeding

April 22, 2019, Decided
April 22, 2019, Filed

ORDER

Servotronics, Inc. ("Servotronics") initiated this action by filing an *ex parte* application for discovery assistance pursuant to 28 U.S.C. § 1782(a). In its application, Servotronics sought an order allowing it to serve a subpoena *duces tecum* upon the Boeing Company ("Boeing"), a resident of this district, to obtain documents for use in a private arbitration proceeding between Servotronics and Rolls-Royce, PLC ("Rolls-Royce") pending in London, England ("London Arbitration"). I granted the application, and Servotronics served its subpoena on Boeing. Shortly thereafter Rolls-Royce filed a motion to vacate the order granting Servotronics's application and to quash the subpoena, and Boeing filed a response in support of Rolls-Royce's motion. For the

reasons that follow, I grant the motion, vacate my previous order, and quash Servotronics's subpoena on Boeing.

The parties' underlying dispute arises from a fire that occurred at Boeing's facilities in Charleston, South Carolina. During a ground engine test of a Boeing 787-9 aircraft, a stray piece of metal apparently got lodged in the aircraft's engine valve, affecting the flow of fuel to the engine. Boeing's employees began troubleshooting the engine, and, at some point, the engine caught fire, causing damage to the aircraft.

After the accident, Boeing sought compensation from the engine manufacturer Rolls-Royce, and the two companies reached a settlement. Rolls-Royce then demanded indemnity from Servotronics, the manufacturer of the engine valve that Rolls-Royce claims caused the engine malfunction. Servotronics refused, and so Rolls-Royce notified Servotronics that it intended to arbitrate the dispute pursuant to an agreement existing between them. According to their agreement, Rolls-Royce and Servotronics must submit all disputes that are not resolved by negotiation or mediation to private arbitration[1] under the rules of the Chartered Institute of Arbitrators ("CIArb"), which provide for "final and binding" arbitration reviewable only for substantive jurisdictional issues and "serious irregularities."[2] Shah Decl. [6] ¶¶ 16-

1. Although the agreement does not use the term "private arbitration," there is no dispute that private arbitration is what it requires.

2. By adopting the CIArb Rules, parties "waive their right to any form of appeal or recourse to a court or other judicial authority

18. After Rolls-Royce sent Servotronics its arbitration notice, the parties agreed to hold an arbitration hearing in London, England. That hearing has not yet occurred.

In preparation for the London Arbitration, Servotronics decided to seek discovery from non-party Boeing and its employees in the United States. It filed an *ex parte* 28 U.S.C. § 1782 application here in the Northern District of Illinois seeking documents from Boeing's headquarters, and it filed a separate *ex parte* application in the District of South Carolina seeking to take depositions from three of Boeing's Charleston facility employees. The South Carolina court denied Servotronics's application on the ground that 28 U.S.C. § 1782 does not reach private arbitral forums, and Servotronics is appealing that decision. I granted the application that was before me.

Rolls-Royce, with Boeing's support, seeks to vacate my order granting Servotronics's application because it asserts that I lacked authority under 28 U.S.C. § 1782 to order discovery for use in a foreign private arbitration. Servotronics disagrees of course, but it also argues that I should not even reach the question of my § 1782 authority now because (1) Rolls-Royce has not formally moved to intervene in this case, and (2) Rolls-Royce lacks standing

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insofar as such waiver is valid under the applicable law." Shah Decl. [6] Exh. A, Art. 34(2). Under the laws of England and Wales, which govern the agreement between Rolls-Royce and Servotronics, *id.* ¶ 17, parties to an arbitration cannot waive the right to challenge an award in court for lack of substantive jurisdiction or for serious irregularities. Arbitration Act, 1996, c. 23, §§ 4, 67-68 & sch. 1. However, parties can waive the right to appeal questions of law arising out of an arbitration award. *Id.* § 69.

to vacate the order and quash the subpoena since both are directed at Boeing. Neither of these arguments is persuasive.

First, although Servotronics is correct that Rolls-Royce never filed a formal motion to intervene in this matter (and neither did Boeing), this does not prevent me from considering the motion to vacate and quash. District courts vary on whether they require non-parties affected by a § 1782 order to formally move to intervene to challenge the order. *Compare In re Kleimar N.V v. Benxi Iron & Steel Am., Ltd.*, No. 17-CV-01287, 2017 WL 3386115, at *4 (N.D. Ill. Aug. 7, 2017) (permitting a party served with a subpoena under § 1782 to challenge the order without separately moving to intervene), *and In re Application of TJAC Waterloo, LLC*, No. 3:16-MC-9-CAN, 2016 WL 1700001, at *2 (N.D. Ind. Apr. 27, 2016) (granting a motion to vacate a § 1782 order by opponent in the underlying foreign proceeding without a formal motion to intervene), *with In re Ambercroft Trading Ltd.*, No. 18-MC-80074-KAW, 2018 WL 4773187, at *4 (N.D. Cal. Oct. 3, 2018) (permitting challenge because party filed a timely motion to intervene under Federal Rule 24(b)), *and In re Hornbeam Corp.*, No. 14-MC-424, 2015 WL 13647606, at *3 (S.D.N.Y. Sept. 17, 2015) (same). And in any case, motions that implicitly seek intervention in a matter may be treated as motions brought under Rule 24. *See United States v. Griffin*, 782 F.2d 1393, 1399 (7th Cir. 1986) (even when a motion is "not styled [as] one for intervention ... a court is entitled to disregard labels and treat pleadings for what they are"); *Am. Nat. Bank & Tr. Co. of Chicago v. Bailey*, 750 F.2d 577, 582 (7th Cir.

1984) (party's failure to file a formal motion for leave to intervene before it filed a counterclaim "not necessarily [] fatal to its status as an intervenor").

Second, as the opposing party in the pending London Arbitration, Rolls-Royce has standing to request that my § 1782 order be vacated. It is well-settled that a party "against whom information obtained under section 1782 may be used, has standing to assert that, to his detriment, the authority for which the section provides is being abused." *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (Ginsburg, J.); *see also Application of Sarrio, S.A.*, 119 F.3d 143, 148 (2d Cir. 1997) ("We have recognized, though implicitly, that parties against whom the requested information will be used may have standing to challenge the lawfulness of discovery orders directed to third parties."). Because Servotronics intends to use whatever discovery it obtains from Boeing against Rolls-Royce in the London Arbitration, Rolls-Royce is entitled to challenge the validity of the order to produce it.

The merits of Rolls-Royce's motion require me to consider the reach of 28 U.S.C. § 1782. Section 1782 "authorizes federal district courts to order the production of evidentiary materials for use in foreign legal proceedings, provided the materials are not privileged." *McKevitt v. Pallasch*, 339 F.3d 530, 531 (7th Cir. 2003). The provision states:

> 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 .... 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....

28 U.S.C. § 1782(a). A federal court thus has authority to order discovery pursuant to § 1782 when (1) a request for discovery from a person residing in or found in the court's district (2) is made by a foreign tribunal or an "interested person" (3) for use in "a proceeding in a foreign or international tribunal." *Id.* If these statutory prerequisites are met, a district court may exercise its discretion to grant a § 1782 application.

Rolls-Royce does not dispute that Servotronics's application met the first and second § 1782 requirements. It contends, however, that Servotronics's application cannot satisfy the third requirement because the London Arbitration for which Servotronics seeks discovery is a private arbitral proceeding that does not qualify as a "foreign or international tribunal" under the statute. I agree.

As Rolls-Royce points out in its motion, I previously addressed this question in *In re Arbitration between Norfolk S. Corp., Norfolk S. Ry. Co., & Gen. Sec. Ins.*

Co. & Ace Bermuda Ltd. ("*Norfolk*"), 626 F. Supp. 2d 882 (N.D. Ill. 2009). In *Norfolk*, I declined to order the former counsel of a party involved in a private arbitration in London to appear for a deposition in Chicago pursuant to § 1782 because I concluded, based on § 1782's text, its legislative history, and relevant case law, that purely private arbitrations were outside the scope of the statute. *Id.* at 885-86. In reaching this conclusion, I considered the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), where the Court determined that an intergovernmental European commission that enforced European competition laws was within § 1782's ambit. Although *Intel* did not involve arbitration, the Court in that case favorably quoted a definition of "tribunal" that included "arbitral tribunals." The Court did not explain whether this definition was intended to include all arbitral bodies or just government-sponsored ones. Nonetheless, because the *Intel* Court "stopped short of declaring that *any* foreign body exercising adjudicatory power falls within the purview of the statute" and instead focused its analysis on the public and quasi-judicial functions of the commission in question and the ultimate reviewability[3] of its decisions, I interpreted the "reference to 'arbitral bodies' as including state-sponsored arbitral bodies but excluding purely private arbitrations." *Norfolk*, 626 F. Supp. 2d at 885. That

3. In *Norfolk*, I observed that the parties' arbitration agreement, like the CIArb Rules here, waived the right to judicial review of the merits of their dispute. 626 F. Supp. 2d at 886. This limitation on reviewability stood in contrast to the reviewable decisions of the intergovernmental commission at issue in *Intel*. *See* 524 U.S. at 255, 259.

the Court made no mention of Second and Fifth Circuit precedent expressly holding that § 1782 did not reach private arbitrations added further support to this interpretation. *See National Broadcasting Co. v. Bear Stearns & Co. ("NBC")*, 165 F.3d 184, 189 (2d Cir. 1999) (holding that the term "foreign or international tribunal" encompasses governmental and intergovernmental adjudicatory bodies, but not "arbitral bod[ies] established by private parties"); *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880, 883 (5th Cir. 1999) (concluding that § 1782 "was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations").

Since my decision in *Norfolk*, there have not been any legal developments that would lead me to a different conclusion about § 1782's scope. In *GEA Group AG v. Flex-N-Gate Corp.*, 740 F.3d 411 (7th Cir. 2014), the Seventh Circuit briefly pondered the question of § 1782's reach in dicta, noting that a private arbitration in Germany might—or might not—qualify as a foreign tribunal under § 1782. *Id.* at 419. But the Court did not resolve the question, as the matter before it was not a § 1782 proceeding. The *GEA* panel did cite one circuit court case, *In re Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.* ("*Consorcio I*"), 685 F.3d 987 (11th Cir. 2012), which post-dated my decision in *Norfolk*, for the proposition that a private arbitral forum might be covered by § 1782. In *Consorcio I*, the Eleventh Circuit broke with the Second and Fifth Circuits to conclude that a private arbitral panel in Ecuador satisfied § 1782's requirements. 685 F.3d at 996-98, 997 n.7. But the Eleventh Circuit subsequently vacated and replaced that

decision with an opinion resolving the dispute on different grounds. *See Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.* ("*Consorcio II*"), 747 F.3d 1262, 1270 n.4 (11th Cir. 2014) (vacating prior decision that concluded that private arbitral forums were covered because that "substantial question" was not clearly presented on the "sparse record" before it). Thus, after *Consorcio II*, what remains, other than the authorities that existed at the time of my decision in *Norfolk*, is *GEA*'s acknowledgement that the question of § 1782's scope is open in the Seventh Circuit. While district courts have continued to answer the question differently, including within this district, *see, e.g., Kleimar*, 2017 WL 3386115, at *5-6, the only two circuits that have directly addressed § 1782's applicability to private arbitration proceedings hold that the statute does not so extend. *NBC*, 165 F.3d at 189; *Biedermann*, 168 F.3d at 883. Without any intervening guidance from the Seventh Circuit or the Supreme Court, my view therefore remains unchanged from my opinion in *Norfolk*. Accordingly, I grant Rolls-Royce's motion [14] to vacate my November 19, 2018, order [11] and to quash the resulting subpoena [12].[4]

ENTER ORDER:

/s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: April 22, 2019

4. Because I agree with Rolls-Royce that § 1782 does not reach purely private arbitrations, there is no need to address its other arguments in support of its motion.

APPENDIX C — STATUTE

28 U.S.C. § 1782

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

Effective: February 10, 1996

(a) 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.

Appendix C

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.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.