THE NATIONAL LAW JOURNAL
APRIL 16, 2021
An ALM Publication

Justices to Resolve Circuit Split on Availability of Domestic Discovery for Use in Private Foreign Arbitrations

At the heart of the case is whether a private foreign arbitration qualifies as a "tribunal."

BY LAUREN M. WEINSTEIN, ELIZABETH K. CLARKE AND LISA W. BOHL

The Supreme Court has agreed to decide whether federal law authorizes a United States district court to order discovery for use in private foreign arbitrations, an issue that has created a circuit split.

On March 22, the Supreme Court granted certiorari in *Servotronics, Inc. v. Rolls-Royce PLC*. The case concerns 28 U.S.C. §1782, which authorizes a federal district court to order those within the court's jurisdiction to provide discovery for use in proceedings in a "foreign or international tribunal." At the heart of the case is whether a private foreign arbitration qualifies as such a "tribunal." Three circuits have decided that private arbitrations are not covered under that provision, holding that the key phrase refers only to state-sponsored foreign tribunals. Two others disagreed, reasoning that the word "tribunal" is expansive enough to encompass private arbitrations.

The U.S. Court of Appeals for the Seventh Circuit is the most recent to weigh in. The underlying dispute arose when Servotronics sought discovery in a federal court for use in a London arbitration. The Seventh Circuit denied Servotronics's request for discovery and took the narrower view of the phrase "foreign or international tribunal." The court looked to the statute's context and history, reasoning that the phrase referred to a governmental, administrative or quasi-governmental tribunal—not a private arbitration.

(Courtesy photos)

Lauren M. Weinstein, Elizabeth K. Clarke and Lisa W. Bohl of MoloLamken.

The Supreme Court granted certiorari after the Seventh Circuit's decision deepened the existing circuit split. The case has important ramifications, because U.S. courts typically allow far more expansive discovery than in international arbitrations. And §1782 is particularly useful because the foreign or international proceeding need not be pending or even imminent, as U.S. courts can order discovery as long as a future proceeding is reasonably contemplated. If the Supreme Court determines that the statute permits discovery in private arbitrations, §1782 will become an even more valuable tool for litigants who seek discovery from international corporations or parties with relationships to the United States. A decision that §1782 extends to private arbitrations could make those arbitrations a more powerful vehicle for dispute resolution, thus better serving the needs of international arbitration users.

The Supreme Court's resolution of the issue will also provide much needed stability. Currently,

there are incentives to forum shop based on the circuits' conflicting approaches. And the uncertainty caused by the circuit split may also discourage parties from contracting to use private arbitration, because parties will often not know beforehand where witnesses might be located and thus whether they may be subject to discovery.

Separately, should the Court decide that §1782 covers private arbitrations, the time and resources required to request discovery may decrease dramatically. As noted by the International Institute for Conflict Prevention & Resolution in **an amicus brief**, it can take nearly a year and a half to resolve a §1782 petition. A substantial part of this time may be attributed to litigating the question of whether §1782 applies to private arbitration, before the court even gets to the merits of the discovery request. The Supreme Court's resolution of that issue could thus speed up that timeline.

Notably, if the Supreme Court were to decide that §1782 does not extend to private arbitrations, questions may remain about what sorts of proceedings fall into that category. In particular, the distinction between "private" and "governmental" arbitration often does not reflect the realities of arbitration practice or recognize the gray area in the middle of a spectrum.

(Photo: Diego M. Radzinschi/ALM)

The U.S. Supreme Court building, Washington, D.C.

For example, courts have held that investor-state arbitrations generally take place in tribunals established by international treaties and thus would be considered a "governmental" arbitration. Yet tribunals like the **London Court of International Arbitration** or the **International Chamber of Commerce**—neither of which are established by treaty—can involve sovereign states. In those cases, the arbitrations may appear far more "governmental" than a private commercial dispute.

By contrast, the **Cairo Regional Center for International Commercial Arbitration** and the **Asian International Arbitration Centre in Kuala Lumpur** were set up by international agreements involving sovereign states, but they deal **almost exclusively** with commercial arbitrations between private parties. As a result, many in the arbitration community would consider arbitral tribunals appointed by those institutions "private" rather than "governmental." Additionally, some foreign countries heavily regulate "private" arbitrations, which has led some courts to conclude that those arbitrations are effectively government-sponsored tribunals.

Thus, while the Supreme Court's decision in *Servotronics* will bring some much-needed guidance and uniformity, litigation about the scope of §1782 may well continue.

Lauren M. Weinstein *is a partner in MoloLamken's Washington, D.C., office.* ***Elizabeth K. Clarke*** *and* ***Lisa W. Bohl*** *are associates in MoloLamken's Chicago office.*