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US Discovery in International Arbitration and the Supreme Court's Views on Statutory Interpretation

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Context: International Arbitration on the Rise

International Arbitration Basics

What is it?

- A private mechanism for addressing cross-border disputes.
- Companies often require disputes to be resolved by arbitration in their commercial contracts with one another.
- Common types:
  - Commercial disputes between companies that operate internationally.
  - Investor-State disputes in which a foreign investor brings a claim against the host state.
- Results in a binding decision (arbitral award).

How is it enforced?

- 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards.
- Ratified by over 150 nations.

Domestic Support for International Arbitration

- Federal Arbitration Act (1925) – intended to counteract the traditional "judicial hostility" towards arbitration.
- U.S. acceded to New York Convention (1970).
- Increasing judicial recognition of and respect for important role of international arbitration.

Judicial Recognition of Int’l Arbitration

- *Mitsubishi Motors Corp. v. Soler ChryslerPlymouth, Inc.*, 473 U.S. 614 (1985) (“[I]f international arbitral institutions ‘are to take a central place in the international legal order, national courts will need to ‘shake off the old judicial hostility to arbitration,’ and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal.”).

- *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer* (1995) 515 U.S. 528, 537 (collecting cases reflecting “contemporary principles of international comity and commercial practice,” which demand respect for international arbitration).

- *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1644 (2020) (holding that the New York Convention, which addresses recognition and enforcement of international arbitral awards, leaves open application of domestic law that is “more generous in enforcing arbitration agreements” than the Convention requires).

Domestic Discovery for Int'l Arbitration?

Domestic Discovery in Int'l Arbitration?

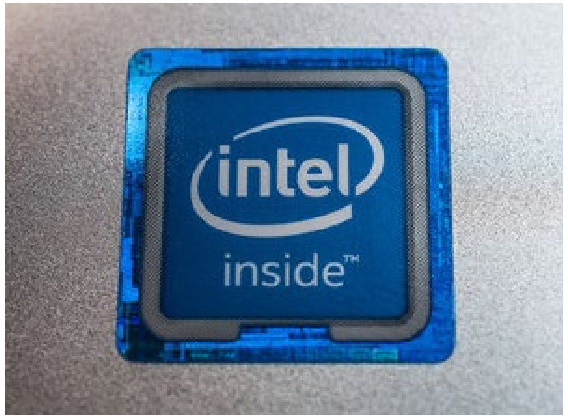
28 U.S.C. § 1782(a) authorizes, but does not require, federal district courts to grant discovery "for use in a foreign or international tribunal" at the request of "any interested person."

- Litigants have been using § 1782 to obtain discovery that might not have otherwise been available in the foreign or international forum.
- That includes parties to international arbitration.

But does an international arbitral forum qualify as a "foreign or international tribunal" under § 1782?

A Hint: SCOTUS's 2004 Decision in *Intel*

Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248 (2004)



<u>Facts</u>: Advanced Micro Devices (AMD) filed a complaint against Intel with Directorate-General for Competition of the Commission of the European Communities (the European Commission). The complaint alleged that Intel used its size to unfairly dominate the computer microprocessor market.

In support of that claim, AMD asked the United States District Court for the Northern District of California for an order requiring Intel to produce potentially relevant documents, invoking 28 U. S. C. §1782(a). The district court concluded that § 1782 did not authorize it to grant discovery. The Ninth Circuit reversed, concluding that § 1782 did grant the district court discretion to order discovery on behalf of AMD, and remanded for further consideration.

Intel

<u>Question Presented</u>: Whether § 1782 authorizes the district court to grant discovery to a claimant before the European Commission? More specifically:

1. Whether a claimant before the European Commission qualifies as an "interested person" under § 1782;

2. Whether the European Commission qualifies as a "tribunal" under § 1782 when it "acts as a first-instance decisionmaker";

3. Whether "proceeding" for which discovery is sought under §1782(a) must be "pending" or "imminent"; and

4. Whether §1782(a) contains a threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding.

Intel

<u>Opinion</u>: The Court held 8-1 that § 1782 authorized the district court to grant discovery to AMD relating to its claim before the European Commission. The Court traced the history of § 1782, observing that it "is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals."

As relevant here, the Court noted that the provision was amended in 1964 to replace the phrase "judicial proceeding" with "proceeding in a foreign or international tribunal." The accompanying Senate Report explains that "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.***'"

Intel

<u>Opinion, cont'd</u>: In a quick two paragraphs, the Court concluded that the European Commission qualified as a tribunal:

1. The authorities that reviewed decisions from the Commission – the Court of First Instance and the European Court of Justice – unquestionably qualified. But those appellate bodies were confined to the record before the Commission, so AMD could only "use" evidence in the Commission proceedings. That meant the Commission must also qualify as a tribunal.

2. Moreover, Congress intended § 1782 to apply broadly to "foreign courts *and quasi-judicial agencies*." The Senate Report and a contemporaneous article by Professor Hans Smit, who was a leading author of the amendment to § 1782, confirmed that understanding. Accordingly, the Court had "no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit."

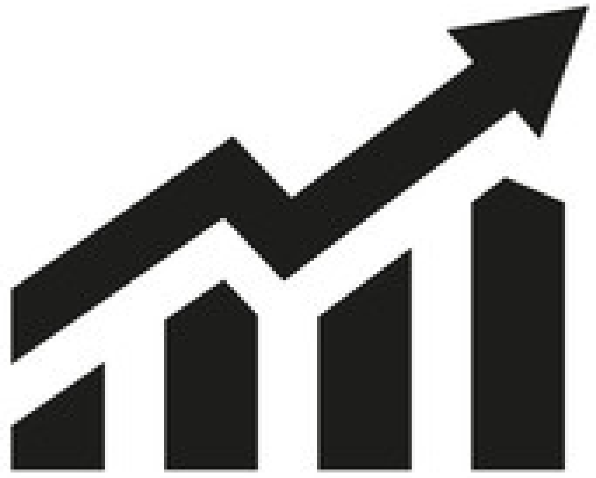
The *Intel* Factors

The Court also set out several factors to guide lower courts' consideration of § 1782 discovery requests:

- Whether the requested evidence is "unobtainable absent § 1782(a) aid," which is likely when the target from whom discovery is sought is a "nonparticipant[] in the foreign proceeding [and] may be outside the foreign tribunal's jurisdictional reach";
- "[T]he nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance";
- Whether the request "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States"; and
- Whether the requested discovery is "unduly intrusive or burdensome," in which case the request may be rejected or limited.

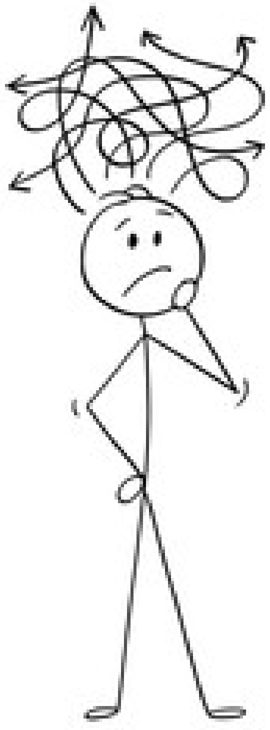
Post-*Intel* Discovery Requests

- Since *Intel*, requests for discovery in aid of international proceedings have increased dramatically.
- The absolute number of requests is fairly small, but it quadrupled between 2005 and 2017 (from 50 to 200 annually).



Source: Brief of Amicus Curiae of Professor Yanbai Andrea Wang in Support of Neither Party (May 13, 2021), filed in *Servotronics v. Rolls-Royce*, 20-794.

Post-*Intel* Confusion



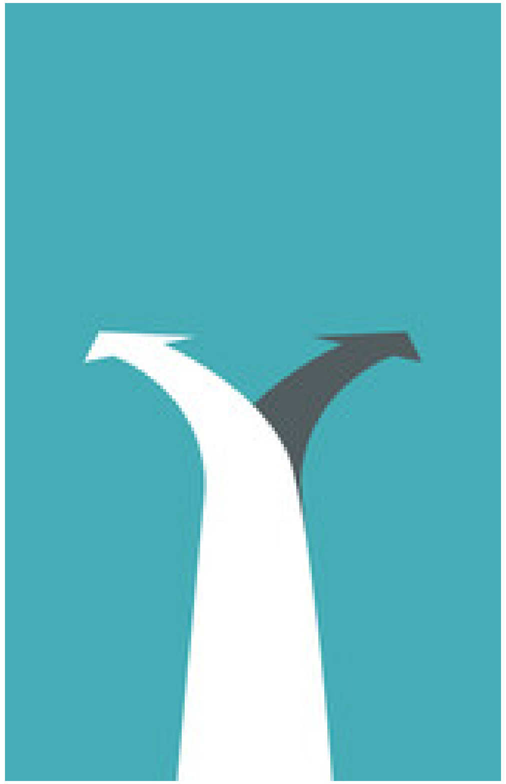
- Faced with these increased requests, courts have struggled to apply the *Intel* factors consistently in resolving them.
- Since *Intel*, the Supreme Court has provided no further guidance about the meaning of the phrase "foreign or international tribunal."
- Courts have reached differing conclusions as to whether certain foreign entities qualify as tribunals under the provision.

The Circuit Split

- The Second and Fifth Circuits have, since 1999, held that private arbitration does not qualify as a tribunal under § 1782. *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999); *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

- Post-*Intel*, in 2019 and 2020, the Fourth and Sixth Circuits came out the other way, interpreting the word "tribunal" broadly to include international arbitration. *In re Application to Obtain Discovery for Use in Foreign Proc.*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020).

- Later in 2020, the Seventh Circuit aligned with the Second and Fifth Circuits. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 693 (7th Cir. 2020), holding that international arbitration doesn't qualify as a tribunal under § 1782.



Reasoning from the 2d and 5th Circuits

The Second Circuit in *Nat'l Broad. Co. v. Bear Stearns & Co.* (1999) reasoned:

- Text: The phrase "foreign or international tribunal" in Section 1782 is "sufficiently ambiguous that it does not necessarily include or exclude" foreign private commercial arbitration.
- Legislative History: Congress "had in mind only governmental entities, such as administrative or investigative courts, acting as state instrumentalities or with the authority of the state."
- Policy Considerations: If § 1782 authorized broader discovery for international arbitrations than the FAA did for domestic ones, that would be a potential conflict. Moreover, the popularity of arbitration rests in large part on its efficiency and cost-effectiveness, which are at odds with full-scale discovery.

"In sum, policy considerations of some magnitude reinforce our conclusion, based upon an analysis of the text and legislative history of § 1782, that Congress did not intend for that statute to apply to an arbitral body established by private parties."

Reasoning from the 2d and 5th Circuits

The Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int'l* (1999) reasoned:

- <u>Text</u>: The meaning of "tribunal" is ambiguous "and must be construed in light of the background and purpose of the statute."
- <u>Legislative History</u>: International private arbitration was novel at the time Congress amended § 1782 to use to word "tribunal." No contemporaneous documents show that arbitration was included. And references in the U.S. Code to "arbitral tribunals" refer almost exclusively to adjuncts of foreign governments or international agencies.
- <u>Policy Considerations</u>: Discovery is limited in domestic arbitration and not usually available to interested third parties. The rule should not be broader for international arbitration.

"We conclude that the term 'foreign and international tribunals' in § 1782 was not intended to authorize resort to United States federal courts to assist discovery in private international arbitrations. The provision was enlarged to further comity among nations, not to complicate and undermine the salutary device of private international arbitration."

Reasoning from the 4th and 6th Circuits

The Sixth Circuit in *In re Application to Obtain Discovery for Use in Foreign Proc.* (2019) looked to:

- Dictionary definitions: "Several legal and non-legal dictionaries contain definitions of 'tribunal' broad enough to include private arbitration, while others contain narrower definitions that seem to exclude such proceedings."
- Use of word "tribunal" in legal writing: "A broader definition of 'tribunal' finds more support in American courts' historical and continuing usage of the word to describe private arbitrations."
  - Surveyed Supreme Court decisions, Sixth Circuit decisions, commentaries by American jurists (e.g., Justice Story)
- Other uses of word "tribunal" in the statute: No indication that "tribunal" must be interpreted narrowly.
- SCOTUS's decision in *Intel*: The Court quoted with approval the following passage from Professor Hans Smit's contemporaneous article: "[t]he term 'tribunal' … includes investigating magistrates, administrative and ***arbitral tribunals***, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." (emphasis added).

In the Sixth Circuit's view, the text of the statute was clear: a private arbitral body qualified as a "tribunal."

Reasoning from the 4th and 6th Circuits

The Fourth Circuit in *Servotronics, Inc. v. Boeing Co.* (2020) looked to:

- Congressional intent:
  - There's a "long-term — over 150-year – policy of Congress to facilitate cooperation with foreign countries by 'provid[ing] federal-court assistance in gathering evidence for use in foreign tribunals.'"
  - Congress knew that by replacing "judicial proceeding" with "proceeding in a foreign or international tribunal," it was expanding discovery assistance to administrative and quasi-judicial proceedings.
  - Congress *favors* arbitration, as evidenced by the FAA. And in the U.S., arbitration is enforced by courts and was developed as a "favored alternative to the judicial process" — in other words, arbitration *is* a product of government-conferred authority.
- Practical effects/potential conflicts: Allowing district courts discretion to order discovery in international arbitrations does not conflict with the FAA by authorizing discovery that the FAA does not contemplate. Nor does it undermine the efficiency purposes of arbitration. District courts should make good use of their discretion under § 1782 – they need not order full-blown discovery and can tailor their assistance.

"[T]he UK arbitral panel convened to address the dispute between Servotronics and Rolls-Royce is a 'foreign or international tribunal' under § 1782(a). . .[.]"

Seventh Circuit - Servotronics

Later in 2020, the Seventh Circuit joined the fray (in a case arising out of the same arbitration):

- Dictionary definitions: Ambiguous.
- Statutory Context: Legislative history does not indicate inclusion of arbitration. Moreover, amendments made at the same time used the same phrase in 28 USC § 1696 and § 1781, which concerned service of process and letters rogatory. Those issues "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."
- Conflict with FAA: This narrower interpretation avoids a conflict with the FAA because the discovery assistance authorized by § 1782 is "notably broader than that authorized by the FAA."
- *Intel*: Court's quotation of Professor Smit's article "has taken on outsized significance here." Although the professor includes "arbitral tribunals," there's no indication he meant *private* arbitral tribunals.

"[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."

A Chance For The Supreme Court to Weigh In?

Cert Granted in 7th Cir. *Servotronics*

This case arose out of a dispute over an engine fire that occurred on a Boeing 787 aircraft. Servotronics supplied a valve installed by Rolls-Royce in the plane's engine. After settling with Boeing, Rolls-Royce filed a demand for arbitration in England seeking indemnification from Servotronics. Servotronics then applied for discovery in the Northern District of Illinois (and in the South Carolina district court) from Boeing under 28 U.S.C. § 1782(a). The Fourth and Seventh Circuits reached opposite results.

Cert Granted: March 22, 2021

Question Presented: Whether the phrase "foreign or international tribunal" extends to private, foreign arbitration or is limited to government proceedings.

Arguments Made In *Servotronics*

Servotronics:

- Dictionary definitions support a broad interpretation. Although definitions vary, "[t]he fact that some dictionaries did define tribunal to include private arbitral tribunals establishes the opposite of what the Second Circuit concluded: the word 'tribunal' was used to refer to private arbitral tribunals at the time Congress enacted the 1964 amendment of Section 1782".
- The Supreme Court has used the word "tribunal" to include arbitration as early as 1898.
- Legislative history supports the plain text. Relying on *Intel*, Servotronics argued that the history supports a broad interpretation because Congress intended to eliminate the requirement of government involvement and allow district courts to render assistance in a wide range of "administrative and quasi-judicial proceedings." The article by Professor Smit confirms that understanding and expressly includes arbitrations.

Arguments Made In *Servotronics*

Rolls Royce/Boeing:

- Dictionary definitions support a narrow interpretation. "In 1964, dictionaries consistently defined a 'tribunal' as a court or other governmental adjudicator." Broader definitions are "obviously inapt."

- Statutory context supports the narrower interpretation. Other uses of the phrase around §1782 "confirms that 'Tribunals' are governmental adjudicators." For example, the provisions relating to service of process and letters rogatory (§§ 1696 and 1781) reinforce that conclusion. And since the 1964 amendment, Congress has used the phrase foreign tribunal or international tribunal to refer to courts or governmental adjudicatory bodies.

- Legislative history does not support inclusion of private arbitral bodies and, in any event, "[l]egislative history 'is not the law.'"

- Extending §1782 to private arbitration "would burden U.S. companies and undermine arbitration."

Arguments Made In *Servotronics*

Amicus Briefs:

- Arbitration community is divided as to the appropriate outcome.
- United States supports the more limited view endorsed by the 2d, 5th, and 7th Circuits, arguing that policy reasons counsel against allowing broader discovery in international arbitration than that allowed in domestic arbitration under the FAA.
- Columbia Law Professor George Bermann supports the broader view endorsed by the 4th and 6th Circuits. Federal Arbitration, Inc. also filed brief in support of broader view.
- The International Court of Arbitration of the International Chamber of Commerce filed a brief in support of neither party arguing that the views of the arbitral tribunal itself as to the applicability of § 1782 should be afforded deference.
- The International Arbitration Center in Tokyo asserted that the key question is not whether the arbitral forum is quasi-governmental but whether the information discovered could actually be used in the underlying arbitral proceeding.

The Textualist Trend

Servotronics raised a simple and fairly narrow question, but it implicates broader questions of statutory interpretation. In particular, what role do dictionaries and legislative history play?

- An empirical study of the 2005–2008 Supreme Court Terms found that the majority of Supreme Court Justices "referenced text/plain meaning and Supreme Court precedent more frequently than any of the other interpretive tools." Kevin Tobia, *Testing Ordinary Meaning*, 134 Harv. L. Rev. 726 (2020). The appointment of Justices Kavanaugh, Gorsuch, and Barrett will likely continue that trend. Id. "The Supreme Court cites dictionaries more today than ever before." Id. at 732.

- *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356 (2019) – consults dictionary definitions, acknowledges early case law as an acceptable tool for statutory interpretation, but strongly limits the use of legislative history. *See id.* at 2363 ("Even those of us who sometimes consult legislative history will never allow it to be used to 'muddy' the meaning of 'clear statutory language.'").

- *Milner v. Dep't of Navy*, 562 U.S. 562, 574 (2011) ("[T]he more fundamental point is what we said before: Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it.").

A Recent Example of the Textualist Approach: *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020)

The Court considered and decided three cases together. In each case, an employer fired a long-time employee shortly after the employee revealed they were homosexual or transgender and allegedly for no reason other than the employee's homosexuality or transgender status. The employees claimed their termination violated Title VII, which prohibits employment discrimination because of an "individual's race, color, religion, sex, or national origin."

Question Presented: Does Title VII of the Civil Rights Act of 1964, which prohibits against employment discrimination "because of . . . sex[,]" ban discrimination based on an individual's sexual orientation or gender identity?

Holding: An employer who fires an employee because that person is homosexual or transgender violates Title VII. The decision was 6-3, with the majority opinion authored by Justice Gorsuch.

A Recent Example of the Textualist Approach: *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020)

Analysis: In deciding whether Title VII prohibits termination because of homosexuality or transgender status, the Court looked to the ordinary public meaning of the word "sex" and the phrase "because of." The employers argued the word "sex" in 1964 meant only "status as either male or female [as] determined by reproductive biology," while the employees argued the word was broader and encompassed sexuality and gender identity. The Court concluded that the distinction didn't matter here.

The Court reasoned that the phrase "because of" simply required "but-for causation." Accordingly, "if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred." That test was met in the cases here even under a narrow interpretation of the word "sex." For example, if the employee who was fired for being attracted to men had himself been a woman rather than a man, the employer would not have fired him. Thus, the employee's sex was a cause of his termination, and that's exactly what the plain text of the statute prohibits.

Although the Court acknowledged that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons, the Court gave no weight to legislative history because the language of the statute unambiguously prohibits the discriminatory practice.

A Recent Example of the Textualist Approach: *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020)

Dissents: Justice Alito, joined by Justice Thomas, dissented. He accused the majority of usurping the role of the legislative branch, noting that Congress had recently tried and failed to amend Title VII to include "sexual orientation" and "gender identity" as prohibited bases for employment discrimination.

The Court's role was to "interpret statutory terms to 'mean what they conveyed to reasonable people *at the time they were written.*'" Because the 1964 dictionary definition of "sex" did not encompass gender identity and sexual orientation—and there is no indication that Congress thought it was prohibiting discrimination on those bases—the provision does not encompass those characteristics.

The dissent disagreed that the majority's interpretation was a textualist one: "The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society."

Justice Kavanaugh also dissented, emphasizing that the issue of prohibiting employment discrimination based on gender identity or sexual orientation is one for the legislature. He described the majority's approach as "literalist." And what matters is the "ordinary" meaning of a phrase—i.e., what a reasonable person would think it means—which is not necessarily the same as the literal definition. The Court should not "simply split statutory phrases into their component words, look up each in a dictionary, and then mechanically put them together again."

How Will the Court Analyze § 1782?

- Would so-called "textualist" Justices decline entirely to rely on nontextual sources to ascertain the meaning of § 1782?
- Without recourse to legislative history, how would the Court ascertain the scope and purpose of the 1964 amendment?
- Would the Justices who favor a textualist approach reject the 2d, 5th, and 7th Circuits' conclusions that dictionary definitions provide no clear answer and conclude instead that dictionaries *are* dispositive here?
- What does the Court mean by "ordinary, contemporary, common meaning" anyway? Is the pertinent question how the phrase was used by the general public at the time, by lawyers, by Congress, by the Supreme Court, or some combination of these? How, if at all, is the ordinary meaning different than the literal one in this case?
- Which party has the better end of a textualist argument here?

We'll Have to Wait to Find Out. . .

- Parties settled and moved to dismiss the case, which had been set for argument in October 2021.
- On September 29, 2021, the Supreme Court voluntarily dismissed *Servotronics* before final adjudication pursuant to Rule 46.

What Now?

Other Opportunities

Fund for Prot. of Inv. Rts. in Foreign States Pursuant to 28 U.S.C. § 1782 for Ord. Granting Leave to Obtain Discovery for use in Foreign Proceeding v. AlixPartners, LLP, 5 F.4th 216, 225 (2d Cir. 2021) (petition for cert. filed Oct. 5, 2021)

- Second Circuit in its 2020 decision in *Guo* reaffirmed its conclusion that § 1782 applies only to government or intergovernmental bodies and state-sponsored entities.

- *Guo* articulated four nonexclusive factors for determining whether an adjudicative body qualifies as a "foreign or international tribunal":

1. The "degree of state affiliation and functional independence possessed by the entity";
2. The "degree to which a state possesses the authority to intervene to alter the outcome of an arbitration after the panel has rendered a decision";
3. The "nature of the jurisdiction possessed by the panel"; and
4. The "ability of the parties to select their own arbitrators."

The "inquiry "does not turn on the governmental or nongovernmental origins of the administrative entity in question." Instead, we adopted a "functional approach" that "consider[s] a range of factors" to answer a key question: "whether the body in question possesses the functional attributes most commonly associated with private arbitration." The more state involvement, the more likely the body qualifies as a "tribunal"; the less state involvement, the less likely § 1782 applies.

Other Opportunities

- In *AlixPartners*, the 2d Circuit considered the question whether a state-investor arbitration qualified as a foreign or international tribunal under § 1782.
- The 2d Circuit applied the *Guo* factors to conclude that an arbitral panel that derived its authority from a bilateral investment treaty and was "authorized to resolve the dispute between the Fund and Lithuania under the terms of the Treaty" qualified as an international tribunal.
- "[B]ecause the arbitration is between an investor and foreign State party to a bilateral investment treaty, and because the arbitration takes place before an arbitral panel established by that same treaty, we hold that this arbitration is a 'proceeding in a foreign or international tribunal.'"
- AlixPartners filed a cert petition on October 5, 2021.

Other Opportunities

In re HRC-Hainan Holding Co. LLC, No. 20-15371 (9th Cir.)

- Raises question whether § 1782 encompasses private arbitral tribunals.
- Fully briefed but had been held in abeyance pending SCOTUS's decision in *Servotronics*.
- Appellants have asked the 9th Circuit to lift the stay.

Other Percolating Issues with § 1782

The statute authorizes discovery "for use in" a foreign proceeding. What does that mean?

- The Supreme Court said in *Intel* that proceeding need not be pending but must be in "reasonable contemplation." And the material need not be admissible in the foreign proceeding. But the material should be relevant. Litigation over these issues is ongoing. *See, e.g.*, *In re Gorsoan Ltd. for an Ord. Pursuant to 28 U.S.C. 1782 to Conduct Discovery for Use in a Foreign Proceeding*, 843 F. App'x 352, 353 (2d Cir. 2021).

Can a district court order discovery of documents located overseas under § 1782?

- "[A] district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad." *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir. 2019).
- But there are few decisions allowing extraterritorial discovery, and the interaction of any such discovery order with foreign privacy laws may create significant complications.

Appendix: Full Text of 28 USC § 1782

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

(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.

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.