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What can companies do to protect themselves from U.S. style discovery creeping into their international disputes in light of the on-going debate as to whether US court discovery should be available in international construction arbitration?

Thomas G. Allen, Partner, Kilpatrick Townsend

International arbitration is popular for resolving construction disputes. The merits of using arbitration can be numerous, including (1) avoiding potentially biased foreign courts, (2) having a meaningful say in who hears your dispute, (3) enforcement of awards across borders, and (4) conducting efficient proceedings.

The promise of efficiency is among international arbitration's biggest selling points. This is particularly true for construction disputes that can be extremely document intensive.

Users of international arbitration have long complained that, in reality, efficiency often proves elusive in international arbitration. To combat this, arbitration proponents have advanced a slate of mechanisms aimed at preventing international arbitration from becoming as costly and time consuming as court litigation. Recent proposals to enhance efficiency have included the creation of a new set of evidentiary rules that place a presumption on limited document disclosure, the adoption of U.N. protocols and UNCITRAL procedures for expedited arbitration, and a host of institutional reforms and arbitration rule changes aimed at streamlining the resolution of international disputes.

Despite many reforms, securing efficiency in international construction disputes can remains a major concern. This concern could be amplified by the availability of new discovery procedures in aid of international arbitration, facilitated by U.S. District Courts. The availability of court ordered discovery procedures turns on the interpretation of an obscure U.S. civil procedure statute. The statute implicates the question of whether the district court may compel the witness testimony, along with the production of documents and electronic files for the purpose of using the evidence in a foreign arbitration. Thus far, the answer to that question has been mixed but clarity is on the horizon.

A Circuit Split on the Availability of Expanded Discovery

A case working its way through the United States Supreme Court *could* hasten or prevent altogether the availability of U.S. court-style discovery in international arbitration and impact the cost and efficiency of arbitral proceedings. This would occur if the Supreme Court sides with the U.S. Courts of Appeals for the Fourth and Sixth Circuits in a circuit split with the Second, Fifth and Seventh Circuits over the availability of certain court-ordered discovery procedures in aid of a foreign tribunal.

The circuit split concerns whether a U.S. District Court has the authority under 28 U.S.C. §1782(a) to order discovery in international arbitrations. Section 1782 authorizes a district court to order a person who "resides or is found" in the district "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." 28 U.S.C. §1782(a).

The instant case before the Supreme Court involves a private commercial arbitration, seated in London, for a claim for indemnity by Rolls-Royce PLC against Servotronics, Inc. Servotronics asked the U.S. District Court for the Northern District of Illinois to compel a non-party, Boeing, to produce documents to be used in the foreign arbitration. Rolls-Royce moved to quash the subpoena and the District Court obliged, holding that Section 1782 does not authorize discovery assistance in aid of private foreign arbitrations.

The Seventh Circuit upheld the district court's decision, setting the stage for the Supreme Court to grant *certiorari*, which it now has, to resolve the circuit split. The Seventh Circuit reasoned that to qualify as a "foreign or international tribunal" within the meaning of Section 1782, the tribunal must be "a state-sponsored, public or quasi-governmental tribunal" and not a private foreign arbitration panel. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020) (*cert. granted)*(*"**Servotronics II***"). The Second and Fifth Circuits reached similar conclusions that a foreign arbitration panel was not a "tribunal" within the meaning of Section 1782. *See In re Application of Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020); *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999).

The above decisions are in contrast to decisions from the Fourth and Sixth Circuits, which held that the definition of "tribunal," under Section 1782, embraces an international arbitration panel. *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020) ("***Servotronics I***"). In ***Servotronics I***, the court concluded that a London-seated arbitration tribunal was a foreign tribunal within the meaning of the statute because the private arbitration is the "product of government-conferred authority" under both U.S. and U.K. law.

A Pro-active Path Forward

Whether or not the Supreme Court finds in favor of expanded discovery in support of international arbitration under Section 1782 is not known. We can expect an answer within 2022, in all likelihood. Importantly though, parties that are negotiating construction contracts that are concerned about the impact of ***Servotronics II*** have the potential to take matters into their own hands.

Arbitration is a feature of contract. Parties are generally free to customize and craft their arbitration provisions as they see fit, within the bounds of the national laws and international treaties and conventions that cabin this authority. While the parties cannot add features to their dispute resolution clauses that would expand the jurisdiction of federal courts in the United States, they are free to limit the authority of the arbitrators and the arbitral institution by contract.

Accordingly, an arbitration clause that included language to the effect of the following, should be enforceable regardless of whether more liberal discovery procedures are endorsed by the Supreme Court: "Notwithstanding anything to the contrary, the parties agree that no third-party document disclosure or testimony may be sought by resort to any national courts, including without limitation under 28 U.S.C. § 1782, and that the arbitrators are free to exclude any such evidence from the proceedings."

Not listed, and often overlooked, when it comes to the advantages of arbitration is the fact that it can be customized. If parties don't want third-party discovery, don't want to be obligated to produce electronic documents, or want to build other procedures into their disputes clauses to make dispute resolution more efficient and cost effective, they can and should include appropriate language in their arbitration clauses. In most instances, courts will be bound to follow the parties' specific procedural agreements.

There is a lurking peril here too that parties should be aware of before they embrace limitations on discovery procedures in their disputes clauses. Depending on the type of contract, it can be difficult or impossible to predict what types of disputes are likely to arise and what evidence a party might need to defend itself or to prosecute a claim in arbitration. For these reasons, the potential negatives of a *per se* limitation on procedures should be carefully considered before any such limitations are agreed-upon. For example, in ***Servotronics I***, the party seeking to use section 1782 to obtain third-party testimony was the Respondent in the case, seeking information to defend itself against the claims of Rolls Royce. While a limitation might ordinarily be considered as something that would hamper claimants, this example shows that respondents should also be wary of worshipping at the altar of efficiency to the detriment of the defense or prosecution of their claims. The draft language tendered above could be softened to include a "good cause" exception to address this risk.