Supreme Court will resolve circuit split on U.S. discovery in private foreign arbitration

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(Reuters) - The U.S. Supreme Court agreed Monday to decide whether parties in foreign arbitration proceedings are entitled to seek discovery from U.S. courts – a question that has recently divided the federal circuits even as it becomes more important with the rise of international commercial arbitration.

The justices granted a petition for review (2020 WL 7343172) by the engine component maker Servotronics, which is the defendant in an arbitration brought by Rolls-Royce in Birmingham, England. The proceeding stems from a 2016 engine fire in a Boeing 737 Dreamliner that was undergoing tests in South Carolina. Rolls-Royce, which manufactured the engine, agreed to pay Boeing $12 million, then sought indemnification from Servotronics, which manufactured a valve in the engine, in the arbitration. Servotronics subsequently sought discovery from Boeing under Section 1782 of Title 28 of the U.S. Code.

That section authorizes U.S. courts to order discovery "in a proceeding in a foreign or international tribunal." The question the Supreme Court will answer in Servotronics v. Rolls-Royce and The Boeing Company is whether private arbitration is a "tribunal."

The 7th U.S. Circuit Court of Appeals ruled last September that it is not (975 F.3d 689), denying Servotronics' bid for discovery from Boeing. The 7th Circuit agreed with the 2nd Circuit, which first addressed the issue in 1999 but resolved any doubt about its view of the statute in 2020's In re Guo (965 F.3d 96), and with the 5th Circuit in 1999's Republic of Kazakhstan v. Biedermann International (168 F.3d 880).

The 4th and 6th Circuits, meanwhile, have held that Section 1782 authorizes U.S. courts to order discovery in foreign commercial arbitrations. The 4th Circuit's 2020 decision in Servotronics v. Boeing (954 F.3d 209), moreover, arose from the very same arbitration between Servotronics and Rolls-Royce as the 7th Circuit's contrary ruling, with the 4th Circuit concluding that Servotronics could depose Boeing employees with first-hand knowledge of the 2016 airplane fire.

Servotronics' Supreme Court counsel, Stephen Stegich of Condon & Forsyth, said the "stark division" between the 4th and 7th Circuit interpretations of the statute showed why justices must clarify the scope of Section 1782. The Supreme Court has not weighed in on the provision since 2004's Intel v. Advanced Micro Devices (542 U.S. 241), which did not involve private arbitration.

In their brief opposing Supreme Court review (2021 WL 680552), Boeing counsel Scott Martin of Perkins Coie and Rolls-Royce counsel Larry Kaplan of KMA Zuckert argued that circuit split is not as deep as Servotronics portrayed it to be, in part because the 4th Circuit's ruling was based on the court's conclusion that private arbitration in the U.K. is conducted under "government-conferred authority," and is therefore a "tribunal." That idiosyncratic (and "mistaken," according to Boeing and Rolls-Royce) contrasts with the consensus interpretation of the 2nd, 5th and 7th Circuits that Congress did not intend to encompass private arbitration when it used the word "tribunal."

Boeing and Rolls-Royce also argued that the 7th Circuit case is not a good vehicle because the British arbitration against Servotronics is scheduled to take place over 10 days in May and will likely be concluded before the U.S. justices hear the matter.
"The mere conclusion of the arbitration hearing — scheduled for May of this year — is likely to render this case moot, even if some aspect of the arbitration remains pending," the opposition brief said.

Servotronics already tried to persuade the British arbitration tribunal to delay the May proceeding, citing both the prospect of U.S. Supreme Court review and the possibility that a delay might allow the arbitration to take place in person instead of remotely. On March 9, the arbitration panel refused to delay the proceeding. (The British panel also, however, refused to enjoin Servotronics from pursuing U.S. discovery under Section 1782. It said that if Servotronics succeeds in obtaining information from those discovery motions, the tribunal will decide whether the discovery is admissible, "assuming that this arbitration will not already have been concluded.")

Servotronics counsel Stegich declined to provide a statement on the mootness issue in response to my query. Boeing counsel Martin and Rolls-Royce counsel Kaplan did not respond to my email.

The case is Servotronics v. Rolls-Royce, No. 20-794 at the U.S. Supreme Court.

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