Is An Arbitrator A "Tribunal" Under Section 1782? — The Second Circuit's House of Cards

Eric S. Sherby*

The U.S. Supreme Court will soon decide whether a "private," non-US arbitrator (or arbitral panel) may qualify as a "tribunal" within the meaning of the statute entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," 28 U.S.C. § 1782 ("Section 1782").[1] The Court has granted certiorari in Servotronics, *Inc. v. Rolls-Royce PLC*,[2] an appeal from a decision by the U.S. Court of Appeals for the Seventh Circuit.

The last time that Section 1782 was before the Supreme Court was in 2004, in Intel *Corp. v Advanced Micro Devices, Inc.*[3] ("*Intel*"). But *Intel* did not directly address whether the term "tribunal" in Section 1782 includes a private, non-US arbitrator.[4]

This article does *not* address every argument put forth by those courts that have held that section 1782 does not apply to "private" arbitrations.[5] Rather, this article focuses on *one* argument that has been relied upon by two Courts of Appeal[6] — the Second and Seventh Circuits. Those two courts have (as described below) concluded that Section 1782 only applies to "state-sponsored adjudicatory bodies" and that, therefore[7] an arbitrator (or arbitral panel) in a *private* arbitration cannot qualify as an "international tribunal" within the meaning of the statute. (Such position is referred to herein as the "State Sponsored Position.")

Even though the appeal to the Supreme Court in *Servotronics* is from a decision of the *Seventh* Circuit, because that decision relied to a great extent[8] upon the *Second* Circuit's decision in *NBC* (which, as noted above, adopted the State Sponsored Position), this article focuses on the *NBC* decision.

As explained below, there were three major flaws in the *NBC* decision. First, even though the Second Circuit had (for decades) held that the determination of whether a foreign proceeding involves a "tribunal" turns on whether that proceeding is "*adjudicatory in nature*," in *NBC* the Second Circuit ignored that rule – without acknowledging the "adjudicatory nature" standard and without (obviously) providing any explanation for departing from it.

The second flaw in *NBC* was a two-part error:

i. in adopting the State Sponsored Position, the Second Circuit took the "working definition"[9] of the term "international tribunal" – namely, that "an international tribunal owes both its existence and its powers to an international agreement" – and inappropriately re-characterized it such that an "international tribunal" is a "state-sponsored adjudicatory bod[y],"[10] and

ii. because the Second Circuit departed from the original working definition of the term "international tribunal," the court failed to consider the effect of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the "New York Convention").[11]

It is argued below that:

a) in *NBC*, there was no justification for the Second Circuit's ignoring its "adjudicatory nature" rule;

b) *If* the Second Circuit had applied the "adjudicatory in nature" standard to the determination of whether an arbitrator is a "tribunal," then the court would have had no choice but to find that an arbitrator *is* a tribunal under Section 1782, and there would have been no need to consider any "ambiguities" concerning the term "tribunal"; and

c) (independent of (b)) *if* the Second Circuit had considered the New York Convention, then the court would have had to conclude that, because of the procedures and powers set forth in that convention, a "private," non-US arbitrator almost always qualifies as a "tribunal" within the meaning of Section 1782.[12]

* Eric Sherby specializes in international litigation and arbitration at Sherby & Co., Advs. in Israel, www.sherby.co.il.
His other works on Section 1782 discovery include the chapter entitled "Discovery In Aid of Foreign Proceedings: 28 U.S.C. § 1782" (the "Sherby Chapter") in the book *International Aspects of U.S. Litigation* (ABA 2017) and "Forum Non Conveniens Dismissal: The Quieter Side of Section 1782 Discovery," 24 INT'L LITIG. Q. 1 (ABA 2008).

I. The *NBC* Decision

The Second Circuit was the first appellate court to address the issue of whether a "tribunal" within the meaning of Section 1782 may include a *private* arbitrator. The court ruled in *NBC*, in 1999, that a private arbitrator is not a "tribunal" within the meaning of the section and that, therefore, Section 1782 discovery is not available in connection with a private, non-US arbitration.

In approaching this question, the Second Circuit had the choice of (i) applying its prior jurisprudence for determining a "tribunal" or (ii) treating the question of arbitration differently. The court opted for the latter.

The *NBC* court began its analysis by observing that, because the term "tribunal" does not plainly include or exclude private arbitral tribunals, the term "foreign or international tribunal" is ambiguous.[13]

a) Abandoning a Decades-Old Standard for Determining "Tribunal"

The Second Circuit's decision to consider the "ambiguity" of the term "tribunal" in Section 1782 was a departure from its decades-old approach to the determination of a tribunal. As summarized below, in no fewer than *six* pre-*NBC* cases, the Second Circuit had established a rule whereby the determination as to the applicability of Section 1782 focuses on whether the foreign proceeding involves the exercise of an "adjudicative function." (Sometimes the Second Circuit phrased the issue as whether the foreign proceeding is "adjudicative in nature" – semantically those standards are slightly different, but substantively they are identical.)

A far back as 1967, in *In re Letters Rogatory Issued by Director of Inspection of Government of India* ("India"),[14] the Second Circuit ruled that, because the Indian tax inspector lacked an "adjudicative function," the inspector was not a "tribunal" within the meaning of Section 1782.[15]

In *Fonseca v. Blumenthal* (1980),[16] the issue was "whether the Superintendent [of Exchange Control under Colombian law] is a 'tribunal' within the meaning of [Section 1782]."[17] Referring to its decision in *India* (from 1967), the Second Circuit observed that "Congress intended 'tribunal' to have an adjudicatory connotation."[18] The court further observed in *Fonseca* that the "hallmark of a tribunal" is "impartial adjudication."[19]

In *In re Federative Republic of Brazil* (1991, "Brazil"),[20] the Second Circuit cited to its decision in *India* and to its decision in *Fonseca*, repeating that the congressional selection of the word "tribunal" evidenced an intention to confine assistance to those proceedings in which an "*adjudicative function* is being exercised."[21]

In July 1996, in *In re Lancaster Factoring*,[22] the Second Circuit again cited to its decision in *India* (from over thirty years earlier), stating that Section 1782 is limited to "a proceeding in which an adjudicative function is being exercised."[23] In December of 1996, in *In re Esses*,[24] the Second Circuit reiterated the "adjudicative function" standard.[25]

Two years later (1998), in *In re Euromepa, S.A. v. R. Esmerian*,[26] the Second Circuit reiterated the "adjudicative in nature" standard.[27] In doing so, the court (naturally) cited to its decisions in *India*, *Fonseca*, and *Lancaster Factoring*. The court's decision in *Euromepa* contained another very telling statement:

> In *India,* this Court interpreted the meaning of the phrase "a proceeding in a foreign or international tribunal" in the context of an Indian income tax assessment proceeding. This Court concluded that the tax assessment proceeding . . . was not a proceeding before a "tribunal" because the role of the government in the administrative proceeding was more akin to a prosecutorial decision to bring a case than to that of a neutral *arbitrator*, and therefore the proceeding was not adjudicative.[28]

The word "arbitrator" does *not* appear in the (1967) decision in *India* – rather, the term "arbitrator" was chosen *in 1998* by the Second Circuit to summarize the concept of "adjudicative in nature." The court did so just one year before rendering its decision in *NBC*.

To summarize, in the thirty-two-year pre-*NBC* era, in at least six different cases, the Second Circuit used the term "adjudicative function" or "adjudicative nature" as the key consideration in determining whether a foreign entity is a "tribunal" within the meaning of Section 1782. The court did not merely repeat its holding – rather, by citing time after time to its prior case law, the court made clear that its most recent

pronouncement on the issue is consistent with its prior jurisprudence.

Yet in *NBC* the Second Circuit abandoned decades of precedent by not applying its "adjudicative" standard to determine whether a private, non-U.S. arbitrator is a "tribunal" within the meaning of Section 1782.[29]

The phrase "adjudicatory function" *does* appear *once* in the *NBC* decision – the phrase appears in the *last footnote*, wherein the Second Circuit *rejects* the view expressed by Professor Hans Smit that the term "tribunal" in Section 1782 refers to "all bodies with adjudicatory functions."[30] A review of the *NBC* decision leaves the reader bereft of knowledge that, in six prior decisions, the Second Circuit had embraced precisely the same rule that it was rejecting (in the last footnote of its decision) in *NBC*.

b) The unanimity that arbitrators are adjudicators

There is little room for doubt as to what would have been the result *if* the Second Circuit had decided to apply its decades-old precedent – namely, *if* the court had applied the *adjudicative nature* rule to determine whether an arbitrator is a tribunal.

Decades before the 1964 amendments to Section 1782, the highest courts of several states used the terminology "*quasi-judicial capacity*" to characterize the role of an arbitrator. One of the first courts to do so was the Supreme Court of Washington, in *Martin v. Vansant*,[31] in which the court referred to arbitrators as "private extraordinary judges of a domestic tribunal."[32] The court further observed that arbitrators are "chosen to act in a quasi judicial capacity."[33] The "quasi-judicial capacity" characterization was repeated by the highest courts of New York and New Jersey – again, long before the 1964 amendments to Section 1782.[34] In 1925, the New York Court of Appeals even observed that "arbitration tribunals" serve as a "substitute for the courts."[35]

In 1957 – seven years before the amendments to Section 1782 – the Court of Appeals of New York observed:

> Arbitration is a method of adjudication of differences which parties, by consent, substitute for the usual processes provided by law. In *Matter of Atlantic Rayon Corp. (Goldsmith)* (277 App. Div. 554), this court said (p. 555): "While an arbitrator is not a judge in the strict sense, his functions are quasi-judicial in character ." . . .[36]

The language of "*adjudication*" chosen by the New York Court of Appeals is substantially the same as the language chosen by several federal courts to refer to arbitrators. One of the leadings cases on point is *Fit Tech, Inc. v. Bally Total Fitness*,[37] in which the Court of Appeals for the First Circuit observed that "common incidents" of arbitration include "an independent adjudicator."[38] That language was echoed by the Eleventh Circuit in *Advanced Bodycare Solutions v. Thione Intl*,[39] when it held that "classic arbitration" includes "an independent adjudicator."[40]

Given the abundance of state and federal case law – spanning decades – that recognized that an arbitrator *is an adjudicator, if the Second Circuit had* applied its (decades long) "adjudicatory nature" test, the *only conclusion that the* court could have reached would have been that an arbitrator meets the standard for a "tribunal" under Section 1782.

Lest it appear that the Second Circuit's abandonment of the "adjudicatory function" standard was a permanent one, the Second Circuit reembraced that standard in 2021 in *Gorsoan Ltd. v. Sundlun*,[41] in which the court cited to *Euromepa* and stated that, for purposes of determining a "foreign tribunal," the "focus "is on whether the proceeding is "adjudicative in nature."[42]

c) The "ambiguity" escape hatch

As indicated above, in *NBC*, the Second Circuit held that the term "tribunal" is ambiguous.[43] Because of its finding of ambiguity, the Second Circuit proceeded to examine the legislative history and purpose of the statute, including the 1964 Senate Report on the draft amendment of Section 1782.[44]

The court observed that Section 1782 was intended to repeal 22 U.S.C. §§ 270-270g ("Section 270"), which had been enacted in 1930.[45] The Second Circuit also observed in *NBC* that the Senate Report cited to a 1962 article by Professor Hans Smit,[46] and the court stated that the Senate Report "relied" on the 1962 Smit Article.[47] In that article, Professor Smit stated "an

international tribunal owes both its existence and its powers to an international agreement."[48]

But in *NBC* the Second Circuit did more than merely adopt Professor Smit's above-quoted working definition under which an international tribunal "*owes both its existence and its powers to an international agreement*." Rather, in the sentence that follows the quote from Professor Smit – and without citing to any other source of legislative history – the Second Circuit concluded that the legislative history reveals that "… Congress intended [Section 1782] to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies."[49]

The *NBC* court proceeded to conclude "[t]he absence of any reference to private dispute resolution proceedings such as arbitration strongly suggests that Congress did not consider them in drafting the statute,"[50] but rather intended to cover "state-sponsored adjudicatory bodies."[51]

II. The "Working Definition" of "International Tribunal"

The State Sponsored Position does not derive from the legislative history of Section 1782. For starters, the phrase "state-sponsored" does *not* appear in the 1962 Smit Article. Similarly, the phrase "state-sponsored" does *not* appear in the Senate Report that cites to the 1962 Smit Article.

Because the Senate Report and the 1962 Smit Article were the primary sources of legislative history cited by the Second Circuit regarding the term "tribunal," the absence of the phrase "state-sponsored" from these two sources raises eyebrows – to say the least – as to the logic of the Second Circuit's adoption of the State Sponsored Position.

In a student note published recently by the Yale Journal of International Law,[52] Alejandro A. Nava Cuenca has argued that the Second Circuit in *NBC* misread Professor Smit.[53] Cuenca argues that, although Professor Smit did write "an international tribunal owes both its existence and its powers to an international agreement," Smit was referring to the working definition[54] of an international tribunal *under Section 270*, which was the provision of the federal code that Congress decided to *repeal* in 1964 when it enacted Section 1782.

Cuenca writes:

> There is nothing in section 1782(a)'s legislative history that indicates that the term "international tribunal" was directly borrowed from section 270. In explaining the use of the word "tribunal" in section 1782(a), Congress never referred to the language in section 270; instead, it made sure to repeal that statute so that section 1782(a) would be available to all participants before proceedings in international tribunals. . . .
>
> [T]he Second Circuit noted that Congress cited Professor Smit's 1962 article to explain the undesirable limitations of section 270. In that article, Professor Smit asserted that "an international tribunal owes both its existence and its powers to an international agreement." The [Second Circuit] concluded that, since the drafter of section 1782(a) was of the alleged view that international tribunals were only State-sponsored, and since Congress had adopted Professor Smit's account, his words further supported the view that the term "tribunal" under section 1782 borrowed its meaning from repealed section 270. This quotation, however, was taken out of context. The relevant portion of Professor Smit's article reads as follows:
>
> > Section 270 is also subject to criticism because it purports unilaterally to bestow power to administer oaths upon international tribunals established by bilateral or multilateral agreement. There is little doubt that it can not effectively do so. Since an international tribunal owes both its existence and its powers to an international agreement, its powers can be extended only by such an agreement and not by a unilateral act. . . . . Accordingly, section 270 is of avail only if the tribunal is willing to assert powers not granted by international agreement and if all parties fail to object or agree.
>
> It is evident from the quotation that Professor Smit addressed the meaning of international tribunals in the exclusive context of section 270 because he was referring to one of the flaws of

> the statute. Given that section 270 limited the scope of the phrase "international tribunal" to those formed pursuant to bilateral and multilateral agreements, a fairer reading of Professor Smit's account would be that the "international tribunal[s] [to which section 270 refers] owe[ ] both [their] existence and [their] powers to an international agreement." Placing the quotation in its proper context, it is clear that Professor Smit did not make a general assertion that all international tribunals must be State-sponsored— only those referred to in section 270.[55]

Cuenca's overall argument is that the Second Circuit's restrictive interpretation of the term "international tribunal" was based on a misreading of the legislative history –specifically, (a) that when Professor Smit "defined"[56] the term "international tribunal," he was doing so *only* with respect to Section 270, and, therefore, (b) that *NBC*'s distinction between private arbitration and State-sponsored arbitration under Section 1782 does not find support in its legislative history.[57] Yet like the Second Circuit (as explained below), Cuenca conflates Smit's "working definition"[58] of the term "international tribunal" with the term "State-sponsored." Notwithstanding that flaw in Cuenca's analysis, his overall argument is sound – namely, that *NBC*'s distinction, for purposes of Section 1782, between private arbitration and State-sponsored arbitration is erroneous.

If Cuenca is right that the Second Circuit misread the legislative history of Section 1782, then the door should be open for a private, non-U.S. arbitrator to be considered an "international tribunal" under Section 1782.

But *even if* we *assume* that the Second Circuit did not *misread* Professor Smit insofar as his working definition of "international tribunal" applied to Section 1782, as explained below, (a) the Second Circuit *misconstrued* Smit's working definition, and (b) if the Second Circuit had properly construed Smit's working definition, then the court would have had to conclude that (i) there is no textual basis for concluding that Congress intended to "exclude" private, non-U.S. arbitrators from Section 1782, and (ii) the overwhelming majority of such arbitrators *should* be considered a tribunal within the meaning of Section 1782.

The key to understanding the Second Circuit's error in applying Professor Smit's working definition lies in recognizing that there is a difference between (on the one hand) a tribunal that – using the terminology of Professor Smit -- "owes . . . its existence and its powers to an international agreement" and (on the other hand) a tribunal that is "state-sponsored." The term "state-sponsored" implies – at the least – that one or more states are responsible directly for the appointment of the arbitrator(s). Yet no such role is suggested by Professor Smit's description that an international tribunal "owes" its "existence and powers" to an international agreement. More specifically, a tribunal that is *constituted pursuant to a procedure (or procedures) established in* an international agreement also "owes its existence and powers" to such an agreement – even if no state has a direct role in appointing the arbitrator(s).

Once it is recognized that the terms "state-sponsored" and "owes its existence and powers" to an international agreement are not synonymous, then it is clear that (a) the Second Circuit's definition of "international tribunal" in *NBC* is more restrictive than the working definition put forth by Professor Smit, and (b) because Congress *relied* on Professor Smit's understanding of the term "international tribunal," his less restrictive standard is the one more faithful to the legislative intent.

If the standard that is more faithful to the legislative intent were to be applied, then the question becomes whether a private, non-U.S. arbitrator should be considered a "tribunal" that is constituted *pursuant to procedures* established by an international agreement.

The answer is (as to the overwhelming majority of international arbitrators) *yes*.

III. The New York Convention As A Source of "Existence and Power"

The United States and over 160 other countries are signatories to the New York Convention. As explained below, (a) the *raison d'être* of the New York Convention is to bestow "power" – international enforceability -- upon an arbitration agreement and (subsequently) upon an arbitral award, and (b) therefore, in any case in which the appointment of a non-U.S. arbitrator arises from an agreement that is subject to the New York Convention, such arbitrator

should be considered a "tribunal" within the meaning of Section 1782.

The two pillars of the New York Convention are Article II, section 3 (referred to herein as the "Stay Provision"), and Article III (referred to herein as the "Enforcement Provision").

Before examining the Stay Provision and the Enforcement Provision, a brief review of the history of the New York Convention is in order. The *pre*-New York Convention level of enforceability – both of arbitration agreements and arbitral awards – has been summarized as follows:

> No sooner had the [International Chamber of Commerce] been founded in 1919 than it urgently pressed for action to ensure that arbitration agreements were respected and that awards made on the basis of such agreements were enforceable throughout the world. It saw international conventions as the means to achieving this end. . . . [After 1927] arbitration continued to be hindered by difficulties encountered in the enforcement of awards and, after the Second World War, ICC renewed its call for a new convention and drew up a draft text, which was submitted to the United Nations, spurring activity that culminated in the adoption of the New York Convention in June 1958.[59]

In other words, for *decades* prior to the execution of the New York Convention, the international business community was of the view that international arbitration was "hindered" by difficulties in enforcing arbitral awards.

Professor Marike Paulsson has summarized the manner in which the New York Convention was/is designed to overcome the difficulties encountered in the enforcement of arbitral awards:

> The New York Convention . . . is an instrument whose transformative effect is usually felt in the domain of *private* law. The beneficiaries of its stipulations are private parties who are not even required to be nationals of a signatory State. Compliance with the Convention is intended to manifest itself in decisions of national courts, via the fulfillment of a promise by the State that it will . . . ensure that national rules of civil procedure are adjusted to enliven the international engagements set down in the Convention. In a phrase, this is effectively a directive to national judges . . . .[60]

For purposes of the Section 1782 analysis, Professor Paulsson's characterization that "national rules of civil procedure are adjusted" to advance the field of arbitration aptly summarizes the significance of the New York Convention. The convention, which is an international agreement, establishes procedures that both facilitate the *appointment* of an arbitrator (pursuant to an arbitration agreement) and *confer powers on such an arbitrator*.

We now turn to the main powers.

The Stay Provision provides:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[61]

The significance of the Stay Provision is sometimes overshadowed by the Enforcement Provision,[62] but the former is indispensable to the international enforceability of arbitral awards.

Two simple examples illustrate the significance of the Stay Provision. First, assume as follows:

- An American company and a Spanish company sign an agreement, which contains a clause that calls for the resolution of any disputes through *arbitration* in the UK;
- After a dispute arises, the Spanish company decides that it wants to sue the American company in court.

For purposes of this discussion, it does not matter whether the potential law suit by the Spanish company would be filed in a Spanish court, an American court, a UK court, or a court of some fourth country – so long as the court is in a country that is a signatory to the New York Convention. (The UK, the US, and Spain are all New York Convention signatories.) A court in any signatory to the New York Convention would be

required – pursuant to the Stay Provision – to stay the court case in favor of arbitration (unless one of the exceptions set forth in the Stay Provision applies).

Because of the near certainty that its law suit in court would be stayed,[63] pursuant to the Stay Provision (subject to the conditions set forth in the New York Convention),[64] the Spanish company is very likely to be dissuaded from commencing such a suit in court, and it is likely (to the extent that it wishes to pursue its legal rights) to commence an arbitration.

If we change the facts of the hypothetical slightly, let's assume that one of the companies commences an arbitration and then, after the arbitrator is appointed, one of those two disputants decides that, notwithstanding the existence of the arbitration agreement and the pending arbitration proceeding, it wishes to commence a legal proceeding in court. Such a desire to take "*I want out* of the arbitration" action might be contemplated by the plaintiff or by the defendant – although the nature of relief to be requested would obviously be very different. Regardless of which disputant might contemplate trying to get out of the arbitration, it knows that there is near certainty (again) that such a court action would be stayed.[65]

The examples above are far from theoretical – in many cases as to which the parties' agreement included an arbitration clause, *after* a dispute arises, one party regrets its prior consent to a non-judicial forum for the resolution of disputes.

The Stay Provision demonstrates that one of the policies underlying the New York Convention is that any post-agreement change of heart as to arbitrating is irrelevant with respect to the jurisdiction of an arbitrator. Because the New York Convention is effectively a "directive to national judges"[66] to refrain from exercising jurisdiction in any case as to which an arbitration agreement covers the dispute, the convention causes *even a recalcitrant disputant* (when it has no alternative to being involved in some legal proceeding relating to the agreement) to participate in the arbitration.

Put slightly differently, in many cases, arbitration would not be commenced *but for* the Stay Provision. The Stay Provision "*empowers*" arbitrators, and therefore it serves as a *source* of the *existence* of an arbitral tribunal.

The other pillar of the New York Convention is the Enforcement Provision, which provides as follows:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down [herein].[67]

The significance of the Enforcement Provision is obvious. Parties to an international agreement participate in an arbitration because of the potential practical effects of such a proceeding.[68] A claimant (plaintiff) wishes to receive an arbitral award – either because it expects the defendant to pay based upon the amount of the award or because of the expectation to be able to turn the award into a judgment, on which the claimant will be able to collect, in a jurisdiction wherein the obligor/defendant has assets. The defendant (respondent) participates in the arbitration because of its concern that the failure to do so would result in a default award being issued against it. All of these reasons (or incentives) for participating in the arbitral proceeding derive directly from the Enforcement Provision.

Were it not for the Enforcement Provision, the parties to an international transaction would have minimal incentive to include an arbitration clause in their agreement. The most significant "power" of an arbitrator is the likelihood that his/her award will be enforceable internationally. Because the Enforcement Provision is the *source* of international enforceability for the overwhelming majority of arbitral awards, the overwhelming majority of arbitrators "owe" their international "powers" to the New York Convention.

In summary, the negotiative history cited above demonstrates that, were it not for the New York Convention, (a) international arbitration as we know it would probably not exist, and (b) a "private" arbitrator would have little, if any, "power" internationally. Because the New York Convention generally serves as a *directive* to courts in signatory states (i) to *stay* an action brought in contravention of an arbitration agreement, and (ii) to *enforce* an arbitral award rendered

by a (foreign) arbitrator, the convention is an "international agreement" as to which the overwhelming majority of private, non-US arbitrators "owe their existence and powers."

Therefore, (a) the New York Convention is an "international agreement" within the working definition that was articulated by Professor Smit and on which Congress relied when enacting the current version of Section 1782, and (b) contrary to the analysis of *NBC* and the State Sponsored Position, a private, non-U.S. arbitrator should almost always be deemed an "international tribunal" within the meaning of Section 1782.[69]

Supporters of the State Sponsored Position might take issue with the analysis set forth above, on the grounds that the United States had not ratified the New York Convention at the time Congress was considering the 1964 version of Section 1782. But that argument places significance on a consideration that was expressly *rejected* in the negotiative history of Section 1782, specifically in the Senate Report:

> Furthermore, [Section 270] provided assistance only to a tribunal established by a treaty to which the United States was a party and then only in proceedings involving a claim in which the United States or one of its nationals was interested. This limitation is undesirable. The availability of assistance to international tribunals should not depend on whether the United States has been a party to their establishment or on whether it is involved in proceedings before them. Smit, supra at 1267.[70]

The Senate Report states expressly that the "availability of assistance to international tribunals should *not* depend on whether the United States has been a party to their establishment." (It is not a surprise that the Senate Report cited to Professor Smit in support of that proposition.) In light of the clear statement in the Senate Report that it should be irrelevant whether the United States has been a party to the establishment of the tribunal, the fact that the U.S. had not ratified the New York Convention by 1964 is of no consequence in determining whether a private, non-U.S. arbitrator should be deemed an "international tribunal" within the meaning of Section 1782.

IV. From *NBC* to the Seventh Circuit's Decision in *Servotronics*

Early in the Seventh Circuit's decision in *Servotronics* (September 2020), the court observed that two cases from 1999 – *NBC* and *Biedermann* – held that Section 1782 does not apply to private, non-U.S. arbitrators,[71] and the Seventh Circuit further observed that, from 1999 until 2019, no other appellate court weighed in on the issue.[72] The Seventh Circuit then proceeded to adopt the reasoning of the Second Circuit in *NBC* – in particular the State Sponsored Position.[73]

Therefore, it is worth examining those issues (or sub-issues) that were addressed by the Second Circuit in *NBC* but which were *not* discussed by the Seventh Circuit in *Servotronics* – in particular regarding legislative purpose and the interpretation of the term "tribunal":

a) Whereas in *NBC*, the Second Circuit stated that Congress "relied" on the views of Professor Smit regarding Section 1782,[74] the Seventh Circuit in *Servotronics* said nothing regarding the conclusion of the Second Circuit that Congress *relied* upon Professor Smit;

b) Although the Seventh Circuit adopted the Second Circuit's conclusion that Section 1782 is available for use by "state-sponsored" tribunals only and not by private arbitrators, there is no mention in *Servotronics* of the 1962 Smit Article;

c) Although the Seventh Circuit referred to Professor Smit, it did so in a passing manner,[75] suggesting that the Seventh Circuit attributed to his views far less significance than did the Second Circuit in *NBC*;

d) There is no mention by the Seventh Circuit of Smit's working definition whereby an international tribunal "owes both its existence and its powers to an international agreement."

A review of the Seventh Circuit's decision in *Servotronics* leaves the reader wondering whether the Seventh Circuit was aware of the fact that the Second Circuit's State Sponsored Position purports to be based upon statements of Professor Smit. At best, the Seventh Circuit made the same mistake that the Second Circuit did in *NBC* – it *conflated* Professor Smit's "working definition"[76] of the term "international tribunal" with the term "State-sponsored."

In all events, there is no question that, in *Servotronics,* the Seventh Circuit relied heavily upon the Second Circuit's decision in *NBC*. Therefore, on the issue of the interpretation of the term "tribunal" in Section 1782, the appeal before the Supreme Court in *Servotronics* will essentially be one concerning the Second Circuit's 1999 analysis and reasoning in *NBC*.

Conclusion

In *NBC*, the Second Circuit erred in three major respects: First, the court failed to apply its own "adjudicatory in nature" standard to determine whether a private arbitrator is a "tribunal." If the court had applied the "adjudicatory in nature" standard, the court would have concluded that a private, non-U.S. arbitrator *is* a tribunal.

Independent of that error, the Second Circuit (a) conflated the term "state-sponsored" with the term "owes its existence and powers to an international agreement," and (ii) it applied a more restrictive definition of "international tribunal" than that intended by Congress. For these reasons, the State Sponsored Position should be *rejected*.

Because the better interpretation of "international tribunal" is one that includes a "tribunal" that is constituted *pursuant to procedures* established by an international agreement, and because the overwhelmingly majority of private, non-U.S. arbitrators are so constituted (appointed) – through procedures established by the New York Convention – the overwhelmingly majority of non-U.S. arbitrators should be considered "tribunals" within the meaning of Section 1782.

Endnotes

[1] 28 U.S.C. § 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," provides (in relevant part):

> (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. ... 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. ...

[2] The Seventh Circuit's decision is *Servotronics, Inc. v. Rolls-Royce*, 975 F.3d 689 (7th Cir. 2020), *cert. granted*, 141 S. Ct. 1684 (Mar. 22, 2021) (U.S. No. 20-794). https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/20-794.html.

[3] 542 U.S. 241 (2004).

[4] *See* Sherby Chapter, *supra*, n.* 590-98 (summarizing various court decisions holding that *Intel* suggests that a private, non-U.S. arbitrator *is* a "tribunal" within the meaning of Section 1782).

[5] As explained below, the Second Circuit engaged in the analysis that led to its State Sponsored Position because the court (first) ignored its prior jurisprudence under which the determination of a "tribunal" under Section 1782 is made by examining whether the foreign proceeding is "adjudicatory" in nature. *See infra*, text accompanying notes 13-30.

[6] The two cases are *NBC v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999, "*NBC*"), and *Servotronics, Inc. v. Rolls-Royce*, 975 F.3d 689 (7th Cir. 2020). The Second Circuit revisited the issue in *Guo v. Deutsche Bank Securities*, 965 F.3d 96, 105 (2d Cir. 2020), restating its holding in *NBC*.

[7] *See NBC*, *supra*, 165 F.3d. at 190.

[8] *See infra* text accompanying notes 71-73.

[9] The Second Circuit was referring to a statement by Professor Hans Smit that an international tribunal "*owes both its existence and its powers to an international agreement*." *See infra* notes 46-48 and accompanying text.

The author does *not* believe that Professor Smit's above-quoted statement was an attempt to *define* the term "international tribunal." Most definitions do not begin with (or even include) the word "owes." (Indeed there probably are many things that "owe" their existence and powers to an international agreement but which are not an international tribunal. For example, a bilateral or multilateral institution might "owe its existence and powers to an international agreement" yet would still not be a "tribunal.")

The author believes that Professor Smit's statement was merely an observation. Nonetheless, because the Second Circuit treated his observation as a type of definition, this article uses the term "working definition" to refer to Professor Smit's above-quoted observation.

[10] *NBC*, *supra*, 165 F.3d at 190.

[11] New York Convention (New York, 1958), 21 U.S.T. 2517, 330 U.N.T.S. 38.

[12] *See infra* Parts II and III.

[13] *NBC*, *supra*, 165 F.3d at 188.

[14] 385 F.2d 1017 (2d Cir. 1967).

[15] *Id.* at 1021.

[16] 620 F.2d 322 (2d Cir. 1980).

[17] *Id.* at 323.

[18] *Id.*

[19] *Id.* at 324.

[20] 936 F.2d 702 (2d Cir. 1991).

[21] *Id.* at 705 (emphasis added).

[22] 90 F.3d 38 (2d Cir. 1996).

[23] *Id.* at 41.

[24] 101 F.3d 873 (2d Cir. 1996).

[25] *Id.* at 876 (*citing* to *India* and *Brazil*).

[26] 154 F.3d 24 (2d Cir. 1998).

[27] *Id.* at 27.

[28] *Id.* (emphasis added).

[29] As explained below, even though the Second Circuit in *NBC* abandoned the "adjudicative function" standard, such abandonment was short lived, as the court subsequently came back to that standard. *See infra* notes 41-42 and accompanying text.

[30] *See NBC*, *supra*, 165 F.3 at 193, n.9 (rejecting Professor Smit's views, as set forth in a 1998 law review article).

[31] 99 Wash. 106 (1917).

[32] *Id.* at 117.

[33] *Id.*

[34] *American Eagle Fire Ins. v. New Jersey Inc.*, 240 N.Y. 398, 405 (1925); *Brotherton, Inc. v. Kreielsheimer*, 8 N.J. 66, 70 (1951).

[35] *American Eagle Fire Ins.*, *supra*, 240 N.Y. at 404.

[36] *Matter of Cross Brown Co.*, 4 A.D.2d 501, 502, 167 N.Y.S.2d 573, 575 (1st Dep't 1957).

The New York Court of Appeals used largely the same language in *In re Siegel*, 40 N.Y.2d 687 (1976), in which it stated:

> [C]ommercial arbitration is a creature of contract. Parties, by agreement, may substitute a different method for the adjudication of their disputes than those which would otherwise be available to them in public courts of law . . . . When they do so, they in effect select their own forum. Their quest is usually for a nonjudicial tribunal that will arrive at a private and practical determination . . . .

Id. at 485. It is noteworthy that the Court of Appeals not only used the term "adjudication" to refer to arbitration but also referred to arbitration as a nonjudicial "*tribunal*."

[37] 374 F.3d 1 (1st Cir. 2004).

[38] *Id.* at 7.

[39] 524 F.3d 1235 (11th Cir. 2008).

[40] *Id.* at 1239; *see also Harrell's, LLC v. Agrium Advanced (U.S.) Tech.*, 795 F.Supp. 2d 1321, 1327-28 (M.D. Fla. 2011) ("classic arbitration" includes "an independent adjudicator"; arbitration is a "form of adjudication").

[41] 843 Fed. Appx. 352, 2021 U.S. App. LEXIS 2491 (2d Cir. Jan. 29, 2021).

[42] 843 Fed. Appx. at 354, 2021 U.S. App. LEXIS 2491, at *4.

Even though the "adjudicative in nature" standard did reappear in Second Circuit jurisprudence in the post-*NBC* era, that reappearance did not occur in the context of a motion for Section 1782 discovery for use before a private, non-US arbitrator. As noted above, in *Guo*, *supra*, 965 F.3d at 100, the Second Circuit had the opportunity to reexamine its holding in *NBC*. In *Guo*, not only did the Second Circuit reaffirm the ruling of *NBC*, *id.* at 106, but it did so without any mention of any of the six (6) decisions summarized above in which the court had adopted the "adjudicative in nature" standard.

[43] *NBC*, *supra*, 165 F.3d at 188.

[44] *Id* at 189.

[45] *Id.* The text of (repealed) section 270 appears in Appendix A to the *NBC* decision. *See id.* at 191.

[46] *Id.* (*citing* Hans Smit, Assistance Rendered by the United States in Proceedings Before International Tribunals, 62 COLUM. L. REV. 1264, 1264 (1962) (the "1962 Smit Article").

The decision in *NBC* identified Professor Smit as "director of a project at the Columbia University School of Law that aided the Commission on International Rules of Judicial Procedure in drafting the bill that included the amended § 1782." *NBC*, *supra*, 165 F.3d at 190. In *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880 (5th Cir. 1999) the Fifth Circuit went further – stating that Professor Smit "directed the Commission's work." *Id.* at 883, n.4.

[47] *NBC*, *supra*, 165 F.3d at 190; *see id.* n.6.

[48] *See id.* at 190 (*citing* 1962 Smit Article at 1267).

[49] *Id.*

[50] *Id.* at 189.

[51] *Id.* at 190.

[52] *See* Debunking the Myths: International Commercial Arbitration and Section 1782(a) (hereinafter "Debunking"), 46 YALE J. INT'L L. 155 (2021).

[53] *Id.* at 158-68.

[54] Cuenca does not state that Professor Smit purported to "define" the term "international tribunal." Cuenca refers multiple times to Professor Smit's statement "an international tribunal owes both its existence and its powers to an international agreement," and Cuenca uses slightly different terminology to refer to that statement: (i) Cuenca refers to Professor Smit's discussing the "meaning of" the term "international tribunal," *id.* at 169; (ii) Cuenca refers to Smit's "words," *id.* at 168; and (iii) Cuenca refers to Smit's "account." *Id.* at 168-69.

[55] *Id.* at 168-69 (footnotes omitted).

[56] *See supra* n.9.

[57] *See* Debunking, *supra*, at 169.

[58] *See supra* n.9.

[59] Patricia Nacimiento, Nicola Christine Port, Herbert Kronke, Dirk Otto, RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (2010), at xxxi.

[60] Marike Paulsson, Preface in THE 1958 NEW YORK CONVENTION IN ACTION (emphasis in original) (2016).

[61] New York Convention art. II, section 3.

[62] *See infra*, text accompanying notes 67-68.

[63] Under the Federal Arbitration Act, there is a presumption of arbitrability. *See* 9 U.S.C. §§ 3, 4; *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). At the same time, courts have recognized that, when the arbitration clause is "narrowly crafted," it cannot be assumed that the parties intended to submit all disputes to arbitration. *See Local 827, Int' Bhd. Of Elec. Workers*, 458 F.3d 305, 310 (3d. Cir. 2006).