No. 20-444

In the

Supreme Court of the United States

DOTY ENERGY PRODUCTION CO.,

Petitioner,

v.

H.K. WATSON (SCOTLAND), LTD.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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COMPETITION PACKET FOR THE
TWENTY-EIGHTH ANNUAL JUDGE JOHN R. BROWN
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H.K. WATSON (SCOTLAND), LTD., Plaintiff-Appellant, Cross-Appellee,

v.

DOTY ENERGY PRODUCTION CO., Defendant-Appellee, Cross-Appellant.

No. 18-12345

United States Court of Appeals,
Fifth Circuit

June 8, 2020

Appeal from the United States District Court for the Eastern District of Louisiana.

Before CHAUDHRY, Chief Judge, and JUSTINIAN, SOLOMON, HAMMURABI, BRACTON, FORTESCUE, BLACKSTONE, WHALLEY, DIXWELL, GOFFE, JEFFREYS, STARELEIGH, TAYLOR, COFFEY, BLAKELY, WEAVER, STORY, and DANIEL, Circuit Judges.

JUSTINIAN, Circuit Judge:

We granted *en banc* rehearing in this case to reconsider our decisions in *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999), which held that 28 U.S.C. § 1782 does not authorize a district court to provide discovery assistance to the parties in a private international arbitration, and *In re Larry Doiron, Inc.*, 879 F.3d 568, 2018 AMC 490 (5th Cir. 2018) (en banc), which established a new test for determining whether a contract is "maritime." For the reasons set forth below, we conclude that *Kazakhstan* misinterpreted 28 U.S.C. § 1782, and that the decision must therefore be overruled. But we reaffirm our decision in *Doiron*. As a result, the judgment of the district court is affirmed in part (to the extent that it permitted attachment under Supplemental Rule B of the Federal Rules of Civil Procedure) and reversed in part (to the extent that it held that 28 U.S.C. § 1782 does not apply to private international arbitration proceedings). We remand the case to permit the district court to decide whether to order the requested discovery in the circumstances presented here.

I
Facts and Proceedings Below

This case began with a contract between Plaintiff-Appellant/Cross-Appellee H.K. Watson (Scotland), Ltd. ("Watson") and Defendant-Appellee/Cross-Appellant Doty Energy Production Co. ("Doty"). Following the parties' example, we refer to that contract as the "P&A Contract." By its terms, Watson agreed to "plug and abandon" three wells located on three small, fixed platforms in the coastal waters of Lafourche Parish, Louisiana. The wells were no longer producing, and Louisiana law obligated Doty to decommission them.

The parties agreed that Watson would use three vessels to perform its obligations under the P&A Contract. The *Marylyn* is a floating dormitory barge that Watson used to house and feed the crew during the time that the work on the P&A Contract was performed. The *Caroline* is a crew boat that Watson used to ferry the workers back and forth between the *Marylyn* and the platforms on which they worked. The *Rebecca* is a liftboat with a crane mounted on the deck. During the actual P&A work, the *Rebecca*'s spuds or footings are anchored in the mud to create a stable platform and the hull is lifted completely out of the water.

The P&A Contract also included an arbitration clause requiring any dispute under the contract to be resolved in a private arbitration proceeding in London.

Watson successfully completed the P&A work on the first of the three wells. Just as Watson began work on the second well, however, an accident occurred that rendered Watson's revolutionary cement-plugging and casing-cutting equipment (worth over a million dollars) a total loss. The parties disagree about who is responsible for the accident, and that disagreement will be resolved in London by the arbitration panel convened pursuant to the P&A Contract's arbitration clause.

Watson commenced this action pursuant to 28 U.S.C. § 1782 seeking deposition testimony from specified Doty employees and the production of relevant documents in Doty's possession. Watson hopes to use that testimony and those documents in the London arbitration. Watson also sought security pursuant to Rule B of the Supplemental Admiralty Rules. The district court granted an *ex parte* order for maritime attachment and garnishment of up to $4.6 million of Doty's financial accounts at two New Orleans banks. Doty moved to vacate the attachment, arguing that Watson could not invoke Rule B because it lacked a valid *prima facie* admiralty claim against Doty.

In the order under review, the district court — following this Court's decision in *Kazakhstan* — denied Watson's motion to obtain discovery on the ground that § 1782 does not extend to private arbitration. The district court also denied Doty's motion to vacate the attachment, reasoning that the P&A Contract was a "maritime contract" under this Court's decision in *Doiron*, and thus Watson had a valid *prima facie* admiralty claim against Doty. A three-judge panel of this Court, concluding that it was also bound by our decisions in *Kazakhstan* and *Doiron*, affirmed. We then agreed to rehear the case en banc.

II
The Applicability of 28 U.S.C. § 1782 to Private Arbitration

In *Republic of Kazakhstan v. Biedermann International*, we held "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." 168 F.3d at 883. That conclusion mentioned "the plain, common sense meaning of the statute's language," *id*. at 881, but the analysis relied primarily on the legislative history of the statute, *see id*. at 881-882, and the panel's view of the appropriate policy goals, *see id*. at 882-883. The panel also relied heavily on the Second

Circuit's then-recent decision in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999), which was the only appellate authority on point at that time.

Now that we have had the benefit of the Supreme Court's dicta in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004), and the careful analysis of the Sixth Circuit in *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), and the Fourth Circuit in *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020), we are persuaded that in *Kazakhstan* we were too hasty in rejecting the application of § 1782 to private international arbitrations. We paid insufficient attention to the statutory language, we turned too quickly to the legislative history, and we gave effect to our own policy preferences when it is Congress's prerogative to determine policy. We should instead have analyzed the statutory language more closely (as the Sixth Circuit did in *Application to Obtain Discovery*, 939 F.3d at 717-723) and paid more attention to the Supreme Court's teachings in *Intel* (again, as the Sixth Circuit did in *Application to Obtain Discovery*, 939 F.3d at 723-726).

Because we are fully persuaded by the reasoning of the Sixth Circuit in *Application to Obtain Discovery* and the Fourth Circuit in *Servotronics*, we overrule *Kazakhstan* and hold that a district court "may order [persons in the district] to give [their] testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal," 28 U.S.C. § 1782, even if the "foreign or international tribunal" is a private arbitration tribunal. We must therefore reverse the district court's judgment on the interpretation of § 1782.

Our holding today does not fully resolve the case on this issue. Section 1782 provides that a district court *may* provide the discovery assistance requested; it does not require the district court to do so. We therefore remand this case to the district court to permit that court in the first instance to exercise its discretion under § 1782 and decide whether it will provide the assistance that Watson has requested.

III
Maritime Contracts in the Oil Patch

In *Doiron*, we overruled *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 1994 AMC 1519 (5th Cir. 1990), and announced a new test for deciding whether a contract to perform specialty services to facilitate oil-and-gas production on navigable waters is maritime. That new test asked two questions:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.

Doiron, 879 F.3d at 576, 2018 AMC at 501-502 (footnotes omitted). Doty concedes (1) that the P&A Contract was "one to provide services to facilitate the drilling or production of oil and gas on navigable waters," (2) that the P&A Contract "provide[d] . . . that a vessel w[ould] play a substantial role in the completion of the contract," and (3) that "the parties expect[ed] that a vessel w[ould] play a substantial role in the completion of the contract." If we adhere to our decision in *Doiron*, therefore, it would necessarily follow that the P&A Contract "is maritime in nature." Because Doty admits that Watson has a valid *prima facie* claim against it for a breach of the P&A Contract, it would also follow that Watson "has a valid *prima facie* admiralty claim" against Doty, and may therefore invoke Rule B.

If we reject *Doiron*, on the other hand, we would need to formulate a new test to address the issue. We would then presumably remand the case to give the district court the opportunity to apply the new test in the context of the present case. But we are not prepared to reject *Doiron*. Doty argues that we must because it is inconsistent with Supreme Court precedent. Doty relies particularly on *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004), *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985), and even older

contract-jurisdiction cases. Less than two and a half years ago, we adopted the *Doiron* test precisely because it was "consistent with the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*." *Doiron*, 879 F.3d at 569, 2018 AMC at 491. The Supreme Court has done nothing since then to call our decision in *Doiron* into question. Everything that the Supreme Court did before then was already available to us when we decided *Doiron*. In particular, we carefully considered the impact of *Kirby* when we formulated the new *Doiron* rule. Since Doty cites nothing today that was not available to us then, we reach the same result today that we did two and a half years ago. We therefore affirm the district court's judgment on the attachment issue.

IV
Conclusion

The judgment of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

HAMMURABI, Circuit Judge, joined by WHALLEY, DIXWELL, and GOFFE, Circuit Judges, concurring in part and dissenting in part:

I join Parts I and III of the majority opinion, but I cannot agree with the Court's decision (addressed in Part II of the majority opinion) to overrule *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999). Because I agree with Judge Solomon that 28 U.S.C. § 1782 does not authorize a district court to provide discovery assistance to the parties in a private international arbitration, I would affirm the decision below on both issues.

SOLOMON, Circuit Judge, joined by BRACTON, FORTESCUE, and BLACKSTONE, Circuit Judges, dissenting:

Because I disagree with my colleagues on both issues, I respectfully dissent.

I
The Applicability of 28 U.S.C. § 1782 to Private Arbitration

I find our interpretation of 28 U.S.C. § 1782 in *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999), entirely persuasive, and nothing in the subsequent decisions to the contrary changes my mind. The Sixth Circuit's decision in *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710 (6th Cir. 2019), does not convince me that we were wrong in *Kazakhstan*. That court found it unnecessary to examine the legislative history of the statute or address policy considerations because " 'the statutory language provides a clear answer' " to the question. 939 F.3d at 723 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). To my mind, however, the term "tribunal" is ambiguous, and I do not understand how the Sixth Circuit can say that it unambiguously means one thing when both our Court and the Second Circuit[*] have held that it means the exact opposite.

II
Maritime Contracts

In my view, *In re Larry Doiron, Inc.*, 879 F.3d 568, 2018 AMC 490 (5th Cir. 2018) (en banc), is the decision that we should overrule, and I dissent from the majority's decision to reaffirm it. I believe that *Doiron* is wrong for two independent reasons. First, it is inconsistent with controlling Supreme Court precedent (notwithstanding protestations to the contrary in the opinion itself). I outlined the principal inconsistencies in my panel concurring opinion and I adhere to

[*] I note that the Second Circuit has recently reaffirmed its decision in *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999). *See In re Hanwei Guo*, 965 F.3d 96 (2d Cir. 2020).

those views. Second, the *Doiron* test is bad as a matter of policy. I will outline some of the policy weaknesses here.

As one of the foremost admiralty scholars of the last century argued in a ground-breaking article seventy years ago, "[t]he federal district court sitting in admiralty should have exclusive jurisdiction of all those cases involving contractual, commercial, and property adjustment, necessity for which grows out of the conduct of the maritime industry." Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 276 (1950). The *Doiron* test is both under- and over-inclusive in accomplishing that goal. The test is under-inclusive because not every contract that is properly characterized as "maritime" will require the involvement of a vessel. In *MMR Constructors, Inc. v. Director, OWCP*, 954 F.3d 259 (5th Cir. 2020), for example, we properly held that a "quality assurance and control technician" employed in "the construction of Chevron's tension-leg platform named Big Foot" was engaged in maritime employment because his work site (the unfinished Big Foot while it was under construction) floated on navigable waters. In *Baker v. Director, OWCP*, 834 F.3d 542, 2016 AMC 2568 (5th Cir. 2016), however, we held that the Big Foot did not qualify as a "vessel." Under *MMR Constructors*, the worker's employment contract would surely qualify as "maritime" — and it would also be a contract to provide services to facilitate the drilling or production of oil and gas on navigable waters — even though, under *Baker*, no vessel was involved.

The over-inclusive nature of the *Doiron* test is well illustrated by our expansive application of the test in *Barrios v. Centaur*, 942 F.3d 670 (5th Cir. 2019), in which we held that a dock-construction contract was maritime because two vessels played a substantial role in its completion. We explained that "*Doiron*'s two-part test applies as written to all mixed-services contracts. To be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the

completion of the contract." *Barrios*, 942 F.3d at 680. But imagine that a shipyard uses a crane mounted on a barge to play a substantial role in constructing a new ship. The ship-construction contract undoubtedly facilitates activity on navigable waters; when the new ship is finished, it will be used in maritime commerce on navigable waters. But it is also well established that a contract for the construction of a vessel is not a maritime contract. *See*, *e.g.*, *People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393, 402 (1857).

I would overrule *Doiron* and apply a test that focuses on the impact of the contract on maritime commerce. The contract here was for work done primarily on artificial islands, *see Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 1969 AMC 1082 (1969), and it had no connection to maritime commerce, *see Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 425, 1985 AMC 1700, 1709 (1985). In my view, it was not maritime.

III
Conclusion

I suspect that today's decision will not be the last word on either of the issues before us. The inter-circuit conflict on the proper interpretation of 28 U.S.C. § 1782 is particularly stark. We are not the first court to acknowledge it. *See Application to Obtain Discovery*, 939 F.3d at 726 ("[W]e recognize that our decision today is at odds with two other circuits' decisions on this issue."). Our decision in *Doiron* is also in conflict with decisions of our sister circuits. *Compare*, *e.g.*, *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 636 F.3d 1338, 2011 AMC 923 (11th Cir. 2011) (holding that a contract to provide research and data concerning the location of a shipwrecked vessel was maritime, even though no vessel was involved in the performance of the contract, noting that "'we cannot look to whether a ship or other vessel was involved in the dispute'") (quoting *Kirby*, 543 U.S. at 24, 2004 AMC at 2711), with *Doiron* (holding that a contract to perform "flow-back" services on a gas well in navigable waters was not

maritime because use of a vessel was an insubstantial part of the job). I hope that the Supreme Court will grant certiorari to resolve one or both of these conflicts and provide the bench and bar with some much-needed certainty and predictability on these questions.

I respectfully dissent.

H.K. WATSON (SCOTLAND), LTD., Plaintiff-Appellant, Cross-Appellee,

v.

DOTY ENERGY PRODUCTION CO., Defendant-Appellee, Cross-Appellant.

No. 18-12345

United States Court of Appeals,
Fifth Circuit

October 1, 2019

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant-Cross-Appellee H.K. Watson (Scotland), Ltd. ("Watson") brought the present action against Defendant-Appellee-Cross-Appellant Doty Energy Production Co. ("Doty") to obtain discovery and security in conjunction with a private arbitration proceeding pending in London. The arbitrators will resolve the underlying contract dispute between the parties here; that is not our concern. We need decide only whether 28 U.S.C. § 1782 authorizes the district court to assist discovery efforts in aid of private international arbitration and whether Supplemental Rule B of the Federal Rules of Civil Procedure authorizes Watson to obtain the security that it seeks.

Following this Court's decision in *Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999), which held that 28 U.S.C. § 1782 does not authorize a district court to provide discovery assistance to the parties in a private international arbitration, the court below denied Watson's request. Watson appeals that aspect of the decision.

Watson's effort to obtain security turned entirely on whether the parties' contract was "maritime." Following this Court's decision in *In re Larry Doiron, Inc.*, 879 F.3d 568, 2018 AMC 490 (5th Cir. 2018) (en banc), which defines when a contract in this context is "maritime," the court below denied Doty's motion to vacate Watson's attachment of the financial assets in two of Doty's bank accounts. Doty cross-appeals to challenge that aspect of the decision.

The district court reached its conclusion on each motion not by independently analyzing the legal principles involved but by noting that it was bound by our decisions in *Republic of Kazakhstan v. Biedermann International* and *In re Larry Doiron*. As a three-judge panel, we are also required to follow this Court's prior decisions. The judgment below is accordingly affirmed.

JUSTINIAN, Circuit Judge, concurring:

I agree that we are bound to follow the same decisions that the district court followed in reaching its conclusions. I therefore join the per curiam opinion in full. If I were free to reconsider *Republic of Kazakhstan v. Biedermann International*, however, I would reach the opposite conclusion on the discovery issue. When we decided *Kazakhstan*, the existing appellate authority all pointed in the same direction. *See National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999). Since then, the Supreme Court has (albeit in dicta) suggested the opposite result. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004) (citing and quoting Hans Smit, *International Litigation under the United States Code*, 65 COLUM. L. REV. 1015, 1026-27 & nn.71, 73 (1965)). More recently, the Sixth Circuit has carefully reviewed this question and in a detailed and well-reasoned opinion has rejected our analysis to hold that § 1782 extends to private arbitration. *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d 710, 723 (6th Cir. 2019) ("[T]he text, context, and structure of § 1782(a) provide no reason to doubt that the word 'tribunal' includes private commercial arbitral panels established pursuant to contract and having the authority to issue decisions that bind the parties.").

Because I find the Sixth Circuit's reasoning to be compelling, I hope that our Court will agree to hear this case en banc so that we may reconsider our decision to the contrary.

SOLOMON, Circuit Judge, concurring:

I agree that we are bound to follow the same decisions that the district court followed in reaching its conclusions. I therefore join the per curiam opinion in full. If I were free to reconsider *In re Larry Doiron*, however, I would reach the opposite conclusion on the attachment issue.

I recognize that *Doiron* is a recent (and unanimous) en banc decision of our Court, and I agree that it was appropriate to jettison the six-factor test of *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316, 1994 AMC 1519 (5th Cir. 1990). But it now appears that the two-part test that we adopted in its place is inconsistent with the teachings of the Supreme Court.

The first part of the *Doiron* test asks whether "the contract [is] one to provide services to facilitate the drilling or production of oil and gas on navigable waters." 879 F.3d at 576, 2018 AMC at 501. But "the drilling or production of oil and gas on navigable waters" does not qualify as commercial maritime activity as the Supreme Court required in *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 25, 2004 AMC 2705, 2712 (2004). On the contrary, the Supreme Court held in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985), that a worker injured on a fixed platform in Louisiana waters was ***not*** engaged in "maritime employment." More specifically, the Supreme Court explained that the "exploration and development of the Continental Shelf are not themselves maritime commerce," 470 U.S. at 425, 1985 AMC at 1708-09, and explicitly rejected "the rationale of the [Fifth Circuit] Court of Appeals . . . that offshore drilling is maritime commerce," *id.* at 421, 1985 AMC at 1705.*

The second prong of the *Doiron* test asks whether "the contract provide[s] or . . . the parties expect that a vessel will play a substantial role in the completion of the contract." 879 F.3d at 576, 2018 AMC at 501-502. Once again, this is inconsistent with *Kirby*, which explicitly declared that "[t]o ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute," 543 U.S. at 23, 2004 AMC at 2711.

Because I find these inconsistencies with Supreme Court precedent troubling, I hope that our Court will agree to hear this case en banc so that we may reconsider our decision in *Doiron*.

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* In the decision below in *Herb's Welding* that the Supreme Court reversed, this Court, in reliance on *Pippen v. Shell Oil Co.*, 661 F.2d 378, 384 (5th Cir. 1981), had concluded that "[o]ffshore drilling — the discovery, recovery and sale of oil and natural gas from the sea bottom — is maritime commerce." *Herb's Welding v. Gray*, 703 F.2d 176, 180, 1984 AMC 2274, 2279 (5th Cir. 1983), *rev'd*, 470 U.S. 414, 1985 AMC 1700 (1985). Although the Supreme Court explicitly rejected that specific conclusion, in *Doiron* we once again relied on *Pippen* and its progeny for the same principle.

United States District Court
for the Eastern District of Louisiana

H.K. WATSON (SCOTLAND), LTD., Plaintiff,

v.

DOTY ENERGY PRODUCTION CO., Defendant.

No. 17-Civ-6838

August 3, 2018

PORTIA, J.:

Plaintiff H.K. Watson (Scotland), Ltd. ("Watson"), a British company, filed the present action against defendant Doty Energy Production Co. ("Doty"), a Delaware/Louisiana corporation, in an effort to obtain (1) discovery in support of a private arbitration proceeding that is now pending in London[1] and (2) security for any award that the arbitration panel may ultimately issue. Because this Court is required to follow controlling decisions of the Fifth Circuit on both issues, the appropriate course is clear. Watson's motion to obtain discovery must be denied. Doty's motion to vacate the attachment of its bank accounts must also be denied.

Factual Background[2]

This dispute arises out of a relatively recent and ongoing arbitration in London commenced by Watson against Doty. In that arbitration, Watson seeks an award of $4.6 million for an alleged

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[1] The arbitrators have agreed to postpone the hearing in London until this case is finally resolved so that Watson can present any evidence that it obtains if discovery is ultimately allowed.

[2] The parties agree on the underlying facts to the extent that they are relevant to the issues before this Court. Of course, they disagree on the issues before the arbitrators in London, including a number of factual issues that are relevant to that dispute. But those disagreements have no bearing on the legal issues here.

breach of the parties' contract, which provides for Watson to "plug and abandon" three no-longer-producing wells located on three small fixed platforms not far from one another in the coastal waters of Lafourche Parish, Louisiana. State law obligated Doty to decommission the wells. As is common in the industry, the parties describe this as "P&A work."

Doty accepted Watson's bid for the P&A work over bids from several U.S. companies because Watson had offered a lower price in an effort to break into the U.S. market. Watson had experienced success in the North Sea, largely due to its invention and development of unique (and expensive) cement-plugging and casing-cutting equipment that significantly reduces the time required to complete the work.

Watson's bid listed the equipment it would use — including its revolutionary cement-plugging and casing-cutting equipment, other supporting equipment, and three vessels. Watson designated a five-person crew to accomplish the P&A work. The three wells on the three platforms would be handled sequentially, one at a time.

The three vessels were the *Marylyn*, a floating dormitory barge to house and feed the crew; the *Caroline*, a crew boat to ferry the workers back and forth between the barge and the platforms (and between the barge and the shore when necessary) and to deliver supplies; and the *Rebecca*, a liftboat[3] with a crane to be positioned next to each platform, avoiding any pipelines or other

[3] The *Rebecca* is a self-propelled, self-elevating vessel with a relatively large open deck capable of carrying equipment and supplies in support of offshore oil-and-gas or construction activities. Liftboats frequently appear in litigation in this circuit. *See*, *e.g.*, *Fornah v. Schlumberger Technology Corp.*, 737 F. App'x 677, 678 (5th Cir. 2018); *Alexander v. Express Energy Services Operating, L.P.*, 784 F.3d 1032, 1035-36 , 2015 AMC 1329, 1333-34 (5th Cir. 2015); *Offshore Marine Contractors, Inc. v. Palm Energy Offshore, L.L.C.*, 779 F.3d 345, 347, 2015 AMC 791, 792 (5th Cir. 2015); *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 930 & n.1, 2014 AMC 913, 914 & n.1 (5th Cir. 2014).

obstructions. The *Rebecca* operated only in shallow water where its spuds or footings could be anchored in the mud to create a stable platform.

Watson's bid became the parties' contract after the addition of several mutually agreed clauses, only one of which is pertinent to this matter: the clause requiring arbitration in London of any disputes between the parties. Under that clause, arbitration was to be conducted "in London, England, in accordance with the rules of the Chartered Institute of Arbitrators. Each party to appoint an arbitrator and the two arbitrators to select a neutral Chairperson Arbitrator."

When work began on the first of the three platforms, Doty's "company man," Owen Doty, met with Watson's "tool pusher," Jackson Knopfler, to discuss, among other things, performing the work safely. Mr. Doty assured Mr. Knopfler that Doty's engineers had ensured that no pressure remained beneath the well heads. P&A work commenced and the job on the first platform was completed without incident.

On the second platform, Doty's company man did not attend the morning's tool-box safety meeting. As the work began, Watson took steps to uncap the well, causing the well head to spew released gas with tremendous velocity. Fortunately, no workers were injured, but the metal from the well head struck the cement-plugging and casing-cutting equipment, rendering it a total loss.

Watson presented Doty with a claim statement seeking a total of $4.6 million in compensation for the destroyed equipment ($1.1 million); the total payment due under the P&A Contract ($1.5 million, *i.e.*, $500,000 per well); and loss of use of the unique equipment for nine months, the time it would take to manufacture a replacement for the equipment that had been destroyed ($2.0 million, *i.e.*, four jobs at $500,000 per job).

Doty hired attorneys to investigate the event and evaluate the company's potential liability. Ultimately, Doty advised Watson that the cause of the damage was Watson's own negligence in failing to protect against unreleased well pressure. Doty declined payment of the claim statement.

As noted above, Watson commenced arbitration in London seeking full payment of its losses. Following the appointment of the three arbitrators, Watson filed this action pursuant to 28 U.S.C. § 1782 seeking deposition testimony from Doty's company man, Owen Doty; the unnamed engineers that Mr. Doty mentioned; and Doty's Chief Financial Officer. Watson also seeks production of documents relating to Doty's work on the three wells and platforms to protect against gas remaining under pressure and financial records reflecting Doty's ability to pay any arbitration award.

Finally, Watson sought security pursuant to Rule B of the Supplemental Admiralty Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure by way of attachment of up to $4.6 million of Doty's financial accounts at Hancock Whitney Bank and Hibernia Bank.

Legal Analysis

Binding Fifth Circuit precedent addresses both of the pending issues, and this Court must follow those binding decisions.

A. Discovery

Watson relies on 28 U.S.C. § 1782, which provides that a U.S. district court may, on the request of an applicant, provide assistance in connection with a proceeding before "a foreign or international tribunal" by ordering a person in its district "to give his testimony or statement or to produce a document or other thing for use in [the] proceeding." The controlling question here is

whether the private London arbitration panel that will decide the underlying dispute between Watson and Doty is "a foreign or international tribunal" as that phrase is used in § 1782.[4]

The one time that the Supreme Court considered § 1782, it declared that the statute's "tribunal" definition is "unbounded by categorical rules" and it quoted a 1965 law review article by Professor Hans Smit that explained that the legislative history of the statute demonstrated an intent to include "arbitral tribunals." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004). The *Intel* Court added that the statute "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." 542 U.S. at 247.

If the issue raised by Watson's request were a matter of first impression, Watson's arguments might well be persuasive. But the Fifth Circuit has held that *Intel* does not extend the right of discovery under § 1782 to private arbitrations.[5] *See Republic of Kazakhstan v. Biedermann International*, 168 F.3d 880 (5th Cir. 1999); *see also El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31, 33-34 (5th Cir. 2009). Because this Court is bound by the Fifth Circuit's decisions, Watson's motion to obtain discovery must be denied. Having preserved the issue here, however, Watson is free to attempt on appeal to persuade the Fifth Circuit to change its mind (or to attempt to bring the issue to the Supreme Court).

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[4] Doty concedes that all the other requirements of § 1782 are satisfied. In particular, Doty concedes that the employees whom Watson seeks to depose are all persons in this district and that employees in this district have access to the documents that Watson seeks.

[5] The Chartered Institute of Arbitrators (https://www.ciarb.org/) is a not-for-profit U.K.-registered charity, not a government body. Watson properly concedes that the arbitration at issue here is "private" arbitration.

B. Security

On March 16, 2018, Watson filed its verified complaint in this Court demanding maritime attachment of Doty's bank accounts at two banks in New Orleans pursuant to Rule B of the Supplemental Admiralty Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. That same day, this Court granted an *ex parte* order for maritime attachment and garnishment of up to $4.6 million of Doty's assets held by Hancock Whitney Bank and Hibernia Bank. On March 19, Doty moved to vacate the attachment based on the lack of admiralty jurisdiction over the underlying dispute, and this Court held a hearing on March 22, during which the parties reported that Watson had successfully attached the authorized sum. With the consent of the parties, the Court adjourned that hearing to April 5 to give the parties time to fully brief the issue. On April 5, after hearing both parties' oral arguments, the Court announced its intention to deny Doty's motion to vacate the attachment for reasons that would be explained in an opinion that would be issued in due course. This is the promised opinion.

Supplemental Rules B and E of the Federal Rules of Civil Procedure govern attachment of assets in maritime actions. Rule B allows for the attachment of a defendant's assets up to the amount in dispute if the defendant is not found within the district.[6] Rule E entitles a party claiming an interest in attached property to "a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated." FED. R. CIV. P. SUPP. R. E(4)(f). In addition to the other requirements established by Rules B and E, a plaintiff opposing vacatur of an attachment must show that it "has a valid *prima facie* admiralty claim against the defendant[]."

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[6] The parties have stipulated that Doty "is not found within [this] district" as that phrase is used in Rule B(1)(a). Doty is incorporated in Delaware and its principal place of business is in the Western District of Louisiana.

Casillo Commodities Italia S.P.A. v. M/V Long Cheer, 2017 AMC 1689, 1696 (E.D. La. 2017) (Feldman, J.). That is the only disputed issue on Doty's motion to vacate the attachment.

Watson argues that it has a valid *prima facie* admiralty claim against Doty based on Doty's breach of the P&A contract, which is undoubtedly a maritime contract. Doty concedes that Watson has a valid *prima facie* claim against it but denies that the claim sounds in admiralty. Doty argues that the P&A contract does not qualify as a "maritime" contract under the standards established by the Supreme Court. Watson replies that the P&A contract falls squarely within the test for a maritime contract that the en banc Fifth Circuit announced earlier this year in *In re Larry Doiron, Inc.*, 879 F.3d 568, 2018 AMC 490 (5th Cir. 2018) (en banc).

As a result of the parties' stipulations and concessions, the resolution of the current issue comes down to a single question: Is the P&A contract a maritime contract? Doty forthrightly admits that the P&A contract is "maritime" under *Doiron*,[7] but it argues that *Doiron* is inconsistent with Supreme Court precedent and should not be followed. Doty also recognizes that this Court, as a district court within the Fifth Circuit, is not free to accept that argument. If the en banc court of appeals erred in failing to follow Supreme Court precedent, only the en banc court of appeals or the Supreme Court itself can correct that error. This Court must apply the Fifth Circuit's decision, which explicitly declared that its new rule was "consistent with the Supreme Court's [most recent] decision" on admiralty contract jurisdiction, *see Doiron*, 879 F.3d at 569, 2018 AMC

[7] The *Doiron* test requires this Court to consider two questions:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?

879 F.3d at 576, 2018 AMC at 501-502. Doty concedes that both questions must be answered affirmatively here.

at 491 (citing *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004)). Doty makes its argument here simply to preserve the issue for appellate review.

Because this Court is bound by *Doiron*, it follows that the P&A contract is "maritime," Watson has a valid *prima facie* admiralty claim against Doty, and Watson has carried its burden "to show why the arrest or attachment should not be vacated." FED. R. CIV. P. SUPP. R. E(4)(f). Doty's motion to vacate the attachment is accordingly denied.

Conclusion

For the reasons set forth above, Watson's motion to obtain discovery is denied and Doty's motion to vacate the attachment is also denied.

Selected Chronology of the Case[*]

May 5, 2017	Plaintiff H.K. Watson (Scotland), Ltd. and defendant Doty Energy Production Co. conclude a contract in which Watson agrees to "plug and abandon" three of Doty's wells in Louisiana coastal waters.
Jan. 4, 2018	After problems develop in the performance of the P&A contract, Watson institutes arbitration proceedings against Doty in London (as required by the arbitration clause in the P&A Contract)
Mar. 16, 2018	Watson files the present action against Doty seeking (1) discovery in support of the London arbitration proceeding and (2) security for any award that the arbitration panel may ultimately issue. District court granted an *ex parte* order for maritime attachment and garnishment of Doty's assets held by two New Orleans banks.
Apr. 5, 2018	District court denies Doty's motion to vacate the attachment (with an opinion to follow in due course)
Aug. 3, 2018	District court denies Watson's discovery motion and explains decision to deny Doty's motion to vacate the attachment (opinion reported as *H.K. Watson (Scotland), Ltd. v. Doty Energy Production Co.*, 2018 AMC 3335 (E.D. La. 2018))
Oct. 1, 2019	Panel of the court of appeals affirms the district court's judgment on both issues with a per curiam opinion (reported as *H.K. Watson (Scotland), Ltd. v. Doty Energy Production Co.*, 778 F. App'x 969, 2019 AMC 3333 (5th Cir. 2019))
Jun. 8, 2020	Court of appeals sitting en banc (1) reverses the district court's judgment on the discovery motion, holding that Watson is entitled to discovery, and (2) affirms the district court's judgment refusing to vacate the attachment, holding that Watson is entitled to security (opinion reported as *H.K. Watson (Scotland), Ltd. v. Doty Energy Production Co.*, 961 F.3d 1387 (5th Cir. 2020) (en banc))
Oct. 3, 2020	Doty files petition for certiorari (docket number 20-444) raising only (1) the discovery issue and (2) the admiralty contract-jurisdiction question on which the security issue turns
Dec. 7, 2020	Supreme Court grants petition for certiorari

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.