Eleventh Circuit rules that private arbitral tribunals fall within 28 U.S.C. § 1782, permitting parties to seek discovery in the U.S. for use in foreign arbitrations

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In a case of great significance to United States participants in arbitrations conducted outside the United States, the U.S. Court of Appeals for the Eleventh Circuit recently held that a party engaged in a private foreign arbitration dispute can rely on 28 U.S.C. § 1782 to obtain discovery from persons or companies located in the United States for use in that foreign arbitration. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, No. 11-12897, 2012 U.S. App. LEXIS 12949 (11th Cir. June 25, 2012). This decision represents a split with the Second and Fifth Circuits, which had previously interpreted the statute narrowly to hold that discovery under that statute is not available in connection with foreign arbitrations, as opposed to state-sponsored adjudicatory proceedings in foreign countries. While the ruling is technically only applicable in district courts within the Eleventh Circuit, it nevertheless may subject U.S. companies, and in particular U.S. affiliates of foreign companies, to potentially significant discovery obligations under the Federal Rules of Civil Procedure for use in a foreign, private arbitral proceeding.

Background

28 U.S.C. § 1782 states that parties to foreign or international tribunals may request a U.S. district court to compel “testimony or statement[s]” or the production of documents for use in the proceeding. Parties involved in arbitrations pending in other parts of the world have often sought to use the statute to obtain discovery in the U.S. in reliance on the statute. The Second and Fifth Circuits addressed the issue of whether private foreign arbitral tribunals fall within the definition of the statute, and ruled that they do not. Rather, they held that 28 USC 1782 applies only to state-sponsored adjudicatory bodies. *See Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190 (2d Cir. 1999) and *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881 (5th Cir. 1999). Subsequently, however, the U.S. Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004) set forth a far broader and more functional definition of the term “tribunal,” and declined to impose “categorical limitations” on the scope of section 1782(a). *Intel*, 542 U.S. at 255. Now, the 11th Circuit has specifically held that the term “tribunal” in 28 U.S.C. § 1782 encompasses private foreign arbitration tribunals.

The case arose out of a foreign shipping contract billing dispute between Consorcio Ecuatoriano de Telecomunicaciones S.A. (“CONECEL”) and Jet Air Service Equador S.A. (“JASE”). JASE brought
an arbitration proceeding against CONECEL in Ecuador pursuant to the parties’ contractual agreements. Thereafter, CONECEL filed an *ex parte* application in the U.S. District Court for the Southern District of Florida pursuant to 28 U.S.C. § 1782 to obtain documents and deposition testimony from JASE’s United States counterpart, JAS Forwarding (USA), Inc., which does business in Miami. Section 1782 provides, in relevant part, that a district court may order a person within the district to provide evidence “for use in a proceeding in a foreign or international tribunal . . . .”

The district court granted the application and authorized CONECEL to issue a subpoena. Thereafter, JASE intervened and moved to quash the subpoena and vacate the order granting the application. The district court denied the motion to quash, and the Eleventh Circuit affirmed.

**The decision**

In affirming the orders of the district court, the Eleventh Circuit held that the arbitral tribunal before which JASE and CONECEL’s dispute was pending was a “foreign tribunal” for purposes of Section 1782. It reasoned that the statutory requirements for judicial assistance were met here because (i) the arbitral panel acted as a first-instance decisionmaker; (ii) it permitted the gathering and submission of evidence; (iii) it would resolve the dispute; (iv) it would issue a binding order; and (v) its order would be subject to judicial review. The discovery statute, according to the panel, “requires nothing more.”

The court relied heavily on the U.S. Supreme Court’s decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), in which the Supreme Court broadened the definition of the term “tribunal” under Section 1782 to justify its interpretation of the statute.

The court noted that the Second and Fifth Circuits had previously reached different conclusions, finding that private arbitral tribunals fall outside of the scope of Section 1782 because the statute was only “intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.” *Consorcio*, 2012 U.S. App. LEXIS 12949 at *42, n. 7 citing Nat’l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 190 (2d Cir. 1999) and Republic of Kazakhstan v. Biedermann Int’l, 168 F.3d 880, 881 (5th Cir. 1999). However, the court distinguished those decisions because they pre-dated the Supreme Court’s decision in *Intel Corp.*, in which the Court set forth a far broader and wholly functional definition of the term “tribunal,” declining to impose “categorical limitations” on the scope of section 1782(a). *Intel*, 542 U.S. at 255.

**Impact of decision**

The Eleventh Circuit’s decision gives parties involved in private foreign arbitral disputes much greater ability to seek discovery from persons or entities located in the United States, with the backing of the federal courts, to aid them in the arbitration. In particular, U.S. affiliates of foreign entities may be particularly at risk of having to respond to discovery requests that would not otherwise be permitted in a foreign (or domestic) arbitration proceeding.

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