

# Kluwer Arbitration Blog

## The Eleventh Circuit Takes the Lead in Holding that a Private Commercial Arbitral Tribunal is a Foreign Tribunal under 28 U.S.C. § 1782

Rodrigo Palacios (Astigarraga Davis) · Tuesday, July 3rd, 2012

On June 25th, 2012 the United States Court of Appeals for the Eleventh Circuit, which covers all federal appeals emanating from the states of Florida, Georgia and Alabama, decided that a private commercial arbitration tribunal in Ecuador used by the parties to resolve a commercial dispute is a ‘tribunal’ for purposes of the collection of evidence pursuant to Title 28 section 1782 of the United States Code (28 U.S.C. § 1782). That section allows United States courts to provide assistance to foreign and international tribunals and to litigants before such tribunals who seek to obtain evidence in the United States for use in proceedings before such tribunals.

The Supreme Court first laid out the test to determine whether and when U.S. courts should provide such assistance to foreign or international tribunals in the landmark 2004 decision of *Intel Corp. v. Advanced Micro Devices, Inc.* Although the Supreme Court did not directly address whether a foreign or international arbitral tribunal was a ‘tribunal’ under Section 1782, it set forth liberal standards for what constitutes a ‘tribunal’ which lower federal courts have struggled to apply consistently to arbitral tribunals. *In re Consorcio Ecuatoriano de Telecomunicaciones S.A., v. JAS Forwarding (USA), Inc.*, 2012 WL 2369166 (11th Cir. June 25, 2012) is the first post-Intel reported Federal Court of Appeals decision that has employed the Intel test to decide whether a private commercial arbitral tribunal constitutes a tribunal under section 1782.

*In re Consorcio Ecuatoriano de Telecomunicaciones S.A.*, involves a commercial dispute that arose in 2008 when Jet Air Service Ecuador, S.A. (JASE) initiated an arbitral proceeding against Consorcio Ecuatoriano de Telecomunicaciones S.A. (CONECEL) before the Guayaquil Chamber of Commerce in Guayaquil, Ecuador. JASE and CONECEL had a lengthy contractual relationship in which JASE provided transportation logistics services for CONECEL’s international shipments of cell phones and accessories. In 2008, an internal audit conducted by CONECEL revealed that JASE improperly had overbilled it by millions of dollars and further suspected that two former employees were involved. Subsequently, JASE initiated an arbitral proceeding in Ecuador alleging that CONECEL had failed to pay several invoices.

On July 14, 2010, CONECEL filed an application for judicial assistance in the Federal Court for the Southern District of Florida pursuant to 28 U.S.C. § 1782 seeking to obtain evidence from JASE’s US counterpart, JAS Forwarding, Inc. (JAS USA) who had provided services to CONECEL. The application requested information relating primarily to invoicing and the calculation of rates charged to CONECEL. CONECEL sought this evidence for the pending

arbitration in Ecuador, but also in preparation for civil and criminal suits in Ecuador it was contemplating bringing against its two former employees. The District Court held that, as interpreted by the seminal United States Supreme Court case *Intel Corp. v. Advanced Micro Devices, Inc.*, the court actions CONECEL was seeking to bring against its former employees were within reasonable contemplation and were therefore covered by the statute. The District Court did not formally reach the issue of whether private arbitrations were tribunals for purposes of Section 1782, but wrote that the Ecuadorian arbitral tribunal was likely a ‘tribunal’ under Section 1782. JAS USA appealed this decision to the 11th Circuit Court of Appeals.

In a clear, cogent, and well reasoned opinion, the Court of Appeals decided to resolve the case by considering whether the tribunal in the pending arbitration in Ecuador was a tribunal for purposes of Section 1782 rather than whether CONECEL’s intended court actions were reasonable contemplated. The Court first discussed the expansive interpretation of ‘tribunal’ adopted in various cases and in *Intel* in particular, and decided that the tribunal in the Ecuador arbitration was a tribunal because it 1) acts as a first-instance adjudicative decision maker 2) permits the gathering and submission of evidence 3) has the authority to determine liability and impose penalties, and 4) its decision is subject to judicial review, even if the review is limited to procedural errors and constitutional challenges.

The Court also considered the discretionary factors identified in *Intel*, and after an extensive discussion, decided that the requests below were not unduly intrusive or burdensome nor did they seek confidentially information, but rather it properly sought to obtain only evidence relevant to the arbitration. The Court made clear that broad-based attacks on discovery sought in a Section 1782 action could not be used by a trial court to deny the discovery altogether. Finally, Judge Black explained in her concurrence that she would affirm the District Court because the actions against CONOCEL’s former employees were within ‘reasonable contemplation’. She further clarified that under the *Intel* test, assistance is not limited to ‘pending’ or ‘imminent’ proceedings and they do not need to occur very soon nor do they need to be very likely to occur.

(Full disclosure: Astigarraga Davis represented *Consortio Ecuatoriano de Telecomunicaciones S.A.* at the trial and appellate levels. Rodrigo Palacios is a summer associate at the firm.)

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