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Will the Eleventh Circuit Become a Magnet for Applications for Discovery in Aid of International Arbitrations Pursuant to 28 U.S.C. § 1782?

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Last week, the U.S. Court of Appeals for the Eleventh Circuit, which sits in Atlanta, waded into the debate concerning whether 28 U.S.C. § 1782 — which provides U.S. district courts with the power to order parties to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal" — can be used to obtain evidence located in the United States for use in an arbitration seated in another country. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc*., No. 11–12897, 2012 WL 2369166, at *1 (11th Cir. June 25, 2012). The Court held that Section 1782 applies to private foreign arbitrations because arbitration panels are "tribunals" for purposes of the statute. Further details of the *Consorcio* decision are set forth in a prior posting on this blog here.

The Eleventh Circuit's ruling is in conflict with two decisions, the most recent one unpublished, from the U.S. Court of Appeals for the Fifth Circuit, which sits in New Orleans, holding that Section 1782 cannot be used in connection with a foreign arbitration because arbitration panels are not "tribunals" for purposes of the statute. *Rep. of Kazakhstan v. Biederman Int'l*, 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 (5th Cir. 2009). The *Consorcio* decision also conflicts with an earlier decision from the U.S. Court of Appeals for the Second Circuit, which sits in New York, holding that foreign arbitral panels are not "tribunals" for purposes of the statute. *Nat'l Broadcasting Co. Inc. v. Bear Stearns & Co.*, 165 F.3d 184 (2d Cir. 1999).

This is the latest chapter in a lively debate that was triggered by the U.S. Supreme Court's seminal ruling in 2004 concerning the scope of Section 1782 in *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241 (2004). Pre-*Intel*, there was widespread consensus based on the Fifth Circuit's holding in *Biederman* and the Second Circuit's holding in *National Broadcasting* that Section 1782 could not be used in connection with a foreign arbitration. In *Intel*, which addressed whether the European DG-Competition is a "tribunal" for purposes of Section 1782, the Supreme Court gave new guidance concerning the definition of the word "tribunal" and suggested that the definition should include "arbitral tribunals." *Id*. at 258. Thus, the issue for the lower courts has been whether *Intel* effectively overruled *Biederman* and *National Broadcasting*.

Post-*Intel*, the U.S. district courts have taken three distinct approaches to this question. First, starting with a case from the U.S. District Court for the Northern District of Georgia (which is located in the Eleventh Circuit) some courts have held that Section 1782 should be read broadly to

include foreign arbitral tribunals. *See In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221 (N.D. Ga. 2006). There, the court held that *Intel* "materially impacted" the reasoning of *Biederman* and *National Broadcasting*. *Id*. at 1226. Applying the criteria set forth in *Intel*, the court held that the arbitral tribunal in a commercial arbitration seated in Vienna was a "tribunal" for purposes of Section 1782 and issued an order compelling broad discovery.

Second, starting with a case out of the U.S. District Court for the District of New Jersey, some courts have distinguished between "private" arbitrations brought pursuant to commercial contracts and "public" arbitrations. *See In re Matter of Application of Oxus Gold PLC*, No. MISC 06-82, 2006 WL 2927615, at *6 (D.N.J. Oct. 11, 2006). *Oxus Gold* involved an arbitration seated in London under the UNCITRAL Rules arising out of a bilateral investment treaty ("BIT"). The court attempted to reconcile the Second Circuit's holding in *National Broadcasting* with the Supreme Court's ruling in *Intel* by holding that Section 1782 applies to "public" arbitral tribunals, such as the BIT tribunal at issue in *Oxus Gold*, but not to "private" arbitral tribunals, like the ICC tribunal involved in *National Broadcasting*; thus, the court permitted discovery to proceed. *Id.*

Third, some courts have held that Section 1782 does not apply to foreign arbitral tribunals. For example, when the *El Paso* case — which arose in connection with a private commercial arbitration seated in Geneva — was presented to the U.S. District Court for the Southern District of Texas, the court held that Section 1782 does not apply to foreign arbitral tribunals. *La Comision Ejecutiva Hidroelectrica Del Rio Lema v. El Paso*, 617 F. Supp. 2d 481 (S.D. Tex. 2008). There, the court held that it was bound by the Fifth Circuit's prior ruling in *Biederman*, and this holding was affirmed on appeal.

The Fifth Circuit and the Eleventh Circuit are the only appellate courts to have addressed the applicability of Section 1782 in connection with "private" foreign arbitrations, and the Eleventh Circuit has issued the only published appellate opinion. The applicability of Section 1782 to BIT tribunals has, however, arisen in two other appellate cases involving Section 1782 actions brought by Chevron Corporation to obtain discovery for potential use in connection with litigation pending in Ecuador and a related BIT arbitration. The first was brought in the U.S. District Court for the Southern District of New York. On appeal, the Second Circuit found it unnecessary to consider whether the BIT tribunal was a "tribunal" for purposes of Section 1782 — and thus it was unnecessary for it to reconsider its prior decision in *National Broadcasting* — because the Ecuadorian court clearly qualified. *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

The second was brought in the U.S. District Court for the District of New Jersey (the same jurisdiction as *Oxus Gold*). It appears that the Respondent did not argue that the BIT tribunal was not a "tribunal" for purposes of Section 1782 and the District Court granted the petition without addressing this issue; rather, the arguments focused on the possible use of the documents in the Ecuadorian court proceedings. On appeal, the U.S. Court of Appeals for the Third Circuit affirmed on the grounds that the discovery was properly sought for use in the Ecuadorian court proceeding. *In re Chevron Corp.*, 633 F.3d 153 (3d Cir. 2011). The Third Circuit went on to say, however, that "use of the evidence uncovered in a section 1782 application in the BIT arbitration . . . unquestionably would be 'for use in a proceeding in a foreign or international tribunal'" and Section 1782 would, therefore, apply. *Id*. at 161.

What does this conflicting jurisprudence mean for parties seeking to use Section 1782 in connection with an arbitration seated outside the U.S.? First, there is now a split of authority in the federal circuits, although it may not be ripe for Supreme Court review because the Fifth Circuit

opinion was unpublished and the Second Circuit has not revisited the *National Broadcasting* decision post-*Intel*.

Second, parties will note that, pursuant to Section 1782(a), the power to order discovery rests with "[t]he district court of the district in which [the target] resides or is found," and that an individual or corporation may be "found" in more than one district. Thus, when given a choice, parties are likely to file Section 1782 petitions in districts that are viewed as friendly to such petitions.

Third, for now, the Eleventh Circuit is the only jurisdiction in which the law relating to the applicability of Section 1782 to foreign arbitral tribunals is clear, and federal district courts in states encompassed by the Eleventh Circuit (Georgia, Florida and Alabama) are the only courts that will have to follow the ruling that Section 1782 applies to foreign arbitral tribunals.

Under the Fifth Circuit's rules, because the *El Paso* decision was unpublished, it is not binding precedent. District courts in the Fifth Circuit (Texas, Louisiana and Mississippi), however, may view the *El Paso* ruling that Section 1782 does not apply to foreign arbitral tribunals as persuasive authority, particularly since *El Paso* followed a prior, published precedent of that Court.

The position in the Third Circuit also is unclear. Arguably, courts in the Third Circuit should consider that Section 1782 applies at least to BIT tribunals, while they may or may not follow the holding in *Oxus Gold* and distinguish between "private" and "public" arbitral tribunals.

The law in other Circuits — especially the Second Circuit (covering New York, Connecticut and Vermont), which has not addressed whether *Intel* impacts its prior holding in *National Broadcasting* — is even more uncertain.

Thus, for better or worse, the courts in the Eleventh Circuit likely will be viewed as the most receptive courts to the use of Section 1782 in connection with international arbitrations — at least until more U.S. Circuit Courts of Appeal weigh into the debate or the U.S. Supreme Court settles the issue. Meanwhile, will this turn the Eleventh Circuit into a magnet for discovery actions in aid of foreign arbitrations under Section 1782? This remains to be seen.

(Full disclosure: The author was counsel for The Coca-Cola Company in the *Roz Trading* case and others at King & Spalding represent Chevron Corporation in the BIT arbitration referenced above).

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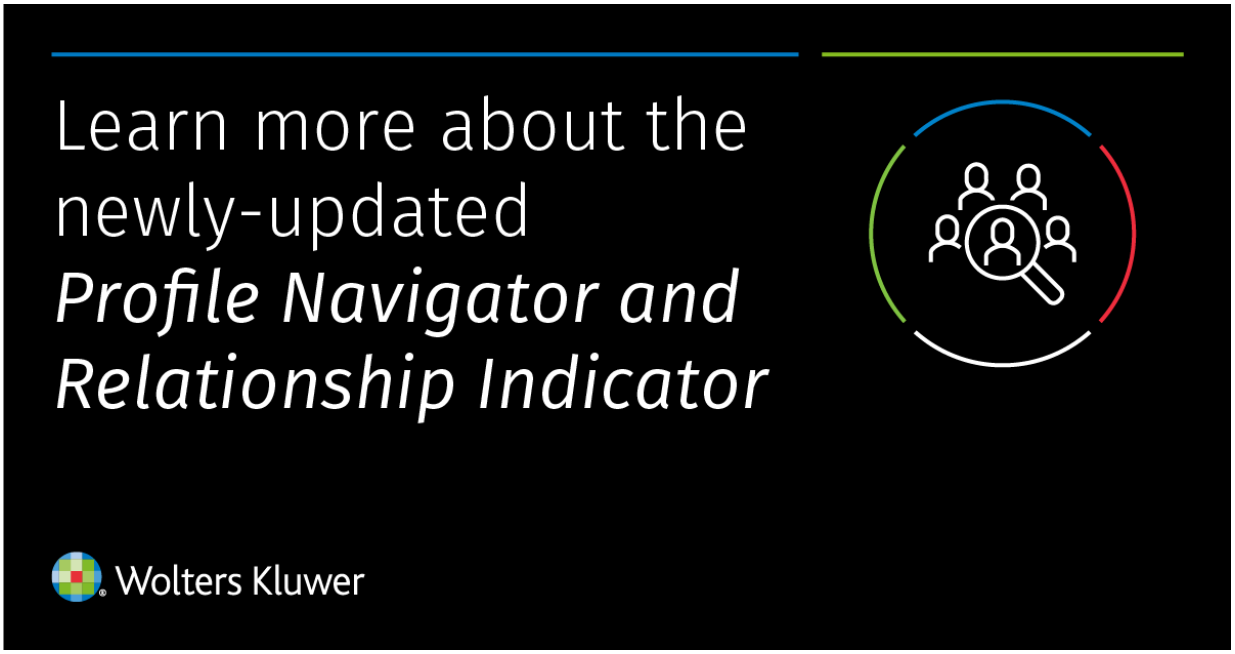

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