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An Eleventh Circuit U-Turn: How International Arbitration Practitioners Should Now Engage § 1782 Discovery in the United States

Christopher Smith (King & Spalding) · Wednesday, February 19th, 2014 · Young ICCA

Co-authored by Christopher Smith and James Menz, Schellenberg Wittmer

On 10 January 2014, the U.S. Court of Appeals for the Eleventh Circuit issued a highly anticipated decision in *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 2014 WL 104132 (11th Cir. Jan. 10, 2014) (hereinafter *Consorcio II*). The holding vacated the same panel's 2012 landmark decision permitting discovery under 28 U.S.C. § 1782 for proceedings before a foreign arbitral tribunal. *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012) (hereinafter *Consorcio I*). This issue has proven controversial following the Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), which broadly interpreted the availability of discovery under § 1782.

Following the *Intel* decision, the first time a circuit court addressed this issue was in *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa*, 341 F. App'x 31 (5th Cir. 2009). There, the Fifth Circuit held foreign arbitration panels are not "foreign or international tribunals" under § 1782, affirming its pre-Intel decision Rep. of Kazakhstan v. Biederman Int'l, 168 F.3d 880 (5th Cir. 1999).

Consorcio I challenged the Fifth Circuit's position, indicating the Supreme Court's broad interpretation of the term "tribunal" can include certain foreign arbitral panels. The Eleventh Circuit then applied a functional analysis, evaluating whether the tribunal satisfied several requirements discussed in Intel. After determining the answer to these questions was 'yes,' the court issued the discovery order.

In *Consorcio II*, the same Eleventh Circuit panel did an abrupt about-face and vacated its earlier decision. In a footnote, the court acknowledged Intel had left the arbitral tribunal issue unsettled. Because it had separate grounds upon which it could uphold the discovery order, the court declined to answer whether § 1782 applied to foreign arbitral tribunals.

After *Consorcio II*, the issue of whether a foreign arbitral tribunal falls under the definition of § 1782 remains unsettled. Apart from the Fifth Circuit (and there only in an unpublished opinion), no other federal appellate court has directly addressed this question. Further, because there is no longer a split among the circuits, the issue is now even less ripe for Supreme Court review than it

was prior to Consorcio II.

Given this state of affairs, how should arbitration and litigation practitioners confront § 1782 discovery? Whether making or opposing a motion under the provision, there are several issues of which attorneys in this area should be aware.

First, practitioners should be wary of relying too heavily on § 1782 for international arbitral proceedings, especially in the purely private contractual context. The district courts are likely to continue taking three broadly different approaches they have applied post-Intel. The first two are polar opposites, providing either that foreign arbitral tribunals satisfy the requirements of § 1782 or they do not. The third approach distinguishes between "private" commercial arbitrations and "public" investment arbitrations. This last approach is complicated by the blurring line between traditionally "private" contractual and "public" treaty arbitration. For further detail on these approaches, see a prior posting on this blog here.

Second, for lawyers who do attempt to mount a § 1782 argument for use in an international arbitration, close attention must be paid to which approach a given district court generally employs. Because the target of the discovery motion may 'reside' in more than one district, attorneys who file in districts applying a rule more favorable to their client are more likely to achieve a favorable outcome.

Third, and on a more cautious note, attorneys need to be aware that except for the Fifth Circuit, it is unclear how the appellate courts will confront this issue (if they decide to address it at all). While this creates substantial flexibility for the arguments that may be advanced, it also ensures a large degree of uncertainty for lawyers as to the efficacy of their position. This makes it difficult to determine whether a potential approach that might succeed before a given district court could backfire on appeal. While there is only so much practitioners can do to prepare for such an eventuality, attention should be paid at the outset to the relevant circuit court's broader case law involving § 1782. For instance, this would include statements by the court about the scope of the Intel decision and the functional analysis. This will give the practitioner the ability to make at least a reasoned conjecture regarding the (in)efficacy of certain approaches.

Fourth, attorneys need to be aware of alternative arguments that may be more effective with a court hesitant to expand the scope of § 1782. One such argument succeeded before the Eleventh Circuit in *Consorcio II*. See also *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011); In re Chevron Corp., 633 F.3d 153 (3d Cir. 2011). While refusing to grant discovery for an ongoing international arbitration, the circuit courts in those cases ultimately granted discovery on the basis of other contemplated civil and/or criminal proceedings. In its 1964 amendment to § 1782, the United States Congress deleted the requirement that judicial assistance be restricted to 'pending' proceedings. Consequently, Intel provides a proceeding need only 'be within reasonable contemplation.' To be sure, not every party will be able to make this argument. But for those parties contemplating other non-arbitral foreign proceedings – including against other parties – this is a potential alternative approach to satisfying the requirements of § 1782.

The doctrine of equitable estoppel has also succeeded in the context of § 1782. Therefore, parties should carefully consider their arguments and defenses before continuing proceedings under the statute. In *Ecuador v. Conner*, 708 F.3d 651 (5th Cir. 2013), Chevron was estopped from resisting the discovery request despite the fact the Fifth Circuit has opposed such orders under § 1782 in the past. The court reached this conclusion for several reasons, including the fact Chevron had on other

occasions (and in the same matter) sought and received discovery under § 1782 from courts in other circuits. In addition to forfeiting their rights to oppose such motions in the future, parties should also be aware resisting such motions could produce the reverse outcome, preventing a party from arguing it is entitled to discovery under § 1782.

Additionally, First Amendment protections have been successfully invoked by parties resisting discovery under § 1782. For example, in the Ninth Circuit, information may be protected under the First Amendment freedom of association, subjecting discovery of these documents to a heightened standard of scrutiny. *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009). This can result in a denial of § 1782 discovery even if the court finds the arbitral panel satisfies the "foreign or international tribunal" requirement. See *Chevron Corp. v. Donziger*, 2013 WL 1402727 (N.D. Cal. April 5, 2013).

Fifth, parties interested in avoiding (or ensuring) broad discovery should consider including a clause in their contract addressing the practice. See H. Christopher Boehning et al., *The Consorcio Decision and the Need to Account for Discovery Outside the Arbitration Procedure,* 18 IBA ARB. N. 120 (2013). This is especially important for parties with a presence in the United States interested in avoiding or limiting potential discovery under § 1782. In so doing, parties can avoid much of the uncertainty they might otherwise encounter. Lack of extensive discovery is widely recognized as one of the major advantages of arbitration. Consequently, for parties wishing to ensure a streamlined process, it would be advisable to include discovery waivers. Alternatively, parties could limit to the arbitral tribunal the right to seek discovery under § 1782. This avoids potential abuse of the provision by an opposing party.

Sixth, parties resisting a discovery motion should be aware that just because a court decides § 1782 applies in the arbitration context, after *Intel*, courts still have broad discretion to limit or even deny discovery. Consequently, if a court recognizes discovery is in principle permissible, this does not mean the party cannot still mount a successful defense to the motion.

Jeremy Bentham once said "the power of the lawyer is the uncertainty of the law." After Consorcio II, the § 1782 "foreign or international tribunal" element is as uncertain as ever. Given the unlikelihood of Supreme Court guidance on this issue in the near future, practitioners are well advised to tread carefully. The lawyers who succeed most in this environment will be those who appreciate the present level of uncertainty and are best able to use it to their client's advantage.

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