US Court of Appeals permits § 1782 discovery in international commercial arbitration

International Arbitration Newsletter

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The United States Court of Appeals for the Eleventh Circuit recently issued a decision that may have a significant impact on the taking of evidence in international arbitration. The court held that an arbitral tribunal constituted a "foreign or international tribunal" for purposes of section 1782 of Title 28 of the United States Code (28 U.S.C. § 1782) and granted a § 1782 application to obtain discovery for use in an Ecuadorian arbitration.

This decision will assist parties in an international arbitration to obtain discovery available in the United States for use in international arbitration proceedings.

US legal background

28 U.S.C. § 1782(a) permits any party or other interested person involved in proceedings taking place before a foreign or international tribunal (including proceedings not yet under way, but rather in “reasonable contemplation”), or the international tribunal itself, to make a request to a federal district court for an order compelling discovery from a person or entity that resides or is found in the district in which the court sits.

Discovery application

In Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc., No. 11-12897, 2012 WL 2369166 (11th Cir. Jun. 25, 2012), the underlying arbitration arose out of a foreign shipping contract billing dispute between the petitioner, Consorcio Ecuatoriano de Telecomunicaciones S.A. (CONECOL), and the respondent, Jet Air Service Equador S.A. (JASE).

CONECOL originally filed an application pursuant to § 1782 in the Southern District of Florida in order to obtain discovery for use in Ecuador before the Center for Arbitration and Conciliation of the Guayaquil Chamber of Commerce. CONECOL sought document production from JASE’s United States affiliate, which did business in Miami, relating to an alleged overbilling scheme conducted by JASE, as well as documents pertaining to two of CONECOL’s own employees, who were alleged to have colluded with JASE. Further, CONECOL sought to depose persons from JASE’s United States affiliate with knowledge pertaining to such documents or services rendered to CONECOL by JASE or its affiliate over the relevant time period. The District Court granted the § 1782 application and authorized CONECOL to issue a subpoena.

Decision of the Eleventh Circuit
The decision of the Eleventh Circuit turned on the meaning of "foreign or international tribunal" for the purposes of § 1782 - an issue that had been subject to considerable controversy in the past. The Eleventh Circuit held that the Ecuadorian arbitral tribunal, before which JASE and CONECOL's dispute was pending, was a foreign tribunal for the purposes of § 1782, thus permitting discovery in the international arbitration to be sought in United States federal courts.

The Eleventh Circuit referred to the Supreme Court's watershed decision in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), in which it held that the European Commission and EU courts dealing with EU competition law and regulatory claims qualified as "tribunals" under § 1782. The Eleventh Circuit relied on Intel as providing "substantial guidance" in favor of adopting an expansive definition of "tribunal" that included arbitration proceedings. The Eleventh Circuit concluded that the Ecuadorian arbitral tribunal qualified as a "foreign tribunal" because "it acts as a first-instance decision-maker; it permits the gathering and submission of evidence; it resolves the dispute; it issues a binding order; and its order is subject to judicial review."

Surveying the field: the significance of Consorcio Ecuatoriano

Following its decision in Consorcio Ecuatoriano, the Eleventh Circuit (Alabama, Florida and Georgia) became the first and only Circuit Court of Appeals to conclude that arbitral tribunals qualify under § 1782. Although the court's interpretation has garnered significant support among district courts throughout the country, the decision is particularly important because the only other Circuit Court to address the issue after Intel, the Fifth Circuit Court of Appeals (Louisiana, Mississippi, Texas) in El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, No. 08-20771, 2009 WL 2407189 (5th Cir. Aug. 6, 2009), reached the opposite result concluding that § 1782 does not apply to discovery for use in a private international arbitration. Significantly, the Fifth Circuit concluded that the Intel case did not disturb prior Fifth Circuit precedent in the Republic of Kazakhstan v. Biederman, 168 F.3d 880 (5th Cir. 1999). The Second Circuit (Connecticut, New York, Vermont) also reached a similar conclusion in National Broadcasting Company v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999), but has not yet addressed the issue after Intel.

Given this historic opposition to the premise that international arbitrations qualify as tribunals under § 1782 and the ratification of that interpretation by the Fifth Circuit in El Paso following Intel, Consorcio Ecuatoriano represents a significant new precedent that may galvanize the previously scattered district courts that have addressed the issue in recent years. The decision of the Eleventh Circuit is however only binding on federal district courts in Alabama, Florida and Georgia and is of persuasive authority to Circuit Courts of Appeals that have yet to rule on this issue and the district courts in the other States. Further disagreement is possible among the Circuit Courts of Appeals, likely leaving a final determination of this issue to the United States Supreme Court.

Conclusions: practical consequences

Although commentators will debate the merits of the Eleventh Circuit's decision for the foreseeable future, its consequences are clear. Parties to international arbitration proceedings will be able to seek discovery from a person or entity based in the district of the Eleventh Circuit and possibly in other circuits should the courts in those circuits follow this decision. This development is particularly significant where only one of the parties has activities in the United States because it could create a strategic advantage for the non-US party, which may be able to seek discovery from the US party and/or its affiliates. Moreover, although the court’s decision in Consorcio Ecuatoriano may cause parties to incur greater costs and delays, it will also assist fact-finders by providing them with access to previously unavailable evidence.

For more information about this decision, please contact Harout Jack Samra.

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