

# Client Alert

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## Eleventh Circuit Holds That Parties to Private International Commercial Arbitral Tribunals May Seek Discovery Assistance from District Courts in Aid of Arbitration

"The Eleventh Circuit's decision marks the first time that a federal court of appeals has extended the scope of the Section 1782 to include private intentional arbitration tribunals. Given this decision contradicts prior decisions of the Second and Fifth Circuit Courts of Appeal, the Supreme Court may soon decide the proper scope of Section 1782."

On June 25, 2012, the Eleventh Circuit Court of Appeals held in *Conсорcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA)* that proceedings before private international arbitration panels fall within the scope of 28 U.S.C. 1782 (Section 1782).<sup>1</sup> Section 1782 allows US district courts to compel an individual or corporation residing or found within that court's jurisdiction to give testimony or produce documents for use in a foreign or international tribunal. The Eleventh Circuit's decision marks the first time that a federal court of appeals has extended the scope of the Section 1782 to include private intentional arbitration tribunals. Given this decision contradicts prior decisions of the Second and Fifth Circuit Courts of Appeal, the Supreme Court may soon decide the proper scope of Section 1782.

### Background on Discovery Requests under Section 1782

Section 1782 provides that a US district court may compel any person who "resides or is found [in that district] . . . to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . ." The statute allows an "interested person" to apply directly to a district court to obtain discovery from a party to the dispute or even a third party, rather than resort to an existing international arbitration panel or by way of the Hague Convention on Taking Evidence Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters.<sup>2</sup>

In 2004, the Supreme Court in *Intel Corp. v. Advanced Micro Devices* broadly interpreted the statute by rejecting categorical limitations to Section 1782.<sup>3</sup> Instead, the court held that US district courts have the authority to grant applications for judicial assistance under Section 1782 if four statutory requirements are met: (1) the request must be made "by a foreign or international tribunal," or by "any interested person"; (2) the request must seek evidence, whether it be the "testimony or statement" of a person or the production of "a document or other thing"; (3) the evidence must be "for use in a proceeding in a foreign or international tribunal"; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance.<sup>4</sup>

The third requirement — that the evidence sought must be used in a proceeding before a “foreign or international tribunal” — has proven the most controversial. Since *Intel*, various district courts have disagreed in their interpretation of what constitutes a “foreign or international tribunal” and whether a private international arbitral tribunals fall under the scope of the statute. Interestingly, although *Intel* did not explicitly address the definitional issue of what constitutes a “foreign or international tribunal” under the statute, the court cited to the late Professor Hans Smit’s article broadly interpreting “international tribunal” as including, *inter alia*, international arbitral tribunals.<sup>5</sup> Nevertheless, several circuit and district courts have limited the scope of Section 1782, holding that it does not cover private international arbitral tribunals and was only intended to cover governmental or intergovernmental tribunals or state-sponsored adjudicatory bodies.<sup>6</sup>

### ***Consortio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.***

The Eleventh Circuit’s recent decision in *Consortio* is the first decision by a federal appellate court finding that a private international arbitration falls within the scope of Section 1782. Following this decision, on July 13, 2012, a Section 1782 application was granted in the context of a North Atlantic Free Trade Agreement (NAFTA) arbitration before the Southern District of Florida.<sup>7</sup>

*Consortio* concerned a contract billing dispute between Consortio Ecuatoriano de Telecomunicaciones S.A. (CONECEL) and Jet Air Service Ecuador S.A. (JASE), which arose before a private arbitration tribunal in Ecuador. Simultaneously, CONECEL contemplated civil and private criminal suits. CONECEL filed an application in the Southern District of Florida under Section 1782, seeking to obtain discovery from JASE’s US affiliate, for use in the international arbitration proceedings and potentially for use in the contemplated civil and private criminal suits. The district court granted the application and denied JASE’s motion to vacate the order.<sup>8</sup> The court found that Section 1782 did not require that the foreign proceeding be pending or imminent, but rather only that the proceeding “be within reasonable contemplation.”<sup>9</sup> Having determined that CONECEL had established that the civil and criminal actions were within “reasonable contemplation,” the court held that the discovery request fell under the scope of Section 1782. The court, however, did not reach the question of whether the pending private international arbitration between JASE and CONECEL qualified as a proceeding before a “foreign or international tribunal” for purpose of Section 1782.<sup>10</sup> JASE appealed.

Although not directly addressed by the district court (although it was briefed by the parties), the Eleventh Circuit considered whether private international arbitral tribunals fall within the scope of the statute.<sup>11</sup> The court relied on the broad and “wholly functional” interpretation of the term “tribunal” in *Intel* to reach its ruling.<sup>12</sup> As a result, the court examined the characteristics of the Ecuadorian arbitration panel, in particular: (1) whether the arbitral panel acted as a first-instance adjudicative decision-maker, (2) whether it permitted the gathering and submission of evidence (3) whether it had the authority to determine liability and impose penalties and (4) whether its decision was subject to judicial review.<sup>13</sup>

The court distinguished two earlier cases by the Second and Fifth Circuits, which found that Section 1782 did not apply to private international arbitration

proceedings, noting that the decisions were “rendered without [the] benefit” of the Supreme Court’s decision in *Intel*.<sup>14</sup> Of note is that the court did not address decisions subsequent to *Intel*, such as the Fifth Circuit Court of Appeals recent affirmation of its prior holding that Section 1782 does not apply to private international arbitral tribunals.<sup>15</sup>

## **Conclusion**

Since the Eleventh Circuit is the first court of appeals to interpret Section 1782 in such an expansive manner, parties and interested third parties to private international arbitrations may flood the district courts within the circuit (Alabama, Florida and Georgia) to seek discovery assistance in aid of international arbitration. Additionally, as Florida — one of the major US arbitration centers — is within the Eleventh Circuit’s jurisdiction, this decision could have a significant impact on arbitrations conducted in Florida and might deter parties from selecting Florida as a place of arbitration out of concern that they could be compelled to produce discovery or be subpoenaed for deposition before a US district court. Because of the split among the Courts of Appeal as to whether Section 1782 applies to private international arbitrations, the Supreme Court will likely be petitioned to hear a case under Section 1782 in the near future.

**Endnotes**

- <sup>1</sup> *Consortio Ecuatoriano de Telecomunicaciones. v. JAS Forwarding (USA)*, No. 11–12897, 2012 WL 2369166 (11th Cir. June 25, 2012).
- <sup>2</sup> Hague Convention on Taking Evidence Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, 20 U.S.T. 361 (1965).
- <sup>3</sup> *Intel Corp. v. Advanced Micro Devices*, 542 US 241, 255 (2004).
- <sup>4</sup> *Consortio*, No. 11–12897, 2012 WL 2369166, at \*11-12 (citing *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007)).
- <sup>5</sup> *Intel*, 542 US at 258 (citing Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-27 (1965)). The decision notes that Professor Smit has been credited as being one of the drafters of Section 1782.
- <sup>6</sup> See e.g. *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 190-91 (2d Cir. 1999) (holding that section 1782 does not apply to private arbitral tribunals and noting that Congress, when in 1964 it enacted the modern version of § 1782, only intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies); *Rep. of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) (holding that section 1782 does not apply to discovery for use in a private international arbitration); *La Comision Ejecutiva Hidroelectrica Del Rio Lema v. El Paso*, 617 F. Supp. 2d 481, 483 (S.D. Tex. 2008) (holding that discretion to order discovery on behalf of “foreign and international tribunals” under Section 1782 does not extend to arbitral tribunals and noting that in its *Intel* decision, the Supreme Court did not explicitly address the application of Section 1782 to arbitral tribunals) *aff'd El Paso v. La Comision Ejecutiva Hidroelectrica Del Rio Lema*, No. 08-20771 (5th Cir. 2009); *Norfolk Southern Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882, 885 (N.D. Ill. 2009) (noting that *Intel* did not endorse such a broad definition of tribunal as to include private arbitration tribunals); *In re Matter of the Application of Oxus Gold PLC*, No. MISC 06-82, 2006 WL 2927615, at \*6 (D.N.J. 2006) (distinguishing between arbitrations resulting from a contract between private parties and sovereign states, and finding that the latter only qualify as “tribunal” under Section 1782).
- <sup>7</sup> *In re Application of Mesa Power Group, LLC Pursuant to 28 U.S.C. § 1782*, Case No. 11-24335-CIV-UNGARO/TORRES (S.D.FI. July 13, 2012).
- <sup>8</sup> *Consortio*, No. 11–12897, 2012 WL 2369166, at \*1-2 .
- <sup>9</sup> *Id.* at \*8.
- <sup>10</sup> *Id.* at \*9.
- <sup>11</sup> *Id.* at \*12.
- <sup>12</sup> *Id.* at \*15.
- <sup>13</sup> *Id.*
- <sup>14</sup> *Id.* at \*19-20, n. 7 (distinguishing *Nat'l Broad. Co.* 165 F.3d 184 and *Biedermann Int'l*, 168 F.3d 880).
- <sup>15</sup> *El Paso v. La Comision Ejecutiva Hidroelectrica Del Rio Lema*, No. 08-20771 (5th Cir. 2009).

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