MEALEY'S™
International Arbitration Report

Eleventh Circuit Court of Appeals Resolves a Disputed Issue of Law – U.S. Discovery is Available in Private International Commercial Arbitration Proceedings

by
Elliot E. Polebaum
Eugene N. Hansen
and
Helene Gogadze

Fried Frank's International Arbitration Group
Washington, DC

A commentary article reprinted from the January 2013 issue of Mealey's International Arbitration Report

LexisNexis®

Commentary

Eleventh Circuit Court of Appeals Resolves a Disputed Issue of Law - U.S. Discovery is Available in Private International Commercial Arbitration Proceedings

By
Elliot E. Polebaum
Eugene N. Hansen
and
Helene Gogadze

[Editor's Note: Elliot E. Polebaum leads Fried Frank's International Arbitration practice group and is chair of the Firm's Washington, DC litigation department. Mr. Polebaum concentrates in international arbitration and complex civil litigation, representing clients before tribunals throughout the world and frequently serving as an arbitrator. Eugene N. Hansen is a litigation special counsel resident in Fried Frank's Washington, DC office. Mr. Hansen's practice focuses on international arbitration and commercial disputes. Helene Gogadze is a litigation associate resident in Fried Frank's Washington, DC office. Ms. Gogadze's practice focuses on international arbitration and commercial disputes. Copyright © 2013 by Elliot E. Polebaum, Eugene N. Hansen and Helene Gogadze. Responses are welcome.]

One of the challenges for parties and counsel in international arbitration is obtaining evidence from third parties because arbitral tribunals generally lack the authority to compel third parties to produce evidence. However, when the third parties are located in the United States and the seat of the arbitration is outside of the United States, there may now be an opportunity to obtain third party discovery in private international commercial arbitration. In a recent decision, the U.S. Court of Appeals for the Eleventh Circuit resolved a disputed issue of law and decided that parties in international commercial arbitration may petition the district court in the United States to take discovery from third parties located in the district. The decision is binding on the courts in the Eleventh Circuit, which includes the states of Florida, Georgia and Alabama, and will likely be influential in other circuits in future determinations on the availability of U.S. discovery in private international commercial arbitration proceedings.

Section 1782 of Title 28 of the United States Code has attracted attention from parties and counsel in international arbitration. Section 1782 permits "any interested person" to seek from a United States district court a discovery order directing a person located within the district to produce documents, other tangible evidence, and testimony "for use in a proceeding in a foreign or international tribunal." A number of U.S. courts, including the Second Circuit and Fifth Circuit, have limited the application of § 1782, deciding that the judicial assistance of U.S. courts is not available to obtain evidence for use in private international arbitration proceedings. According to these courts, a "foreign or international tribunal" does not include an international arbitration tribunal.[1]

Subsequently, the 2004 ruling of the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.*, provided seminal guidance on the scope of § 1782.[2] The Supreme Court endorsed a broad interpretation of the term "tribunal" and refused to impose "categorical limitations" on the application of the statute.[3] In determining whether the Directorate-General for

Competition of the European Commission was a "tribunal" under § 1782, the Supreme Court reviewed its functions and considered whether the body was a first-instance decision-maker, whose dispositive judgments are subject to judicial review.[4] Applying this functional analysis, the Supreme Court decided that the Directorate-General functioned as a "foreign tribunal" and therefore fell within the scope of § 1782.[5] The Supreme Court did not analyze or decide whether an international arbitral tribunal is a "tribunal" under the statute and did not reference the earlier decisions of the Second Circuit and Fifth Circuit. The Supreme Court did, however, cite throughout the opinion to Professor Hans Smit, a leading scholar of international arbitration and procedure and drafter of and commentator on the 1964 version of Section 1782. The Supreme Court quoted Professor Smit's broad definition of the term "tribunal" as including "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts."[6]

Since *Intel*, courts have split on the question whether the Supreme Court's decision and statutory construction mandate inclusion of international arbitral tribunals within the ambit of § 1782. Courts have been more willing to provide judicial assistance in aid of governmental and inter-governmental arbitral tribunals and other state-sponsored adjudicatory bodies than to private international arbitral tribunals. Thus, § 1782 petitions have been denied when applicants have sought evidence for use in commercial arbitrations under the auspices of private organizations such as Stockholm Chamber of Commerce and the International Chamber of Commerce.[7] On the other hand, applicants have been more successful in seeking § 1782 discovery in aid of international tribunals established under a bilateral or multilateral investment treaty or applying the UNCITRAL Arbitration Rules adopted by United Nations Commission on International Trade Law.[8]

The Eleventh Circuit recently became the first court of appeals to rule that § 1782 <u>*can*</u> be utilized to obtain evidence for use in a proceeding before a private international arbitration tribunal. In *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, a buyer of transportation logistics sought discovery in Florida for use in a private arbitration proceeding pending against the buyer in Ecuador.[9] The court applied *Intel*'s functional analysis and held that the private arbitration tribunal was a "tribunal" under § 1782 because (i) it acted as a first-instance adjudicative decision-maker, (ii) it permitted the gathering and submission of evidence, (iii) it had the authority to determine liability and impose penalties, and (iv) its final award was subject to judicial review in Ecuadorian courts, albeit review that does not extend to the merits and is largely limited to procedural defects in the arbitration proceedings and other constitutional challenges.[10] The Eleventh Circuit has opened the door to a broader use of § 1782, to reach not only "state-sponsored" tribunals but also private arbitral tribunals.

Importantly, however, even where § 1782 statutory requirements are met, the district court retains discretion to decide whether to provide assistance. The court must weigh a number of discretionary factors set forth by the Supreme Court in *Intel*.[11] Thus, for example, a court is more likely to order third parties to provide discovery as opposed to parties over whom a foreign tribunal can exercise jurisdiction. A court is less likely to order discovery where it considers that the foreign tribunal will not be receptive to the obtained evidence or has not authorized in advance the requesting party to proceed under Section 1782. A court also will consider whether a request is an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. In addition, a court may evaluate whether a request is otherwise intrusive or burdensome and appropriately limit the scope of discovery. Accordingly, the success of a § 1782 discovery application will depend not only on whether the court considers private international arbitral tribunals to fall within Section 1782, but also on the circumstances of the particular case as to which the court may exercise discretion.

While the debate over the interpretation of Section 1782's application to a "foreign or international tribunal" continues, and may have to be resolved by the U.S. Supreme Court, the *Consorcio* decision is a significant one. It likely will influence future decisions, and it provides an opportunity to take discovery in aid of

private international commercial arbitration of third parties located within the Eleventh Circuit.

Endnotes

1. *Nat'l Broad. Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999) (private commercial arbitrations administered by the International Chamber of Commerce are not included within the scope of § 1782); *Rep. of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999) (arbitrators in proceeding administered by Stockholm Chamber of Commerce do not constitute a "tribunal" for purposes of § 1782).

2. 542 U.S. 241 (2004).

3. *Id.* at 255.

4. *See id.* at 257-58.

5. 542 U.S. at 259.

6. 542 U.S. at 258 (quoting Hans Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015, 1026-35 (1965)). In a different article, Professor Smit has stated that private arbitral tribunals "[c]learly" come within the ambit of Section 1782, and thus, "tribunal in Section 1782 includes an arbitral tribunal created by private agreement." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 5–6 (1998).

7. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica Del Rio Lema*, 341 Fed. Appx. 31, 33-34 (5th Cir. 2009) (not extending § 1782 to private Swiss arbitration tribunals); *Norfolk Southern Corp. v. Gen. Sec. Ins. Co.*, 626 F. Supp. 2d 882, 884-86 (N.D. Ill. 2009) (finding that a private arbitration held in London, England did not fall within the scope of § 1782); *In re Application of Operadora DB*, 2009 WL 2423138, at *8-12 (M.D. Fla. Aug. 4, 2009) (declining to apply § 1782 to a private arbitration conducted under the International Chamber of Commerce). *But see In re Roz Trading Ltd*. No.1:06-CV-02305- WSD, 2007 WL 120844, at *1, 4 (N.D. Ga. Jan. 11, 2007) (applying § 1782 to a private arbitral panel convened by the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna); *In re Babcock Borsig*, 583 F. Supp. 2d 233, 238-40 (D. Mass. 2008) (qualifying a private arbitral tribunal convened under International Chamber of Commerce as a "tribunal" under § 1782 and refusing to draw a distinction between public and private arbitral bodies); *Application of Winning (HK) Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at *8-10 (April 30, 2010) (applying the functional test and concluding that the tribunal in a private arbitration conducted under the rules of the London Maritime Arbitrators Association was a "foreign tribunal" pursuant to § 1782); *In re Hallmark Capital Corp.*, 534 F.Supp. 2d 951, 955-55 (D. Minn. 2007) (applying § 1782 to a private arbitration proceeding in Israel).

8. *In re Application of Mesa Power Group, LLC*, 878 F. Supp. 2d 1296 (S.D. Fla. 2012) (granting § 1782 application for use in a NAFTA arbitration); *In re Application of Veiga*, 746 F. Supp. 2d 8, 22-23 (D.D.C. 2010) (allowing § 1782 discovery in aid of arbitration tribunal convened under a bilateral investment treaty and UNCITRAL Rules); *OJSC Ukrnafta v. Carpatsky Petroleum*, 2009 WL 2877156, at *4 (D. Conn. 2009) (approving § 1782 discovery in aid of arbitration proceeding governed by UNCITRAL Rules); *In re Matter of Application of Oxus Gold PLC*, No. MISC. 06-82, 2006 WL 2927615, at *4 (D. N.J. Oct. 11, 2006) (applying § 1782 to international arbitration governed by UNCITRAL Rules).

9. 685 F.3d 987 (11th Cir. 2012).

10. *Id.* at 995-99.

11. 542 U.S. at 264-66. ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT
edited by Lisa Schaeffer
The Report is produced monthly by

1600 John F. Kennedy Blvd., Suite 1655, Philadelphia, PA 19103, USA
Telephone: (215)564-1788 1-800-MEALEYS (1-800-632-5397)
Email: mealeyinfo@lexisnexis.com
Web site: http://www.lexisnexis.com/mealeys
ISSN 1089-2397