



## **Eleventh Circuit Holds An Arbitration Panel Is A Tribunal Under 28 U.S.C. § 1782 For Purposes Of Obtaining Discovery For Use In Foreign Arbitration**

John D. LaBarbera • 312.382.3111 • [jlabarbera@cozen.com](mailto:jlabarbera@cozen.com)

Gary M. Klinger • 312.382.3164 • [gklinger@cozen.com](mailto:gklinger@cozen.com)

As a matter of first impression, the United States Court of Appeals for the 11<sup>th</sup> Circuit, held that an arbitral panel in Ecuador was a tribunal under 28 U.S.C. § 1782 for purposes of obtaining discovery for use in foreign proceedings. *See, Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, No. 11-12879, 2012 WL 2369166 (11<sup>th</sup> Cir. June 25, 2012).

The appeal arose out of a foreign shipping contract billing dispute between Consorcio Ecuatoriano de Telecomunicaciones S.A. ("CONECEL") and Jet Air Service Ecuador S.A. ("JASE"). CONECEL filed an application in the Southern District of Florida pursuant to 28 U.S.C. § 1782 to obtain discovery for use in foreign proceedings in Ecuador. Section 1782 provides in relevant part:

The district court of the district in which a person resides or is found may order him 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*, including criminal investigations conducted before formal accusation.

In its application for the subpoena, CONECEL submitted that the foreign proceedings included both a pending arbitration brought by JASE against CONECEL for non-payment under the shipping contract, as well as contemplated civil and private criminal suits CONECEL might pursue against its former employees, who CONECEL alleged colluded with JASE in connection with approving JASE'S inflated invoices.

CONECEL's application sought discovery from JASE's affiliate in Miami which was involved in the invoicing operations. The district court granted the application and authorized CONECEL to issue the subpoena. JASE moved to quash the subpoena and vacate the order granting the application. JASE argued

that the evidence sought must be for use in a proceeding in a foreign or international tribunal, a requirement under the statute, and that the foreign arbitration did not fall within the scope of section 1782. The district court denied the motion and JASE appealed.

On appeal, the 11<sup>th</sup> Circuit held the pending arbitration between JASE and CONECEL fell within the scope of section 1782. In support of its holding, the court relied on the U.S. Supreme Court's decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004). The court pointed to the fact the Supreme Court in *Intel* emphasized the breadth of the statutory term "tribunal," and that the term was intended to "provide the possibility of U.S. judicial assistance in connection with administrative and quasi-judicial proceedings abroad." 542 U.S. 241, 158. Since the arbitration panel in Ecuador had the "authority to receive evidence, resolve the dispute, and award a binding decision," the 11<sup>th</sup> Circuit held the pending arbitration met the functional criteria articulated in *Intel*, and thus, affirmed the district court's decision.

The *Conecel* decision could have significant implications for U.S. businesses that have agreed to arbitrate disputes overseas as they could now be subject to extensive discovery in the United States under the reach of 28 U.S.C. § 1782 whereas limited disclosure is traditionally the norm in international arbitration proceedings.

---

*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:*

John D. LaBarbera at [jlabarbera@cozen.com](mailto:jlabarbera@cozen.com) or 312.382.3111

Gary M. Klinger at [gklinger@cozen.com](mailto:gklinger@cozen.com) or 312.382.3164