The *Consorcio* decision and the need to account for discovery outside the arbitration procedure

UNITED STATES

H Christopher Boehning
Paul, Weiss, Rifkind, Wharton & Garrison, New York
cboehning@paulweiss.com

Damiën F Berkhout
Paul, Weiss, Rifkind, Wharton & Garrison, New York

Peter Hering
Paul, Weiss, Rifkind, Wharton & Garrison, New York
phering@paulweiss.com

A recent decision by the Eleventh Circuit serves as a further warning that parties to arbitral agreements must account for possible discovery assistance by US courts outside the arbitral proceedings. In *Consorcio Ecuatoriano de Telecomunicaciones SA v JAS Forwarding (US), Inc*,[1] the Eleventh Circuit affirmed that a private arbitral tribunal can be deemed 'a foreign or international tribunal' under 28 USC section 1782 ('section 1782'), and thus judicial assistance in the gathering of evidence may be provided by the district court. This could have the effect of importing US-style discovery into private arbitrations. This is the first time a Circuit Court confirmed that private arbitral tribunals can fall under the scope of the statute. The 'functional approach' analysis used by the Court may become a model for a more coordinated approach in US courts, and may lead to more judicial assistance to private arbitrations.

28 USC section 1782 and the *Intel* decision

Under section 1782, a district court can grant an application for judicial assistance to foreign and international tribunals if four requirements are met:

- the request must be made by 'a foreign or international tribunal' or by an 'interested person';
- the request must seek evidence;
- the evidence must be 'for use in a proceeding in a foreign or international tribunal'; and
- the person from whom the evidence is sought must reside or be found in the district of the district court.[2]

Clear as these requirements may seem, there have been conflicting decisions about the statute in various US courts. In particular, there is disagreement about whether section 1782 also applies to private foreign arbitral tribunals. Before 2004, the consensus was that this was not the case and that judicial assistance should not be provided in private arbitrations. As exemplified by *NBC v Bear Stearns & Co* and by *Republic of Kazakhstan v Biedermann Int'l*, the leading cases on the topic reasoned, in essence, that the term 'tribunal' in section 1782 did not refer to private arbitral tribunals, but only to governmental tribunals.[3]

In 2004, this limited reading of the term 'tribunal' was put in question. In *Intel Corp v Advanced Micro Devices Inc*,[4] the Supreme Court held that Congress inserted the phrase 'a proceeding in a foreign or international tribunal' in section 1782 to provide for the possibility of US 'judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]'.[5] Based on this broad reading and a functional analysis of the European Union's Directorate-General for Competition's task and powers that were at issue, the Supreme Court concluded that it had no reason to exclude the European Commission (as a 'tribunal') from section 1782 to the extent that it acts as a first-instance decision maker.[6]

After the *Intel* opinion, conflicting case law about the scope of the term 'tribunal' developed. While certain US federal district courts decided that private arbitral tribunals can be deemed 'tribunals' under section 1782, based on the broad definition and functional analysis used in the *Intel* opinion,[7] other district courts noted that the Supreme Court was not directly faced with the question whether a private arbitral tribunal is a 'tribunal' under the statute and decided that the reasoning in *NBC* and *Biedermann* remained valid.[8]

The *Consorcio* case

In *Consorcio*, the Eleventh Circuit provides a framework based on a two-prong test to determine – on a case-by-case basis – whether or not assistance can be provided when dealing with private arbitral tribunals.

The first part of the framework is the 'functional approach' based on the Supreme Court's broad, functional reading of the term

'tribunal' in *Intel*. This approach examines the characteristics of the arbitral body in question to determine whether or not it is a 'tribunal' under section 1782. Inspired by *Intel* and district court cases already applying a functional test,[9] the court lists four criteria that must be met for an arbitral panel to be considered a section 1782 'tribunal': does the arbitral panel (i) act as a first-instance adjudicative decision maker; (ii) permit the gathering and submission of evidence; (iii) have the authority to determine liability and impose penalties; and (iv) is the arbitral decision subject to review?[10]

The second part of the framework concerns the use of discretionary powers by the district courts. Even if the private arbitral tribunal is a 'tribunal' under section 1782, under the *Consorcio* test, the district courts are still given discretion to decide whether or not to provide assistance in the case at hand. When providing guidance on this question, the court simply pointed to the four factors outlined in *Intel*:

- Is the person from whom discovery is sought a participant in the foreign proceeding?
- What is the nature of the foreign tribunal, the character of the proceedings abroad and the receptivity of the foreign government or the court or agency abroad to US federal court judicial assistance?
- Did the request conceal an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the US?
- Is the request otherwise unduly intrusive or burdensome?[11]

The answers to these questions should allow the district courts to decide whether or not assistance is warranted.

Reasons to believe *Consorcio* is here to stay

It is uncertain whether the framework provided by the Eleventh Circuit will prove to be the best view in the case law. It is certainly possible to argue that *Consorcio* is a disconcerting confirmation that there simply is conflicting case law about the meaning of the term 'tribunal'.

However, there is reason to believe that *Consorcio* will have a lasting influence.

First, the main conflicting circuit cases were, as the Eleventh Circuit put it, 'rendered without the benefit of the Supreme Court's subsequent Intel decision, in which the Court set forth a far broader and wholly functional definition of the term "tribunal", and declined to impose "categorical limitations" on the scope of section 1782(a).'[12] Secondly, the categorical distinction between governmental and private arbitral tribunals, which is the main conflict between circuit decisions, cannot be found in the text of the statute and is not supported by *Intel*, which rejected other categorical limitations. It seems highly unlikely that this categorical distinction is correct, and as soon as the categorical distinction is dropped, the analysis that remains is rather similar to the analytical framework set out in *Consorcio*. It should also be noted that the discretionary test provides sufficient room for courts to attach importance to the non-governmental 'nature of the foreign tribunal'. In other words, courts wanting to limit assistance to private arbitral tribunals can still do so under the functional approach.

The last observation is not unproblematic. As the framework provided by *Consorcio* leaves room for different outcomes, the particular outcomes of discovery applications under section 1782 may remain uncertain for a while. Additional case law will thus be necessary – and can be counted on to arise – to provide a better understanding of what the various criteria and factors in the framework entail and indeed whether or not the various elements of the framework make sense.

Considerations for parties to arbitration agreements

Unless (or until) the Supreme Court provides a view on whether private arbitral tribunals fall under section 1782, there will remain controversy about the scope of the statute. In light of *Consorcio*, parties to arbitration agreements should consider whether they want to be involved in discovery outside the arbitration. It can be assumed that generally, this is not the case. The arbitration agreement will have been agreed upon to prevent the need to go through the normal, governmental procedures. The section 1782 procedure would draw parties back into the 'regular' courts.

If parties want to minimise the impact of *Consorcio* and more generally section 1782, several actions can be taken. *Ex ante* inclusion of discovery waivers in the arbitration agreement will help minimise the chance of becoming involved in a section 1782 application. An example of language which can be included would be as follows:

> The arbitral tribunal shall have the exclusive discretion to order the disclosure of documents, the testimony of witnesses, and the discovery of any form of evidence in this arbitration, or for the purpose of any conflict that would fall under the scope of the arbitration agreement between parties. The parties will not request or initiate any disclosure, testimony or other discovery outside the arbitration proceeding. Evidence obtained in breach of this clause will not be admissible in arbitration.

Before inserting discovery waivers, the parties should consider that there are situations in which they may want to be able to obtain evidence outside the arbitration. Embroiled in contentious arbitration, a party may want to use a section 1782 application to try and force a settlement. Or more fundamentally, there may be situations in which the arbitral tribunal lacks the power to enforce disclosure of a document. In order to deal with these concerns, parties can amend the language of the discovery waiver to grant the arbitral tribunal the power to provide permission to request judicial discovery assistance outside the arbitration procedure. Similar language can be included when drafting the terms of arbitration, in circumstances where a dispute has already arisen and the parties are about to arbitrate.

The more general choices made in the arbitration agreement will also influence whether or not a section 1782 application is possible. If parties do not permit the gathering of evidence or if the arbitral tribunal does not have binding power to impose liabilities, the arbitral tribunal will likely not pass the functionality test. Similarly, the choice for particular arbitration venues and rules will influence the discretionary test. The IBA Rules on the Taking of Evidence in International Arbitration, for example, provide that the arbitral tribunal directs how discovery is dealt with (Article 3, paragraph 9), something that will be considered by district courts when considering the nature and character of the tribunal.

That leads to our final observation that ex post, if one is confronted with a section 1782 application, it is possible to use the analytical framework provided by *Consorcio* to determine how an application under section 1782 can be derailed. In essence, the criteria and factors listed by the Eleventh Circuit provide a checklist of vulnerabilities. Arguments that the arbitral tribunal will be unreceptive and that the application is unduly intrusive should at the very least help to minimise the scope of the discovery.

Notes

1 685 F.3d 987 (Eleventh Cir Fla 2012).
2 *Ibid*, at 993.
3 *NBC v Bear Stearns & Co*, 165 F.3d 184 (2d Cir NY 1999); *Republic of Kazakhstan v Biedermann Int'l*, 168 F.3d 880 (5th Cir Tex 1999).
4 542 US 241 (US 2004).
5 *Ibid*, at 258.
6 *Ibid*.
7 See, for example, *In re Application of Hallmark Capital Corp*, 534 F Supp 2d 951 (D Minn 2007); *In re Roz Trading Ltd*, 469 F Supp. 2d 1221 (ND Ga 2006).
8 See, for example, *Norfolk Southern Corp v Gen Sec Ins* Co, 626 F Supp 2d 882 (ND Ill 2009*); La Comision Ejecutiva Hidroelectrica Del Rio Lempa v El Paso Corp*, 617 F Supp 2d 481 (SD Tex 2008), *aff'd sub nom El Paso Corp v La Comision Ejecutiva Hidroelectrica Del Rio Lempa,* 341 F.App'x 31 (5th Cir 2009).
9 See, for example, *In re Winning (HK) Shipping Co*, 2010 US Dist LEXIS 54290 (SD Fla 2010); *In re Operadora DB Mex, SA*, 2009 US Dist LEXIS 68091 (MD Fla 1 August 2009).
10 *Consorcio*, 685 F.3d at 995.
11 *Ibid*, at 998.
12 *Ibid*, at 997 n 7. The *Conscorio* Court did not address the Fifth Circuit's decision in *El Paso Corp v La Comision Ejecutiva Hidroelectrica Del Rio Lempa.*