Analysis of *Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 11-12897, 2014 WL 104132 (11th Cir. Jan. 10, 2014)

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On January 10, 2014 the United States Court of Appeals for the Eleventh Circuit, which covers all federal appeals emanating from Florida, Georgia and Alabama, decided that a reasonably contemplated civil law claim, which would be brought in Quito, Ecuador is a "tribunal" for purposes of the collection of evidence pursuant to Title 28 section 1782 of the United States Code (28 U.S.C. § 1782). That section allows United States courts to provide assistance to foreign and international tribunals and to litigants before such tribunals who seek to obtain evidence in the United States for use in proceedings before such tribunals. However, the question of whether a private commercial arbitration panel qualifies as a "tribunal" is still open to interpretation.

Application of Consorcio Ecuatoriano de Telecomunicaciones S.A. ("CONECEL") v. JAS Forwarding (USA), Inc. ("JAS USA"), arises out of a dispute between two private parties. CONECEL claimed an extensive internal audit revealed that JASE billed CONECEL in excess of their prescribed shipping rates. Specifically, CONECEL claimed JASE used an extra multiplication factor to determine the final shipping prices. In response, JASE claimed that CONECEL failed to pay numerous invoices and consequently pursued arbitration in Ecuador as permitted under their contract. CONECEL claimed its own internal audit revealed two employees, "Egas" and "Narváez," "allegedly 'participated in the processing and approval'" of JASE's billing scheme. CONECEL further claimed that all evidence necessary to support its

claims against its former employees must be presented prior to filing its desired civil court action in Quito, Ecuador. To support this argument, CONECEL made that point that, if the civil action was successful, CONECEL could pursue a private criminal action against its former employees. Further, because it needs all of the information up front, CONECEL is waiting on the Section 1782 request before filing. Additionally, CONECEL stated it needs the documentation to rebut JASE's claims in their Ecuadorian arbitration proceedings.

CONECEL filed its request in the Southern District of Florida. Since JASE's U.S. affiliate, JAS USA, has an office and conducts business in Miami, FL, the Southern District was the proper venue to make the Section 1782 request. The district court granted CONECEL's request and JASE timely appealed to the United States Court of Appeals for the Eleventh Circuit. Judge Stanley Marcus, writing for the court, affirmed the district court.

Section 1782 has four prima facie elements before a discovery request may be granted.

> (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. (citing *In re Clerici*, 481 F.3d 1324, 1331-32 (11th Cir. 2007)).

JASE conceded that elements (1), (2), or (4) were not at issue. Rather, the dispute centered upon element (3), which forced the court to decide whether a proceeding in a foreign or international tribunal for which CONECEL sought discovery was

present. Under *Intel Corp. v. Advanced Micro Devices*, 542 U.S. 241 (2004), Section 1782 does not require a suit be pending or imminent but rather that the foreign proceeding be within "reasonable contemplation." The future proceedings must be more than speculative, however, and a "district court must insist on reliable indications of the likelihood that proceedings will be instituted within a reasonable time." (*In re Letter of Request from the Crown Prosecution Serv. of the U.K.*, 870 F.2d 686 D.C. Cir. 1989).

The court determined that CONECEL had evinced substantial intent to bring suit against its former employees. Therefore, the question for the contemplated action against CONECEL's former employees is whether that action constitutes a "proceeding in a foreign or international tribunal."

CONECEL raised two arguments: (1) that CONECEL needed the evidence for use in reasonably contemplated civil collusion proceedings that it may file against two of its former employees; and (2) that the arbitration between JASE and CONECEL is a proceeding already pending in a foreign tribunal.

The court decided that CONECEL's contemplated proceeding against its former employees was a proceeding in a foreign or international tribunal without ever reaching the second claim. While the court did not answer the question directly, Judge Marcus insinuates in footnote 4 that the court would lean towards finding an international arbitral tribunal satisfies element (3) ("in *Intel* the Court suggested in dicta that '[t]he term tribunal ... includes investigating magistrates, administrative and *arbitral tribunals,* and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.'"). Judge Marcus

did note that prior to the Supreme Court's decision in *Intel*, the Second and Fifth Circuits found private arbitral tribunals were outside the scope of Section 1782. Thus, the question still looms.

In concluding that the contemplated civil action met element (3), the court emphasized that CONECEL needs the information contained in the discovery request before it can bring its civil action. *Intel* noted that "[i]n civil law countries, documentary evidence is generally submitted as an attachment to the pleadings or as part of a report by an expert." Thus, Section 1782 covers this type of scenario.

Judge Marcus's opinion then segues into whether the district court, despite meeting the statutory requirements of Section 1782, still abused its discretion in permitting the discovery request.

Once the prima facie requirements are satisfied, *Intel* requires

> "these factors to be considered in exercising the discretion granted under § 1782(a): (1) whether 'the person from whom discovery is sought is a participant in the foreign proceeding,' because 'the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant'; (2) 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance'; (3) 'whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States'; and (4) whether the request is otherwise 'unduly intrusive or burdensome.' The Supreme Court in Intel added that 'unduly intrusive or burdensome requests may be rejected or trimmed.'"

Here JASE focused only on factor (4) (the other three were clearly not at issue), claiming CONECEL's request was overbroad and forced the revelation of proprietary and confidential information related to how JAS USA and JASE price their services. Judge Marcus accentuated however that once the Section 1782

factors are met, it is Federal Rules of Civil Procedure 26-36 that "contain the relevant practices and procedures for the taking of testimony and the production of documents." (*Weber v. Finker*, 554 F.3d 1379 (11th Cir. 2009)). Rule 26(b)(1) of the Federal rules of Civil Procedure allows for discovery of any nonprivileged matter relevant to any party's claim or defense. Therefore, JASE's claim was unfounded because CONECEL's request did not ask for general pricing information but rather only how JASE priced CONECEL. According to the court, this is not unduly burdensome, intrusive, or confidential. JASE's claim that confidentiality would be broken was insufficient because it was abstract and undefined. This claim must be made with specificity.

Finally, a sticking point with the court is that JASE did not seek to limit the request or find middle ground with CONECEL but instead sought to completely negate the entire request. JASE should have precisely identified what was overbroad and what they sought to restrict. The all-or-nothing approach is unsatisfactory and it is unreasonable to try and repudiate a legitimate discovery request. ("it is a tall order indeed for a party resisting a section 1782 application to establish on appeal that the district court abused its broad discretion in granting any discovery at all.") (*See footnote 5*).

Ultimately, CONECEL prevailed because their reasonably contemplated civil suit qualified as a proceeding in a foreign or international tribunal primarily because (1) their civil suit in Ecuador is clearly a "proceeding" as it is a civil law suit, (2) they needed the discovery material prior to filing the claim, and (3) the request they made pertained only to their relationship with JASE. Additionally, JASE should

have asked what documents it wished to remove from the request. Unfortunately, the court left open the question of whether an arbitral tribunal is encompassed by Section 1782, however footnote 4 of Judge Marcus's opinion appears to foreshadow the court's likely direction.