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The International Comparative Legal Guide to:

International Arbitration 2013

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A practical cross-border insight into international arbitration work

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The Use of Section 1782 Applications in aid of International Arbitration

Marc S. Palay

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Introduction

For potential litigants in disputes with a nexus to the United States, the expensive and sometimes burdensome US discovery process is frequently cited as a disincentive to litigating in US courts, and a reason for choosing international arbitration. US pre-trial procedures provide for broad discovery of information that is reasonably calculated to lead to the discovery of admissible evidence, including both extensive document production and the liberal conduct of pre-trial depositions. Extensive use of third-party subpoenas for production of documents and to summon witnesses for deposition is also permitted.

By contrast, most international arbitration practitioners consider US-style "fishing expeditions" as something to be avoided, and disclosure obligations in international arbitration typically are more limited, with the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") the reference standard. Depositions in international arbitration are virtually unheard of.

Wherever you chose to litigate, however, access to critical evidence can make the difference between winning and losing. And where such evidence lies in the hands of third parties, opportunities to obtain it in an international arbitration may, as a practical matter, be limited.

Even if you have made the choice to eschew a US forum, where relevant evidence for your case rests in the hands of US parties, the US courts may still be willing to help. US legislation allows US federal courts to assist private parties in the gathering of evidence for use before a foreign tribunal, but the use of such procedures for private international arbitrations has been controversial. In some recent decisions, such doubts are being resolved in favour of such use.

Under Section 1782 of Title 28 of the United States Code ("Section 1782"), a federal district court may, in its discretion, grant discovery in aid of foreign proceedings where three elements are met.[1]

- First, the person from whom the discovery is sought resides or is found in the district of the district court to which the application is made.
- Second, the application is made by a foreign or international tribunal or any interested person.
- Third, the discovery is for use in a proceeding before a foreign or international tribunal.

With respect to the third statutory element, the initial break through was in 2004, when the Supreme Court in *Intel Corp. v. Advanced Micro Devices* widened the scope of Section 1782 by applying it to an action before an international executive and administrative body.[2] In so doing, *Intel* endorsed the view that the term "foreign tribunal" includes "investigating magistrates, administrative and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal and administrative courts".[3] The Supreme Court considered that the entity in question – the European Commission – constituted a tribunal when it acted as a first-instance decision-maker in a proceeding "that leads to a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court".[4]

Since *Intel*, there has been much debate as to whether an "arbitral tribunal" – in particular a private arbitral tribunal – constitutes a "foreign tribunal" under Section 1782. While the circuit courts have split on this question,[5] a recent decision from the Eleventh Circuit Court of Appeals suggests that the trend is moving more steadily in the direction of "yes".[6] As a result, an application to a US court under Section 1782 is now one of the tools that should be considered by practitioners where depositions or discovery from US entities may assist in the prosecution of an arbitration claim or defence.

Not all proponents of international arbitration will consider this to be a welcome development. Opponents argue that application of Section 1782 to arbitration proceedings defeats one of the purposes of this alternative method of dispute resolution. Many parties to international arbitration select that forum precisely to avoid the costs and burden of US-style discovery. Moreover, in nearly every arbitration there are established procedures for party disclosure, although, as noted above, experienced arbitral tribunals rarely impose US-style discovery procedures. The Supreme Court in *Intel* recognised this fact, reasoning that when the person from whom discovery is sought is a participant in the foreign proceeding, the need for Section 1782 aid "generally is not as apparent" as where evidence is sought from a non-participant.[7]

On the other hand, even the most vocal opponents of US-style discovery may reconsider these views when faced with a concrete need to prove a claim or defence. Moreover, where third-party evidence is needed, Section 1782 aid may be the most practical means to secure crucial and otherwise unattainable evidence. Again, as reasoned by the *Intel* Court, "nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach …, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid".[8]

This chapter reviews the recent decision of the Eleventh Circuit Court of Appeals holding that a private arbitral tribunal does indeed fall under Section 1782, and then reviews important considerations a litigant will likely face when seeking or challenging discovery in aid of arbitration.

The Eleventh Circuit Court of Appeals: Trend-Setter?

Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.[9] arose out of a foreign shipping contract billing dispute between two companies that agreed to resolve the matter in a private arbitration in Ecuador. The Section 1782 application at issue sought discovery from a non-party to the arbitration, i.e., a US counterpart to one of the parties that was involved in the disputed invoicing.

Deciding on a motion to quash the subpoena and vacate the order granting the application, the Eleventh Circuit Court of Appeals held in 2012 that the arbitral tribunal before which the dispute was pending constituted a foreign tribunal for purposes of the statute. In reaching this conclusion, the court of appeals was guided by the *Intel* decision and focused in particular on the Supreme Court's emphasis on the "breadth" of the statutory term "tribunal".[10] While acknowledging that the Supreme Court in *Intel* was "not tasked with specifically deciding whether a private arbitral tribunal falls under the statute", the court of appeals considered that the Supreme Court's "broad functional construction" of the term tribunal provided substantial guidance.[11]

The court of appeals thus turned to an examination of the characteristics of the private arbitral body in that case which was seized with the dispute. Notably, the court analysed "whether the arbitral panel acts as a first-instance adjudicative decision-maker, whether it permits the gathering and submission of evidence, whether it has the authority to determine liability and impose penalties, and whether its decision is subject to judicial review".[12]

In *Consorcio Ecuatoriano*, the party opposing discovery only challenged whether the arbitral tribunal's decision was subject to judicial review, one of the considerations under the third *Intel* statutory factor described above. One of the important features of most modern arbitration statutes is the limitation of judicial review of arbitral awards, and the party opposing the application in *Consorcio Ecuatoriano* seized on this fact in its attempt to resist the application. The court of appeals, however, rejected this argument, and set a far less rigorous standard, reasoning: "One could not seriously argue that, because domestic arbitration awards are only reviewable in court for limited reasons (notably excluding a second look at the substance of the arbitral determination), this amounts to no judicial review at all".[13]

The court of appeals firmly rejected any suggestion that the requirement of judicial review is only satisfied when the "sum and substance of the arbitral body's decision is subject to full judicial reconsideration on the merits".[14] The court could "discern no sound reason to depart from the common sense understanding that an arbitral award is subject to judicial review when a court can enforce the award or can upset it on the basis of defects in the arbitration proceeding or in other limited circumstances".[15]

Relying on *Consorcio Ecuatoriano* and the broad functional set forth therein, a federal district court in *In re Mesa Power Group, LLC* recently held that a NAFTA arbitration "functionally qualifies" as a foreign tribunal under Section 1782.[16] In that matter, there was no dispute that the threshold requirements authorising judicial assistance under Section 1782 had been satisfied, and the application for document production and deposition testimony was granted.

Close Court Scrutiny of Whether Courts can Scrutinise an Arbitral Award

The functional analysis test set forth in *Consorcio Ecuatoriano* and in some of the other post-*Intel* cases addressing whether a private arbitral tribunal falls under Section 1782 requires that courts scrutinise closely an arbitral tribunal's authority to hear the dispute, to weigh evidence, and to issue a decision that is binding on the parties to the arbitration and subject to judicial review. Litigants seeking to uphold the grant of a Section 1782 subpoena should thus be prepared to make more than just a *prima facie* showing of these elements. This is particularly the case with respect to the availability of judicial review, on which the *Intel* Court placed great emphasis. A few points bear noting in this regard.

Whether a particular arbitral tribunal lacks adequate judicial review has proven to be a hotly-contested issue upon which many of the post-*Intel* cases have turned. Indeed, it was the sole challenge raised with respect to the private Ecuadorian arbitral tribunal in *Consorcio Ecuatoriano*. By contrast, a party seeking to avoid discovery will likely be unable to dispute that the arbitrators can collect evidence and issue a decision on the merits of the dispute since all modern arbitration rules clearly provide for this. Nonetheless, a party seeking discovery under Section 1782 should spell this out in its application. By way of illustration, under Article 22 of the LCIA Arbitration Rules, which authorises an LCIA arbitral tribunal to:

> *(d) ... order any party to make any property, site or thing under its control and relating to the subject matter of the arbitration available for inspection by the Arbitral Tribunal, any other party, its expert or any expert to the Arbitral Tribunal; (e) ... order any party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant; (f) ... decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal.*

The Swiss, ICC, and Vienna Arbitration Rules all include similar provisions regarding an arbitral tribunal's authority.[17]

The fact remains that – relative to US court decisions – arbitral awards are reviewable in court under a limited number of circumstances. Indeed, as noted, this is one of the principal attractions of international arbitration. A party seeking Section 1782 aid should provide, in the application, a detailed explanation of the extent and nature of judicial review of the future award, both under the national arbitration law of the place of arbitration, and in connection with any enforcement action under the New York Convention, assuming that the place of arbitration is a signatory country. Indeed, US judges and litigants can be surprisingly unfamiliar with the nature and limits of such judicial review.

For example, for an LCIA arbitration seated in London, it will be important to specify in the application to the district court that the arbitration is subject to the English Arbitration Act of 1996, which expressly provides for judicial review.[18] The English Arbitration Act allows parties to apply to a court for review of an award on the grounds that the tribunal lacked substantive jurisdiction or that there was a serious irregularity affecting the tribunal, proceedings or award.[19] The application should also explain that provisions in the LCIA rules limiting judicial review do not mean that judicial review has been eliminated. For example, the LCIA Arbitration Rules provide that parties waive the right to appeal only "insofar as such waiver may be validly made".[20] For a LCIA arbitration seated in London, the English Arbitration Act applies, and only permits waiver of non-mandatory provisions of law.[21] In addition, Article 29 of the LCIA Arbitration Rules which forbids judicial review of

decisions reached by the LCIA Court (whose decisions are administrative in nature) has no effect on decisions of the LCIA arbitral tribunal (which decides the substantive issues in dispute).[22] Finally, it should be recalled that – when a party seeks to enforce an award – the New York Convention provides grounds for courts to deny recognition and enforcement of foreign arbitral awards.[23]

When properly presented, we expect that other courts will embrace the view of the Eleventh Circuit Court of Appeals that limited judicial review does not amount to no judicial review at all, and does not alter the functional analysis.

The Intel Discretionary Factors

It is important to recall that a US district court's inquiry under Section 1782 does not end with a determination that the statutory factors have been met. Rather, where a litigant's Section 1782 application meets the statutory requirements, the Supreme Court has directed that a federal district court should also consider four factors to determine whether to exercise its discretion to grant the subpoena:

- first, whether the person from whom discovery is sought is a participant in the foreign proceeding;
- second, the nature of the foreign proceeding and whether the foreign tribunal is receptive to U.S. judicial assistance;
- third, whether the discovery request is an attempt to circumvent foreign proof-gathering restrictions; and
- fourth, whether the application is unduly intrusive or burdensome.[24]

Indeed, numerous applications have turned on these *Intel* discretionary factors. For example, a series of Ninth Circuit cases *denied* Section 1782 discovery on the basis of these discretionary factors even though the courts determined in each case that the statutory requirements *had* been met. The recent decision in *In re Application of Prabhat K. Dubey*, discussed below, is a notable exception.

The Nature of the Foreign Proceeding and Whether the Foreign Tribunal is Receptive to U.S. Judicial Assistance: In *In re Babcock Borsig*, the court considered that – based on the reasoning and dicta of *Intel* – an ICC arbitral tribunal is a "tribunal" within the meaning of Section 1782.[25] Nonetheless, the court ultimately denied (notably, without prejudice) the motion to compel discovery because, in its view, the real question was whether the ICC arbitral tribunal would be receptive to judicial assistance. The court found that both parties had failed to present "authoritative proof" regarding the ICC's receptivity to the discovery materials requested.[26] Interestingly, the court in *Babcock* emphasised its willingness to reconsider its ruling if the arbitral proceedings advanced to the stage where the ICC panel indicated its receptivity to the requested discovery materials.[27]

In *In Chevron Corp. v. Sheffitz*, a case involving a bilateral investment treaty arbitration, the court observed that there were two approaches to evaluating whether the foreign tribunal would be receptive to judicial assistance. On one view (similar to the analysis in *Babcock*), a court can require "authoritative proof" regarding the receptivity of the foreign tribunal. On a second view, it is the party opposing discovery that has the burden of proving that the tribunal is unreceptive to the evidence. Ultimately, the court reasoned, what mattered most to the court at the end of the day was that the arbitral tribunal "may have an interest in these documents".[28]

These decisions raise the question of what, from a practical perspective, constitutes "authoritative proof" that an arbitral tribunal would be receptive to judicial assistance, or "reliable evidence" that the tribunal would make use of the requested materials. Absent direct evidence from an arbitral panel – which may be unavailable in the early stages of the arbitration – counsel might, as a possible recourse, cite the applicable arbitration rules themselves to argue that they contemplate judicial assistance in appropriate circumstances.

Many modern arbitration rules recognise the right of parties to apply to state courts or other judicial authorities for interim or conservatory measures. For example, the LCIA (Article 25.3), Vienna (Article 22) and ICC (Article 28) Arbitration Rules each provide for interim and conservatory measures. Likewise, many national arbitration statutes – such as the US Federal Arbitration Act or the English Arbitration Act – provide for local court assistance in arbitration proceedings under certain circumstances, such as to stay litigation proceedings, to compel arbitration, or to appoint/remove arbitrators.[29]

Many courts have erred on the side of discovery in applying Section 1782, noting that the foreign tribunal can easily disregard material that it does not wish to consider. In this respect, some courts have held that persons applying for discovery under Section 1782 "enjoy a presumption in favor of foreign tribunal receptivity" that can only be offset by reliable evidence that the tribunal would reject the evidence.[30] To further such arguments, it can be useful to establish that the arbitrators under a particular set of arbitration rules will, in the end, have broad discretion to determine the admissibility and relevance of the requested evidence.[31] Similarly, many arbitrations incorporate the IBA Rules, which provide that the arbitral tribunal "shall determine the admissibility, relevance, materiality and weight of evidence".[32]

Another recent case that turned on the *Intel* discretionary factors involved a request for discovery in aid of a bilateral investment treaty ("BIT") arbitration, rather than a commercial arbitration. Such arbitrations are authorised by treaty, involve claims by investors against states or state entities, and are frequently conducted under the rules of the International Centre for Settlement of Investment Disputes ("ICSID"). In *In re Caratube Int'l Oil Co., LLP*, the court determined that the very nature of the ICSID arbitral tribunal seized with the dispute, and the character of the proceedings underway, weighed against granting the discovery petition. In reaching this conclusion, the court assumed, but did not evaluate, that an ICSID arbitration falls under the third statutory requirement of Section 1782.[33] Instead, the court focused directly on the *Intel* discretionary factors, and reasoned that, the claimant chose to bring its dispute before an ICSID arbitral panel (as opposed to a court), where parties are "free to set the rules for arbitrators to follow".[34] The court thus declared itself "reluctant … to interfere with the parties' bargained-for expectations concerning the arbitration process" and, in particular, the specific procedural rules set for discovery in that arbitration, which was well underway.[35]

Participants versus Third Parties: A critical *Intel* discretionary factor where an international arbitration is involved is whether the party from whom discovery is sought is a participant in the foreign proceedings, as opposed to a third party. As previously mentioned, the Supreme Court reasoned that the need for Section 1782 aid is less apparent when the discovery is sought from a party to the arbitration proceedings.[36] There are other important practical considerations that must be considered before filing a Section 1782 application against a party to an existing arbitration.

When parties submit a dispute to international arbitration, they typically agree on the procedural rules – including procedures for the exchange of documents and the examination of witnesses – that will govern the arbitration. Should a party to an arbitration thereafter apply to a US court for Section 1782 discovery directed at its counterparty, that counterparty will likely bring that application to the arbitral tribunal's attention, arguing that the

application is an end run around agreed-upon procedures and violates the principal of equal treatment of the parties. When faced with this issue, the court in *Caratube* (discussed above) alluded to the risk that a Section 1782 application be perceived as "a party's attempt to manipulate United States court processes for tactical advantage".[37] Indeed, such an attempt might even prompt the arbitral tribunal to contact the court directly and express its non-receptivity to the evidence and to US judicial assistance in that instance.

This suggests that where an arbitral panel is already in place, the tribunal should be consulted with respect to a Section 1782 petition directed to a party, and provided with a persuasive justification for the application. Notwithstanding this recommendation, there is no requirement that a party first request the discovery from the foreign tribunal.

By contrast, when a Section 1782 application seeks discovery of a third party, an arbitral tribunal will adopt a more hands-off approach, particularly where the evidence sought might not otherwise be obtainable. Nevertheless, it may still be advisable to inform the arbitration panel of a Section 1782 application against such a third party.

When it comes to disclosure from an opposing party, the situation may be different where the arbitration has not yet been brought, or where a panel has not yet been constituted. For example, it may be necessary to preserve evidence which you have reason to believe may be destroyed, or in some circumstances to gather more facts in order to determine whether and against whom to pursue a claim.[38] In this regard, the *Intel* Court held that, under Section 1782, Congress "does not limit the provision of judicial assistance to 'pending' adjudicative proceedings"; rather, proceedings need only be "within reasonable contemplation".[39] Thus, where there is a need for Section 1782 discovery from a party to a pending or contemplated arbitration, consideration should be given to doing so at an early stage, before an arbitral panel is seized with the dispute.

A recent decision from the Central District of California is illustrative of the practical implications that may arise when evidence is sought from a party, as opposed to a non-party, to an arbitration. *In re Application of Prabhat K. Dubey*[40] involved Section 1782 application for discovery in aid of a private AAA arbitration conducted under its International Dispute Resolution Procedures. The petitioner in that case sought documents from its counterparty in the AAA arbitration, whose panel had not yet been constituted.

Where the court considered that the arbitrator's position regarding the parties' need for documents was "unclear", it could have denied the discovery application purely on the *Intel* discretionary factors.[41] Yet, the court appears to have gone out of its way to deny the application under the statutory elements of Section 1782.[42] Notably, having remarked (in a footnote) that the parties did not address the extent to which an AAA arbitral award is subject to judicial review, the court expressly chose not to conduct the "functional" analysis set forth in many of the post-*Intel* decisions.[43]

Although this decision goes against the trend suggested by the Eleventh Circuit, it does suggest that the petitioner might have stood a better chance of obtaining a decision in its favour had its application not appeared to be an end-run around the arbitral process, and if it had demonstrated a real need to obtain judicial assistance in advance of the constitution of the arbitral tribunal.

BIT Versus Private Arbitrations

Because in recent decisions courts have routinely granted or upheld Section 1782 applications in aid of BIT arbitrations,[44] some parties opposing discovery have argued that there is a distinction between public and private tribunals, relying in part on two *pre-Intel* decisions from the Second and Fifth Circuits, which held that Section 1782 did not apply to private arbitrations.[45] The Second Circuit noted in particular that "the legislative history reveals that when Congress in 1964 enacted the modern version of § 1782, it intended to cover governmental or intergovernmental arbitral bodies and conventional courts and other state-sponsored adjudicatory bodies".[46] It bears noting, however, that the reasoning of these decisions (although not expressly overruled) is called into question by *Intel*.[47] In our view, there is no basis to draw a distinction between public and private tribunals when it comes to Section 1782 applications, especially in light of *Intel* and the recent decision in *Consorcio Ecuatoriano*. In either case, the tribunal permits the gathering and submission of evidence, resolves the dispute, and allows for judicial review.

Concluding Remarks

It seems inevitable that more courts will follow the broad functional analysis outlined in *Consorcio Ecuatoriano* and apply Section 1782 to private international arbitrations. Arbitration practitioners should thus familiarise themselves with Section 1782, which in appropriate circumstances can be a valuable evidence gathering tool.

Endnotes

1 28 U.S.C. § 1782(a).

2 *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 250 (2004).

3 *Intel*, 542 U.S. at 258 (quoting with approval Hans Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015, 1026-27 and nn. 71 & 73 (1965) (emphasis added).

4 *Intel*, 542 U.S. at 255.

5 For post-*Intel* cases holding that an arbitral tribunal falls under Section 1782, *see e.g., In re Winning (HK) Shipping Co., Ltd*., 2010 U.S. Dist. LEXIS 54290 (S.D. Fla. Apr. 30, 2010) (holding that a private arbitration in London subject to the English Arbitration act constituted a foreign tribunal under Section 1782); *OJSC Ukrnafta v. Carpatsky Petroleum Corp*. 2009 U.S. Dist. LEXIS 109492 (Conn. 2009) (granting discovery in aid of an arbitration before the Stockholm Chamber of Commerce on the grounds that the tribunal was a first-instance decision-maker whose decision may be subject to judicial review); *Comision Ejecutiva, Hidroelectrica del Rio Lempa v. Nejapa Power Co. LLC*, No. 08-135-GMS, 2008 U.S. Dist. LEXIS 90291 (D. Del. Oct. 14, 2008) (holding that *Intel* and post-*Intel* decisions indicate that Section 1782 does indeed apply to private foreign arbitrations); *In re Babcock Borsig AG*, 583 F. Supp. 2d 233 (D. Mass. 2008) (considering that a private ICC arbitral panel falls within the meaning of Section 1782, but denying the motion to compel discovery on other grounds); *In re Hallmark Capital Corp*., 534 F. Supp. 2d 951 (D. Minn. 2007) (opining that it is "best read not to impose any restrictive definitional exclusions that would necessarily preclude assistance to all private arbitral bodies", and granting discovery in aid of an Israeli arbitration proceeding); *In re Oxus Gold PLC*, Misc. No. 06-82-GEB, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007) (applying Section 1782 to investment treaty arbitrations); *In re Roz Trading, Ltd*. 469 F. Supp. 2d 1221 (N.D. Ga. 2006) (holding that an international commercial arbitral panel located in Austria was a tribunal under Section 1782 because the body acted as a first-instance decision-maker and issued decisions both responsive to a complaint and reviewable in court).

For post-*Intel* cases holding that an arbitral tribunal does not fall under the statute, *see e.g., In re Operadora DB Mexico, S.A. DE C.V.*, 2009 U.S. Dist. LEXIS 68091 (M.D. Fla. Aug. 4, 2009) (holding that an ICC arbitral panel did qualify as a tribunal under Section 1782 because its decisions were not judicially reviewable); *In re Arbitration in London, England*, 626 F. Supp. 2d 882 (N.D. Ill. 2009) (holding that the arbitral tribunal did not fall under the statute as its decisions were only subject to judicial review on narrow grounds); *La Comision Ejecutiva Hidroelectrica Del Rio Lempa v. El Paso Corp.*, 617 F. Supp. 2d 481 (S.D. Tex. 2008) (denying discovery on both the statutory grounds and the *Intel* discretionary factors); *In re Application of Prabhat K. Dubey*, Case No: SACV 13-677 JVS (SHx), 2013 U.S. Dist. LEXIS 83972 (C.D. Cal. June 7, 2013).

6 *See Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012).

7 *Intel*, 542 U.S. at 264.

8 *Intel*, 542 U.S. at 264.

9 *Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987 (11th Cir. 2012).

10 *Consorcio Ecuatoriano*, 685 F.3d at 994.

11 *Consorcio Ecuatoriano*, 685 F.3d at 995.

12 *Consorcio Ecuatoriano*, 685 F.3d at 995, citing *Intel*, 542 U.S. at 255 & n. 9, 257-58 and *In re Winning (HK) Shipping Co.*, 2010 WL 1796579, *7 (S.D. Fla. April 30, 2010) ("*Intel* suggests that courts should examine the nature of the arbitral body at issue").

13 *Consorcio Ecuatoriano*, 685 F.3d at 996.

14 *Consorcio Ecuatoriano*, 685 F.3d at 996.

15 *Consorcio Ecuatoriano*, 685 F.3d at 996-97.

16 *In re Mesa Power Group, LLC*, 878 F. Supp. 2d 1296 (S.D. Fla. 2012).

17 LCIA Arbitration Rules, Article 22.1(d)-(f). *See also e.g.,* Swiss Arbitration Rules, Articles 24 and 25 (evidence and hearings) and Section IV (the award); ICC Arbitration Rules, Articles 25 (establishing the facts of the case), 26 (hearing) and 31 (award); Vienna Arbitration Rules, Articles 20 (conduct of the proceedings) and 27 (award).

18 This was recognised in *In re App. of Winning (HK) Shipping Co.*, 2010 U.S. Dist. LEXIS 54290, at *22 (S.D. Fla. Apr. 30, 2010) (citing Section 68 of the English Arbitration Act).

19 English Arbitration Act, Ch. 23, Sections 67 and 68.

20 LCIA Arbitration Rules, Article 26.9.

21 English Arbitration Act, Ch. 23, Sections 4(1), 4(2), 67, 68, 69 and Schedule 1.

22 *See* LCIA Arbitration Rules, Articles 29,1 and 29.2.

23 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), Article V.1.

24 *Intel*, 542 U.S. at 264-66.

25 *Babcock*, 583 F. Supp. at 238-39.

26 *Babcock*, 583 F. Supp. at 241 (opining that the existence of "reliable evidence" that the tribunal would not make use of the requested materials would make it "irresponsible" for a district court to order discovery).

27 *Babcock*, 583 F. Supp. at 241.

28 *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254, 261-62 (D. Mass. 2010).

29 *See e.g.*, Federal Arbitration Act, Sections 3, 5. English Arbitration Act, Ch. 23, Sections 9, 17-18, 21 and 24.

30 *Pallares v. Kohn (In re Chevron Corp.),* 2010 U.S. Dist. LEXIS 134970, *14 (E.D. Pa. Dec. 20, 2010).

31 *See e.g.,* LCIA Arbitration Rules, Article 22.1(f); Swiss Arbitration Rules, Article 24(2); ICSID Arbitration Rules, Article 34(1); UNCITRAL Arbitration Rules, Article 25(6).

32 IBA Rules, Article 9.1.

33 *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 105 (D.D.C. 2010).

34 *Caratube*, 730 F. Supp. at 106-07.

35 *Caratube*, 730 F. Supp. at 106.

36 *See Intel*, 542 U.S. at 264.

37 *Caratube*, 730 F. Supp. at 106 (citing *Kazakhstan v. Biedermann Int'l*, 168 F. 3d 880, 883 (5th Cir, 1999)).

38 *See In re Gianasso*, 2012 U.S. Dist. LEXIS 25763, at **4-5 (N.D. Cal. Feb. 28, 2012).

39 *Intel*, 542 U.S. at 258-59.

40 *In re Application of Prabhat K. Dubey*, Case No: SACV 13-677 JVS (SHx), 2013 U.S. Dist. LEXIS 83972 (C.D. Cal. June 7, 2013).

41 *In re Application of Prabhat K. Dubey*, 2013 U.S. Dist. LEXIS 83972, at *18 (noting further that there was no evidence before the court as to the tribunal's receptivity to the requested materials).

42 *In re Application of Prabhat K. Dubey*, 2013 U.S. Dist. LEXIS 83972, at *4.

43 *See In re Application of Prabhat K. Dubey*, 2013 U.S. Dist. LEXIS 83972, at *11, footnote 3.

44 *See e.g., in re Republic of Ecuador*, 2011 U.S. Dist. LEXIS 103360 (E.D. Cal. Sept. 13, 2011); *Chevron Corp. v. Shefftz*, 754 F. Supp. 2d 254 (D. Mass. 2010); *In re Chevron Corp.*, 749 F. Supp. 2d 141 (S.D.N.Y. 2010); *In re Chevron Corp.*, 2010 U.S. Dist. LEXIS 47034 (S.D.N.Y. May 10, 2010); *In re Chevron Corp.*, 709 F. Supp. 2d 283 (S.D.N.Y. 2010); *Pallares v. Kohn (In re Chevron Corp.),* 2010 U.S. Dist. LEXIS 134970 (E.D. Pa. Dec. 20, 2010); *In re Chevron Corp.,* 2010 U.S. Dist. LEXIS 120798 (M.D. Tenn. Aug. 17, 2010).

45 *See Nat'l Broadcasting Co., Inc. ("NBC") v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 190 (2nd Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 881 (5th Cir. 1999) ("we elect to follow the Second Circuit's recent decisions that § 1782 does not apply to private international arbitrations").

46 *See In re Oxus Gold PLC*, 2007 U.S. Dist. LEXIS 24061 at *13 (citing NBC, 165 F.3d at 190).

47 *See e.g., Babcock*, 583 F. Supp. at 239 ("I do not find the reasoning in *National Broadcasting Co.* and *Republic of Kazakhstan* to be persuasive, particularly in light of the subsequent Supreme Court decision in *Intel*"); *In re Roz Trading, Ltd.* 469 F. Supp. at 1227 (suggesting that the Supreme Court's decision contradicts and undermines the reasoning of *NBC* and *Republic of Kazakhstan*); *In re Chevron Corp.,* 2010 U.S. Dist. LEXIS 120798, *5 (M.D. Tenn. Aug. 17, 2010) ("*Intel* puts the courts' reasoning in these cases in question").

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