No. 08-3518

United States Court of Appeals
For the Third Circuit

COMISIÓN EJECUTIVA HIDROELÉCTRICA DEL RÍO LEMPA,

Appellee/Plaintiff,

v.

NEJAPA POWER COMPANY, L.L.C.,

Appellant/Defendant.

MOTION BY AMICUS CURIAE DANIEL J. ROTHSTEIN, ESQ. FOR LEAVE TO FILE AMICUS BRIEF SUPPORTING REVERSAL OF DISTRICT COURT'S ORDER, AND FOR RELIEF FROM TIME AND PAGE LIMITS ON AMICUS FILING

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
CAUSE NO. 1:08-MC-00135, THE HONORABLE GREGORY M. SLEET

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United States Court of Appeals for the Third Circuit

La Comisión Ejecutiva Hidroélectrica del Río Lempa v. Nejapa Power Co. (No. 08-3518)

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF, AND FOR RELIEF FROM TIME AND PAGE LIMITS ON AMICUS FILING

Daniel J. Rothstein, being duly sworn, states as follows under penalty of perjury:

1. I am an attorney admitted to practice law in the State of New York. Simultaneously with this submission, I have applied for admission to practice before this Court.

2. I submit this affidavit in support of my motion to file an *amicus curiae* brief, which is attached to this motion. The brief presents the manuscript of my forthcoming article, which focuses on the fundamental legal issue in this case – whether discovery under 28 U.S.C. § 1782 is available to parties to a private foreign arbitration. The article, "A Proposal to Clarify U.S. Law on Judicial Assistance in Taking Evidence for International Arbitration," is scheduled for publication in June 2009 in *The American Review of International Arbitration*, Volume 19, No. 1. As discussed below (pp. 5-6, ¶ 10), the article introduces arguments and primary source materials that have not been presented in court decisions or other articles during the decades-long controversy over the applicability of § 1782 to private arbitration. The article argues that the decision

appealed from, and other recent district court decisions in accord with it, have been mistaken in concluding that § 1782 applies to private arbitration.

3. As further discussed below (pp. 10-11, ¶¶ 18-20), because this motion is being submitted as soon as possible after the article was accepted for publication, the motion seeks relief from the normal deadline for filing as amicus curiae. The motion also seeks relief from the normal page limits of an amicus curiae brief (*infra* pp. 11-12, ¶ 21).

4. My article supports the position of appellant in this case, urging that this Court reverse the district court's decision. On March 30, 2009, I sent the article to the parties, and I later informed them of my intention to file this motion. Appellant does not oppose this motion. Appellee opposes the motion.

Statement of Interest under FRAP 29(c)(1)

5. I am a Member of the Chartered Institute of Arbitrators, and have published on issues of international arbitration, international law, and foreign and comparative procedural and substantive law. My interest in submitting an amicus brief is to contribute to the clarification and consistent development of the law governing international arbitration, and thereby to promote international arbitration as an effective means of dispute resolution.

6. Neither my law firm nor I represent any parties in this case, a related appeal in the Fifth Circuit,[1] or any other case involving the issues presented in the two appeals. I am submitting an identical (other than matters of form) motion and amicus curiae brief in the Fifth Circuit case.

Statement under FRAP 29(c)(2) of Relevance and Desirability of Submission

7. The fundamental legal issue presented in this case – whether the term "foreign or international tribunal" in 28 U.S.C. § 1782 includes a private arbitration – is a question of first impression in this Court, and is before the U.S. Court of Appeals for the first time since the only Supreme Court decision focusing on § 1782, *Intel v. Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004). Before *Intel,* the Fifth and Second Circuits held that § 1782 was not intended to apply to private arbitration. *Republic of Kazakhstan v. Biedermann International,* 168 F.3d 880 (5th Cir. 1999); *National Broadcasting Co. v. Bear Stearns & Co.,* 165 F.3d 184 (2d Cir. 1999).

8. The controversy over the applicability of § 1782 to private arbitration has important ramifications for international arbitration conducted anywhere in the world with U.S. parties. Until the controversy is resolved, there is a risk that either (a) U.S. parties will be compelled to undergo discovery that was not contemplated

[1] *El Paso Corp. v. La Comisión Ejecutiva Hidroeléctrica del Río Lempa* (Fifth Cir., No. 08-20771). The two appeals present the same legal issues and arise from opposite decisions by two district courts concerning the same foreign arbitration.

in the arbitral agreement (Manuscript, pp. 32-34), or (b) if arbitrators frustrate efforts to take discovery under § 1782, the resulting arbitral awards will be unenforceable (Manuscript, pp. 12-14). The controversy has additional ramifications for international arbitration conducted in the United States, because discovery can be broader under § 1782 than under the Federal Arbitration Act. *Biedermann,* 168 F.3d at 882-83; *NBC,* 165 F.3d at 187-88.

9. The *American Review of International Arbitration,* where my article is to be published, has been a major forum for the debate over the applicability of § 1782 to private arbitration, and has published differing views on the question of the implications, if any, of the Supreme Court's opinion in *Intel* (by Justice Ginsburg) for private arbitration.[2] The *Review*'s editor-in-chief and founder, Professor Hans Smit, was the "dominant drafter" of the 1964 amendments that produced the modern version of § 1782.[3]

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[2] *See, e.g.,* H. Smit, *The Supreme Court Rules on the Proper Interpretation of § 1782: Its Potential Significance for International Arbitration—Postcript,* 14 AM. REV. INT'L ARB. 295, 331-32 (2003) (interpreting *Intel* as supporting application of § 1782 to private arbitration); *contra* Anna Conley, *A New World of Discovery: The Ramifications of Two Recent Federal Courts' Decisions Granting Judicial Assistance to Arbitral Tribunals Pursuant to 28 U.S.C. § 1782,* 17 AM. REV. INT'L ARB. 45, 71 (2006) ("§ 1782 should be interpreted not to include arbitral tribunals").

[3] *In re Letter of Request from the Crown Prosecution Service of the United Kingdom,* 870 F.2d 686, 689 (D.C. Cir. 1989) (Ginsburg, R.B., J.). Professor Smit and the future Justice Ginsburg were the Director and Associate Director, respectively, of a working group that assisted a Congressional commission

10. In addition to analyzing § 1782 and its legislative history materials (as the parties have also done), my article introduces arguments and primary source materials that have not been presented in court decisions or other articles on the question of whether § 1782 was intended to apply to private arbitration. Such new matter includes the following:

> (a) Almost without exception, the term "tribunal" in federal legislation refers to a governmental body, not a private body. (Manuscript, Sec. III.A, pp. 21-22)[4]
>
> (b) When the modern version of § 1782 was enacted in 1964, the United States had declined to join the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") because of serious misgivings set forth in the *Official Report of the U.S. Delegation to the 1958 U.N. Conference on International Commercial Arbitration*.[5] It would not have been logical for the United States to introduce evidentiary assistance for international arbitration after having declined to provide the more basic assistance of enforcing arbitral awards. (Manuscript, Sec. III.B.2, pp. 24-28)

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responsible for preparing the 1964 amendments. H. Smit, *American Judicial Assistance to International Arbitral Tribunals,* 8 AM. REV. INT'L ARB. 153, 154 (1997).

[4] The article's analysis of federal statutes that use the term "tribunal" expands analysis previously undertaken by others, including the Fifth Circuit. *See Biedermann,* 168 F.3d at 882 ("References in the United States Code to 'arbitral tribunals' almost uniformly concern an adjunct of a foreign government or international agency.")

[5] The *Official Report of the U.S. Delegation to the 1958 U.N. Conference on International Commercial Arbitration* is submitted as an addendum to the proffered amicus curiae brief. The Report, which has not been previously published, is scheduled to be published in the *Review* together with my article.

> (c) Soon after the 1964 amendments to § 1782, the United States took an active role in drafting the Hague Convention on the Taking of Evidence Abroad in Civil Matters (the "Hague Evidence Convention"). The U.S. proposals included extensive discussions of § 1782 as the background to the U.S. approach to the Convention. However, the United States did not propose that the Convention provide for assistance in taking evidence for arbitration. Moreover, the United States did not support such a proposal that was made during the work on drafting the Convention. (Manuscript, Sec. III.B.2, pp. 28-30)
>
> (d) During the period between 1958 (when the New York Convention was completed and work on the amendments to § 1782 began) and 1970 (when the United States ratified the New York Convention and signed the Hague Evidence Convention), international judicial assistance in taking evidence for private arbitration was not discussed in professional literature in the field of arbitration and apparently was not provided by other countries. (Manuscript, Sec. III.B.3, pp. 30-32)

11. The new matter summarized above is relevant to the issue of the legislative intent behind § 1782, because the statute does not define the term "foreign or international tribunal."[6] This new matter supports the Fifth Circuit's conclusion in *Biedermann* that "[t]here is no contemporaneous evidence that Congress contemplated extending § 1782 to the then-novel arena of international commercial arbitration." 168 F.3d at 882; *see also NBC,* 165 F.3d at 189-90.

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[6] *See Biedermann*, 168 F.3d at 882 ("the term 'tribunal' lacks precision and demands judicial interpretation consistent with the statute's purpose"); *NBC,* 165 F.3d at 188 ("the term 'foreign or international tribunal' is sufficiently ambiguous that it does not necessarily include or exclude the arbitral panel at issue here. Accordingly, we look to legislative history and purpose to determine the meaning of the term in the statute.")

12. Since *Intel,* the debate over the applicability of § 1782 to private arbitration has focused in part on *Intel*'s reference to a 1965 article by Professor Smit, in which he stated that under the 1964 amendments to the statute, "[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."[7] Regarding *Intel*'s reference to Professor Smit's article, the decision appealed from in the Fifth Circuit observed:

> [T]he Supreme Court has not addressed the application of § 1782 to arbitral tribunals, not even in *dicta. Intel* . . . deals with the application of § 1782 to a proceeding before the Directorate-General for Competition . . . of the Commission of the European Commission . . . . The Supreme Court was only making use of this quoted sentence from the article for the proposition that § 1782 applies to quasi-judicial agencies and administrative courts . . . .

La Comisión Ejecutiva Hidroélectrica del Río Lempa v. El Paso Corp., 2008 WL 5070119, *4-5 (S.D. Tex. 2008).

13. In holding that § 1782 does not apply to private arbitration, the Texas district court decision, which my article supports, is alone among post-*Intel* reported decisions. In the decision from which the appeal to this Court has been taken, the Delaware district court stated: "the Supreme Court's decision in *Intel* (and post-*Intel* decisions from other district courts) indicate that Section 1782 does indeed

[7] *Intel,* 542 U.S. at 258 (quoting H. Smit, *International Litigation Under the U.S. Code,* 65 COLUM. L. REV. 1015, 1026-27 and nn. 71, 73 (1965) (internal quotation marks omitted)).

apply to private foreign arbitrations." *Comisión Ejecutiva Hidroélectrica del Río Lempa v. Nejapa Power Co.,* 2008 WL 4809035, *1 (D. Del. 2008). *See also, e.g., In re Application of Babcock Borsig AG,* 583 F. Supp.2d 233, 239-40 (D. Mass. 2008) (holding that private arbitration is a § 1782 "tribunal," because, among other reasons, *Intel* "favorably quoted Professor Smit's definition of the term, which expressly included 'arbitral tribunals'").[8]

14. Controversy over the meaning of Professor Smit's 1965 reference to "arbitral tribunals" preceded *Intel.* In *Biedermann,* the Fifth Circuit acknowledged the relevant passage in Professor Smit's 1965 article, but concluded that an "international tribunal" in § 1782 is not a private arbitration, but rather means the same "international government-sanctioned tribunals" treated in § 1782's antecedents. *Biedermann,* 168 F.3d at 882; *see also supra* p. 5, fn. 4.[9]

15. My article suggests that the arguments over the meaning of Professor Smit's 1965 reference to "arbitral tribunals," and over the meaning of *Intel*'s citation to it, are inconclusive, and that better guidance on the intention behind § 1782 can be

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[8] *Accord In re Hallmark Capital Corp.*, 534 F. Supp.2d 951 (D. Minn. 2007); *In re Roz Trading Ltd.*, 469 F. Supp.2d 1221 (N.D. Ga. 2006). Similarly, as the Fifth Circuit noted, "the majority view of commentators" is "that private commercial arbitrations are within § 1782." *Biedermann,* 168 F.3d at 882 n.5.

[9] The Second Circuit reached the same conclusion, noting that the § 1782 legislative history materials cite a 1962 article by Professor Smit on inter-governmental arbitral tribunals, entitled "*Assistance Rendered by the United States in Proceedings before International Tribunals*." *National Broadcasting Co. v. Bear Stearns & Co.,* 165 F.3d 184, 190 (2d Cir. 1999).

found in the legislative context in which the 1964 amendments to § 1782 were enacted (*see supra,* pp. 5-6, ¶ 10). Moreover, the article argues that because of the consensual nature of international arbitration, parties to an international arbitration should not be compelled to undergo discovery unless it is provided for in clear legislation on the subject or in the arbitral agreement. (Manuscript, Sec. III.B.4, pp. 32-34)

16. Finally, my article proposes amendments to § 1782 so that it would clearly allow the possibility of ordering discovery for a foreign private arbitration, while also preserving the arbitrators' authority over whether the parties may request such an order. (Manuscript, Sec. IV.A, pp. 37-43) Because some courts have ordered discovery under § 1782 without giving proper deference to the arbitrators' views, the statute in its current form threatens to undermine the arbitrators' control over the arbitral proceedings. For example, in the present case, the Delaware district court ordered discovery although the arbitrators' position on the application for discovery was unclear:

> [I]t is not readily apparent to the court that the defendant misled or misrepresented the facts regarding the Tribunal's position towards discovery. It is clear from the record that the parties themselves never reached agreement on this issue. The Tribunal's ultimate position on this issue, however, is less clear.

Comisión Ejecutiva Hidroélectrica del Río Lempa v. Nejapa Power Co., 2008 WL 4809035, *1. Thus, the related appeals before this Court and the Fifth Circuit

present a conflict between what have been called two "key" elements of the "Magna Carta of Arbitral Procedure:"[10] the parties' need to obtain evidence to present their case and the arbitrators' authority to control the arbitral proceedings.

17. In sum, in light of the potential significance of the Court's decision beyond the circumstances of this case, and the possibility that the new matter introduced in the article (summarized *supra,* pp. 5-6, ¶ 10) will contribute to a resolution of the controversy over the applicability of § 1782 to private arbitration, I request that the motion for leave to file the attached amicus curiae brief be granted.

Request for leave to file beyond normal time limit

18. I hereby request leave under FRAP 29(e) to file the amicus curiae brief later than the normal time of seven days after the brief of the party whose position I support. I request such leave because I am making this submission promptly, as explained below.

19. After my article was accepted for publication, and after editing and checking of sources by the *Review*, I received the manuscript back from the *Review* on March 26, 2009. On March 27, 2009 and March 30, 2009, respectively, I sent (a) the manuscript by e-mail to all parties in the Fifth and Third Circuit cases, and (b) letters to the Clerks of the Fifth and Third Circuits (with copies e-mailed to the

[10] HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 550, 564 (1989)

parties), requesting that the manuscript be filed and/or distributed to the judges who will consider the appeals. After both courts' staffs informed me within a week that my letter request was denied, I immediately began preparing this motion, including creating a table of the over 150 authorities cited in the manuscript, conforming the manuscript to the requirements of FRAP 32, and applying for admission to practice before this Court.

20. Except for minor technical corrections to several citations in the footnotes, the manuscript presented in the amicus brief is identical to what I previously sent to the parties. A computer-generated comparison of the two versions has been provided to the parties.

Request for relief under FRAP 29(d) from page limitation

21. I hereby request leave to submit the entire manuscript notwithstanding the usual length requirements of FRAP 29(d), so that the new matter introduced in my article can be presented in the context of the at least 20-year-old debate over whether 28 U.S.C. § 1782 applies to private arbitration (*see* citations to early discussions, Manuscript, p. 1, fn. 1), and so that the issues of the legislative intent and purpose of § 1782 can be considered in light of my recommendations on how a proper domestic and international legal framework for judicial assistance in taking discovery for international arbitration might look (*see* Manuscript, Sec. IV, pp. 37-57).

CONCLUSION

On the basis of the foregoing, I request that the Court grant this motion for leave to file the attached amicus curiae brief, and for relief from the normal time and page limits on the filing.

Respectfully submitted,

Daniel J. Rothstein, Esq. *(Amicus Curiae, pro se)*

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April 14, 2009

/notarization/

Addenda: certificates

CERTIFICATE OF FILING AND SERVICE

In compliance with Fed. R. App. P. 25, 31 and Third Circuit L.A.R. 31.1, I certify that on April 14, 2009, I caused the original and six copies of this document, as well as a computer disk with an electronic version thereof, to be sent by overnight courier to the Clerk of the U.S. Court of Appeals for the Third Circuit. I further certify that on April 14, 2009, I caused an identical paper copy and computer disk to be sent to counsel listed below by overnight courier and an identical electronic version to be sent to them by e-mail.

I further certify that the above-mentioned courier transmission to the Clerk included my entry of appearance in the case, and copies thereof were included in the above-mentioned courier transmissions to counsel.

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April 14, 2009

CERTIFICATE OF COMPLIANCE WITH TYPE-FACE AND TYPE STYLE REQUIREMENTS

I certify this document complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point TrueType Times New Roman typeface.

I have requested leave of the Court to be excused from the volume limitations of Fed. R. App. P. 32(a)(7)(B).

/s/ Daniel J. Rothstein
Daniel J. Rothstein, Esq.

April 14, 2009

CERTIFICATE REGARDING BAR MEMBERSHIP

In compliance with Third Circuit L.A.R. 46.1(e), I certify that on April 14, 2009, I submitted to the office of the Clerk of the U.S. Court of Appeals for the Third Circuit an application for admission to the Bar of the U.S. Court of Appeals for the Third Circuit.

___/s/ Daniel J. Rothstein___
Daniel J. Rothstein, Esq.

April 14, 2009

CERTIFICATE OF VIRUS CHECK AND IDENTITY OF ELECTRONIC FILES

In compliance with Third Circuit L.A.R. 31(1)(c), I certify as follows:

The virus protection program McAfee Total Protection Service, version 4.7.0.538 Patch 003b has been run on the electronic version of this document, and no virus was detected.

The electronic version of this document (including the attachments referred to above) on the computer disk that I caused to be sent to the Clerk of this Court and counsel for the parties is identical to the paper and e-mail versions that I caused to be sent to them.

___/s/ Daniel J. Rothstein___
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April 14, 2009