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In re Caratube: Section 1782 Under the Arbitral Tribunal's Control

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In an important contribution to the ongoing debate among courts and commentators regarding the scope of 28 U.S.C. § 1782 – and the first such case related to ICSID proceedings – the D.C. district court recently exercised its discretion to decline a discovery request by Caratube International against the Republic of Kazakhstan. In re Caratube Int'l Oil Co., No. 10-0285, 2010 WL 3155822 (D.D.C. Aug. 11, 2010). Though the court assumed arguendo that ICSID arbitration is "a proceeding in a foreign or international tribunal" for purposes of Section 1782, it considered three factors in deciding whether to grant the petition for discovery.

First, the court considered whether the person from whom discovery is sought is a participant in the foreign proceeding. Given that the requests were directed towards certain individuals Caratube alleged were relevant to its dispute with Kazakhstan, but who were not parties to the ICSID arbitration, the court found that this factor weighed in favor of granting the petition.

Second, the court examined the nature of the foreign tribunal, the character of the proceedings, and the receptivity of the tribunal to U.S. judicial assistance. Here, the ICSID Tribunal denied Kazakhstan's request to order Caratube to cease and desist from the Section 1782 petition, but also stated that it "will have to decide [whether to admit any such discovery] having regard to its obligation to accord procedural fairness to the Parties." Id. at *2. While the court observed that a tribunal's willingness to accept Section 1782 evidence weighs in favor of granting such petitions, it found that Caratube in this particular case filed its petition late in the arbitration proceedings, after the Tribunal had ruled on various discovery disputes and less than a month before discovery was to close. Thus, the court held that Caratube improperly sought to undermine the ICSID procedures.

Third, the court assessed whether Caratube's petition "conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States." Id. at *5. It noted that Caratube proposed, and Kazakhstan and the Tribunal agreed, that the arbitration's discovery process should be guided by the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration. In particular, the Rules provided that if a party seeks discovery from a third party, it should ask the Tribunal "to take whatever steps are legally available to obtain the requested documents." Id. at *6. Thus, the court held that, based on Caratube's own proposed discovery rules, the Tribunal should itself decide whether to request discovery as permitted by Section 1782. Id.; see also 28 U.S.C. § 1782(a) ('The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal….").

The court reasoned that Caratube unilaterally "side-stepped" procedural guidelines to which it agreed in the arbitration and thus "undermined the Tribunal's control over the discovery process." Id. at *6 (emphasis added).

Reflecting principles of international comity, though without using these terms, the court recognized and respected the power of foreign and international tribunals such as ICSID to control their own proceedings. It expressed reluctance to interfere with the Tribunal's decision-making by granting Caratube's unilateral petition, which it perceived circumvented the agreed-upon procedural rules in the arbitration. This ruling serves the pro-arbitration policy of the United States by empowering arbitral tribunals and even encouraging them to issue Section 1782 petitions as they deem appropriate. Moreover, it appears to serve the common interests of both petitioners and respondents, who may not want to entirely supplant arbitration discovery rules with costly U.S. discovery, but may want a Tribunal's discovery rulings to have greater effectiveness with the ultimate threat of contempt sanctions for violating a U.S. discovery order. Indeed, other countries (to the extent they have not) should consider following the U.S. example in providing evidentiary assistance to arbitral tribunals, and such tribunals should consider utilizing it whenever deemed necessary to facilitate effective arbitration. See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1922-39 (2009) (discussing the role of national courts in the U.S., Switzerland, Sweden, Belgium, Netherlands, Germany, Japan, and England in obtaining evidence for use in international arbitrations).

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This entry was posted on Friday, September 10th, 2010 at 11:40 am and is filed under Disclosure, Section 1782 Discovery
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