D.C. Court Sends a Harsh Reminder to Yukos Shareholders: Section 1782 Discovery is Discretionary

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In re Application for an Order Pursuant to 28 U.S.C. § 1782 to Conduct Discovery for Use in a Foreign Proceeding, No. 1:17-MC-01466-BAH (D.D.C. Aug. 18, 2017)

Section 1782 discovery is a powerful tool in the hands of international litigants, but the grant of discovery is discretionary. Yukos shareholders got a recent reminder of that from the District Court for the District of Columbia in connection with their efforts to enforce the unprecedented $50-billion arbitral award against the Russian Federation. The award was set aside by a court in The Hague on jurisdictional grounds, and Petitioners sought discovery for use on appeal before the Court of Appeal for the Hague. The target of discovery was a Washington-based law firm Baker Botts and one of its partners. The firm and the partner represented Russian oil giant Rosneft in other Yukos-related proceedings in Armenia, Netherlands, and other countries. The petitioners sought evidence that would ostensibly demonstrate efforts by the Russian Federation to manipulate proceedings in Armenia so as to influence proceedings before a Dutch court. The evidence, petitioners asserted, would be used to respond to the allegation of unclean hands contemplated to be made by the Russian Federation in The Hague proceedings.

The petitioners passed the threshold requirements of section 1782 with flying colors. The district court easily found that: the respondents resided or could be found in the judicial district of D.C. where the petition was filed; the discovery was sought for use in a foreign proceeding – the appellate case in The Hague; and the petitioners, as litigants in foreign proceedings, were undoubtedly interested parties. But the petitioners hit a stumbling block at the *Intel* discretionary factors[1] – specifically with the requirement to assess whether the request is unduly intrusive or burdensome. Although that factor does not directly speak of relevance, the district court relied on *In re Veiga*[2] to include the relevance of the sought discovery to the foreign proceedings as a consideration. The district court found no sufficient connection between the evidence of Russian Federation's alleged manipulation of different Yukos proceedings sought by the petitioner and The Hague appellate proceedings, which implicated jurisdiction of the arbitral tribunal. In sum, the district court found that the relevance of the information to The Hague proceedings was "tenuous" and the burden on the respondents was "sufficiently onerous" to deny the request for discovery.

In considering the petition, the district court relied, in part, on the fact that the "unclean hands" argument had not yet been made in The Hague proceedings. If the Russian Federation does, in fact, makes that argument, perhaps it could open a window of opportunity for the Yukos shareholders for a renewed consideration of their section 1782 discovery request.

1 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 264–65 (2004).
2 *In re Veiga*, 746 F. Supp. 2d 8, 19 (D.D.C. 2010).

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