New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM

An incisivemedia publication
VOLUME 241—NO. 106
THURSDAY, JUNE 4, 2009

INTERNATIONAL ARBITRATION LAW

Expert Analysis

Enforcement of Annulled Awards: The Dutch Chapter

On April 28, 2009, the Amsterdam Court of Appeal rendered a decision granting leave to enforce in the Netherlands four arbitral awards issued by the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation in arbitral proceedings initiated by Yukos Capital SARL against OJSC Yuganskneftegaz. These awards had earlier been set aside by the Russian courts, being the "competent authority" for the purposes of Article V(1)(e) of the New York Convention 1958.

In refusing to recognize the decisions of the Russian courts setting aside the arbitral awards, and thereby reversing the decision of the lower court of Feb. 28, 2008, the Amsterdam Court of Appeal has firmly rejected any suggestion that its role as the enforcing court is a purely passive one. At the same time, the decision of the Court of Appeal adds another voice to the growing chorus of international condemnation of the Russian judiciary in the Yukos affair.

'Yukos Capital' Dispute

The dispute arose out of four loan agreements that were entered into in July and August 2004 between Yukos Capital, as lender, and Yuganskneftegaz, as borrower.

At that time, Yukos Capital, a Luxembourg based company, and Yuganskneftegaz both formed part of the Yukos Group, to which Yukos Oil Company also belonged. Yuganskneftegaz was a wholly owned subsidiary of Yukos Oil Company and one of its core production units.

In December 2004, in the context of the Russian Federation's attacks on Yukos, Baikal Finance Group, a shell company

By **Emmanuel Gaillard**

that was incorporated only a few weeks earlier, acquired 76.79 percent of the shares in Yuganskneftegaz through a sham auction orchestrated by the Russian authorities. Shortly thereafter, Baikal Finance Group was purchased by OAO Rosneft, a Russian state-owned oil company.

On Dec. 27, 2005, Yukos Capital initiated arbitration proceedings against Yuganskneftegaz before ICAC pursuant to the arbitration clause in each of the loan agreements. On Sept. 19, 2006, the ICAC tribunal rendered four awards in favor of Yukos Capital against Yuganskneftegaz in a total amount of approximately 13 billion roubles (U.S. $300 million), excluding interest and costs. Subsequently, Yuganskneftegaz merged with Rosneft and the latter became Yuganskneftegaz's successor in title.

> By its April 28 decision, the Amsterdam Court of Appeal has firmly rejected any suggestion that its role as the enforcing court is a purely passive one.

By judgments of May 18, 2007, the Moscow Arbitrazh Court (i.e., the commercial court) set aside the arbitral awards of Sept. 19 (Case Nos. A40-4576/07-69-46, A40-4581/07-69-47, A40-4577/07-8-46 and A40-4582/07-8-47). One of the grounds cited, which has proved the most contentious, concerned the managing partner of the law firm Nomos, which was representing Yukos Capital in the arbitration proceedings. According to the judgments, the law firm Nomos had:

(i) together with the Russian Chamber of Commerce and Industry, organized an international conference on the subject "United Nations Convention on Contracts for the International Sale of Goods: 25 Years of Enforcement" which had taken place in November 2005; and

(ii) among other law firms, taken part in organizing a workshop in November 2004 in Vienna entitled "Current Issues in 'East-West' Arbitration."

The speakers at both events included, among others, the same arbitrators who would later sit on the arbitral panel in the ICAC cases. Further, the materials from one of the conferences were reviewed at the arbitration hearings.

The Court held that failure to disclose these facts to the respondent deprived the latter of its procedural right to the challenge the arbitrator(s) concerned. Moreover, the representation of Yukos Capital by the managing partner of Nomos was held to be "incompatible with the fundamental principles of Russian law, such as equality of the parties and the adversarial nature of proceedings" and, as such, against the public policy of the Russian Federation.

These judgments were upheld in appeals to the Federal Arbitrazh Court for the Moscow District (Case Nos. KG-A40/6775-07 and KG-A40/6616-07, Decisions of July 26, 2007), albeit noting that the breach in question had amounted to a violation of the arbitral procedure agreed upon between the parties rather than of public policy, and to the Highest Arbitrazh Court of the Russian Federation (Case Nos. 14955/07 and 14956/07, Decisions of Dec. 10, 2007).

Permission to enforce the four arbitral awards in the Netherlands was refused by the Amsterdam District Court at first instance. In a decision dated Feb. 28, 2008, the district court held that a decision by the competent court in the place of arbitration to set aside an award should, in principle, be respected by the enforcing judge, save under exceptional circumstances (such as the violation of the right to a fair trial in the proceedings before the competent authority). In the case at hand, the

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district court was of the opinion that such exceptional circumstances had not been pleaded by Yukos Capital, or at any rate had not been sufficiently proved.

In Amsterdam Appeal Court

In the decision dated April 28, 2009, the Amsterdam Court of Appeal set aside the decision of the district court of Feb. 28, 2008, and granted leave to enforce in the Netherlands the arbitral awards of Sept. 19, 2006 (*Yukos Capital SARL v. OAO Rosneft*, Amsterdam Court of Appeal, Decision of April 28, 2009, Case No. 200.005.269/01).

Taking as its point of departure the fact that the New York Convention 1958 provides for the recognition and enforcement of arbitral awards, but not for the recognition of foreign judgments setting aside or annulling such awards, the Court of Appeal held that neither Article V(1)(e) of the New York Convention 1958 nor other provisions of the Convention compel the Dutch courts to automatically recognize the decisions of the Russian courts.

Rather, the Court of Appeal held that "[t]he question whether the decision of the Russian civil court to set aside the arbitral awards can be recognized in the Netherlands must be answered on the basis of the rules of general private international law" (paragraph 3.4).

The Court then proceeded to consider whether the decisions of the Russian courts to set aside the arbitral awards could be recognized in the Netherlands.

As a general proposition, the Court of Appeal stated that a foreign judgment will be recognized if a number of minimum requirements have been met, including that the foreign judgment was rendered after due process of law. According to the Court, there can be no due process of law if the foreign judgment is rendered by a judicial body that is not impartial and independent.

In examining the parties' submissions in this respect, the Court of Appeal quoted various sources submitted by Yukos Capital to demonstrate the lack of independence and impartiality of the Russian judiciary. The Court of Appeal also referred to, and quoted from, the substantial body of case law that has been established by the courts in various European countries on the political motivation underlying the Yukos affair:

Michael Cherney v. OV Deripaska [2008] EWHC 1530 (Comm), July 3, 2008; Decision of the Swiss Cour de droit public on the Administrative Law Appeal of M. Khodorkovsky against the decision of the Swiss Federal Prosecutor's Office, Aug. 13, 2007; Judgment of the Bow Street Magistrates' Court, March 18, 2005; Judgment of the City of Westminster Magistrates' Court, Dec. 19, 2007; Judgment of the District Court of Amsterdam in *Godfrey et al. v. Rebgun et al.*, Oct. 31, 2007; Decision of the Highest Administrative Court of Lithuania, Oct. 16, 2006.

In light of the above, the Court of Appeal made a number of key findings.

First, it held that "[t]here is a close interwovenness of Rosneft and the Russian State" (paragraph 3.9.1).

Second, it held that "[t]he established facts further show that there is an undeniable connection between the dispute at hand between Yukos Capital and Rosneft and the altercations in Russia that led to the dismantling and bankruptcy of Yukos Oil Company" (paragraph 3.9.2). The Court continued that "[t]he case at hand, in view of said connectedness, the ties between the Russian State and Rosneft and the substantial interest of the claim at hand, also pertains to considerable interests in the dispute that the Russian State considers to be its own" (paragraph 3.9.2).

The Amsterdam Court of Appeal decision is yet another instance of the courts outside of the Russian Federation, including in Cyprus, Liechtenstein, Switzerland and the UK, concluding that the Russian judiciary lacks independence and impartiality, at least as concerns the Yukos affair.

Third, and significantly, the Court concluded that the Russian judiciary lacks independence and impartiality in matters pertaining to the Yukos affair:

> Rosneft has insufficiently rebutted that the Russian judiciary in cases that pertain to the (former) Yukos group (or parts thereof) or the (former) directors thereof and which concern interests that the Russian State considers to be its own, is not impartial and independent, but allows itself to be led by the interests of the Russian State and is instructed by the executive. […]
>
> On grounds of the preceding the Court of Appeal concludes that it is *in this way* plausible that the judgments of the Russian civil court in which the arbitral awards were set aside were the result of a judicial process that must be qualified as partial and dependent, that these judgments cannot be recognized in the Netherlands. (paragraphs 3.9.3 and 3.10)

Having resolved that the decisions of the Russian courts "must be ignored," the Court of Appeal went on to consider whether an exequatur of the awards may be granted. The Court promptly rejected the remaining grounds advanced by Rosneft for refusing leave for enforcement (based on Articles V(1)(b) and V(2)(b) of the New York Convention 1958) and granted leave to enforce the awards in the Netherlands.

Partiality of Russian Judiciary

The decision of the Amsterdam Court of Appeal is yet another instance of the courts outside of the Russian Federation, including in Cyprus, Liechtenstein, the Netherlands, Switzerland and the United Kingdom, concluding that the Russian judiciary lacks independence and impartiality, at least as concerns the Yukos affair.

As noted in the decision of the Court of Appeal itself, there has been a consistent line of cases in which the courts have found that the criminal prosecutions against Mikhail Khodorkovsky, the former CEO of Yukos Oil Company, Platon Lebedev and others, and the dismantlement of Yukos Oil Company, to be politically motivated and fundamentally flawed.

Indeed, in October 2007, in a separate set of proceedings, the District Court of Amsterdam held that the tax cases brought by the Russian Federation against Yukos Oil Company violated due process principles under Dutch law and Article 6 of the European Convention of Human Rights, and that the Russian Federation had deprived Yukos Oil Company of a fair trial (*Godfrey et al. v. Rebgun et al.*, District Court of Amsterdam, Oct. 31, 2007, Case No. 355622/HA ZA 06-3612). In relation to the alleged additional taxes owed by Yukos, the district court there observed:

> [T]he course of affairs as represented hereinto before can only lead to the conclusion that the way in which the (size of the) additional tax assessment owed by Yukos Oil was assessed first by the Russian Tax Ministry and subsequently by the tax court cannot stand the test of criticism. […]
>
> The subsequent hearing before the tax court and the appeal are in violation of the fundamental principles of due process of law as generally accepted in the Netherlands and outlined in Article 6 ECHR, but which also apply outside the sphere of applicability of that Article of the Convention. […] The conclusion must be, therefore, that in the course of the determination of (the extent of) the tax it owed to the Russian State, Yukos Oil was deprived of a fair trial. (paragraph 3.8)

As a result, the district court held that:

> The above leads to the final conclusion that the Russian bankruptcy order in which Rebgun was appointed receiver in the bankruptcy of Yukos Oil was

effected in a manner not in accordance with the Dutch principles of due order of process, and is thus in violation of the Dutch public order. For that reason, the bankruptcy order cannot be recognized and the receiver's powers that ensue from it under Russian law cannot be exercised by Rebgun in the Netherlands. (paragraph 3.21)

In some respects, the Amsterdam Court of Appeal may be considered to have gone further by concluding that in all cases concerning the Yukos affair, not simply the much publicized tax and bankruptcy proceedings, the Russian judiciary has been led by the interests of the Russian state.

Awards Set Aside at the Seat

Though once considered to be moving in the same direction, French and U.S. courts have increasingly adopted divergent positions on the enforcement of arbitral awards set aside in the country where they were rendered.

In France, a consistent line of cases, including *Norsolor*, *Hilmarton*, *Bechtel* and, recently, *Putrabali*, have held that the fact that an award has been set aside in the country where it was rendered is not a ground for refusing enforcement of that award in France. This is consistent with the view that the courts' review should focus on the arbitral award itself, not on the court decisions surrounding its adoption (see E. Gaillard, "Autonomy of International Arbitration," New York Law Journal, Dec. 14, 2006).

As a consequence, as noted by the Cour de cassation in *Putrabali*, "an international arbitral award, which is not anchored in any national legal order, is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought." (*Sté PT Putrabali Adyamulia*, Cass. Civ. 1, June 29, 2007; see also E. Gaillard, "Aspects philosophiques du droit de l'arbitrage international" (Martinus Nijhoff Publishers, 2008), paragraph 127).

Following this approach, the courts in the place of arbitration hold no precedence over those in the place of enforcement in terms of their legitimacy of the review of arbitral awards. In each case, the relevant question is whether the local rules for enforcement of the award are met, irrespective of the decisions of foreign courts, including at the seat of the arbitration.

In the United States, on the other hand, the delocalized approach once favored in *Chromalloy* has given way to almost complete deference to the courts at the seat of the arbitration, which are considered as having "primary" jurisdiction over the validity of the award (see *Alghanim*, *Baker Marine*, *M Spier*, *Pertamina* and *TermoRio*).

In *TermoRio*, for example, the U.S. Court of Appeals for the District of Columbia Circuit declared that a "principal precept" of the New York Convention 1958 was that "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made" (*TermoRio SA ESP v. Electranta SP*, 487 F.3d 928, 936 (D.C. Cir. 2007)). The court continued:

"The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to 'competent authority' to 'set aside' an arbitration award made in its country" (at 937).

According to this classic territorial approach, the role of the enforcing court is a purely passive one.

Prior to the recent decision of the Amsterdam Court of Appeal, the position in the Netherlands was that the Dutch courts would refuse, in principle, enforcement of an award set aside in the country where it was rendered. As noted, at first instance, by the Amsterdam District Court:

"The New York Convention expressly assigns the assessment of, if one can put it that way, the right to existence of such arbitral award to the relevant domestic judge. The exequatur judge should not involve himself in this assessment" (paragraph 6.5.3.2).

This echoes the decision of the *TermoRio* court. However, the suggestion that the drafters of the New York Convention 1958 sought to draw jurisdictional boundaries between the judge sitting at the place of arbitration and the judge in the country of enforcement, granting the former the exclusive right to determine the validity of an award and imposing upon the latter an obligation to recognize such decision sits uneasily with the text and structure of the Convention.

It ignores, for example, the language of Article VII of the Convention which allows parties to avail themselves of rules that are more favorable. It also fails to explain why a decision of the court at the seat of the arbitration declining to set aside an award is not shown equal deference. The fact is that the New York Convention 1958 does not establish any such hierarchy.

The decision of the Amsterdam Court of Appeal is therefore to be lauded, in as much as it recognizes that the setting aside of arbitral awards by the courts at the seat of the arbitration does not automatically render the awards unenforceable in the Netherlands.

By strengthening its role as the enforcing court based on the legal requirements of the sole country of enforcement, the Court of Appeal has preserved the discretionary power granted by the New York Convention 1958 with respect to the recognition and enforcement of awards and ensured that more than mere lip service is paid to the permissive "may" in Article V(1) of the Convention. Where, as is the case here, it is widely recognized that the local courts do not provide a neutral forum for resolution of the parties' disputes, any other result, which would follow from a blind allegiance to the courts at the seat of the arbitration, is hardly defensible.

While the Dutch courts have thus moved a step closer to their French counterparts, the better view, in our opinion, remains that it is the arbitral award itself, and not the decision setting aside such award, that should be the subject of review in enforcement proceedings.

By focusing on the arbitral award, the enforcing court avoids the delicate situation of having to pass judgment on the decision of the courts at the seat of the arbitration. At the same time, it prevents the latter courts from thwarting the enforcement of an award by artfully hiding their bias or giving the appearance of due process, notwithstanding that the award may have been set aside on contrived grounds.

As the Amsterdam Court of Appeal rightly reminds us, the New York Convention 1958 is concerned with the recognition and enforcement of foreign arbitral awards, not foreign judgments, and that is where the spotlight should remain.