CHAPTER 4

The Aftermath of the Hague District Court Judgment: Are the Yukos Shareholders Now Shut Out from Enforcing the ECT Awards through the English Courts?

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Abstract

Following the recent judgment of the Hague District Court setting aside six Energy Charter Treaty (ECT) awards rendered against Russia in favour of the former Yukos shareholders, this article explores the potential effect of the Dutch judgment on enforcement of the underlying awards in England and Wales. English courts have consistently held that they are not bound by the setting aside of awards by the courts of the seat of arbitration. Nonetheless, recent cases demonstrate a trend that such discretion will be exercised sparingly, in accordance with the usual standards of English law applicable to the recognition and enforcement of foreign judgments. Further, in appropriate circumstances, the doctrine of issue estoppel may apply in enforcement actions before the English courts. It is, as yet, uncertain whether the fact that the awards arose under treaty will have any effect on the treatment by the English courts of the Dutch judgment.

1 Introduction

In July 2014, the tribunal in the three Yukos-related Energy Charter Treaty (ECT) arbitrations against the Russian Federation rendered the highest-value investment treaty arbitration awards in history, with a combined value in excess of USD 50 billion. In April 2016, just under two years later, the District Court of The Hague (the legal seat of arbitration) issued a high-profile judgment setting aside six awards rendered by the tribunal, including three interim awards on jurisdiction and admissibility. It did so on the grounds that, under Section 1065 (1) of the Dutch Code of Civil Procedure, there was no valid arbitration

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agreement between the parties due to Russia having not consented to arbitration under the ECT. Russia had not ratified the ECT and, in the opinion of the Hague District Court, provisional application under Article 45 of the ECT was in conflict with Russian law.

The annulment of the ECT awards, while subject to appeal before the Dutch courts, is likely to have serious ramifications for the enforcement efforts of the award creditors, currently pending in multiple jurisdictions. For example, in the immediate aftermath of the Dutch judgment, counsel for Russia filed a Notice of Supplemental Authority before the US District Court of the District of Columbia arguing, *inter alia*, that “as a result of the Dutch judgment’s annulment of [the ECT awards], there is nothing for the Court to confirm or enforce”.¹ In other words, Russia argues that annulment of an award at the seat of arbitration renders the award a nullity and precludes enforcement under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the Convention). Counsel for the Yukos shareholders, meanwhile, responded that “courts have the discretion – and thus necessarily the jurisdiction – to enforce a New York Convention award against a sovereign even when the award has been set aside by a foreign decision like the Dutch judgment”.²

This article considers the English position on enforceability of arbitral award annulled at the seat of arbitration. First, it explains that under the English Arbitration Act 1996 (the Act) and the Convention, the English courts retain a discretion, and are not obliged, to enforce awards annulled by the courts of the seat of arbitration. Second, it explores recent practice of the English courts and the circumstances under which they will exercise this discretion. Third, it addresses the recent use by the English courts of issue estoppel in the context of enforcement proceedings. Finally, this article examines the potential implications for enforcement of the ECT awards in England and Wales given that the Russian’s alleged consent to arbitration, and the alleged causes of action, arose under a treaty as opposed to a contractual relationship governed by private law.
