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Exorbitant Jurisdiction in the Enforcement of Arbitral Awards. Some Limits: *Yukos Capital v. Tomskneft*

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Exorbitant jurisdiction is generally described as comprising domestic courts' powers in cross-border litigation to assume jurisdiction based on a very thin (although in the courts' view sufficient and permitted by the courts' domestic law) link between the case and the forum State. This may be based on territoriality (e.g. the respondent having assets in the forum State or being fleetingly present on its territory) or nationality (e.g. if the claimant is entitled to seek assistance from its own country's courts regardless of the specific circumstances of the dispute – see Art. 14 of the French Civil Code). Exorbitant jurisdiction can be used as a gateway for forum shopping purposes if the claimant decides that the more suitable for his purposes court is the one entitled under its domestic law to exercise exorbitant jurisdiction.

Award-creditors tend to seek enforcement in places where they would be effectively entitled to reach some assets of the respondent. In cases of respondents located in countries where enforcement may turn to be a difficult task (in spite of the application of the New York Convention), award-creditors often prefer trying to seize some assets in other countries, e.g. financial centres such as London, New York, Paris, etc. But there can be another perspective on such attempt and the recent Irish case of *Yukos Capital S.A.R.L -v- OAO Tomskneft VNK*[2014] IEHC 115 (*Yukos Capital v. Tomskneft*) is an illustration in this regard.

Facts

Both Yukos Capital S.A.R.L (Yukos Capital) and OAO Tomskneft VNK (Tomskneft) once were subsidiaries of the Yukos Oil Company. They had entered into a loan agreement in 2004. Later, in the course of reorganization of the Yukos corporate group, Tomskneft's holding was transferred to Rosneft. In arbitral proceedings seated in Switzerland, Yukos Capital successfully claimed its rights under the 2004 loan agreement. Tomskneft did not participate. Later, however, when Yukos Capital attempted enforcement of the award in Russia, the Tomsk Commercial Court refused to recognise it, considering that the underlying loan agreement was a fake transaction intended to conceal transfers within the Yukos group. The Tomsk Court held that the transaction had been illegal and could not be enforced on grounds of public policy. However, Yukos Capital has also attempted two other enforcement procedures – in France and Singapore. In France, the Paris court granted enforcement but the enforcement order was overturned on appeal as the appellate court found breaches of due process in the arbitral proceedings since Tomskneft was not properly served all necessary documents in the course of the procedure in Switzerland. The Singaporean position on the application for enforcement of the award has not been declared yet.

Yukos Capital tried to enforce the award in another jurisdiction – Ireland. However, Tomskneft does not seem to hold any assets in Ireland. Under the Irish Arbitration Acts 1954-1998, it is possible to serve summons out of the Irish jurisdiction as to bring the respondent within the Irish courts’ powers. However, courts having such discretion (typically in common law countries, e.g. English courts) would consider the necessity and propriety of such request for exorbitance. In a decision delivered on 13 March 2014, Kelly J of the Irish High Court admitted that holding assets in the jurisdiction where enforcement is sought is not a prerequisite set by the New York Convention. Yet, the court is entitled to make assessment of its own jurisdiction in accordance with its *lex fori* and if there are limitations under it, they would prevent proceeding to the merits of an application for enforcement under the New York Convention. The Irish court noted that the actual intent of Yukos Capital has been to obtain enforcement order in a reputable jurisdiction as to use that before other courts where the respondent would have assets. Although Yukos Capital did plead that the enforcement of the award has been compromised by the political bias of the Russian court, Kelly J still refused to assume jurisdiction over the matter considering the application as (i) not sufficient to ground exercise of exorbitant jurisdiction, and (ii) an inadmissible attempt to use the Irish courts for mere instrumentality for achieving aims outside Ireland, i.e. where the actual assets of Tomskneft are placed.

Observations

A number of important points may be taken from *Yukos Capital v Tomskneft*:

- Rules on exorbitant jurisdiction, including the rules on its ouster, are suggested as applicable in enforcement of foreign awards cases. The natural conclusion following from the reasoning of Kelly J is that application for enforcement under the New York Convention should not “bypass” ordinary jurisdiction rules of the particular seized domestic court.
- The case demonstrates how the issue of exorbitant exercise of court jurisdiction may become intertwined with the (limits on) enforcement of the award. If the enforcement could be considered by Kelly J, this would have been on basis of exorbitant jurisdiction of the Irish courts. But the exorbitant exercise of jurisdiction would have meant to “drag” Tomskneft, seemingly an unrelated to Ireland company, into a procedure before the Irish courts. To hear the merits of the case would be in fact to honour, in a sense, the attempt to escape the jurisdictions where Tomskneft might hold assets but where the attempt to enforce might fail, too. In the absence of a requirement that the respondent should be somehow present in the jurisdiction, it seems still important to consider whether the requested enforcement pursues a practically achievable aim or it pursues an alternative of the ordinary and natural ways to obtain enforcement. The purpose lying at the heart of enforcement procedure is the award to be granted relief in a particular jurisdiction and to be subsequently executed. Where it is evident (or at least strongly arguable) that the execution in that jurisdiction would be pointless, the court should not reject the application immediately but consider what reasons for granting enforcement there might be in the particular case. If, as it happened in *Yukos Capital v Tomskneft*, the sole reason is to obtain enforcement order in a reputable jurisdiction, this would qualify as an exercise very close to forum shopping – in fact, a “shopping” of enforcement in a reputable jurisdiction. The actual purpose has not been execution in Ireland but making use of the Irish decision on enforcement to support enforcement in another jurisdiction – a jurisdiction where the “real” execution should take place.

It can be inferred from the reasoning of the Irish court that the foreign arbitral award should have a sufficient nexus to the forum State. In the light of this, although an application for enforcement may meet the criteria in both the New York Convention and the domestic law of the court, it

should be rejected on grounds of lack of basis supporting exorbitant exercise of court powers.


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