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Recognition and enforcement of annulled arbitral awards – the Yukos Capital decision

Patricia Nacimiento (Herbert Smith Freehills) · Wednesday, October 14th, 2009 · Herbert Smith Freehills

The 9.10.2009 session of the New York Convention subcommittee of the IBA in Madrid saw a lively discussion on the topic of enforcement of annulled arbitral awards.

The discussion related to the “Yukos Capital” decision issued by the Amsterdam Court of Appeals in April 2009. The Amsterdam Court of First Instance had previously upheld the decision of the Russian courts setting aside four awards related to a dispute between Yukos Capital and Rosneft (initially Yuganskneftegaz which later merged with Rosneft). The dispute related to the shares in Yuganskneftegaz which were held by Yukos Capital and subsequently seized by the Russian Ministry of Finance. In an auction, such shares were sold first to the newly established company Baikal Finance Group and a few days later to Rosneft, the shares of which were held in the majority by the Russian State.

Yukos was awarded 7 billion Euros in arbitrations under the Rules of the International Court of Commercial Arbitration (ICAC) with the place of arbitration in Moscow. Rosneft’s request that the four awards be set aside was upheld on three occasions by the Russian courts: the Arbitrazh Court of the Russian Federation, the Federal Arbitrazh Court of the Moscow Region and the Supreme Arbitrazh Court of the Russian Federation.

The courts set aside the awards for three main reasons:

- Rosneft was not granted a postponement of the hearing, leading the Russian courts to conclude that Rosneft had been denied its right to present its case.
- Yukos Capital had submitted new claims, which is not allowed under the applicable ICAC Rules.
- The Arbitral Tribunal had not been properly constituted since the arbitrators failed to disclose that they had spoken at conferences co-sponsored by the firm representing Yukos.

During the Russian annulment proceedings Yukos had applied to the Amsterdam courts for enforcement. The Court of First Instance denied leave of enforcement on the grounds that the Russian court decisions were to be respected as Russian courts in this case are the competent authority under Art. V(1)(e) of the New York Convention. The Court of First Instance did recognize the possibility of deviating from this principle in exceptional circumstances, namely in case of a violation of generally accepted principles of due process and a lack of independence of

the courts. In this specific case, however, the court concluded that Yukos failed to submit sufficient evidence.

The Amsterdam Court of Appeals reached a different conclusion. It reviewed in depth the evidence submitted and held that the Russian courts in this case had lacked impartiality and independence and that its decisions were politically motivated. The court stated in particular that proving such a lack of impartiality and independence is difficult since there is usually no direct evidence. As a consequence, the court relied on external evidence indicating possible partiality and dependence, including reports of Transparency International, the EU-Russian Centre and Freedom House, as well as court decisions from the UK and Switzerland related to the criminal prosecutions in Russia of Yukos officers.

The IBA session on the New York Convention discussed the background and consequences of this decision and discussed its potential impact on the practice of recognition and enforcement. It was pointed out that the case is exceptional and that the decision must be viewed as taking into account the exceptional circumstances. It is in any event path breaking since it applies and enforces international standards of the New York Convention and will thus contribute to its harmonized interpretation and application.

By Patricia Nacimiento

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