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Non-Participating Parties and Burden of Proof: French Cour de Cassation Quashes a Paris Court of Appeal Decision Refusing Enforcement. Yukos Capital v. Tomskneft Case

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On 5 November 2014, the French *Cour de Cassation*, overruled a decision of the Paris Court of Appeal for having reversed the burden of proof in a case involving a non-participating party. With this victory before the French Supreme Court, Yukos Capital ("Yukos") is one step closer to the enforcement of an arbitral award against Otkrytoye Aktsionernoye Obshestvo Tomskneft Vostochnoi Neftyanoi Kompanii ("Tomskneft").

The French *Cour de Cassation* decision is one of the main chapters in the Yukos saga in which Yukos is trying to recover its assets under several loan agreements executed with Yukos Oil's (now liquidated) former subsidiaries (including Tomskneft), which were later acquired by the Russian State oil company Rosneft ("Rosneft").

In 2006-2007, in different arbitration proceedings, Yukos was granted (i) over US$400 million against Yuganskneftegaz by an International Commercial Arbitration Court (MKAS) Arbitral Tribunal, (ii) over US$100 million plus post-award interest against Samaraneftegaz by an ICC Arbitral Tribunal, and (iii) approximately US$145 million plus post-award interest against Tomskneft by an ICC Arbitral Tribunal. Yukos succeeded in the enforcement of the awards against Yuganskneftegaz but is still trying to collect interest before English courts. It was denied enforcement against Samaraneftegaz before Russian courts.

The French *Cour de Cassation* was requested to rule on the award granted against Tomskneft rendered by an ICC Sole Arbitrator, Robert Briner (a former President of the ICC Court), in 2007 granting approximately $US145 million to Yukos.

During the arbitration proceedings, Tomskneft, after having challenged the existence of the arbitration agreement between the parties, had refused to participate.

After the award was rendered, Yukos applied for its enforcement in Russia, Singapore, Ireland and France.

In Russia, the Federal Commercial Court for the District of Tomsk refused enforcement of the award on the grounds of public policy, holding that the contract was illegal.

In Singapore, the proceedings are still pending.

In Ireland, in March 2014, the High Court refused enforcement of the award stating that a foreign arbitral award should have a sufficient link with the forum State. In particular, the Irish High Court stated that:

> "It is a case with no connection with Ireland. There are no assets within this jurisdiction. There is no real likelihood of assets coming into this jurisdiction. This is the fourth attempt on the part of the applicant to enforce this award. There is little to demonstrate any "solid practical benefit" to be gained by the applicant. The desire or entitlement to obtain an award from a "respectable" court has already been exercised in the courts of France and is underway in the courts of Singapore" (a KluwerArbitration blog post is available here).

On the contrary, in France, the absence of assets was not sufficient for refusing enforcement, which was granted in 2010. Tomskneft appealed the enforcement order.

In the appeal proceedings against the enforcement order, Tomskneft contended that the Sole Arbitrator had violated the fundamental principle of due process by failing to properly notify his procedural orders. In particular, Tomskneft argued that it had been deprived from its right to be heard because it had not received a number of communications from the Sole Arbitrator, including (i) procedural order n. 1 related to the modification of the provisional timetable, extending the time limits granted to the parties to file their briefs, (ii) procedural order n. 2 inviting the parties to a hearing, and (iii) other communications addressed to the parties.

On 15 January 2013, the Paris Court of Appeal refused the enforcement on the grounds of breach of due process by the Sole Arbitrator holding that there were no sufficient elements to prove the effectiveness of the notifications (decision available in Albert Jan van den Berg (ed.), Yearbook Commercial Arbitration 2013, Vol. 38, pp. 373 – 375).

Yukos filed an appeal before the French *Cour de Cassation*.

Before the *Cour de Cassation*, Yukos alleged that (i) Tomskneft had failed to prove that it had never received procedural orders, letters and other documents from the Sole Arbitrator, (ii) neither the 1998 ICC Rules, nor the French arbitration law provide for the arbitrator or the ICC to keep the receipts of the notifications addressed to the parties, (iii) the Sole Arbitrator ensured that Tomskneft had the opportunity to participate in every stage of the arbitral proceedings, and (iv) a party, which decided to not take part in an arbitration, could not invoke – at the enforcement stage – the lack of due process if it was not raised during the arbitration proceedings.

Tomskneft maintained that it had not received proper notification of the Sole Arbitrator's correspondence.

On 5 November 2014, the *Cour de Cassation* overruled the Paris Court of Appeal decision refusing the enforcement of the award and found that the burden of proof lies with the party alleging the breach of due process, i.e. Tomskneft. The case is now to be heard before the Versailles Court of Appeal.

The *Cour de Cassation* considered that the award made specific reference to all postal receipts (DHL) – and their dates – confirming the proper notification of all communications to both parties.

It was therefore for Tomskneft to prove the alleged lack of receipt of such communications but it failed to do so.

Hence, pursuant to the *Cour de Cassation "the Court of Appeal reversing the burden of proof violated the legal provisions …"*.

In an annex to its decision, the *Cour de Cassation* also relies on the principle of estoppel by holding that a non-participating party cannot object to an irregularity that was not brought up in the course of the arbitration proceedings.

In this respect, Yukos Capital vs. Tomskneft case is perfectly in line with the French case law: the fact that a party does not participate in arbitration proceedings does not necessarily lead to a violation of due process and thus to setting aside the arbitral award, if the non-participating party was given the opportunity to take part in the proceedings (CA Paris, 24 March 1995 in *Revue de l'Arbitrage* 1996, p. 259, available here). In another similar case, the Paris Court of Appeal ruled that where a party was regularly informed of the arbitration proceedings but willingly decided not to take part, then it was prevented from invoking any irregularities regarding the arbitration proceedings (CA Paris, 21 April 2005 available here).

With its decision, the French *Cour de Cassation* firmly reiterates that a party alleging the violation of due process is the party bearing the burden of proof. But the decision is not only about burden of proof: the French *Cour de Cassation* expressly sanctions the bad faith of the non-participating party bound by the arbitration agreement and emphasizes the parties' duty to procedural loyalty in the arbitration proceedings.

Non-participating parties are thus clearly on notice when it comes to dilatory tactics. This is welcome.

The decision can be found here.

The views and opinions expressed herein are those of the author alone.

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