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Revival Of The Yukos Awards Against Russia Following The Decision Of 18 February By The Court Of Appeal In The Hague

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Introduction

On the 18th of February, the Court of Appeal in The Hague reversed the lower court's decision annulling the awards rendered against the Russian Federation in Veteran Petroleum Ltd., Yukos Universal Ltd. and Hulley Enterprises Ltd. cases. The awards are thus revived. Notwithstanding the global notoriety and public controversy, the identity of the protagonists, and the amount at stake, the Court of Appeal's approach was fundamentally legal: based on a close analysis of the Dutch Code of Civil Procedure, Article 1065 and the Energy Charter Treaty (the "ECT"). The Court engaged in a detailed analysis of the Law of Treaties – the Vienna Convention on the Law of Treaties. It acknowledged the premise that States promulgate investment treaties to lower the cost of capital. A signature means a consent to being bound. One observes that states sign on willingly but resist being held accountable under those treaties when they violate them. The Court levels the playing field in times when there is a dire need for a reminder that international law is a valuable resource of the global community.

The Yukos case

On 20 April 2016, the District Court in The Hague rendered its judgment annulling the awards rendered against Russia in excess of 50 US billion in July 2014. The District Court had held that on the basis of Art. 1065(1)(a) DCCP there was no valid arbitration agreement and with that there was no jurisdiction for the PCA tribunal under the ECT. The Russian Federation had signed the ECT but had not ratified it.

Conclusions of the Court of Appeal

The Court of Appeal concluded that there was a valid arbitration agreement and that the tribunal had jurisdiction under the ECT, which the Russian Federation signed on 17 December 1994. As of that moment it was bound unless the application violated Russian Law of fundamental importance, which according to the Court of Appeal was not the case here (paras 4.3.2., 4.3.4).[1)] The Russian Federation will be filing an appeal with the Supreme Court.

Relying on Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT"), the Court of Appeal emphasizes the primacy of the text and interprets the ECT on the basis of good faith. The Court refers to Art. 39 ECT and Art. 44 ECT on the entry into force of the treaty: the treaty will not enter into force until the State has deposited an instrument of ratification, acceptance or approval (para 4.3.1). On behalf of the Russian Federation, O.D. Davydov, at the time Deputy Chairman of the government of the Russian Federation had signed the ECT on the 17 December 1994. On the 16 August 1996, the treaty was submitted to the Duma for approval. That approval never took place; and the Russian Federation never deposited an instrument of ratification, acceptance or approval. The ECT thus never entered into force as per the requirements set forth in Art. 44 of the ECT (para 4.3.2). The Court then crucially refers to Art. 45(1) ECT – the Limitation Clause – that provides that each State that signed the treaty will apply the treaty in a provisional way, "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" (para 4.3.3). The Court held that this type of application is accepted in international law and codified in Art. 25 VCLT and that there are no additional requirements for the application of Art. 26 ECT (consent to arbitration) (para 4.3.4).[2)]

The Court refers to Art. 1065(1)(a) of the Dutch Code of Civil Procedure (DCCP) that provides that an arbitral award can be annulled if there is no valid arbitration agreement. It was important for the Court to distinguish between the question whether there is a valid arbitration agreement on the one hand and the tribunal's own assessment of its jurisdiction on the other hand. The Court reminds us of the final judicial authority as to whether there is a valid arbitration agreement (para 4.3.4).

"In the first place, in this case it is about a purely legal argument, that is the explanation of the Limitation Clause …." (para 4.4.6).[3)]

The Court holds that the treaty applies provisionally and quotes the following of the Preamble of the ECT:

> "Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyze economic growth by means of measures to liberalize investment and trade in energy."

and Art. 2 ECT (Purpose of the Treaty):

> "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." (paras 4.5 and 4.5.23)

The Court takes a firm pro-investor stance in its reasoning, relying on the provisions of the ECT that refer to stimulating investment in the energy sector, by creating stable and transparent investment conditions. From the fact that the treaty must be applied conditionally, it follows that the Contracting States accepted to comply with those obligations to establish conditions for investment immediately upon the signing of the treaty (para 4.5.26).[4)] In the case at hand, the Court holds that the provisional application of Art. 26 ECT does not violate constitution, laws or

regulations of the Russian Federation (para 4.6.1). The Court holds that Article 26 ECT provides for international arbitration under the UNCITRAL Rules for violations of ECT provisions. It does not accept Russia's argument that such international arbitration cannot exist in parallel with the legal provisions that were referenced by the Russian Federation (para 4.7.37). The Court agrees with the claimants that the LFI 1991 and the LFI 1999 provide for the possibility of international investment arbitration (and thus they confirm that international investment arbitration does not violate Russian law) which is then enlivened by the investment treaty in this case Art. 26 ECT: hence Art. 26 does not violate Russian law in the sense of the Limitation Clause (paras 4.7.56-58). Thus there was no basis to set aside the Yukos awards pursuant to Art. 1065(1)(a) DCCP.

The Russian Federation had also argued 'unclean hands': enforcement of the Yukos Awards would lead to violation of public policy with respect to fraud, corruption and other serious irregularities. Therefore, enforcement would justify and preserve fraudulent, corrupt and illegal activities, thus violating fundamental principles of public policy (Art. 1065(1)(e)) – and also invalidate the arbitration agreement (para 9.8.1). The Court dismisses these claims, referring to its earlier considerations in the decision (paras 5.1.11.1- 5.1.11.9). The Court holds that the illegal acts were not relevant for granting the claims in the arbitration because (i) only an illegal act at the time of investing would be relevant for protection under the ECT and (ii) the alleged illegal acts were committed by others, not Hulley and (iii) the shares were in Yukos legally (para 9.8.7).

Final remarks

National laws do protect parties from injustices that at times can occur in arbitration, a form of checks and balances that contribute to the legitimacy of international arbitration. This case has received global attention beyond the legal community. It goes to the core of treaty protection that States create in order to attract foreign direct investment and lower the cost of capital.

The Court's pro-investor stance is re-assuring. The court attributed a great amount of importance to the purpose of the ECT and applied it in good faith. Under the VCLT, a treaty must be interpreted on the basis of its text but in conjunction with context and purpose. The Court reminds States why they sign on to treaties: there is a self-interest: attracting investment. Especially State delegations in the WG-III of UNCITRAL, that looks at the reforms in ISDS, would do well to remember they created those treaties for their own benefit. Even though the ECT and other treaties provide for international tribunals to deal with disputes, its safety net in this case was found in the jurisdiction of the Dutch court; in this case to ensure there was a valid arbitration agreement, proper composition of the tribunal, and compliance with due process. All the while the WG-III's envisions reforms that would broaden the claims of sovereignty to an extent the drafters of the New York Convention could never have imagined and review by an Appellate Mechanism where practical constitution and functioning are yet to see the light of day. In the meanwhile, for this monumental case, after this week's decision, the enforcement actions will be picked up at full speed, whilst we await the undoubtedly intense unfolding of the cassation procedure.

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References

?1 Vienna Convention on the Law of Treaties, Articles 25, 46.

?2 *See* also Article 46 of the VCLT, which is of particular relevance in the United States.

?3 The Limitation Clause of the ECT (Article 45(1)) provides that provisional application is only allowed to the extent that it does not violate 'the Constitution, Laws and Regulations'.

?4 Articles 13, 14, 10 ECT.

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