

# Yukos: Enforcement or Adjourning of Arbitral Awards During Set Aside Proceedings

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I discussed in a previous post on the blog the decision of 18 February 2020 of the Court of Appeal in The Hague that revived the awards rendered in July 2014 against the Russian Federation in Veteran Petroleum Ltd., Yukos Universal Ltd. and Hulley Enterprises Ltd. cases. Those awards had been annulled in April 2016 on the basis that there was no valid arbitration agreement.

The decision in 2016 did not stop the efforts to enforce the awards, that Yukos continued globally, in addition to filing an appeal with the Court of Appeal to overturn the annulment decision (which was successful earlier this year).

In principle, on the basis of Article V(1)(e) of the New York Convention, a court may refuse the enforcement of an award if the award had been set aside. Courts developed theories to enforce annulled awards: they are what I call the Russian Doll theories. Now that the Yukos awards have been revived, Article V(1)(e) of the New York Convention no longer applies. What about Art. VI? Could the Russian Federation argue that the enforcement proceedings should be stayed pending the annulment procedure and its imminent appeal with the Supreme Court?

## **Article V(1)(e) and Article VI**

The judicial application of Article V(1)(e) has taken a life of its own. Not only in the Yukos proceedings but in others, the courts have allowed for the enforcement of annulled awards, often for reasons of public policy.

Article V was drafted for the party resisting the enforcement; the party that has lost the arbitration. The New York Convention is built on two pillars: sovereignty and party autonomy. The latter protects both the claimant and the respondent. If due process rights have not been complied with, if there is no valid arbitration agreement or if some other irregularity has occurred; Article V allows for the respondent to be heard. Article VI was also created for the losing party. If the party resisting enforcement had serious grounds to request for the award to be set aside, it could initiate those setting aside proceedings and request for a stay of the enforcement proceedings:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security (Article VI of the New York Convention).

The rationale was procedural efficiency. At the core of the request, the enforcement court must establish a bona fide intention to set aside the award, rather than the use of setting aside procedures as a mere delaying tactic.<sup>[fn]</sup>M.Paulsson, 'The 1958 New York Convention in Action', (Kluwer 2016), p. 213.<sup>[/fn]</sup> The delegates in 1958 allocated more time to understanding and drafting Article VI than Article V. The debate focused on the role of the court of origin that has to review the setting aside request and the courts of enforcement that would have to decide to what extent the setting aside proceedings would be successful. Article VI was a compromise between the need to give the losing party in the arbitration adequate time to await the final decision in the setting aside proceedings and be ensured that assets would not be executed pending the annulment procedure and the successful party in the arbitration who has the right to enforce a valid and binding award as soon as possible. The use of the word 'may' in Article VI was to allow the enforcement court discretion to either dismiss an Article VI defense and grant enforcement immediately or, if based on submitted

evidence, the court considers an annulment procedure to be meritorious, adjourn the outcome so that there is time to await the setting aside proceedings. The delegates did not draft Article VI to enable the losing party to rely on setting aside proceedings to delay enforcement. One indicator for delaying tactics was if the losing party would wait with the filing of a setting aside request until the successful party had commenced enforcement proceedings. In the Yukos case the Russian Federation filed the request for setting aside in a timely manner by complying with the statute of limitations under Dutch law.

### **Standards developed by enforcement courts**

Mostly lower courts in the US developed further standards for the application of Article VI of the New York Convention. Admittedly, the judicial application of courts in Contracting States – to date 160 – is not a source under Article 31 of the Vienna Convention on the Law of Treaties (some opine that judicial application can be a source if there is a dominant application. The New York Convention has proven over the last sixty years that uniform or even a dominant application is not always feasible). Furthermore, in the US, the decisions of district courts do not always carry the same weight and it is a court of first instance with single judges, often overruled. Yet, their decision might offer useful guidance in understanding the rationale of Article VI.

In *Spier v Tecnica* the District for the Southern District of New York developed a test for adjourning the enforcement proceedings: it placed the burden of proof on the party requesting enforcement to submit enough evidence proving that it is manifestly clear that the request for setting aside was ‘transparently frivolous’. The text of Article VI states nothing about the burden of proof unlike Article V. The delegates did not discuss the allocation of the burden of proof either. A good faith interpretation of Article VI would not necessarily justify such a heavy onus on the prevailing party in the arbitration: the purpose of the New York Convention is to contribute to the effectiveness of international arbitration. Another US District Court analyzed the court’s discretion under Article VI and held that enforcement courts have an ‘unfettered discretion’. Another important reason for courts to adjourn the enforcement decision is international comity towards the courts of origin. Again another US District Court balanced the New York Convention’s pro-arbitration attitude against the principle of international comity which was ‘equally

embraced by the New York Convention’.

The US Court of Appeals, District of Columbia held that if the award was manifestly invalid, the enforcement would be adjourned without the court requiring security. If the award was manifestly valid, the court would deny a request under Article VI and grant the enforcement or it would stay the enforcement but require the respondent to post security. The second point is that the court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger.

The English Commercial Court developed a sliding scale for security in *Soleh Boneh*:

*If the challenge to the validity of the award is manifestly well-founded, it would in my opinion be quite wrong to order security until that is demonstrated in a foreign court... If the award is manifestly invalid there should be an adjournment and no order for security; if it is manifestly valid there should either be an order for immediate enforcement, or else an order for substantial security.*[fn]*Dowans Holding S.A. et al. v. Tanzania Electric Supply Co. Ltd (High Court of Justice, Queen’s Bench Division, Commercial Court 2011), in Yearbook Commercial Arbitration XXXVI (2011) (United Kingdom no. 93), at 363-365 and Soleh Boneh International Ltd. V. Government of Government of the Republic of Uganda [1993] 2 Lloyd’s Law Rep 208 CA at 212 and IPCO Nigeria Limited (Nigeria) v. Nigeria National Petroleum Corporation (Nigeria), (Commercial Court 2005), in Yearbook Commercial Arbitration XXXI (2006) (United Kingdom no. 70), at 853-866.*[/fn]

If setting aside might be successful and tip the balance of the sliding scale in favor of defendant, the court might still order security if the risk of assets being moved remains high.[fn]M.Paulsson, ‘The 1958 New York Convention in Action’, (Kluwer 2016), p. 216.[/fn]

## **Final Remarks**

We have to see how the Russian Doll unfolds in the Yukos case: does the cassation

procedure trump the enforcements efforts around the world or not? Will an enforcement court use Article VI to grant adjournment? With or without security? Will there be a discrepancy between the various decisions on that point in the enforcement fora relied upon by Yukos? We will have to wait for a year or two before the Dutch Supreme Court will decide on the appeal.

What any court of enforcement would have to assess, at minimum, and through a good faith-lens, is:

- whether the setting aside attempt was bona fides; or
- whether the setting aside attempt was for dilatory tactics;
- whether the assets would be executed and lost during the setting aside procedure;
- whether the losing party in the arbitration submitted enough evidence that warrants a stay of the enforcement because the setting aside will ultimately be successful; or
- whether the successful party in the arbitration submitted enough evidence proving that it was manifestly clear that the setting aside was transparently frivolous;
- whether the losing party can provide security pending the remainder of the annulment proceedings.

All of this is against the background of an enforcement effort against a sovereign which begs the question as to what kind of assets can be enforced: are those assets in a given forum, protected by immunity? If so, none of the above doesn't even matter. Either way, how this saga will unfold will continue to be complex and take a while.