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Setting the Stage for the Final Yukos Setting Aside Verdict in The Hague: Advocate General Advises Dutch Supreme Court to Uphold PCA Awards

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On 23 April 2021, Paul Vlas, Advocate-General of the Dutch Supreme Court issued his opinion in the *Yukos* case, setting the stage for the final setting aside act in The Hague after nine years of PCA-administered arbitration and six years of setting aside litigation. Advocate-General Vlas had previously advised the Dutch Supreme Court to reject Russia's request for suspension of enforcement, with the latter eventually following the Advocate-General's opinion in December 2020. The 23 April 2021 opinion deals with a spectrum of controversial topics, ranging, *inter alia*, from the issue of whether Russia was bound to provisionally apply the Energy Charter Treaty (ECT) to questions regarding the role of the tribunal's assistant. In this round, Russia has also sought to involve the Court of Justice of the European Union, requesting a preliminary reference on questions related to the interpretation of the ECT. This blog post will cover some of the matters discussed in Advocate-General Vlas' opinion.

Provisional Application of the ECT

In the setting aside proceedings in The Hague, Russia has sought to annul the USD 50 billion awards that found Russia liable for breaches of the ECT in respect of its treatment of former oil company Yukos. In 2016, Russia scored a victory in the District Court of The Hague, which found that the *Yukos* tribunal had wrongly assumed jurisdiction because Russia was not bound to provisionally apply the (dispute resolution clause of the) ECT (see earlier blog here). This judgment was reversed by the Court of Appeal of The Hague (see earlier blog here).

In the view of the Advocate-General, the Court of Appeal judgment should be taken as the final word on the issue.

The Advocate-General starts his reflections by noting that a provisional application mechanism (such as the one found in Article 45 of the ECT) serves to effectuate the intended benefits of a treaty prior to the completion of lengthy national ratification procedures. At the same time, the Advocate-General observes that such mechanisms have been criticised for posing a potential threat to the domestic separation of powers, an issue that was also touched upon by the District Court of The Hague (see earlier blog here).

Article 45(1) of the ECT on provisional application reads:

> 'Each signatory agrees to apply this Treaty provisionally …, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations'.

The Advocate-General notes that, by now, three different interpretations of this clause have emerged. According to the so-called 'all or nothing' approach that was adopted by the arbitral tribunal, Article 45 ECT is concerned with whether the mechanism of provisional application as such is not inconsistent with domestic law (see here). By contrast, according to the 'piece-meal' approach followed by the District Court of The Hague, the crucial question is whether a specific ECT provision that is to be provisionally applied is not inconsistent with domestic law. The Court of Appeal of The Hague adopted a third variation, ruling that Article 45 ECT applies as long as the provisional application of a specific ECT provision is not inconsistent with domestic law, and concluding that Russian law does not exclude the provisional application of specified (categories of) treaty provisions. In the opinion of the Advocate-General, the Court of Appeal's approach fits with the ordinary meaning of the wording of Article 45 ECT.

The Advocate-General suggests dismissing Russia's complaint that a domestic court cannot uphold arbitral jurisdiction on other grounds than those applied by the tribunal itself. Since under Dutch law the jurisdiction of an arbitral tribunal is subject to *de novo* review, the question before the courts is not whether the tribunal had established its jurisdiction on a correct basis but whether the tribunal had jurisdiction. This approach avoids the situation where parties would be referred to adjudication because the tribunal established its jurisdiction on the wrong basis even if their intention was to resolve a dispute through arbitration.

No Need to Involve the CJEU

In the cassation proceedings, Russia has asked the Dutch Supreme Court to submit a preliminary reference regarding the ECT to the CJEU, arguing that the ECT is a mixed agreement that requires a consistent interpretation among the EU institutions and the member states. According to the Advocate-General, however, the CJEU is only competent to interpret a mixed agreement when the EU has adopted instruments implementing the relevant treaty, which has not happened in respect of the ECT. The Advocate-General extensively discusses the Opinion of Advocate-General Szpunar of the CJEU in *Moldavië/Komstroy* (see earlier blogs here and here), who considered that the CJEU has jurisdiction to interpret the ECT since the substantive provisions of the ECT might apply within the EU legal order even if the ISDS mechanism of the ECT violates EU law (in Advocate-General Szpunar's view, see further here). Noting that Advocate-General Szpunar failed to discuss the CJEU's own case law that links the CJEU's jurisdiction to interpret mixed agreements to the existence of implementing legislation, Advocate-General Vlas concludes that, in any event, a preliminary reference must be necessary for adjudging a particular dispute. In his view, this condition is not fulfilled in the *Yukos* case, *inter alia*, because the case concerns the ECT's provisional application in Russia and not in the EU.

The 'Investor' and 'Investment' Definitions of the ECT

Russia has argued that the claimants in the *Yukos* arbitration were controlled by Russian investors who made use of ‘U-turn arrangements’ to qualify for protection under the ECT. The Advocate-General notes that this claim should be assessed in light of the ECT’s own definition of the terms ‘investor’ and ‘investment’, referring to Article 31(4) VCLT, which respects a term’s ‘special meaning’ if intended by the parties. The Advocate-General agrees with the Court of Appeal’s judgment that the object and purpose of the ECT do not require that further conditions be read into the ECT’s definitions of ‘investor’ and ‘investment’. He also argues that recent reform suggestions by the EU institutions proposing to exclude letterbox companies from the scope of the ECT cannot qualify as subsequent practice in the sense of the VCLT. Even if some tribunals have imposed additional requirements in the context of the ICSID Convention or specific bilateral investment treaties, the Advocate-General agrees with the Court of Appeal that such requirements do not constitute a general rule and are not necessarily applicable to the ECT. This might mean that letterbox companies can benefit from the ECT’s protection, but the denial of benefits-clause gives contracting states the opportunity to prevent this if so desired. In response to Russia’s claim that the claimants’ investments were tainted by illegality, the Advocate-General notes that the ECT does not contain an explicit legality requirement and that the implicit legality requirement recognised by arbitral case-law does not affect jurisdiction (see also this blog).

Taxation

A further range of arguments concerned the ECT’s carve-out for taxation measures (Art. 21(1) ECT) and the claw-back for taxation measures constituting expropriation (Art. 21(5) ECT). Russia complained that the tribunal had failed to make a referral to Russia’s tax authorities, as required by Article 21(5)(i) ECT. The Advocate-General notes that even if a referral had taken place, the tribunal would not have been obliged to follow the conclusions of the domestic tax authorities. Accordingly, the Advocate-General agrees with the Court of Appeal that the tribunal’s failure to involve the domestic tax authorities was not serious enough to justify the setting aside of the award.

The Role of the Tribunal’s Assistant

Russia’s most sensational complaint in the setting aside proceedings was that the tribunal’s assistant had drafted significant parts of the award (see earlier blogs here, here, here and here). According to the Advocate-General, there is no generally accepted rule or practice that makes it in all cases unacceptable for a tribunal to delegate the drafting of substantive parts of an award to a secretary. Rather, the absence of such a general rule explains why some arbitration rules explicitly address the matter. If the applicable rules do not do so, the tribunal has discretion to delegate certain tasks to the secretary, as long as they fulfil their own duties.

Accordingly, a party seeking to set aside an award on this ground would have to prove that the arbitrators failed to properly execute their mandate. This could be the case if a tribunal would simply adopt the drafts or unduly involve the secretary in the decision-making process. According to the Advocate-General, this high burden of proof fits with the seriousness of the allegation made vis-à-vis the tribunal and with the judicial restraint incumbent on the court in this context.

In the case at hand, the Advocate-General concludes that Russia has failed to demonstrate that the

arbitrators did not exercise their own mandate or that the secretary had functioned as a 'fourth arbitrator', although the tribunal should have informed the parties of the secretary's role. Moreover, according to the Advocate-General, the Court of Appeal had not erred when it rejected Russia's proposal to hear the secretary, since even if he had provided drafts for significant parts of the award, this would not amount to a ground for setting aside the awards.

Concluding Remarks

In his opinion, the Advocate-General agreed with the Court of Appeal on most counts. If the Dutch Supreme Court follows the opinion, Russia's initial success in the District Court of The Hague will have been conclusively overturned and six years of attempts to set aside the PCA awards will have come to an unsuccessful end. At the same time, the judgment will not put an end to the Yukos litigation in courts and tribunals around the globe, as the beneficiaries of the PCA awards will likely increase their enforcement efforts in various jurisdictions (see earlier blog here) while subsequent investment arbitrations brought by other shareholders remain pending.

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This entry was posted on Wednesday, June 2nd, 2021 at 8:18 am and is filed under Energy Charter Treaty, Investment Arbitration, Netherlands, Set aside an arbitral award, Yukos
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