



ARTICLE

THE YUKOS CASE : FORMER SHAREHOLDERS LOSE THEIR LEGAL BATTLE IN FRANCE BUT CONTINUE THE WAR

| 01/12/17 |



On 23 November 2017, another hearing was held before the Paris Court of Appeals in the famous Yukos case. The counsels for the Russian Federation and the former Yukos majority shareholders discussed the question of the apportionment of legal costs incurred in the scope of the appeal proceedings against the French enforcement orders of the arbitral awards rendered in July 2014 against Russia. This hearing, which appears to be the final one to our knowledge, is a logical consequence of the announcement made on 10 October 2017 by Tim Osborne, the chief executive of the holding company Group Menatep Limited (GML) representing the interests of the former shareholders, to definitively abandon the enforcement in France of the arbitral awards that granted them US\$ 50 billion in damages.[1] This unexpected ending is the occasion to look back at the multiple twists of this extraordinary case.

FIRST ACT: AN UNPRECEDENTED RULING

In 2004, three former majority shareholders of the oil company Yukos - Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. - initiated an arbitration under the auspices of the Hague Permanent Court of Arbitration in order to resolve their dispute against the Russian Federation arising from the expropriation of Yukos for the benefit of the state-controlled companies Rosneft and Gazprom.

Three partial awards were rendered in November 2009. Five years later, three final awards dated 18 July 2014 condemned the Russian Federation to pay US\$ 50 billion in damages plus arbitration and legal fees (the "Yukos Awards") for the violation of Article 13 of the Energy Charter Treaty (the "ECT") that prohibits any form of expropriation without the payment of prompt, adequate and effective compensation. This ruling is what made the case become the "arbitration of the century".

On 1st December 2014, the President of the First Instance Court of Paris[2] granted enforcement orders (*exequatur*) of the Yukos Awards, thus letting the enforcement battle begin. Indeed, given that an appeal against an *exequatur* order has no suspensive effect under French law[3], the appeal lodged by Russia did not stop the attempts to enforce the Yukos Awards in France.

SECOND ACT: ATTACHMENTS OF RUSSIAN ASSETS IN FRANCE

The beneficiaries of the Yukos Awards attempted multiple attachments of what they considered to be assets belonging to the Russian Federation. Some of the attached assets were highly symbolic as they involved the site of the Orthodox Cathedral situated in the heart of Paris, the freezing of the shares owned by the Russian public company VGTRK in the news channel Euronews[4], the accounts of the Enterprise of the Business Administration of the President of Russian Federation (FGUP)[5], the shares belonging to the Russian state satellite operator RSCC in Eutelsat[6] or assets of Total, BNP Paribas and Air France. Some press articles reported that more than 200 attachments were made in France, but they were immediately all challenged by the Russian Federation.[7] In this regard, the attachment of the money owed to the Russian space agency Roscosmos by Arianespace, the French leader in satellite launching, is particularly illustrative and represents the last case covered by the media.

By a ruling of 19 January 2016, the enforcement judge of the First Instance Court of Evry ordered the release of the attachments on the ground that Roscosmos was not a State entity and that it was not established that it had acted on behalf of Russia while entering into agreements with Arianespace.[8] This ruling was subsequently upheld on 27 June 2017.

THIRD ACT: ANNULMENT OF THE AWARD AT THE SEAT OF THE ARBITRATION

Meanwhile, on 20 April 2016, annulment proceedings were brought before the District Court of The Hague, the seat of the arbitration. Russia challenged jurisdiction of the arbitral tribunal to hear the dispute as it was based on the ECT, which was signed but never ratified by Russia. Indeed, it stems from Article 45-1 of the ECT that in the absence of ratification, Russia could only be bound by the provisions that were compatible with its domestic law. By its judgment of 20 April 2016, the District Court of The Hague thus held that the possibility to submit disputes to international arbitration provided under Article 26 of the ECT was not part of the provisions which were provisionally applicable to Russia, and ruled, in consequence, that the arbitral tribunal lacked jurisdiction to hear the case.

Nonetheless, this ruling did not put an end to the enforcement proceedings launched in France. Indeed, the French Court of Cassation considers that an arbitral award is not attached to any national legal system and thus consistently rules that an award annulled at the seat of the arbitration can still be enforced in France in the absence of grounds for annulment that are restrictively provided under Article 1520 of the French Code of Civil Procedure.[9] Accordingly, the annulment of the Yukos Awards at the seat of the arbitration did not have a direct impact on the analysis of the French judges.

FOURTH ACT: OBSTACLE TO NEW ATTACHMENTS BROUGHT BY THE ADOPTION OF THE SAPIN 2 ACT



Another difficulty appeared when the rules on State immunity from enforcement were amended by the Sapin 2 Act insofar as the Act imposed a preliminary judicial approval before performing any enforcement measure on the assets belonging to a foreign State.[10]

Indeed, from now on, any enforcement measure in France against the assets of a foreign State can only be carried out if it was previously approved by the judge.[11] However, the judge will only authorize such measure if certain conditions are met (e.g. under the condition that the State has expressly consented to the application of the given enforcement measure, or that the targeted assets are not used by the State for non-commercial, public service matters).[12] Consequently, these new provisions supersede the traditional rule according to which the decision to resort to arbitration, be it through the mere adhesion to institutional rules, used to create a presumption that the State waived its jurisdiction and enforcement immunities.[13]

Consequently, the creditors will find it more difficult today to enforce an arbitral award against State debtors in France.[14] In addition, similar rules came into force in 2015 in Belgium[15] where many equally unsuccessful attempts of attachments had also been made but recently abandoned, at least by one of the former shareholders, Yukos Universal Ltd.[16]

FIFTH ACT: THE APPEAL AGAINST THE *EXEQUATUR* ORDERS IN FRANCE

By three decisions rendered on 27 June 2017[17], the Court of Appeals of Paris ordered the reopening of the debates in the scope of the appeal against the orders that granted *exequatur* of the Yukos Awards in France. Most notably, the Court invited the parties to submit their observations on the opportunity to refer several preliminary questions to the Court of Justice of the European Union (the "*CJEU*") with regards to the interpretation of various provisions of the ECT.

In doing this, the Court of Appeals of Paris reminded that the ECT had been entered into by the European Communities and that the CJEU had thus jurisdiction, pursuant to Article 267 of the Treaty on the Functioning of the European Union, to give preliminary rulings on the interpretation of the treaties, and the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

It should also be noted that the three decisions of the Paris Court of Appeals make reference to the ruling of the Hague District Court. It thus seems that without departing from the existing case law, the French judges nonetheless took account of the annulment of the award at the seat of the arbitration as they preferred to submit the questions in dispute to the CJEU in order to avoid contradictory decisions. However, it appears that the CJEU will not have the opportunity to hear this dispute.

THE EPILOGUE: ABANDON OF SEIZURES OF RUSSIAN ASSETS IN FRANCE

Indeed, given the significant number of attachments in France, their cost and their subsequent releases, the former Yukos shareholders of Yukos decided that it would be more efficient to focus their efforts on the appeal against the ruling of The Hague District Court. Two days of hearings have already been planned for December 2017 in these proceedings.[18]

Accordingly, they decide to abandon, at least for now, the enforcement of the Yukos Awards not only in France, but also in Belgium, Germany and India and to put on hold enforcement proceedings launched in the United Kingdom and the United States.

Consequently, the hearing that was held before the Court of Appeals of Paris on 23 November 2017 only concerned Russia's claims regarding Article 700 of the French Code of Civil Procedure, which grants the judge the power to order the losing party to pay the other party's legal fees and costs. Yet, this hearing was far from irrelevant as the costs and fees claimed by Russia amount to almost EUR 4 million, which shows once again the unprecedented nature of this case.

However, some questions remain to be answered. At the hearing of 23 November 2017, the judges as well as the parties acknowledged that by their decision to abandon the enforcement of the Yukos Awards in France, the former Yukos shareholders renounced to the benefit of the *exequatur* orders and withdrew from the pending appeal proceedings. The question remains as to whether this decision also means that they waived their right to initiate enforcement proceedings in future and, as such, whether they will be entitled to relaunch the enforcement of the Yukos Awards in case of a positive decision of The Hague District Court, which would necessarily require a new *exequatur* order.

In any case, any good observer can conclude that the future of the world's most famous international arbitration saga will be full of other unexpected twists.

[1] <http://www.gmllimited.com/content/media/pressrelea...>

[2] Tribunal de grande instance de Paris



[3] Article 1526 French Code of Civil Procedure

[4] <http://lexpansion.lexpress.fr/actualites/1/actuali...>

[5] <https://www.italaw.com/sites/default/files/case-do...>

[6] <https://www.lesechos.fr/30/06/2016/LesEchos/22224-...>

[7] <http://www.liberation.fr/planete/2016/04/20/affair...>

[8] First Instance Court of Evry (*TGI Évry*), order of the enforcement judge, 19 January 2016, No 15/05236

[9] Court of Cassation, 1st Civil Division, 23 March 1994, No 92-15.137, *OTV c/ Hilmarton case*; Court of Cassation, 1st Civil Division, 29 June 2007, No 05-18.053, *Putrabali case*

[10] Transparency, Anti-corruption and Economic Modernization Act n°2016-1691 of 9 December 2016, Article 59

[11] Article L. 111-1-1 of the French Code of Civil Enforcement Procedures

[12] Article L. 111-1-2 of the French Code of Civil Enforcement Procedures

[13] Court of Cassation, 1st Civil Division, 6 July 2000, No 98-19.068, *Creighton Ltd. case*

[14] See our previous article: <https://www.august-debouzy.com/en/blog/943-soverei...>

[15] Act of 23 August 2015 inserting article 1412 *quinquies* on state immunity from execution into the Belgian Code of Civil Procedure

[16] <http://www.gmllimited.com/content/media/pressrelea...>

[17] Court of Appeals of Paris, 1st Division, 1st Chamber, 27 June 2017, No 15/11664, No 15/11665, No 15/11.666, No 15/11.667, No RG 15/11.668, No RG 15/11.669

[18] C. Simson, *Dutch Court Will Not Split Yukos Appeal*, 23 January 2017
