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CASE AND COMMENT

FROM RUSSIA WITH PREJUDICE? THE ACT OF STATE DOCTRINE AND THE EFFECT OF FOREIGN PROCEEDINGS SETTING ASIDE AN ARBITRAL AWARD

THE Court of Appeal decision in *Yukos Capital SARL v OJSC Rosneft Oil Company* [2012] EWCA Civ 855 addresses important issues concerning the recognition and enforcement of arbitral awards and the act of state doctrine. The origins of the dispute lay in arbitrations in Russia, in which four damages awards totaling US$425 million were made in favour of Yukos Capital against OJSC Yuganskneftegaz ("YNG"). Yukos Capital and YNG had entered into various loan contracts with exclusive arbitration agreements when they had both been part of the same Russian corporate group, but by the time of the arbitration YNG had come under the control of the state-owned Rosneft company. Shortly after the awards YNG was amalgamated with Rosneft who succeeded to its rights and obligations. On application by Rosneft, the Russian courts declared the arbitral awards to be annulled, finding the contracts between Yukos Capital and YNG to be part of an unlawful tax avoidance scheme. Yukos Capital nevertheless pursued enforcement of the arbitral awards in the Dutch courts, against Rosneft assets in the Netherlands. The action was dismissed at first instance because of the Russian decision, but on appeal the Dutch courts decided that the awards should indeed be enforced despite the declaration of the Russian courts, accepting Yukos Capital's argument that the Russian judicial proceedings were "partial and dependent" because of state interference. Yukos Capital then brought English proceedings seeking enforcement of the awards plus an additional US$160 million in post-award interest. Following a failed appeal to the Dutch Supreme Court, the awards were enforced against security put up by Rosneft in the Netherlands – thus, only the post-award interest claim remained. The central issue facing the English courts was

whether to recognise and give effect to (i) the decision of the Russian courts setting aside the arbitral awards; or (ii) the decision of the Dutch courts that the judgment of the Russian courts should not be recognised; and/or (iii) the arbitral awards.

The case thereby raised an important issue which has long troubled arbitration practitioners and academics – the legal effect which should be given to an arbitral award set aside by the courts of the seat of the arbitration. On one view, the legal status of the arbitral award is a product of the "public" national legal order under which that status is conferred, and an award set aside by the courts of that legal order is thus effectively null and void. On a contrary view, the arbitral award has a "private" free-standing status independent of national law which is unaffected by any decision of the courts of the arbitral seat. The issue is therefore one which goes to the heart of the status of arbitration and its relationship with national law. The uncertainty has not been decisively resolved in international practice, nor by Article V of the New York Convention 1958 or its implementation in section 103 of the Arbitration Act 1996, which provide (in relevant part) only that an arbitral award *may* be refused recognition if set aside by a competent authority of the country in which it was made.

The approach of the Court of Appeal in this case was, perhaps unsurprisingly, something of a pragmatic middle ground. The Court effectively held that, in principle, an arbitral award set aside in the courts of the place of arbitration might nevertheless be enforced in the English courts – accepting the independent and private nature of arbitration. On the other hand, the Court also acknowledged the possibility that a foreign national court decision annulling an arbitral award might itself give rise to an issue estoppel which would preclude enforcement of the award in the English courts. The key question in this case was therefore whether the decision of the Russian courts should be recognised (and not the arbitral awards), or indeed whether the contrary decision of the Dutch courts would give rise to an alternative issue estoppel precluding recognition of the Russian court decision (and opening the door to enforcement of the arbitral awards).

The principal ground on which Yukos Capital sought to argue that the decision of the Russian courts should not be recognised as giving rise to an issue estoppel was that the outcome of those proceedings was dictated by bias and state interference, as part of a campaign to effectively "re-nationalise" Yukos Capital and its assets. In response, Rosneft raised a jurisdictional objection based on the act of state doctrine and the related doctrine of non-justiciability. Was it appropriate and permissible for the English courts to decide on allegations of governmental interference in the conduct of Russian judicial proceedings?

The development of the act of state and non-justiciability doctrines has been somewhat piecemeal, and this decision, which re-examines the foundations and histories of both doctrines, will be welcomed as perhaps the clearest restatement of their principles and limitations. The Court of Appeal confirmed the conclusion of Hamblen J. at first instance that neither doctrine precluded consideration of the allegations of Russian state interference in judicial proceedings in this case (although in some respects departed from his approach and analysis). While the decision needs detailed and careful reading, and the Court itself cautioned that "the act of state doctrines cannot be reduced to a single formula" (at [113]), a number of key conclusions may be identified. First, the act of state doctrine is a subset of broader doctrines of non-justiciability, themselves closely connected with the doctrine of sovereign immunity, all dealing with circumstances in which the English courts may not properly hear a dispute involving a foreign sovereign, and all founded on "analogous concepts of international law, both public and private, and of the comity of nations" (at [66]). Secondly, the act of state doctrine "will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights" (at [69]). In such contexts access to justice may, in effect, trump comity concerns. Thirdly, "judicial acts are not acts of state for the purposes of the act of state doctrine" (at [87]), because there are justiciable standards by which allegations of bias or breach of due process in foreign judicial proceedings may be evaluated drawing on "what is more and more being expressed as a global deference to the rule of law" (at [90]), although comity requires cogent evidence before such arguments are accepted. This is an important reconciliation of the act of state doctrine with other doctrines such as *forum non conveniens* in which courts commonly evaluate the possibility of obtaining justice before a foreign tribunal. Fourthly, further exceptions to the act of state doctrine apply in cases where the acts concerned have a commercial character, or where the act of state is only considered as a question of fact (without its validity or effectiveness being called into question). In drawing out these exceptions, the Court observed that "increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations" (at [115]).

In application to the facts, the Court dismissed Rosneft's jurisdictional objection to the arguments raised by Yukos Capital concerning unfairness in the Russian courts – this was an issue which the English courts could and should decide. The question of whether the Russian proceedings were tainted by state interference, or whether they should instead give rise to an issue estoppel precluding

enforcement of the arbitral awards, was thus one which would have to proceed to trial.

Finally, what about the decision of the Dutch courts, refusing to recognise the Russian judicial proceedings on the grounds that they were "partial and dependent"? Would it give rise to a decisive issue estoppel which would eliminate the need for any decision by the English courts on this issue? At first instance, Hamblen J. had held that the decision of the Dutch courts did in fact give rise to such an estoppel, precluding Rosneft from contesting the argument that the decision of the Russian courts was "partial and dependent". The conclusion of the Court of Appeal, however, was that the decision of the Dutch courts should be denied any issue estoppel effect, because the issue before the Dutch courts was not the same issue which was before the English courts. The Dutch courts had decided that recognition of the Russian proceedings was contrary to Dutch public policy; the English courts would have to decide whether recognition of those proceedings would be contrary to English public policy. While the decisions would be analogous, each national court would be applying distinct national standards, and thus no estoppel could arise. Although this approach is readily understandable, it perhaps glossed over some difficulties. It is, for instance, somewhat in tension with the earlier conclusion of the Court that one reason the act of state doctrine presented no obstacle to evaluating the conduct of foreign courts was because there were well established *global* standards by which to judge that conduct. And the judgment did not fully explore the possibility that, even if the *legal conclusion* reached by the Dutch courts did not have an issue estoppel effect, the decisions of *fact* made by the Dutch courts in reaching that determination might still do so.

These points aside, this is a judgment which brings welcome clarity to at least some aspects of important issues whose complexity has long troubled courts across the globe. While it is unlikely to be viewed as conclusive internationally, its influence is certain to be significant.

ALEX MILLS

THE IMMIGRATION RULES, THE RULE OF LAW AND THE SEPARATION OF POWERS

SOME constitutional systems (at least in theory) begin with principles and require everything else to fit around them. But the British constitution arguably adopts the opposite starting-point, accommodating principles in a way, and to an extent, that is feasible in the light of other features of the system. Thus Dicey's concern about the compatibility of