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High Court lifts stay on enforcement of arbitral awards against Russia to hear sovereign immunity challenge

Clifford Chance | **Arbitration & ADR - United Kingdom**

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Introduction

In *Hulley Enterprises Limited, Yukos Universal Limited, and Veteran Petroleum Limited v The Russian Federation*,[(1)] the High Court granted an application to lift a stay on proceedings brought to seek enforcement of three arbitral awards, for the limited purpose of permitting the resolution of the defendant's jurisdictional objection. The Court acknowledged the pendency of challenge proceedings at the arbitral seat in The Hague, which address an issue of alleged fraud during the arbitration, and it left open for future determination whether and if so, how, the outcome of the Dutch proceedings would impact on the enforcement application in England. The Court declined to make an order against the defendant for payment into court of security in the amount of the award. The judgment is another development in the long-running *Yukos* saga. Cumulatively, awards issued in 2014 by a tribunal hearing the underlying dispute were the highest value arbitral award ever handed down as at that date.

Background

Sections 100 to 103 of the Arbitration Act 1996 (the Arbitration Act) implement the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to which the United Kingdom, the Netherlands and many other states are party. Under the New York Convention, an award resulting from arbitral proceedings seated in one contracting state will be recognised as binding in the other contracting states, subject to very limited, specifically enumerated grounds to refuse recognition and enforcement. Those grounds are set out at article V of the New York Convention and section 103 of the Arbitration Act. Among others, they include that:

- the award contains decisions on matters beyond the scope of the submission to arbitration; and
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

Pursuant to section 103(5) of the Arbitration Act, where an application for setting aside of an award has been made at the arbitral seat, the English court may, if it considers it proper, adjourn the decision on recognition or enforcement of the award. The court may also, on the application of the party seeking recognition or enforcement of the award, order the other party to give suitable security.

Section 1 of the State Immunity Act 1978 (the Immunity Act) provides that states are "immune from the jurisdiction of the courts of the United Kingdom". There is an exclusion under section 9(1) of the Immunity Act whereby if a state "has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration", the state "is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration". Further, a state is not immune as regards proceedings in respect of which it has submitted to the UK courts' jurisdiction (section 2(1) of the Immunity Act). Under section 2(3)(b) of the Act, a state is deemed to have submitted to proceedings if it "has intervened or taken any step in the proceedings".

Facts

The claimants in these proceedings are former shareholders in OAO Yukos Oil Company (Yukos). Each of them brought an arbitration under the Energy Charter Treaty (ECT). By party agreement, these were heard together before identical arbitral tribunals seated in The Hague in proceedings administered by the Permanent Court of Arbitration. On 18 July 2014, the arbitral tribunals handed down final awards, unanimously holding that the Russian Federation (the defendant) had taken measures with the effect equivalent to an expropriation of the various claimants' investments in Yukos, in breach of article 13(1) of the ECT. The defendant was ordered to pay over $50 billion in compensation.

On 30 January 2015, the claimants issued proceedings seeking recognition and enforcement of the awards under the Arbitration Act. In September 2015, the defendant issued an application disputing the English court's jurisdiction (the jurisdiction application), on the basis that it was immune pursuant to section 1(1) of the Immunity Act. The claimants responded that the exception under section 9(1) of the Immunity Act applied, on the basis that the defendant had agreed to submit the dispute to arbitration. A central issue of the enforcement proceedings thus became the question of whether the arbitral tribunals had properly asserted jurisdiction.

On 20 April 2016, the Hague District Court set the awards aside (the first-instance decision). It did so on the sole ground that the defendant was not bound by the dispute resolution provisions of the ECT under the provisional application contained in article 45 of the ECT (as on the date of the requests for arbitration in 2005, the defendant had signed, but not ratified the ECT and had allowed the provisional application of the ECT). This decision prompted the parties to agree that the English proceedings should be stayed, with liberty to apply for a lifting of the stay following the determination of the claimants' appeal of the first-instance decision.

The Hague Court of Appeal handed down its decision on 18 February 2020 (the Hague Court of Appeal decision). Having considered the

question of jurisdiction de novo, it quashed the first-instance decision and reinstated the awards. On 6 July 2020, the claimants applied to lift the stay in the English enforcement proceedings.

The application was heard before Henshaw J in March 2021, at a time when the defendant's appeal of the Hague Court of Appeal decision was pending before the Supreme Court of the Netherlands. Henshaw J considered that parts of the defendant's challenge to the awards in the Netherlands had a real prospect of success and that these grounds overlapped substantially with those raised by the defendant in the context of the jurisdiction application. Accordingly, he declined to lift the case stay (for further details, see "Commercial Court declines to lift stay on enforcement of arbitral awards against Russia").

In a judgment dated 5 November 2021, the Dutch Supreme Court dismissed the grounds of challenge to the awards going to the arbitral tribunal's jurisdiction. However, it also found that the Hague Court of Appeal had erred in refusing to allow the defendant to advance certain allegations that the awards were contrary to Dutch public policy because of alleged frauds perpetrated by the claimants in the course of the arbitration (the Supreme Court judgment). The matter was referred to the Amsterdam Court of Appeal. It is anticipated that the judgment in the Amsterdam proceedings will be handed down no sooner than mid-2023.

On 3 March 2022, the claimants made a renewed application to the English High Court for an order lifting the stay of enforcement proceedings or, in the alternative, for an order that the defendant should pay security as a condition for not lifting the stay (the March 2022 application). The claimants invoked two grounds in support of the application:

- the Dutch Supreme Court judgment; and
- the prospect that enforcement of the awards in England and Wales would become progressively more difficult following the defendant's invasion of Ukraine and the responsive steps taken by other governments.

The defendant initially participated in the application proceedings, albeit that its long-time representative soon withdrew due to its more general decision to stop representing the Russian state. Replacement lawyers were lined up, but the UK Office of Financial Sanctions Implementation (OFSI) was slow to respond to those lawyers' application for a licence to act. The defendant thereupon sought to adjourn the proceedings. This was rejected by Butcher J, on the grounds that the defendant:

- had not given any specific information as to its communications with potential alternative counsel or with OFSI;
- was proposing an adjournment of indefinite length; and
- had already served both factual and expert evidence and put in written submissions.

The defendant was ultimately unrepresented at the hearing of the March 2022 application.

Decision

In his judgment dated 26 October 2022, Butcher J dismissed the defendants' suggestion that, by virtue of the Supreme Court judgment, the awards had been set aside and therefore were nullities as a matter of Dutch law. He noted that the Dutch courts had themselves rejected this argument, citing a June 2022 decision of the Hague Court of Appeal reinstating certain attachments against Russian assets located in the Netherlands. Further, the Hague Court of Appeal decision and the Supreme Court judgment both rejected the defendant's arguments on whether the arbitral tribunal had jurisdiction to determine the dispute. There was now, subject to one point, no risk that a determination of the jurisdiction application in the English proceedings – if and to the extent that the English High Court were to find that the decision of the Dutch Supreme Court precluded any points that the defendant might wish to take – be based on a decision which might itself be subject to reversal in the Dutch proceedings. Further, the decision by the English High Court on the jurisdiction application would not give rise to the risk of an inconsistent decision with the Dutch courts on the points which are live there, because such points did not overlap. While the defendant had suggested that the decision of the Dutch Supreme Court might not be final because there could be a reference by the Amsterdam Court of Appeal to the Court of Justice of the European Union of the question of the proper construction of article 45 of the ECT, there was no evidence before Butcher J indicating that there was any realistic prospect that such a reference would be made.

As to the impact of the defendant's invasion of Ukraine on the claimants' prospects of enforcing the awards against the defendants' assets in the United Kingdom, Butcher J commented that he found it difficult to quantify the extent of any additional difficulties arising as a result of the invasion. However, he did accept the claimants' arguments that they were suffering prejudice as a result of the stay of proceedings.

Given that the awards remained subject to challenge in the Netherlands, Butcher J considered that there were advantages to allowing the process in the Netherlands to run its course before a final decision on recognition and enforcement was taken. Nonetheless, as the jurisdictional questions had now been disposed of in the Netherlands, it would be appropriate to lift the stay for the sole purpose of permitting the resolution of the defendant's jurisdiction application. Butcher J commented that it might be sensible to order a preliminary issue as to whether the defendant's challenge was capable of being advanced or whether it was now precluded by the Dutch Supreme Court judgment.

Finally, Butcher J noted that the claimants' application for security had been expressed as being alternative to their application that the stay be lifted. No decision was therefore necessary. In any event, he would not have ordered security. Henshaw J had already decided that, unless and until the defendant's claim to state immunity had been determined and rejected, the Court could not exercise any powers under section 103 of the Arbitration Act; even if he had the power to order security under section 103(5), he would not have done so. The claimants had not contended that Henshaw J was wrong in his decision, and Butcher J agreed with it.

Comment

This judgment reflects a pragmatic approach to trying to resolve challenges to the recognition and enforcement of foreign awards while challenge proceedings are live at the seat of arbitration. Butcher J recognised that there was still potential for the awards to be set aside in the Netherlands (on grounds of alleged fraud in the arbitral proceedings). However, on the basis of the decisions already handed down by the Dutch courts, he also decided that it is possible to address the defendant's jurisdiction application in the meanwhile and either dispose of the enforcement case altogether or take the claimants a step closer to recognition and enforcement, insofar as the Dutch proceedings are ultimately decided in the claimants' favour. Considerations of efficiency appear to have driven this approach.

The dispute underlying the Dutch and English proceedings is notable both for its duration (the arbitrations were commenced in 2005) and the overall monetary value of the awards ($50 billion). The claimants' most recent application to lift the stay on the enforcement proceedings was issued on 3 March 2022, just days after the Russian invasion of Ukraine, and as set out above, that application was

justified in part by anticipated complications in achieving enforcement of the awards against the Russian Federation in the current geopolitical environment. Although Butcher J expressed a degree of sympathy for the claimants in the circumstances, the question of ease of enforcement was at best a secondary consideration for the Court.

The Russian Federation did not appear at the hearing of the March 2022 application, citing delays in obtaining an OFSI licence for its new counsel. Shortly after the judgment reported here was handed down, OFSI issued a legal fees general licence,[(2)] permitting a limited amount of work to be carried out on behalf of designated persons. It remains to be seen how actively the Russian Federation will continue to resist recognition and enforcement in the United Kingdom in these circumstances. Equally, it will be of interest to monitor whether, if an enforcement judgment is ultimately made in the claimants' favour, sufficient assets will remain in the United Kingdom to ensure that the claimants' victory is not a hollow one. In this connection, it is notable that enforcement efforts are also ongoing in the Netherlands and the United States and may also be taken upon elsewhere.

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Endnotes

(1) [2022] EWHC 2690 (Comm).

(2) General Licence INT/2022/2252300. See also UK Government Guidance on Legal Fees General Licence.