

ClientAlert

Arbitration

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To enforce or not to enforce, a question for the English courts



In the latest instalment of the Yukos v Rosneft saga (covered previously in our **2012 Alert**), the English High Court considered whether an award set aside (annulled) at the seat of arbitration can nevertheless be enforced in England, and the availability of interest on such award.

The question of whether a court should ever enforce an award that has been set aside at the seat of the arbitration has been a topic of much debate and is relevant for any company attempting to enforce in multiple jurisdictions.

For the text of the judgment, click [here](#).

Background

In September 2006, in an arbitration seated in Russia, Yukos Capital obtained four arbitral awards against a former Yukos entity taken over by state-owned Rosneft (the “**Awards**”) and began enforcement proceedings in the Dutch courts.

The Russian Arbitrazh Courts subsequently set aside all of the Awards (the “**Russian Annulment Judgments**”). Nevertheless, the Dutch courts allowed Yukos Capital to enforce the Awards, holding that the Russian courts had acted without impartiality and independence. However, no payment was forthcoming.

Yukos Capital then brought a second enforcement action in England. It argued that, in light of the Dutch court’s judgment, Rosneft could no longer rely on the Russian Annulment Judgments. Rosneft argued, to the contrary, that the doctrine of Act of State prohibited the English courts from questioning the Russian Annulment Judgments. The English Court of Appeal agreed with neither proposition. It did not consider the Russian Annulment Judgments to be an Act of State, but nor was Rosneft estopped from relying on them.

The principal sums due under the Awards were eventually paid by Rosneft but, as the Awards did not contain provisions for the payment of interest, no interest was paid in respect of the delay in payment. Accordingly, Yukos Capital continued its claim in the English High Court for post-award interest. The claims for interest were advanced under Article 395 of the Russian Civil Code and/or section 35 of the Senior Courts Act 1981 (the “**1981 Act**”).

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The English High Court was concerned with two preliminary questions:

- (i) Whether the Russian Annulment Judgments meant that the Awards could not be enforced because they no longer existed in a legal sense (the “Enforcement Preliminary Issue”); and
- (ii) Whether, in principle, interest could be recovered in respect of such awards under Russian law and/or English law (the “Interest Preliminary Issue”).

The High Court decision

The Enforcement Preliminary Issue

On the Enforcement Preliminary Issue, Rosneft argued that the Awards were made under and existed subject to, Russian law. Since the Awards had been annulled by the Russian courts in the Russian Annulment Judgments, they no longer existed and consequently there was no obligation under Russian law to comply with them. Accordingly, Rosneft contended that under the principle ‘*ex nihilo nil fit*’, (‘nothing comes out of nothing’) there were no legal grounds on which Yukos Capital could bring an action in the English court.

Yukos Capital argued that an award could be enforced provided that it was made in accordance with a valid arbitration agreement and was final and binding according to its governing law and that for this purpose it was not necessary for the award to be enforceable under the law governing the arbitration.

The Hon Mr Justice Simon reviewed a considerable body of academic opinion and case law on the topic, concluding that in considering whether an award has legal effect notwithstanding a later court order annulling it “*it would be both unsatisfactory and contrary to principle if the Court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy*”. Accordingly, the existence of the Russian Annulment Judgments did not automatically extinguish the Awards. It was open to Yukos Capital to argue that the Russian Annulment Judgments ought to be disregarded. The question of whether the Awards in the present case were in fact enforceable was left for later determination.

The Interest Preliminary Issue

On the Interest Preliminary Issue there were two distinct sub-issues considered by the High Court:

- (i) the claim for interest under Article 395 of the Russian Civil Code; and
- (ii) the claim for interest in English law under section 35A of the 1981 Act.

Having examined expert evidence adduced by the parties, the High Court held that interest cannot be recovered as a matter of Russian law.

In respect of English law, Rosneft argued that the parties had excluded the ability of the English Court to award interest by having agreed that all disputes between them, including a dispute as to any interest, should be resolved by an arbitral tribunal in Russia, and that such tribunal had no power to award interest under section 35A of the 1981 Act.

The High Court held that the enforcement action was a claim to enforce a debt and therefore interest could be claimed as part of that action even though it was not included in the underlying award. Although the circumstances in which the arbitrators declined to grant an award of interest might be relevant to the exercise of the English Court’s discretion to award interest, the court held there was no absolute bar to an award of interest in respect of the late payment of a foreign award under section 35A of the 1981 Act. Whether the interest should be awarded as a matter of discretion in these particular circumstances was also left for later determination.

Comment

This latest decision advances the debate on the recognition of awards that have been set aside at their seat. It allows English courts, in considering whether to recognise a set-aside decision of a foreign court, to take into account whether the decision in question was obtained by fraud and to apply principles of natural justice and English public policy. It will be interesting to see whether, applying these principles, the English Court decides to give effect to the Awards, and whether or not it exercises its discretion to award interest.