

The setting aside of the Yukos awards: full update

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In *The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited (C/09/477160 / HA ZA 15-1, 15-2 and 15-112)*, the District Court of The Hague considered whether to set aside the Energy Charter Treaty (ECT) awards in favour of the former majority shareholders in Yukos against the Russian Federation worth over US\$50 billion.

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Speedread

As reported in brief last week, the District Court of The Hague has set aside the Energy Charter Treaty awards (both interim and final awards) in favour of the former majority shareholders in Yukos against the Russian Federation worth over US\$50 billion.

Contrary to the approach that the arbitral tribunal had taken in its 2009 interim awards, the District Court came to the conclusion that Article 45(1) of the ECT (which provides for provisional application of the ECT to a signatory state) only applies in relation to the provisions that do not violate the laws of that signatory state. The court then went on to hold that provisional application of the dispute resolution provision of the ECT (Article 26 ECT, providing for arbitration) would violate the Russian constitution.

Despite the setting aside of the arbitral awards in the Netherlands, the investors who will appeal the decision, will also continue their efforts to enforce the awards outside the Netherlands. At the same time, the Russian Federation may now seek the international recognition of the setting aside judgment. (*The Russian Federation v Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited (C/09/477160 / HA ZA 15-1, 15-2 and 15-112)*.)

Background

Article 45(1) and (2)(a) of the Energy Charter Treaty (ECT) on provisional application provide:

"(1) Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

(2)(a) Notwithstanding paragraph (1) any signatory may, when signing, deliver to the Depository a declaration that it is not able to accept provisional application. The obligation contained in paragraph (1) shall not apply to a signatory making such a declaration. Any such signatory may at any time withdraw that declaration by written notification to the Depository."

Article 26(3)(a) of the ECT on dispute resolution provides:

"(3) (a) Subject only to subparagraphs (b) and (c), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration or conciliation in accordance with the provisions of this Article."

Section 1064(4) of the applicable (old) Dutch Arbitration Act 1986 (AA 1986) provides:

"(4) An application to set aside an interim arbitral award may be made only in conjunction with an application for setting aside a final or partial final award."

Section 1065 of the AA 1986 provides:

"(1) Setting aside of the award can take place only on one or more of the following grounds: (a) absence of a valid arbitration agreement (...)"

Facts

The Russian Federation signed the ECT on 17 December 1994 and in doing so became a signatory in the sense of Article 45(1) of the ECT. However, the parliament of the Russian Federation never ratified the ECT. The Russian Federation did not exercise its right under Article 45(2)(a) of the ECT to submit a declaration that it did not accept provisional application of the ECT. On 20 August 2009, it notified the depository of its intention not to ratify the ECT (see *Legal update, Russia withdrawing from Energy Charter Treaty* (www.practicallaw.com/7-422-4842)).