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DISPUTE RESOLUTION ALERT

IN THIS ISSUE

THE POWER OF THE INTERNATIONAL ARBITRAL AWARD – A COMMENT IN LIGHT OF YUKOS

On 20 April 2016, the Hague District Court (Netherlands), set aside an international arbitration award which originally granted a claim for damages in favour of certain shareholders in the Yukos Oil Company (Yukos), against the Russian Federation totalling more than US$50 billion (Yukos award). The Hague District Court determined that Russia had not consented to the arbitral proceedings, that the request for arbitration was, as a consequence, invalid and set aside the largest international arbitral award ever issued. A discussion on the reasons for the setting aside of the Yukos award can be found here.

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At the time of the setting aside of the Yukos award, enforcement proceedings had already been launched in France, the United States, the United Kingdom, Belgium and Germany. Since 2 June 2015 the majority shareholders in whose favour the Yukos award was granted had successfully attached bank accounts, client receivables and immoveable property located predominantly in France, in execution of the Yukos award.

The instinctive reaction to learning that the Yukos award had been set aside would be to immediately halt all enforcement proceedings. After all, the award giving rise to the enforcement proceedings was no longer valid. Or is that necessarily the case? In international arbitration the position is not that simple. It is this 'lack of simplicity' which provides yet another reason why international arbitration is the most popular method for resolving international commercial disputes.

By definition, international arbitration is a process which runs independently to national courts and in so doing, seeks to avoid any undue influence from a sovereign state. It is this foundational principle that ensures that no particular entity (or state) bows down to the power of another sovereign power.

Article 5 of the New York Convention (the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards) provides for specific circumstances in which the enforcement of an award may be refused. One such circumstance is where the award has been set aside by a "competent authority of the country under the law of which that award was made". The permissive wording of the clause is however fundamental to the effective enforcement of foreign arbitral awards.

The rationale for the wording used is quite simple – whilst an international arbitral award may have been obtained in circumstances which avoids any undue influence by sovereign power, a party seeking to review and ultimately set aside such an arbitral award is entitled to approach the national courts of the place in which the arbitral award was made, for relief. It is at this juncture that a sovereign power, has an opportunity to influence the enforcement of an international arbitral award, if it so wishes.

Practically this means that each time a court (in a New York convention signatory country) is faced with a request to enforce a foreign arbitral award (which has been set aside), it is to interrogate the facts carefully and satisfy itself that there has been no untoward dealings in the setting aside of the award in question. Such a court will always maintain a discretion as to whether or not to enforce the foreign arbitral award, regardless of whether that award has been set aside or not.

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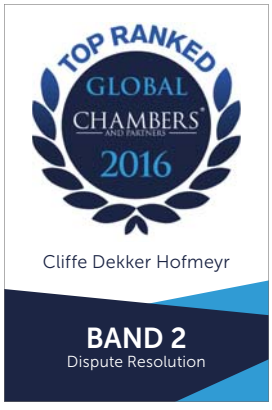
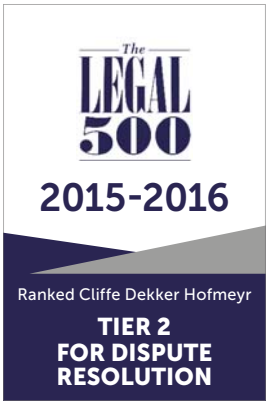
In applying these principles to the setting aside of the Yukos award, it is in theory still possible to enforce the Yukos award in other New York convention countries, but this is unlikely to occur. It would be extremely difficult to argue, for example, that the setting aside of the Yukos award was politically motivated or was tainted by undue influence of a sovereign nation as the proceedings for the setting aside of the award were successfully brought in the Netherlands and not in the country against which the award was granted.

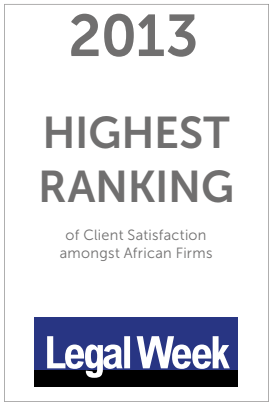
In addition, the enforcement of foreign arbitral awards which have been set aside by a court is anything but consistent. It would appear that enforcing such an award in civil jurisdictions may prove easier than would be the case in common law systems. There is however no guarantee of this as the discretion granted under the New York convention requires that a court consider each case on its merits.

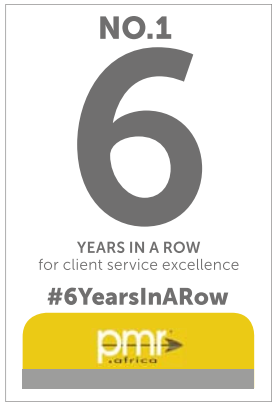
The shareholders aggrieved by the setting aside of the Yukos award have indicated their intention to appeal the decision to the Hague Court of Appeal. We are therefore likely to see a temporary suspension of efforts to execute on the Yukos award, pending the outcome of the hearing of the appeal court.

Jonathan Ripley-Evans









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Tim Fletcher ranked by CHAMBERS GLOBAL 2015–2016 in Band 4 for dispute resolution.

Pieter Conradie ranked by CHAMBERS GLOBAL 2012–2016 in Band 1 for dispute resolution.

Jonathan Witts-Hewinson ranked by CHAMBERS GLOBAL 2014–2016 in Band 3 for dispute resolution.

Joe Whittle ranked by CHAMBERS GLOBAL 2016 in Band 4 for construction.

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Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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