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[SKIP TO CONTENT](#)

- [HOME](#)
- [ABOUT](#)
- [EVENTS](#)
- [JURISDICTIONS](#)
- [EUROPEASIAHONG KONG & CHINAINDIAEAST ASIASOUTH EAST ASIAMIDDLE EASTTHE AMERICASAUSTRALIAPUBLIC INTERNATIONAL LAW](#)
- [INVESTMENT ARBITRATIONSANCTIONSINTERNATIONAL HUMAN RIGHTSBOUNDARIES AND DELIMITATIONADVICE ON STATE CONTRACTS AND DISPUTESHF BLOGS](#)
- [EMPLOYMENTFSRLITIGATIONADR](#) 3 JULY, 2012 · 12:41 PM
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### English Court decision on enforcement of awards annulled at the seat: (1) allows part of Rosneft's appeal in *Yukos Capital v Rosneft* on basis that issue estoppel does not apply; and (2) provides guidance on the limitations of the act of state doctrine

The Court of Appeal has allowed part of Rosneft's appeal in the long-running *Yukos Capital v Rosneft* case. Rosneft sought to overturn a first instance decision on two preliminary issues in enforcement proceedings that:

1. a decision by the Amsterdam Court of Appeal that Russian annulment decisions were "partial and dependent" gave rise to issue estoppel; and
2. Rosneft could not rely on the act of state doctrine to prevent Yukos Capital leading evidence as to the partial and dependent nature of the legal process leading to those annulments.

The Court of Appeal found that the act of state doctrine did not bar any part of Yukos Capital's case, providing helpful clarification on the doctrine's limitations. However, the Court of Appeal found that there was no issue estoppel. The Amsterdam Court of Appeal had decided that the Russian Courts had been partial and dependent on Dutch public order grounds. The English Court must decide the same question but on English public order grounds.

Followers of the case will need to wait to see whether the English Court will follow the Dutch Court of Appeal's lead in allowing the enforcement of these arbitral awards despite their annulment at the seat of arbitration.

#### Background

In September 2006, Yukos Capital obtained four arbitration awards (the "Awards") against Rosneft totalling over US\$400 million. Yukos Capital began enforcement proceedings in the Netherlands on 9 March 2007. In May 2007 the Awards were set aside by the Russian Arbitrazh Courts. Despite this, enforcement proceedings continued. In April 2009, the Amsterdam Court of Appeal gave leave to enforce the Awards, deciding that the annulments were a result of a partial and dependent judicial process and should not be recognised.

Rosneft paid the principal sum under the Awards in August 2010. Yukos Capital then sought to recover interest of over US\$160 million through enforcement of the Awards in the English Court. Two preliminary issues fell to be decided in those English enforcement proceedings:

(1) did the Amsterdam Court of Appeal's finding give rise to an issue estoppel so that Rosneft was unable to argue that the annulment was not a result of a partial and dependent judicial process; and

(2) could Yukos Capital lead evidence as to the partial and dependent nature of the Russian judicial process, or was the English Court unable to consider such issues due to the Act of State doctrine (the principle that the English Court will not adjudicate upon the act of a sovereign government within its own territory)?

### **The First Instance Decision**

The first instance decision was reported on this blog on 13 July 2011 (see [here](#)). As set out in that blog post, the High Court resolved both issues in favour of Yukos Capital. It found that the Amsterdam Court of Appeal's decision did give rise to an issue estoppel in England (such that Rosneft would not be able to deny that the annulment decisions were the result of a partial and dependent judicial process). It also found that Rosneft could not rely on the Act of State doctrine where the validity of the acts of the Russian government were not being called into question.

Rosneft appealed.

### **The Court of Appeal Decision**

#### **(i) "Act of State" doctrine**

The Court of Appeal considered the jurisprudence concerning the Act of State doctrine at some length, disagreeing with the formulation reached by the High Court. The Court of Appeal was careful to explain that the Act of State doctrine did not have "exceptions", but was rather subject to "limitations" which confined its scope. These included (non-exhaustively) that:

- The act of state must, generally speaking, take place within the territory of the foreign state itself;
- The doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, contrary to English principles of public policy or where there is a grave infringement of human rights;
- Judicial acts will not be regarded as acts of state where those acts are an abuse of its responsibilities as a court of law; and
- There is no immunity for a state's commercial activities.

It was the third of these limitations which was most relevant in the present proceedings. The Court considered that the question of whether the Act of State doctrine applied to at least some of Yukos Capital's allegations was not an easy one. However, it ultimately concluded that the doctrine did not bar any part of Yukos Capital's case.

The essential issue was whether the annulment decisions should be recognised, and this was a judicial question raised in respect of judicial acts. Rosneft was asking the English Court to recognise the annulment of the Awards as removing the basis of Yukos Capital's claim for enforcement. Yukos Capital must be entitled to show that such decisions are not worthy of recognition. While the English Court must approach the issue with proper respect and require cogent grounds for any allegation, the Act of State doctrine did not prevent an investigation of, or adjudication upon, the conduct of the judiciary of a foreign state. It was therefore open to Yukos Capital to seek to prove (and for the English Court to hear) its allegations.

#### **(ii) Issue Estoppel**

The Court of Appeal considered the primary requirements for the application of a foreign issue estoppel set out in the first instance decision, namely that:

1. The judgment must be:

1. of a court of competent jurisdiction;
  2. final and conclusive; and
  3. on the merits.
2. The parties in the first action and the later action in which estoppel is raised must be the same.
  3. The issue in the later action must be the same action as that decided in the first.

The High Court held that these requirements had been fulfilled and there were no special circumstances in this case for the Court to exercise discretion. The Court of Appeal disagreed, finding that the third requirement had not been fulfilled. Whether the annulment decisions setting aside the Awards were “partial and dependent” had been decided under Dutch public policy. The standards by which one country decides that the courts of another are partial and dependent may vary considerably in another country. In order for the English Court to refuse recognition, cogent evidence of partiality and dependency must be given and considered in accordance with English law and public policy. Rosneft was therefore not issue estopped from disputing before the English Court that the Russian Court’s annulment of the Awards was partial and dependent. The issue would have to be tried.

### **Comment**

As the case continues, arbitration practitioners and clients will continue to follow its progress with interest. The question of the enforceability of arbitral awards annulled or set aside in their seat is not one with which the English Court is grappling alone. The Paris Court of First Instance recently decided to enforce an arbitral award despite it having been set aside by the Russian Arbitrazh Court<sup>[1]</sup>. In that case Mr Maximov has also sought enforcement in the Netherlands and is appealing to the Amsterdam Court of Appeal. For international parties involved in on-shore arbitrations where the independence of the local courts is questionable, the outcome of these cases could have long and far-reaching consequences.

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<sup>[1]</sup> The May 2012 Paris Court of First Instance decision to render an Order granting enforcement of an International Commercial Arbitration Court (ICAC) award for almost US\$300 million in favour of Nikolai Maximov against Novilipetsk Steel.