INTERNATIONAL
LEGAL BULLETIN
FOCUS ON ARBITRATION
JULY 2016

SHOOK
HARDY & BACON

CONTENTS

The Setting Aside of the Russia/Yukos Awards by the District Court in The Hague: What Is the Role of the Courts?

It is not often that $50-billion arbitration awards are issued. So it is understandable why the global arbitral community was awaiting the decision of The Hague District Court in *The Russian Federation v. Veteran Petroleum Limited*, *The Russian Federation v. Yukos Universal Limited*, and *The Russian Federation v. Hulley Enterprises Limited ("Yukos")*. On April 20, the wait ended. The District Court quashed the three awards totaling nearly $50 billion, holding that Russia never agreed to arbitrate disputes under the Energy Charter Treaty ("ECT") .

How did the District Court reach this conclusion? Russia had, after all, signed the ECT in 1994. While it terminated provisional application of the ECT in 2009, under the ECT's terms, investments made before this date were still subject to investor-State arbitration of expropriation disputes. Once it became a signatory, Article 45(1) of the ECT made the ECT provisionally applicable to Russia unless provisional application of the ECT was inconsistent with Russia's constitution, laws, or regulations. Russia could have submitted a declaration at the time of execution under Article 45(2) of the ECT that it was not able to accept provisional application of the ECT pending entry into force of the ECT, but it did not do so--unlike several other countries which had submitted such declarations. Hence, the tribunal concluded that Article 45(1) was applicable. Since it further found that there was no inconsistency with Russia's constitution, law, or regulations, the arbitration clause in the ECT was in effect and binding.

In its review, the District Court held that the limitation contained in Article 45(2) was not an "all or nothing" proposition. It held further that Article 26 of the ECT containing the arbitration clause could not become effective until Russia ratified it in keeping with the principle of separation of powers. Under the Russian Constitution only the Federal Parliament could ratify a treaty that supplemented or amended Russian law. The Court held that there was no Russian law that allowed an independent legal basis for the settlement of investor-State disputes in international arbitral proceedings. Thus Russia never agreed to arbitrate and the tribunal had no jurisdiction to hear these matters.

Under Dutch law, having an award quashed is the exception, not the rule. The doctrine developed by the Dutch Supreme Court in landmark cases such as *Spaanderdam/Anova* and *Rijpma/Kers* prevents parties from successfully using a setting aside mechanism as a *de facto* appeal. But in 2014, another landmark decision, *Chevron/Ecuador*, was rendered. The Dutch Supreme Court there held that if the jurisdiction of the tribunal is contested, the court will adhere to a less rigid standard of review. Why? Because parties have a fundamental right to access to courts. If arbitrators do not have jurisdiction, that right is violated.

It was *Chevron/Ecuador* that provided the *Yukos* District Court with sufficient ammunition to engage in a full review of the jurisdictional issues. Lack of a valid arbitration agreement is a setting aside ground similar to Article V(1) (a) of the New York Convention. As with Article V(1)(a), courts are usually of the view that while tribunals may decide on their own jurisdiction, courts will have the final word on whether jurisdiction exists.[1] The rationale is that all courts--whether the courts of origin in an annulment procedure or the courts of enforcement--must protect parties' fundamental right to access to courts.

The Hague District Court explained that "this fundamental character also entails that, in deviation from a principally restrictive assessment in reversal proceedings, the court does not restrictively assess a request for reversal of an arbitral award on the ground of a lacking valid agreement." The District Court also shifted the burden of proof by requiring that the claimants prove that the tribunal had jurisdiction.

Although some courts do address Article V(1)(a) of the New York Convention in a manner that safeguards a right of access to courts by closely scrutinizing a tribunal's rationale in support of jurisdiction, shifting of the burden is not typical under Article V(1)(a).

The Hague District Court only ruled on jurisdiction, not on any of the other annulment grounds relied upon by The Russian Federation. Hence, Dutch precedent that setting aside mechanisms cannot be used as a *de facto appeal* remains intact.

In the United States, the question of who decides whether an arbitrator has jurisdiction is a function of contract. In *First Options*,[1] the Supreme Court held that courts "should not assume that the parties agreed to arbitrate arbitrability" unless there is "clear and unmistakable" evidence that they did so. While private parties do not negotiate treaties like the

For more information about Shook's International Arbitration Practice, please contact:


John Barkett
305.960.6931
jbarkett@shb.com


Frank Cruz-Alvarez
305.358.5171
falvarez@shb.com


Sergio Pagliery
305.960.6928
spagliery@shb.com


Marike Paulsson
305.960.6916
mpaulsson@shb.com

ECT, if they want the tribunal to decide arbitrability, they need to make sure under *First Options* that they say so clearly and unmistakably in the arbitration clause of an agreement if they want to avoid the fate of the claimants in *Yukos*.

U.S Courts Using Local "Rules of Procedure" as a Stopper to Enforcement of Foreign Arbitral Awards Unleashing International Criticism: Founded or Not?

Under the New York Convention, recognition and enforcement of foreign arbitral awards may be refused only upon proof of one of seven specified grounds. "Forum non conveniens" (FNC) is not one of the seven grounds. Nonetheless, FNC has been invoked by litigants in the United States seeking to enforce or nullify arbitration awards, and a split in the circuits has resulted.

First, a brief explanation of FNC. The FNC doctrine allows trial courts to decline to hear a case that would be more convenient to try in a foreign forum, notwithstanding that the court has jurisdiction over both the parties and the subject matter of the dispute.[2]

Because both personal and subject matter jurisdiction exists, the use of FNC to dismiss enforcement actions under the New York Convention has been the subject of criticism.[2] Hence, it should not be surprising that courts have diverged on the doctrine's applicability in enforcement proceedings. We highlight here the split between courts in the D.C. and Second Circuits.

In *Belize Social Development Ltd. v. Government of Belize*, 5 F. Supp. 3d 25 (D.C. D.C. 2013), Belize Social Development Ltd. ("BSDL") obtained an arbitral award in London against the Government of Belize ("GOB") and sought to enforce the award under the New York Convention.

The GOB moved to dismiss the petition on several grounds including FNC. But it had a problem. In *TMR Energy Limited v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005), the D.C. Circuit had held that a FNC defense was not available where there was no other forum in which a successful arbitrant could reach a losing arbitrant's property and that was the case when the losing arbitrant was a foreign nation. The district court acknowledged the conflict between *TMR Energy* and the Second Circuit decisions in *In re Arbitration Between Monegasque*

de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir.2002) ("Monde Re") and *Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir.2011), but, obviously, decided to follow *TMR Energy* since it "is the controlling law in our Circuit." *Id.* at 34.

The district court then explained that under *TMR Energy*, it was required to conduct a FNC analysis and balance the private and public interest factors *only* if an adequate alternative forum exists. *Id.* at 34. "Unfortunately for GOB, there is no adequate alternative forum for this case because 'only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.'" *Id.* at 34, quoting *TMR Energy*, 411 F.3d at 303. Continuing, the district court held that "[e]ven if GOB has no attachable property in the United States at this time, . . . 'it may own property here in the future, and [BSDL's] having a judgment in hand will expedite the process of attachment.'" *Id.* at 34, quoting *TMR Energy*, 411 F.3d at 303.

The D.C. Circuit affirmed the district court rejecting the FNC argument for the reasons articulated by the district court. 794 F.3d 99, 105 (D.C. Cir. 2015).

In *Figueiredo Ferraz Consultoria E Engenharia de Projeto Ltda. v. Republic of Peru*, 655 F. Supp. 2d 361 (S.D.N.Y. 2009), Figueiredo sought to confirm a $22-million arbitral award against the Republic of Peru. Peru moved to dismiss the petition on several grounds, including FNC. Relying on the D.C. Circuit's decision in *TMR Energy*, the district court denied the motion finding, among other things, that there was no adequate alternative forum where Figuereido could bring its enforcement action because Figueiredo could not reach the Republic's assets in the United States unless it brought an action in U.S. courts. *Figueiredo*, 655 F. Supp. 2d at 376.

On appeal, the Second Circuit reversed the district court and, in doing so, rejected *TMR Energy*. *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011).

> In considering the factor of the adequacy of an alternative forum, the District Court concluded that although Peruvian law permits execution of arbitral awards, "only a United States court 'may attach the commercial property of a foreign nation located in the United States,' " *id.* at 375–76 (quoting *TMR Energy Ltd. v. State*

> *Property Fund of Ukraine*, 411 F.3d 296, 303 (D.C.Cir.2005)). In deeming a Peruvian forum inadequate for the stated reason, we think the District Court erred. It is no doubt true that only a United States court may attach a defendant's particular assets located here, but that circumstance cannot render a foreign forum inadequate. If it could, every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC. *Figueiredo*, 665 F.3d at 390.
>
> . . .
>
> Where adequacy of an alternative forum is assessed in the context of a suit to obtain a judgment and ultimately execution on a defendant's assets, the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there. *See Norex Petroleum Ltd. v. Access Industries, Inc.*, 416 F.3d 146, 158 (2d Cir.2005) (adequacy of alternate foreign forum does not depend on "identical remedies"). And the fact that a plaintiff might recover less in an alternate forum does not render that forum inadequate. *See Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir.1980) (alternate forum not inadequate although plaintiff might recover only $570,000 there, rather than $8 million in the United States). *Figueiredo*, 665 F. 3d at 390-391.

The Second Circuit held that "[t]o the extent that the District of Columbia Circuit in *TMR Energy* considered a foreign forum inadequate because the foreign defendant's precise asset in this country can be attached only here, we respectfully disagree." *Figueiredo*, 665 F. 3d at 391.

Circuit splits are eventually resolved by the Supreme Court and that may happen here. The GOB has petitioned the Supreme Court for review. In an order dated March 28, 2016, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States on the subject. That brief has not been filed as of this writing. Justice Ginsburg wrote the opinion in *TMR Energy* when she was on the D.C. Circuit. That fact may add an extra measure of interest in the resolution of the circuit split should the Court accept the petition.

Miami's International Commercial Arbitration Court: What It Is and How to Get There

Miami, an arbitral venue whose popularity continues to skyrocket, has created its own international commercial arbitration court. In so doing, Miami has joined the world's top-ranked arbitral seats by serving an unmet need for a top-notch arbitral venue close to the Caribbean, Central America and South America but easily accessible from Europe.

Here is an overview of Miami's international commercial arbitration court, the court's jurisdiction, and how its judges set themselves apart with their highly specialized training and pro-arbitration attitudes.

How did Miami's international commercial arbitration court come to be?

In December 2013, the Eleventh Judicial Circuit of Florida, which is the highest ranking Florida trial court in Miami, came to three conclusions:

1. "Miami . . . has become one of the leading venues in the Americas within which to conduct international commercial arbitration proceedings";
2. "[I]nternational commercial arbitration is a specialized area of law"; and
3. "[D]esignating particular trained judges to hear all international commercial arbitration matters will foster greater judicial expertise and understanding of this area of the law, will lead to more uniformity in legal decisions, and help establish a consistent body of case law . . . ."

As a result, the Miami Circuit Court created within its Complex Business Litigation Section a specialized court dedicated to international commercial arbitration: the International Commercial Arbitration Subsection ("ICA").[3]

What is Miami's international commercial arbitration court?

The ICA, as its name suggests, focuses only on international commercial arbitration.[4] The ICA features judges who are experienced with complex commercial matters and who have received judicial education tailored to international commercial arbitration.[5] Indeed, judges without that specialized education cannot serve as ICA judges.[6] As of this date, five

judges had completed the international commercial arbitration training and were available for ICA matters.[7]

Parties may seek the ICA's assistance with compelling arbitration under the Florida International Commercial Arbitration Act ("FICAA"), the Federal Arbitration Act ("FAA"), or the New York Convention (as implemented by the FAA).[8] The ICA is also available for the panoply of other arbitration-related issues parties would normally bring before a Miami judge: appointment and challenge of arbitrators, obtaining interim measures, issuing process for evidence gathering or witness attendance, and enforcement or set aside of awards.[9]

How do I get my matter before Miami's international commercial arbitration court?

The ICA has jurisdiction over matters arising under the FICAA.[10] Parties may use the FICAA only if their commercial arbitration is "international."[11] That will be the case if:

1. [t]he parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different countries; or
2. [o]ne of the following places is situated outside the country in which the parties have their places of business:
3. [t]he place of arbitration if determined in, or pursuant to, the arbitration agreement; or
4. [a]ny place where a substantial part of the obligations of the commercial relationship are to be performed or the place with which the subject matter of the dispute is most closely connected; or
5. [t]he parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.[12]

For instance, the FICAA may apply to a dispute between a business in the United States and a business outside the United States or to two businesses outside the United States. But the FICAA would not apply to disputes between businesses in the United States unless the arbitral seat is outside the United States, a substantial portion of the contract will be performed outside the United States, or the parties agree that the arbitration's subject matter relates to more than one country.

The ICA also has jurisdiction over cases arising under the FAA.[13] Unlike the FICAA, the FAA applies to contracts involving interstate *or* foreign commerce.[14] Because the FAA may apply to disputes between businesses in different states within the United States, the ICA excludes "matters arising out of a relationship which is entirely between citizens of the United States, unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states . . . ."[15]

If a matter meets the criteria above, it can be heard by the ICA by a filing with the Clerk of the Eleventh Judicial Circuit, along with a complaint, and a notice requesting ICA jurisdiction.[16]

What advantages does Miami's international commercial arbitration court offer?

Parties can expect more consistent and predictable outcomes from a cadre of judges trained in, dedicated to, and experienced with international commercial arbitration. That training, dedication, and experience also enables the ICA judges to be more efficient than judges with little or no experience with arbitration. For instance, the ICA recently ruled on a petition to compel arbitration in less than three months after the petition was filed.[17] That timeline is not surprising: the ICA's lead judge recently said in an interview, "The key is getting the matter resolved, whether it should or should not go into arbitration pretty quickly up front . . . ."[18]

Furthermore, the ICA has already demonstrated its competence. For example, in the recent dispute between CT Miami, LLC ("CT Miami") and Samsung Electronics Latinoamerica Miami, Inc. ("Samsung") CT Miami filed a motion to stay arbitration initiated by Samsung in January 2015.[19] Samsung, in response, filed a motion to compel arbitration.[20]

The central dispute was whether CT Miami had entered into a contract (which had an arbitration clause) with Samsung.[21] The ICA, without an evidentiary hearing, concluded that the parties had entered into a contract and granted Samsung's motion to compel arbitration.[22] Florida's Third District Court of Appeals affirmed the ICA in both regards.[23]

The ICA's location (Miami) offers two additional advantages. For parties from the Caribbean, Central America, and South America, the ICA is the most geographically convenient court that specializes in international commercial arbitration. And Miami's bevy of multi-lingual lawyers offers parties many options for top-notch counsel.

ABOUT SHOOK

Shook, Hardy & Bacon has a breadth of experience in all facets of international arbitration, from drafting and negotiating arbitration agreements to representing parties in arbitral proceedings and subsequent domestic annulment and enforcement proceedings under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. We have also acted as arbitrator or arbitral secretary in both ad hoc and institutional international arbitrations under most institutional rules, including those of the ICC, AAA, ICDR, NAI, LCIA, and UNCITRAL, and governed by a variety of procedural and substantive laws.

We are active in the International Council of Commercial Arbitration (ICCA), London Court of International Arbitration (LCIA), Miami International Arbitration Society, International Arbitration Institute and more generally in the international arbitration community through the International Bar Association and conferences held by organizations such as the ICDR and ICC.

We stay abreast of key issues affecting international arbitration, including arbitrator selection processes, challenges to and enforcement of arbitration awards under the New York Convention, the growing concern of the users of arbitration about the cost and time of arbitration, and the consideration of common ethical standards in conducting international arbitrations.

1. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995).
2. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241, (1981).
3. Eleventh Judicial Circuit Admin. Or. 13-08 ("Admin. Or. 13-08").
4. All cases involving international commercial arbitration must be assigned to the ICA. *Id.* at §1.c. Conversely, cases that do not involve international commercial arbitration will not be eligible to go before the ICA. *Id.* at § 2.
5. *Id.* at ¶ 2. The University of Miami School of Law trained judges during previous years. Currently, the University of Miami's International Arbitration Institute and the Miami International Arbitration Society provide that specialized education as part of a Special Master Series.
6. *Id.*
7. Carolina Bolado, *Miami Builds International Arbitration Chops with New Court*, Law360, Feb. 16, 2016.
8. Admin Or. 13-08 at § 3.c; Fla. Stat. § 684.0009; *Default Proof Credit Card Systems, Inc. v. Friedland*, 992 So. 2d 442 (Fla. 3d DCA 2008) (compelling arbitration under the FAA); *Benefit Ass'n Int'l, Inc. v. Mount Sinai Comprehensive Cancer Center*, 816 So. 2d 164 (Fla. 3d DCA 2002) (granting motion to compel arbitration under the New York Convention).
9. Fla. Stat. §§ 684.001, 684.0014(3), 684.0017(3), 684.0026-.0028, 684.0038, 684.0046-.0048.
10. Admin. Or. 13-08 at § 1.b.
11. Fla. Sat. § 684.0002(1). If the parties did not choose Florida as the arbitral seat, they will not be able to use everything the FICAA offers. Fla. Stat. § 684.0002(2) (specifying certain sections as inapplicable to arbitrations seated outside Florida).
12. *Id.* at § 684.0002(3).
13. Admin. Or. 13-08 at § 1.b.
14. U.S.C. § 1. *See also Default Proof Credit Card Systems, Inc.*, 992 So. 2d at 443-45 ("When underlying contracts involve interstate commerce, agreements to arbitrate under the law of another state are enforceable in Florida under the FAA.").
15. Admin Or. 13-08 at §1.b. This language is identical to the language in 9 U.S.C. § 202, which describes the scope of the New York Convention as implemented by the FAA.
16. *Id.*
17. *CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.*, No. 2015-763-CA-01 (Fla. 11th Jud. Cir., Mar. 28, 2015) (granting motion to compel arbitration filed on January 12, 2015).
18. Bolado, *Miami Builds International Arbitration Chops, supra.*
19. *CT Miami, LLC v. Samsung Electronics Latinoamerica Miami, Inc.*, No. 3D15-641, 2015 WL 5247160, at *2 (Fla. 3d DCA Sept. 9, 2015).
20. *Id.*
21. *Id.* at 2-3.
22. *Id.* at 3.
23. *Id.* at 4-11.