君合研究简讯

JUNHE

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争议解决法律热点问题

荷兰法院撤销尤科斯案 500 亿美元仲裁裁决

2014 年 7 月 18 日，海牙常设仲裁法院（Permanent Court of Arbitration）根据联合国贸法会仲裁规则（UNCITRAL Arbitration Rules）组成的仲裁庭，作出一份有史以来赔偿数额最大的仲裁裁决（简称“**尤科斯案仲裁裁决**”）[1]，裁定俄罗斯向已经破产的尤科斯石油公司（Yukos Oil Company）的股东支付超过 500 亿美元的赔偿。该案中，仲裁庭认定，俄罗斯迫使尤科斯石油公司破产并非法征收了其资产，违反了其在《能源宪章条约》（Energy Charter Treaty）项下的义务。该案并未就此收尾，裁决一出，俄罗斯即刻表示其将全力争取撤销该裁决。2016 年 4 月 20 日，海牙地区法院（简称“**海牙法院**”）以仲裁庭对争议没有管辖权为由撤销了尤科斯案仲裁裁决。本文将简要介绍这一历史性的案件，并从国际投资争议解决的角度探讨该案中的法律议题。

一、尤科斯案始末：500 亿美元裁决的作出与撤销

1. 案件背景

尤科斯石油公司曾是俄罗斯最大的石油公司，也曾是世界十大石油和天然气公司之一。但是，从 2003 年 7 月开始，俄罗斯税务与金融监管部门对尤科斯石油公司采取了一系列调查措施，尤科斯石油公司的董事长和数名高管先后因偷税漏税罪、诈骗罪和洗钱罪等多种罪名被判刑入狱。尤科斯石油公司最终于 2006 年 8 月 1 日被宣告破产，其巨额资产被俄罗斯收归国有。

此后，依据《能源宪章条约》第 26 条，尤科斯石油公司的股东认为尤科斯石油公司受到了俄罗斯专断、不公正和歧视性的待遇，并非法征收了其资产，将上述争议提交仲裁。该案为临时仲裁（*ad hoc* arbitration），根据联合国贸法会仲裁规则进行，仲裁庭由三位仲裁员组成，分别为首席仲裁员 Mr. Yves Fortier，俄罗斯指定的仲裁员 Mr. Stephen Schwebel，以及尤科斯石油公司股东指定的仲裁员 Mr. Charles Poncet。

2. 仲裁庭管辖权

针对仲裁庭的管辖权，俄罗斯提出了诸多异议，其中最主要的异议是关于含有仲裁条款的《能源宪章条约》的“临时适用”（provisional application）问题。俄罗斯虽已签署了《能源宪章条约》，但尚未批准该条约生效。尽管如此，根据《能源宪章条约》第 45（1）条的规定，在临时适用该条约与签署国宪法、法律或法规不冲突的“范围内”（to the extent），签署国应于条约被批准前临时适用。但俄罗斯主张，临时适用该条约与其国内法冲突。

然而，仲裁庭经审理认为，《能源宪章条约》中临时适用的原则并不违反俄罗斯的宪法、法律和法

[1] 参见 *Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226)*, *Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. AA 227)* and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 228)*. 为行文方便，本文将这三份裁决统称为裁决。

规。因此，仲裁庭最终驳回了俄罗斯的管辖权异议，并裁定其对尤科斯案拥有管辖权。

3. 500 亿美元的仲裁裁决

2014 年 7 月 18 日，仲裁庭作出最终裁决。仲裁庭认定，逮捕、税务调查、罚款以及迫使出售主要生产设施以及其他各项针对尤科斯石油公司的措施，在效果上等同于征收尤科斯石油公司，这违反了俄罗斯应临时适用的《能源宪章条约》。在认定俄罗斯违反该条约的基础上，仲裁庭裁定尤科斯石油公司的股东应获得 500 亿美元的损害赔偿。同时，仲裁裁决裁定，俄罗斯的海外资产可以用于该裁决的执行。

4. 海牙法院撤销尤科斯案仲裁裁决

然而，2016 年 4 月 20 日，海牙法院撤销了仲裁裁决，理由是仲裁庭“错误地认定其享有管辖权”，而根据《荷兰民事诉讼法典》（the Dutch Code of Civil Procedure）第 1065.1（1）条的规定，“不存在有效的仲裁协议”（absence of valid arbitration agreement）的仲裁应予撤销，海牙法院因此撤销了尤科斯案仲裁裁决。[2]

首先，海牙法院确认，其作为仲裁地法院，根据荷兰法有权对本案仲裁裁决进行司法审查。

随后，海牙法院进一步审查了尤科斯案仲裁庭的管辖权。海牙法院认为，《能源宪章条约》第 45（1）条中“临时适用”的前提是，该条约中的具体条款与俄罗斯的宪法、法律和其他法规相兼容。基于两份专家报告，海牙法院认为，俄罗斯的宪法、法律和法规并不允许将外国投资者和政府间的争议提交仲裁。因此，《能源宪章条约》第 26 条中的仲裁条款，不符合俄罗斯国内法，在条约批准生效前，不得临时适用。因此，海牙法院最终认定，仲裁庭没有管辖权，根据荷兰法，尤科斯案仲裁裁决因“不存在有效的仲裁协议”，应予撤销。

二、本案若干法律议题研讨

尤科斯案引人注目，不仅因为有史以来数额最高的损害赔偿，还因为其在世界范围内广泛的政治影响。本文将对比国际商事仲裁的相关问题，重点讨论该案中国际投资仲裁的典型议题。

1. 无默契仲裁原则

国际商事仲裁中，当事人间的仲裁协议是进行仲裁的必要前提。而国际投资仲裁则采纳了“无默契仲裁”（arbitration without privity）原则。该原则确认，即使与东道国不存在仲裁协议，但只要东道国曾签署包含仲裁条款的国际条约或作出通过仲裁解决争议的单方承诺，外国投资者即享有提起仲裁的权利。[3] 尤科斯案就是适用无默契仲裁原则进行国际投资仲裁的典型案例。本案中，尤科斯石油公司的股东与俄罗斯之间并不存在仲裁协议，其股东系依据俄罗斯签署的《能源宪章条约》中的仲裁条款而对俄罗斯提起的仲裁。

2. 东道国的国际法义务

尤科斯案中，尤科斯石油公司的股东主张，俄罗斯违法了《能源宪章条约》中的义务，包括不得对投资者进行国有化、征收或采取效果等同于国有化和征收的措施。该主张依据在于，国际法下，条约的缔约国应遵守条约（条约必守原则，*paeta sunt senvanda*）。此外，个人有权主张国际法中赋予其的利益、权利和保证。正因如此，国际投资仲裁中常常需要适用国际法，例如，尤科斯案中的仲裁庭和海牙法院，均适用《维也纳条约法公约》（Vienna Convention on the Law of Treaty）对《能源宪章条约》进行解释。相较而言，商事仲裁中，当事人通常仅能依据当事人间签署的合同内容进行仲裁，极少有适用国际法的情形。

3. 仲裁裁决的司法审查

目前，国际投资仲裁发展出两种不同的类型，一是《解决国家与他国国民之间投资争议公约》（Convention on the Settlement of Investment Disputes between States and Nationals of Other States，简称“**《华盛顿公约》**”）体系下的仲裁（简称“**ICSID**

[2] 参见 See *Russia v. Veteran Petroleum Limited*, *Russia v. Yukos Universal Limited* and *Russia v. Hulley Enterprises Limited*, the Hague District Court, Case No. C/09/477160 / HA ZA 15-1.

[3] 参见 See Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. FOREIGN INV. L.J. 232, 232 (1995).

仲裁”），另一种是联合国贸法会仲裁规则或其他特定仲裁机构[4]仲裁规则下的非 ICSID 仲裁（简称“**非 ICSID 仲裁**”）。

尤科斯案仲裁，系根据联合国贸法会仲裁规则，由海牙常设仲裁院作为仲裁员指定机构协助组成仲裁庭而进行的临时仲裁，是典型的非 ICSID 仲裁。该案仲裁庭作出的仲裁裁决具有终局性，但是仲裁地法院有权依据仲裁地法对其进行司法审查。这也就给了俄罗斯在海牙法院申请撤销该判决的机会。最终，海牙法院也依据荷兰法撤销了尤科斯案仲裁裁决。

而 ICSID 仲裁则完全在《华盛顿条约》自成一体的体系下进行，由根据《华盛顿条约》组建的国际投资争端解决中心（International Centre for the Settlement of Investment Disputes）进行管理。ICSID 仲裁裁决是终局的，对仲裁当事人具有约束力，并且不受制于《华盛顿条约》规定之外的任何审查和救济。根据《华盛顿条约》，仅在特定且有限的条件下[5]，当事人才可以向 ICSID 组建的临时委员会申请撤销仲裁裁决。因此，ICSID 仲裁作出的仲裁裁决将免于任何国家法院的司法审查。

4. 仲裁裁决的执行

由 ICSID 仲裁作出的仲裁裁决在执行时，《华盛顿公约》的缔约国应将该仲裁裁决视为“如同该国法院作出的终审判决”予以认可并执行。并且，ICSID 是有权审查并撤销其仲裁裁决的唯一机构。“如同该国法院作出的终审判决”的表述实际上要求缔约国将仲裁裁决视同终局的、不受其法院审查的国内终审判决予以执行。

然而，非 ICSID 仲裁作出的裁决，需要根据《承认和执行外国仲裁裁决公约》（Convention on the Recognition and Enforcement of Foreign Arbitral Awards，简称“**《纽约公约》**”）的规定由被申请执行地法院承认和执行。根据《纽约公约》，被申请承认和执行仲裁裁决的法院有权审查该仲裁裁决。本案中，法院的司法审查使尤科斯案仲裁裁决的执行更为复杂且具有不确定性。因为，根据《纽约公约》第五条第一款第（戊）项，“裁决所依据法律之国家之主管机关撤销或停止执行者”，被要求承认和执行的法院“始得”（may），而非必须，拒予承认及执行。尤科斯案仲裁裁决的执行程序已经于 2014 年在法国、比利时等国家启动，理论上，这些国家的法院有权行使其裁量权，最终决定是否承认和执行该裁决。

三、简评

尤科斯案因其数额巨大的损害赔偿和世界范围内广泛影响而备受关注。海牙地区法院作出的撤销判决进一步促使国际投资者考虑国际投资争议解决方式的选择，例如，就仲裁裁决所面临的司法审查，是应选择 ICSID 仲裁抑或非 ICSID 仲裁？

尤科斯石油公司的股东已经表明，他们不服海牙地区法院的判决，将就此提起上诉。同时，针对俄罗斯海外资产的执行程序也已经启动，其中包括在美国、英国、法国、比利时和印度等国法院的仲裁裁决执行程序。尤科斯案上诉结果如何以及执行程序有何进展，都值得我们继续关注。

[4] 例如国际商会（The International Chamber of Commerce, ICC），斯德哥尔摩商会仲裁院（Arbitration Institute of the Stockholm Chamber of Commerce, SCC），伦敦国际仲裁院（London Court of International Arbitration, LCIA）等等。

[5] 《华盛顿公约》第 52 条第 1 款规定，任何一方可以以下述一个或数个理由书面申请撤销裁决：1.仲裁庭组成不恰当；2.仲裁庭明显越权；3.仲裁员有贪污腐败行为；4.仲裁庭严重僭越基础程序规则；5.裁决未能陈述其依据的理由。

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JUN HE BULLETIN

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Dispute Resolution

Dutch Court Set Aside $50 Billion Award in Yukos Case

On July 18th, 2014, a tribunal formed by the Permanent Court of Arbitration (PCA) in Hague ("**Tribunal**") rendered a largest-ever award ("**Award**" or "**Yukos Award**")[1] which required Russia to pay damages more than USD 50 billion to the shareholders of the defunct Yukos Oil Company ("**Yukos**") on the basis that Russia breached its obligations under the Energy Charter Treaty ("**ECT**" or "**Treaty**") by forcing Yukos into bankruptcy and illegally expropriating the latter's assets. The story does not end there, as Russia immediately indicated that it would fight to set aside the Award. On April 20th, 2016, the Hague District Court ("**Hague Court**" or "**Court**") set aside the Award with the reason that the tribunal lacked jurisdiction to arbitrate the dispute. This article will briefly introduce this historic case and analyze some typical issues thereof from the perspective of international investment dispute resolution.

I Review of Yukos Case - from $50 Billion Award to Quash

1. Background

Yukos was Russia's largest oil company and was listed as one of the world's top ten oil and gas companies. However, starting in July 2003, the tax and finance supervision authority of Russia took a series of investigation measures against Yukos, and the president and several senior managers of Yukos were sentenced to prison terms for various offences such as tax evasion, fraud, money laundering and so on. Yukos was eventually declared bankrupt on August 1st, 2006 and its huge assets were nationalized.

Yukos' shareholders then submitted the disputes with Russia for *ad hoc* arbitration under the UNCITRAL Arbitration Rules provided in Article 26 of the ETC and claimed that Yukos was arbitrarily, unfairly and discriminatorily treated and its assets were illegally expropriated. A three-arbitrator

[1] See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 226), Yukos Universal Limited (Isle of Man) v. The Russian Federation (PCA Case No. AA 227)* and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation (PCA Case No. AA 228).* For purpose of this article, these three awards together are referred as the Award.

tribunal consisting of the Chief Arbitrator Mr. Yves Fortier, Mr. Stephen Schwebel appointed by Russia, and Mr. Charles Poncet appointed by Yukos shareholders ("**Tribunal**") was constituted to hear the case.

2. Jurisdiction of Tribunal

Russia raised a series of objections to the Tribunal's jurisdiction, inter alia, the major objection related to the "provisional application" of the ETC which provided an *ad hoc* arbitration clause. Though the ETC was signed but was not ratified by Russia, the ETC required that the ECT signatories to provisionally apply the treaty "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations" before its ratification, in accordance with Article 45(1). But Russia argued that the ETC was inconsistent and in conflict with its domestic laws.

The Tribunal, after examining the case, eventually found that the principle of provisional application of the ETC had not violated Russia's constitution, laws and regulations. Therefore, the Tribunal dismissed Russia's jurisdictional objection and ruled its jurisdiction over the case.

3. $50 Billion Award

On July 18th, 2014, the Tribunal rendered its final award. The Tribunal found that the arrests, tax reassessments, fines and the forced sale of main production facility, among other measures imposed on the claimants, amounted to an indirect expropriation of Yukos, in breach of Russia's obligations under the ECT during the provisional application of the Treaty in Russia. Due to Russia's breach of the ECT, the Tribunal awarded the Yukos' shareholders more than USD 50 billion as damages. It also addressed that Russia's oversea assets were available for enforcement of the Award.

4. Hague Court Set Aside Award

However, on April 20th, 2016, the Hague Court set aside the Yukos Award finding that the Tribunal "wrongly declared itself competent" which may lead to the reversal of the Award in accordance with Section 1065.1(1) of *the Dutch Code of Civil Procedure* – "absence of valid arbitration agreement".[2]

First of all, the Court confirmed its jurisdiction on the basis that Hague is the place of arbitration and it has competence to review the Award in accordance with the Dutch Law.

Then the Court assessed the Tribunal's jurisdiction holding that the "provisional application" under the Article 45 (1) of the ETC is applicable on the premise that individual ETC's provision is consistent with Russia's constitution, laws and other regulations. Basing on two expert reports, the Court found, however, that Russia' constitution, law and other regulation does not provide a legal basis for submitting a dispute between foreign investors and the government for arbitration. Thus, the arbitration clause in Article 26 of ETC shall not be provisionally applied. Thus,

[2] See *Russia v. Veteran Petroleum Limited*, *Russia v. Yukos Universal Limited and Russia v. Hulley Enterprises Limited*, the Hague District Court, Case No. C/09/477160 / HA ZA 15-1.

the Court arrived at the opinion that the Tribunal lacked jurisdiction and the Award should be quashed under Dutch Law due to "absence of valid arbitration agreement".

II Some Insights into Yukos Case

The Yukos case has drawn a great deal of attention not only due to damages awarded being the largest-ever, but also the widespread political impact around the world. However, this section will focus on some important issues that arise in regard to international investment arbitration versus international commercial arbitration.

1. Arbitration without Privity

In international commercial arbitration, an arbitration agreement between parties is necessary. However, international investment arbitration adopts the principle of "arbitration without privity" which sets forth the right of the investor to initiate arbitration against the host state without a previous arbitration agreement as long as the host state has signed an international treaty with an arbitration clause or made a unilateral statement to arbitration.[3] The Yukos case is a case where the principle of arbitration without privity exactly applied. There was no previous arbitration agreement between Yukos and Russia. It was on the basis of the arbitration clause contained in the ETC that Yukos initiated the arbitration against Russia.

2. Host State's Obligations under International Law

In the Yukos case, Yukos's shareholders argued that Russia breached its obligations of ETC, inter alia, protection of investors from nationalization, expropriation or any other measures having effect equivalent to nationalization or expropriation. This argument is tenable because, under international law, a signatory state is bound by treaties it signed (*paeta sunt senvanda*) and individuals are entitled to the benefits, rights and guarantees established in international law. In this regard, international law was often applied in the international investment arbitration, for example, the Tribunal and Court both applied the Vienna Conventional on the Law of Treaties to interpret the ETC. However, in commercial arbitration, the parties are usually limited to recourse to the contents of the contract signed by and between them and the international law is rarely applied.

3. Judicial Review of Award

Presently, the international investment arbitration has developed into two different forms, one is arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("**ICSID Convention**") ("**ICSID Arbitration**"), and the other is non-ICDIS Arbitration which is usually *ad hoc* arbitration or institutional arbitration under UNCITRAL Rules or rules of specific arbitral institutions, such as ICC, SCC and LCIA ("**Non-ICSID Arbitration**").

The Yukos arbitration is a typical Non-ICSID Arbitration, i.e. an *ad hoc* arbitration conducted under UNCITRAL Arbitration Rules with the

[3] See Jan Paulsson, Arbitration Without Privity, 10 ICSID REV. FOREIGN INV. L.J. 232, 232 (1995).

support of PCA as the appointing authority. The Award rendered by the Tribunal is final but subject to *lex loci arbitri* and the judicial review of the court at the arbitration place. Therefore, it gives an opportunity for Russia to challenge the Award in Hague. Eventually the Court in Hague did set aside the Award according to the Dutch Law.

ICSID Arbitration, however, proceeds under an autonomous system of ICSID Convention and is managed by the International Centre for the Settlement of Investment Disputes ("**ICSID**") establish under the ICSID Convention. The ICSID awards are final and binding and not subject to any remedy, except as provided for in the ICSID Convention. Under the ICSID Convention, the parties could apply for the annulment of an award under certain narrowly defined circumstances [4] before a separate *ad hoc* committee of the ICSID. Therefore, an award by the ICSID Arbitration is immune from the national court's judicial review.

4. Recognition and Enforcement of Award

When it comes to enforcement of an award by the ICSID Arbitration, the Contracting State of ICSID Convention should recognize and enforce the awards "*as if it were a final judgment of a court in that State*". And the ICSID is the only authority to review and set aside its arbitral awards. The reference to "*a final judgment of a domestic court*" puts ICSID awards on the same footing with a final domestic judgment that is no longer subject to judicial review by the state court for enforcement.

However, an award rendered in the Non-ICSID Arbitration usually need to recourse to Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") for recognition and enforcement. Under the New York Convention, the state court to which the recognition and enforcement of the award is applied for has authority to review the award. This judicial review by the state court may make the enforcement of the Yukos Award complicated and uncertain. Because, in accordance with Article 5.1(5) of the New York Convention, recognition and enforcement of the award "**may**" be refused where the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made. Nonetheless, the enforcement proceedings of the Yukos Award were initiated in 2014 in France, Belgium and other countries. Theoretically, the courts in those countries have the discretion to decide on whether or not to recognize and enforce the Award.

III Comments

The Yukos case has drawn great deal of attention due to the amount being the largest-ever damages awarded and the widespread impact around the world. The set-aside judgment by the Hague Court further spurs international investors to carefully consider the choice of dispute resolution in international investment, i.e. ICSID Arbitration or

[4] Article 52(1) of ICSID Convention, *(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.*

Non-ICSID Arbitration in particular in terms of the state court's judicial review of a final award.

The shareholders of Yukos have expressed their intent to appeal the judgment of the Hague Court and have simultaneously initiated the application for enforcement of the Yukos Award with the authorities of various jurisdictions where Russia has overseas assets, including the USA, UK, France, Belgium and India. Developments in both the appeal and the enforcement proceedings deserve our continuous attention.

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