

Recognition of Foreign Insolvency Judgments: The Case of Yukos

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1. BACKGROUND FOR THE YUKOS CASE

In this contribution, we scrutinize the Yukos insolvency case recognizing it as a precedent setting sequence of decisions, both in terms of the Russian constitutional development and the progression in cross-border (Dutch) insolvency practice. First, we describe the background of the Yukos insolvency in Russia (1). From there we briefly summarize the relevant judgments of the European Court of Human Rights (*Yukos v. Russia*) (2) and the Supreme Court of the Netherlands in 2008 and 2013 (3). We then turn to a more recent constitutional response to the *Yukos v. Russia* affair, resulting in two guiding positions of the Russian Constitutional Court from 2015 and 2017 (4), and the long awaited 9 May 2017 decision of the Amsterdam Court of Appeal in *OOO Promneftstroy and Yukos Finance B.V. v. Others*, refusing recognition of the Russian insolvency of Yukos based on a public policy exception (5). Ultimately, we conclude with some remarks on the future of Dutch-Russian cross-border insolvencies, in the aftermath of the Amsterdam court's non-recognition decision (6).

It is important to note that the Yukos case is not a routine case. Due to its complexity and the high stakes involved, it has attracted significant attention both within and outside Russia and has protracted for well over a decade. Heavy involvement of the Russian government, the Constitutional Court of the Russian Federation and the Dutch Supreme Court in addressing various legal challenges related to the Yukos case has made it a testing ground for international insolvency law. Importantly, we do not aim at reviewing the correctness of the multitude of judgments around Yukos insolvency – we merely intend to present the facts and the legal positions chosen by the courts mentioned, concluding with a guidance for the future.

Yukos Oil Company (Yukos Oil, Yukos) was incorporated in Russia on 15 April 1993. It was together with its subsidiaries one of the largest oil companies in the world and engaged in exploration, development and production of crude oil and natural gas, refining crude oil into finished petroleum products, and marketing and

distributing crude oil, natural gas and petroleum products.¹ The company had been fully state-owned until 1995–1996 when, through a series of tenders and auctions, it was privatized and fell under the control of a banking group, Bank Menatep, chaired by its co-founder Mikhail Khodorkovsky. In less than a decade, from 1995 to 2003, Yukos Oil became one of the landmark oil companies in Russia, with more than 600 subsidiaries, a total production of oil amounting to 19.2% of Russian oil production and a market capitalization around USD 46 billion.²

At the end of the 1990s and the beginning of 2000s, it was claimed by some that Yukos used various tax optimization schemes that were not in line with the applicable tax legislation. In 2003, the Russian tax authority started its investigations regarding Yukos tax payments for 2000–2003. As a result of the investigations, Yukos was charged with massive tax evasion and the total amount of tax debt was set to exceed EUR 15 billion.³ At the same time, in October 2003 the chairman and CEO of Yukos Mikhail Khodorkovsky was arrested and later found guilty for fraud, tax evasion and other economic crimes, and sentenced to nine years in prison.⁴

Yukos attempted to challenge the tax claims arguing, inter alia, that they were partially time barred. As part of the proceedings, the Constitutional Court of the Russian Federation had to decide whether the prescribed three-year limitation period for responding to tax violations could be disregarded. In its judgment from 14 July 2005, the court ruled that where the taxpayer impedes tax supervision and the conduct of tax inspections, the court may excuse the tax authorities' failure to bring the proceedings in time.⁵ As a result of this ruling, Russian courts affirmed the legality of tax claims, noting that Yukos had been actively impeding tax inspections – the claims therefore were not time-barred. Meanwhile, Russian authorities started enforcement proceedings. In July 2004, the bailiffs seized the shares of OAO Yuganskneftegas, one of Yukos' principal production subsidiaries, responsible for approximately 60% of its revenue. In order to prevent

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1 Yukos Oil Company, *U.S. GAAP Consolidated Financial Statement* (31 Dec. 2002).

2 M. Glazunov, *Corporate Strategy in Post-Communist Russia* (Routledge Contemporary Russia and Eastern Europe Series) 163 (Routledge 2016).

3 See the facts section in case of *OAO Neftyanaya Kompaniya Yukos v. Russia* (ECtHR), application No. 14902/04, dated 20 Sept. 2011. See *European Human Rights Cases 2011/1600*, with comments of Bob Wessels.

4 In 2010, while still serving his sentence, Mikhail Khodorkovsky was further charged and found guilty of embezzlement and money laundering. As a result, his sentence was extended to 2014. After presidential pardon Mr Khodorkovsky was released from jail on 20 Dec. 2013.

5 Russian Constitutional Court, Case No. 9-II from 14 July 2005, available in Russian at <https://rg.ru/2005/07/22/postanovlenie-dok.html>.

the auction sale of the above shares, Yukos filed a voluntary petition under Chapter 11 of the US Bankruptcy Code in the US Bankruptcy Court for the Southern District of Texas, Houston Division. However, on 24 February 2005 the US Court dismissed the bankruptcy petition holding that such dismissal was for the best interests of the creditors and the estate, since the vast majority of the business and financial activities of Yukos continued to occur in Russia.⁶ Having failed to secure an injunction, Yukos could not stop the sale of the shares in OAO Yuganskneftegas, which were ultimately sold for around EUR 7 billion and later transferred to OAO Rosneft, a state owned oil company.

In September 2005, a consortium of foreign banks filed an application with a Russian court for recognition and enforcement of an English High Court judgment ordering Yukos to repay the contractual debt of around EUR 385 million, resulting from its default under a USD 1 billion loan agreement from 24 September 2003. After having the judgment recognized, in March 2006 the banks lodged a petition to initiate insolvency proceeding against Yukos, Mr Eduard Rebgun was appointed as Yukos' temporary insolvency administrator.⁷ Tax authorities were included into the creditors' registry with claims exceeding EUR 10 billion in amount. On 25 July 2006, the committee of creditors rejected the restructuring plan, proposed by the management, and voted to liquidate Yukos instead. In August 2006, the court declared Yukos bankrupt, dismissed its management and appointed Mr Rebgun as a liquidator.⁸ Through a number of auctions from March to August 2007, the company's assets were sold out, Yukos was liquidated and the company ceased to exist.

2. YUKOS CASE IN THE EUROPEAN COURT OF HUMAN RIGHTS

On 23 April 2004, the management of Yukos filed an application with the European Court of Human Rights (ECtHR, Court), arguing that the company's rights had been violated by the Russian state. In particular, they asserted that the state violated Article 6 ('right to a fair trial'), Article 1 of Protocol No. 1 ('protection of property'), Articles 13 ('right to an effective remedy') and 14 ('prohibition of discrimination'). Originally, Yukos sought around EUR 81 billion of damages and a daily interest payment of EUR 29.6 million for

pecuniary damage, later the company changed the total amount to EUR 37.9 billion.

The hearing on the merits took place in March 2010 and on 20 September 2011 the ECtHR delivered its judgment, exceeding 150 pages. The Court analysed the enforcement proceedings in their entirety and found that the speed and rigidity with which the authorities demanded the company to pay, the decision to target and sell Yukos' main production unit, OAO Yuganskneftegaz, without considering other alternatives, proposed by the management, the disproportionate amount of the enforcement fee (around EUR 1.16 billion) caused 'a fatal blow to [Yukos'] ability to survive the tax claims and to continue its existence'.⁹ As a result, the Court found a violation of Yukos' rights under Article 1 of Protocol 1 ('protection of property'). The ECtHR disagreed with the Russian Constitutional Court in adjudicating the time-barred tax claims, concluding that it represented a reversal and departure from the well-established practice directions of the Supreme Commercial Court and was therefore unforeseeable to the taxpayer.¹⁰ Thus, the Court reasoned that the retroactive imposition of the penalties relating to 2000 and in part of the year 2001 was unlawful. Besides, the ECtHR also held that Yukos' trial did not comply with the procedural requirements of Article 6, finding that the company did not have sufficient time to study the case file at first instance, and the early beginning of the hearings by the appeal court unjustifiably restricted the company's ability to present its case on appeal.¹¹

At the same time, the Court did not find proof that Yukos was discriminated¹² or that the case against it was politically motivated, or that there was effectively a disguised expropriation of the company's property and the alleged intentional destruction of the company itself.¹³ Moreover, apart from the intervention by the Russian Constitutional Court and tax assessment for 2000 and a part of 2001 relating to the imposition and calculation of penalties, the ECtHR rejected Yukos' claims that the company's debt had been recognized as a result of an unforeseeable, unlawful and arbitrary interpretation of the domestic law.¹⁴

Interestingly enough, following the announcement of the Court's judgment, both parties claimed victory.¹⁵ It was not until 2014, when the ECtHR rendered its long-awaited judgment on just

6 In re Yukos Oil Company, Debtor. United States Bankruptcy Court, S. D. Texas, Case No. 04-7742-H3-II, dated 24 Feb. 2005. Further on this case, see Bob Wessels, *International Insolvency Law Part I* (4th ed., Deventer: Wolters Kluwer 2015) para. 10046.

7 A temporary insolvency administrator (*vremenniy upravlyayushiy*) is appointed for the first insolvency stage, namely the supervision stage (*nablyudenie*). His main tasks include taking measures to secure debtors' assets, conducting analysis of debtors' financial position, keeping the registry of creditors, etc. During the supervision stage, debtor's management remains in place.

8 The vast majority of insolvency proceedings in Russia (around 95% according to our reasoned estimate) end up in liquidation. During the liquidation insolvency stage (*konkursnoe proizvodstvo*) a liquidator (*konkursniy upravlyayushiy*) is appointed. He replaces debtor's management. For the avoidance of confusion, we will refer to Mr Rebgun interchangeably as to liquidator, insolvency trustee, curator or administrator.

9 *OAO Neftyanaya Kompaniya Yukos v. Russia (ECtHR)*, application No. 14902/04, dated 20 Sept. 2011, paras 650, 653.

10 *Ibid.*, paras 573–575.

11 *Ibid.*, para. 551.

12 *Ibid.*, para. 616.

13 *Ibid.*, para. 666.

14 *Ibid.*, paras 605, 616.

15 *Russia Violated Rights of Yukos Oil Company, Rules European Court*, Guardian (20 Sept. 2001), <https://www.theguardian.com/world/2011/sep/20/russia-violated-yukos-rights-court>.

satisfaction, that the real disruption occurred. On 31 July 2014 the Court awarded Yukos shareholders (the company was dissolved by that time) the unprecedented EUR 1.87 billion¹⁶ – the largest compensation ever given by the ECtHR.¹⁷ While the award was welcomed by the former officers of Yukos, Russian authorities unleashed their anger and dissatisfaction, commenting that they did not consider this judicial act as ‘an example of a fair and impartial approach to assessing legal and factual circumstances of the case’.¹⁸

3. RECOGNITION OF YUKOS INSOLVENCY IN THE NETHERLANDS, SUPREME COURT GUIDANCE

The Yukos case led to several judgments from the Dutch Supreme Court. In the matter of recognition, two cases stand out. The first one is from 2008.¹⁹ In these interim proceedings it was expressly acknowledged that the case itself still had to be decided on the merits. The question within the interim proceedings was whether Mr Rebgun, in his capacity of an insolvency trustee in the bankruptcy of Yukos Oil (which was opened by the Moscow court), had the authority to exercise the voting rights on the shares in Yukos Finance B.V. (Yukos Finance), a Dutch wholly owned subsidiary of Yukos Oil, including the right to dismiss the management of Yukos Finance. Nevertheless, the question was obviously a test for the solidity of the Dutch’ notorious position regarding territoriality in insolvency matters.

In its judgment from 31 October 2007, the court in the first instance held that the question whether to recognize the powers of a foreign (non-EU) bankruptcy trustee should be answered in several steps: (1) Analysis of the foreign (Russian) law to decide if the bankruptcy trustee is authorized to represent the company under foreign law, (2) Determination whether the trustee can exercise his foreign-based powers in the Netherlands.²⁰ This last step according to the court’s reasoning required the recognition of a foreign bankruptcy order.²¹

Thus, in line with the court’s reasoning, a foreign trustee had the potential to act in his capacity in the Netherlands. Contrary to the arguments put forward by Yukos Finance, the principle of territoriality did not bar Mr Rebgun, as a foreign curator, from exercising voting rights on the shares in Yukos Finance. Although the principle of territoriality did not prevent a trustee in a foreign bankruptcy from exercising his rights in the Netherlands, the

territoriality principle remained intact with regard to the garnishment aspects of bankruptcy, its sole effect – according to the court being that property owned by a company declared insolvent in another country and attached as part of an insolvency proceeding did not include any assets located in the Netherlands. In appeal, the Amsterdam Court of Appeal upheld this decision, but its reasoning differed: the foreign trustee may exercise his rights, as vested in the shares, not because of the fact that these shares are a part of the insolvent Russian estate, but:

because he (uniquely) represents the company, which owns the shares, according to the law applicable to that company. This has nothing to do with the extraterritorial effect of insolvency ... As in this case there is not present a statutory director who, next to the administrator (in another country) is able to exercise powers, the fact that the Russian insolvency garnishment does not extend to the Dutch shares, does not have any significance.²²

The Dutch Supreme Court, in its interim judgment from 19 December 2008, clearly rejected the view of the Amsterdam Court of Appeal. The Supreme Court agreed with the opinion of the plaintiffs (Yukos Finance et al.) that according to Dutch private international law, the issue relating to the existence and meaning of the powers of a trustee in bankruptcy liquidation proceedings is a question of insolvency law:

Answering this question will be determined by the law which is applicable to such bankruptcy proceedings, and therefore – contrary to what the Court of Appeal has decided concerning this point – it must be assessed whether the principle of territoriality of a bankruptcy liquidation, which is leading in Dutch private international law, limits the possibility that the defendant in his capacity of a temporary administrator in the bankruptcy of Yukos Oil exercises the voting rights based on the shares in Yukos Finance.²³

Even though this part of the judgment seems to be in favour of the Russian trustee, he nevertheless loses the case, because the Dutch Supreme Court upholds firmly the principle of territoriality. Although not uncommon in the Supreme Court’s way of reasoning, it refers to earlier judgments, and therefore provides a concise roadmap in the way the courts in the Netherlands treat foreign insolvency proceedings:

16 *ОАО Нефтяная Компания Yukos v. Russia (ECtHR)*, application No. 14902/04, dated 31 July 2014 (Just Satisfaction). The amount of compensation was calculated by adding up penalties for 2000 and a part of 2001, together with the respective enforcement fees.

17 As a comparison, the total amount of compensation awarded against Russia in any previous year did not exceed EUR 9 million per year.

18 Минюст РФ назвал решение ЕСПЧ по иску бывших акционеров ЮКОСа несправедливым, Интерфакс, 31 июля 2014, доступ <http://www.interfax.ru/russia/388811>.

19 Dutch Supreme Court 19 Dec. 2008, *LJN* BG3573; *RI* 2009/18; *JOR* 2009/94, comments Veder; *NIPR* 2009/17; *V&O* 2009, 19ff, comments by Van Beek; *NJ* 2009/456, note De Boer; *Ondernemingsrecht* 2009-6, 319ff, comments by Broeders.

20 District Court of Amsterdam 31 Oct. 2007, Case No. 355622/ HA ZA 06-3612. The Judgment is available in English at <https://www.iiiglobal.org/sites/default/files/GodfreyMisamoreandYukosvOAOYukosOilCompany.pdf>.

21 Notably, in this judgment, the District Court of Amsterdam ultimately refused to recognize Russian insolvency, arguing that ‘the Russian bankruptcy order appointing [defendant 1] (Mr Rebgun) as receiver in Yukos Oil’s bankruptcy was effected in a way that is not in accordance with Dutch principles of due process and is, thus, contrary to Dutch public order’. See B. Verkerk, *Commentary on the Amsterdam District Court Judgment of 31 October 2007 Re Yukos*, 5(1) Eur. Company L. (Feb. 2008).

22 Court of Appeal Amsterdam 24 May 2007, *LJN* BA5682; *RI* 2007/17.

23 Dutch Supreme Court 19 Dec. 2008, *NJ* 2009/456 in re Yukos Finance I.

Unless a Convention, binding the Netherlands, provides otherwise, insolvency proceedings opened in another country have territorial effect, not only in the meaning that foreign insolvency proceedings do not encompass goods belonging to the debtor which are located in the Netherlands (Dutch Supreme Court 2 June 1967, NJ 1968, 16), but in addition also that the legal consequences arising under the insolvency law of that other country cannot be invoked where such action would result in unpaid creditors being prevented from taking recourse – during or after the insolvency proceedings – in respect of those assets of the (former) debtor which are located in the Netherlands (Dutch Supreme Court 31 May 1996, NJ 1998, 108). The principle of territoriality *does not limit other consequences* of insolvency proceedings, opened abroad, to have effect in the Netherlands.²⁴

In September 2013, the Dutch Supreme Court once more had to decide in the matter of insolvency of the former Russian Oil giant and it clarified that the appointed Russian trustee (Mr Rebgun) may in principle exercise the power to sell the debtor's assets located in the Netherlands (shares in the Dutch B.V.). The Court considered that assuming that a foreign insolvency judgment was not arrived at in a manner that is contrary to Dutch public policy:

the trustee in a foreign bankruptcy may, in principle, also execute acts of management and disposition in respect of assets located in the Netherlands that form part of the bankrupt's estate – but which are not attached as part of the bankruptcy proceedings – provided that the trustee is authorised to do so pursuant to the laws of that other country (*lex concursus*).²⁵

Accordingly, the foreign trustee can, if he derives the power to do so from *lex concursus*, alienate the assets located in the Netherlands and have the proceeds benefit the bankruptcy estate, on the understanding that attachments levied up to the moment of transfer must be respected, as those assets do not fall under the bankruptcy attachment.

But what about the long-standing rule that legal effects which are linked to bankruptcy by the bankruptcy law of a foreign country cannot be invoked in the Netherlands inasmuch as this would result in unpaid creditors no longer having the possibility of having recourse against assets of the (former) bankrupt located in the Netherlands, either during the bankruptcy or after its completion?²⁶ The Supreme Court reasoned that in order to do

justice to this rule, it is sufficient that as long as during or after the bankruptcy assets belonging to the (former) bankrupt debtor are situated in the Netherlands, unsatisfied creditors can take recourse against them. The rule does not extend so far that those assets would have to be kept fully out of the normal settlement of the foreign bankruptcy. 'The territoriality principle does not preclude the power of disposition of the debtor being transferred to the foreign trustee, so that the foreign trustee may also liquidate the assets located in the Netherlands for the benefit of the joint creditors, provided the attachments levied on them are respected.'²⁷

As an interim remark: one of the weaknesses of the Dutch international insolvency framework is that it (in many respects mirroring the Russian situation) does not contain a system of international insolvency law for cases beyond the scope of the EU Insolvency Regulation (EIR). The Dutch system, as explained by the Supreme Court above, still adheres to the territoriality principle, expressed in the line: '[u]nless a Convention, binding the Netherlands, provides otherwise, insolvency proceedings opened in another country have territorial effect'²⁸ in the Netherlands. However, in the decision cited above, the court limits the territoriality principle to its mirror image: sheer universality!²⁹ In the Yukos case the Dutch Supreme Court considered the position of the Russian trustee appointed in Yukos insolvency proceedings opened in Russia. Was the trustee authorized to sell and transfer shares Yukos held in a Dutch B.V.? These shares formed a part of the Russian insolvency estate. The Supreme Court decided that the Russian trustee was indeed authorized to transfer these shares provided that Russian insolvency law would allow so. In the Supreme Court's view there is only one exception, i.e. the foreign insolvency proceedings violate Dutch public policy, the question of which was still pending at that time at the Court of Appeal level.³⁰

4. ECtHR AND RUSSIAN CONSTITUTIONAL REFORM

Russia ratified the European Convention on Human Rights (ECHR, Convention) in 1998. By acceding to the Convention, it accepted the jurisdiction of the ECtHR, an international court that rules on individual applications alleging violations of the civil and political rights set out in the Convention. The Constitution of the Russian Federation provides that 'if an international treaty of the Russian Federation stipulates other rules than those stipulated by the law,

24 *Ibid.*

25 See Dutch Supreme Court 13 Sept. 2013, ECLI:NL:HR:2013:BZ5668; *JOR* 2014/50. The Judgment is available in English at http://www.insol.org/emailer/Oct_2013_downloads/Yukos%20decision%20e%20translation.pdf. Note Bertrams; *JBPR* 2014/15, note Bos; *TvI* 2014/6, comments by Berkenbosch.

26 See Dutch Supreme Court 19 Dec. 2008, *NJ* 2009/456 in re Yukos Finance I, referred to above.

27 Dutch Supreme Court 13 Sept. 2013, ECLI:NL:HR:2013:BZ5668; *RI* 2013/107; *NJ* 2014/454, comments De Boer; *Ondernemingsrecht* 2014/41, comments Reumers; *JBPr* 2014/16, comments Bos; *TvI* 2014/6, comments Berkenbosch; *JOR* 2014/50, comments Bertrams. See Wessels, *supra* n. 6, para. 10046e.

28 Dutch Supreme Court 31 May 1996, *JOR* 1996/75; *NJ* 1998, 109 (Coppole/De Vleeschmeesters).

29 In the same vein Berends, *International insolventierecht: wat is er nog over van het territorialiteitsbeginsel?*, *TvI* 2014/33.

30 The Supreme Court's line of reasoning is followed by the Court of First Instance Curaçao 5 May 2017, ECLI:NL:OGECAC:2017:51, in a case of two South-African joint administrators versus three legal persons with registered offices in Curaçao.

the rules of the international treaty shall apply'.³¹ Analogous provisions appear in several Russian procedural statutes.³²

Following the Yukos ECtHR compensation judgment, a group of Russian MPs filed a complaint with the Russian Constitutional Court, claiming that participation in international organizations shall not contradict the foundations of the constitutional order and that enforcement of ECtHR judgments may sometimes lead to such a contradiction.³³ In its judgment from 14 July 2015 (which per se did not mention the Yukos case), the Constitutional Court reasoned that participation in international organizations does not deprive the state of its national sovereignty, so that the ECHR and the ECtHR judgments based on it do not abolish constitutional pre-eminence.³⁴ The Constitutional Court proceeded by considering a situation in which a Strasbourg judgment contradicts the Constitution of the Russian Federation – in such a case it would be possible not to follow the Court's judgment. Ultimately, it is the Constitutional Court that should decide on whether enforcing a particular judgment of the ECtHR complies with the Russian Constitution.

The authority of the Russian Constitutional Court to adjudicate on the issue of compatibility between findings of international bodies on protection of human rights and the Constitution was subsequently incorporated into law.³⁵ Under the newly established procedure, the Government of Russia has been empowered to bring before the Constitutional Court a judgment of the ECtHR allegedly contradicting the Constitution, seeking the Constitutional Court to explore and assess whether or not it can be enforced. The Venice Commission, an advisory body of the Council of Europe, expressed serious concerns about the compatibility of the legislative changes with obligations of Russia under international law. It concluded that the provision that no execution measure may be taken if the Constitutional Court finds that a judgment is non-enforceable, was in direct conflict with Russia's international obligations under the Vienna Convention on the Law of Treaties and Article 46 ECHR.³⁶

Nevertheless, in line with the adopted procedure, the Ministry of Justice of the Russian Federation asked the Constitutional Court to decide on the Yukos EUR 1.87 billion award. On 19 January 2017, the Constitutional Court released its much-anticipated judgment

ruling that payments to Yukos shareholders would contradict such constitutional principles as equality and justice. It rejected arguments of the ECtHR and reiterated its findings from 2005 on disregarding the three-year limitation period for 'malicious tax evaders', taking into account 'Yukos' place in the country's economy and the destructive effect of its activities'.³⁷

5. RECOGNITION OF YUKOS INSOLVENCY IN THE NETHERLANDS, PUBLIC POLICY EXCEPTION

As noted above, the Dutch Supreme Court held that the powers of the Russian liquidator could in principle be recognized in the Netherlands, provided that foreign insolvency proceedings did not violate Dutch public policy. The question whether Yukos proceedings were in line with such public policy was referred back to the Amsterdam Court of Appeal. In the judgment from 9 May 2017, the Court of Appeal arrived at the conclusion that the Russian insolvency proceedings went contrary to the principle of fair trial and that the behaviour of Russian authorities was such as to intentionally trigger the bankruptcy of Yukos Oil.³⁸ The court's reasoning heavily relied on the findings of the ECtHR and resembled argumentation in the early decision of the District Court of Amsterdam from 2007, which we mentioned before. As a result, the court concluded that Mr Rebgun was never authorized to sell the shares in Yukos Finance and transfer them to OOO Promneftstroy, so the latter did not become the owner of the said shares.

Without the need to discuss particulars of the case and reviewing correctness of legal assessment conducted by the court, we should rather briefly refer to the public policy exception as used in cross-border insolvency recognition cases. Notably, public policy protection can be found in a wide variety of international instruments. For instance, Article 6 ('Public policy exception') of the UNCITRAL Model Law on Cross-Border Insolvency reads: 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of this State.'³⁹ Similar wording can be found in Article 33 of the European Insolvency Regulation Recast (EIR).⁴⁰ Both the Model Law and the EIR underline the exceptional nature of a violation that should trigger the application of the public policy provision by using the word 'manifestly'.⁴¹ 'It involves, in particular, constitutionally

31 Para. 4 Art. 15 of the Constitution of the Russian Federation, adopted by national referendum on 12 Dec. 1993. Similar clauses can be found in constitutions of Albania, Croatia, The Czech Republic, France, Germany, The Netherlands and other countries.

32 See e.g. Art. 13 of the Commercial Procedure Code (2002), Art. 11 of the Civil Procedure Code (2002), Art. 15 of the Administrative Procedure Code (2015).

33 Russian Constitutional Court from 14 July 2015 No. 21-II, para. 2.2., available in Russian at <https://rg.ru/2015/07/27/ks-dok.html>.

34 *Ibid.*

35 Federal Constitutional Law, On Amending Federal Constitutional Law 'On Constitutional Court of the Russian Federation', No. 7-ФК3 dated 14 Dec. 2015.

36 Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court, Adopted by the Venice Commission at its 107th Plenary Session (Venice 10–11 June 2016), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)016-e).

37 Judgment of the Russian Constitutional Court from 19 Jan. 2017 No. 1-II, para. 4.5., available in Russian at <https://rg.ru/2017/02/03/konstsudyukosdok-dok.html>.

38 Gerechtshof Amsterdam 9 May 2017, ECLI:NL:GHAMS:2017:1695.

39 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (Model Law), <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

40 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

41 See e.g. para. 30 of the Guide to Enactment and Interpretation, clearly pointing out that 'the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances'.

protected rights and freedoms of the law of the recognizing state.⁴² Restrictive interpretation and application of the public policy exception in insolvency recognition matters is expressly upheld by courts in the US,⁴³ Germany⁴⁴ and Canada.⁴⁵

Apart from this exceptionality, the concept lacks precise formulation, leaving it for the national law and judges to interpret public policy, taking into account facts of a particular case and legal traditions of the (non-)recognizing state. The absence of any uniformity is further exacerbated by the fact that, in words of Lord Millett, 'no branch of the law is moulded more by considerations of national economic policy and commercial philosophy',⁴⁶ than that of insolvency law. The diverging approaches to public policy are especially evident in *Re Toft* case, in which the creditors of Dr Jürgen Toft, a celebrity knee surgeon from Munich tried to obtain recognition and enforcement of a 'Mail Interception Order' granted by a German insolvency court. This order, if enforced, would have given the administrator of Mr Toft's bankruptcy estate in Germany the power to access the debtor's email accounts. While English courts had no problem recognizing the German order, concluding that it was proportionate to the legitimate aim pursued,⁴⁷ the US court disagreed. In *Re Toft* the US Bankruptcy Court for the Southern District of New York reasoned that recognizing foreign mail interception order would undermine the US public policy and in particular fundamental principles of protecting the secrecy of electronic communications.⁴⁸ This completely opposite result was reached despite the fact that both the UK and the US adopted legislation based on the Model Law.

Even though neither the EIR nor the Model Law are instructive in the *Yukos* case – since the first one is non-applicable (COMI outside the EU), whereas the latter remains soft law and in any case is not upheld by the Dutch insolvency framework, they can be used as non-mandatory authority or a source of inspiration by national

court in matters falling outside their scope. And it seems that so far Dutch courts have been rather reserved whenever the public policy argument was brought up by a party, at least in the context of recognizing foreign arbitral awards.⁴⁹

The contentious issue with bankruptcy cases is whether any procedural violation materializing at a certain stage of insolvency proceedings, may lead to the whole proceedings being treated as violating public policy thus sanctioning non-recognition. We believe that the answer should be negative. We must bear in mind that unlike the majority of regular disputes, insolvency proceedings are multi-layered (or multi-staged) and involve a wide variety of participants having 'diverse (procedural) interests and rights regarding the different judgments handed down in the course of the proceedings'.⁵⁰ In such a context, it would be highly undesirable if any procedural deficiency would lead to the door for the cross-border insolvency recognition being closed for an indefinite period of time. It is particularly so if we keep in mind the far-reaching consequences of non-recognition which may be value-destructive, preventing coordination between judges and insolvency practitioners and ultimately harming the efficiency of the insolvency proceedings as a whole.⁵¹

At the same time one must not overlook the paramount importance of procedural rights of participants in the insolvency proceedings. In very general terms, such rights include: (1) Right to be notified of the proceedings, (2) Opportunity to put allegations before the court, (3) Right to provide proof to substantiate such allegations.⁵² Such core procedural rights are enshrined in Article 6 ECHR. Tangible embodiment of these rights, however, would at the end be left to each national state to pursue.⁵³ It is the gravity of a particular procedural infringement that is determinative in answering the recognition question. Otherwise permitted limitations of one's rights, can in particular circumstances be regarded as a

42 Virgós & Schmit Report 1996, para. 205.

43 See M. Garza, *When Is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy?*, 38 *Fordham Int'l L.J.* 1587 (2015); E. Buckel, *Curbing Comity: The Increasingly Expansive Public Policy Exception of Chapter 15*, 44 *Geo. J. Int'l L.* 1281 (2013).

44 In the case concerning recognition in Germany of insolvency proceedings opened in Brazil, the highest German Labour Law Court (*Bundesarbeitsgericht*) made it clear that 'a violation of public policy should be accepted only in exceptional cases. It requires a clear breach of fundamental principles of German law. Mere deviation from German law does not suffice', BAG 18 July 2013 – 6 AZR 882/11 (A). See also OLG Celle, 27 Nov. 2012 – 2 U 147/12.

45 See *Re Hartford Computer Hardware Inc.*, 2012 ONSC 964, 212 A.C.W.S. (3d) 315.

46 Sir Peter Millett, *Cross-Border Insolvency: The Judicial Approach*, 6 *Int. Insolv. Rev.* 109 (1997).

47 Order of the Chancery Division of the High Court of Justice from 28 Jan. 2011, <https://lettersblogatory.com/wp-content/uploads/2011/08/toft-uk-order.pdf>.

48 In *Re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011). For more on this and other cases concerning public policy in insolvency cases, see G. McCormack, *Foreign Law and Public Policy in the UNCITRAL Model Law on Cross-Border Insolvency: A Transatlantic Perspective*, 3 *NIBLeJ* 26, 477–492 (2015). Coincidentally, just a few months after the Toft non-recognition decision, the US Bankruptcy Court for the Eastern District of Virginia refused to recognize termination of patent licenses of a German debtor, which was allowed under German law, see *In re Qimonda AG*, Case No. 09-14766 (Bankr. E.D. Va., 28 Oct. 2011).

49 Dutch Supreme Court 17 Jan. 2003, *NJ 2004/384*, in which the court indicated that not every violation of a procedural rule in arbitration proceedings leads to the setting aside of the arbitral award. See Dutch Supreme Court 25 May 2007, *NJ 2007/294*, likewise noting that even if the procedural breach amounts to a violation of the principle of due process, it should not necessarily lead to the setting aside. In a more recent judgment the Dutch Supreme Court refused to rely on Art. 6 ECHR in case of the so-called 'asymmetric appeal' rule. This rule provides that where exequatur is granted, the respondent will have no right to appeal, but where it is refused, the decision can be appealed up to the Supreme Court. The court rejected the argument that the appeal in case of a recognition decision should be allowed by virtue of Art. 6 ECHR. See Dutch Supreme Court 31 Mar. 2017, 2017:555 (*Nelux*).

50 R. Bork & R. Mangano, *European Cross-Border Insolvency Law* 188 (Oxford: OUP 2016).

51 In the same vein Reinhard Bork, *Principles of Cross-border Insolvency Law*, intersentia, Cambridge – Antwerp – Portland 2017, 39, arguing that taking into account these diverse interests (he mentions interests of the debtor, of the creditors, third parties and even the public) result in 'endangering the proper functioning of universal insolvency proceedings and undermining the principle of universalism as well as damaging any serious harmonisation efforts'.

52 M. Virgós & F. Garcimartín, *The European Insolvency Regulation: Law and Practice* 215 (2004).

53 For instance, right to be informed may be fulfilled by personal notifications or a single online publication, whereas the right to be heard may see itself in collective voting of creditors.

manifest and disproportionate infringement of those rights.⁵⁴ In our opinion, it is only when a procedural violation can be regarded as making the entirety of the insolvency proceedings unacceptable in light of all the circumstances present, that the recognition should be denied. This position finds some support in the way the Model Law distinguishes between recognition and relief. Whereas a particular relief sought may be considered anti-public policy, the insolvency proceeding itself can be well recognizable.

6. YUKOS AND THE FUTURE OF DUTCH-RUSSIAN CROSS-BORDER INSOLVENCIES

Refusal by the Amsterdam Court of Appeal to recognize the Yukos bankruptcy can have an important aftereffect for the future of Dutch-Russian relations in the context of recognition and enforcement of insolvency proceedings.

Under Article 241 of the Russian Commercial Procedure Code, decisions of foreign courts, rendered in disputes and other cases arising in the course of entrepreneurial and other economic activity are recognized and enforced in Russia, if the recognition and enforcement of such judgments is stipulated in an international treaty of the Russian Federation and in federal law. According to Article 1(6) of the Russian Federal Law 'On insolvency (bankruptcy)',⁵⁵ judgments of foreign courts in insolvency (bankruptcy) cases are recognized in Russia under international treaties, or in absence of such treaties, according to the *principle of reciprocity*.⁵⁶

Currently, Russia has no international treaties on recognition and enforcement of foreign insolvency proceedings and we are not aware of any negotiations that might lead to such treaties being adopted. Therefore, reciprocity is essentially the only venue available under Russian law to have a foreign insolvency order recognized and enforced in Russia.⁵⁷ For instance, in a recent decision, the Russian court did not find reciprocity in the case of a Russian businessman Mr Vladimir Kekhman who fled to the UK to obtain a discharge of debts under English bankruptcy rules.⁵⁸ The court stated that it lacked proof that English courts would recognize

Russian insolvency proceedings opened under Russian law against a UK citizen.⁵⁹ The recognition was therefore denied. In another case concerning insolvency of a private fund registered in Curaçao,⁶⁰ the Russian court in Saint Petersburg found reciprocity on the basis of two pieces of evidence: (1) a legal opinion given by a specialist on the law of Curaçao, saying that foreign insolvency orders would be recognizable in Curaçao, provided that they are final and enforceable in the home jurisdiction, (2) a decision by the Dutch Supreme Court from 2014, which recognized the Russian judgment, in spite of expiration of a leave to enforce it in and under the laws of the country of origin.⁶¹ Interestingly and somewhat ironically, the Saint Petersburg court also referred to the 2008 and 2013 judgments in Yukos case, as proof of reciprocity. The Amsterdam Court of Appeal in May 2017 dealt a final blow to this reciprocity argument.

Yukos insolvency case is not an ordinary case. As seen from the previous sections, it has been heavily litigated both in Russia and elsewhere. It is also notable for the precedent-setting involvement of both the Dutch Supreme Court and the Russian Constitutional Court. In essence, the vast majority of procedural and material complaints raised by Yukos in the Netherlands in one way or another have been scrutinized by Russian courts, including the Russian Constitutional Court and have been held unfounded. This result was reached despite and contrary to the findings of the ECtHR. Refusal to recognize and enforce the insolvency of Yukos Oil in the Netherlands may be seen as contravening the Russian constitutional adjudication, thus increasing tensions between the two legal systems and cementing the non-reciprocity example. Unless remedied by an international treaty providing for mutual recognition of insolvency judgments (which remains unlikely), this case of non-reciprocity may bar future attempts to recognize Dutch insolvencies in Russia. This is detrimental for international trade and investment.

Leaving the reciprocity issue aside, we should conclude that regulation of cross-border insolvencies in Russia, just like in the Netherlands,⁶² calls for reform.⁶³ It is in fact just one paragraph in

54 See e.g. *Gambazzi v. Daimler-Chrysler Canada Inc* [2009] ECR I-0000 (Judgment of 2 Apr. 2009), para. 33.

55 Federal Law 'On Insolvency (Bankruptcy)' No. 127-ФЗ dated 26 Oct. 2002.

56 As explained by the court, reciprocity means that foreign insolvency judgments can be enforced in Russia on the condition that analogous judgments originating in Russia are enforceable in that foreign state. See Federal Commercial (*Arbitrazhniy*) Court for North West, Case No. A56-22667/2007 dated 28 Aug. 2008. Reciprocity can be proved by reference to a foreign statute (e.g. in case of Germany) or case law.

57 It is worth noticing that in a number of cases Russian courts recognized and enforced foreign (non-insolvency) judgments based on the principle of comity, which oftentimes is not distinguished from the principle of reciprocity, see e.g. Decision of the High Commercial Court of the Russian Federation No. BAC-13688/09 dated 7 Dec. 2009. We should note, however, that insolvency cases are inherently more sensitive, touching upon issues of national sovereignty and third party protection to a greater extent than regular non-insolvency claims. Besides, Art. 1(6) of the Russian Federal Law 'On insolvency (bankruptcy)' by clearly prescribing reciprocity, should be viewed as *lex specialis*. Thus, unless otherwise provided in Russian law, comity in itself can hardly be relied on as a basis for recognition and enforcement of foreign insolvency proceedings in Russia.

58 See <http://bobwessels.nl/2014/05/2014-05-13-russian-banana-king-bankrupt-in-england/>. More information on the case of Mr Kekhman can be found in INSOL Europe's Inside Story for Nov. 2016, <https://www.insol-europe.org/download/documents/889>.

59 Commercial (*Arbitrazhniy*) Court for North West, Case No. A56-27115/2016 dated 14 Nov. 2016.

60 Commercial (*Arbitrazhniy*) Court for Saint Petersburg and Leningrad Region, Case No. A56-42444/2015, dated 21 Jan. 2016.

61 Dutch Supreme Court 26 Sept. 2014 (ECLI:NL:HR:2014:2838).

62 See Wessels, *supra* n. 6, para. 10181a.

63 As part of the VII St. Petersburg International Legal Forum (Russia), a separate First International Insolvency Forum was organized from 17 to 19 May 2017. At one of the plenary sessions participants were asked to vote on the most favourable way of establishing cross-border insolvency framework for Russia. As a result, 39% of votes were given in favour of adopting the UNCITRAL Model Law, 21% preferred a regional international agreement for the Eurasian Economic Union, while 18% voted in favour of bilateral agreements on cross-border bankruptcy regulation with selected countries. Only 3% believed that there was no need to change anything.

the Russian insolvency law that mentions the possibility of recognizing foreign insolvencies, without providing much guidance with regards to the consequences of such recognition, the type of judgments that can be recognized or the kind of cooperation or

assistance that is possible to expect from Russian courts and insolvency practitioners. Taking into account the build-up of international economic and commercial ties, this situation is unsatisfactory and calls for a change.