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Enforcement of Arbitral Awards Annulled in Russia

Case Comment on Dutch Supreme Court of 25 June 2010

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By a decision dated 28 April 2009, the Court of Appeal in Amsterdam granted enforcement of four arbitral awards annulled by the Russian courts under the New York Convention of 1958. The Dutch Supreme Court declared the recourse against the Court of Appeal decision inadmissible. The Supreme Court on 25 June 2010 opined that such a recourse would violate Article III of the New York Convention since it would impose a more onerous condition on the enforcement of Convention awards than on domestic (Dutch) awards. In the author's opinion, the Supreme Court's reasoning is at odds with both the New York Convention and Dutch arbitration law.

1 INTRODUCTION

1. This case comment is a saddening sequel to my case comment on the Court of Appeal in Amsterdam, which had granted enforcement of certain arbitral awards made in Russia in its decision of 28 April 2009, although those awards had been set aside by the Russian courts.[1] In an astonishing decision of 25 June 2010 (the 'Decision'), the Dutch Supreme Court (Hoge Raad) declared inadmissible Rosneft's recourse in cassation.[2] The Supreme Court did so on the basis of a combined reading (or rather misreading) of: (i) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958 (New York Convention); and (ii) Dutch arbitration law.

2. While the question of the means of recourse against the grant of leave for enforcement was the central issue in the Supreme Court decision, the Court of Appeal had to determine the issue of the enforcement of awards annulled in their

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* © Albert Jan van den Berg. Email: ajvandenberg@hvdb.com. The present article is based on a legal opinion that, at the request of Rosneft's counsel, I provided in conjunction with the application to the European Court of Human Rights against the Court of Cassation decision.

1 *See* my case comment in 27 J. Int'l Arb. 179 (2010).

2 Case no. LJN: BM1679; original decision http://www.rechtspraak.nl. An excerpt of the English translation is published in XXXV Y.B. Com. Arb. 427 (2010), and a detailed report is *available at* http://www.kluwerarbitration.com/document.aspx?id=KLI-KA-1052036-n (accessed Nov. 14, 2011).

Van den Berg, Albert Jan. 'Enforcement of Arbitral Awards Annulled in Russia'. *Journal of International Arbitration* 28, no. 6 (2011): 617–642.

country of origin. The virtually unprecedented and, in my view, untenable decision of the Court of Appeal may be an explanation of why the Supreme Court focused on inadmissibility of the recourse in cassation.

3. This case comment is set out as follows. Section II sets forth the relevant facts. Section III describes the Netherlands Arbitration Act 1986, with particular attention to the enforcement of domestic and foreign awards and the means of recourse against decisions by Dutch courts on enforcement. Section IV includes a description of the legislative history and analysis of Article III of the New York Convention. The decision of the Supreme Court is reviewed in Section V.

2 FACTS

4. A dispute arose between Yukos Capital Sàrl as lender and OJSC Yuganskneftegaz as borrower. The loans were concluded at the time that Yukos Capital and Yuganskneftegaz formed part of the Yukos group. Subsequent to an auction in 2004, Rosneft acquired the majority of the shares in Yuganskneftegaz, which merged with Rosneft and ceased to exist in October 2006. The ensuing facts that are relevant for this case comment are set out chronologically in the following overview.

5. *27 December 2005*: Yukos Capital filed for arbitration with the International Court of Commercial Arbitration at the Chamber of Trade and Industry of the Russian Federation.

6. *19 September 2006*: In four arbitral awards made under the auspices of the International Court of Commercial Arbitration at the Chamber of Trade and Industry of the Russian Federation in Moscow, Yuganskeftegaz was ordered to pay Yukos Capital some 13 billion roubles (exclusive of interest and costs) (the Awards). As mentioned, Yuganskeftegaz subsequently merged with Rosneft.

7. *9 March 2007*: Yukos Capital submitted a request for enforcement of the four Awards to the President of the District Court in Amsterdam against Rosneft, on the basis of Article 1075 of the Dutch Code of Civil Procedure (DCCP) in conjunction with the New York Convention and, in the alternative, on the basis of Article 1076 DCCP concerning the enforcement of foreign arbitral awards outside a treaty.[3]

8. *18 and 23 May 2007*: The Arbitrazh Court of the City of Moscow set aside the Awards on the ground of violation of the right to equal treatment, violation of the agreed rules of procedure and the appearance of a lack of impartiality and independence on the part of the arbitrators.

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[3] Art. 1076 DCCP contains a statutory regime for the recognition and enforcement of foreign arbitral awards outside the New York Convention. Such a regime is contemplated by the more-favourable-right-provision set forth in art. VII(1) of the New York Convention. *See* paras 40–45 *infra*.

9. *13 August 2007*: The Federal Arbitrazh Court of the Moscow District affirmed the judgments on appeal.

10. *10 December 2007*: The Supreme Arbitrazh Court of the Russian Federation affirmed the judgments on recourse to cassation.

11. *28 February 2008*: The President of the District Court in Amsterdam denied Yukos Capital's application for enforcement of the Awards, based on the ground for refusal of enforcement set forth in Article V(1)(e) of the New York Convention:

> 1. Recognition and enforcement of the award by may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> . . .
>
> (e)The award . . . has been set aside . . . by a competent authority of the country in which . . . that award was made.

12. The President of the District Court also held that the Awards should be refused enforcement on the ground set forth in Article 1076(1)(A)(e) DCCP, the provisions of which were relied upon by Yukos Capital in the alternative:

> 1. If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, an arbitral award made in a foreign State may be recognised in the Netherlands and its enforcement may be sought in the Netherlands, upon submission of the original or a certified copy of the arbitration agreement and arbitral award, unless:
>
> (A)the party against whom recognition or enforcement is sought, asserts and proves that:
>
> . . .
>
> (e)the arbitral award has been set aside by a competent authority of the country in which that award is made;

13. It is to be noted here that Yukos Capital lodged an appeal against the President of the District Court's decision with respect to Article 1075 DCCP (enforcement of foreign award based on a treaty, i.e., the New York Convention) only, and not his decision with respect to Article 1076 DCCP (enforcement of foreign award based on Dutch law outside a treaty).[4]

14. *28 April 2009*: The Court of Appeal in Amsterdam reversed the decision denying enforcement by the President of the District Court and granted enforcement on the four awards annulled by the Russian courts.[5] The Court of Appeal reasoned that Article V(1)(e) of the New York Convention requires the recognition of the foreign court judgment setting aside an award on the basis of Dutch law on the recognition of foreign court judgments. The Court of Appeal was

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[4] The distinction is explained in paras 40–45 *infra*.

[5] *See* Court of Appeal comment, *supra* n. 1.

of the opinion that it could deduce from press publications and reports of a general nature, as well as from criminal law procedures in Russia, that the civil judges in the present case lacked impartiality and independence. The Court of Appeal acknowledged: 'Yukos Capital has furnished no direct evidence of the partiality and dependence of the individual judges who ruled on the Rosneft claim for the annulment of the arbitral awards.'[6] This did not deter the Court of Appeal from assuming a lack of impartiality and independence in the present case: 'in part because partiality and dependence, by their very nature, take place behind the scenes'. The Court of Appeal's reasoning amounted to finding a purportedly systematic lack of impartiality and independence of the Russian judiciary: the very fact that the judgment in the Yukos Capital case was pronounced in Russia would indicate that the judges considering the application to set aside the arbitral awards could not be independent and impartial. The Court advanced this conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges involved in all three instances. The Court of Appeal's decision read as follows:

> 3.10 Based on the foregoing, the Court concludes that since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision [*sic*] by the Russian court must be disregarded.[7]

15. *29 June 2009*: Rosneft filed recourse in cassation with the Supreme Court (Hoge Raad) against the decision of the Court of Appeal.

16. *25 June 2010*: The Supreme Court declared Rosneft's recourse inadmissible, reasoning that the recourse against a *grant* of enforcement would violate the non-discrimination principle of Article III of the New York Convention as no appeal would be available against the grant of enforcement of a domestic (Dutch) arbitral award. Article III of the Convention provides:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

17. The result was that Yukos Capital was awarded an amount of GBP 271,233,490.87.

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6 *Id.* para. 3.9.4.
7 *Id.* para. 3.10.

18. *16 December 2010*: Rosneft filed an application to the European Court of Human Rights against the Kingdom of the Netherlands under Article 34 of the European Convention on Human Rights (ECHR) for violation of Article 6 of the Convention (equality of arms).[8]

3 NETHERLANDS ARBITRATION ACT 1986

19. A review of the Netherlands Arbitration Act 1986, and in particular the means of recourse against a grant of a leave for enforcement on a domestic and foreign award, is relevant to the issue whether the Dutch Supreme Court was justified in declaring inadmissible Rosneft's recourse in cassation.

20. On 1 December 1986, the Dutch arbitration law contained in the DCCP of 1838 was replaced by an entirely new Arbitration Act (the Act). The Act is set forth in a new Book Four of the DCCP, consisting of Articles 1020–1076.

21. The Act is divided into two Titles: Title 1 is concerned with arbitration within the Netherlands (Articles 1020–1073), whilst Title 2 is devoted to arbitration outside the Netherlands (Articles 1074–1076). The latter Title contains three provisions; one relating to the stay of court proceedings in the Netherlands in case of arbitration abroad, and two others dealing with the recognition and enforcement of arbitral awards rendered outside the Netherlands.

22. The division into two Titles reflects the desire of the Dutch legislature to provide a clear criterion for the Act's applicability. The Act is based on the principle that arbitration is governed by the arbitration law of the place of arbitration, also referred to as the principle of territoriality of arbitration.

3.1 Enforcement of domestic arbitral awards in the Netherlands

23. Enforcement of a domestic award is governed by Articles 1062 and 1063 of the DCCP. Article 1062 concerns the grant of leave for enforcement, whilst Article 1063 addresses the refusal of leave for enforcement.

24. A final or partial final award may be enforced in the Netherlands upon leave for enforcement granted by the President of the District Court. The President of the District Court within whose district the award is made has jurisdiction in this regard.

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[8] To complete this chronology (although not directly relevant for the present case comment), it should be mentioned that the High Court in London decided in a judgment of June 14, 2011, [2011] EWHC 1461 (Comm), in favour of Yukos Capital two preliminary issues: (1) Rosneft was issue estopped by the judgment of the Amsterdam Court of Appeal dated 28 Apr. 2009 from denying that the judgments of the Russian civil courts annulling the arbitral awards were the result, or likely to be the result, of a partial and dependent judicial process; and (2) Rosneft had no valid pleas relating to act of state/non-justiciability and the relevant paragraphs of Yukos Capital's pleading were not struck out.

25. In practice the procedure is ex parte, although the President may request the parties to appear. He or she will do so if the losing party, upon receipt of the award, has requested to be heard.

26. The President of the District Court exercises a summary control only. Enforcement may be refused by him solely on the ground that the award, or the manner in which it was made, is *manifestly* contrary to public policy or good morals (Article 1063(1)).[9] If leave for enforcement is granted, the award may still be set aside on the grounds mentioned in Article 1065(1). The corresponding ground for setting aside in Article 1065(1)(e) is not limited to manifest violation of public policy or good morals. [10]

27. The legislative scheme for recourse against the decision of the President of the District Court with respect to a request for enforcement of a domestic award is 'asymmetrical': if the President refuses the requested enforcement, the award creditor has as means of recourse an appeal to the Court of Appeal; if the President grants the requested enforcement, the award debtor does not have the means of recourse of an appeal to the Court of Appeal, but has as means of recourse an application for setting aside of the award (and, theoretically, revocation of the award).

28. The reason for this asymmetrical scheme is that the Dutch legislature wished to concentrate challenges against an award in one single means of recourse: the setting aside of the arbitral award as provided in Articles 1064–1065.[11] The legislature wanted to abolish the regime that previously existed under which the same award could be challenged in both appeal proceedings against the grant of a leave for enforcement and setting aside proceedings, running in parallel.[12]

29. The result is the following detailed and sophisticated scheme that the Dutch legislature devised.

30. In the case of *refusal* by the President of the District Court to grant leave for enforcement, the petitioner can lodge an appeal to the Court of Appeal, as provided in Article 1063(3):

> The petitioner may lodge an appeal to the Court of Appeal against refusal to grant leave for enforcement within two months after the date on which the decision is signed.

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[9] Art. 1063(1) DCCP provides: 'Enforcement of an arbitral award may be refused by the President of the District Court only if the award or the manner in which it was made is manifestly contrary to public policy or good morals, or if enforcement is ordered notwithstanding the lodging of an appeal in violation of article 1055, or if a penalty for non-compliance is imposed in violation of article 1056. In the latter case, the refusal shall be limited to the enforcement of the penal sum.'

[10] Art. 1065(1): 'Setting aside of the award can take place only on one or more of the following grounds: . . . (e) the award, or the manner in which it was made, violates public policy or good morals'.

[11] The revocation of the award as contemplated by art. 1068 DCCP is very rare in practice.

[12] Response Memorandum (Memorie van Antwoord), Tweede Kamer (Second Chamber), vergaderjaar 1985–1986, 18 464, no. 6 p. 35.

31. If the Court of Appeal affirms the refusal, the petitioner/appellant has recourse to the Supreme Court, as provided in Article 1063(4):

> If refusal to grant leave for enforcement is affirmed on appeal, the time limit for recourse to the Supreme Court shall be two months after the date on which the decision on appeal is signed.

32. However, in the case of a *grant* by the President of the District Court of leave for enforcement, the respondent's recourse is an application for setting aside the award or (exceptionally) revocation of the award, as provided in the first sentence of Article 1062(4):

> If the President of the District Court grants leave for enforcement, the means of recourse mentioned in Article 1064(1) shall be the only means of recourse [*rechtsmiddelen*] available to the respondent.[13]

33. Article 1064(1) referred to in the above quoted first sentence of Article 1062(4) provides with respect to those means of recourse:

> Recourse to a court against a final or partial final arbitral award which is not open to appeal to a second arbitral tribunal, or a final or partial final award rendered on arbitral appeal, may be made only by an application for setting aside or revocation in accordance with this Section.

34. If the application for setting aside or revocation is successful, the President's grant of leave for enforcement is annulled by operation of law, as is provided in the second sentence of Article 1062(4):

> The setting aside or the revocation of an arbitral award causes by operation of law the annulment of any leave for enforcement.

35. The same scheme applies if the President of the District Court has refused to grant leave for enforcement, but the Court of Appeal or the Supreme Court reverses that decision by granting leave for enforcement. This is provided in Article 1063(5):

> If leave for enforcement is granted on appeal or after recourse to the Supreme Court, the provisions of the first sentence of Article 1062(4) shall apply accordingly.

36. The Dutch legislature was aware that the three months' time limit for making an application for setting aside could have expired by the time the President of the District Court (or the Court of Appeal or Supreme Court, for that matter) had decided to grant leave for enforcement of the award. To that end, the legislature provided an extra time limit of three months, which starts to run from the date of

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[13] An application for setting aside does not suspend enforcement by operation of law. A suspension must be applied for to the District Court deciding on the application for setting aside. *See* art. 1066 DCCP.

service by the petitioner of the award with leave for enforcement on the respondent. This is provided in the third sentence of Article 1064(3), which, because of the legislature's meticulous concern for the extra time limit, does not make easy reading:

> An application for setting aside may be made as soon as the award has acquired the force of *res judicata*. The right to make an application shall be extinguished three months after the date of deposit of the award with the Registry of the District Court. *However, if the award together with leave for enforcement is officially served on the other party, that party may make an application for setting aside within three months after the said service, irrespective of whether the period of three months mentioned in the preceding sentence has lapsed*. (emphasis added)

37. The extra three months' time limit enables the affected party to make the application for setting aside in all cases of a grant of leave for enforcement of a domestic award. In that sense too, the application for setting aside the award functions as a true means of recourse against a grant of leave for enforcement of a domestic award.

38. Having regard to the above scheme as embodied in the quoted provisions, it cannot be said that there is no recourse against the grant of leave for enforcement of a domestic award. Article 1062(4) concerning the refusal to grant leave for enforcement even expressly uses the expression 'means of recourse' (*rechtsmiddelen*). Moreover, as mentioned,[14] the recourse concerns in essence the same subject matter: the ground for refusal of enforcement of a domestic award set forth in Article 1063(1)[15] is also the ground for setting aside contained in Article 1065(1)(e), albeit that the former is limited to manifest cases.[16]

39. The difference between the recourse against a grant of leave for enforcement and the recourse against a refusal of leave for enforcement is the route by which the recourse is to be achieved. Thus, in the case of a refusal to grant the leave, the means of recourse is an appeal; in the case of a grant of leave, the recourse is an application for setting aside. With respect to the latter, the circle is closed by the above quoted provision in the second sentence of Article 1062(4) that an actual setting aside entails by operation of law the annulment of the leave for enforcement.[17]

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[14] *See* para. 26 *supra*.

[15] Art. 1063(1) DCCP provides: 'Enforcement of an arbitral award may be refused by the President of the District Court only if the award or the manner in which it was made is manifestly contrary to public policy or good morals, or if enforcement is ordered notwithstanding the lodging of an appeal in violation of article 1055, or if a penalty for non-compliance is imposed in violation of article 1056. In the latter case, the refusal shall be limited to the enforcement of the penal sum.'

[16] Art. 1065(1) DCCP provides: 'Setting aside of the award can take place only on one or more of the following grounds: . . . (e) the award, or the manner in which it was made, violates public policy or good morals.'

[17] The question has arisen whether, the notion of recourse notwithstanding, a statutory prohibition as allowed in certain circumstances by the Dutch Supreme Court can be applied to art. 1062(4). In his case comment on the Court of Appeal of Amsterdam of Aug. 27, 1998, Prof. W.D.H. Asser expresses the view

3.2 Enforcement of foreign arbitral awards in the Netherlands

40. Enforcement of a foreign award is totally different in the Netherlands. It was explained above that the new Act is based on the principle of territoriality of arbitration, that is, the arbitration is governed by the arbitration law of the place of arbitration. In conformity with this principle, the Act is divided into two Titles: Title 1 is concerned with arbitration in the Netherlands (Articles 1020–1073); Title 2 is devoted to arbitration outside the Netherlands (Articles 1074–1076), which is the subject of the present discussion.

41. Title 2 provides, in the first place, for a stay of court proceedings pending before a Dutch court where the parties have agreed to arbitration outside the Netherlands (Article 1074). It contains further provisions on recognition and enforcement of foreign awards under a treaty (Article 1075), and recognition and enforcement of foreign awards where no treaty applies or where a treaty allows an applicant to rely on domestic law on enforcement of foreign awards (Article 1076).

42. In its request for enforcement of the Awards to the President of the District Court, Yukos Capital relied on Article 1075 in conjunction with the New York Convention, and, in the alternative, on Article 1076.[18] As mentioned,[19] the Court of Appeal and the Supreme Court do not deal with the alternative basis of Article 1076 since Yukos Capital had not appealed against the part of the decision concerning the refusal of enforcement under Yukos Capital's alternative basis, that is, Article 1076.

43. Article 1075 provides that an arbitral award made in a foreign state to which a treaty concerning recognition and enforcement is applicable, may be recognized and enforced in the Netherlands:

> An arbitral award made in a foreign State to which a treaty concerning recognition and enforcement is applicable may be recognised and enforced in the Netherlands. The provisions of articles 985 to 991 inclusive shall apply accordingly to the extent that the treaty does not contain provisions deviating therefrom and provided that the President of the District Court shall be substituted for the District Court and the time limit for appeal from his decision and for recourse to the Supreme Court shall be two months.

44. Articles 985–991 DCCP deal with the requirements for the recognition and enforcement of mainly foreign court judgments. Article 988 and 990 provide specifically for appeal to the Court of Appeal and cassation recourse to the Supreme Court, respectively, without distinguishing between a grant or a refusal of enforcement.

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that reliance on that case law is not necessary 'because there are definitely means of recourse available, namely against the "award" itself: it can be challenged by means of a setting aside action, whilst suspension can be requested or an execution dispute can be initiated in order to block enforcement', Tijdschrift voor Arbitrage 170, para. 1.5 (2000).

[18] Decision of the President of the District Court, para. 6.5.3.3.

[19] *See* para. 13 *supra*.

45. Article 1075 declares Articles 985–991 applicable 'to the extent that the treaty does not contain provisions deviating therefrom'. Thus, when Article 986(2) requires that documents be produced from which it appears that the award is enforceable in the country where it was made, that requirement does not apply to enforcement under the New York Convention of 1958 which abolished the so-called double exequatur.

4 ARTICLE III OF THE NEW YORK CONVENTION

4.1 In general

46. It may be useful to recall here the text of Article III of the New York Convention:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

47. Article III opens the provisions relating to the enforcement of arbitral awards falling under the Convention (Articles III–VI). It contains the general obligation for the Contracting States to recognize Convention awards as binding and to enforce them in accordance with their rules of procedure 'under the conditions laid down in the following articles'. Thus, a clear distinction is made between the conditions for enforcement in respect of which the Convention alone is controlling, and the procedure for enforcement in respect of which the procedural law of the forum governs.

4.2 Legislative history of article III

48. The legislative history of Article III of the New York Convention is analysed in my Ph.D. thesis of 1981.[20] A summary of that analysis is as follows.

49. The history of Article III can be traced back to the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 (the New York Convention's predecessor) which provided in Article I(1) that 'an arbitral award . . . shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon'.[21] In their comments on the Draft

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[20] The New York Arbitration Convention of 1958, 234–236 (The Hague, 1981).

[21] *See* H.-W. Greminger, *Die Genfer Abkommen von 1923 und 1927 über die internationale private Schiedsgerichtsbarkeit* 47 (Winterthur, 1957).

Convention some governments and non-governmental organizations (NGOs) expressed a desire to supplement the provision. They wished either: (a) to include in it uniform procedural rules that would be applicable to the enforcement of foreign arbitral awards; (b) to provide that arbitral awards to which the Convention applied should be enforced by a 'summary enforcement procedure'; or (c) to stipulate that arbitral awards to which the Convention applied should be enforced by the same procedure as that which applied to domestic arbitral awards.

50. In commenting on these proposals, the Secretary-General of ECOSOC observed that each of these proposals would give rise to difficulties.[22] The Secretary-General suggested that these difficulties could be overcome by providing that arbitral awards should be enforced in accordance with a simplified and expeditious procedure which, in any event, should not be more onerous than that applied to domestic awards.

51. During the New York Conference of 1958, the suggestion of the Secretary-General of ECOSOC was taken up by the delegate of the United Kingdom who submitted a proposal to amend the provision. His proposal read that the rules of procedure should not be 'more complicated than those used for the enforcement of any other award' and that 'in no case shall the scale of fees and charges demandable be . . . greater than those demandable in respect of the enforcement of any other award'.[23] The UK delegate gave as explanation for his proposal that an arbitral award which met the conditions of the Convention should be enforceable without unnecessary inconvenience or excessive fees; otherwise the purpose of the Convention would be defeated.[24]

52. The ensuing debates at the Conference in New York in May–June 1958 were confusing. What finally did become clear was that the majority of delegates did not want national treatment for Convention awards (i.e., proposal (c)). Furthermore, the Conference implicitly rejected proposal (a) as it was not discussed at the Conference. The delegates apparently considered the unification of the rules of procedure for the enforcement of foreign arbitral awards as too far-reaching an interference with the differing national laws on procedure. The same applies to proposal (b) above to provide for enforcement by a 'summary enforcement procedure'.

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22 Note by the Secretary-General on the Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards of Mar. 6, 1958, UN Doc. E/CONF.26/2, 1958, paras. 7–8.

23 UN Doc. E/CONF.26/L.11, 1958. A similar proposal was submitted by the Israeli delegate (UN Doc. E/CONF.26/L.21, 1958).

24 UN Doc. E/CONF.26/SR.10, 1958.

4.3 Analysis of article III of the convention

53. This history of Article III of the Convention shows that the rules of procedure for the enforcement of a Convention award are left to the law of the country where the enforcement is sought. As is shown in the 'National Reports' published in the *International Handbook on International Arbitration*,[25] generally speaking, there are three possibilities for regulating the procedure for enforcement of a Convention award:

(1) specific provisions;
(2) enforcement as for a foreign award in general;
(3) enforcement as a domestic award.

54. (1) Specific provisions for the procedure of enforcing an award falling under the Convention can be found, *inter alia*, in the legislations of Australia, Bermuda, Botswana, Hong Kong, India, the United Kingdom and the United States. The specific provisions are contained in the Acts implementing the New York Convention in these countries. In most of these countries such an Act is required in order to incorporate a treaty into the internal law.

55. (2) Most countries party to the Convention have provided that the procedure for the enforcement of a Convention award is the same as that for the enforcement of a foreign award in general. These countries may be divided into two groups. The first group has enacted specific provisions for the enforcement of foreign awards. Examples of this group are Belgium, Croatia, France, Germany, Greece and Sweden. According to the second group, the procedure for the enforcement of a foreign award is the same as for the enforcement of a foreign judgment. Examples of the second group are Austria, Bangladesh, Belarus, Brazil, Bulgaria, Chile, Denmark, Georgia, Colombia, Costa Rica, Italy, Mexico, the Netherlands and Ukraine.

56. (3) Provisions for the enforcement of a Convention award pursuant to the same procedure as for a domestic award are found in very few countries. This confirms the view of the majority of the delegates at the New York Conference of 1958 not to subsume the procedure for enforcement of Convention awards under that of domestic awards. One of the few countries where the assimilation apparently exists is Japan.

57. The above bird's-eye view shows that the procedure for the enforcement of an award falling under the Convention differs considerably amongst the Contracting States. A unification on this point would seem desirable but is impracticable.

58. The only directive which Article III gives for the procedure for enforcement of a Convention award is stated in the second sentence which, as noted, was inserted

[25] *International Handbook on International Arbitration* (J. Paulsson, gen. ed.).

at the instigation of the ECOSOC Secretary-General and the UK delegate. As far as it could be researched, the Contracting States have not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards than are imposed on the recognition or enforcement of arbitral awards rendered under their own law. It has not led to problems for the courts, either.

59. It should be emphasized that the rules of procedure of the forum for the enforcement of a Convention award as mentioned in Article III are not concerned with the conditions for enforcement. The rules of procedure within the meaning of Article III are confined to questions such as the form of the request and the competent authority.

60. The conditions for enforcement, on the other hand, are those set out in the Convention and are exclusively governed by the latter. This is unequivocally stated in Article III in the phrase 'under the conditions laid down in the following articles'. It means that the procedural law governing the enforcement of Convention awards may not derogate from the principles embodied in Articles IV–VI. Thus, the petitioner only needs to submit an original or copy of the arbitration agreement and arbitral award, and, possibly, a translation thereof (Article IV). Enforcement may be refused only if the respondent can prove one of the grounds listed exhaustively in Article V(1) or on public policy grounds by virtue of Article V(2). This implies also that the respondent must be offered an opportunity to be heard either during the proceedings concerning the request for enforcement or in proceedings in opposition to the granting of the leave for enforcement, as the case may be, according to the procedural law of the forum. In addition – and this may even be an innovation for certain procedural laws – the decision on the enforcement may be adjourned if an action for setting aside the award is pending in the country where the award was made (Article VI).[26]

61. In this connection it may be observed that the use of the wording 'shall not impose substantially more onerous conditions' in the second sentence of Article III is somewhat confusing. The word 'conditions' as used in the second sentence must be deemed to relate to the conditions of the procedure, in other words, the rules of procedure. It does not refer to the conditions under which the enforcement of a Convention award is to take place, in which sense the word is employed in the first sentence of Article III.[27]

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[26] Article VI of the New York Convention provides: 'If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.'

[27] *See* A. Bülow, *Das UN-Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche*, 20 konkurs-, treuhand- und schiedsgerichtswesen 1, 8 n. 59 (1959).

62. Two studies are to be mentioned in connection with Article III. First, UNCITRAL'S Secretariat published a *Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (UNCITRAL Survey 2008).[28] Paragraphs 45–48 concern fees, levies, taxes or duties for enforcing a Convention award. With a few exceptions,[29] the responses to the questionnaire confirmed that Contracting States had not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards compared to domestic awards. The Addendum to the Survey addressed matters such as competence of the national courts and other authorities concerning recognition and enforcement of Convention awards; time limits for applying for recognition and enforcement; procedures and requirements applicable to a request for enforcement of a Convention award; objections to request for enforcement; and appeal against granting, or refusal to grant, enforcement.

63. The second study is the Report of the ICC Commission on Arbitration, *Guide to National Rules of Procedure for Recognition and Enforcement of New York Convention Awards*, published in the *ICC International Court Bulletin* 2008 Special Supplement (ICC Guide). The ICC Guide gives for more than sixty-five countries the following information: (a) the Contracting State and the Convention; (b) national sources of law; (c) limitation periods; (d) national courts and court proceedings; (e) evidence required; (f) stay of enforcement; (g) confidentiality; and (h) other issues (including enforcement of interim awards; enforcement of non-monetary relief; partial enforcement; enforcement of annulled awards; other procedural or practical requirements).

4.4 Means of recourse against enforcement of convention award in the contracting states

64. The main issue before the Supreme Court in the present case was whether an appeal against a grant of leave for enforcement of a New York Convention award would be contrary to Article III of the Convention as it was said (erroneously as we will see) that no means of recourse were available against a grant of a leave for enforcement of a domestic (Dutch) award. It is therefore interesting to examine

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[28] UN Docs. A/CN.9/656 and A/CN.9/656 Add.1.

[29] In one case, the court fee was based on a percentage of the value of the award and the fee imposed on foreign awards was double the fee imposed on domestic awards. Several states mentioned that, unlike foreign awards, domestic awards did not require exequatur and therefore the fees could not be compared. On a practical note, it was observed that although the official fees were the same, the costs for an international award would be higher because of the requirement to provide a certified translation of the documents accompanying the application. According to one response, administrative fees were the same, but an additional proportional fee was imposed only for the enforcement of foreign awards, thus constituting a difference. Conversely, in two other cases, a fee was imposed on the enforcement of domestic awards, but not of foreign awards.

whether other Contracting States have a means of recourse available against a grant of leave for enforcement of a Convention award.

65. Based on information collected during the above-mentioned UNCITRAL Survey 2008,[30] virtually all Contracting States maintain at least one 'challenge instance' for the decisions granting or denying recognition and enforcement. Some states designate the highest court (or higher court) as the sole authority to decide on a request for leave for enforcement of a Convention award. An asymmetrical regime, however, is virtually unknown, with very few exceptions (e.g., Estonia, Macedonia and Indonesia).

5 THE ERRONEOUS DUTCH SUPREME COURT'S APPLICATION

5.1 Genesis

66. As explained above,[31] the Dutch legislature had carefully crafted the provisions concerning means of recourse against domestic awards. The legislature had further devised a separate procedure for the enforcement of foreign arbitral awards. No one had even thought about a possible violation of Article III. Actually, the founding father of the New York Convention and one of the principal draftspersons of the Netherlands Arbitration Act 1986, Professor P. Sanders, observed in his treatise on the Act:

> Article III does not give rise to much comment. With respect to the enforcement of a foreign arbitral award there may not be imposed 'more onerous conditions or higher fees or charges' than for a 'domestic award', a Dutch award. *That does not occur under our law*.[32] (emphasis added)

67. Professor H.J. Snijders, a noted commentator on the Act, wrote in the first (2000) and second (2003) edition of his treatise on the Act on the assumption that appeal and recourse in cassation were possible in conjunction with Article 1075.[33]

68. Ph. de Korte, a Dutch practising lawyer, wrote a first time publication in the field of arbitration in 2007 on the subject of the consequences of what he dubbed the 'prohibition of discrimination' of Article III of the New York Convention on the leave for enforcement procedure in the Netherlands.[34] To my knowledge, he was the first one who broached the subject. He concluded that an

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30 *See* para. 62 *supra*.

31 *See* paras 23–38 *supra*.

32 P. Sanders, *Het Nederlandse arbitragerecht* 222 (4th ed. 2001). The same view was shared by A.J. Van Den Berg, R. Van Delden & J. Snijders, *Arbitrage Recht* 178–180 (1st ed. 1988); 190 (2d ed. 1992); Netherlands Arbitration Law 160 (1993).

33 H.S. Snijders, *Nederlands arbitragerecht : een artikelsgewijs commentaar op de art.* 1020–1076 Rv 322 (2d ed. 2003). His view was not followed by G.J. Meijer, *Tekst & Commentaar* 1481 (3d ed. 2008).

34 1 Tijdschrift voor Arbitrage 3 (2007).

appeal from a grant of enforcement of an arbitral award falling under the New York Convention would be in violation of Article III of the Convention.

69. This thought was picked up by Professor Snijders, who is also the Editor in Chief of the publication in which Mr De Korte's publication appeared. In the third (2007) edition of his treatise of the Act he wrote that it could be questioned whether appeal and recourse in cassation are available against the grant of leave for enforcement of an arbitral award under the New York Convention. [35]

70. When Yukos Capital won its appeal at the Court of Appeal, it used the arguments of Mr De Korte, as espoused by Professor Snijders, to prevent Rosneft from bringing its recourse in cassation before the Supreme Court. It is remarkable that the Advocate General to the Supreme Court solely addressed the admissibility of the recourse, on the basis of the writings of Mr De Korte and Professor Snijders, without even considering (even in the alternative) the merits of the recourse.

71. The Supreme Court then conveniently 'copied' the Advocate General's opinion. Hence, the Supreme Court did not need to deal with the aberrant view of the Court of Appeal on enforcement of annulled awards, nor with the apparently underlying general misapprehension of the Dutch judiciary of their brethren in the Russian Federation.

72. The decision of the Supreme Court is all the more remarkable since in a number of cases appeal was lodged from a grant of leave for enforcement of a Convention award to a Dutch Court of Appeal, without any questioning of alleged discrimination.[36] It is also the more remarkable since, as mentioned before,[37] virtually all Contracting States maintain at least one 'challenge instance' for the decisions granting or denying recognition and enforcement, or (as some states do) designate the highest court (or higher court) as the sole authority to decide on a request for leave for enforcement of a Convention award.

73. A surprising side effect of the Supreme Court's decision is that if leave for enforcement is granted of a Convention award by a President of a District Court who is not experienced in (international) arbitration, there is no recourse to a higher court.[38] This cannot have been in the intent of the drafters of the New York Convention and the Netherlands Arbitration Act.

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[35] H.S. Snijders, *Nederlands arbitragerecht : een artikelsgewijs commentaar op de art.* 1020–1076 Rv 354–55 (3d Ed. 2007). Mr. De Korte's Publication is not mentioned in Prof. Snijders' Analysis. Neither Mr. De Korte's Arguments nor those of Prof. Snijders are convincing in light of the analysis made at paras 53–63 *supra*.

[36] *See, e.g., Kersten & Co. B.V. v. Raoul Duval et Cie*, Hof (Court of Appeal) of Amsterdam, July 16, 1992, Tijdschrift voor Arbitrage 40 (1993), which concerned an appeal from a grant of leave for enforcement of a Convention award by the President of the District Court in Utrecht.

[37] *See* para. 65 *supra*.

[38] The Netherlands has 19 District Courts.

5.2 Analysis of the Supreme Court's reasoning

74. The Supreme Court's reasoning is structured by first giving its own analysis of the question of admissibility, and then addressing what it conceived as being three arguments by Rosneft. These are examined in turn below.

5.2[a] *Supreme Court's Own Analysis*

75. The Supreme Court started its analysis with the observation that the text of Article III of the Convention, in light of its object and purpose, 'does not unambiguously answer the question as to what is meant by "substantially more onerous conditions or higher fees or charges"'.[39]

76. The Supreme Court further noted that the *travaux préparatoires* do 'not provide a clear picture of the exact purport and meaning of Article III of the New York Convention' either.[40] As set out above, the discussions at the New York Conference were indeed not a model of clarity. However, it was also noted that the majority of delegates did not want national treatment for Convention awards.[41] It further became clear that there should not be an attempt to spell out the applicable enforcement procedures in full detail in the text of the Convention. Nor did they adhere to the concept of a 'summary enforcement procedure'.[42]

77. In any event, the expression 'substantially more onerous conditions or higher fees or charges' does not require a one-on-one comparison between the procedure for the enforcement of domestic awards and the one for Convention awards. In the Netherlands, the procedure for enforcement of domestic awards is usually ex parte.[43] The scheme of the New York Convention, on the other hand, is that the petitioner submits the request for enforcement with copies of the arbitration agreement and arbitral award (Article IV) and that the respondent may assert and prove one or more of the grounds for refusal of enforcement set forth in Article V(1). This implies that the procedure for enforcement of a Convention award cannot be ex parte.

78. As acknowledged by the Supreme Court, Article III of the Convention is unclear. Moreover, it contains an open norm, that is, 'substantially more onerous conditions'. Nor does the text and legislative history of Article 1075 DCCP exclude appeal and recourse in cassation (to the contrary, as we will see below). It is then against the fundamental principle of fair trial to conclude, as the Dutch Supreme

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39 Decision, *supra* n. 2, para. 3.3.
40 *Id.*
41 *See* para. 52 *supra.*
42 *See* para. 52 *supra.*
43 *See* para. 25 *supra.*

Court does, that there is no recourse available against a grant of leave for enforcement of a Convention award in the Netherlands.

79. Next, the Supreme Court engages in its reasoning in a comparison between the procedural requirements concerning the enforcement of domestic (Dutch) awards and those falling under the Convention. It concludes that:

> when comparing the procedural requirements on recognition and enforcement of national arbitral awards, on the one hand, and foreign arbitral awards coming within the scope of the New York Convention, on the other, the latter procedural requirements turn out to contain 'substantially more onerous conditions or higher fees or charges' if they were to allow appeal and appeal in cassation against leave to enforce, where such remedies – leading to additional costs and prolonging of the proceedings – as it follows from Article 1062(4) in conjunction with Article 1064(1) DCCP are not available against leave for enforcement of an arbitral award rendered in the Netherlands. [44]

80. This conclusion is incorrect in various respects.

81. First, there are means of recourse available against the grant of leave for enforcement of a domestic (Dutch) award. The carefully drafted scheme is explained in detail above. The text of Article 1062(4) even uses *expressis verbis* the expression '*rechtsmiddelen*' (means of recourse). The means of recourse are setting aside and, exceptionally, revocation. That is what is explicitly stated in Articles 1062(4) and 1064(1) DCCP, which are complemented by the extra time limit provided in the third sentence of Article 1064(3).

82. It is surprising to note that in its subsequent reasons concerning Rosneft's argument based on Article 6 ECHR, the Supreme Court contradicts itself by stating that means of recourse are available against the grant of leave for enforcement of a domestic award (*see* paragraph 101 *infra*).

83. Second, as there are means of recourse available against the grant of leave for enforcement of a domestic award, the argument about 'prolonging of the proceedings' does not hold water. Actually, setting aside proceedings in the Netherlands can go through three stages and take much more time than enforcement proceedings and their appeals. Some of those setting aside proceedings take many years.

84. Moreover, recourse against the grant of leave for enforcement of a domestic award is the institution of setting aside proceedings. As mentioned, those proceedings can go through three stages. In comparison, an appeal against a grant of leave for enforcement of a Convention award would involve one stage less, that is, being brought before the Court of Appeal, and, possibly, the Supreme Court. One stage less means that, in comparison with domestic awards, the period is necessarily shorter for the recourse against a grant of leave for enforcement of a Convention award, apart

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[44] Decision, *supra* n. 2, para. 3.4, first paragraph.

from the fact that those proceedings take much less time than setting aside proceedings.

85. Furthermore, concerns about delayed enforcement of Convention awards are alleviated by Article 988(2) DCCP which, as noted, provides that the decision of the court is enforceable notwithstanding appeal, unless the court decides otherwise.[45]

86. Third, again, as there are means of recourse available against the grant of leave for enforcement of a domestic award, the argument about 'additional costs' does not hold water either. As there is one stage less, by necessity again, the costs are less for resisting enforcement of a Convention award than resisting enforcement of a domestic award. Actually, setting aside proceedings involve much more work for counsel than appeal proceedings regarding the enforcement of foreign awards.

87. Fourth, the Supreme Court fails to address the threshold of '*substantially* more onerous' (emphasis added). If there is an appeal, whilst simultaneously enforcement can be carried out, it cannot be said that the procedure for enforcement is 'substantially' more onerous.

88. Fifth, and importantly, the text of Article 1075 does not distinguish between a grant of leave for enforcement and a refusal of leave for enforcement, unlike Article 1062(4) in the case of domestic awards. Article 1075 even mentions appeal in the context of an extension of the time limit for lodging the appeal. As mentioned, Articles 989 and 990 expressly contemplate appeal and recourse in cassation.

89. The Supreme Court seems to be oblivious to those aspects. Rather, it draws the conclusion:

> The procedure for enforcement of foreign arbitral awards would, therefore, be substantially more onerous than the procedure for enforcement of domestic arbitral awards if appeal and recourse in cassation against the granting of leave to enforce were allowed. This would be contrary to the prohibition on discrimination of Article III of the New York Convention. Accordingly, this is a situation where a treaty contains a derogating provision within the meaning of Article 1075 DCCP, which precludes application *mutatis mutandis* of Articles 985–991 DCCP, to the extent that such articles allow appeal and appeal in cassation without discriminating between a decision granting, and a decision rejecting, a request for enforcement. [46]

90. The Supreme Court's reasoning raises the question: Can it really be assumed that, for more than two decades, the Dutch legislature, all Dutch courts, the entire Dutch academic world, and the entire Dutch bar were in a collective catatonic

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[45] There may be an interplay with art. VI of the New York Convention where the setting aside proceedings are still pending the country of origin. Art. VI of the New York Convention provides: 'If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.'

[46] Decision, *supra* n. 2, para. 3.4, second paragraph.

state about the status of a Dutch statute being discriminatory under Article III of the New York Convention?

5.2[b] *Rosneft's Textual Argument*

91. After having given its own analysis, as reviewed above, the Supreme Court addressed three arguments raised by Rosneft.

92. First, the Supreme Court rejected Rosneft's argument that the text of Article 1075 in conjunction with Articles 985–991 DCCP contain the express provisions regarding appeal and recourse in cassation and that the text of those Articles does not contain a limitation regarding appeal or recourse in cassation.[47] The Supreme Court repeated its argument that Articles 985–991 DCCP apply according to Article 1075 to the extent that the treaty does not contain provisions deviating therefrom. As discussed above, that view of the Supreme Court is, in my opinion, erroneous.

93. It may be added here with respect to the Supreme Court's reliance on the phrase 'to the extent that the treaty does not contain provisions deviating therefrom' in Article 1075, that that phrase precedes the phrase 'provided that the President of the District Court shall be substituted for the District Court and the time limit for appeal from his decision and for recourse to the Supreme Court shall be two months'. Textually, therefore, the phrase concerning deviating treaty provisions does not apply to appeal and recourse in cassation, which are mentioned in the part of the sentence appearing after the phrase concerning deviating treaty provisions. It shows that, contrary to what the Supreme Court seems to assume, the drafters of Article 1075 did not view the appeal and recourse in cassation as falling within the category of deviating treaty provisions.

5.2[c] *Rosneft's Argument that Article 1064(1) DCCP Provides Means of Recourse Against a Grant of Enforcement of a Domestic Award*

94. Rosneft's second argument was that, when answering the question as to whether allowing appeal and recourse in cassation created a 'substantially more onerous condition', it should be considered that in the event of a grant of leave for enforcement of a domestic (Dutch) award, there is the means of recourse of setting aside (Article 1062(4) in conjunction with Article 1064(1) DCCP), whilst such a means of recourse is not available in the Netherlands against the grant of leave for enforcement of a foreign arbitral award. According to Rosneft, the absence of such

[47] *Id.* para. 3.6.

a means of recourse (i.e., setting aside of a foreign award in the Netherlands) explains the appeal and recourse in cassation mentioned in Article 1075 DCCP.[48]

95. The Supreme Court misconstrued Rosneft's argument by both: (i) introducing into its reasoning the setting aside in the country of origin; and (ii) ignoring that means of recourse are available against a grant of leave for enforcement of a domestic (Dutch) award:

> 3.7.2 This argument does not prompt the Supreme Court to come to a different opinion either.
>
> The question as to whether the foreign arbitral award can be affected by the remedy of setting aside or revocation should be answered based on the laws of the country where the arbitral award was rendered, and under the New York Convention the competent authorities of that country also have exclusive jurisdiction to hear an application for setting aside or revocation. Accordingly, in the Netherlands there is no possibility for setting aside or revocation of foreign arbitral awards that come within the scope of the New York Convention, and in light of the provisions of the Convention there is no reason to compensate for the absence of that possibility by allowing appeal and recourse in cassation against the granting of leave to enforce. It should be noted that, if the possibilities of challenging in the country where the arbitral award was rendered are limited, the parties could have taken that into account when entering into the arbitration agreement.
>
> 3.7.3 Therefore, the fact that setting aside or revocation of the foreign award cannot be obtained in the country of enforcement does not imply that the remedies of appeal and recourse in cassation against the leave to enforce should be allowed although such remedies are not available against national arbitral awards and would, therefore, lead to a 'substantially more onerous condition' for foreign awards under Article III of the New York Convention.
>
> When answering the question as to whether there is a 'substantially more onerous condition', the key is to compare the procedural requirements of the country of enforcement for domestic arbitral awards, on the one hand, and foreign arbitral awards coming within the scope of the Convention, on the other. A comparison with the procedural requirements of the country where the arbitral award was rendered is thereby irrelevant. Therefore, when assessing whether there is a 'substantially more onerous condition', it need not be considered if and how, according to the laws of the country where the arbitral award was rendered, there is still a possibility of setting aside or revocation of the relevant arbitral award in the event of granting of leave to enforce.

96. The Supreme Court is correct when it states that a foreign award cannot be set aside in the Netherlands. But it is irrelevant for Rosneft's argument under consideration.

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[48] Rosneft's argument as summarized in *id.* para. 3.7. At this point, the Supreme Court also summarized Rosneft's additional argument that the procedure in the Netherlands, including a possible appeal and recourse in cassation, for setting aside a domestic arbitral award may be less time-consuming and expensive than a procedure in which the granting of leave to enforce a foreign award is subject to appeal and recourse in cassation. Rosneft had argued just the opposite in its submissions to the Supreme Court. *See* Rosneft's Defense to Inadmissibility, Oct. 22, 2009, para. 15. Although mentioning Rosneft's argument (albeit in an incorrect manner), the Supreme Court did not answer it.

97. The Supreme Court is also correct that what should be compared are the procedural requirements for enforcement of a domestic award with those governing the enforcement of a Convention award in the country where enforcement of a Convention award is sought. However, in making the comparison, the relevant comparators should be used. That is something that the Supreme Court did not do as it failed to include in the comparison the fact that an application for setting aside an award is a means of recourse against a grant of leave for enforcement of a *domestic* award (i.e., Article 1062(4)). The comparison would have led to the conclusion that there should also be a means of recourse available against the grant of leave for enforcement of a Convention award.

5.2[d] *Rosneft's Argument Regarding the ECHR*

98. Rosneft's third argument was that application of the 'asymmetric' prohibition on means of recourse of Article 1062(4) in conjunction with Article 1064(1) DCCP to the grant of leave for enforcement of foreign arbitral awards falling under the New York Convention is contrary to the principle of due process and, in particular, to the principle of 'equality of arms' guaranteed by Article 6 ECHR.

99. The Supreme Court rejected those arguments as well. After having repeated its previous (in my opinion, erroneous) arguments, the Supreme Court noted that there was an issue:

> 3.8.4 . . . However, as explained in more detail in paragraphs 28 et seq. of the opinion of the Advocate General, it should be tested whether the 'asymmetry' in the prohibition of means of recourse puts the respondent in a disadvantaged position as compared to the petitioner for the leave for enforcement to such an extent that the principle of due process within the meaning of Article 6 ECHR is not present.

100. Surprisingly, the Supreme Court acknowledged here that there is a means of recourse available against a grant of leave for enforcement of a domestic award:

> On the grounds set forth in paragraphs 29–31 of the opinion [of the Advocate General] it should be assumed that, where the means of recourse in the procedure for obtaining leave to enforce arbitral awards rendered in the Netherlands are concerned, no rights protected by Article 6 are violated, particularly because in the event that leave to enforce is granted, *the means of recourse of setting aside or revocation can still be invoked against the relevant arbitral award pursuant to Article 1064(3) DCCP.*[49] (emphasis added)

101. This is a clear contradiction with the Supreme Court's earlier reasoning that an appeal against a grant of leave for enforcement of a Convention award under Article 1075 in conjunction with Article 989 and 990 DCCP would be in

[49] Decision, *supra* n. 2, para. 3.8.4.

violation of the discrimination prohibition of Article III of the Convention (*see* para. 79 et seq. *supra*). *Quid* the perceived 'substantially more onerous conditions'?

102. As a next step, the Supreme Court examined whether there is a means of recourse against a foreign award comparable with the setting aside of a domestic (Dutch) award:

> When assessing whether this is also true if national arbitral awards are not at issue, but rather the procedure concerning foreign arbitral awards coming within the scope of the New York Convention, it is important to verify whether there exists a provision similar to that of Article 1064(3) DCCP in the country where the arbitral award was rendered.[50]

103. To recall, Article 1064(3) DCCP provides an extra time limit for a setting aside of an arbitral award, i.e., a period of three months, which starts to run from the date of service by the petitioner of the award with leave for enforcement on the respondent.[51]

104. To my knowledge, it is extremely rare that an arbitration law provides for an extra (second) time limit upon service of the award with leave for enforcement on the respondent. It is because of the specific regime governing means of recourse against the grant of leave for enforcement of a domestic (Dutch) award that such an extra time limit is provided in the Netherlands Arbitration Act (i.e., Article 1064(3) DCCP). Such a time limit is not provided for in the Arbitration Act of the Russian Federation of 1993, which provides for a time limit of three months after the date of receipt of the award.[52] The Supreme Court does not make any inquiry to that effect. That inquiry is relevant because at the time that leave for enforcement of the Convention award is granted, the time limit for setting aside in the country of origin may well have expired.

105. Rather, the Supreme Court was minded to observe the following:

> If so, and the relevant procedure has been, or can still be, followed in that country, the 'asymmetry' does not lead to violation of any rights protected by Article 6 ECHR. The outcome, or expected outcome, of that procedure is thereby irrelevant, for the essence is whether, subject to the international aspects of the case, the principle of 'equality of arms' has been violated because the possibilities to obtain the leave to enforce, in comparison with the remedies to stop that, are so different that either party is substantially prejudiced as compared to the other. There is no such substantial prejudice if either prior to or after granting the leave for enforcement a procedure for setting aside or revocation of the

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50 *Id.* para. 3.8.4.

51 *See* para. 36 *supra*.

52 Art. 34(3) of the Law of the Russian Federation on International Commercial Arbitration of 1993 provides: 'An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award and, if a request had been made under article 33 [i.e., correction, interpretation and additional award], from the date on which that request had been disposed of by the arbitral tribunal.'

> relevant decision is to be conducted before the court in the country where the arbitral award was rendered rather than before the court competent to grant leave to enforce.[53]

106. What the Supreme Court is saying here is that there is no violation of Article 6 ECHR in terms of 'equality of arms' if the respondent in an enforcement procedure under the New York Convention (to which Article 1075 of the Arbitration Act refers) in the Netherlands has, or has had, the possibility to seek the setting aside of the award in the country where the award was made. That reasoning, once again, proceeds on the assumption that a means of recourse is available against a grant of leave for enforcement of a domestic award in the Netherlands, that is, the setting aside of the award. The Supreme Court posits that if a similar means of recourse of setting aside is available or has been available in the country of origin, there would not be a violation of the principle of 'equality of arms'.

107. There are two fundamental flaws in the Supreme Court's reasoning.

108. First, the Court ignores here what it itself has correctly noted before, that it should compare procedural requirements (i.e., means of recourse) regarding enforcement of domestic (Dutch) awards with those applicable to Convention award as those procedural requirements exist in the Netherlands:

> the key is to compare the procedural requirements of the country of enforcement for domestic arbitral awards, on the one hand, and foreign arbitral awards coming within the scope of the Convention, on the other. A comparison with the procedural requirements of the country where the arbitral award was rendered is thereby irrelevant.[54]

109. Therefore, the Supreme Court's reference to the possibility of setting aside in the country of origin (i.e., the Russian Federation) is irrelevant in the context of assessing compliance with the requirement of 'equality of arms'.

110. Second, a means of recourse inherently implies that it is a recourse against a decision. The recourse can logically be taken only *after* the decision is rendered. Logic breaks down when the Supreme Court states that an application for setting aside in the country of origin *prior* to the granting of leave for enforcement in the Netherlands removes any substantial prejudice caused by the asymmetry of means of recourse.

111. It is at this point that the reasoning of the Supreme Court is incongruous. The Supreme Court made the violation of the principle of 'equality of arms' dependent on the availability of an action for setting aside in the country of origin. However, the very issue before the Court of Appeal was whether the Russian judgments on the setting aside could be recognized in the Netherlands. The Court of Appeal came to the conclusion that the judgments could not be recognized in the

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[53] Decision, *supra* n. 2, para. 3.8.4.

[54] *Id*. para. 3.7, quoted and analysed at paras 91–93 *supra*.

Netherlands. If that is the case, the Supreme Court cannot base its reasoning on the consideration that there is no violation of the principle of 'equality of arms' because an action for setting aside was available and has been used in the country of origin (i.e., the Russian Federation). One cannot have it both ways: on the one hand, non-recognition of the foreign court judgments setting aside the Awards and, on the other, not to admit a recourse in cassation because the Awards could be and have been subject to setting aside proceedings before the Russian courts.

112. In conclusion, the Supreme Court should have admitted Rosneft's recourse. It failed to do so on untenable grounds under the New York Convention and Dutch arbitration law.

113. As a result, Yukos Capital had the possibility of recourse to the Court of Appeal against the refusal of enforcement of the Awards by the President of the District Court (and to the Supreme Court against a refusal of enforcement by the Court of Appeal), whilst Rosneft had no recourse to the Supreme Court against the grant of enforcement of the (annulled) Awards by the Court of Appeal.

6 CONCLUSION

114. The Court of Appeal's reasoning amounted to finding a purportedly systematic lack of impartiality and independence of the Russian judiciary: the very fact that the judgment in the *Yukos Capital* case was pronounced in Russia would indicate that the judges considering the application to set aside the arbitral awards could not be independent and impartial. The Court of Appeal advanced this conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges involved in all three instances. By adding the condition of a recognition of the court judgment setting aside the award in the country of origin to Article V(1)(e) of the New York Convention, the Court of Appeal has applied the Convention incorrectly.

115. The Supreme Court should have admitted Rosneft's recourse. It failed to do so on untenable grounds under the New York Convention and Dutch arbitration law.

116. There is something fundamentally wrong with the decision in this case: Yukos Capital had the possibility of recourse to the Court of Appeal against the refusal of enforcement of the Awards by the President of the District Court (and to the Supreme Court against a refusal of enforcement by the Court of Appeal), whilst Rosneft had no recourse to the Supreme Court against the grant of enforcement of the (annulled) Awards by the Court of Appeal. It is submitted that this constitutes a classic case of violating the principle of equality of arms under Article 6 ECHR.

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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