

# Insight: Commercial Litigation

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## English court considers public law aspects of enforcing arbitral awards

The Court of Appeal has ruled on preliminary issues in the well-known and complex *Yukos v Rosneft* case. Yukos Capital, owned by former Yukos shareholders, had obtained arbitral awards in Russia against a Yukos entity that has since been taken over by state-owned Rosneft. These awards were subsequently annulled by the Russian courts. Nevertheless, the courts of the Netherlands allowed Yukos Capital to enforce them, holding that the Russian courts had acted without impartiality and independence. Yukos Capital then brought a second enforcement action in England. It argued that Rosneft could no longer rely on the Russian annulment judgment in light of the Netherlands judgment. Rosneft argued, to the contrary, that the doctrine of Act of State prohibits the English courts from questioning the Russian annulment.

The Court of Appeal agreed with neither proposition. It did not consider a judgment to be an Act of State, but nor was Rosneft estopped from relying on the annulment decision. The trial on the merits of the enforcement action continues.

This alert looks in more detail at the Court of Appeal's decision and considers what it means for parties facing controversial decisions by foreign courts.

For the text of the judgment, [click here](#).

### Background

In March 2007 Yukos Capital began enforcement proceedings in the Netherlands of four arbitration awards against Rosneft for over US\$400 million (the "**Russian Awards**") made in September 2006 by an arbitral tribunal sitting in Moscow. In May 2007 the Russian Arbitrazh Courts set aside the Russian Awards (the "**Russian Annulment Judgments**"). In April 2009, the Amsterdam Court of Appeal allowed enforcement of the Russian Awards and refused to recognise the Russian Annulment Judgments on the basis of "partial and dependent" judicial process in Russia in these proceedings. Subsequently, in 2010 Rosneft paid the principal sum under the Russian Awards. Yukos Capital then applied to the English Court to enforce the Russian Awards to recover outstanding interest of over US\$160 million.

### Proceedings in the English courts

By the time of the English enforcement proceedings, the English Court had before it:

- (a) the Russian Awards (enforced in the Netherlands);
- (b) the Russian Annulment Judgments (not recognised by the Dutch court); and
- (c) the Amsterdam Court of Appeal finding that the Russian Annulment Judgments were a result of partial and dependent judicial process.



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In support of its contention that the Russian Annulment Judgments were “partial and dependent” Yukos Capital argued that the Russian state, through its tax authorities and courts, had pursued an unlawful conspiracy to destroy Yukos Oil Company. Rosneft contended that this allegation was barred by a doctrine known as Act of State (which precludes an English court from adjudicating on acts of a foreign state within its own territory).

The English Court at first instance found that:

1. the Act of State doctrine applied only where a litigant was challenging the validity or effectiveness of a foreign act of state, but not where the act of state was alleged to be unlawful, wrongful or improper; and
2. the decision of the Amsterdam Court of Appeal meant that Rosneft could no longer deny that the Russian Annulment Judgments were “partial and dependent” because this issue has already been decided by another court (issue estoppel).

### The Court of Appeal decision

Rosneft appealed and the Court of Appeal considered the two issues: the Act of State doctrine and issue estoppel. It disagreed with the first instance judgment on both.

On the first issue the Court of Appeal delivered a landmark judgment. It held that the Act of State doctrine covered questions of unlawfulness and wrongfulness, clarified that court decisions do not constitute acts of state for the purposes of the doctrine and concluded that the English court is entitled to examine the substantial justice available in the courts of foreign jurisdictions. Naturally, the English courts will require cogent evidence for any allegation that a foreign court decision should not be recognised on the grounds of a failure of substantial justice but the Court of Appeal emphasised that that was a matter of evidence and argument, not a matter of any immunity or doctrine of non-justiciability.

On the second issue the Court of Appeal found there to be no issue estoppel. This was because the Amsterdam Court of Appeal was guided by considerations of Dutch public order, whereas the English court would have to form its own view in line with any relevant issues of English public policy. The conclusions of the Court of Appeal on this issue are not surprising, given that under English law (a) the courts have historically been required to consider whether proceedings before foreign courts complied with English concepts of natural justice; and (b) it must ultimately be for the English court to decide on the question whether, on grounds of public policy, to withhold recognition of foreign judgment, since accepting the decision of a third country on the matter would be an abdication of responsibility on the part of the English court, in that it would necessarily entail acceptance that the scope of English public policy was the same as that of the third country.

### Comment

This decision will bring comfort to litigants faced with controversial or politically driven decisions of foreign courts by confirming the English court’s ability to provide unbiased assessment of the substantial justice available in those courts (provided the matter is within the jurisdiction of the English court). The foreign courts whose justice is being assessed in such circumstances may, in due course, also find it reassuring that the English Court will not be guided by the decisions of the third country courts, thereby taking upon itself the function of a litmus test.