ICSID Review, Vol. 30, No. 2 (2015), pp. 336–344
doi:10.1093/icsidreview/siv015

CASE COMMENT

Yukos Universal Limited (Isle of Man) v The Russian Federation[1]

Enforcement of the Yukos *Awards: A Second* Noga *Saga or a New* Sedelmayer *Fight?*

Julien Fouret[2] and Pierre Daureu[3]

I. INTRODUCTION

As already discussed at length in this volume of the *ICSID Review*, on 18 July 2014, the Russian Federation was ordered to pay over US$50.2 billion[4] for its 'devious and calculated' indirect expropriation of OAO Yukos Oil Company (Yukos) almost 10 years after the start of the arbitration. Since then, a lot has been said and written about the largest quantum awarded in the history of international arbitration,[5] but one question remains: will Russia abide voluntarily with the Award or will it attempt to avoid enforcement again? As aptly put in 2001 by the Singapore High Court, the Russian Federation has only a few options:

> A party faced with a Convention award against him has two options. Firstly he can apply to the courts of the country where the award was made to seek the setting aside of the award. If the award is set aside then this becomes a ground in itself for opposing enforcement under the Convention. Secondly, the unsuccessful party can decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition. . . . [T]he[se] options are alternatives and not cumulative.[6]

[1] *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014) (Hon L Yves Fortier, Chairman; Dr Charles Poncet; Judge Stephen M Schwebel).

[2] Partner, betto seraglini, Paris, France. Email: julien.fouret@bettoseraglini.com.

[3] Associate, Castaldi Mourre & Partners, Paris, France. Email: pierre.daureu@bettoseraglini.com.

[4] Post-award interest is due on such amount since 15 January 2015, date at which the grace period granted by the Arbitral Tribunal to the Russian Federation expired.

[5] The previous largest known investment treaty award was the one rendered in the ICSID case *Occidental Petroleum Corporation and and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, in which Ecuador was ordered to pay US$1.7 billion for the termination of a contract to exploit an oil block in the Amazon rainforest.

[6] *Newspeed Int'l Ltd v Citus Trading Pte Ltd*, Singapore High Ct, 2001, (2003) 28 YB Comm Arb 829, 833 applying the reasoning of the Honk Kong Court of First Instance in *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 40.

Considering the current situation of the Russian Federation on the diplomatic scene and its weak economic picture, there was little doubt in July 2014 that it would ever pay voluntarily such a colossal amount to Yukos ex-shareholders: Veteran Petroleum Ltd, Yukos Universal Ltd and Hulley Enterprises Ltd.[7] More than six months after the Awards, no doubt is left. Russia challenged the three Awards before the District Court in The Hague on 12 November 2014.[8] GML Limited (formerly Group Menatep Limited), the holding company of Yukos Universal Ltd and Hulley Entreprises, recently reaffirmed, on the other hand, its determination to seek leave for enforcement in every country where the Russian Federation owns non-commercial assets. A new legal battle is thus being fought in potentially dozens of different domestic fora because there is 'nothing that limits the forums in which an award might be recognized or enforced'.[9]

As a matter of principle, the Awards, which are final and binding, are indeed enforceable in 152 States under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In practice, obtaining a favourable award is not always something easy, but enforcing an investment treaty award against a reluctant State is generally an even more complex task, especially when the award is obtained outside of the International Centre for Settlement of Investment Disputes (ICSID) system where the claimant does not benefit from Article 54 of the Washington Convention which recognizes an award 'as if it were a final judgment of a court in that State'.[10]

It took ten years for the Yukos ex-shareholders to obtain an award, and obtaining payment, be it only partial, will probably last at least a few more.[11] GML's subsidiaries and the Yukos pension fund (Veteran Petroleum Ltd) will indeed be facing various legal and practical challenges since Russia has never complied voluntarily with an investment arbitration treaty award.[12]

In their quest for enforcement, Yukos former shareholders must answer four questions in order to identify the practical challenges of enforcing the awards:

[7] Veteran Petroleum Ltd (Cyprus), Hulley Enterprises Ltd (Cyprus) and Yukos Universal Limited (Isle of Man), which jointly owned 70.5 percent of the shares in Yukos, were respectively awarded US$8.2 billion, US$39.9 billion and US$1.85 billion in damages.

[8] See 'Russia Challenges Largest Award Ever' (12 November 2014) Global Arb Rev <http://globalarbitrationreview.com/news/article/33162/russia-challenges-largest-award-ever/> accessed 15 March 2015, and the three articles published by *Global Arbitration Review* on this topic on 27 January 2015: 'Yukos moves to the Dutch courts' <http://globalarbitrationreview.com/news/article/33336/yukos-moves-dutch-courts/>; 'Fatally flawed? Why Russia says the awards should not stand' <http://globalarbitrationreview.com/news/article/33334/fatally-flawed-why-russia-says-awards-not-stand/>, and 'Was the tribunal's assistant the fourth Yukos arbitrator?' <http://globalarbitrationreview.com/news/article/33333/was-tribunals-assistant-fourth-yukos-arbitrator/>.

[9] Gary B Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2980.

[10] The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, or Washington Convention, indicates at art 54(1): 'Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.' For all the issues arising when attempting to enforce investment treaty awards, see Julien Fouret (ed), *Enforcement of Investment Treaty Arbitration Awards—A Global Guide* (Globe Law and Business Publisher 2015).

[11] Tim Osborne, executive director of GML indicated indeed in an interview that:

> It's going to take a long while to collect $50 billion but there are assets out there. I can see it taking another ten years. We've stuck at this for ten years. We've got to a point now with this award which nobody ever thought we would get to, and we're not going to stop now.

Andrew Cave, 'The Man Who Won $50B From Russian President Vladimir Putin—And Now Has To Collect It' *Forbes* (8 August 2014) <http://www.forbes.com/sites/andrewcave/2014/08/08/the-man-who-won-50-billion-from-russian-president-vladimir-putin-and-now-has-to-collect-it/> accessed 15 March 2015.

[12] Noah Rubins, Maxim Kulkov and Dmitry Vlasov, 'Russia', in Fouret (n 10) 351.

when, where, what, and against whom to attach? Below, we will address each of these four questions in an attempt better to understand some of the practical challenges which the Yukos ex-shareholders, as well as any winning party having to enforce an investment treaty award against a State, will face.

II. WHEN TO ENFORCE THE FINAL AWARDS?

In theory, the Awards are already enforceable in the 152 member States to the 1958 New York Convention. Member states are bound to recognize the awards without re-examining the case on the merits. In our view, this is only a theoretical possibility today since setting aside proceedings are already pending in the Netherlands. As a consequence, no enforcement can take place in the Netherlands at the moment.

Second, pursuant to Article VI of the 1958 New York Convention, domestic courts hearing a leave of enforcement claim for a foreign arbitral award can stay recognition proceedings and/or enforcement, in the case of pending setting-aside proceedings in the country of the seat of the arbitration. However, this does not mean that the award/s, is/are not binding even if an action to set aside the award has been started as indicated by many jurisdictions, including the Swiss Federal Tribunal in 2008:

> In order to be deemed 'binding', a foreign award need not be executory in the state of origin, since the New York Convention wished to avoid 'double exequatur' . . . The fact alone that an action for setting aside is possible or has been filed in the state of origin against the award whose recognition is sought in another state does not affect that award's 'binding' character.[13]

However, save in a few jurisdictions including France, in which the annulment of a foreign award by the jurisdiction of the seat of an arbitration is not binding on domestic courts,[14] the Dutch proceedings are what really matters at this juncture for the Yukos ex-shareholders. Indeed, should the Awards be set aside, the enforcement would be extremely difficult since the vast majority of States would not recognize them.[15]

[13] Swiss Federal Tribunal, *X-Company Sa v Y-Federation* Judgment (9 December 2008) (2009) 34 YB Comm Arb 810, 813. See also Swiss Federal Tribunal, *Inter Maritime Management SA v Russin & Vecchi*, Judgment (8 January 1995) (1997) 22 YB Comm Arb 789 or *Société Nationale d'Opérations Pétrolières de la Côte d'Ivoire Holding v Keen Lloyd Resources Ltd*, HK Ct First Inst 2001 (2004) 29 YB Comm Arb 776, 779.

[14] See eg *PT Putrabali Adyamulia v Rena Holding et Société Mnogutia Est Epices*, French Cour de Cassation, Judgment (29 June 2007) (2007) Revue de l'Arbitrage 507; *Omnium de Traitement et de Valorisation v Hilmarton*, French Cour de Cassation, Judgment (10 June 1997) (1997) 22 YB Comm Arb 696; and *Société Hilmarton v Société OTV*, French Cour de Cassation, Judgment (23 March 1994) (1994) Revue de l'Arbitrage 327. See also the numerous articles, notably Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31(5) J Intl Arb 575; Alexis Mourre, 'À Propos des Articles V et VII de la Convention de New York et de la Reconnaissance des Sentences Annulées dans leurs Pays d'Origine : Où va-t-on après les Arrêts *Termo Rio* et *Putrabali* ?' (2008) 2 Revue de l'Arbitrage 263; and Philippe Pinsolle, 'The Status of Vacated Awards in France: the Cour de Cassation Decision in *Putrabali*' (2008) 24(2) Intl Arb 277.

[15] Only a few domestic jurisdictions, besides France's, have indicated that an award may, and sometimes must, be recognized by foreign courts even if set aside at the arbitral seat. Such is notably the case in Austria, Belgium, and the USA: *Radenska v Kajo*, Austrian Oberster Gerichtshof, Judgment (20 October 1993) (1999) 26(a) YB Comm Arb 919; *Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) v Ford, Bacon & Davis, Inc*, Brussels Tribunal de Première Instance, Judgment (6 December 1988) (1990) 15 YB Comm Arb 370; and *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996). The Netherlands have also followed that trend by accepting to actually enforce an award set aside in Russian Courts in an ancillary *Yukos* procedure: *Yukos Capital Sarl v OJSC Rosneft Oil Co*, Dutch Hoge Raad, Judgment (25 June 2010) (2010) 35 YB Comm Arb 423.

In addition, although GML has been able, since 18 July 2014, to initiate attachment proceedings anywhere in the world, it faces two major legal hurdles: first, the proceedings could be suspended, upon Russia's request, as soon as they are set in motion in a given jurisdiction. In all likelihood, the Russian Federation would raise the application of Article VI of the New York Convention. However, nothing prevents the enforcing court from also granting a suitable security if the Claimant were to ask for such a guarantee. Both decisions would be at the sole discretion of the court and 'there are no internationally accepted standards for the exercise of discretion by courts' on these issues.[16] It will be a fight jurisdiction by jurisdiction.

Second, if the enforcement is to resume, the Russian Federation could object to the attachment. In other words, Russia has, as a matter of principle, the ability to paralyse attachment proceedings and/or recognition proceedings until the Dutch courts definitively rule on Russia's setting-aside proceedings, before then objecting to the attachment procedure as such. Any of Yukos ex-shareholders' enforcement attempts can, and probably will, give rise to lengthy and costly proceedings, as the Russian Federation has traditionally objected to enforcement up until it has reached the highest competent domestic jurisdiction of every country in which enforcement is sought.

In conclusion, the challenges of the 'when' question all point towards an inevitable lengthy quest for enforcement for Yukos ex-shareholders.

III. WHERE TO ENFORCE THE FINAL AWARDS?

The answer to this question is straightforward: Yukos ex-shareholders can enforce the awards in every place where the Russian Federation owns, directly or indirectly, any assets. That said, it would be more efficient for Yukos ex-shareholders to double check beforehand whether they are at all likely to obtain a favourable enforcement decision in any country where they believe assets can be attached. For instance, many, including the present authors, are of the view that Russia could easily be crossed off the list of potential enforcement fora. Although the vast majority of the Russian Federation's assets are located within its own territory, it seems hardly possible to obtain a leave for enforcement there.[17]

As with every investment arbitration award, the *Yukos* Decisions have strong political features, and it is doubtful whether Russian courts would recognize them on their soil. After all, the Tribunal's Decision on its own jurisdiction has been amply debated and sometimes criticized, not only by Russian officials but also by arbitration practitioners.[18] And one needs to be reminded that the lack of arbitration agreement (without which there cannot be any arbitration) is one of the limited grounds under which recognition can be refused pursuant to Article V of the 1958 New York Convention.

[16] Dana Freyer, 'The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration' in Emmanuel Gaillard and Domenico Di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards—The New York Convention in Practice* (Cameron May 2008) 757, 766

[17] See on this issue, notably Rubins and others (n 12).

[18] See eg Mahnoush H Arsanjani and W Michael Reisman, 'Provisional Application of Treaties in International Law: The Energy Charter Treaty Awards' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 86, 92.

Unless assets worth more than US$50 billion can be found in one location, the Yukos ex-shareholders will have to chase Russian assets around the world, and where any can be located, it will be necessary to put their value in balance with the political and judicial probability that enforcement will be successful in that particular jurisdiction. Past attempts to enforce such awards prove that it can be difficult to find a proper jurisdiction where to obtain relief.

The *Noga* saga illustrates various attempts to enforce an award against Russia in multiple jurisdictions even though it was not an investment treaty case. By way of background, Noga Import & Export SA, a Swiss-based company entered into two agreements in 1991 and 1992 for credits and loans with Russia for the purchase of certain products. The Russia Federation would then repay, according to a precise schedule, with crude oil.[19] Both agreements contained an SCC arbitration clause with Swiss law being applicable to the dispute and they also contained an express waiver for immunity from enforcement. Noga obtained a favourable SCC Award in 1997 for US$27 million. While it refused to voluntarily comply with the Award, Russia also attempted to set aside the Award in Sweden but its application was dismissed both in first instance and in appeal.[20] Consequently, Noga attempted to attach assets of the Russian Federation in France, the United States and Switzerland where the enforcement could have appeared easier than in other jurisdictions.

All these attempts have failed for various reasons, including the absence of standing to sue[21] as well as immunity issues,[22] because Noga did not properly identify the assets that could be seized. All these attempts, and failures, illustrate the difficulty of enforcing such an award when faced with extreme resistance from the debtor State, even in very arbitration-friendly jurisdictions. One can imagine that the political impact as well as the monetary amounts which are almost 2000 times greater in *Yukos* Awards will prompt Russia to use every possible avenue to prevent enforcement. However, the Yukos shareholders might hope that their fate will be similar to that of Mr Sedelmayer rather than that of the Noga company.

The *Sedelmayer* arbitration arose from a contract concluded in 1991 between Franz Sedelmayer, a German businessman, and the Leningrad Police Department on both the delivery of law enforcement equipment and training.[23] In 1991, the parties signed a contract establishing a joint stock company (KOC) in which Mr Sedelmayer was appointed General Director. KOC and the Leningrad Police Department then agreed on the transfer of property owned by the Police Department to KOC. After the collapse of the Soviet Union, the new Federal Property Fund established to manage state property ordered the Leningrad Police Department to transfer its shares in KOC to the Property Fund but the Department refused. Ultimately, in 1996, the premises were seized.

[19] See for a complete description Dominique Brown-Berset, 'Enforcement and Execution of Arbitral Awards: A Swiss Perspective' in Christian Klausegger and others (eds), *Austrian Yearbook on International Arbitration* (Kluwer 2011) 180, 184.

[20] *Russian Federation v Compagnie NOGA*, Stockholm District Court Case No T 6-6357-97 (17 June 1998) and *Russian Federation v Compagnie NOGA*, Svea Court of Appeals Case No T 925-98-80 (24 March 1999).

[21] This was in the USA, see *Compagnie Noga d'Importation et d'Exportation SA v The Russian Federation*, 2008 WL 3833257 *7 (SDNY 15 August 2008) and confirmed on appeal in *Compagnie Noga d'Importation et d'Exportation SA v The Russian Federation*, 350 F App'x 476, 477 (2d Cir 2009).

[22] These issues will be analysed concisely in Section IV, and are also addressed in Rubins and others (n 12).

[23] *Franz Sedelmayer v The Russian Federation through the Procurement Department of the President of the Russian Federation*, Stockholm Chamber of Commerce, Award (7 July 1998).

Relying on the USSR–Germany BIT, Mr Sedelmayer submitted a request for arbitration to the SCC seeking compensation for its investment in KOC. In 1998, the Tribunal found that Russia had expropriated Mr Sedelmayer's investments and awarded US$2 350 000 as compensation with 10 percent interest per annum. Mr Sedelmayer never attempted to enforce the Award in Russia but spent over a decade enforcing it and attaching Russia-owned property both in Sweden and Germany. The Claimant carefully chose the jurisdictions in which he sought to enforce the Award, both because assets were located within their territory and because these were arbitration friendly jurisdictions. Russia, of course, attempted to have the Award set aside in Sweden, but in 2002, the Stockholm District Court rejected these arguments[24]—a Decision which was confirmed by the Svea Court of Appeal in 2005.[25] Then Mr Sedelmayer attempted and succeeded in attaching assets in Sweden and Germany, and finally obtained full payment in 2008 after having brought his claims before no less than five different local courts in Germany.[26]

However, the success of such a venture, which nonetheless took over 10 years and involved an amount some 20 000 times lower than the *Yukos* Awards, stemmed more from the identification of the kind of assets to attach (the 'what'), from which the geographic localization of such seizable properties (the 'where') is automatically derived, rather than from a mere determination of the fora in which to attach assets.

IV. WHAT ASSETS TO LOOK FOR?

The third element in the four-step challenge of obtaining payment from the Russian Federation is in reality the nucleus of any enforcement procedure against a State: the identification of the precise assets that could/should be attached in order to collect the amounts. And here, the ex-shareholders will be faced with the biggest challenge in terms of execution: the issue of sovereign immunity, which is going to become central to Yukos ex-shareholders' strategy.[27] In summary, Yukos ex-shareholders can only attach commercial assets of the Russian Federation; and for assets that would qualify as commercial, most European jurisdictions will be prepared to enforce the Final Awards.

The New York Convention does not address in express terms the issue of immunity, even though some authors, relying on courts' interpretation, have indicated that Article III[28] and the terms 'rules of procedure' implicitly referred to rules such as sovereign immunity.[29] The only other international instrument that

[24] *Russian Federation v Franz J Sedelmayer*, Stockholm District Court Case No T 6-583-98 (18 December 2002) (2005) 2 Stockholm Intl Arb Rev 116.

[25] *Russian Federation v Franz J Sedelmayer*, Svea Court of Appeal Case No T 525-03 (15 June 2005) (2005) 2 Stockholm Intl Arb Rev 132.

[26] Most of the decisions are available on the ITAlaw website at <http://www.italaw.com/cases/982> accessed 15 March 2015. These are analysed at length in Rubins and others (n 12).

[27] Robert G Volterra, Graham Coop and Álvaro Nistal, 'Sovereign Immunities and Investor-State Awards—Specificities of Enforcing Awards Based on Investment Treaties' in Fouret (n 10) 67.

[28] Its relevant part indicates: '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.'

[29] See eg Achim Börner, 'Article III' in Herbert Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 115, 136; and David Rivkin and Christopher Tahbaz, 'Attachment and Execution on Commercial Assets' in Doak Bishop (ed), *Enforcement of Arbitral Awards against Sovereign States* (Jurispub 2009) 140.

could have applied to this issue is the United Nations Convention on Jurisdictional Immunities of States and Their Property,[30] as the first international conventional instrument to codify the law on sovereign immunity. But the Convention has yet to enter into force, even though some jurisdictions already rely on it as the codification of customary rules.[31]

Thus, it will be the local law applied by domestic courts that will decide whether an asset is covered by sovereign immunity and if the ex-shareholders can attach it to obtain partial payment of the Award.

The question thus becomes: what is a commercial asset? Unfortunately for the Yukos ex-shareholders, there are as many answers as there are countries in which enforcement can be sought. Besides, the tendency of domestic courts is rather to limit the definition of State's commercial assets in an attempt to protect State sovereignty. Hence a careful analysis of the case law in the various jurisdictions where assets have been located must be carried out. However, some indications can already be provided as to what can and cannot be attached, particularly when it pertains to Russian property.

First, The *Noga* saga could here serve as a good illustration of what assets can already be excluded from the list of prospective targets. Indeed, in its various enforcement attempts, Noga tested the limit of State immunity in many jurisdictions, such as Switzerland, France and the United States. In France, the company tried to seize assets belonging to the Russian Embassy and the Russian Representative at the UNESCO in Paris. Both these attempts failed, and the Paris Court of Appeal clearly indicated that, notwithstanding a waiver of immunity, immunity was intrinsic to diplomatic missions and therefore both assets, including bank accounts, could not be seized.[32] Noga also attached a Russian ship in 2000 and attempted to do the same for two Russian military jets in 2001 when they were on French territory. Both failed; the attachment of the ship was revoked since it did not belong to the State but to a University,[33] and the planes took off from the air show minutes before being impounded.[34] Notwithstanding these failures in France, Noga then attempted to seize in Switzerland, in 2005, 54 paintings from the Pushkin State Museum of Fine Arts of Moscow on display in a Swiss museum. Even though it obtained the seizure from the local Swiss courts, the procedure took a political turn when, in November 2005, the Swiss Federal Council ordered the release of the paintings as 'in international law, national cultural treasures are public property and not subject to confiscation'.[35] Further attempts to attach assets were brought by the company, with little success.[36]

[30] United Nations Convention on Jurisdictional Immunities of States and their Property (adopted 2 December 2004) UN Doc A/59/508.

[31] It will enter into force on the thirtieth day following the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. As of January 2015, only 28 States have signed it and 16 States have ratified, accepted, approved or acceded to it. A list of State Parties is available at <https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en> accessed 15 March 2015.

[32] *Embassy of the Russian Federation and others v NOGA*, Cour d'Appel de Paris, Judgment (10 August 2000), (2001) 26 YB Comm Arb 273. The Court indicated that diplomatic immunity was of paramount importance since failing to protect such assets could 'hinder the functioning of the State's embassies and missions abroad'.

[33] *The Murmansk State Technical University (MSTU) and others v Compagnie NOGA d'importation et d'exportation*, Tribunal de Grande Instance, Brest (24 July 2000), (2001) 3 Gaz Pal 801. This question will be concisely analysed in Section V.

[34] In any event, the air show organizers who were sued by Noga obtained the dismissal of the case, by the Bobigny Court in 2003, on the basis that the failed attempts to seize these planes were illegal.

[35] For the text of the order see: <http://www.admin.ch/cp/d/437b6673_1@fwsrvg.html> accessed 15 March 2015.

[36] See for a full explanation Rubins and others (n 12).

On the bright side, from the ex-shareholders' perspective, there are the *Sedelmayer* case's recent enforcement successes against Russia. The German businessman succeeded, after more than a decade of attempts, to enforce its Award in Germany and Sweden. Sweden was the seat of the arbitration, and after having been refused to set aside the Award in 2002 and in 2005, the Claimant moved to obtain enforcement on the collection of rent of a building of the Russian Trade Mission. This issue went up to the Swedish Supreme Court which accepted the withholding of rent payment indicating that such rent was a commercial asset, not a sovereign one.[37] The Claimant concurrently pursued enforcement in Germany, before different tribunals in different regions, and did not succeed in Berlin to attach Lufthansa overflight rights or VAT reimbursement covered by sovereign immunity. However, in Frankfurt, Hagen and Cologne, Mr Sedelmayer managed to attach bank accounts, rent payments in business premises and a building of the Trade Mission not used by officials but rented to the city.[38]

The success in *Sedelmayer*, and the failure in *Noga*, illustrate the difficulty of enforcing awards against the Russian Federation which refuses to abide voluntarily by an international decision, even after the set-aside proceedings have been rejected. It also illustrates the highly political turn that some of these procedures can take when trying to attach assets belonging to a sovereign State. The Yukos ex-shareholders have been expecting that all along in any case. However, the 'what' is vital as we can see that these two experiences illustrate the importance of targeting the proper assets so as not to delay any further by starting attachment procedures bound to fail.

As highlighted by some authors:

> Both the *Sedelmayer* and *Noga* cases provide insight into the world of enforcing arbitral awards against Russia, as well as into the tactics and defences both claimants and the Russian state have employed to obtain or avoid enforcement. As Russia has sought to escape enforcement in spite of its obligations to respect such awards, the ability to seek execution in other jurisdictions and the limits of sovereign immunity have particular relevance for claimants seeking to enforce awards against Russia.[39]

This summarizes perfectly the long road ahead for the *Yukos* Awards' creditors to determine the proper and most efficient 'what'.

V. WHOSE ASSETS TO ATTACH?

The last hot topic of the *Yukos* case is whether Yukos ex-shareholders will manage to pierce the corporate veil of State-run OAO Rosneft and OAO Gazprom whose assets are being targeted.

Indeed, the Final Awards have found both Rosneft and Gazprom to be instrumental in the Russian Federation's campaign against Yukos Oil Company.[40] The question is of the utmost importance to Yukos ex-shareholders for they stand

[37] *Russian Federation v Franz J Sedelmayer*, Supreme Court of Sweden Case No Ö 170-10 (1 July 2011).

[38] See for a full explanation August Reinisch, 'Enforcement of Investment Awards' in Katia Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to Key Issues* (OUP 2010) 671, 687 and Rubins and others (n 12).

[39] Rubins and others (n 12).

[40] See notably *Veteran Petroleum*, *Hulley Enterprises* and *Yukos Universal*, Final Awards (n 1) para 1180.

a better chance of winning court-ordered seizures of assets of Russia's two largest companies than of sovereign property.

Though the chances of success are higher, the task is not an easy one, either.[41] In most jurisdictions, there exist principles and circumstances in which State-owned company assets may be equated with the State. And most jurisdictions, such as the United States, hold that even though there is a separate legal entity and personality, the control of the State can be so extensive that disregarding the obvious link would go against a proper administration of justice and equate to a fraud.[42]

The real question is not whether Rosneft and/or Gazprom can be held liable for the expropriation themselves, but rather whether they can be equated with the Russian Federation for the purpose of attachment of assets and enforcement of the Award. This could also be the case for many other State-owned companies.

The Final Awards are quite interesting in that respect and may actually serve the Yukos ex-shareholders in their quest. Yukos ex-shareholders will most probably rely on the Awards in which the Tribunal has actually attributed the actions of Rosneft to the Russian Federation. The Tribunal indeed confirmed that Rosneft has acted as an instrument of the State.

Once the Awards are recognized in a given State, such finding in the Award could very well be used against any attempt by Rosneft to depict itself as a fully independent company but could rather serve the ex-shareholders to portray it as a commercial arm of the Russian Federation[43].

In conclusion, after fighting in The Netherlands for the Awards to be confirmed, Yukos ex-shareholders will have to look to countries in which the Russian Federation holds significant commercial assets and where an absolute approach to immunity does not prevail. The game of hide-and-seek seems in reality to have just begun in this mammoth dispute.

[41] See more generally Baiju Vasani and Sylvia Tonova, 'Enforcement of Investment Treaty Awards against Assets of States, State Entities and State-Owned Companies' in Fouret (n 10) 83.

[42] The main US Supreme Court decision being *First National City Bank v Banco Para El Comercio Exterior de Cuba*, 462 US 611 (1983).

[43] And this is exactly what Yukos' counsel declared after:

> Emmanuel Gaillard, the Shearman & Sterling partner who headed the shareholders' legal team, expressed optimism that if Russia did not pay, it would be possible to round up $50 billion of assets 'if we pierce the veil of Rosneft and Gazprom'. In other words, the shareholders could go after refineries, pipelines and other properties of Russia's state energy companies abroad.

Stanley Reed, '$50 Billion Awarded in Breakup of Yukos' *New York Times* (28 July 2014) <http://www.nytimes.com/2014/07/29/business/international/yukos-shareholders-awarded-about-50-billion-in-court-ruling.html> accessed 15 March 2015.