

Yukos Oil, the Spirit of a Decision

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'Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.' It is this passage from Charles De Montesquieu's 'The Spirit of Laws' (1748), which comes to mind when reading the *Yukos* decision of the Amsterdam District Court.

Technically there is nothing spectacular about this decision. *Yukos Finance B.V.* is a Dutch corporation. Two managing directors were dismissed by the shareholders and two others were appointed. The ones dismissed contested the validity of the shareholders' resolutions. This is primarily a matter of Dutch corporate law. According to Dutch corporate law, a resolution is void if the voting is done by persons who do not properly represent the shareholders. The court found that the shareholders were not properly represented. Therefore the resolutions are void.

The real difficulties lie behind this part of the decision. The Russian corporation *Yukos Oil* appears to be the sole shareholder of *Yukos Finance B.V.* and *Yukos Oil* was declared bankrupt in Russia under Russian law. The bankruptcy estate has been placed under the care of a bankruptcy trustee and it is the trustee who made the decisions on behalf of the shareholders. This is the trail the court had to follow, and in order to do this the court had to make deep incursions into Russian legal territory.

Montesquieu developed his ideas with an eye on the government and the judiciary of national states. It was France he had in mind and he used England as an example. His ideas were accepted and put into practice in these countries, as they have been in most of the Western world. Together with the ideas commonly bundled under the names 'the rule of law' and 'due process', they form the solid basis of Western democracies. As such they are helpful in smoothing out international conflicts, political conflicts as well as conflicts of laws.

In past decades many walls between countries, both tangible and virtual, have come down. In the wake of these events international trade and the international movement of capital have increased tremendously. This is part of the global economy. New legal and political devices to more or less control this

development had to be put in place and the old ones are being taxed heavily. One of the difficulties is that we cannot expect that basic ideas as mentioned above, separation of powers, the rule of law and due process, self-evident as they are in the Western world, are as self-evident among our new trade partners, like Russia. Russia may have accepted these ideas in theory but the tradition has long been different. Visitors to the Russian Supreme Court are shown the special telephone on the President's desk which used to maintain a direct connection to the Kremlin. They are told that under the former regime it was used to receive instructions every time the court had to make an important decision. I assume that the telephone has now been disconnected but an ingrained tradition cannot be disconnected so easily.

The decision by the Amsterdam District Court in *Yukos* must have raised the eyebrows, to say the least, of the Russian authorities. For them it must be hard to accept that a judge in a rather insignificant Western country explains to them why certain actions of their tax authorities and certain decisions of their courts are so much out of line that they must be ignored. Here again one may argue that all this is just a technical matter, in this part of the decision a matter of international private law. The Amsterdam court has followed the rules as it sees them on the basis of the facts as presented. Appeal is possible for a party who is not convinced. But in fact it is a matter which reaches to the heart of international commercial and legal relations. The decision of the Amsterdam court may have an impact which goes far beyond interpretation of the law.

In a case like this the challenge for the judiciary is not to lose sight of its primary task: to judge independently from a just distance on the basis of the judge's professional understanding of the law and keeping in mind the basic principles of the system the judge works in. The award shows that the Amsterdam court has tried to act in this spirit. Whether it has delivered a decision that is beyond criticism is a different matter. Barend Verkerk will devote attention to the various aspects of the case in the following pages of this issue and will give his comments. Further views may emanate from the Amsterdam Court of Appeal and other courts that have been involved in this matter.

A different question again is whether this is the best way to solve international legal conflicts. Are the rules of corporate law and the rules of international private law in a certain country

that adheres to the above-mentioned principles unassailable? Of course they are not. They can be changed by the legislature and executive authorities may be able to find other ways to solve problems. But part of the system we cherish is that this is not for the judge to decide. It is his task to find the answers in the law as it stands.

A Dutch trade mission has just visited Moscow. In one of our national business glossies I saw a picture of Vladimir Putin in a relaxed position on the couch, smiling nicely at our prime minister, Jan Peter Balkenende, who tried to smile too. This was two weeks after the *Yukos* decision. 'Russia has complete confidence in the Netherlands as a trade partner', our prime minister stated afterwards. I am sure it is true. Somewhere in the background *Yukos* must have lingered.