

CORPORATE  
YUKOS

# From Moscow to London: Yukos ruling analysed

Akin Gump lawyers who worked on this high profile case involving allegations of auction-rigging explain what others need to know

The history of the English Commercial Court's decision *Yukos Finance BV & Ors v Stephen Lynch & Ors* emanates from the Russian bankruptcy of Yukos Oil (Yukos) in 2006. The decision is a reaffirmation of the aptitude of the English Commercial Court to conduct a detailed and forensic examination of events that took place 12 years ago in a different country and subject to a different law.

Yukos was declared bankrupt in 2006, following very substantial tax demands levied on it by the Russian Federation. Yukos was alleged to have been involved in widespread tax evasion; in return, its supporters alleged that the tax demands were politically motivated (because its ultimate beneficial owner, Mikhail Khodorkovsky, had fallen out of favour with President Putin).

There followed a great deal of international litigation, including well-known cases in the European Court of Human Rights and Hague Court. In addition, the former management of Yukos took steps to protect Yukos' international assets, most of which were held by a subsidiary called Yukos Finance, from the Russian bankruptcy process. These steps involved a reorganisation in 2005 under which control of Yukos Finance became subject to a Dutch *stichting* (similar to a trust). Having completed this reorganisation, the former management issued proceedings before the Dutch Court seeking declarations that the Russian bankruptcy violated Dutch public policy and that the authority of the Russian bankruptcy administrator should not therefore be recognised in the Netherlands.

In the meantime, under the Russian bankruptcy regime, the bankruptcy administrator embarked upon a series of auctions of Yukos assets in 2007 to raise funds to pay off Yukos' creditors. The principal creditor was Rosneft. A number of these auctions took place during the first half of 2007.

In July, the bankruptcy administrator announced the auction for Lot 19: the sale of Yukos' shares in Yukos Finance. Yukos Finance's principal asset was a substantial cash pile. However, the company itself was caught up in claims and cross-claims between Yukos' shareholders and Rosneft, and the cash was subject to liens. Additionally, control of Yukos Finance was cast in doubt by the Dutch litigation referred to above.

Into this toxic mix came the five defendants in the English case. Four of the five were employed by two financial organisations: Renaissance Capital, then one of the largest investment banks headquartered in Russia; and VR Capital, a substantial hedge fund.

## 1 MINUTE READ

This article by Akin Gump lawyers considers the English Commercial Court's recent decision in the high-profile Yukos saga, arising out of an auction of Yukos Oil assets under the Russian bankruptcy regime in 2007. The decision dismissed in their entirety the allegations of auction rigging against individual defendants and reaffirms the aptitude of the English Commercial Court to conduct a detailed and forensic examination of events that took place 12 years ago in a different country and subject to a different law.

The first defendant was the principal of a smaller company, Monte Valle. Together, the three companies decided to form a consortium and bid in the Lot 19 auction for Yukos Finance. With hindsight, this looks like a bold decision, but at the time, the consortium had reason to be confident that it would be a successful investment if it won the auction. It had relationships with the two warring parties in the litigation – Rosneft and the Yukos shareholders – and had good reason to believe that it could broker a mutual settlement of the cross claims on Yukos Finance. This would then free up the cash that it owned.

The auction took place on August 15 2007 and the consortium made the winning bid. Their initial pleasure soon turned to concern, however, as only a few months later the Dutch Court found that the Russian bankruptcy violated Dutch public policy and that the bankruptcy administrator had no authority under Dutch law to deal with Yukos Finance or dispose of its shares, so that in turn the consortium could not assume control of Yukos Finance. The Dutch decision was appealed and there followed nearly twelve years of appeals in that case, and ancillary litigation in other jurisdictions. The case was only finally resolved earlier this year when the Dutch Supreme Court confirmed the first instance decision.

The English litigation was brought by Yukos Finance and the former management to recover losses that they alleged had been caused by the consortium’s participation in the auction. The claimants argued that this participation was unlawful as the defendants knew that the auction would be rigged in their favour.

After a seven-week trial, the judge dismissed the claim in its entirety, finding – among other points – that there was no wrongdoing or dishonesty by the defendants. The claimants have indicated that they intend to seek permission to appeal.

## Russian law in an English court

This case is a striking example of the willingness and ability of the English courts to hear, forensically examine and decide a case where there is very little connection to England. Most of the relevant events took place in Russia and all of the key legal questions, which were complex, varied, and at times novel, were Russian law questions. The only reason the English court had jurisdiction

at all is that, when the proceedings were issued, two of the defendants resided there.

To arrive at its findings, the court considered extensive (and, at times, contradictory) written and oral evidence by the parties’ respective experts on Russian law and, guided by those experts, it also undertook a detailed analysis of the relevant Russian statutory provisions and case law.

In addition, there is a growing body of English court decisions in which Russian legal questions have previously been decided. As a matter of English procedural law, an English judge’s decision about the meaning and effect of a foreign law is treated as a finding of fact. Any such finding therefore does not bind a future English judge faced with deciding the same question – but it will be informative and, depending on the context, influential.

For English practitioners, this is instructive as it helps to predict how an English court may react to a particular Russian law issue; and it is notable that some issues, such as the meaning and application of the Russian law of limitation, or the scope of an employer’s vicarious liability, resurface before the English court with some regularity.

## Reconstructing the facts

The relevant events in this case nearly all occurred some twelve years ago. As the judge noted in his judgment: ‘The problem is how to reconstruct the events...in the absence not only of many or most of the documents, but of many or most of the relevant participants, and after such a long period of time.’

The English court typically does not shy away from a forensic examination of events in the distant past, but as the judge in this case noted, documentary evidence will normally be ‘...of most assistance, if only to test the accuracy and reliability of the oral evidence’.

An unusual feature of the documentary evidence in this case was the fact that the claimants had in their possession over one million documents belonging to Renaissance Capital (the employer of three of the defendants at the relevant time). This cache included numerous confidential email communications among members of the consortium of investors, as well as privileged communications with legal advisers.

Any litigant in the normal course would go to great lengths to prevent their opponents in litigation from ever having access to such material. In this case, the defendants had no choice in the matter; but, paradoxically, this

cache of sensitive and private material assisted the defendants: the judge noted that one of the factors supporting his conclusion that the defendants were honest businessmen was the ‘...absence of any ‘smoking gun’ in the internal communications revealed in the RenCap cache, which they can never have thought would see the light of day...’

The decision also provides a refreshing reminder that what is accepted wisdom in the media may not be accepted by the English court, which will instead look forensically at the evidence to get to the truth. With Yukos, elements of the western media had reported since 2007 that all of the Yukos auctions were rigged in favour of the Russian Federation. In this case, the judge found that the claimants’ arguments that all of these auctions had been pre-determined were unsubstantiated.

## Costs sanctions

In English, the loser must pay the winner’s costs. The amount of those costs is normally assessed on a standard basis or on an indemnity basis. The latter typically leads to a substantially higher recovery.

At a time when allegations of dishonesty, fraud and conspiracy are becoming more commonplace in commercial litigation, this case is a salutary reminder of the risks to a claimant in making such allegations and then failing to persuade the English court that they are justified. In this case, given that the judge’s findings were overwhelmingly in the defendants’ favour, indemnity costs were awarded to the defendants.

Decisions such as this serve as a warning for claimants pursuing claims involving dishonesty or fraud in the English courts to take particular care when deciding whether such allegations are justified. Where such claims are brought, it is advisable for claimants to reassess regularly the justification for maintaining a dishonesty or fraud allegation during the course of the litigation. Failure to do so will likely lead to a heavier costs sanction, as was the case here.



**Mark Dawkins**  
Partner  
Akin Gump, London



**Mouna Moussaoui**  
Associate  
Akin Gump, London