The Yukos Appeal Decision on the Role of Arbitral Tribunal's Secretaries

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Where should courts draw the line between the permissible delegation of tasks and the improper acting of the secretary as the 'fourth arbitrator'?

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1 Introduction

In February 2020, a new episode of the *Yukos* awards[1] saga was revealed to the international arbitration community. Reversing the lower court's judgment, which in 2016 annulled the US$50bn *Yukos* Awards,[2] the Court of Appeal of The Hague (the 'Court of Appeal') issued a milestone decision that reinstated the three *Yukos* Awards (the 'Awards').[3]

This judgment will re-start the several enforcement actions brought in the past by Yukos' shareholders in several jurisdictions (including the United States, France, the UK, Belgium or India). The revived Awards represent the largest amount awarded in international arbitration, which explains the unprecedented attention this recent decision has brought. Yet, and beyond this general interest, the judgment also constitutes a landmark decision that resolves important legal questions under the Energy Charter Treaty (ECT) and, more generally, highly relevant matters in the field of international arbitration. Pending the cassation appeal filed by the Russian Federation with the Dutch Supreme Court, the Court of Appeal has rendered a sound decision, which the authors of this commentary anticipate is likely to be confirmed in the last instance by Dutch courts.

Part 2 of this commentary briefly contextualises the decision of the Court of Appeal and its disposition of each ground of annulment that had been originally submitted by the Russian Federation before the first instance court. Part 3 focuses on the particular issue of the (im)permissible role of secretaries acting for arbitral tribunals and the Court of Appeal's holding under the fact-setting of the *Yukos* dispute. Lastly, Part 4 provides some overall conclusions and confronts the test that results from this decision with some approaches that have been suggested to address the delegation of functions to tribunal's secretaries. It ends up with a prospective reflection inviting the arbitration community to hold a meaningful debate on this matter in future revisions of institutional rules and regulations.

2 Some context to the Court of Appeal's decision

The recent decision of the Court of Appeal is of relevance for an important number of matters. This commentary focuses on one: the role of secretaries in arbitral tribunals. By briefly contextualising the decision, it may be recalled that Dutch courts have issued two decisions throughout the *Yukos* set-aside proceedings. The Hague (Netherlands) was the seat of arbitration for the three UNCITRAL (PCA registered) parallel arbitration proceedings brought against Russia.

> The *first instance decision* issued in April 2016 by the District Court of the Hague quashed the three Awards on the grounds that the *Yukos* Tribunal lacked jurisdiction. Out of the six grounds for annulment that Russia presented, the District Court annulled the Awards upholding the first ground asserted. The rules on the provisional application of the ECT (article 45(1) of the ECT, known as the ECT 'Limitation Clause') ? signed but never ratified by Russia ? did not oblige the host state to arbitrate investment disputes. Russia had not consented to submit the *Yukos*dispute to investor-state arbitration and no valid arbitration agreement existed.
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> After lengthy *appellate proceedings* (2016–2020), in February 2020 the Court of Appeal upheld the Yukos' challenge of the lower court's decision and reinstated the three *Yukos* Awards. Under a *de novo* standard of review, the Court of Appeal dismissed the six grounds for annulment that the Russian Federation asserted[4] and reversed the findings of the District Court relating to the provisional application of the ECT.[5] The issue concerning the role of the *Yukos* Tribunal's assistant is examined below.

3 Drawing the line between the permissible delegation of tasks and the improper acting as fourth arbitrator: The Hague's proposed test

Out of the (quite complex) Yukos scenario, one of the issues that has led to greater debates amongst arbitration practitioners is the role of the *Yukos* Tribunal's assistant (Mr Valasek).

In its application to set aside the *Yukos* Awards, Russia asserted that ? due to Valasek's substantive involvement in the works of the *Yukos* Tribunal ? the Tribunal: (i) failed to comply with its mandate and incurred in an impermissible delegation of the arbitrators' personal tasks (article 1065(1)(c) of the Dutch Code of Civil Procedure (DCCP)); and (ii) was improperly constituted for the Awards were de facto rendered by three (appointed) and an additional fourth (not-appointed) arbitrator (article 1065(1)(b) of the DCCP). Both grounds were rejected by the Court of Appeal (see Sections 6.6 and 7).

Russia's main argument: Valasek's disproportionate involvement in the last phase of the arbitration

In essence, Russia sustained that the Awards should be set aside because of the disproportionate role played by Valasek in their preparation. To substantiate its argument, Russia drew attention to three main elements:

> Valasek had billed a disproportionately large number of hours in the second phase of the proceedings (2,625 hours), whereas the arbitrators charged (on average) 1,661 hours each. Further, this work could not be related to administering and organising the works of the Tribunal since these tasks had been previously discharged by the two secretaries of the Tribunal, who charged (together) 5,232 hours. Therefore, Russia concluded that Valasek must have made a major substantive contribution to the arbitration;
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> Valasek had been introduced as an assistant to the Tribunal (actually, as a contact-person for parties' enquiries) without mentioning that he would also perform substantive tasks; and
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> because the Tribunal and the Permanent Court of Arbitration (PCA) did not provide detailed information on Valasek's specific work, Russia resorted to the opinion of two linguistic experts. Using digital means, these experts examined the presence of authorship characteristics derived from earlier writings of Valasek and the three arbitrators. The experts concluded that it was more than 95 per cent certain that Valasek had written at least 60–70 per cent (Chaski's expert opinion) or at least 41 per cent (Daelemans' expert opinion) of Chapters IX (*Preliminary Objections*), X (*Liability*) and XII (*Quantum*) of the Awards.

The Court of Appeal's fundamental holding: no evidence of Valasek's participation in the decision-making process

The Court of Appeal's decision did not hinge on weighing the linguistics' expert evidence, but rather on the question of whether proof had been furnished to demonstrate Valasek's actual participation in the decision-making process. In illustrative terms, the Court of Appeal reasoned that 'it is up to the expertise of Chaski and Daelemans to analyze, using scientific methods, which author most likely wrote a certain text, but not to determine whether that author wrote that text on his own authority or on the instructions and under the responsibility of someone else' (para 6.6.6).

Hence, even assuming – for the sake of the Court of Appeal's reasoning – that Valasek had indeed made significant contributions to the drafting of Chapters IX, X and XII of the Awards, the decision concludes that Russia had failed to establish that the secretary had participated in the actual decision-making process or that the Tribunal had delegated any portion of such decision-making process to the secretary (para 6.6.6).

The actual decision-making process was deemed to be the arbitrators' sole responsibility. The core adjudicatory process needs to be distinguished from other tasks such as drafting procedural orders, reviewing pleadings, researching the law, summarising positions and the procedural background to the case, or also – in the Court of Appeal's thesis – preparing drafts of substantive parts of the final award. All such 'other tasks' are subject to the ultimate scrutiny, supervision and responsibility of the appointed arbitrators and are ancillary to the decision-making process that is memorialised in the award.

Crucially, the Court of Appeal rejected Russia's proposed distinction between two types of tasks of tribunal's secretaries: (i) the drafting of memoranda summarising legal and factual points of view (which could be (perhaps) permissible, in Russia's thesis); and (ii) the drafting of decisive parts of an arbitral award (which, according to Russia, was unlawful since the award must be written by the arbitrators).

In the Court of Appeal's view, this distinction overlooked a consideration that is key to determine the (un)lawfulness of the Tribunal's behaviour. Irrespective of whether the input from the secretary/assistant consists of memoranda or actual drafts of portions of the award, what matters is that the arbitrators '*check these texts for correctness and completeness*'. The submission of findings or texts does not imply that the secretary has taken independent decisions that are simply 'copy-pasted' by the arbitrators without any revision on their side. Therefore, the Tribunal's use of draft texts from Valasek was not found to be tantamount to an 'outright scrapping of the intuitu personae principle or the delegation prohibition'. The question came down to the fact that 'the arbitrators have decided to assume responsibility for the draft versions of Valasek, whether in whole or in part and whether or no amended by them'

and that Russia had not argued – much less established – that 'the arbitrators accepted Valasek's drafts indiscriminately' (paras 6.6.9–6.6.10). This led the Court of Appeal to reject Russia's contention based on the improper constitution of the *Yukos* Tribunal.

Based on a similar reasoning, the Court of Appeal also dismissed Russia's argument of violation of the mandate entrusted to arbitrators. It noted that, absent an explicit agreement between the parties regarding the permitted functions of secretaries/arbitrators, 'it is left to the discretion of the Tribunal to what extent it wishes to use an assistant or secretary for the drafting of the award'.[6] Considering the courts' needed restraint in set-aside proceedings, the Court of Appeal reasoned that the violation of the mandate required under article 1065(1)(c) of the DCCP has to be *serious*. It noted that *such violation would be serious*'if the substantive decisions relevant to the arbitral awards had been delegated to Valasek and/or if Valasek had had final responsibility for (certain parts of) those awards.' However, the submission of drafts written under the responsibility of the arbitrators and accepted by them cannot lead to a finding of serious violation of the arbitrators' mandate (para 6.6.14.1).

In all, the Court of Appeal required establishing that 'substantive decisions' were delegated and taken only by the secretary or that the secretary had 'final responsibility for part of the awards', a situation that could arise, for instance, where the arbitrators failed to check, review or scrutinise the drafts submitted by the secretary. Although the Court of Appeal explicitly warned that it was not establishing a general test to decide about the roles that can be entrusted to secretaries, reality is that this holding results in a high threshold to be met in order to set aside an award on 'fourth arbitrator' grounds.[7]

Further unpacking of the Court of Appeal's fundamental holding

A number of additional elements in the Court of Appeal's reasoning merit analysis.

First, the Court of Appeal also rejected two additional arguments pleaded by Russia based on certain inferences seeking to establish that Valasek had actually played a role in the decision-making process. On one side, Russia had sought to use in its favour the fact that the Tribunal and the PCA had refused to provide a 'rough specification' of Valasek's activities. However, the Court of Appeal highlighted that such refusal was based on the PCA's reasoning that the access to such information would be 'at odds with the confidentiality of the deliberations [of the Tribunal]'. Under a reasoning that shows a tacit endorsement of the Tribunal/PCA position, the Court

of Appeal concluded that the decision to reject such access cannot be regarded as an implied acknowledgement of Valasek's *actual participation in the deliberations*(para 6.6.7).

On the other side, the Court of Appeal also rejected Russia's argument based on an inference from the hours of work spent by the assistant and the arbitrators. Russia argued that the comparison of hours made it apparent that Valasek's functions had gone beyond the mere 'ordering and summarizing of the party positions and the relevant legal sources' and crossed the line into functions that are proscribed to secretaries/assistants. Nevertheless, the Court of Appeal remarked that, precisely in cases as complex as this *mammoth-scale* Yukos dispute, the structuring process can prove 'very time-consuming', even if the parties have made great efforts to present their positions as efficiently as possible. Russia's argument that such structuring process concerns 'precise but simple handiwork' was rejected: such statement 'certainly does not apply to a case of this size' (para 6.6.8).

Second, although the Court of Appeal noted that the *Yukos* Tribunal failed to fully inform the parties about the functions that would be assumed by Valasek (who was introduced as an assistant and contact person), 'under the circumstances', this failure 'does not constitute a serious violation of the mandate that it [sic] should lead to the setting aside of the [Awards]' (para 6.6.14.2). This infringement did not reach – in the eyes of the Court of Appeal – the level of seriousness required to quash the Awards.

4 Conclusions: a prospective look on the issue

The Court of Appeal's decision rests on the absence of evidence that could establish whether the Yukos tribunal had delegated a substantive part of the decision-making process or final responsibility over parts of the award to the assistant. This results in a test that sets a high threshold of proof,[8] which some may view as requiring the challenging party to present evidence that can hardly be obtained by it.

While the Court of Appeal anticipated that it was not seeking to propose any general test, its holding reveals that – absent specific institutional rules or arrangements to the contrary – the allegation (even if assumed, *in arguendo*) that a secretary/assistant drafted certain significant sections of an award (which has been aptly described as the 'holding the pen' argument)[9] may not be sufficient to challenge an award on grounds of improper constitution of the tribunal or violation of the tribunal's mandate.

To a certain extent, this decision broadens the functions permitted to secretaries if one scrutinises this holding under the 'uniform standard' proposed by PolkinghorneandRosenberg in their brilliant contribution, *The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard*.[10] Their proposal set essentially two *red line*s for tribunals' secretaries: 'the secretary cannot prepare drafts [of] substantive portions of awards'[11] and 'the secretary may not have decision-making functions'. Their proposal also conditioned the possibility that secretaries draft procedural orders and 'non-substantive portions of the award' to the following two conditions: '(i) the tribunal provides detailed guidance to the secretary in advance of drafting; and (ii) the draft is scrutinized by the tribunal before finalizing. Ultimately, the responsibility for the contents of all procedural orders and awards remains with the members of the tribunal'.

The Court of Appeal's decision in the *Yukos* case would seem to validate the enlargement of the scope of functions permitted to secretaries to also encompass the drafting of *substantive portions of the award* provided that those two 'safeguards' are kept in place: (i) previous guidance by the arbitrators; and (ii) supervision and scrutiny of the draft, to ensure that the arbitrators continue to be responsible for the final product (the award). The limit on the secretary stepping into the *decision-making process* stands (obviously) as the *last frontier*, a question that the recent *Code of Best Practices in Arbitration* (2019) issued by the Spanish Arbitration Club (CEA) considers together with, or as the final outcome of, the 'evaluative role concerning the positions of the parties in fact or in law',[12] which should not be delegated to the secretary either.

Moving forward, it seems clear that institutions, arbitrators, secretaries, counsels and, generally, the arbitration community, should reflect on the possibility to introduce uniform rules in subsequent amendments of institutional regulations that address the role(s) that may – and those that cannot – be performed by secretaries, particularly relating to the drafting of sections of the award, as well as defining the precise tasks comprised within the key notion of 'decision-making process'.

Lastly, in a context of increasing transparency in international arbitration, it would be desirable that tribunals or institutions endeavored to provide the parties with some general description on the functions performed by secretaries. Provided that we can reach a certain consensus on which tasks should form the decision-making process (in which the secretary cannot step), the secrecy of the tribunal's deliberation does not appear to be a compelling reason to deny access to this basic information.

Notes

Reference is to the following three *Yukos* awards: (i) *Hulley Enterprises Ltd (Cyprus) v Russian Federation*, PCA Case No 2005-03/AA226 Final Award (18 July 2014); (ii) *Yukos Universal Ltd (Isle of Man) v Russian Federation*, PCA Case No 2005-05/AA227 Final Award (18 July 2014); and (iii) *Veteran Petroleum Ltd (Cyprus) v Russian Federation*, PCA Case No 2005-05/AA228 Final Award (18 July 2014). Before these 2014 Final Awards, the three *Yukos* Interim Awards affirming the Tribunal's jurisdiction were issued in November 2009.
The *Yukos* Tribunal was composed by L Yves Fortier QC (Chair), Charles Poncet and Stephen M Schwebel.

Judgment of the District Court of The Hague [*Rechtbank's-Gravenhage*], 20 April 2016 (Appeal Case No 200.197.079/01), ECLI:NL:RBDHA:2016:4230, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA2016:4230.

Judgment of the Court of Appeal of The Hague [*Gerechtshof Den Haag*], 18 February 2020, ECLI:NL:GHDHA:2016:234, available at https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2020:234(in Dutch only). To prepare this Commentary, the Authors have reviewed the sworn English translation filed by the Yukos entities in May 2020 before the US Courts (US District Court for the District of Columbia) in Case No 1:14-cv-01996-BAH (*Hulley Enterprises Ltd, Yukos Universal Ltd and Veteran Petroleum Ltd v Russian Federation*).

Briefly, on the remaining grounds for annulment, the Court of Appeal held the following:

> *Other grounds on the Tribunal's jurisdiction*: (i) *first*, on the proper notions of 'Investor' and 'Investment' under the ECT (art 1(6) and (7)), the Court of Appeal confirmed that the treaty only required corporate investors to be legally constituted under the laws of a state party to the ECT and that the ECT included no contribution requirement as part of its definition of Investment (Section 5.1); and (ii) second, that the tax carve-out under art 21 of the ECT did not deprive the Yukos tribunal of its jurisdiction under art 26 of the ECT, but merely provided that the certain treaty's rights and obligations did not extend to taxation measures (Section 5.2).
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> *Violation of the Tribunal's mandate*(other than due to the role of the assistant Mr Valasek analysed below in Part 3 of this commentary): (i) the Court of Appeal held that, even if the tribunal was obliged to refer the dispute to the Russian tax authorities (article 21(1)(5)(b) of the ECT), the fact that the tribunal did not do so on grounds of futility, Russia did not suffer any prejudice

from such lack of referral (Section 6.3); and (ii) the Court of Appeal also dismissed Russia's criticisms related to the method of damages valuation employed by the *Yukos* Tribunal (Section 6.4).

Lastly, the Court of Appeal also dismissed Russia's grounds for annulment related to *Failure to state reasons*(Section 8) and based on *breach of Public Policy*, including Russia's argument of the 'unclean hands' of Yukos (Section 9).

For a general discussion on these approaches and a critical analysis of the first instance decision, *see* Borja Alvarez Sanz, *The Yukos Saga Reloaded: Further Developments in the Interplay between Domestic Legislations and Provisionally Applied Treaties*, 49 NYU *Journal of International Law and Politics* 587, 606 (2017).

The Court of Appeal relied on this point on the well-known treatise by G Born *International Commercial Arbitration, Volume II: international arbitral procedures,* 2nd Edn (Kluwer Law International 2014), pp 1999 and 2000),and on the holding that there is 'no unwritten rule to the effect that a secretary or assistant is not allowed to write parts of the award'(para 6.6.14).

See Simon Rainey WC & Gaurav Sharma (Quadrant Chambers), *In search of certainty: the Dutch appeal court decision in Yukos*, 15 April 2020, available at www.quadrantchambers.com/sites/default/files/media/document/in_search_of_certainty_the_dutch_appeal_court_decision_in_yukos.pdf.

Reference can be made also to the holding of the High Court of England and Wales in the case of *P v Q* [2017] EWHC 194 (Comm), 3 February 2017, (Popplewell J), holding that 'the use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function'. The High Court of Appeal dismissed the set-aside application on grounds that 'soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator is an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants' (paras 65–71). See also *Sonatrach v Statoil* [2014] EWHC 875 (Comm), 2 April 2014, (Flaux J) dismissing a set-aside application on grounds that it had not been established (nor could be inferred) that the secretary had participated in the deliberations. For a complete review of

precedents, see CJ Carswell and L Winnington-Ingram, *Awards: Challenges based on misuse of tribunal secretaries*, in '*Global Arbitration Review: The Guide to Challenging and Enforcing Arbitration Awards*', 1st Edn.

See Rainey & Sharma, n 7 above.

M Polkinghorne and C Rosenberg,*The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard,* IBA, Dispute Resolution International, October 2014, available at www.ibanet.org/Article/NewDetail.aspx?ArticleUid=987d1cfc-3bc2-48d3-959e-e18d7935f542.

The authorsnote that the *Young ICCA Guide on Arbitral Secretaries* (2014 – ICCA Reports No 1) does not generally distinguish between substantive and non-substantive parts of the award. It states that 'with appropriate direction and supervision by the arbitral tribunal' the secretary may draft 'appropriate parts of the award'. See *Young ICCA Guide on Arbitral Secretaries*, art 3(2)(j) and commentary at p 15, available at www.arbitration-icca.org/media/3/14235574857310/aa_arbitral_sec_guide_composite_10_feb_2015.pdf.Recently, institutions like the ICC or the LCIA have memorialised to a certain extent their policies regarding secretaries by way of supplementary Notes. Yet, on some of the 'hot topics', different institutions seem to maintain different views. While the LCIA permits that the secretary prepare 'first drafts of awards or sections of awards' (LCIA 2017 Notes for Arbitrators, section 71.c), the ICC limits such possibility to 'factual portions of an award, such as the summary of the proceedings, the chronology of facts, and the summary of the parties' positions' (ICC 2019 'Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration', section 185).

Recommendation No 97 of the 'Code of Best Practices in Arbitration' of the Spanish Arbitration Club (2019), available at www.clubarbitraje.com/wp-content/uploads/2019/01/Code-of-Best-Practices-in-Arbitration-of-the-Spanish-Arbitration-Club.pdf. Note that Recommendation No 95 generally defines the scope of permitted functions to 'certain tasks of an administrative, organizational or supporting nature'.

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