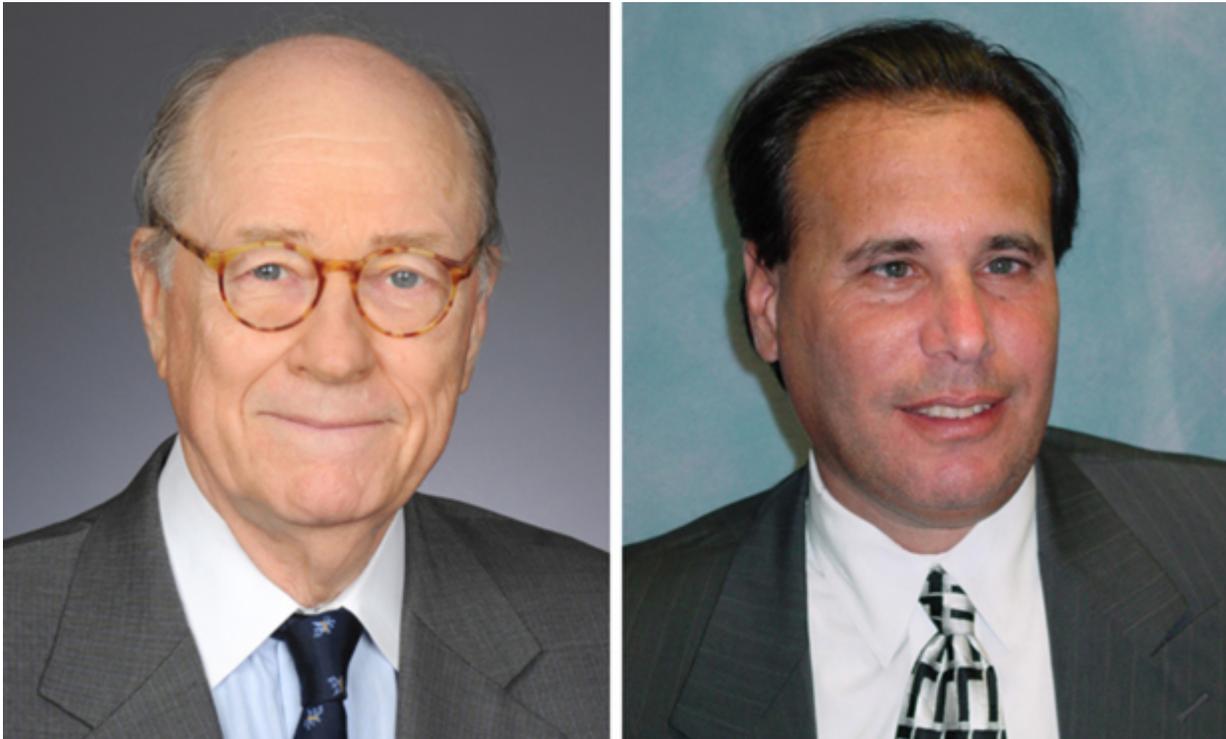


The Yukos Case: More on the Fourth Arbitrator

Lawrence W. Newman and David Zaslowky, New York Law Journal

May 28, 2015 |



Lawrence W. Newman and David Zaslowky

In 2012, we wrote a column about the use of law secretaries in international arbitration titled, "[The Fourth Arbitrator: Contrasting Guidelines on Use of Law Secretaries](#)."¹ Recently, in the Yukos case, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*,² in connection with the largest arbitration award ever issued, questions of the extent and influence of tribunal secretaries on arbitrators' decisions have been brought to the fore.

A challenge to that award by the Russian Federation in the District Court in The Hague in the Netherlands describes circumstances of the involvement of a tribunal assistant that it contends should lead the court to vacate the award. That challenge provides a unique opportunity to look more closely, and practically, at some of the issues raised in our earlier column.

Extent of Involvement

The argument made by Russia—though not the leading argument in its extensive brief—was that an assistant appointed by the chairman exercised too much influence over the tribunal's decision and that the award should therefore be set aside. According to Russia's brief, Martin Valasek, an associate lawyer in the Montreal office of the tribunal chairman, Yves Fortier, was appointed by the chairman to "assist me in the conduct of this case." In describing to the parties Valasek's expected duties, Fortier went on to say, "because, like all of us, I travel a lot, if at any time I am unreachable, you can always contact him."³ Thus, the appointment was made without prior consultation with the parties, but, when disclosed, was not objected to by them.

Russia contends that Valasek went on to play a far more extensive role than simply as a contact person in lieu of the chairman. It developed, according to calculations by Russia's lawyers based on disclosed fees and hourly rates, that "Mr. Valasek spent far more time on the case than any other arbitrator."⁴ The Permanent Court of Arbitration (PCA), under the auspices of which the arbitration was conducted, confirmed this conclusion in revealing that Valasek worked 3,006 hours on the case, 381 hours through hearings on jurisdiction and admissibility and 2,625 hours on the remainder of the case, which consisted of the substantive hearings and the preparation of the award. In contrast, the chairman charged for only 1,592 hours, although the expenses of both the chairman and Valasek were virtually the same, showing, according to Russia, "Mr. Valasek's full participation in all aspects of the arbitration."⁵

According to Russia's brief, Valasek's hours were about 65 percent greater than the number of hours spent by the chairman and more than 70 percent and 40 percent greater than the hours of each of the other two arbitrators. Russia also points out that Valasek's duties had to be more than administrative because the administrative staff of the PCA secretariat charged a total of 5,232.1 hours for administrative services.

Russia states that, when it requested the Secretariat for details concerning what Valasek did in the hours for which he billed, it received the following response:

In the view of the Tribunal the attached statement of account [including hours only but no further detail] provides the parties with the appropriate level of detail while ensuring the confidentiality of the tribunal's deliberations.⁶

Russia contends that this statement, attributed to the tribunal, constitutes an admission by it that Valasek was involved in confidential tribunal deliberations.

Russia argues, evidently in anticipation of an argument by Yukos that it consented to or knew about the extent of Mr. Valasek's involvement, that it was not given notice of the extensive role played by Valasek until after the fact, when the award was issued. Russia also contends that the tribunal violated the fundamental principle that "goes to the essence of the arbitral function"—that the arbitrator has the obligation "to review the evidence and arguments and to decide the case personally, without delegation."⁷

Russia concedes that it is generally assumed that an arbitral tribunal may use the assistance of an administrative secretary and that he may play a preparatory role when the time comes to write

the award. Nevertheless, it asserts, "...the tribunal may not be discharged from conducting its own research and the writing of the award is reserved to the tribunal."

Thus, Russia seeks to have the court draw the inference that Valasek played a "decisive role" in the arbitral proceeding, based on the hours logged by him, the tribunal's description of duties as being part of the tribunal's deliberations and the evidence that the work he did was not ministerial or administrative. What he did do, of course, may only be determined through whatever circumstantial evidence is available, primarily outside of the hearing record.

Russia concludes that Valasek "...played a too substantive and therefore unacceptable role in the proceedings." "By acting in this way" Russia says, "Valasek assumed a significant portion of the personal mandate of one or more of the arbitrators or functioned as a fourth arbitrator."⁸ Thus, Russia says, the tribunal failed to comply with its mandate because Valasek "must be presumed to have participated in an unacceptable manner in the deliberations that led to the final awards and to the drawing up of parts, if not more, of the final awards."⁹

But what is participation in deliberations in an unacceptable manner? Russia makes the point that, according to the Dutch Code of Civil Procedure, an arbitral tribunal must consist of an odd number of arbitrators, and, if Valasek did function as a fourth arbitrator, the tribunal would have been illegally constituted.¹⁰

International Practice

As a general standard of behavior for tribunal secretaries against which Valasek's participation should be measured, Russia refers to international arbitration practice, relying, in part, on the writings of commentators such as Constantine Partasides, who is quoted as having described the arbitrator's "mission" in these words: "A party's choice of arbitrator is, of essence, personal. And so is the chosen arbitrator's mandate. In accepting appointment, an arbitrator necessarily accepts a duty not to delegate that mandate."¹¹

Russia also refers to Gary Born's comment in his treatise, that a secretary "...may not assume the tribunal's (or an arbitrator's) functions and may not influence the tribunal's decision."¹² In addition, Russia mentions the recently published Young ICCA Guide on Arbitral Secretaries, which refers, in a chapter on best practices on the appointment and use of arbitral secretaries, to "...the responsibility of each arbitrator... not to delegate any part of his or her personal mandate to any other person, including an arbitral secretary."¹³

The International Chamber of Commerce stated in its 1995 note concerning the appointment of administrative secretaries (also cited by Russia) that the secretary "may not influence in any manner whatsoever the decisions of the arbitral tribunal" or "assume the functions of an arbitrator, notably by becoming involved in the decision-making process of the tribunal or expressing opinions or conclusions with respect to the issues in dispute."¹⁴

The 2012 revision of the ICC note uses the following language:

Under no circumstances may the arbitral tribunal delegate decision-making functions to an administrative secretary. Nor should the arbitral tribunal rely on the administrative secretary to perform any essential duties of an arbitrator.

What constitutes delegation by an arbitrator of his mandate? The Young ICCA report comments on its general principle "(4) that an arbitrator not delegate any part of his/her personal mandate" as meaning that an arbitrator must not "delegate any part of his/her decision-making in a way that could *dilute the arbitrator's mandate*." [emphasis added]. This is similar to Born's comment that the secretary "may not influence the tribunal's decision."

Thus, the Dutch court, in determining whether the Yukos tribunal "complied with its mandate" may have to consider what such compliance or noncompliance means. In a sense, almost any work that a secretary might do for a tribunal of a non-administrative nature might be regarded as influencing, in some way, the tribunal's decision. Particularly when the secretary is given writing assignments with respect to the award. Indeed, Partasides, in his article, counsels against an arbitrator's allowing a secretary to draft awards, saying, "The act of writing is the ultimate safeguard of intellectual control. An arbitrator should be reluctant to relinquish it."¹⁵

Other Issues

If there is established to have been unacceptable behavior, what are the consequences for the award? Russia contends that the award should be set aside because it violated article 1065(1)(c) of the Dutch Civil Code. That provision reads as follows (in translation as found on the Internet¹⁶).

A reversal of the award can take place only on one or more of the following grounds:

* * *

the arbitral tribunal has not complied with its mandate.

Russia refers to a Dutch decision setting aside an arbitral award by a tribunal made up of an even number of arbitrators—two, a president and a secretary.¹⁷

But Article 1065 of the Dutch Code of Civil Procedure continues, in Article 1065(4):

The ground mentioned in paragraph (1)(c) above shall not constitute a ground for reversal if the party who invokes this ground has participated in the arbitral proceedings without invoking such ground, although it was known to him that the tribunal did not comply with its mandate

Thus, it would appear that Russia has the weighty burden of establishing—in satisfaction of what standard of proof is not clear—not only that Valasek "participated in an unacceptable manner in the deliberations" and in the "drawing up of parts, if not more, of the final awards," but also that Russia did not knowingly fail to object.

Russia's arguments regarding Valasek are different from its other attacks on the award in that they call on the court to make findings of fact on the basis of limited information as to the facts and circumstances of Valasek's activities as tribunal "assistant." One important limitation seems to be the tribunal's unwillingness to turn over time records for Valasek that may be inferred to have some relevant information since they are said to have to do with the tribunal's deliberations. Whether Russia knowingly accepted the role actually played by Valasek by failing to object to it is another set of factual issues that the Dutch court will have to deal with.

The case is important because of the size of what is at stake and because it is one of very few cases that deal with the role of tribunal secretaries. How the court responds to Russia's arguments on this issue, and what legal standards it applies to its analysis, could provide useful guidance for both arbitrators and counsel in international arbitration proceedings.

Endnotes:

1. New York Law Journal, Nov. 29, 2012.
2. *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, PCA Case No. AA 228, Final award, July 18, 2014. This case was one of three Yukos cases that were heard in parallel by the same arbitral tribunal and the three final awards (of a total of more than \$50 billion) were almost identical. See Mark Kantor, "Fifty Billion Dollars; The Yukos Damages Awards," *The Journal of Damages in International Arbitration*, Vol. 2, No. 1 (2015) 91.
3. Brief of Russian Federation, (herein after "Russia brief,"), Jan. 28, 2015, p. 185, at note 639.
4. Russia brief, p. 187, para 492.
5. Russia brief, p. 189, para. 498.
6. *Id.*, p. 190, para. 500.
7. *Id.* at p. 179, para. 468.
8. *Id.* at 192, para. 506.
9. *Id.* at p. 193, para. 509.
10. *Id.* at 194, citing article 1026 of the Dutch Civil Code.
11. Constantine Partasides, "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration," <http://arbitration.oxfordjournals.org/content/18/2/147>, first page, cited in Russia's brief at p. 181, para. 472.
12. Gary Born, "International Commercial Arbitration" (Kluwer 2014), p. 2000, cited in Russia's brief at pp. 182-83.

13. Article (1)(4) of General Principles on the Appointment and Use of Arbitral Secretaries, cited in Russia's brief at p. 183, para. 480.

14. Russia brief, p. 183.

15. Partasides, Id.

16. dutchcivillaw.com

17. Russia brief, p. 194, para. 514, referring, in note 680, to a decision of the District Court of Utrecht, Aug. 8, 2007, NJF 2007, 501, LJM BB 1410.

Lawrence W. Newman is of counsel and David Zaslowky is a partner in the New York office of Baker & McKenzie. They can be reached at lawrence.newman@bakermckenzie.com and david.zaslowky@bakermckenzie.com.

Reprinted with permission from the May 28, 2015 edition of the New York Law Journal
© 2015 ALM Media Properties, LLC. All rights reserved. Further duplication without
permission is prohibited. For information, contact 877-257-3382 - reprints@alm.com
or visit www.almreprints.com.