

# ARBITRAL EVENT OF THE YEAR: THE YUKOS AWARD

By Agostinho Pereira de Miranda



By now most international arbitration practitioners know about the biggest arbitral award in history. On July 18, 2014 an *ad-hoc* arbitral tribunal seated in The Hague ordered the Russia Federation (Russia) to pay damages and costs of more than US\$50 billion to three controlling shareholders of the now defunct company OAO Yukos Oil Company (Yukos) as compensation for its illegal liquidation by Russia.

The arbitral tribunal, constituted in 2005 under the 1994 Energy Charter Treaty (ECT), issued three final awards in respect of as many claims filed by shareholders representing a 70 per cent shareholding in Yukos – two Cypriot companies and a third incorporated in the Isle of Man. The three arbitrators unanimously held that Russia had breached its obligations under the ECT when it “took steps equivalent to expropriation of the claimants’ investment in Yukos”.

The damages are less than 50 per cent the US\$114 billion the claimants had sought. However the sum awarded is 30 times higher than the largest investment arbitration award to date (*Occidental v. Ecuador*) and 20 times higher than that awarded in a commercial arbitration (*Dow Chemicals v. Kuwait*). It is also equivalent to almost 3% of Russia’s GDP and more than 10 per cent of the country’s annual national budget. Legal fees and expenses incurred by both sides reached the amount of US\$124 million.

The award is historical not only for the amounts involved. The legal issues tackled and ruled on by the panel will reverberate for years to come.

## Mammoth Legal Issues

The tribunal itself called the proceedings “mammoth arbitrations” (paragraph 4 of the final award). It held five procedural hearings and issued 18 procedural orders, as well as three interim awards each over 200 pages. The award is 615 pages long. The legal issues involved could just as well be described as “mammoth” in terms of their detailed elaboration (and future likely relevance).

The panel rejected three “preliminary objections” to the tribunal’s jurisdiction that Russia had raised:

- The “fork-in-the-road” argument as per Article 26(3)(b)

(i) of the ECT, purportedly due to the existence of other outstanding legal proceedings, including at the European Court of Human Rights in Strasbourg (paragraph 1272);

- The alleged “unclean hands” of the claimants, as, according to Russia, they had acted illegally, notably in the acquisition of Yukos and the subsequent control and ownership over that oil group (paragraph 1343 et seq.);
- The ECT’s taxation carve-out rule, as provided for in Article 21 of the ECT (paragraphs 1375 et seq.)

Regarding the Russia liability under the ECT the tribunal ruled *inter alia* on the following issues:

- Attribution – Russia was found responsible for its organs, executive, judicial and administrative, in the actions that they took against Yukos and its stockholders (paragraph 1480);
- Applicable legal standards under Article 13 of the ECT (expropriation) – It was ruled that Russia did not explicitly expropriate Yukos, but the measures it took had an effect equivalent to nationalization or expropriation (paragraph 1580);
- Contributory fault – The tribunal reduced the amount of damages awarded to the claimants by 25 per cent, on the argument that the misconduct of Yukos and its shareholders – particularly the abusive use of tax provisions - had contributed to the prejudice they suffered (paragraph 1637).

Article 26(8) of the ECT provides that ECT arbitral awards will be final and binding upon the parties. Furthermore, they are enforceable in any of the 150-plus signatory countries of the New York Convention. It is very possible that claimants may move fast to attach Russian assets in those countries. But it won’t be an easy task. For the time being, Russia keeps the initiative. Last November it asked the District Court in The Hague to set aside the three arbitral decisions. Regardless of the Dutch court’s future ruling, the Yukos arbitration will continue to make history for years to come.

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