

Dutch Supreme Court considers Yukos opinion by former judge 'inappropriate'

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In *Russian Federation v Mr. A. Hammerstein* (ECLI:NL:PHR:2016:1529), the Dutch Supreme Court considered whether a former judge of the Supreme Court had acted inappropriately by providing an opinion on the possibility of setting aside the Yukos arbitral awards.

Speedread

On 30 June 2017, the Dutch Supreme Court ruled that one of its former judges (Mr Hammerstein) had acted inappropriately by providing an opinion on the possible success of setting aside the three awards in favour of the former majority shareholders in Yukos against the Russian Federation worth over US \$50 billion (Yukos awards).

In January 2016, Mr Hammerstein, who was at that time a judge at the Dutch Supreme Court, provided one of the Yukos investors his opinion on the chances of success of the Russian Federation's claim before the District Court in The Hague to set aside the Yukos arbitral awards. He opined that he saw no evident grounds for setting aside the awards. As Mr Hammerstein was aware, the investor used this opinion to support its court application to enforce the awards in Belgium. On 13 April 2016, the Russian Federation filed a complaint against Mr Hammerstein in the Dutch Supreme Court arguing that it was inappropriate for him to have issued this opinion while still sitting as a judge at the Supreme Court. Subsequently, on 20 April 2016, the District Court of The Hague set aside the awards.

In this decision, the Dutch Supreme Court ruled that Mr Hammerstein had acted inappropriately. On the facts of this case, the court found it conceivable that such an expert opinion could be viewed as an indication of what the Supreme Court would actually rule on the matter.

The case demonstrates the invidious position a judge in the Netherlands could find themselves in when asked to provide a legal opinion in an ongoing case, even if that opinion consists of an unreasoned general assessment, rather than a reasoned judicial determination. (*Russian Federation v Mr. A. Hammerstein* (ECLI:NL:PHR:2016:1529).)

Background

The Dutch Act on the Judiciary (*Wet op de rechterlijke organisatie*) (RO) provides mechanisms under which a complaint can be filed at the Supreme Court against any judge of the Dutch judiciary, including a judge at the

Supreme Court. Complaints are heard by a special chamber of the Supreme Court, consisting of three judges (*Article 13d, RO*).

The particular complaint mechanism chosen by the Russian Federation in this case (*Section 1a, RO*) uses ‘appropriateness’ as standard to test the conduct of the judge (*Article 13f(1), RO*). The complaint procedure under this provision does not result in any reprimand or dismissal, but may instead result in a ruling that the conduct in question was inappropriate. The decision is not open to appeal. The standard of appropriateness under Article 13f(1) is an open norm. However, the RO does specifically provide that judges may not be in contact with a party or counsel regarding a case that is, or is likely to come, before them (*Article 12, RO*). This standard of appropriateness is further informed by the Dutch judiciary’s Codes of Conduct (see the [Code for Judges of the Netherlands Association for the Judiciary](#) and the [Guidelines for impartiality and ancillary position of the Netherlands Association for the Judiciary](#)), as well as the Bangalore Principles of Judicial Conduct (2002) (see [United Nations and The Rule of Law: Bangalore Principles of Judicial Conduct](#)).

Facts

In July 2014, in three parallel arbitral awards an international investment treaty tribunal seated in The Hague ordered the Russian Federation to pay more than US\$50 billion to the former majority shareholders in Yukos (see [Legal update, Majority shareholders in Yukos awarded US\\$50 billion](#)) (Yukos awards). In November 2014, the Russian Federation initiated proceedings before the District Court in The Hague to set aside these three arbitral awards. At the same time one of the investors (Yukos Universal) sought to enforce the awards in Belgium. The Russian Federation opposed enforcement in Belgium, pointing out that a setting aside claim was pending in the Netherlands. On 29 January 2016, in the Belgian proceedings for the (suspension of) enforcement of the awards, Yukos Universal submitted an opinion of Mr Hammerstein.

At that time, Mr Hammerstein was a member of the Dutch Supreme Court and was due to retire by 1 May 2016. Mr Hammerstein made it clear that his opinion was intended to inform the Belgian courts on Dutch civil procedure and on the Russian Federation’s chances of success in setting aside the Yukos awards. He also disclosed that he was retained by the investors for a fee. He further stated that his opinion was based on his many years of experience sitting as a judge, as well as confirming that he had not been asked to study the file to the level that would be required to come to a reasoned judicial determination. Instead his opinion consisted of an unreasoned general assessment, which concluded that he saw no evident grounds for the setting aside of the arbitral awards.

The Russian Federation requested Mr Hammerstein to retract this opinion, but to no avail. On 13 April 2016, the Russian Federation filed a complaint against Mr Hammerstein in the Dutch Supreme Court.

Subsequently, on 20 April 2016, the District Court of The Hague set aside the awards (see [Legal update, The setting aside of the Yukos awards: full update](#)). On 9 December 2016, the Belgian court held the Russian Federation’s attempt to suspend enforcement of the arbitral awards in Belgium was inadmissible (see [Legal update, Russian Federation’s opposition to Yukos shareholder’s exequatur judgment inadmissible \(Belgian Court of First Instance\)](#)).

Decision

The Dutch Supreme Court ruled that Mr Hammerstein had acted inappropriately. While the court found it permissible for Mr Hammerstein to be in contact with Yukos Universal regarding the pending case (because it was certain he would not rule on the matter as he was about to retire as a judge), the court went on to conclude

that it is generally undesirable for a Supreme Court judge to give an unreasoned opinion as a party appointed expert, particularly because it referred to the judge's many years of experience sitting as a judge. The court found it be conceivable that such an expert opinion could be viewed as an indication of what the Supreme Court would actually rule on the matter and could create the impression in the Belgian enforcement proceedings that the Russian Federation could not mount an adequate defence against the enforcement of the awards.

Mr Hammerstein should have realised that his membership of the Supreme Court could have that effect and, consequently, he acted inappropriately by providing this opinion.

Comment

This decision is, of course, somewhat of a side show in the bigger theatre of battle, but by raising a complaint to the Supreme Court, the Russian Federation has been able to neutralise the opinion of Mr Hammerstein in a very effective way. Even though the arbitral awards were subsequently set aside by the District Court of The Hague, Mr Hammerstein's opinion still lingered on in Belgium. After all, the Brussels court had found that the Russian Federation's attempt to suspend enforcement of the arbitral awards in Belgium was inadmissible.

This decision is particularly relevant for judges sitting in the Netherlands courts that are asked to provide a legal opinion, especially as many practicing lawyers in The Netherlands sit as part-time judges. While it would be unfair to conclude in general that a person sitting as judge in the Netherlands cannot provide a legal opinion as a party appointed expert, this case demonstrates that such persons should consider refraining from issuing an unreasoned opinion, while also emphasising judicial experience.

Case

Russian Federation v Mr. A. Hammerstein, (ECLI:NL:PHR:2016:1529)

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