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In the name of the King

SUPREME COURT OF THE NETHERLANDS

CIVIL LAW DIVISION

Number 20/01892
Date 4 December 2020

DECISION

In the matter of

THE RUSSIAN FEDERATION,
seated in Moscow, Russian Federation,
APPLICANT,
hereinafter: the Russian Federation,
attorneys: R.S. Meijer and R.R. Verkerk,

v.

1. HULLEY ENTERPRISES LIMITED,
established in Nicosia, Cyprus,
2. VETERAN PETROLEUM LIMITED,
established in Nicosia, Cyprus,
3. YUKOS UNIVERSAL LIMITED,
established in Douglas, Isle of Man,

RESPONDENTS,
hereinafter: HVY and individually also Hulley, VPL and YUL.
attorneys: T. Cohen Jehoram, J. de Bie Leuveling Tjeenk and B.M.H. Fleuren.

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1. Course of the proceedings

For the course of the proceedings so far the Supreme Court refers to its interim judgement in the motion on jurisdiction of 25 September 2020, ECLI:NL:HR:2020:1511.
HVY subsequently filed a statement of defence in the main proceedings.
On 30 October 2020, the parties had the case pleaded at an oral hearing on the basis of pleading notes, which they submitted.
The opinion of Advocate General P. Vlas concludes that the Russian Federation's applications must be denied.
The Russian Federation's attorneys have responded to that opinion in writing.
The Supreme Court has taken note of HVY's letter of 30 November 2020 and of the Russian Federation's letter of 30 November 2020.

2. Points of departure

2.1 This case pertains to the question of whether the enforcement of the arbitral awards rendered between the parties must be suspended on the basis of Article 1066(2) (old) of the Dutch Code of Civil Procedure [DCCP] until the claim for setting aside has been irrevocably decided. In addition, it is at issue whether one of the parties must provide security on the basis of Article 1066 (5)(old) DCCP.

2.2 The Supreme Court assumes the following facts.

(i) HVY are, or at least were, shareholders in Yukos Oil Company (hereinafter: Yukos).

(ii) In 2004, VPL, YUL and Hulley each initiated arbitration proceedings against the Russian Federation on the basis of Article 26 of the Energy Charter Treaty[1] (hereinafter: ECT or the Treaty). The place of arbitration was The Hague. In those arbitration proceedings, HVY stated – briefly put – that the Russian Federation had expropriated their investments in Yukos and had failed to protect these investments, and sought an order for the Russian Federation to pay damages.

(iii) After three separate Interim Awards, the arbitral tribunal (hereinafter: the Tribunal) ordered, in three separate Final Awards, the Russian Federation to, *inter alia*, pay damages of USD 8,203,032,751.00 (to VPL), USD 1,846,000,687.00 (to YUL) and USD 39,971,834,360.00 (to Hulley). The Interim Awards and the Final Awards are hereinafter jointly referred to as the Yukos Awards.

(iv) On the basis of Article 1064(2) (old) DCCP, the Russian Federation sought the setting aside of the Yukos Awards before the District Court. The District Court set aside the Yukos Awards on account of the lack of a valid arbitration agreement.[2] The Court of Appeal annulled the judgment of the District Court and denied the Russian Federation's claim to set aside the Yukos Awards.[3]

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[1] Treaty Series, 1995, 108.
[2] District Court of The Hague 20 April 2016, ECLI:NL:RBDHA:2016:4229.
[3] Court of Appeal of The Hague 25 September 2018, ECLI:NL:GHDHA:2018:2476 and Court of Appeal of The Hague 18 February 2020, ECLI:NL:GHDHA:2020:234. For a summary of the latter judgment, see the Advocate General's opinion at 2.13-2.31.

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The Russian Federation instituted a cassation appeal against the Court of Appeal's judgments. [4] HVY instituted a conditional cross appeal in cassation. These appeals have not yet been decided.

2.3 In these proceedings, the Russian Federation is applying to the Supreme Court on the basis of Article 1066 (old) DCCP, in summary, to:

- primarily (i) by way of a provisional suspension measure order HVY to suspend all pending and future enforcement measures with regard to the Yukos Awards until the Supreme Court has rendered a decision on the suspension application on the basis of Article 1066 (old) DCCP, and (ii) suspend the enforcement of the Yukos Awards on the basis of article 1066 (old) DCCP until the claim for setting aside has been irrevocably decided; and
- alternatively, if the suspension application is denied, to order HVY to provide security on the basis of Article 1066 (5) (old) DCCP.

2.4 By interim decision of 25 September 2020, the Supreme Court declared – in response to a defence contesting jurisdiction put forward by HVY – that it had jurisdiction to hear the Russian Federation's applications based on Article 1066(2) and (5) (old) DCCP. [5]

2.5 HVY subsequently put forward a substantive defence against the Russian Federation's applications, which, according to HVY, must be denied. For the event that the Russian Federation's suspension application is granted, HVY are requesting that the Russian Federation be ordered to provide security.

2.6 The parties explained their positions in more detail during the oral pleadings on 30 October 2020.

2.7 The opinion of the Advocate General concludes that the Russian Federation's applications must be denied. The Russian Federation's attorneys responded to that opinion in writing.

3. Assessment of the Russian Federation's applications

3.1 These proceedings are subject to the Fourth Book (Arbitration) of the Dutch Code of Civil Procedure, as applicable until 1 January 2015. [6]

3.2 Below, the Supreme Court will first discuss the Russian Federation's primary application to suspend the enforcement of the Yukos Awards until the setting-aside claim has been

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[4] Those cassation proceedings are pending before the Supreme Court under case number 20/01595.
[5] Supreme Court 25 September 2020, ECLI:NL:HR:2020:1511.
[6] Article IV (4) in conjunction with Article IV (2) of the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Dutch Civil Code and the Fourth Book of the Dutch Code of Civil Procedure in connection with the modernisation of Arbitration Law (Bulletin of Acts and Decrees 2014, 200), which entered into force on 1 January 2015 (Bulletin of Acts and Decrees 2014, 254).

irrevocably decided. Thereafter, the Supreme Court will discuss the Russian Federation's alternative application with regard to the provision of security.

3.3.1 On the basis of Article 1065 (1) (old) DCCP, the setting aside an arbitral award can be sought on the grounds exhaustively listed in that provision. In the assessment of the setting-aside claim, the court must exercise restraint – except in so far as this claim is based on (i) the absence of a valid arbitration agreement[7] or (ii) a breach of the right to be heard. [8] After all, setting-aside proceedings may not be used as a disguised appeal. After all, the general interest in the effective functioning of arbitral justice means that the civil courts should only intervene in arbitral decisions in telling cases. [9]
The claim for setting aside does not suspend the enforcement of the arbitral award (Article 1066 (1)(old) DCCP). However, the court that decides on a claim to set aside may, at the request of any party, if there are grounds to do so, suspend the enforcement until the claim to set aside has been irrevocably decided (Article 1066(2) (old) DCCP).

3.3.2 The suspension application on the basis of Article 1066(2) (old) DCCP is aimed at obtaining a provisional measure. In its decision on that suspension application, the court must make a provisional assessment of the claim for setting aside the arbitral award and, in addition, balance the interests of the parties. In making this provisional assessment, the court will have to assume that the claim for setting aside can only succeed if a ground for setting aside as referred to in Article 1065 (old) DCCP is present. [10]
If, in the setting aside proceedings, the court in the previous instance has already rendered a decision on the claim for setting aside, the court that decides on the suspension application must take that decision into account. This entails that in the event that the court in the setting aside proceedings denied the claim for setting aside, the court deciding on the suspension application must observe more restraint than in the case in which the court in the setting aside proceedings has not yet given a decision.

3.3.3 In this case it is so that in the setting aside proceedings both the District Court and the Court of Appeal have already rendered a decision on the claim for setting aside, and a cassation appeal is pending against the judgments of the Court of Appeal in which the claim for setting aside was denied (see 2.2 (iv) above).
This means that in these suspension proceedings, the Supreme Court must come to a provisional decision of the question of whether the complaints in the in cassation proceedings directed against the Court of Appeal's decision – also in view of the limitations attached to Supreme Court review – will lead to the annulment of (one of) the judgments of the Court of Appeal. In addition, the Supreme Court must come to a provisional decision of the question of whether this will (ultimately) lead to a different outcome in the setting aside proceedings – namely: the setting aside of the Yukos Awards.

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[7] Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, para. 4.2.
[8] Supreme Court 25 May 2007, ECLI:NL:HR:2007:BA2495, para. 3.5.
[9] Supreme Court 9 January 2004, ECLI:NL:HR:2004:AK8380, para. 3.5.2 and Supreme Court 17 January 2003, ECLI:NL:HR:2003:AE9395, para. 3.3.
[10] Cf. Supreme Court 21 March 1997, ECLI:NL:HR:1997:ZC2314, para. 3.5.

3.3.4 When making a provisional decision on the question of whether the complaints in cassation proceedings directed against the decision of the Court of Appeal will lead to the annulment of (one of) the judgments of the Court of Appeal, the Supreme Court will only consider cassation complaints that are stated in the suspension application or to which (sufficiently specific) reference is made in that application.

3.4 Below – with due observance of the considerations above – the Supreme Court will first form a provisional decision on the claim for setting aside the arbitral award instituted by the Russian Federation. In that context the Russian Federation's arguments in the suspension application with regard to (i) the validity of the arbitration agreement, (ii) the Tribunal's mandate, (iii) the composition of the Tribunal, (iv) the lack of reasons stated for the Yukos Awards and (v) public policy will be discussed in succession. Thereafter, the Supreme Court will balance the interests of the parties in granting or denying the suspension application.

The validity of the arbitration agreement

3.5 On the basis of Article 1065(1), opening words and (a) (old) DCCP, the arbitral award can be set aside if there is no valid agreement to arbitrate. In the suspension application, the Russian Federation referred in this context to complaints in the ground for cassation in the setting aside proceedings which are directed against the Court of Appeal's decision on (a) the interpretation and application of the Limitation Clause of Article 45(1) ECT, (b) the terms 'investment' and 'investor' and (c) the protection of illegal investments. According to the Russian Federation, these complaints must lead to the annulment of the Court of Appeal's decision that there is no reason to set aside the Yukos Awards on account of the lack of a valid arbitration agreement.

The interpretation and application of the Limitation Clause

3.6 In paras. 4.4.1-4.5.48[11], the Court of Appeal decided on the interpretation of the Limitation Clause of Article 45(1) ECT and subsequently decided in para. 4.6.1 that, based on this interpretation, the provisional application of Article 26 ECT (which clause enables international arbitration with regard to the disputes referred to in Article 26(1) ECT) is not inconsistent with the Russian Federation's 'constitution, laws or regulations'.
Subsequently, in paras. 4.6.2-4.7.58, the Court of Appeal considered that, even if the Russian Federation's divergent interpretation of the Limitation Clause is followed, Article 26 ECT must be applied provisionally by the Russian Federation.
The Supreme Court decides provisionally that these two grounds each independently carry the Court of Appeal's decision that Article 26 ECT must be provisionally applied by the Russian Federation.

3.7.1 With regard to the second independent ground referred to above in 3.6, in its suspension application the Russian Federation refers to complaints from part 2 of the ground for cassation in the setting aside proceedings, which are directed against the rejection by the

[11] Where the Supreme Court refers in this judgment to legal findings of the Court of Appeal, unless stated otherwise, reference is made to paragraphs in the Court of Appeal's final judgment of 18 February 2020.

Court of Appeal of the Russian Federation's argument, (i) that under Russian law disputes on powers of public law are not eligible for arbitration, (ii) that the arbitration proceedings between HVY and the Russian Federation are therefore inconsistent with Russian law and (iii) that, in that light, Article 26 ECT does not apply provisionally on the basis of the Limitation Clause. The complaints argue that, in rejecting this argument, the Court of Appeal wrongly qualified Article 26 ECT as the basis for arbitration of disputes of a public law nature such as the present one and thus assumed that Article 26 ECT was part of the Russian internal legal system, and that this constitutes a circular argument.

3.7.2 The Court of Appeal rejected the Russian Federation's argument presented above in 3.7.1, based on the consideration that the dispute between HVY and the Russian Federation is not of a public law nature (para. 4.7.35). The Court of Appeal then, superfluously, assessed whether – if it is assumed that under Russian law arbitration is only possible for civil law disputes and that the present dispute is not of a civil law nature – arbitration under Article 26 ECT is 'inconsistent' with Russian law, and answered this question in the negative (paras. 4.7.36-4.7.58).
In the provisional assessment of the Supreme Court, these considerations of the Court of Appeal also relate to the interpretation and application of Russian law. On the basis of Article 79(1), opening words and (b) of the Judiciary Organisation Act, the Supreme Court cannot annul the Court of Appeal's judgments on account of violation of Russian law. This rule also bars reasoning complaints that cannot be assessed without also assessing the correctness of the Court of Appeal's decision on the substance and interpretation of Russian law. [12] Also considered in this light, the Supreme Court provisionally does not consider the probability that the complaints referred to above in 3.7.1 will succeed to be such that this justifies the suspension of the enforcement of the Yukos Awards.

3.8 Where the Russian Federation argues in its suspension application, with reference to complaints in part 2 of the ground for cassation, that the Court of Appeal considered (in para. 4.7.64) that 'the ECT makes it possible for shareholders to file claims that they are otherwise prevented from filing under Russian law' and that that would imply that the provisional application of Article 26 ECT is inconsistent with Russian law, in the provisional assessment of the Supreme Court the following applies.
In paras. 4.7.62-4.7.64, the Court of Appeal rejected the statement that HVY, as (former) shareholders of Yukos, cannot file a claim legal under Russian law in connection with damages inflicted upon the company, on three distinct grounds. Each of these three grounds can independently carry the rejection of the Russian Federation's statement. However, the suspension application does not show that each of these grounds is being challenged in cassation. The complaints referred to in the suspension application therefore already fail in the Supreme Court's provisional decision on account of a lack of interest.
Superfluously, the Supreme Court notes that the contested decision of the Court of Appeal is also about the Court of Appeal's interpretation and application of Russian law, so that, in view of Article 79(1), opening words and (b) of the Judiciary Organisation Act (see 3.7.2 above), the probability that these complaints will lead to cassation, even apart from the lack

[12] Supreme Court 6 September 2013, ECLI:NL:HR:2013:BZ9228, para. 3.15.5.

of interest, is provisionally not such that it justifies suspension of the enforcement of the Yukos Awards.

3.9 It follows from the foregoing that the Supreme Court provisionally decides that the complaints mentioned in the suspension application fail in so far as they are directed against the second independent ground, referred to in 3.6 above, for the Court of Appeal's decision that Article 26 ECT must be applied provisionally by the Russian Federation. As a result, the complaints referred to in the suspension application directed against the first independent ground referred to in 3.6 above do not require a provisional assessment.

The terms 'investment' and 'investor'

3.10.1 In the suspension application the Russian Federation has further invoked part 3 of the ground for cassation in the setting aside proceedings.
The Russian Federation points out that part 3 of the ground for cassation argues that the Court of Appeal wrongly qualified HVY as 'foreign investors' as referred to in Article 26 ECT. According to the part of the ground for cassation, by doing so the Court of Appeal failed to recognise that HVY are letterbox companies, established and controlled by Russian nationals and which have not invested (foreign) capital in the Russian economy.
In addition, the Russian Federation points to the argument in part 3 of the ground for cassation that, when interpreting Article 1(6) and (7) ECT, the Court of Appeal attributed insufficient weight to (i) the ordinary meaning of the terms 'investment' and 'investor', (ii) the object and purpose of the ECT and (iii) subsequent practice in this respect, and thus wrongly considered that HVY are 'investors' and made 'investments' as referred to in Article 1(6) and (7) ECT.

3.10.2 First of all, the Court of Appeal pointed out that the point of departure for the interpretation of Article 1(6) and (7) ECT is the text of the provisions and the ordinary meaning that accrues to it and that HVY, according to the text, have met the requirements set by Article 1 (6) and (7) ECT. In addition, according to the Court of Appeal, the requirement of Article 26 ECT that there is a dispute between a 'Contracting Party' (the Russian Federation) and investors from 'another Contracting Party' (HVY, companies under the laws of Cyprus and the Isle of Man) has also been satisfied. (para. 5.1.6)
The Court of Appeal continues with the consideration that the ECT opts for 'the law of the country under the laws of which the investor is organised' to determine the nationality of an investor and that it follows neither from the context of Article 1 ECT or Article 26 ECT nor from the purpose of the Treaty that the drafters had the intention to impose further requirements on the foreign character of the investment or the investor, or the international character of the dispute (paras. 5.1.7.2-5.1.7.3). To this the Court of Appeal adds that there is no general principle of law according to which investment treaties do not provide protection to companies wholly controlled by nationals of the host country. (paras. 5.1.8.1-5.1.8.10).
Finally, the Court of Appeal considers that there is insufficient basis to decide that Article 1(6) ECT must be understood to mean that the foreign investor must make an economic contribution to the host state (paras. 5.1.9.1-5.1.9.5).

3.10.3 These decisions do not provisionally reveal an incorrect interpretation of the law. The fact that the Russian Federation argues a different position on the interpretation of Article 26 ECT or Article 1 (6) and (7) ECT does not change this. Furthermore, the extensive assessments of the Court of Appeal are provisionally not incomprehensible, also in light of the arguments put forward in the suspension application on this point.
In view of this, in the provisional assessment of the Supreme Court, the probability that the complaints presented above in 3.10.1 will succeed – and that after referral this will lead to the setting aside of the Yukos Awards – is not such that this justifies the suspension of the enforcement of the Yukos Awards.

Protection of purported illegal investments

3.11.1 In its suspension application, the Russian Federation also invoked part 4 of the ground for cassation in the setting aside proceedings, which argues (i) that the Court of Appeal incorrectly interpreted the ECT with its decision (in para. 5.1.11.5) that the ECT does not require investments protected by the ECT to be made in accordance with the laws of the host state and (ii) that the Court of Appeal wrongly decided that illegal actions can only be relevant if they relate directly to the acquisition of the Yukos shares by HVY themselves.

3.11.2 The Court of Appeal considered (in paras. 5.1.11.1-5.1.11.5), in summary, that 'illegal conduct' at the time of or upon the making the investment under the ECT does not lead to a lack of jurisdiction on the part of the Tribunal (but may lead to the action being denied). The Court of Appeal subsequently considered (in paras. 5.1.11.6-5.1.11.9) that even if it must be assumed that 'unlawful conduct' at the time of or in making the investment under the ECT does lead to lack of jurisdiction of the Tribunal, this cannot benefit the Russian Federation because – in summary – the illegal acts invoked by the Russian Federation are too far removed from the transactions with which HVY acquired their shares in Yukos.
In the provisional assessment of the Supreme Court, the Court of Appeal thus gave two independent grounds for the decision that the illegality of HVY's investments alleged by the Russian Federation does not lead to lack of jurisdiction on the part of the Tribunal. It is also relevant that in the challenged considerations, the Court of Appeal only assesses whether the illegal conduct alleged by the Russian Federation leads to a lack of jurisdiction on the part of the Tribunal, and not whether the alleged illegal conduct should lead to the denial of HVY's claims. The Supreme Court provisionally decides that the probability that both these independently carrying grounds will not survive cassation and that, moreover, after referral this will lead to the setting aside of the Yukos Awards, is not such that it must lead to suspension of the enforcement.

Intermediate conclusion

3.12 It follows from the foregoing that the Supreme Court provisionally decides that the probability that the complaints against the Court of Appeal's decision that there is no reason to set aside the Yukos Awards on account of the lack of a valid arbitration agreement will succeed and that, furthermore, after referral this will lead to the setting aside of the Yukos Awards, is not such that this justifies suspension of the enforcement of the Yukos Awards.

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The Tribunal's mandate

3.13.1 On the basis of Article 1065(1), opening words and (c) (old) DCCP, an arbitral award can be set aside if the arbitral tribunal has violated its mandate.
In this respect, the Russian Federation has referred in the suspension application to part 5 of the ground for cassation in the setting aside proceedings, which argues that the Court of Appeal (in paras. 6.3.2-6.3.3) rightly assumed that the Tribunal should have made a referral to the Russian tax authorities as referred to in Article 21(5) ECT and omitted to do so, but then wrongly decided that this violation of Article 21(5) ECT by the Tribunal does not justify the setting aside of the Yukos Awards. In addition, the Tribunal also wrongly failed to make a referral to the tax authorities of Cyprus and the United Kingdom as referred to in Article 21(5) ECT, so that the Court of Appeal's decision to the contrary (in para. 6.3.4) is incorrect, according to the Russian Federation. According to the Russian Federation, this latter decision by the Court of Appeal is also contrary to Articles 19 and 24 DCCP.

3.13.2 It is not evident from the suspension application that the decision of the Court of Appeal, that Article 1065 DCCP entails that no setting aside shall take place on the ground that the arbitral tribunal did not comply with its mandate if the departure from the mandate is not of a serious nature, is being challenged in cassation (para. 6.1.5). Nor is it evident from the suspension application that it has been challenged in cassation that it is not plausible that the Russian Federation suffered a disadvantage because the Tribunal failed to make a referral to the Russian tax authorities on the basis of Article 21(5) ECT. In this light, in the provisional decision of the Supreme Court, the probability of success of the complaint against the Court of Appeal's decision that the Tribunal's violation of Article 21 (5) ECT does not justify the setting aside of the Yukos Awards is insufficient to justify suspension of the enforcement.

3.13.3 With regard to the tax authorities of Cyprus and the United Kingdom, the Court of Appeal considered that the Tribunal did not have to make a referral to these tax authorities as referred to in Article 21 (5) ECT, because Article 21 (5) ECT only prescribes a referral to the 'relevant competent tax authority' if it concerns the question 'whether a tax constitutes an expropriation', and it has not been argued that tax measures taken by Cyprus or the United Kingdom constitute an expropriation (para. 6.3.4).
In the Supreme Court's provisional decision, this consideration of the Court of Appeal must be understood to mean that the Court of Appeal did not consider the tax authorities of Cyprus and the United Kingdom to be *relevant* tax authorities within the meaning of Article 21(5) ECT, and that this consideration by the Court of Appeal is not incorrect or incomprehensible in light of (i) the Court of Appeal's decision, which has not been challenged as such, that the dispute between the parties is not about whether tax measures of Cyprus or the United Kingdom constitute an expropriation and (ii) the circumstance that a defence directed at this was also raised by HVY before the Tribunal (see the Final Award, § 1419).

With this, the Supreme Court provisionally decides that the probability that this complaint will succeed – and that after referral this will lead to the setting aside of the Yukos Awards – is insufficient to justify the suspension of the enforcement.

The composition of the Tribunal

3.14.1 Based on Article 1065(1), opening words and (b) (old) DCCP, an arbitral award can be set aside if the arbitral tribunal is composed in violation of the applicable rules. In the suspension application, the Russian Federation invokes complaints from part 6 of the ground for cassation in the setting aside proceedings, which are directed against the rejection by the Court of Appeal of the Russian Federation's assertion that the arbitrators' delegation to assistant Valasek of part of their highest personal core task, namely the drafting of (parts of) the Final Award, must lead to the setting aside of the Yukos Awards.

3.14.2 In the suspension application, the Russian Federation firstly points out in that respect that the Court of Appeal (in para. 6.6.5) wrongly disregarded the Russian Federation's offer of proof in so far as it related to Valasek's contribution to the decision-making process. The Court of Appeal assumed by way of a presumption that Valasek indeed made significant contributions to the drafting of Chapters IX, X and XII of the Final Award by providing (draft) texts that the arbitrators incorporated, in whole or in part, in the arbitral awards (para. 6.6.5). However, the Court of Appeal also considered that it does not follow from this that the arbitrators left the decision-making to Valasek (para. 6.6.6). The latter decision is provisionally not incomprehensible. In the provisional assessment of the Supreme Court, the probability that the complaint directed at the passing of the Defendant's offer of proof, pertaining to the division of the drafting labour and Valasek's ensuing contribution to the decision-making process, will succeed – and that after referral this will lead to setting aside the Yukos Awards – is not such that this justifies suspension of enforcement.

3.14.3 Also with regard to the further arguments advanced in this respect in the suspension application with regard to the Court of Appeal's decisions on (i) the signing of the Final Awards and (ii) the failure to inform the parties in advance of Valasek's role, the Supreme Court provisionally decides that the probability that these complaints lead to the annulment of (one of) the judgments of the Court of Appeal is insufficient to justify suspension of the enforcement of the Yukos Awards.

Arbitral award stating reasons

3.15.1 On the basis of Article 1065(1), opening words and (d) (old) DCCP, an arbitral award can be set aside (*inter alia*) if the arbitral award does not state reasons. Setting aside an arbitral award on this ground only takes place if reasons are absent, which must be equated with the case in which, although reasons have been given, no valid explanation for the relevant decision can be discerned. [13]

[13] Supreme Court 22 December 2006, ECLI:NL:HR:2006:AZ1593, para. 3.3.

In the suspension application, the Russian Federation referred in this respect to complaints from part 7 of the ground for cassation in the setting aside proceedings directed at the Court of Appeal's decision on what are called the Mordovian shams.

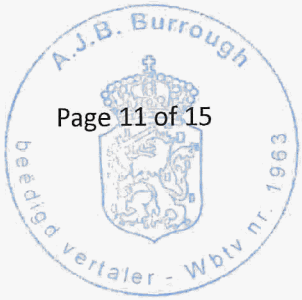
3.15.2 The Court of Appeal rejected the Russian Federation's assertion that it is incomprehensible that the Tribunal decided that there was no evidence for the Mordovian shams.
To this end, the Court of Appeal first of all considered that the Tribunal did not mean in § 639 of the Final Award that evidence for the Mordovian shams was missing in the arbitration record, but that that evidence was lacking in the Russian tax record (paras. 8.4.13-8.4.15). In the event that the Tribunal did mean that there was no evidence for the Mordovian shams in the arbitration record, the Court of Appeal considered that § 639 does not support the Tribunal's decision in § 648 that the Russian Federation violated HVY's right to 'due process' when handling the tax record (para. 8.4.16).
According to the suspension application, the complaint is directed against the Court of Appeal's decision in para. 8.4.16 that this consideration is based on a misconception of what the Tribunal considers in § 648 about 'undue process', because this is nothing other than the lack of evidence of abuse of Mordovian shams alleged in § 639.
The Supreme Court provisionally decides that the two grounds upon which the Court of Appeal based its decision can each independently support the Court of Appeal's rejection of the Russian Federation's statement and that it cannot be said that a valid explanation for that rejection cannot be found in the Court of Appeal's reasoning.

Public policy

3.16 On the basis of Article 1065(1), opening words and (e) (old) DCCP, the arbitral award can be set aside (*inter alia*) if the award is contrary to public policy.

3.17.1 In the suspension application, the Russian Federation argues in this respect – with reference to part 1 of the ground for cassation in the setting aside proceedings – that the Court of Appeal wrongly decided that, since the accusations made by the Russian Federation HVY fall within the scope of the revocation ground of Article 1068(1) opening words and (a) (old) DCCP, these accusations cannot be used as the basis for a setting aside ground under Article 1065(1), opening words and (e) (old) DCCP.

3.17.2 The Court of Appeal took as its starting point that the accusations made by the Russian Federation HVY fall under the grounds for revocation of Article 1068(1), opening words and (a) DCCP (para. 5.6, interim judgment of 25 September 2018). That point of departure as such has not been disputed in cassation.
The Court of Appeal considered, *inter alia*, that a different period applies to instituting a claim for revocation than for instituting a claim for setting aside and that the competent court is different with regard to a claim for revocation than the one with regard to a claim for setting aside. According to the Court of Appeal, this could be circumvented if it were possible to seek the setting aside of the arbitral award based on Article 1065 (old) DCCP on the basis of statements covered by a ground for revocation of Article 1068 (old) DCCP, and that consequence would be unacceptable (para. 5.7, interim judgment).



In the provisional assessment of the Supreme Court, the probability that the complaint presented above in 3.17.1 will succeed – and that this will subsequently lead to the setting aside of the Yukos Awards – does not justify a suspension of the enforcement.

3.18.1 Within the context of the ground for setting aside for breach of public policy, the suspension application refers to grounds 4 and 5 of the ground for cassation in the setting aside proceedings.

3.18.2 According to the suspension application, part 4 of the ground for cassation complains in this respect that the Court of Appeal failed to recognise that it is contrary to public policy that claims based on a treaty pertaining to illegally obtained or illegally exploited investments could be eligible for protection.
In this respect the Court of Appeal considered that it cannot be seen why the Tribunal's decision that these illegalities are not relevant for the award of HVY's claims because (i) only an illegality in the *making* of the investment is relevant for protection under the ECT, (ii) the alleged illegalities were committed by parties other than HVY and (iii) HVY acquired the shares in Yukos lawfully, would be contrary to public policy (para. 9.8.7).
The complaints directed against this decision provisionally do not have such a probability of success that this should lead to the suspension of the enforcement of the Yukos Awards.

3.18.3 The suspension application also argues – with reference to part 5 of the ground for cassation in the setting aside proceedings – that the Tribunal's decision not to hear the Russian tax authorities on the basis of Article 21(5) ECT points to an unacceptable partiality and that, moreover, the Russian Federation was deprived of the right to respond to this opinion. That is why the decision is contrary to public policy, according to the Russian Federation.
The Supreme Court does not consider the probability that these complaints will succeed – and that this will lead to the setting aside of the Yukos Awards after referral – to be such that this should result in suspension of the enforcement, if only because the suspension application does not show that it is being contested in the cassation proceedings that the Russian Federation did not suffer any disadvantage from this decision of the Tribunal (see above at 3.13.2).

Conclusion with regard to the probability of success of the setting-aside claim

3.19 It follows from the foregoing that, even if everything else put forward to that end in the suspension application is taken into account, the probability that the complaints referred to in the suspension application will lead to the annulment of (one of) the judgments of the Court of Appeal – and subsequently to the setting aside of the Yukos Awards – is, in the provisional assessment of the Supreme Court, not such that the enforcement of the Yukos Awards must be suspended.

Balance of interests

3.20 With regard to the interests of the parties in the granting and denying of the suspension application, the Supreme Court considers as follows.
The Supreme Court provisionally decides that it is sufficiently plausible that the enforcement of the Yukos Awards involves a certain restitution risk. On the other hand, however, it has also been made sufficiently plausible that collecting what the Russian Federation was ordered to pay in the Yukos Awards is not straightforward and that it cannot be expected that HVY will be able to collect the full amount of by now (more than) USD 57 billion or a substantial part thereof during the remaining time of these proceedings. It is also relevant that, provisionally, it is sufficiently plausible that HVY are entitled to payment by the Russian Federation of a significant part of the amount of € 1,866,104,634.00, increased by interest, awarded in the ECtHR's decision of 31 July 2014.[14] Taking all this into account, balancing the interests does not lead to anything other than the conclusion to be reached below with regard to the Russian Federation's suspension application.

Conclusion regarding the Russian Federation's applications

3.21 In view of the foregoing, the Supreme Court will deny the suspension application of the enforcement. There is no longer any interest in assessing the application for a provisional suspension until the Supreme Court has rendered a decision on the suspension application.

3.22 In light of the foregoing, the Supreme Court also sees insufficient grounds to order HVY to provide security on the basis of Article 1066(5) (old) DCCP.

4 Assessment of HVY's application

In addition, as the Russian Federation's suspension application is denied, the Supreme Court does not get to decide on the application made by HVY to have the Russian Federation provide security in the event that the suspension application were to be granted.

5 Decision

The Supreme Court:
- denies the Russian Federation's applications;
- orders the Russian Federation to pay the costs of the proceedings, calculated to date on HVY's side at € 899.07 in disbursements and € 1,800.00 in salary.

[14] ECtHR 31 July 2014, no. 14902/04 (*OAO Neftyanaya Kompaniya Yukos/Russia*).

SWORN TRANSLATION
The English text is a sworn translation of the Dutch original. In case of any discrepancies, the Dutch original shall prevail.

This decision was rendered by vice president V. van den Brink as president and justices A.M.J. van Buchem-Spapens and H.M. Wattendorff, and pronounced in public by justice M.J. Kroeze on 4 December 2020.

SWORN TRANSLATION
The English text is a sworn translation of the Dutch original. In case of any discrepancies, the Dutch original shall prevail.

SIGNING OF DECISION

ECLI:NL:HR:2020:1952

Signatures

Tissuer, T.

Kroeze, mr. M.J.

[illegible signatures]

Issued as an enforceable copy
The Clerk of the Supreme Court of the Netherlands

4 Dec 2020

[official stamp of the Supreme Court of the Netherlands]

[illegible signatures]

A.J.B. Burrough
beëdigd vertaler - Wbtv nr. 1963

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD.,
YUKOS UNIVERSAL LTD., and
VETERAN PETROLEUM LTD.,

Petitioners,

v.

THE RUSSIAN FEDERATION,

Respondent.

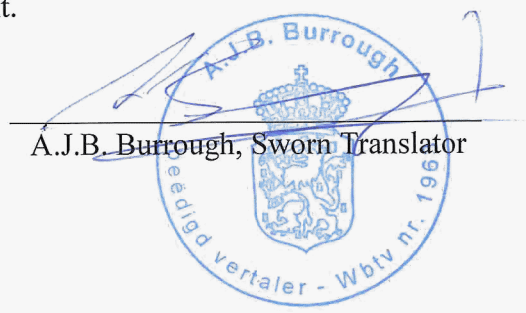
Case No. 1:14-cv-01996-BAH

CERTIFICATION

I, Alexander Jan Boenish Burrough, translator for the English language sworn in before the District Court of The Hague, the Netherlands, and registered in the public register pursuant to the Dutch Act on Sworn Interpreters and Translators Wbtv (*Wet beëdigde tolken en vertalers "Wbtv"*) under number 1963, do hereby certify, to the best of my knowledge and belief, that the attached English translation is a true, complete, and accurate translation of the Dutch source document listed below:

- Decision of the Supreme Court of the Netherlands, dated 4 December 2020, Case Number 20/01892, in the matter of *The Russian Federation v. Hulley Enterprises Limited, Veteran Petroleum Limited and Yukos Universal Limited*

I have prepared this document, at the request of Bart Fleuren of De Brauw Blackstone Westbroek N.V., for submission to this Court and other legal proceedings in English. I affirm that I am competent to translate documents from Dutch to English and review such translations. I am not a relation to any of the parties in the source document.



A.J.B. Burrough, Sworn Translator

Dated: December 10, 2020

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: THE NETHERLANDS
   This public document
2. has been signed by **A.J.B. Burrough**
3. acting in the capacity of sworn translator
4. bears the seal/stamp of aforesaid translator

Certified

5. in Amsterdam 6. on 10-12-2020
7. by the registrar of the district court of Amsterdam
8. no. 055933
9. Seal/stamp: 10. Signature:

H.H.S. Verhagen

RECHTBANK AMSTERDAM

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Signature, Notary Public

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Stamp, Notary Public