

PROCURATOR GENERAL
AT THE
NETHERLANDS SUPREME COURT

Number 22/03139

Hearing 22 September 2023

CONCLUSION

P. Vlas

In the case of

the Russian Federation, located in Moscow

against

1. Hulley Enterprises Limited in Nicosia, Cyprus
2. Veteran Petroleum Limited in Nicosia, Cyprus
3. Yukos Universal Limited, located in Douglas, Isle of Man (defendants 1 - 3 hereafter jointly: HVY)

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1. Introduction

- 1.1 This case concerns an enforcement dispute. HVY has placed an enforceable attachment on trade marks and copyrights used in the marketing of Russian vodka in the Benelux, against the Russian Federation and against and on the Russian State-owned enterprise FKP Sojuzplodoimport (hereafter: FKP). The attachment serves to recover HVY's claims against the Russian Federation based on three arbitration rulings.
- 1.2 FKP summoned both HVY and the Russian Federation and primarily requested the removal of the attachment, and as an alternative, suspension of execution of the attachment. The District Court accepted the primary complaint of FKP and cancelled the seizure. The Court of Appeal has annulled the sentence of the District Court and lifted the attachment insofar as this was imposed on and under FKP, and on a part of the copyrights. In cassation, the Russian Federation contests among other things the judgements of the Court of Appeal that: (i) the current state of the annulment procedure with regard to the arbitration decisions does not mean that their enforcement has been suspended, (ii) the seized trade mark and copyrights previously formed part of the disposable assets of the Russian Federation, (iii) the Russian Federation cannot successfully invoke immunity from execution, and (iv) the interests of HVY in the execution of the attachment outweigh the recovery risk on their side.
- 1.3 FKP has filed an independent cassation appeal against the ruling of the Court of Appeal. That case is pending with the Supreme Court under case number 22/03114, on which I also conclude today. In that conclusion, I also consider the judgements of the Court of Appeal as described above under (i) and (ii).
- 1.4 This case is governed by the old arbitration law, i.e. by the Fourth Book (Arbitration) of the Dutch Code of Civil Procedure, as this applied prior to the introduction of the Law on Modernisation of Arbitration procedures on 1 January 2015.¹ Unless stated otherwise, this conclusion refers at all to times to the old arbitration law.

2. Facts and the course of the proceedings

- 2.1 The following was assumed for cassation.² FKP is a Russian state-owned enterprise that deals, among other things, with the exploitation of trade marks relating to Russian vodka.
- 2.2 HVY are three former shareholders of the Russian company Yukos Oil Company, since declared bankrupt. On 7 May 2020, HVY placed an executory attachment against the Russian Federation and against and under FKP on:

“the Benelux trade mark rights belonging to the Russian Federation but that are held by [FKP], or registered in the name of [FKP], including (...).”

¹ Art. IV para. 4 in conjunction with para. 2 of the Law on Modernisation of Arbitration law (National Gazette 2014/200) stipulates that this law does not apply to arbitration proceedings brought before its entry into force - on 1 January 2015 - nor to cases brought before the court if and insofar as these are such arbitration proceedings. In the present case, the arbitration proceedings and the annulment proceedings were both filed before this date.

² See paragraphs 3.1 to 3.9 of the contested judgement of the Court of Appeal of The Hague dated 28 June 2022, ECLI:NL:GHDHA:2022: 1159, JBP r 2022/77, with note by M.C. van Leyenhorst, with reference to paragraphs 2.1 to 2.15 of the judgement of the District Court of The Hague dated 27 October 2020, ECLI:NL:RBDHA:2020:10708.

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The list that follows quotes various Benelux text and text/image trade marks, and internationally registered Benelux text and text/image trade marks that were registered in the name of FKP for class 32 and/or 33 (including for vodka and/or other beverages) (hereafter also referred to as: the trademarks).

2.3 The attachment was also placed on:

“all rights accruing to the Russian Federation under the Copyright Act 1912 that relate to any of the figurative elements of any of the aforementioned trademarks (...) and all rights under the Copyright Act 1912 on the design of the products produced and sold under these trademarks by or with the consent of [FKP] and/or the Russian Federation.”

2.4 The seized trademark and copyrights are hereafter jointly referred to as the (seized) “IP rights”.

2.5 The official report of seizure includes the following advance notice:

“that the executors are of the opinion that the rights seized here belong to the Russian Federation (...) and that [FKP] - insofar as it is the holder of these rights - is only acting as the manager of these state-owned assets on behalf of the Russian Federation. Notwithstanding this view, in order to comply with the legal provisions to protect the possible rights of “third parties”, this attachment has/will also be notified/served on [FKP].”

2.6 The enforcement attachment is intended to enforce three arbitration decisions dated 18 July 2014, under which the Russian Federation was ordered to pay significant amounts to HVY (hereafter: the arbitration rulings). On 28 April 2020, the preliminary relief proceedings judge in the District Court of The Hague granted leave to enforce the arbitration decisions³, which was served on the Russian Federation on 4 May 2020 with a demand to comply with the arbitration decisions.

2.7 On 10 November 2014, the Russian Federation summoned HVY before the District Court of The Hague and requested the annulment of the arbitration decisions. In a judgement dated 20 April 2016⁴, the court granted these requests. HVY appealed this judgement. In a final judgement on 18 February 2020⁵ the Court annulled the judgement of the District Court and rejected the claims of the Russian Federation.

2.8 The Russian Federation filed a cassation appeal against this judgement and the interim judgement of 25 September 2018.⁶ In a judgement dated 5 November 2021⁷, the Supreme Court annulled both judgements and referred the case to the Court of Appeal in Amsterdam for further processing and a decision.

2.9 Some of the trademarks were filed in the 1970s by a state-owned company of the Union of Socialist Soviet Republics called VO Sojuzplodoimport and, after changing its legal form to a VVO in 1990, by VVO Sojuzplodoimport (hereafter: VO/VVO). The other trademarks were registered by FKP. In 2006, the trademarks originally filed by VO/VVO were registered in the name of Spirits International N.V. (hereafter: Spirits). From 2006 to 2020, FKP and Spirits were in litigation in the Netherlands over the question of who owns those trademarks. In these proceedings, Spirits

³ This ruling was not published on rechtspraak.nl.

⁴ ECLI:NL:RBDHA:2016:4229.

⁵ ECLI:NL:GHDHA:2020:234, JOR 2020/164, with note by N. Peters.

⁶ ECLI:NL:GHDHA:2018:2476, JBPr 2019/9, with note by C.L. Schleijsen.

⁷ ECLI:NL:SC:2021:1645, NJ 2022/102, with note by A.I.M. van Mierlo, C.M.J. Ryngaert.

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contested the right of FKP to claim them. FKP claimed that in 2002 the Russian State transferred the trademark rights to FKP, and FKP was authorised to initiate proceedings in its own name to recover these trademarks. Ultimately, Spirits was ordered to transfer the trademarks filed by the VO/VVO into the name of FKP. These trademarks have been registered in the name of FKP since 7 July 2015. On the relationship between FKP and the Russian state, the Court of Appeal of The Hague ruled as follows in the proceedings referred to above, in its interim judgement of 24 July 2012⁸:

“7.16 In all of this, the Court of Appeal notes that this was in fact a reallocation of (the management of) state property of the Russian Federation. (...)”

7.19 Insofar as Spirits also wanted to raise the question of whom FKP represents in the present proceedings, the Court of Appeal concluded as follows. FKP's statements can be summed up as saying that the VO trademark rights have always remained state-owned (...) and that the management of this state-owned property belonged to a series of state-owned businesses (VO, VVO, FGUP and currently FKP) (...) In short, the VO trademark rights are state owned by the Russian Federation, and this state property is managed by FKP (...).’

- 2.10 An agreement was concluded between the Russian Federation and FKP on 15 May 2015 (hereafter: the 2015 Agreement) in which it is stated that rights to (among other things) the trademarks have been transferred to FKP so far as necessary.
- 2.11 FKP summoned HVY and the Russian Federation before the preliminary relief judge in the District Court of The Hague and requested primarily the lifting of the attachment, and alternatively the suspension of execution of the attachment. The Russian Federation endorsed FKP's claims.
- 2.12 In a judgement dated 27 October 2020, the preliminary relief judge lifted the attachment of the trademarks, because - in short - the independent capital of FKP does not provide recourse for the claims by HVY against the Russian Federation.
- 2.13 HVY appealed this judgement. In a judgement dated 28 June 2022, currently contested in cassation, the Court of Appeal annulled this judgement and, ruling once again, lifted the attachment insofar as this was applied (i) against and under FKP and (ii) to the copyrights of the design of the products produced and sold under these trademarks by or with the consent of FKP and/or the Russian Federation. Insofar as they are relevant in cassation, the Court of Appeal considered the following.
- 2.14 FKP and the Russian Federation have argued that with the annulment by the Supreme Court of the judgements of the Court of Appeal of The Hague on 25 September 2018 and 18 February 2020, the operative part of the judgement of the District Court of The Hague of 20 April 2016, in which the arbitration decisions were annulled, was reinstated, so that HVY is still not authorised to enforce the arbitration rulings and the exequaturs obtained on the basis of Art. 1062 para. 4 CCP have expired by operation of the law (para. 5.4). The Court rejected this argument as follows:

“5.5 (...) In the annulment proceedings, the District Court of The Hague annulled the arbitration decisions on the grounds that there is no valid agreement to arbitration (Art. 1065 para. 1 sub a (old) CCP). On appeal, the Court of Appeal ruled that there was no ground for annulment on this point, and the cassation

⁸ ECLI:NL:GHSGR:2012:BX1515. In cassation, the complaints against (among other things) these considerations were rejected, under application of Art. 81 para. 1 RO (Judiciary Organisation Act), see SC December 20, 2013, ECLI:NL:SC:2013:2071, NJ 2014/386, with note by Ch. Gielen, para. 3.5. To see more about this procedure, read: SC 24 January 2020, ECLI:NL:SC:2020:112, NJ 2020/59.

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objections against it were rejected by the Supreme Court. In its judgement of 5 November 2021, the Supreme Court found only part 1 well-founded. Under that part of the appeal, the Court felt unable to formally reject the opinion that the arbitration decisions are in violation of public order (Art. 1065 para. 1 sub d (old) Code of Civil Procedure) because HVY supposedly acted fraudulently in the arbitration proceedings. After cassation and referral, only this argument is still present in the annulment procedure, which is now being conducted before the Court of Amsterdam. No annulment court has yet ruled on its merits. We are therefore dealing with a case of a current annulment procedure, for which the starting point has to be that it does not suspend enforcement (Art. 1066 para. 1 CCP). Nor is the expiration by operation of the law of the leave to enforce, due to annulment of the arbitration judgement referred to in Art. 1064 para. 4 CCP relevant in this situation.”⁹

2.15 Subsequently, the Court of Appeal addressed the question of whether the seized IP rights are assets belonging to the Russian Federation. This question is governed by Dutch law (para. 5.9). The executory seizure of goods belonging to the Russian Federation located in the Netherlands was applied under Dutch (property) law. Where necessary, the foreign legal relationship must be aligned to (assimilated with) a comparable legal relationship in Dutch law. It must be assessed whether, in view of the application of Art. 3:276 Civil Code, the property law position of the Russian Federation with regard to the seized IP rights can be equated in content and scope with that of a (full) owner of the rights under Dutch law (para. 5.10). In paras. 5.11 to 5.13, the Court of Appeal first established several characteristics that relate to the relationship between the Russian Federation and FKP. The Court of Appeal then concluded that FKP does not exploit the trademark and copyrights as their (full) owner, and that these rights form part of the disposable assets of the Russian Federation (para. 5.14-5.19). The considerations are as follows:

“5.11 It has been established that FKP is one of many so-called Federal Treasury Enterprises (FTEs) in the Russian Federation. It is therefore a legal entity created by the Russian Federation. This form of legal entity has its origins in the Soviet tradition of state ownership. FTEs hold ownership of state assets assigned to them under so-called “operational management”. FKP is a “legal entity” within the meaning of Art. 48 Russian Civil Code (hereafter: RCC) with its own independent capital. The Court of Appeal also refers to the characteristics of an FTE set out in the judgement of the preliminary relief judge in paras. 4.10.1 to 4.10.9.

5.12 The Russian Federation and FKP concluded the 2015 Agreement on 15 May 2015. This agreement states, among other things, the following:

“(…) Whereas (...) Party 1 (Russian Federation, Court) was instructed to enter into an agreement with Party 2 (FKP, Court) on the transfer (alienation) of exclusive rights to the trademarks (...)

1 “Party 1” transfers its entire exclusive and other rights to the assigned property to the extent such assigned property would not already lie with “Party 2” and “Party 2” accepts this property, which includes:

1.1. all rights to the trademarks originally registered in the name of the All-Union Association (...) including but not limited to (...) Benelux, as well as international registrations of the trademarks (...)

1.3. all other intellectual property rights relating to the Trademarks held by “Party 1”, including but not limited to copyrights (...)

2 The parties confirm that since its incorporation, “Party 2” had the rights to (i) use and dispose of the Assigned Property, (ii) register the Trademarks in its own name and (iii) bring suit to claim back any Assigned Property, cease infringements on the Assigned Property, recover for damages and compensation for infringement of the rights to the Assigned Property (...).’

5.13 The legal relationship between the Russian Federation and FKP is further determined by the articles of association of FKP, last amended in 2019 (hereafter: the 2019 Articles of Association).

⁹ The Court of Appeal mistakenly referred to Art. 1065, para. 1d, CCP and Art. 1064 para. 4 CCP, where it obviously intended to refer to Art. 1065, para. 1e, CCP and Art. 1062 para. 4 CCP, respectively.

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Art. 14 of the Articles of Association states: *The property of the Enterprise is in federal ownership and is held by the Enterprise under the right of operative administration. The property complex of the Enterprise includes all types of property intended for its activities, as well as the rights to designations that individualise the Enterprise, its products, work, services (commercial designation, trademarks, service marks), and other exclusive rights. The Enterprise holds exclusive rights to the results of intellectual activity and means of individualization equated with them, for which the Enterprise is registered as a right holder. (...) In addition, based on Art. 24 of the preamble and sub 1 of the 2019 Articles of Association, FKP has the right "with the approval of the Government of the Russian Federation to enter into transactions for the alienation of the exclusive rights to the results of intellectual activity and means of individualisation, including trademarks held by the Enterprise".*

5.14 FKP and the Russian Federation did not state (sufficiently specifically and with substantiation) that the fact that the alleged transfer took place in 2015 although the current articles of association were only adopted in 2019 is important under (this) property law approach (in the sense that the 2015 agreement should be assessed without reference to the articles of association). The assessment of whether under Dutch (property) law the positions of the Russian Federation and FKP can be equated with those of transferor and transferee in relation to the transfer, is therefore applied with due observance of both schemes combined.

5.15 The terms of the 2015 agreement (*alienation, transfer, entire exclusive rights, assigned property, all rights to the trademarks*) in and of themselves indicate a full transfer of the IP rights. FKP therefore has full rights of use and enjoyment of these rights, and can enforce these rights against anyone else. On the other hand, it is stated that, as established between the parties, based on the aforementioned statutory provisions the Russian Federation has the right to take the "property complex" away from FKP (including all IP rights) as a whole and to sell it to (for example) a newly created FTE, and also has the right to annul any transactions concluded by FKP with third parties without the consent of the Russian Federation relating to the disposal of the (IP) rights in court (with third party effect). The Russian Federation also had these powers under the (previous) status of operational management.

5.16 In the opinion of the Court of Appeal, these latter powers of the Russian Federation make it impossible to equate the legal position of FKP in its relationship with the Russian Federation, under Dutch (property) law, to that of the (full) owner of the trademarks. These are far-reaching limitations to FKP's power of disposal with third-party effect. In the event that the Russian Federation exercises its rights with regard to the "property complex", FKP then loses its authority to exploit the trade marks and copyrights. Under Dutch property law, a transfer where the transferor reserves such property law powers is not possible. Any agreement to that effect would not be a valid transfer of title. This means that, under Dutch (property) law, the 2015 agreement would not result in a legal transfer and so FKP did not become the rightful owner based on that agreement. The fact that FKP is/was not the (complete) rightful owner in a property law sense, also applies in the situation with the 2015 agreement (of operational management) since in that situation the same restrictions applied. Assessed under Dutch goods and seizure law, it must therefore be held in these preliminary injunction proceedings that the IP rights are, for the purposes of the present claims, disposable assets of the Russian Federation, and that FKP does not exploit these rights in the capacity of a (full) rightful owner.

5.17 Insofar as FKP, as owner of the trademark rights, could invoke the presumption of Art. 3: 119 para. 2 Civil Code - which is in dispute between the parties - it follows from the above that in the preliminary proceedings the opposite became a reasonable assumption.

5.18 It follows from the above that no transfer of copyrights has taken place and FKP therefore cannot be viewed as being the (full) rightful owner of the (possible) copyrights

in the situation either after or before the 2015 Agreement. FKP cannot rely on Article 4 Copyright Law, because, as a legal entity, it cannot be a creator (a legal entity does not have a personality that it can express through creative choices), nor on Article 8 of the Copyright Law, since this Article only regulates the relationship between the publishing legal entity - which can also be "noted" as the creator - and the natural person/creator, but not the relationship between two legal entities both claiming the copyright.

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Insofar as FKP - as the person who would have published the works, for example with the trademark registrations - could still invoke the assumption of Art. 4 and/or 8 Copyright Law, this assumption must, in the light of the legal considerations 5.15 and 6.16 [read: 5.16, Court], be rejected.

5.19 The conclusion is that, assessed under Dutch property and seizure law, FKP does not exploit the trademarks and copyrights as the (full) rightful owner of these rights (and has filed with regard to the trademarks) and these rights form part of the disposable assets of the Russian Federation.”

- 2.16 Subsequently, the Court of Appeal ruled that insofar as the attachment writ (also) intended to levy executory garnishment on FKP, HVY, especially in the light of FKP’s defence that not all of the formalities prescribed in Art. 475 para. 1 Code of Civil Procedure for a garnishment under penalty of nullity were complied with (in particular the requirement in Art. 475 para. 1a, Code of Civil Procedure), had not explained sufficiently how the present seizure of intellectual property rights belonging to the Russian Federation from FKP, who does not exploit these rights as their rightful owner, could be considered in this case to be a (legally valid) garnishment (para. 5.21).
- 2.17 By way of an interim conclusion, the Court of Appeal considered that the claim to lift the attachment is applicable insofar as this was levied at the expense of and on FKP, because the IP rights form part of the disposable assets of the Russian Federation, it has been established that FKP is not the debtor for the claims in respect of which the attachment was applied, and also the (legally) garnished third-party attachment that was levied was not (sufficiently) justified or demonstrated to apply (para. 5.22). The following considerations of the Court of Appeal only pertain to the lifting of the attachment levied against the Russian Federation, or the suspension of its execution, where FKP has the capacity of a (material) interested party (para. 5.23).
- 2.18 In the event that the attachments would apply to disposable assets of the Russian Federation, FKP (supported by the Russian Federation) has invoked immunity from execution, as defined in Art. 19c of the United Nations Convention on the Jurisdictional Immunity of States and their Property (hereafter: UN Convention)¹⁰ (para. 5.30).
- 2.19 After setting out the legal framework in para. 5.31, the Court of Appeal ruled that FKP and the Russian Federation cannot successfully invoke immunity from execution in this case, and added the following considerations:

“5.34 (...) The trademarks and copyrights relate to property rights intended for the commercial sales of alcoholic beverages. Trademarks and the copyrights they included for the figurative elements (which fall under the attachment) are, by their very nature, intended for purposes other than public information, namely for promoting the (commercial) sale of goods bearing the trademarks. Nor is it disputed between the parties that FKP, based on its 2019 articles of association, must donate part of its annual net profit (25%) to the budget of the Russian Federation. In response to a question, FKP stated at the hearing that the remaining part (75%) of the revenue of FKP is not given to the Russian Federation, but is used to cover FKP’s maintenance and the costs. The Russian Federation and FKP have not (sufficiently) disputed that the proceeds therefore - and for the majority - have a non-public purpose. This means that the relevant IP rights are assets that are used, or are intended for use in particular for other than non-commercial government purposes. Given that the requirement of Art. 19 UN treaty that a third-party attachment must be directed against goods “related to the entity against which the proceedings are directed” relates to international common law, this requirement has also been met. The fact that there is a (sufficient) connection between the rights assigned to the Russian Federation and exploited by FKP is easily shown

¹⁰ Signed in New York on 2 December 2004, Trb. 2010, 272 (English and French authentic texts; Dutch translation).

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from what was considered above, in particular under 5.16. The appeal to immunity from execution therefore fails.” [footnote omitted; Court]

- 2.20 The Court of Appeal subsequently reviewed the subsidiary claim by FKP to suspend the execution, insofar as that claim relates to the attachment placed against the Russian Federation (para. 5.35). The Court of Appeal rejected this claim as follows:

“5.36 For the assessment of this claim, the Court of Appeal must weigh the interests of granting and of rejecting the request to suspend the execution of the attachment. It is true, as the Supreme Court also considered in its decision of 4 December 2020, that for the time being it is sufficiently likely that enforcement of the arbitration decisions will entail a risk of restitution. On the other hand, it cannot be expected that for the duration of the annulment procedure, HVY will be able to earn a significant part of the amounts allocated by the arbitration decisions (in some other way). Furthermore, any (irrevocable) final judgement in the annulment procedure may still remain pending for some time. To the extent that FKP is still relying on its argument that it is the true owner in the context of weighing up interests with regard to the seized rights, and in considering immunity from execution, these arguments have already been rejected for this. The circumstance that the position of FKP as operator of the seized trade marks and copyrights of the Russian Federation will be damaged if these are sold under court order, does not outweigh the interests [of] HVY in the enforcement.” [footnote omitted; Court]

- 2.21 Insofar as the same standard should be taken into account for the request for suspension referred to in Art. 1066 para. 2 CCP, the Court of Appeal also rejected the claim (para. 5.37-5.38).
- 2.22 The Court of Appeal concluded that the claim to cancel the seizure is partially successful, namely insofar as this was charged to and from FKP. The claim to cancel the attachment levied against the Russian Federation is unsuccessful, except insofar as it is directed at the copyrights for the design of the products produced and sold under the trademarks by or with the permission of FKP and/or the Russian Federation (para. 5.39). The Court of Appeal rejected FKP’s request not to declare the judgement provisionally enforceable (para. 5.40).
- 2.23 The Russian Federation filed an appeal (in good time) against the Court of Appeal’s judgement. In the initial pleading dated 23 August 2022, the Russian Federation asked the Supreme Court to allow a period of four weeks for amending, extending or supplementing the cassation grievance, due to the very short time period between the point at which a cassation attorney is compulsorily assigned to the Russian Federation based on Art. 13 Lawyers Act and the expiration of the cassation deadline. The single civil chamber allowed that request. Within the granted period of four weeks, the Russian Federation submitted a supplement to the cassation grievance on 22 September 2022.
- 2.24 On 22 September 2022, following a request from the Dean of the Hague Bar Association, the lawyers of the Russian Federation and FKP asked the Supreme Court to anonymise the case file and all decisions to be taken in this case, in such a way that it is not publicly known which lawyers assist the Russian Federation in cassation.
- 2.25 HVY rejected the principal appeal in cassation and lodged a conditional cross-appeal in cassation. The Russian Federation rejected this. The Russian Federation and HVY have put forward their views in writing, followed by a reply and a rejoinder.

3. Discussion of the principal grievance

- 3.1 The grievance consists of six parts, parts I to III of which are included in the case presentation and parts

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IV to VI in the additional case presentation.

- 3.2 For the record, I raise the question of whether the Russian Federation should be declared inadmissible with regard to the additional case presentation. I see no reason for this. HVY did not object to the granting of a period to the Russian Federation for amending, extending or supplementing the grievance, the single civil chamber granted the request of the Russian Federation and the Russian Federation submitted the supplement within the period of four weeks set by the single civil chamber. It may also be taken into account that the (current) lawyer of the Russian Federation only received a compulsory instruction from the Dean of the Hague Bar Association on 19 August 2022 to assist the Russian Federation, and so did not have sufficient time to study the extensive case material carefully.¹¹
- 3.3 Part I is directed against para. 5.5 of the contested judgement and is divided into six sub-parts, of which parts I.2 and I.3 do not contain complaints.
- 3.4 Part I.1 asserts that the Court of Appeal rejected wrongly and/or without adequate justification in para. 5.5 the argument of FKP and the Russian Federation that - in brief - HVY are not yet authorised to enforce the arbitration decisions, because due to the annulment by the Supreme Court of the judgements of the Court of Appeal of The Hague of 25 September 2018 and 18 February 2020, the operative part of the judgement of the District Court of The Hague of 20 April 2016 was reinstated, under which the arbitration decisions were annulled. Part I.4 attacks the opinion of the Court of Appeal that for an ongoing annulment procedure based on Art. 1066 para. 1 CCP, the starting point is that it does not suspend the enforcement. According to this part, this judgement cannot legally, or at least not without further justification, justify the rejection of the argument of FKP and the Russian Federation. In this case, there is not just a request for annulment, but an annulment already pronounced by the court, which was reinstated by the judgement of the Supreme Court of 5 November 2021, according to the complaint. According to part I.5, the annulment by the Supreme Court of (the operative part of) the judgement of the Court of Appeal of The Hague of 18 February 2020 does not have partial effect. In addition, part I.6 claims that the judgement of the Court of Appeal in recital 5.5 is incorrect or insufficiently justified, that the expiration of the leave of execution due to annulment of the arbitration judgement referred to in Art. 1062 para. 4 CCP is not at issue in this case because the annulment by the District Court was reinstated, and the basis on which the exequaturs were granted - namely: the judgement of the Court of Appeal of The Hague on 18 February 2020 - was annulled.
- 3.5 These complaints can be dealt with together. In doing so, I posit the following in advance. In the Netherlands, the execution of an arbitral award can only take place after the preliminary relief judge has granted leave ("exequatur") (Art. 1062 para. 1 CCP). In the event of granting leave, the only legal remedies open to the other party are annulment and revocation (of the arbitral award) (Art. 1062 para. 4, first sentence, CCP). A claim for annulment does not suspend the enforcement of the arbitral award (Art. 1066 para. 1 CCP). However, the court that rules on the annulment may, if grounds exist to do so, suspend the enforcement at the request of either party until the claim for annulment has been decided irrevocably (Art. 1066 para. 2 CCP). Visibly different from the case of a suspension on appeal of the enforcement of a judgement (Art. 351 CCP) or of a decision (Art. 360 para. 2 CCP)¹², a suspension based on Art. 1066 para. 2 CCP, therefore continues until the decision in the annulment procedure has

¹¹ See claims A-G Lückers dated 30 June 2023, ECLI:NL:PHR:2023:640 and ECLI:NL:PHR:2023:641, under 3

¹² Cf. SC December 20, 2019, ECLI:NL:SC:2019:2026, NJ 2020/425, with note by A.I.M. van Mierlo, para. 5.6.4.

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become *res judicata* ['kracht van gewijsde']. If the judge in the previous court in the annulment procedure had already issued an opinion about the claim for annulment, the court that decides on the suspension request must take this opinion into account.¹³

- 3.6 An arbitration award that has been annulled has no legal force.¹⁴ The annulment of an arbitral award entails as a matter of law the annulment of the leave to enforce (Art. 1062 para. 4, second sentence, CCP).
- 3.7 The annulment of a ruling by the civil court has direct and retroactive effect.¹⁵ A judgement in the first instance that was annulled on appeal must be deemed to have lost its effect, unless the judgement on appeal has itself been annulled.¹⁶ If the judgment on appeal is in turn annulled in cassation, the literature assumes that the decision in first instance is only reinstated if the Supreme Court ratifies that decision.¹⁷ After all, the partial effect of the appeal in cassation means that decisions that were not or not successfully challenged in cassation are binding, even if the judgement is annulled due to other complaints having been successful.¹⁸ The mere circumstance that the operative part of the judgement or the decision of the Supreme Court does not (expressly) subject the annulment to any limitation cannot lead to the inference that everything contained in the contested decision has been annulled. After referral, the court should, based on the scope of what the Supreme

Court has considered and decided, assess which parts of the judgement annulled in cassation have not or not successfully been challenged and therefore have become unassailable ['onaantastbaar'].¹⁹ The annulment of a judgment by the Supreme Court affects not only the decisions that are stated in that judgment that were successfully challenged in cassation, but also implies that all decisions that are based upon it or that are inextricably linked to it lose their legal force because their foundation no longer exists.²⁰

- 3.8 The core argument of this part is that with the annulment by the Supreme Court of the judgements of the Court of Appeal dated 25 September 2018 and 18 February 2020, the operative part of the judgement of the District Court of 20 April 2016 was reinstated and with it the annulment of the arbitration awards

¹³ See SC December 4, 2020, ECLI:NL:SC:2020:1952, NJ 2022/101, with note by A.I.M. van Mierlo, para. 3.3.2.

¹⁴ See G.J. Meijer, *Agreement for Arbitration*, 2011, para. 11.6.6 (p. 949); A.J. van den Berg, R. van Delden & H.J. Snijders, *Arbitration Tribunal*, 1992, p. 136.

¹⁵ See SC 27 April 1979, ECLI:NL:SC:1979:AC6573, NJ 1980/169, with note by W.H. Heemskerk; SC September 26, 1997, ECLI:NL:SC:1997:ZC2438, NJ 1998/419, with note by P.A. Stein, para. 3.3. See also Asser *Procedural Law/Bakels, Hammerstein & Wesseling-van Gent* 4 2022/7; H.J. Snijders & A. Wendels, *Civil appeal*, 2009, no. 264.

¹⁶ See SC 28 September 1984, ECLI:NL:SC:1984:AG4866, NJ 1985/83, with note by W.H. Heemskerk; SC 14 December 1990, ECLI:NL:SC:1990:ZC0084, NJ 1991/307.

¹⁷ See I.M.A. Lintel, "Annulment by the Supreme Court: consequences of indirect annulment", *TCR* 2019/1, p. 40; A.A. van Rossum, *Liability for the enforcement of annulled or set-aside court decisions*, 1990, p. 82-83; C.J.J.C. van Nispen, "The effect of a later ruling on a ban or order", *BIE* 6/7 1985, p. 228; W.H. Heemskerk in his NJ note under SC 28 September 1984, already cited.

¹⁸ See W.D.H. Asser, *Civil cassation*, 2018, paras. 6.4.5 and 9.2; Asser *Procedural Law/Korthals Altes & Groen* 7 2015/296-297 and 331; N.T. Dempsey & A.E.H. van der Voort Maarschalk, in: Van der Wiel, *Cassation* 2019/388; B. Winters, *The proceedings after cassation and referral in civil cases*, 1992, p. 104, with reference to SC 16 March 1927, ECLI:NL:SC:1927:246, NJ 1927/528.

¹⁹ See SC 2 May 1997, ECLI:NL:SC:1997:AG7229, NJ 1998/237, with note by H.J. Snijders, para. 4.1.

²⁰ See among others SC 18 May 2018, ECLI:NL:SC:2018:728, NJ 2019/127, with note by A.I.M. van Mierlo, para. 3.3.2, with reference to SC 19 September 2014, ECLI:NL:SC:2014:2739, para. 3.6.2; SC 8 February 2019, ECLI:NL:SC:2019:207, NJ 2019/387, with note by C.J.M. Klaassen, para. 5.2.2; SC 15 November 2002, ECLI:NL:SC:2002:AE8463, NJ 2004/2, with note by W.D.H. Asser, para. 3.3. See also Dempsey & Van der Voort Maarschalk, a.e., 2019/393.

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contained therein. This argument makes an incorrect legal assumption about the partial effect of the cassation appeal. From para. 5.1.3 - 5.1.19 of the Supreme Court judgement dated 5 November 2021, it follows that the annulment of the judgements of the Court of Appeal is based solely on the success of the complaint that the Court of Appeal ruled incorrectly that the Russian Federation could only put forward its allegations of fraud in revocation proceedings and could not base its annulment claim on these. The other complaints did not lead to cassation (para. 7.1). The partial effect of the cassation appeal then means that the annulment pronounced by the Supreme Court applies only to the ruling of the Court of Appeal that was successfully challenged in cassation. The fact that such a limitation does not follow from the operative part itself does not affect this. The other rulings of the Court of Appeal have become unassailable [*onaantastbaar*]. This includes therefore the ruling of the Court of Appeal that the arbitration tribunal had jurisdiction to hear and decide on HVY's claims, so that the judgement of the District Court that no valid was arbitration agreement had been concluded, and that the arbitral awards must be annulled for that reason, could not be maintained.²¹ It cannot be argued that the ruling of the Court of Appeal builds on or is inextricably linked to the Court of Appeal's finding that the Russian Federation could only raise its allegations of fraud in revocation proceedings. The District Court's finding that no valid arbitration agreement had been entered into was therefore not reinstated, so that the annulment in the operative part based on this finding was not reinstated either. The distinction made in this part between the operative part, or at least its legal effect, and the underlying considerations of the merits, is irrelevant in this regard.

3.9 Where part I.4 still argues that Art. 1066 para. 1 CCP must be read in such a way that "the mere submission" of a claim for annulment does not suspend the enforcement of the arbitral award, this opinion is incorrect. This kind of limitation does not follow from the text of the provision, nor from legal history or case law. Given the fact that the court, on the basis of the second para. of Art. 1066 CCP, can suspend enforcement until the claim for annulment *has been irrevocably decided*, it can be inferred that the effect of Art. 1066 para. 1 CCP also extends until that moment in time. This conclusion is also supported in the decision cited above on 4 December 2020, in which the Supreme Court expressly considered the position where a judgement has already been issued

in respect of the claim for annulment, but a request for suspension is raised in a higher instance.

3.10 In this case, it is established that the request for annulment by the Russian Federation has not yet been irrevocably decided, so that there are ongoing annulment proceedings. At the time I draw this conclusion, no ruling has yet been issued in this annulment procedure.²² As stated, there is no reinstatement of the District Court's judgement or of the annulment of the arbitral awards contained therein. The Court of Appeal has therefore correctly ruled that the enforcement of the arbitral awards has not been suspended and also that the expiration of the leave to enforce based on Art. 1062 para. 4 CCP is not at issue. In other respects, the opinion of the Court of Appeal in recital 5.5 offers no evidence of an incorrect interpretation of the law, nor is the judgement insufficiently substantiated. The complaints of part I therefore fail.

3.11 Part II is directed against paras 5.14 to 5.19, in which the Court of Appeal, in summary, considered that

²¹ See para. 4.9, 5.3 and 10.1 of the judgement of the Court of Appeal of 18 February 2020.

²² Case number at the Amsterdam Court of Appeal is 200.303.103/01. According to information I have obtained ex officio from the clerk of the Court of Appeal, the case has the necessary documentation provided by the parties and the oral hearing is fixed for 21 November 2023.

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FKP does not exploit the IP rights as (the full) rightful owner of the rights, and that these rights form part of the disposable assets of the Russian Federation. This part is divided into four sub-parts, the fourth sub-part of which contains an explanation of and further elaboration of the complaints under II.3²³.

- 3.12 Parts II.1 and II.2, as included in the case introduction, contain no complaints and state first of all that in cassation the starting point must be that (i) FKP is an independent legal entity with its own independent capital which creditors of the Russian Federation cannot seize, and (ii) the Russian Federation transferred the IP rights to FKP in the 2015 Agreement, because from 1 October 2014 intellectual property rights could not (any longer) be the object of "operational management".
- 3.13 Part II.2.1 is included in the additional case introduction. This part is directed against paras 5.15, and 5.16 to 5.19. This part challenges the opinion of the Court of Appeal that FKP does not exploit the IP rights as the (full) rightful owner of the rights, and that these rights form part of the assets of the Russian Federation. According to this part, this assessment is incorrect or incomprehensibly argued, because the Russian Federation and FKP have stated that: (i) FKP is an independent legal entity, (ii) the powers of the Russian Federation over FKP do not extend to intellectual property rights, and can only be exercised in exceptional, and in this case, not relevant circumstances, and (iii) the 2015 agreement implemented the 2014 legislative changes, and so transferred the rights. In the subsequent explanation, this claim is further detailed, with the argument that the Court of Appeal incorrectly failed (apparently) to include these essential factors in its assessment. It is also claimed that it is incorrect and/or incomprehensible that the judgement of the Court of Appeal in para. 5.16, that it was agreed between the parties that the Russian Federation has the right to take over the "property complex" as a whole²⁴, and that the Court of Appeal wrongly failed to include the essential factor that FKP never had these rights under operational management.²⁵
- 3.14 Insofar as the claims relate to the judgements of the Court of Appeal on the content and the interpretation of Russian law, the claims run counter to the provisions in Art. 79 para. 1, preamble and 1b, RO. Insofar as the claims argue that there is a lack of reasoning because the Court of Appeal has failed to consider essential factors, I note the following. A lack of substantiation that can be argued in cassation means that the trial judge has failed to address a statement by one of the parties that, if correct, would probably have led to a different decision regarding the granting or rejection of the claim.²⁶ The court does not have to address all arguments and arguments put forward by the parties in support of their position.²⁷ In its assessment, the Court of Appeal took the following into account, among other things:
- (i) FKP is a "Federal Treasury Enterprise" (hereafter: FTE), as well as a "legal entity" within the meaning of Art. 48 Russian Civil Code, with its own independent capital (para. 5.11, fifth sentence);
 - (ii) an FTE can only dispose of and transfer its allocated state property with the permission of the Russian Federation, and the Russian Federation can take back that state property if the assets are redundant, unused or used inappropriately (para. 5.11, last sentence, with a reference to para. 4.10.5 of the judgement);
 - (iii) under Russian law, creditors of the Russian Federation cannot seize assets from an FTE (para. 5.11,

²³ In the case introduction, the heading of II.4 accidentally states III.3, where II.3 is intended.

²⁴ See additional process introduction, p. 5.

²⁵ See additional process introduction, p. 6.

²⁶ See A.E.H. van der Voort Maarschalk, in: Van der Wiel, Cassation 2019/70; Asser, a.w., para. 4.6.3; Asser Procedural Law/Korthals Altes & Groen 7 2015/188; no. 2.6 of the conclusion of A-G Langemeijer (ECLI:NL:PHR:2010:BN6254) before SC 5 November 2010, ECLI:NL:SC:2010:BN6254, Judicial Code 2010/1334.

²⁷ See e.g. SC 10 March 2006, ECLI:NL:SC:2006:AV1044, NJ 2006/191, para. 4.5.

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last sentence, under reference to para. 4.10.9 of the judgement);

(iv) the IP rights were transferred in the 2015 agreement, but the Russian Federation has retained certain powers with regard to the IP rights (para. 5.15); and

(v) since the 2015 agreement, there has been no (no more) operational management (para. 5.15, last sentence, and para. 5.16, seventh sentence).

- 3.15 In light of this, it cannot be said that the Court of Appeal did not (visibly) include the arguments in its assessment that (i) FKP is an independent legal entity with its own independent capital, (ii) the IP rights were transferred in the 2015 agreement and (iii) the IP rights are not (any longer) held under operational management by FKP.
- 3.16 Furthermore, the Court of Appeal held in recital 5.15 that, as agreed between the parties, on the basis of Art. 14 and Art. 24, preamble and under (I), of the 2019 Articles of Association ("the aforementioned statutory provisions" in recital 5.13) the Russian Federation has the right to take back and sell the entire "property complex" from FKP (including all the IP rights) to (for example) a newly established FTE, and also has the right to annul transactions concluded without the consent of the Russian Federation by FKP with third parties concerning the disposal of (IP) rights in court (with third party effect). It is these powers that, according to the Court of Appeal, prevent the legal position of FKP in its relationship with the Russian Federation being assimilated under Dutch law to that of the (full) rightful owner of the rights (para. 5.16). The judgement of the Court of Appeal that it was established between the parties that the Russian Federation has such powers, can only be tested in cassation for comprehensibility, given the fact that the interpretation of the procedural documents is reserved for the trial judge.²⁸
- 3.17 In the instances reviewing the facts of the matter, HVY argued, inter alia, that the 2019 Statutes confirm that FKP may only dispose of and transfer IP rights with the consent of the Russian Federation, that the Russian Federation is entitled to take annulment action with third-party effect if any such legal action is performed without its consent, and that the Russian Federation is entitled to take back and transfer the IP rights, as part of the "property complex" of FKP, without the consent of FKP.²⁹
- 3.18 Among other things, the Russian Federation has argued that its powers are limited to exceptional circumstances and do not differ materially from the control that a sole shareholder can exercise over a Dutch company.³⁰ These statements apparently (also) pertain to the situation in which there is no operational management (anymore). Furthermore, FKP, whose arguments the Russian Federation has endorsed,³¹ has argued in this context that the Russian Federation must consent to a disposal/transfer and may itself transfer the property complex of FKP, but that these restrictions apply to all SOEs and do not affect the fact that FKP is the beneficiary of the IP rights.³²
- 3.19 In view of these various arguments between the parties, it is not incomprehensible that the Court of Appeal has ruled that it has been established between the parties that the Russian Federation has

²⁸ See Van der Voort Maarschalk, a.e., 2019/68.

²⁹ See par. V.2.9 of the Statement of Defence HVY, par. III.6 of the HVY pleadings in first instance and par. III.7.2 of the HVY Statement of Appeal.

³⁰ See #27, 35-36 of the RF Statement of Reply.

³¹ See no. 3.3 of the RF pleadings in first instance and no. 1 of the RF Statement of Reply. See also paragraph 4.3 of the contested judgement.

³² See on the consent provision: no. 85 of the FKP pleadings in first instance and no. 130 of the FKP Statement of Reply and for the authority to transfer the "property complex": no. 88 of the FKP pleadings in first instance and no. 131 of the FKP Statement of Reply and no. 34 of the FKP pleadings on appeal.

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certain powers based on the 2019 articles of association with regard to the IP rights, or at least it cannot be said that the Court of Appeal did not sufficiently clearly include the arguments of the Russian Federation and FKP in its opinion in this context. Part 11.2.1 therefore fails.

- 3.20 Part II.3 complains that recital 5.14 through 5.18 are incorrect in light of the principles of parts II.1 and II.2, or at least insufficiently substantiated. This complaint is explained and elaborated upon in section II.4. It is argued that it is incorrect and incomprehensible to conclude that, given the specific role of the Russian State under Russian statutory law and the articles of association of FKP, the exclusive IP rights of FKP must be 'assimilated' to rights of the Russian Federation itself. The Court of Appeal has disregarded the fact that assimilation must be applied with restraint and that in doing so it must be functionally aligned with the purpose and scope of the foreign regulation. Assimilation is also incompatible with art. 10:118 and 10:119 Civil Code and the judgement of the Court of Appeal deviates from judgements of the Dutch and French courts³³, according to the part.
- 3.21 In recital 5.9 - undisputed in cassation - the Court found that in the context of the dispute about the legitimacy of the attachment, the question whether or not the IP rights are included in the assets of the Russian Federation must be answered under Dutch law. The Court of Appeal added to this - also undisputed in cassation - that art. 4.8bis paragraph 2 BVIE³⁴ also determines that the property law aspects of the Benelux trademark rights are governed by Dutch law. Then the Court of Appeal found in paragraph 5.10 that since the question is whether the post-judgement attachment of property belonging to the Russian Federation has been levied under Dutch law, the foreign legal relationship must, if necessary, be adjusted to (assimilated with) a comparable legal relationship in Dutch law. In doing so, according to the Court of Appeal, it must be assessed whether, in view of the application of art. 3:276 Civil Code, the property law position of the Russian Federation with regard to the IP rights under attachment according to content and scope can be equated with that of (full) rightsholder under Dutch law.
- 3.22 Parts II.3 and II.4 apparently oppose the manner in which the Court of Appeal concluded in recital 5.14 through 5.16 that the IP rights are in the assets of the Russian Federation and not in the assets of FKP. As it is undisputed in cassation that under Dutch (property) law it must be assessed whether FKP should be considered as full rightsholder of the IP rights, the Court of Appeal, based on the various arguments and counterarguments of the parties, has examined the legal position of FKP in its relationship with the Russian Federation. The Court of Appeal has come to the conclusion that this legal position is not equal to that of a full rightsholder under Dutch law. Insofar as the complaints are directed against the interpretation and the content of Russian law, they are countered by the provisions in art. 79 paragraph 1, preamble and under b, Judicial Organisation Act [Wet op de rechterlijke organisatie, RO]. Insofar as the complaints are directed against the reasoning employed by the Court of Appeal, such complaints cannot be assessed without involving the correctness of the judgements of the trial judge about the content and interpretation of Russian law.³⁵ This counters the complaint that the judgements of the Court

³³ The part refers to the judgements submitted by the Russian Federation by deed of 6 October 2020 as exhibits RF-3A through RF-3F and the judgement of the District Court of The Hague of 16 June 2021 in the case between FKP and Spirits, ECLI:NL:RBDHA:2021:6053.

³⁴ See Bulletin of Treaties 2005, 96. The treaty entered into force for the Netherlands on 1 September 2006.

³⁵ See SC 6 September 2013, ECLI:NL:HR:2013:BZ9228, NJ 2015/376, annotated by N.J. Schrijver, recital 3.15.5; SC 5 November 2021, already cited, recital 5.2.18 and most recently: SC 9 June 2023, ECLI:NL:HR:2023:865, RvdW 2023/650.

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of Appeal in recital 5.14 through 5.18 have been insufficiently substantiated in light of the principles under II.1 and II.2 mentioned in the grievance.

- 3.23 Insofar as the part complains that the ‘assimilation judgement’ of the Court of Appeal is incorrect and incomprehensible, because assimilation must be applied with restraint and ‘must be functionally connected to the purpose and scope of the foreign regulation’, this complaint also fails. The complaint disregards the fact that to determine whether FKP should be considered as full rightsholder of the IP rights under Dutch (property) law, the Court of Appeal has rightly investigated whether the relationship between FKP and the Russian Federation can be equated with that of a full rightsholder under Dutch (property) law. As stated, the Court of Appeal has come to the conclusion that this is not the case. Contrary to what the part argues, it cannot be understood that this judgement cannot be reconciled with the independent legal personhood of FKP under Russian law. The fact that under Dutch international private law, FKP is governed by Russian law on the basis of art. 10:118 and 10:119 Civil Code as a legal entity, does not mean that the question whether FKP should be considered as a full beneficiary of the IP rights should also be answered under Russian law. The complaint therefore fails.
- 3.24 In the supplemental summons, part II.3.(e) also complains that the Court of Appeal in recital 5.18 has ruled wrongly and/or without sufficient justification that FKP cannot invoke art. 4 and 8 Copyright Act. A legal entity, too, may be considered a creator on the basis of art. 4 Copyright Act and the application of art. 8 Copyright Act is not limited to the relationship between the publishing legal entity and the natural person/creator, according to the part.
- 3.25 Copyright is the exclusive right of the creator of a work of literature, science or art (art. 1 Copyright Act). Art. 4 Copyright Act determines, in short, that subject to proof of the contrary, the person who is indicated as such on or in the work, or in the absence of such indication, the person who was indicated as the creator thereof when the work was published by the one publishing it. Pursuant to Art. 8 Copyright Act a fictitious creator is appointed, namely the legal entity that publishes a work as originating from him without mentioning a natural person as creator. Art. 8 Copyright Act contains an exception if it is proven that the publication was unlawful.³⁶ In the literature it is accepted that, contrary to what the Court of Appeal has found, the presumptions of evidence of art. 4 Copyright Act also apply in favour of the person who is designated as a fictitious creator based on art. 8 Copyright Act³⁷ Art. 8 has a broad scope of application³⁸, as does Art. 4 Copyright Act³⁹
- 3.26 In light of the above, the Court of Appeal assigned a too restrictive scope to art. 4 and 8 Copyright Act in recital 5.18 and the part in itself rightly complains that the Court of Appeal took an incorrect legal view. However, the part cannot lead to cassation. In recital 5.18, the Court of Appeal found that it follows from recital 5.15 and 5.16 (“the foregoing”) that no transfer of copyrights has taken place and FKP can also, to that extent, not be considered a (full) owner of the (possible) copyrights in the situation after and before the 2015 agreement. At the end of recital 5.18, the Court of Appeal has found that insofar as FKP could invoke the presumption of art. 4 and/or art. 8 Copyright Act, this presumption can be deemed

³⁶ P.F.G.A. Geerts & A.M.E. Verschuur, Kort begrip van het intellectuele eigendomsrecht, 2022/553.

³⁷ See Spoor/Verkade/Visser, Auteursrecht, 2019, par. 2.16 (p. 61).

³⁸ See no. 4.38 of the opinion of A-G Verkade (ECLI:NL:PHR:2009:BH2956) prior to SC 8 May 2009, ECLI:NL:HR:2009:BH2956, NJ 2009/222. See also SC 17 September 2004, ECLI:NL:HR:2004:AO8198, NJ 2005/169, annotated by J.H. Spoor; BIE 2005/7, annotated by A.A. Quaedvlieg.

³⁹ See Spoor/Verkade/Visser, l.c., par. 2.16 (p. 61-62).

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refuted in light of recitals 5.15 and 5.16. This consideration is an independent basis for the opinion in recital 5.18, first sentence (and the subsequent judgement in recital 5.19), that FKP cannot be considered a (full) copyright holder. The part does not complain that it does not follow from recital 5.15 and 5.16 - to refute the presumption of art. 4 Copyright Act - that FKP is not the creator of the figurative elements of the registered marks (cf. recital 5.29), or at least that someone else must be considered as creator thereof, nor - to refute the presumption of art. 8 Copyright Act - that the disclosure by FKP of these figurative elements is allegedly unlawful, and thus these considerations cannot serve to refute the presumptions of art. 4 and 8 Copyright Act. The complaint under II.3.(e) therefore fails in the absence of interest.

- 3.27 In the written explanation of the Russian Federation, 6.1.3 also contains the complaint that the Court of Appeal has disregarded the attributive system for the creation of trademark rights and also the obligation to interpret in accordance with the directive and the useful effect of art. 10 Trademark Directive. This complaint has not been included in the summons nor in the supplemental summons, and thus it was raised too late, given the provisions in art. 407 paragraph 2 CCP. I will therefore disregard the complaint.
- 3.28 Part III is directed against paragraph 5.34, in which the Court of Appeal has ruled that the appeal of FKP and the Russian Federation to immunity of enforcement fails. The part complains under II.1 that this opinion is incorrect and/or insufficiently substantiated, with further elaboration under III.2.⁴⁰
- 3.29 In discussing this part, I will first note the following. Pursuant to art. 13a of the General Provisions Act [Wet algemene bepalingen], the enforceability of judgements is limited by the exceptions in public law. It is settled case law that according to the rules currently applicable in the Netherlands as unwritten international public law, foreign states enjoy immunity from judicial enforcement, but not in an absolute sense.⁴¹ State property with a public purpose, regardless of whether it is actually used for public purposes, is in any case not subject to forced judicial enforcement.⁴² This rule is supported by art. 19 UN Convention, which has been designated by the Supreme Court as a codification of common international law with regard to the immunity of judicial enforcement and the boundaries imposed on the same.⁴³
- 3.30 I will point out the legislative proposal to approve the UN Convention is now pending before the Lower House.⁴⁴ Following the plenary debate on 14 June 2023, the Minister of Foreign Affairs asked the Commission for Advice on Public Law Issues (CAVV, Commissie van advies inzake volkenrechtelijke vraagstukken) for advice on, among other things, the risks of interpretation differences between courts of states affiliated to the treaty, in particular about the concept of 'commercial purposes' in art. 18 and 19 UN Convention and whether such risks should lead to the making of a statement or a reservation to these Articles.⁴⁵

⁴⁰ Insofar as the written explanation (see nos. 4.4.2 and 4.10.1,4.5.3, 4.6.2 and 5) of the Russian Federation contain further complaints, these complaints were raised too late (art. 407 paragraph 2 CCP). I will therefore disregard these complaints.

⁴¹ See e.g. SC 11 July 2008, ECLI:NL:HR:2008:BD1387, NJ 2010/525, annotated by Th.M. de Boer, recital 3.5; SC June 28, 2013, ECLI:NL:HR:2013:45, NJ 2014/453, annotated by Th.M. de Boer, recital 3.6.1; SC September 30, 2016, ECLI:NL:HR:2016:2236, NJ 2017/190, annotated by Th.M. de Boer under NJ 2017/192, recital 3.4.3.

⁴² See SC 28 June 2013, already cited, recital 3.6.1.

⁴³ See SC 28 June 2013, already cited, recital 3.6.2.

⁴⁴ See Parliamentary Papers II 2021-2022, 36027 (R2160), no. 2.

⁴⁵ See the letter from the Minister of Foreign Affairs to the Chairman of the CAVV, 29 June 2023, which can be consulted at: <https://www.adviescommissievolenrecht.nl/publicaties/adviesaanvragen/2023/07/04/vn-verdrag-state-immunity>.

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3.31 In this case, art. 19, under c, UN Convention is relevant. The provision in the English authentic text reads as follows:

'No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(..)

c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that postjudgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.'

And in the Dutch translation:

'No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(..)

c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that postjudgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.'

3.32 In the so-called Autumn Judgments from 2016, the Supreme Court has clarified that not all provisions of the UN Convention can be considered international customary law, but that this does apply to art. 19 UN Convention.⁴⁶ The feasibility in the Netherlands of both pre-judgement and post-judgement measures is therefore limited by public international law in the sense that such measures are excluded unless and insofar as there is a case as referred to in art. 19, under a through c, UN Convention. The Supreme Court has disregarded whether the coherence requirement at the end of part c can also be considered international customary law.⁴⁷

3.33 In the Autumn Judgements, the Supreme Court also ruled that it is in accordance with the purport of the immunity of judicial enforcement - aimed at respecting the sovereignty of foreign states - and is consistent with art. 19, under c, UN Convention to assume as a starting point that the property of foreign states is not susceptible to attachment and judicial enforcement, unless and insofar as it has been determined that these have a purpose that is not incompatible with this. The obligation to furnish facts and burden of proof with regard to the susceptibility to attachment and judicial enforcement rests with

⁴⁶ See SC 30 September 2016, already cited, recital 3.4.4-3.4.8; SC 14 October 2016, ECLI:NL:HR:2016:2354, NJ 2017/191, annotated by Th.M. de Boer under NJ 2017/192; SC 14 October 2016, ECLI:NL:HR:2016:2371, NJ 2017/192, annotated by Th.M. de Boer, recital 3.4.2. Moreover, the International Court of Justice in its judgement *Jurisdictional Immunities* of 3 February 2012, ICJ Rep. 2012, par. 118, disregarded whether all elements of art. 19 UN Convention can be considered international customary law and it is concluded that 'there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes, or that the State which owns the property has expressly consented to the taking of a measure of constraint, or that that State has allocated the property in question for the satisfaction of a judicial claim'.

⁴⁷ See SC 30 September 2016, already cited, recital 3.4.6.

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the creditor who levies or wants to levy attachment on the property of the foreign state. The creditor will therefore always have to submit information on the basis of which it can be determined that the property is used by the foreign state or is intended for, briefly put, non-public purposes.⁴⁸ This assessment will have to take place separately for each asset.⁴⁹ Even if it concerns monies and funds that are used by the foreign state for various purposes, both public and (exclusively) commercial or otherwise, the creditor who levies or wants to levy an attachment must state and make it plausible that and to what extent those monies and funds are susceptible to attachment and judicial enforcement.⁵⁰

- 3.34 As a result of the Autumn Judgements, it has been defended that the purpose criterion of art. 19, under c, UN Convention should be filled in in such a way that the creditor does not to plausibly argue that the *ultimate* purpose is non-public, but only that the *immediate* purpose of the property or the *immediate* use of the proceeds

is non-public.⁵¹ The Supreme Court rejected this view in the *Samruk decision* of 18 December 2020:

‘3.2.4 The requirement used by the Court of Appeal that it is decisive whether the immediate purpose of the seized property is a different purpose than a public purpose, does not correspond to the rules set out above in 3.2.3 and therefore shows an incorrect understanding of the law. Those rules mean that, under public law, the property of a foreign State is presumed to be subject to a presumption of immunity of judicial enforcement, which only gives way if it has been established that the property in question is used by the foreign State or is intended for non-public purposes, and that it is up to the party invoking an exception to immunity of judicial enforcement to submit data on the basis of which this can be established. It follows from these rules that immunity of judicial enforcement is not limited to property of which the immediate purpose is a public one.’ [footnote omitted; A-G]

- 3.35 The Supreme Court has also found that the opinion of the Court of Appeal that the allocation of the shares held by the Kazakh company Samruk in the Dutch private limited company KMGK is different from a public purpose, shows an incorrect understanding of the law or has been insufficiently substantiated. According to the Supreme Court, the fact that the proceeds from the shares in KMGK are intended to increase the national prosperity of Kazakhstan, in principle indicates that these proceeds have a public purpose.⁵² After annulment and referral, the Court of Appeal of The Hague ruled by judgement of 14 June 2022⁵³ that it has been established that the shares under attachment of Samruk in KMGK enjoy immunity from judicial enforcement. This judgement was appealed in cassation. On 16 June 2023, I submitted an opinion in that case.⁵⁴
- 3.36 I will return to the discussion of the part. Part III.2(a) complains that the Court of Appeal has disregarded that the IP rights under attachment were not used by the Russian Federation, nor intended for use by the Russian Federation, let alone for other than non-commercial government purposes. The IP rights

⁴⁸ See SC 30 September 2016, already cited, recital 3.5.2-3.5.3; SC 14 October 2016, ECLI:NL:HR:2016:2354, already cited, paragraph 3.4.2; SC October 14, 2016, ECLI:NL:HR:2016:2371, already cited, paragraph 3.4.2. See also SC 18 December 2020, ECLI:NL:HR:2020:2103, NJ 2021/242, annotated by Th.M. de Boer, recital 3.2.3 (*Samruk*).

⁴⁹ See SC December 1, 2017, ECLI:NL:HR:2017:3054, NJ 2019/137, annotated by A.I.M. van Mierlo, recital 3.7.2.

⁵⁰ See SC 30 September 2016, already cited, paragraph 3.5.4 and SC October 14, 2016, ECLI:NL:HR:2016:2354, already cited, paragraph 3.5.2, both with reference to SC 11 July 2008, already cited, paragraph 3.5 and 3.7.

⁵¹ For a discussion of this position, I refer to no. 3.20-3.24 of my opinion (ECLI:NL:PHR:2020:649) before SC 18 December 2020, already cited.

⁵² See SC 18 December 2020, recital 3.2.5.

⁵³ ECLI:NL:GHDHA:2022:977.

⁵⁴ ECLI:NL:PHR:2023:611.

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have always and exclusively been used by FKP, and thus the condition from art. 19, under c, UN Convention that the IP rights are specifically used or intended for use *by the state* has not been met.

3.37 In art. 2 preamble and paragraph 1, under b, UN Convention, the term “state” is defined for the application of the treaty. The provision, insofar as currently relevant, in the authentic English text reads as follows:

‘Article 2 Use of terms

1 .For the purposes of the present Convention:

(...)

b) “State” means:

(i) the State and its various organs of government;

(ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

(iv) representatives of the State acting in that capacity;’

And in the Dutch translation:

‘Article 2 Use of terms

1 .For the purposes of the present Convention:

(...)

b) “State” means:

i. the State and its various organs of government;

ii. constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;

iii. agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State;

iv. representatives of the State acting in that capacity;’

3.38 The term ‘state’ is therefore broadly defined. The definition also covers agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State (see under iii). From the explanatory notes to the Draft Articles of the International Law Commission (ILC) 1991, on which the UN Convention is based, it appears that ‘agencies or instrumentalities of the State or other entities’ could also theoretically include state-owned enterprises or other entities established by the State for the purpose of carrying out commercial transactions, but it is presumed that they are not authorised to carry out public tasks and therefore cannot rely on immunity.⁵⁵

3.39 In this case, the Court of Appeal has ruled in recital 5.19 that the IP rights under attachment belong to

⁵⁵ See ILC, Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, 1991, art. 2, note 2, note 15. See also T. Grant, ‘Article 2(1)(a) and (b)’, in: R. O’Keefe, C.J. Tams & A. Tzanakopoulos, The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary, 2013, p. 50-52.

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the recoverable assets of the Russian Federation. In paragraph 5.22, the Court of Appeal has ruled that the claim to cancel the attachment is successful insofar as this is imposed on and under FKP. The following considerations of the Court of Appeal only pertain to the lifting of the attachment levied against the Russian Federation, or the suspension of its judicial enforcement, with FKP in the capacity of a (material) stakeholder (recital 5.23). In the event that the IP rights under attachment belong to the recoverable assets of the Russian Federation, FKP (supported by the Russian Federation) has invoked immunity from judicial enforcement (recital 5.30). When assessing that appeal (recital 5.31-5.34), the Court of Appeal apparently assumed that the IP rights under attachment are property of the Russian Federation within the meaning of art. 19 UN Convention.

- 3.40 The part raises the question whether in such a case, in which it has been established that the property in respect of which immunity from judicial enforcement is invoked due to it being “property of the state” within the meaning of art. 19 UN Convention, independent meaning accrues to the wording of part c that those properties are specifically used or are intended for use “by the state”. Moreover, the part itself states that the Russian

Federation has never used the IP rights under attachment itself and they were also never intended for use by the Russian Federation, “let alone for other than non-commercial government purposes”. If I read the part correctly, it is therefore argued that, in short, the immediate purpose of the IP rights is commercial. In that case, there is no immunity from judicial enforcement and the part already fails on this alone.

- 3.41 I also note that the UN Convention itself provided for the possibility of invoking immunity from judicial enforcement with respect to an attachment levied on property owned or controlled by the State, but used by a state-owned enterprise or other entity. The view that it is required for the application of art. 19, under c, UN Convention that the use take place by the state itself is hard to reconcile with this possibility and in practice will cause it to be the case that, given the definition of the term “state” in art. 2 UN Convention, invoking the exception is (almost) entirely impossible. After all, participation in commerce by a state does often take place via entities that are not authorised to act for the benefit of exercising sovereign state powers, and thus the definition of art. 2 paragraph 1, under b, UN Convention has not been met. The part therefore fails.

- 3.42 Section III.2(b) complains that the Court of Appeal in recital 5.34 has disregarded the fact that the 25% of its net profit paid annually by FKP to the budget of the Russian Federation is used for non-commercial government purposes, and thus these IP rights should have been granted immunity from enforcement to that extent. Expanding on this, part III.2(c) complains that the Court of Appeal has also disregarded the fact that the remainder of 75% remains within FKP itself, and thus - in the opinion of the Court of Appeal - it remains part of the assets of the Russian Federation and is used to maintain FKP, with the sole public ultimate purpose being the payment of profits into the budget of the Russian Federation.

- 3.43 The complaints can be discussed together. In paragraph 5.34, the Court of Appeal rejected the appeal to immunity from judicial enforcement. This judgement is based on two grounds, namely that (i) the IP rights under attachment are used for a commercial purpose (the commercialisation of alcoholic

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beverages) and (ii) the revenues from the IP rights have largely a non-public purpose (namely for the maintenance and the costs of FKP). The Russian Federation has only filed complaints against the second ground. The question arises whether both grounds jointly bear the finding that the appeal to immunity from judicial enforcement fails or that both grounds are independently bearing. Should the latter be the case, the Russian Federation has no interest in its complaints against the second ground.

- 3.44 I note the following about the question of whether both grounds are jointly or each independently bearing. In paragraph 5.34, the Court of Appeal has not only taken into account the purpose of the IP rights themselves, but also the purpose of the revenues obtained with the IP rights. It has been established that HVY did not levy an attachment on claims related to the exploitation of IP rights, nor to the distributions of profits by FKP to the Russian Federation. However, the provisions in art. 474bb paragraph 2 in conjunction with art. 474b CCP mean that the benefits that generate intellectual property rights also fall under the attachment.⁵⁶ Regarding this point, parallels can be drawn with the case from the *Samruk* decision of 18 December 2020. This is because income, including dividend payments, is also covered by the attachment.⁵⁷ The Supreme Court has considered that the circumstance that the *proceeds* from the shares are intended to increase national prosperity, indicates in principle that they have a public purpose. From this it can be inferred that the proceeds from the IP rights under attachment must also be taken into account when considering whether the IP rights are specifically used or intended for use by the state for non-commercial government purposes. However, the proceeds from the IP rights under attachment cannot automatically be equated - as the Court of Appeal seems to have done - to the net profit or income of FKP.⁵⁸ In the lower courts, FKP has argued that its net profit arises from the exploitation of the IP rights, including damages that FKP receives in case of an infringement of the IP rights.⁵⁹ The Court of Appeal has only considered that it is not in dispute between the parties that FKP must surrender part of its net profits to the budget of the Russian Federation. In light of the above, both grounds therefore jointly support the opinion of the Court of Appeal that the appeal to immunity of judicial enforcement fails, and thus I come to the substantive treatment of the complaints.
- 3.45 In the Autumn Judgements, the Supreme Court ruled that even in the case of funds and credits that are used by the foreign state for various purposes, the creditor must state and plausibly argue that and to *what extent* those funds and credits are susceptible to attachment and judicial enforcement.⁶⁰ From this it can be inferred that for property with a mixed purpose, the presumption of immunity from judicial enforcement differs only for the part of the property that the creditor has shown to have a non-public purpose.⁶¹ In foreign case law another approach can also be found, in which, briefly put, it is considered decisive whether (the proceeds of) the property is predominantly used for commercial purposes. If the

⁵⁶ Moreover, based on art. 2, paragraph 4 of the Copyright Act, the copyright that accrues to the creator of a work is not eligible for attachment, but this exception does not apply to a (fictitious) creator within the meaning of art. 7 and 8 of the Copyright Act (art. 2, paragraph 5 of the Copyright Act). Fruits of the exploitation of the copyright, such as royalties, are always (independently) susceptible to (pre-judgement) attachment and judicial enforcement, see Spoor/Verkade/Visser, I.c., par. 9.12 (p. 516).

⁵⁷ See art. 474b paragraph 1 CCP. See also G. van Daal, *Executoriaal en conservatoir verhaalsbeslag op aandelen in kapitaalvennootschappen en op certificaten daarvan*, 2008, no. 76 et seq., 205 et seq.

⁵⁸ See no. 8-10 of the annotation by M.C. van Leyenhorst (JBPr 2022/77) under the contested judgement.

⁵⁹ See No. 142 and footnote 10 of the Statement of Reply FKP.

⁶⁰ See SC 30 September 2016, already cited, paragraph 3.5.4 and SC October 14, 2016, ECLI:NL:HR:2016:2354, already cited, recital 3.5.2.

⁶¹ See also no. 25 of the opinion of A-G Strikwerda (ECLI:NL:PHR:2008:BD1387) before SC 11 July 2008, already cited, and no. 2.13 of my opinion (ECLI:NL:PHR:2016:552) before SC 14 October 2016, ECLI:NL:HR:2016:2371, already cited.

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answer to this is affirmative, the property as a whole is exposed to attachment and judicial enforcement.⁶²

3.46 In this case, the ground apparently defends the view that a part of the IP rights under attachment enjoy immunity from judicial enforcement, insofar as the proceeds thereof accrue to the budget of the Russian Federation each year (25% of the net profit of FKP), because it has not been established that this portion is ultimately used for commercial purposes. I believe this view to be incorrect. Firstly, it has not been shown that this portion (25%) can be traced back to specific IP rights under attachment for which immunity of judicial enforcement would apply. In that case, it should also be traceable that immunity should not apply to other IP rights under attachment (which provide for the other 75% of the net profit of FKP).

I think that is an impossible exercise before the court and certainly in preliminary relief proceedings in a judicial enforcement dispute. Secondly, the Court of Appeal - undisputed in cassation - has determined that the IP rights under attachment are used for other than non-commercial government purposes, namely the commercial exploitation of alcoholic beverages. This purpose applies to all IP rights under attachment. After all, HVY has argued that the IP rights under attachment have a non-public purpose and must for this purpose distinguish the beverage types sold under these rights and, if applicable, take enforcement action (see recital 5.32). The Russian Federation has acknowledged in cassation that the immediate use of IP rights by FKP is aimed at a commercial purpose, namely the promotion of the sale of the relevant alcoholic beverages that are traded using the IP rights.⁶³ Against this background, I believe that the Court of Appeal rightly ruled that the IP rights - taken as a whole - are specifically used or intended for use for other than non-commercial government purposes, and thus the presumption of immunity of judicial enforcement must give way to this. There is no violation of international customary law. Therefore, parts III.2(b) and III.2(c) fail.

3.47 Part IV is included in the additional summons. The part is directed against recital 5.21 and complains that the Court of Appeal has ruled, wrongly and/or without adequate justification, that, insofar as HVY intended to levy a post-judgement garnishment against FKP with the garnishment writ, there is no legally levied garnishment.

3.48 The part fails due to an absence of interest, because the Court of Appeal has ruled in paragraph 5.21 in favour of FKP and the Russian Federation.⁶⁴ Incidentally, recital 5.21, contrary to what the part assumes, does not entail that garnishment of intellectual property rights is possible.

3.49 Part V is included in the supplemental summons and apparently directed against recital 5.36.⁶⁵ In order to assess the claim for suspension of the judicial enforcement with regard to the attachment levied on the Russian Federation, the Court of Appeal weighed the interests involved in both granting and rejecting and concluded that the interests of HVY in judicial enforcement outweigh [those of the Russian Federation]. The part complains that this opinion is incorrect and/or insufficiently substantiated. The explanatory note argues that this judgement is incomprehensible in light of the established recovery risk

⁶² See, among other things, the Swedish Supreme Court (Högsta Domstolen) 1 July 2011, Ö 170-10 (English translation), about which: M. Potesta, 'Sedelmayer v. Russian Federation', *American Journal of International Law* 106:2, 2012; United States Court of Appeal for the Fifth Circuit 17 September 2004, 383 F.3d 361, on which Y. Dautaj, 'Enforcing Arbitral Awards Against States and the Defense of Sovereign Immunity from Execution: A U.S. Perspective', *Penn State Journal of Law & International Affairs* 11:2, 2023, p. 127-129.

⁶³ See III.2 under (b) of the summons.

⁶⁴ See Asser *Procesrecht/Korthals Altes & Groen* 7 2015/48-49.

⁶⁵ In the supplemental summons (p. 9, first sentence), it erroneously refers to paragraph 5.39, while it follows from the complaint that recital 5.36 is intended.

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on the part of HVY. The circumstances listed by the Court of Appeal cannot bear its decision, or at least cannot, without further justification, cause the weighing of interests to shift in balance towards HVY. In its judgement, the Court of Appeal failed to include the essential assertions of the Russian Federation that HVY does not need funds to maintain its business activities, make necessary investments or provide for the livelihood of the Yukos oligarchs, and that the enforcement sale of the IP rights will have far-reaching and irreversible harmful consequences, according to the part.

- 3.50 On the basis of art. 438 paragraph 3 CCP, the preliminary relief judge may suspend the enforcement of a judgement in an enforcement dispute. In the so-called Zeester decision of December 20, 2019⁶⁶, the Supreme Court outlined which criterion the court must employ for this. The starting point is that a judgement, once pronounced, must be enforceable pending an appeal. Deviation from this principle can be justified by circumstances that entail that the interest of the affected party in maintaining the existing situation as long as their legal remedy has not been decided on outweighs the interest of the person who has obtained the judgement in having the judgement be enforced, should it be provisionally enforceable. In the application of this measure, the chance of success of the legal remedy used or to be used against that decision is not taken into account, with the understanding that the court may refer in its judgement to, or the decision(s) to be enforced is(are) based on, an apparent wrongdoing. In preliminary relief proceedings regarding the enforcement of a judgement that has become *res judicata* [kracht van gewijsde], the suspension can only be ordered if the (continued) enforcement would constitute abuse of authority.⁶⁷
- 3.51 In the context of the discussion of part I, the matter was raised that the court that rules on the annulment of an arbitral award, based on art. 1066 paragraph 2 CCP⁶⁸, may suspend the enforcement of the arbitral award at the request of the most appropriate party. When deciding on such a request for suspension, the applicable criterion is that the court must form a preliminary opinion about the claim for annulment of the arbitral award and must also weigh the interests of the parties.⁶⁹ Parliamentary history notes that art. 1066 CCP does not exclude the option to request suspension from the preliminary relief judge in the event of immediate urgency.⁷⁰ Meijer argues that this option exists regardless of whether a claim for annulment is (already) pending.⁷¹ It must be assumed that this option in any case exists for a third party who is not a party to the arbitral award and in that capacity cannot claim the annulment thereof, but nevertheless suffers harm from the enforcement of that judgement.
- 3.52 The question arises whether in the event that suspension of the enforcement of an arbitral award is requested in preliminary relief proceedings, the standard of art. 438 paragraph 3 CCP or the standard of art. 1066 paragraph 2 CCP must be applied. Case law of the lower courts shows diverging opinions.⁷²

⁶⁶ ECLI:NL:HR:2019:2026, NJ 2020/425, annotated by A.I.M. van Mierlo.

⁶⁷ See SC 22 April 1983, ECLI:NL:HR:1983:AG4575, NJ 1984/145, annotated by W.H. Heemskerk.

⁶⁸ Art. 1066 paragraph 2 CCP did not undergo any change in the Law on Modernisation of the Arbitral Tribunal.

⁶⁹ See SC 21 March 1997, ECLI:NL:HR:1997:ZC2314, NJ 1998/206, annotated by H.J. Snijders, recital 3.5; SC December 4, 2020, already cited, recital 3.3.2.

⁷⁰ See Meijer & Van Mierlo, *Pari. Gesch. Arbitragewet 2015/111.49.3*. See also H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering*, art. 1066 CCP, note 2; J.W. Bitter & H. Biesheuvel, *Arbitrage*, 2018, p. 129; Asser *Procesrecht/Boonekamp* 6 2020/55.

⁷¹ See G.J. Meijer, *T&C CCP*, comments on art. 1066 CCP, note 2.d; see also P. Sanders, *Het Nederlandse arbitragerecht*, 2001, par. VI.2(c) and VII.B.3.2.

⁷² In District Court of Rotterdam 24 April 2012, ECLI:NL:RBROT:2012:BW5070 and District Court of Oost-Brabant 13 October 2022, ECLI:NL:RBOBR:2022:4491, the preliminary relief judge applied the standard of art. 1066 paragraph 2 CCP, while in District Court of Middelburg 1 March 2011, ECLI:NL:RBMID:2011:BQ1342, the preliminary relief judge applied the standard of art. 438 paragraph 2 (old) CCP (currently: art. 438 paragraph 3 CCP). In the contested judgement, the Court of Appeal

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It is not an obvious choice to use a different standard depending on whether the request for suspension is assessed by the annulment judge or by the judge in preliminary relief proceedings. In addition, the standard of art. 438 paragraph 3 CCP is tailored to the situation that an ordinary appeal has been filed against a judgement declared provisionally enforceable. Annulment is an extraordinary legal remedy⁷³, and thus in the application of the standard of art. 438 paragraph 3 CCP, it would be the case that the suspension may only be pronounced if the (further) enforcement of the arbitral award were to result in abuse of jurisdiction. I would like to argue that the standard of art. 1066 paragraph 2 CCP must be applied regardless of whether the request for suspension has been submitted to the annulment judge or the judge in preliminary relief proceedings. I find no insurmountable objection in the fact that the judge in preliminary relief proceedings will have to give a preliminary opinion about the claim for annulment of the arbitral award, which is not normally part of his competence⁷⁴, and it does not outweigh the interest of legal unity on this point.

- 3.53 In the annulment procedure with regard to the arbitral decisions, the Russian Federation submitted in cassation a suspension request based on art. 1066 paragraph 2 CCP. By decision of September 25, 2020, the Supreme Court declared that it had jurisdiction to consider that request and ruled that the circumstance that suspension of the enforcement of an arbitral award can also be requested in preliminary relief proceedings does not mean that art. 1066 paragraph 2 CCP does not apply in cassation.⁷⁵ Subsequently, the Supreme Court in recital 3.19 of the already cited decision of 4 December 2020, for the time being ruled that the likelihood of the complaints mentioned in the request for suspension leading to annulment of (one of) the judgements of the Court of Appeal - and subsequently to annulment of the arbitral decisions - is not such that the enforcement of the arbitral decisions must be suspended. On the interests of HVY and the Russian Federation in granting and rejecting the request for suspension, the Supreme Court found as follows:

'3.20 The Supreme Court is of the opinion that it is sufficiently plausible that the enforcement of the Yukos Copyright Awards entails some recovery risk. However, it is also sufficiently plausible that the collection of what the Russian Federation was ordered to pay in the Yukos Copyright Awards is not simple and that it cannot be expected that HVY will be able to collect the full amount of (more than) USD 57 billion or a significant part thereof during the remaining term of these proceedings. It is also important that it is sufficiently plausible for the time being that HVY is entitled to payment by the Russian Federation of a significant part of the amount of € 1.866.104.634 awarded in that judgement, plus interest, based on the ECtHR ruling of 31 July 2014. Taking this into account, a weighing of interests does not lead to a different conclusion other than the one to be reached below with regard to the suspension request of the Russian Federation.'

- 3.54 In my opinion before this decision⁷⁶, I have explained which factors play a role in this consideration, namely the interests of the parties in light of the duration of the annulment and revocation procedure, the irreversible consequences of the enforcement and the recovery risk. In individual cases, other interests may be relevant. The result of a weighing of interests as a result of a claim or request for suspension based on art. 438 paragraph 3 CCP or art. 1066 paragraph 2 CCP is a factual judgement,

applied both measures (recitals 5.35-5.38).

⁷³See art. 1064 CCP in conjunction with art. 1066 paragraph 1 CCP. See e.g. also G.J. Meijer, T&C Rv, comments on art. 1064 CCP, note 1.a.

⁷⁴Cf. Sanders, I.c., par. VI.2(c) and VII.B.3.2.

⁷⁵See SC 25 September 2020, ECLI:NL:HR:2020:1511, NJ 2020/360, recital 3.4.

⁷⁶ECLI:NL:PHR:2020:1082 under 3.19 and 3.20.

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which can only be examined in cassation for its comprehensibility.⁷⁷

- 3.55 It follows from recital 5.36 that the Court of Appeal in its assessment considered a recovery risk existing on the part of HVY as being as yet sufficiently plausible. The Court of Appeal has not only taken into account the arguments of FKP and the Russian Federation in this regard, including the argument that HVY does not need funds to maintain its business activities, make necessary investments or provide for the livelihood of the Yukos oligarchs, into consideration in its judgment, but apparently also adopted these arguments. Contrary to what the part argues, this may be affected by the fact that HVY - according to the Court of Appeal - will not be able to collect a significant part of the amounts awarded in the arbitral decisions. After all, this circumstance limits the extent of the recovery risk. The duration of the annulment procedure is also a relevant factor that the Court of Appeal may consider in favour of HVY. Furthermore, the final sentence of recital 5.36 shows that the Court of Appeal has clearly taken into account in its judgment the argument that the enforcement sale of the IP rights will have far-reaching and irreversible consequences. In short, the result of the weighing of interests by the Court of Appeal is neither incomprehensible nor insufficiently substantiated. This causes the complaints of the part to fail.
- 3.56 Part VI contains a sweeping complaint, which is directed against paragraph 5.39 to 5.41 and the operative part of the contested judgement. In view of the failure of all the preceding parts, this complaint does not require separate discussion.
- 3.57 The conclusion is that the principal appeal fails.
- 3.58 The cross-appeal in cassation of HVY has been lodged under the condition that the principal cassation appeal succeeds and leads to annulment of the contested judgement. Since none of the complaints of the principal appeal in cassation succeed, the condition under which the cross-appeal was lodged has not been fulfilled. The cross-appeal therefore does not need to be discussed.

4. Conclusion

The conclusion is to reject the principal cassation appeal.

The Procurator-General of the Supreme Court of
the Netherlands

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⁷⁷ See Van der Voort Maarschalk, I.c., 2019/68; Asser Procesrecht/Korthals Altes & Groen 7 2015/157.

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Signature Opinion P.G.

ECLI:NL:PHR:2023:821

Signatures

Vlas, Prof. mr. P.

[signature]