UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

HULLEY ENTERPRISES LTD., YUKOS UNIVERSAL LTD., and VETERAN PETROLEUM LTD., *Petitioners,* v. THE RUSSIAN FEDERATION, *Respondent.*	Case No. 1:14-cv-01996-BAH

SECOND WITNESS STATEMENT OF TOBIAS COHEN JEHORAM

I, Tobias Cohen Jehoram, of De Brauw Blackstone Westbroek N.V. ("De Brauw"), Claude Debussylaan 80, 1082 MD Amsterdam, The Netherlands, pursuant to 28 U.S.C. § 1746, declare:

1. I, Professor Dr Tobias Cohen Jehoram, am a Partner of De Brauw and Professor at the School of Law of Erasmus University of Rotterdam. I was admitted to the Netherlands Bar (Orde van Advocaten) to practise law as an attorney (advocaat) in 1993. In addition, I am a Supreme Court Attorney (Advocaat bij de Hoge Raad) within the meaning of Article 9(j)(1) of the Dutch Attorneys Act (Advocatenwet). This would roughly and informally translate as being admitted to the Supreme Court Bar of the Netherlands. My resume has previously been provided to the Court in connection with my prior declaration in this matter. *See* Dkt. 181-44.

2. I make this declaration based on my personal knowledge, experience and education. If sworn as a witness, I could and would testify competently to the matters referred to below.

3. I was the lead lawyer with responsibility on behalf of the petitioners Hulley Enterprises Ltd., Yukos Universal Ltd., and Veteran Petroleum Ltd. (collectively, "**HVY**") for the

proceedings before the Netherlands Supreme Court (Hoge Raad der Nederlanden, the "**Dutch Supreme Court**") with case number 20/01595 (the "**Cassation Proceedings**"), relating to the Russian Federation's application for setting aside of arbitral awards issued in the arbitration proceedings captioned *Hulley Enterprises Limited (Cyprus) v. The Russian Federation,* PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228 (the "**Arbitrations**", and the "**Awards**"). The Awards include three final arbitration awards, all dated 18 July 2014, between each of the Claimants and the Russian Federation (the **"Final Awards**") and three interim awards dated 30 November 2009 in which some of the Russian Federation's objections to jurisdiction and admissibility in the Arbitrations were resolved (the "**Interim Awards**"). The Dutch Supreme Court published an English translation of its decision in the Cassation Proceedings on its official website on December 13, 2021. In this Declaration, I refer to that translation as the "**Dutch Supreme Court Judgment.**"[1]

4. Other partners at my firm served as lead counsel for HVY in proceedings before the District Court of The Hague (the "**Hague District Court**") and the Court of Appeal of The Hague (the "**Hague Court of Appeal**"). In connection with my representation of HVY in the Dutch Supreme Court, I thoroughly reviewed the records of the proceedings before these courts.

5. I am informed by HVY's U.S. counsel, Susman Godfrey LLP, that the following question will be relevant to U.S. District Court's consideration of whether the Russian Federation has sovereign immunity from the confirmation petition filed against it by HVY in the U.S. District

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[1] The translation of the Hague Court of Appeal decision was certified by a qualified translator. I am informed that this translation is in the record before the U.S. District Court at Docket Number 181-26. The other translations used in this Declaration are the work of myself and lawyers at my law firm who are competent in the English language.

Court: Does the Energy Charter Treaty ("**ECT**") contain an agreement by the Russian Federation to submit to arbitration the claims made against it by HVY in the Arbitrations? I will refer to this as the "ECT Question."

6. I have been asked by Susman Godfrey to answer the following questions:

(1) Was the ECT Question actually litigated by the parties in the Dutch Proceedings, and if so, what answer was given by the Dutch Courts?

(2) Is the Dutch Courts' answer to the ECT Question final?

(3) Did the Dutch Courts have jurisdiction (over the parties and the subject matter) to decide the ECT Question?

(4) Did the Dutch Proceedings provide for a full and fair trial of the ECT Question?

(5) Were the Dutch Proceedings conducted without prejudice or fraud?

(6) What are the remaining proceedings in the Dutch Courts, and when will they be concluded?

(7) What is the current status of the Awards under Dutch law?

I. The ECT Question Was Litigated by the Parties and Answered in the Affirmative by the Dutch Courts

7. The ECT Question was thoroughly litigated in the Dutch Proceedings and was answered by the Dutch Courts in the affirmative: The ECT contains an agreement by the Russian Federation to submit to arbitration the claims made against it by HVY in the Arbitrations.

8. Article 26 of the ECT provides for the arbitration of: "[D]isputes between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former . . . ." ECT art. 26(1). The Arbitral Tribunal found, in its Interim Awards, that Article 26 constituted an agreement by the Russian Federation to submit to arbitration the claims made against it by HVY.

9. The Dutch Proceedings were instituted by the Russian Federation in an attempt to "set aside" the Awards. Article 1065 of the Dutch Code of Civil Procedure sets forth the only possible grounds for setting aside arbitral awards. The first such ground is that "a valid arbitration agreement is lacking." Hague Court of Appeal Judgment ¶ 4.4.3 (quoting the Dutch Code of Civil Procedure ("**DCCP**") art. 1065(1)(a)).[2] This is precisely the ECT Question, that is, "whether or not a valid arbitration agreement between the parties *exists*." *Id.*

10. This ground for setting aside was one of the Russian Federation's principal contentions in the Dutch Proceedings. In the Hague Court of Appeal, the Russian Federation made various arguments as to why, in its view, it was not bound by the arbitration clause in Article 26 of the ECT. *See* Hague Court of Appeal Judgment ¶¶ 3.2.1-3.2.4 (summarizing the Russian Federation's arguments).

11. The Russian Federation's contentions on this issue were all considered *de novo* by the Hague Court of Appeal, that is, without deference to the Arbitral Tribunal's findings. As the Hague Court of Appeal stated: "It is . . . established case law that the court ultimately has the final say on the question of whether a valid arbitration agreement was concluded and that this question is subject to a full review by the court." *Id.* ¶ 4.4.3.[3]

12. The Hague Court of Appeal considered and rejected each of the Russian Federation's arguments, and answered the ECT Question in the affirmative: The ECT contained

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2 All references to the DCCP in this Declaration are references to the "old" version of the DCCP, *i.e.*, the version that was in effect at all relevant times, prior to its revision effective 1 January 2015.

3 *See also* Supreme Court 26 September 2014, ECLI:NL:HR:2014:2837, *NJ* 2015/318 (*Ecuador/Chevron I*), para. 4.2: "[T]he fundamental nature of the right to access to the court implies that it is ultimately up to the court to decide whether or not the arbitration agreement is valid [...]. Moreover, this fundamental nature also comprises that the court does not apply restraint when assessing a claim to set aside an arbitral award based on the ground mentioned in art. 1065(1)(a) DCCP."

a valid agreement by the Russian Federation to submit to arbitration the claims made against it by HVY. In summing up its decision, the Hague Court of Appeal wrote: "In conclusion, none of the grounds argued by the Russian Federation for the absence of a valid arbitration agreement support such a conclusion. There is no reason to set aside the Yukos Awards pursuant to Article 1065(1)(a) DCCP." Hague Court of Appeal Judgment ¶ 5.3.1. In the paragraphs that follow, I cite each of the Russian Federation's arguments in relation to this setting-aside ground, and cite (with parenthetical descriptions) the Hague Court of Appeal's rejections of each argument. I then describe the Dutch Supreme Court's judgment (if any) on that argument.

A. Provisional Application of ECT Article 26 (the Article Providing for Arbitration)

13. Article 45(1) of the ECT provides that, by signing the ECT, a state thereby agrees to apply the treaty "provisionally," from the moment of signature. The key text in Article 45(1), providing for "provisional" application, is:

> Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory… to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.

Hague Court of Appeal Judgment, ¶ 4.5.1 (quoting Article 45(1), emphasis added). The Hague Court of Appeal referred to the underlined text as the "Limitation Clause" of Article 45(1). *Id.* ¶ 3.2.1. It is undisputed that the Russian Federation signed the ECT in 1994. *Id.* ¶ 4.3.2.

14. The Hague District Court interpreted Article 45(1) in conjunction with certain Russian Law provisions as prohibiting the provisional application of Article 26 to the Russian Federation. This was the sole legal basis for the Hague District Court's decision. HVY then appealed that decision to the Hague Court of Appeal, which, as I have previously stated, conducted a *de novo* review of all issues before it.

15. In the Hague Court of Appeal, the Russian Federation contended that by signing the ECT, it did not agree to be bound by Article 26 (the Article that provides for arbitration) because, in its view, provisional application of Article 26 is barred by the Limitation Clause, as being allegedly "inconsistent with [the Russian Federation's] constitution, laws or regulations." *See id.* ¶¶ 4.5.3, 4.7.2.1-4.7.4, 4.7.33-.34, 4.7.59 (summarizing the Russian Federation's arguments). The Hague Court of Appeal rejected the Russian Federation's arguments, and found that the Russian Federation agreed to apply Article 26 provisionally when the Russian Federation signed the ECT. *Id.* ¶ 4.6.1 (finding that the Russian Federation has "not . . . shown that Russian law comprises a rule that precludes the provisional application of Article 26"), ¶¶ 4.7.5, 4.7.32 (rejecting the Russian Federation's argument that provisional application of Article 26 would be inconsistent with Russian law's "separation of powers" doctrine), ¶¶ 4.7.35, 4.7.57-.58 (rejecting the Russian Federation's argument that provisional application of Article 26 would be inconsistent with Russian laws barring arbitration of certain "public law" disputes), ¶¶ 4.7.62-.65 (rejecting the Russian Federation's argument that provisional application of Article 26 would be inconsistent with Russian law regarding the limits on shareholders' rights to file a claim arising from damages inflicted on the company).

16. In the Dutch Supreme Court, the Russian Federation argued that the Russian Federation was not provisionally bound by the arbitration clause in Article 26 ECT pursuant to Article 45 ECT. The Dutch Supreme Court rejected the Russian Federation's reading of Article 45, and further held that there was no reason to refer the question to the Court of Justice of the European Union ("**CJEU**"). Dutch Supreme Court Judgment, ¶ 5.2.4, 5.2.7, 5.2.16, 5.2.20.

17. The Dutch Supreme Court then ruled that the Russian Federation's challenges, to the Hague Court of Appeal's decisions regarding the content of Russian law, all failed because

these challenges cannot be the subject of a complaint in cassation. *E.g.*, ¶ 5.2.17 ("The court of appeal's finding that Russian law explicitly allows arbitration in a dispute such as the present case is also based on its interpretation of Russian law. . . . [T]he correctness of this judgment cannot be questioned in cassation.").

B. "Investors" and "Investments"

18. In the Hague Court of Appeal, the Russian Federation also contended that Article 26 did not constitute an agreement to arbitrate HVY's claims because, according to the Russian Federation, HVY were not "Investor[s] of another Contracting Party" and HVY's shares of Yukos were not "Investment[s] . . . in the Area of [the Russian Federation]," within the meaning of those phrases in Article 26 and within the meaning of the definitions of "Investment" and "Investor" contained in Article 1(6) and (7) of the ECT. Hague Court of Appeal Judgment, ¶¶ 5.1.3-.4, 5.1.7.1, 5.1.8.1-3, 5.1.8.5, 5.1.9.1, 5.1.10.1, 5.1.11.1 (summarizing the Russian Federation's arguments).

19. The Hague Court of Appeal rejected the Russian Federation's arguments. *Id.* ¶ 5.1.6 (finding that HVY are "Investor[s] of another Contracting Party" because HVY are "companies that are 'organized in accordance with the law applicable in that Contracting Party [i.e., in Cyprus and the Isle of Man, the jurisdictions under whose laws HVY are organized]'" and finding that HVY's "Yukos shares" qualify as "Investments"); ¶¶ 5.1.7.2-.4 (rejecting the Russian Federation's argument that the nationality of HVY's controlling persons is relevant); ¶¶ 5.1.8.2-.4 (rejecting the Russian Federation's argument that Article 17's "denial of benefits" clause means that entities controlled by Russian nationals do not qualify as "Investors of another Contracting Party"); ¶¶ 5.1.8.6-.11 (rejecting Russian Federation's argument that a "rule of customary international law" prohibits "companies in which nationals of the [Russian Federation] state have a controlling interest" from "bringing an international law action" against the Russian Federation); ¶¶ 5.1.9.2-.5 (rejecting Russian Federation's contention that HVY's Yukos shares are not

"Investment[s] in the Area" because HVY allegedly did not "actively make an investment" within the Russian Federation); ¶¶ 5.1.10.1-.4 (rejecting Russian Federation's contention that, under the doctrine of "piercing the corporate veil," the nationality of HVY's control persons should be considered when determining whether HVY qualify as "Investors of another Contracting Party"); ¶¶ 5.1.11.2-.9 (rejecting the Russian Federation's contention that various allegations of "fraud" and "bribery" deprived the arbitral tribunal of jurisdiction under Article 26); *id.* ¶ 5.1.12 (concluding that "the Russian Federation's reliance on Article 1(6) and (7) ECT fails").

20. The Dutch Supreme Court affirmed the correctness of the Hague Court of Appeal's interpretation of these provisions. Dutch Supreme Court Judgment, ¶ 5.3.11. "[T]he parties to the ECT deliberately opted for a broad meaning of the terms 'Investor' and 'Investment' and, despite proposals to the contrary, refrained from including additional criteria." *Id.* ¶ 5.3.12.

C. Taxation Measures

21. Article 21(1) of the ECT states that "nothing in this Treaty shall create rights or impose obligations with respect to Taxation Measures of the Contracting Parties." ECT art. 21(1). In the Hague Court of Appeal, the Russian Federation contended that Article 26 did not constitute an agreement to arbitrate HVY's claims because, according to the Russian Federation, (a) Article 21(1) of the ECT forbids arbitration of disputes relating to taxation, and (b) HVY's claims arise from taxes imposed by the Russian Federation. Hague Court of Appeal Judgment, ¶ 5.2.3 (summarizing the Russian Federation's arguments).

22. The Hague Court of Appeal rejected these arguments. *Id.* ¶¶ 5.2.5-.10 (rejecting the Russian Federation's argument that Article 21(1) restricts the jurisdiction of an arbitral tribunal under Article 26); ¶¶ 5.2.11-22 (rejecting the Russian Federation's argument that the expropriation of HVY's Yukos shares constituted a "Taxation Measure" for purposes of Article 21(1)).

23. The Russian Federation chose not to appeal these particular decisions to the Dutch Supreme Court. Therefore, the Hague Court of Appeal's decision on this ground is now final. (The Russian Federation made a separate argument, in the Dutch Supreme Court, that the arbitral tribunal had violated its mandate by not explicitly soliciting the opinion of the Russian tax authorities. The Dutch Supreme Court denied cassation on that ground. Dutch Supreme Court Judgment, ¶ 5.5.7.)

II. The Dutch Courts' Answer to the ECT Question Is Final

24. The ECT Question has been finally resolved in HVY's favor. This is the result of the Dutch Supreme Court's decision to reject the complaints of the Russian Federation, against the decision of the Hague Court of Appeal, regarding the ECT Question. Dutch law principles of *res judicata* preclude the Russian Federation from re-litigating the ECT Question.

25. Article 236(1) of the DCCP provides as follows: "Decisions that concern the legal relationship in dispute and are contained in an irreversible judgment, have binding force in another dispute between the same parties." Pursuant to this Article, decisions that concern the legal relationship in dispute, and that are contained in a final and conclusive judgment, have binding effect (*bindende kracht*) in another dispute between the same parties.[4] This means that irreversible decisions concerning the legal dispute between the parties can no longer be questioned in a new

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[4] *See* Explanatory Memorandum, Article 236 DCCP (former Article 67 DCCP): "The words 'irreversible judgment' express that the binding force is only accorded to a judgment which is not or is no longer subject to opposition, appeal or cassation." ("*De woorden 'in een in kracht van gewijsde gegaan vonnis' drukken uit, dat de bindende kracht alleen toekomt aan een vonnis dat niet of niet meer vatbaar is voor verzet, hoger beroep of cassatie.*")

dispute between the parties. Thus, the object of the decision cannot again become the object of proceedings between the parties.[5]

26. The Hague Court of Appeal's judgment regarding the ECT Question is now an "irreversible judgment," for purposes of Article 236(1), because the Supreme Court, on November 5, 2021, denied the Russian Federation's cassation appeal regarding the ECT Question. No further appeal is possible, nor are any other ordinary legal remedies available.

27. The Hague Court of Appeal's decision, on the ECT Question, is a "[d]ecision[] that concern[ed] the legal relationship in dispute" in the Dutch Proceedings, for purposes of Article 236(1). The "legal relationship in dispute," as far as the ECT Question is concerned, is whether the ECT contains a valid agreement by the Russian Federation to arbitrate the claims brought against it by HVY in the Arbitrations. It is settled Supreme Court case law that the phrase "*decisions concerning the legal relationship that is in dispute*" does not only regard the operative part of the Hague Court of Appeal Judgment (*dictum*), but also the supporting considerations of

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5 *See* Supreme Court 18 December 2020, ECLI:NL:HR:2020:2099, para. 3.1.3: "Res judicata may be invoked if the same point of contention is presented in a lawsuit between the same parties as in a previous lawsuit, and the decision given in the operative part of the previous judgment rests (in part) on a decision on that point of contention, regardless of whether what is claimed is the same" ("*Het gezag van gewijsde kan worden ingeroepen als in een geding tussen dezelfde partijen eenzelfde geschilpunt wordt voorgelegd als in een eerder geding, en de in het dictum van de eerdere uitspraak gegeven beslissing (mede) berust op een beslissing over dat geschilpunt, ongeacht of wat gevorderd wordt hetzelfde is.*"). *See also* Supreme Court 16 May 1975, *NJ* 1976/465 (*Du Crocq/Van Tuyn*); Supreme Court 14 October 1988, *NJ* 1989/413 (*Wijnberg c.s./WUH*).

the decision.[6] The force of *res judicata*, under Article 236(1), covers all decisions by the Hague Court of Appeal necessary to determine the legal relationship in dispute.[7]

28. Even if the Russian Federation were to advance new facts and evidence as to why in its view the ECT does not constitute a valid agreement to arbitrate HVY's claims, Article 236(1) would still preclude the Russian Federation from re-litigating the ECT Question. The Supreme Court of the Netherlands recently re-affirmed this principle, as follows: "[I]n case of an appeal to the authority of *res judicata*, facts and evidence that have not been brought forward in the earlier

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6 *See* Opinion of the Advocate-General of 3 July 2020 for Supreme Court 18 December 2020, ECLI:NL:HR:2020:2099, para. 2.1; Veegens, Het gezag van gewijsde (1972), p. 33-34: "the authority of res judicata [accrues] to all decisions that are necessary to determine the concrete legal relationship of the parties and carry the final decision. It is indifferent whether they are laid down in the decision given in the operative part of the judgment or merely form part of the grounds, i.e. decide preliminary questions that the court had to answer in order to settle the dispute to the extent in which it was submitted to it. They may relate both to points in dispute raised by the parties and to questions which the judge must examine of his own motion." ("*het gezag van gewijsde* [komt] *toe aan alle beslissingen die noodzakelijk zijn ter bepaling van de concrete rechtsverhouding van partijen en de eindbeslissing dragen. Het is onverschillig of zij zijn neergelegd in het dictum dan wel enkel deel uitmaken van de gronden, d.w.z. voorvragen beslissen die de rechter heeft moeten beantwoorden om het geschil in de omvang waarin het hem is voorgelegd te beslechten. Zij kunnen zowel betrekking hebben op geschilpunten opgeworpen door partijen als op vragen die de rechter ambtshalve moet onderzoeken.*").

7 *See* Supreme Court 20 January 1984, *NJ* 1987/295 (*Leutscher/Van Tuyn II*), para. 3.10: "In its judgment of November 27, 1980, the Amsterdam Court of Appeal dismissed both Leutscher's appeal against the unfounded statement of opposition and the Van Tuyns' cross-appeal against the above-mentioned consideration of the District Court. The Court of Appeal's judgment on that grievance [...] was not decisive for the decision on the point of dispute of pp. in those proceedings [...] so that it did not have the authority of res judicata. Leutscher's claim to the force of res judicata of this decision was therefore rightly rejected by the contested judgment of the Court of Appeal of 's-Hertogenbosch." ("*Bij zijn arrest van 27 nov. 1980 verwierp het Hof te Amsterdam zowel het appel van Leutscher tegen de ongegrondverklaring van het verzet als de grief welke de Van Tuyns in incidenteel appel hadden ontwikkeld tegen de hiervoor aangehaalde overweging van de Rb. 's Hofs oordeel omtrent die grief* [...] *was niet dragend voor de beslissing omtrent het geschilpunt van pp. in die procedure,* [...] *zodat daaraan geen gezag van gewijsde toekomt. Het beroep van Leutscher op gezag van gewijsde van dit oordeel is dan ook bij het bestreden arrest van het Hof te 's-Hertogenbosch terecht verworpen.*").

proceedings to support the alleged basis, cannot be put forward as yet in the context of the same basis for the claim in another lawsuit."[8]

29. Above, in paragraphs 7-23, I listed the paragraphs of the Hague Court of Appeal Judgment and the Dutch Supreme Court Judgment that rejected the Russian Federation's arguments on various aspects of the ECT Question. Each of those paragraphs constitutes a "decision concerning the legal relationship that" was "in dispute" during the Dutch Proceedings, and is therefore now *res judicata* (*heeft gezag van gewijsde*) under Article 236(1).

III. The Dutch Courts Had Jurisdiction To Decide the ECT Question

30. The Dutch courts had jurisdiction over the Russian Federation. The Russian Federation itself invoked the authority of the Dutch courts when the Russian Federation commenced the Dutch Proceedings, seeking to set aside the Awards. By so doing, the Russian Federation accepted that the Dutch courts, including the Hague Court of Appeal and the Supreme Court, had jurisdiction over it.

31. The Dutch courts also had jurisdiction over the subject matter. The arbitrations took place in the Netherlands, which means that Dutch courts have exclusive jurisdiction to decide applications to set aside the Awards.

IV. The Dutch Proceedings Provided a Full and Fair Trial of the ECT Question

32. The Dutch Courts conducted a full and thorough trial of the ECT Question. The materials submitted to the Hague Court of Appeal included the following:

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8 *See* Supreme Court 18 December 2020, ECLI:NL:HR:2020:2099, para. 3.1.4. ("*Dit betekent onder meer dat bij een beroep op gezag van gewijsde, feiten en bewijsmiddelen die in de eerdere procedure niet ter staving van de gestelde grondslag zijn aangevoerd, in een ander geding niet alsnog in het kader van dezelfde grondslag aan de vordering ten grondslag kunnen worden gelegd.*").

(a) On 14 March 2017, the HVY submitted their Statement of Appeal (the "Statement of Appeal"), consisting of 325 pages (in the original Dutch) together with 65 new exhibits and 7 expert reports (in turn accompanied by 437 new exhibits).

(b) The Hague Court of Appeal was also provided with the complete records of both (i) the proceedings before The Hague District Court, and (ii) the proceedings in the Arbitrations, including all of the parties' submissions, all documentary evidence, all witness statements, all expert reports, and full transcripts of all hearings.

(c) On 28 November 2017 the Russian Federation submitted its Statement of Defense on Appeal (the "Statement of Defense"), consisting of 759 pages (in the original Dutch) together with 189 new exhibits, 22 new expert reports (in turn accompanied by 563 new exhibits) and 5 new witness statements (in turn accompanied by 155 new exhibits).

(d) The HVY filed procedural objections against certain arguments and grounds raised in the Statement of Defense. After hearing the parties on these objections, the Hague Court of Appeal accepted some of the HVY's complaints and rejected others in an interim judgment on 25 September 2018 (the "First Interim Judgment"). On 18 December 2018, the Hague Court of Appeal rendered a second interim judgment on the further course of the proceedings before it (the "Second Interim Judgment"). Pursuant to the Second Interim Judgment, both parties were allowed to make further submissions to the Hague Court of Appeal.

(e) On 26 February 2019, HVY submitted their Reply (the "Reply"), consisting of 685 pages (in the original Dutch) together with 327 new exhibits, 10 new expert reports (in turn accompanied by 206 new exhibits), and 5 new witness statements.

(f) On 25 June 2019, the Russian Federation submitted a further Deed consisting of 270 pages (in the original Dutch) together with 87 new exhibits.

(g) On 15 August 2019, the Russian Federation submitted a further Deed consisting of 9 pages (in the original Dutch) together with 6 new exhibits, 7 new expert reports (in turn accompanied by 18 new exhibits).

(h) On 26 August 2019, the HVY submitted a further Deed consisting of 24 pages (in the original Dutch) together with 62 new exhibits and 2 new witness statements (in turn accompanied by 8 new exhibits).

(i) On 26 August 2019, the Russian Federation submitted a further Deed consisting of 3 pages (in the original Dutch) together with 3 new exhibits.

(j) On 9 September 2019, the HVY submitted a further Deed consisting of 7 pages (in the original Dutch) together with 1 new exhibit, 10 new expert reports (in turn accompanied by 40 new exhibits) and 2 new witness statements (in turn accompanied by 7 new exhibits).

(k) On 9 September 2019, the Russian Federation submitted a further Deed consisting of 7 pages (in the original Dutch) together with 13 new exhibits and 1 new expert report (in turn accompanied by 1 new exhibit).

33. The Hague Court of Appeal conducted a three-day oral hearing on 23, 24 and 30 September 2019. During that hearing, HVY submitted Pleading Notes consisting of 271 pages (in the original Dutch). The Russian Federation submitted Pleading Notes consisting of 292 pages (in the original Dutch).

34. On 18 February 2020, the Hague Court of Appeal handed down its judgment. The Hague Court of Appeal Judgment runs to over 130 pages. This is unusually long. Many judgments

of the Dutch Courts of Appeal, even in large commercial cases, run to fewer than 15 pages. It is unusual for judgments to run to more than 50 pages, and extremely rare to run to over 130 pages.

35. On 15 May 2020, the Russian Federation initiated cassation proceedings by filing its notice of appeal in cassation (the "Notice of Appeal in Cassation") with the Supreme Court, consisting of 140 pages (in the original Dutch). The Supreme Court was also provided with copies of (i) the First and Second Interim Judgments, (ii) the Hague Court of Appeal Judgment and (iii) the Judgment of The Hague District Court of 20 April 2016 (the "District Court Judgment").

36. The parties made the following submissions to the Supreme Court on the merits of the Cassation Appeal:

(a) On 17 July 2020, HVY submitted their Statement of Defense in Cassation, including Conditional Cross-Appeal (the "Statement of Defense in Cassation") consisting of 14 pages (in the original Dutch).

(b) On 7 August 2020, the Russian Federation submitted its Statement of Response in the Conditional Cross-Appeal (the "Statement of Response in the Conditional Cross-Appeal") consisting of 2 pages (in the original Dutch).

(c) On 5 February 2021, HVY submitted their Written Pleadings (the "HVY's Written Pleadings"), consisting of 528 pages (in the original Dutch) including two Annexes.

(d) On 5 February 2021, the Russian Federation also submitted its Written Pleadings (the "Russian Federation's Written Pleadings"), consisting of 49 pages (in the original Dutch) together with 8 Annexes.

37. The Supreme Court conducted a one-day oral hearing on 5 February 2021. During that hearing, HVY submitted Pleading Notes consisting of 26 pages (in the original Dutch). The Russian Federation submitted Pleading Notes consisting of 37 pages (in the original Dutch).

38. The hearing was followed by the submissions of the following materials:

(a) On 12 March 2021, HVY submitted their Rejoinder (the "Rejoinder") consisting of 53 pages (in the original Dutch) together with 3 Annexes. On that same day, the Russian Federation submitted its Reply (the "Reply") consisting of 58 pages (in the original Dutch) together with two Annexes.

(b) On 23 April 2021, the Advocate-General P. Vlas advised in his written opinion (the "AG Opinion on the Cassation Proceedings") consisting of 89 pages (in the original Dutch) that the principal appeal in cassation should be rejected.

(c) On 21 May 2021, the Russian Federation submitted its letter responding to the AG Opinion on the Cassation Proceedings, consisting of 30 pages (in the original Dutch). On that day, HVY also submitted their letter responding to the AG Opinion on the Cassation Proceedings, consisting of 5 pages (in the original Dutch).

39. On November 5, 2021, the Dutch Supreme Court rendered its decision. The decision is 45 pages in the original Dutch version. This decision considers and resolves each of the Russian Federation's grounds for cassation.

40. Separately, the Russian Federation made two motions in the Dutch Supreme Court to "suspend" enforcement of the Awards. The first motion was denied on December 4, 2020. The second motion was voluntarily withdrawn by the Russian Federation on November 15, 2021. The

Supreme Court confirmed the withdrawal by letter on November 25, 2021. Neither of those motions is relevant to the question of whether the Hague Court of Appeal's and Supreme Court's decisions are *res judicata* pursuant to Article 236(1).

V. The Remaining Proceedings

41. The sole ground on which the Russian Federation prevailed, in the Dutch Supreme Court, related to the Russian Federation's complaint about its right to be heard on the merits of its allegation that HVY committed fraud *during* the arbitration proceedings. This complaint and the underlying allegations are not an issue that has any relevance to the ECT Question. The Russian Federation has not contended that this fraud allegation, even if true, would mean that "a valid arbitration agreement is lacking," such that the Awards should be set aside under Article 1065(1)(a) DCCP. Rather, the Russian Federation has contended that this alleged fraud, during the arbitrations, is grounds for setting aside the Awards under a *different* provision, namely, Article 1065(1)(e) DCCP, which states that an arbitral award may be set aside if "the award, or the manner in which it was made, violates public policy or good morals."

42. The Russian Federation first raised this allegation (of fraud committed during the arbitration) in the Russian Federation's Defense brief to the Hague Court of Appeal. HVY's response included a preliminary response on the merits and also responses based on Dutch procedural law. In its procedural responses, HVY argued (among other things) that this allegation could only be raised in a *revocation* proceeding, brought under a separate provision of Dutch law (Article 1068(1) DCCP), and could not be brought in the *set-aside* proceeding. In its Interim Judgment of September 25, 2018, the Hague Court of Appeal agreed with that procedural argument and held that "these accusations [of fraud committed during the arbitration] can be addressed only in revocation proceedings under Article 1068 DCCP, not in setting aside proceedings such as these." First Interim Judgment ¶ 5.7. The Hague Court of Appeal did not address the *merits* of

these allegations. The Hague Court of Appeal also did not address HVY's other procedural objections.

43. The Dutch Supreme Court annulled the judgment of the Hague Court of Appeal on this procedural issue. The Dutch Supreme Court held that Dutch law will permit such allegations (of fraud committed during the arbitration proceedings) to be made in *set-aside* proceedings. Dutch Supreme Court Judgment ¶ 5.1.10-12. The Hague Court of Appeal erred in holding that making such allegations is only possible in revocation proceedings. *Id.* ¶ 5.1.1(v) (summarizing the Hague Court of Appeal's holding); ¶ 5.1.12 (reversing the procedural holding). The Dutch Supreme Court also held that the Russian Federation's allegations of fraud could only be grounds for setting aside the Arbitral Awards if the Russian Federation were able to meet the standard for setting-aside set by Article 1065(1)(e). *Id.* ¶ 5.1.8. That statute only authorizes a court to set aside an arbitral award if the court finds that "the award, or the manner in which it was made, violate[d] public policy or good morals." Like the Hague Court of Appeal, the Dutch Supreme Court did not address, or express any opinion on, the *merits* of the Russian Federation's allegations of fraud during the arbitration. Nor did the Dutch Supreme Court address, or express any opinion on, the question of whether raising such allegations so late in the setting aside proceedings would be in violation of the prohibition that all grounds for annulment should be submitted in the writ of summons to the District Court or constitute a violation of due process in this case. *Id.* ¶¶ 5.1.12 & 5.1.1.14-18.

44. The Dutch Supreme Court then "refer[red] the case to [the] Amsterdam Court of Appeal" for "further consideration and decision." Dutch Supreme Court Judgment ¶ 8. This "further consideration" will concern only the Russian Federation's sole remaining ground for setting aside the Arbitral Awards, i.e., the alleged violation of Dutch public policy due to the allegations of purported fraud during the arbitration. All of the Russian Federation's other grounds

for setting aside, brought forward in the Dutch Supreme Court, have now been finally resolved in HVY's favor. This is the result of the Dutch Supreme Court's decision to reject the complaints of the Russian Federation, against the decision of the Hague Court of Appeal, regarding those other grounds. The Hague Court of Appeal's decision on those other grounds has become final and can no longer be questioned or reconsidered by any Dutch court.

45. On November 16, 2021, HVY initiated proceedings in the Amsterdam Court of Appeal, by summoning the Russian Federation to appear on January 4, 2022. HVY's initial submissions to the Amsterdam Court of Appeal will likely be due on February 15, 2022.

46. I estimate that the proceedings before the Amsterdam Court of Appeal will likely take between 1.5 and 2 years from now until the Amsterdam Court of Appeal renders its decision. The losing party will have the right to seek a cassation appeal, of that decision, to the Dutch Supreme Court. I estimate that such a cassation appeal, when lodged, is likely to take between 1.5 and 2 years, from the date of the Amsterdam Court of Appeal's decision until a decision of the Dutch Supreme Court.

VI. The Current Status of the Awards

47. I have reviewed the filing of the Russian Federation dated December 10, 2021, and the accompanying declaration of Prof. Albert Jan van den Berg. The Russian Federation and Prof. van den Berg are incorrect when they assert that the Awards "no longer exist as a matter of Dutch law." Seventh van den Berg Decl. ¶ 5.

48. The Russian Federation's assertion is based on the Hague District Court's judgment, which set aside the Awards. However, this assertion is incorrect. The Hague District Court never considered the Russian Federation's allegations of fraud during the arbitration—indeed, the Russian Federation did not even *make* those allegations during the proceedings in the Hague District Court. Instead, the Hague District Court's judgment was based on one ground only,

namely, the Hague District Court's conclusion that the ECT did not contain a valid agreement to arbitrate the dispute with HVY. *Supra*, ¶ 14. The Hague District Court's decision and reasoning on these matters has now been rejected by both the Hague Court of Appeal and the Dutch Supreme Court, as I described above. *Supra*, ¶¶ 7-23.

49. The Russian Federation contends that the final sentence of the Dutch Supreme Court's judgment revives the Hague District Court's judgment. The sentence reads: "The Supreme Court: *in the main appeal:* --quashes the judgments of The Hague Court of Appeal of 25 September 2018 and 18 February 2020." Dutch Supreme Court Judgment ¶ 8. The Russian Federation argues that this language annuls[9] *all* of the Hague Court of Appeal's decisions (including the Hague Court of Appeal's annulment of the *District Court*'s decision) and that therefore the Hague District Court's judgment, setting aside the Awards, has been revived.

50. I disagree with the Russian Federation's contentions. The language in the Dutch Supreme Court's opinion, just quoted, is commonly used by the Dutch Supreme Court. It does *not* mean that the entire judgment of the Hague Court of Appeal is annulled, as such an annulment by the Dutch Supreme Court only has partial effect.

51. Long-standing Supreme Court case law, going back as early as 1927, holds that a court of appeal judgment will only be annulled to the extent that the cassation complaints, directed against specific considerations and decisions of the court of appeal, are successful:

> "[It is understood] that if the points that were contested [in the cassation appeal] are found to be well-founded, the Supreme Court will usually be obliged to set aside the entire operative part of the judgment, but that if the case is then referred back to the [court of appeal], the further investigation [in that court] must take place within the limits drawn by the [Supreme Court's] judgment in cassation and that this examination cannot bring about

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[9] For the avoidance of doubt, the terms "annul" and "quash" have the same meaning and shall be used interchangeably in this declaration.

a change in the decisions of the first judgment which were not—or were unsuccessfully—contested in cassation . . . ."[10]

This doctrine of the partial effect of Supreme Court judgments has since been confirmed multiple times.[11]

52. Therefore, the only considerations and decisions that are nullified, by a Supreme Court judgment, are the considerations and decisions that were challenged and that the Supreme Court subsequently decided to be incorrect. Insofar as the Hague Court of Appeal's decision has not been challenged or the complaints against that decision have failed, the decision will become final and (as a result) will have *res judicata* effect.[12]

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10 Supreme Court 16 March 1927, ECLI:NL:HR:1927:246, *NJ* 1927, p. 528 The quote is from p. 530: "*dat de Hooge Raad bij gegrondbevinding van de wel bestreden punten in den regel wel genoopt zal zijn het geheele dictum van het vonnis te vernietigen, maar dat, wanneer de zaak alsdan wordt teruggewezen naar den rechter, die haar berechtte, het voortgezet onderzoek heeft te geschieden binnen de grenzen door het arrest van cassatie getrokken, en dit onderzoek geene verandering kan teweeg brengen in de niet — of tevergeefs — in cassatie bestreden beslissingen van het eerste vonnis* [...];"

11 Supreme Court 2 May 1997, ECLI:NL:HR:1997:AG7229, *NJ* 1998/237. This judgment been quoted approvingly by the Supreme Court in more recent judgments. See, for instance, Supreme Court 18 May 2018, ECLI:NL:HR:2018:728, annotated by A.I.M. van Mierlo. See also the authoritative handbook on Dutch procedural law Asser: Procesrecht/Korthals Altes & Groen 7 2015/296 in which the following is stated: "In answering this question, the starting point should be that the appeal in cassation has only 'partial effect'. It is true that the operative part of a judgment of the Supreme Court in cassation usually means that the contested judgment or order is annulled, but this does not mean that the annulled judgment is eliminated entirely." *("Bij de beantwoording van deze vraag moet uitgangspunt zijn dat het cassatieberoep slechts 'partiële werking' heeft. Weliswaar houdt het dictum van een casserende uitspraak van de Hoge Raad doorgaans in dat het bestreden arrest of de bestreden beschikking wordt vernietigd, maar dit betekent niet dat de vernietigde uitspraak geheel wegvalt.")*

12 The Court of Appeal after referral is therefore bound by all such decisions as well. Supreme Court 16 March 1927, ECLI:NL:HR:1927:246, *NJ* 1927/528, summarized in Supreme Court 2 May 1997, ECLI:NL:HR:1997:AG7229, *NJ* 1998/237; B. Winters, *De procedure na cassatie en verwijzing in civiele zaken* (*The procedural after cassation and referral in civil cases*) 1992, p. 104; N.T. Dempsey, 'De procedure na cassatie en verwijzing' (*The procedure after cassation and referral*), *TCR* 2012/1, no. 2.1. After cassation and referral, the Court of Appeal must observe the findings in the Supreme

53. I agree with commentator B. Winters, who writes (in what is so far the only extensive study in the Netherlands of the proceedings in Courts of Appeal after cassation):

> "In its operative part, the Supreme Court will usually [state that its decision] 'sets aside the contested judgment (sentence)' or 'sets aside the contested order'. No legal consequences may be attached to this. If a cassation complaint against one of the grounds of the contested judgment is upheld, the Supreme Court will often have to set aside the entire operative part of the judgment, but this does not alter the fact that the other grounds [of the contested judgment] are upheld."[13]

54. In this case, the Hague Court of Appeal's decision reversing and annulling the Hague District Court's judgment has been upheld by the Dutch Supreme Court. The Hague District Court's sole basis for setting aside the Awards was its interpretation of Article 45 of the ECT in conjunction with its interpretation of certain Russian Law provisions. That basis for setting aside the Awards was rejected by the Hague Court of Appeal. The Dutch Supreme Court has now affirmed the correctness of the Hague Court of Appeal's decision on this matter, making this decision final (and therefore *res judicata*). Thus, the Hague District Court's judgment remains annulled, which in turn means that the Awards have not been set aside.

55. Moreover, it should also be noted that the Supreme Court did *not* confirm that the Hague District Court's judgment was correct. Several Dutch commentators have stated that a

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Court's judgment pursuant to Article 424 DCCP and is bound by the irreversible decisions contained in the annulled judgment (Supreme Court 27 April 1934, *NJ* 1934/1233, para. 4.1). There is thus no possibility for further party debate on these issues after cassation and referral (see the following recent examples: Amsterdam Court of Appeal 14 September 2021, ECLI:NL:GHAMS:2021:2946, para. 4.4; The Hague Court of Appeal 8 October 2019, ECLI:NL:GHDHA:2019:3544, para. 4.

13 B. Winters, *De procedure na cassatie en verwijzing in civiele zaken* (*The procedural after cassation and referral in civil cases*), 1992, p. 104: "*In zijn dictum zal de Hoge Raad meestal overwegen 'vernietigt het bestreden arrest (vonnis)' of 'vernietigt de bestreden beschikking'. Daaraan mogen geen rechtsgevolgen verbonden worden. Na gegrondbevinding van een cassatieklacht tegen één der gronden van de bestreden uitspraak zal de Hoge Raad weliswaar veelal het gehele dictum van die uitspraak moeten vernietigen, doch dat doet er niet aan af dat de andere gronden in stand blijven.*"

district court judgment, if annulled by the court of appeal, can *only* come back into force if the Supreme Court confirms that the district court's judgment was correct.

56. For example, Heemskerk states that the District Court's decision will be revived if the Supreme Court "upholds" that ruling—something that did not occur here. He writes, following in his annotation to the judgment B/Staat:

> "If the judgment of the court of appeal is annulled [by the Supreme Court] in cassation, the situation thereafter depends on the judgment in cassation. If the cassation court [i.e., the Supreme Court] upholds the ruling made at first instance [i.e., in the District Court], the effect of this ruling will be restored with retroactive effect."[14]

57. Similarly, Van Rossum writes:

> "Does the same [i.e., retroactive restoration of the District Court's ruling] apply if the Supreme Court only sets aside the decision of the court of appeal but does not confirm the [district court's] judgment in summary proceedings? The answer must be in the negative. Assuming that in the above example the Supreme Court does not uphold the ruling of the president [of the district court], the situation is that the judgment in summary proceedings[of the district court] is annulled by the decision of the court of appeal, with the result that the penalties attached to it have also lapsed now that there is no title."[15]

58. More recently, Lintel wrote:

> "In B. v. State and S. v. P., the Supreme Court ruled that a judgment annulled on appeal has the effect of depriving that judgment of its effect 'as long as the appeal decision itself has not been annulled'. It could be inferred from this sentence that—

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14 Supreme Court 28 September 1984, ECLI:NL:PHR:1984:AG4866, *NJ* 1985/83 (*B/Staat*), annotation by W. Heemskerk: "*Indien de vernietigende uitspraak van de appelrechter in cassatie wordt vernietigd, hangt het van de uitspraak in cassatie af hoe de toestand daarna is. Zou de cassatierechter het vonnis in eerste aanleg gewezen bekrachtigen, dan herleeft de werking van dit vonnis en wel met terugwerkende kracht.*"

15 A.A. van Rossum, *Aansprakelijkheid voor de tenuitvoerlegging van vernietigde of terzijde gestelde rechterlijke beslissingen*, Deventer: Kluwer 1990, p. 82-83: "*Geldt hetzelfde indien de Hoge Raad alleen de uitspraak van het hof vernietigt doch niet tot bekrachtiging van het k.g.-vonnis overgaat? Het antwoord moet ontkennend luiden. Gesteld dat in het hierboven gegeven voorbeeld de Hoge Raad het vonnis van de president niet bekrachtigt, dan is de situatie deze dat het k.g.-vonnis door de uitspraak van het hof is vernietigd, met als gevolg dat de daaraan verbonden dwangsommen ook zijn komen te vervallen nu er geen titel meer aanwezig is.*"

> if the [court of] appeal decision is in turn annulled by the Supreme Court—the district court's judgment is revived. However, I believe that there is no question of reviving the district court's judgment. If setting aside a [court of appeal] judgment by the Supreme Court were to result in the judgment made at first instance being revived, this would be contrary to the partial effect of the appeal in cassation referred to in section 3, which means that setting aside a court of appeal's judgment by the Supreme Court does not result in the entire court of appeal's judgment being set aside. Although annulment by the Supreme Court means that it considers (certain decisions in) the court of appeal's judgment to be unsound, this does not mean that the case must be decided in accordance with the judgment made at first instance. The referring court [i.e., the court of appeal that hears the case after referral], which continues the appeal proceedings with due regard for the judgment of the Supreme Court, will have to examine and determine what the final judgment in the case should be. Only if the Supreme Court itself disposes of the case after setting aside and in that connection confirms the judgment made at first instance, does that judgment reappear."[16]

59. Likewise, Van Nispen notes that it is only logical there is no automatic revival of the district court's judgment, as the correctness of that judgment still requires further review:

> "The question remains as to what the law is if the annulling judgment of the court of appeal is in turn annulled in cassation. If the Supreme Court upholds the order made at first instance or disposes of the case itself, there is no problem. But what if it refers the case back for further consideration: does the annulment of the appeal judgment in cassation *ipso iure* restore the enforceable force of the injunction

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16 I. Lintel, 'Vernietiging door de Hoge Raad: gevolgen van de vernietiging bij verwijzing', *TCR* 2019/1.4, para. 5.4: "*De Hoge Raad heeft in de arresten B./Staat en S./P. geoordeeld dat een in hoger beroep vernietigde uitspraak tot gevolg heeft dat die uitspraak geacht wordt haar werking te hebben verloren, 'zolang de appelbeslissing zelf niet is vernietigd'. Uit die zinsnede zou kunnen worden afgeleid dat – indien de appelbeslissing op haar beurt door de Hoge Raad wordt vernietigd – de uitspraak uit de eerste aanleg herleeft. Toch meen ik dat van herleving van de uitspraak in eerste aanleg geen sprake kan zijn. Als een vernietiging door de Hoge Raad ertoe zou leiden dat de uitspraak in eerste aanleg herleeft, dan zou dat in strijd komen met de in paragraaf 3 genoemde partiële werking van het cassatieberoep, die maakt dat een vernietiging door de Hoge Raad niet tot gevolg heeft dat de gehele appeluitspraak van tafel is. De vernietiging door de Hoge Raad betekent weliswaar dat hij (bepaalde beslissingen in) de appeluitspraak ondeugdelijk acht, maar daarmee staat nog niet vast dat de zaak moet worden beslecht overeenkomstig de uitspraak in eerste aanleg. De verwijzingsrechter, die de appelinstantie met inachtneming van de uitspraak van de Hoge Raad voortzet, zal moeten onderzoeken en bepalen hoe het eindoordeel in de zaak moet luiden. Alleen als de Hoge Raad de zaak na vernietiging zelf afdoet en in dat verband de uitspraak van de rechter in eerste aanleg bekrachtigt, herleeft die uitspraak.*"

> declared provisionally enforceable by the court at first instance? I do not think so: although the appeal ruling has been found to be incorrect, the correctness of the first instance ruling has not been established; the Supreme Court considers further investigation necessary."[17]

60. Here, the Supreme Court did *not* "uphold" the Hague District Court's judgment. Instead, the Hague Court of Appeal reversed the District Court's holding, and the Supreme Court affirmed the Hague Court of Appeal on this issue (the ECT Question). Therefore, the Hague District Court judgment remains annulled, and the Awards are not considered "set aside" under Dutch law.

61. Prof. van den Berg's reasoning, in support of his assertion that the Awards "no longer exist," is unpersuasive. As an initial matter, I note that Prof. van den Berg did not serve as the Russian Federation's Supreme Court appeal counsel and does not claim to be a specialist in Dutch Supreme Court procedure. Although Prof. van den Berg states that he "prepared" his declaration "in consultation with" the Russian Federation's Supreme Court appeal counsel of record, Mr. Rob Meijer, Prof. van den Berg does *not* state that Mr. Meijer agrees with the assertions contained in Prof. van den Berg's Declaration. *See* Seventh van den Berg Decl., n.1.

62. Prof. van den Berg's declaration fails to take into account relevant Supreme Court case law and does not discuss the relevant and authoritative legal literature (as cited in this declaration in footnotes 10-17). The authorities that Prof. van den Berg does cite, in support of his

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17 C.J.J.C. Van Nispen, 'Het effect van een latere uitspraak op een rechterlijk verbod of bevel', *BIE* 1985, 6/7, p. 228: "*Resteert de vraag wat rechtens is indien de vernietigende uitspraak van de appelrechter op haar beurt in cassatie wordt vernietigd. Wanneer de Hoge Raad de in eerste instantie getroffen voorziening bekrachtigt of het geding zelf afdoet, is er geen probleem. Maar wat als hij de zaak verwijst ter verdere behandeling: herleeft door de vernietiging in cassatie van de appeluitspraak ipso iure de executoriale kracht van het bij voorraad uitvoerbaar verklaarde verbod van de rechter in eerste aanleg? Ik denk van niet: de uitspraak in appel is weliswaar onjuist bevonden maar de juistheid van het eerste vonnis staat niet vast; de Hoge Raad acht verder onderzoek nodig.*"

claim that the Awards "no longer exist," do not support the proposition that the Awards no longer exist.

63. First, Prof. van den Berg cites two treatises on Dutch civil procedure (F.J.H. Hovens and Snijders & Wendels). *See* Seventh van den Berg Decl. ¶ 3 & n.4. But these treatises merely restate the general proposition that the legal force of a court of appeal's decision "may of course in turn be set aside by a ruling of the Supreme Court." *Id.* n.4 (quoting Snijders & Wendels). More specifically, the quoted excerpts address *when* a nullification of a district court judgment by a court of appeal takes effect. This is of no significance for the case at hand because the question *when* a nullification of a judgment takes effect only becomes relevant *if and when* a decision is nullified, which is – as I discussed above – not the case here when it comes to the Hague Court of Appeal's decision to annul the District Court Judgment.

64. What the consequences are of a nullification of a part of a court of appeal judgment by the Supreme Court, and what this means for the other – unaffected – decisions in that court of appeal judgment, are not discussed in the quoted excerpts from both treatises. Hovens discusses this topic in a different chapter of his treatise. He dedicates chapter 6 of his book to the proceedings after cassation and referral and paragraph 6.3 of this chapter concerns the ambit of the legal dispute after referral of the proceedings by the Supreme Court. In this paragraph Hovens states that the mere circumstance that the operative part of a Supreme Court judgment says that the court of appeal judgment is nullified, does not mean that this court of appeal judgment is completely off the table:

> "The circumstance that the operative part of the judgment of the Supreme Court states that the judgment [of the court of appeal] will be nullified and that the dispute is referred to another court of appeal, does not mean that the first judgment [of the court of appeal] is swept aside completely. On the contrary, sometimes only a small part is nullified and the rest is upheld without this being expressed in the operative part of the judgment [of the Supreme Court]. One will have to look into the

> considerations [of the judgment of the Supreme Court] to determine which part of the judgment [of the court of appeal] is nullified. It is in part dependent on the scope and object of the appeal in cassation to what extent the challenged judgment is considered to be nullified."[18]

65. This confirms what I have said in this declaration regarding the partial effect of a Supreme Court judgment. *See supra*, ¶¶ 51-60.

66. Second, Prof. van den Berg quotes media publications that, in turn, purport to quote statements made by the Supreme Court's "press judge" when announcing the Supreme Court's decision. Seventh van den Berg Decl. ¶ 6. Those statements are not persuasive authority for three reasons. First, there is no official transcript of the statements—only the quotations in the media. After reading those media accounts, my law firm asked the Supreme Court for a transcript of the "press judge's" statements, which was refused by e-mail. That e-mail, which was sent on November 9, 2021 by Thea Tjeerdema, Spokesperson, Dutch Supreme Court, is attached to my Declaration as **Exhibit A**.

67. Second, the "press judge's" oral statements are not part of the Supreme Court's holding and do not have any legal effect. For the interpretation of the Supreme Court Judgment, only its text is determinative. As the Supreme Court put it in a case from 2013 'a judge speaks through his judgment':

> "Firstly, the starting point is that, as it is usually put, the judge speaks through his judgment. The source of a judicial decision is the judgment or order of the judge, in which the judge clearly expresses his decision and provides reasons for it. Parties to the proceedings and third parties have to deal with that. It is not for a judge to

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18 F.J.H. Hovens, Civiel appèl, Sdu Uitgevers: Den Haag, 2007, p. 157: "*De omstandigheid dat het dictum van de Hoge Raad vermeldt dat het arrest wordt vernietigd en het geding wordt verwezen naar een ander hof, betekent niet dat het eerste arrest geheel van tafel is. Integendeel: soms wordt slechts een klein gedeelte vernietigd en blijft de rest in stand zonder dat dit tot uitdrukking komt in het dictum. Men zal in de overwegingen moeten zoeken welk gedeelte van het arrest is vernietigd. Het is mede afhankelijk van de reikwijdte en strekking van het cassatiemiddel in hoeverre de bestreden uitspraak geacht wordt te zijn vernietigd.*"

comment on or clarify his own decision, once it has been established and made public, nor to answer questions about the meaning of the decision or parts of the reasoning for it. [...]"[19]

68. The fact that a "press judge" makes statements regarding a judgment makes no difference. The same principle applies. To avoid any misunderstanding, the press judge should therefore not be part of the panel of judges that gave the judgment and he should ensure not to give the impression that he is giving an authentic interpretation of the judgment:

> "It should also be noted that the above does not prevent a press judge from commenting on a decision that attracts media attention or is otherwise of interest, but that must be a judge who did not give the decision in question himself and who is not part of the panel of judges that gave the decision, whereas he must try, to its best interests, to prevent that the information he provides is interpreted as an authentic interpretation of that decision."[20]

69. The principle that 'a judge speaks through his judgment' is also laid down in the Press Guidelines 2013 of the Dutch Judiciary, which contain rules and agreements on reporting legal proceedings and indicate what journalists may expect from courts and how courts provide

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19 Supreme Court 6 March 2013, ECLI:NL:HR:2013:BZ3450, *NJ* 2013/530, annotation by E.A. Alkema: "*In de eerste plaats is uitgangspunt dat, zoals dat pleegt te worden verwoord, de rechter door zijn vonnis spreekt. De kenbron van een rechterlijke beslissing is het vonnis of de beschikking van de rechter, waarin de rechter zijn beslissing duidelijk onder woorden brengt en van een motivering voorziet. Procespartijen en derden moeten het daarmee doen. Het ligt niet op de weg van een rechter zijn eigen beslissing, als die eenmaal is vastgesteld en bekend gemaakt, van commentaar te voorzien of te verduidelijken, en ook niet om vragen over de betekenis van de beslissing of van onderdelen van de daarvoor gegeven motivering, te beantwoorden. [...].*"

20 Supreme Court 6 March 2013, ECLI:NL:HR:2013:BZ3450, *NJ* 2013/530, annotation by E.A. Alkema: "*Opmerking verdient nog dat het vorenstaande niet eraan in de weg staat dat een persrechter zich uitlaat over een beslissing die media-aandacht trekt of anderszins belangstelling geniet, maar dat zal dan een rechter moeten zijn die de betreffende beslissing niet zelf heeft gegeven en geen deel uitmaakt van de combinatie die die beslissing heeft gegeven, terwijl hij zoveel mogelijk moet proberen te voorkomen dat de door hem verstrekte informatie wordt opgevat als een authentieke interpretatie van die beslissing.*"

the press with information prior to, during and after legal proceedings.[21] Explanatory notes to Articles 1.1 – 1.8 of the Press Guidelines 2013 state:

> "In the Netherlands judges generally do not explain their own judgments directly to journalists or otherwise discuss what has taken place at the hearing in respect of a particular case. That is based on the principle that the judge 'speaks through his judgment'."[22]

70. The statements made by the press judge of the Supreme Court therefore have no relevance in the interpretation of the Supreme Court Judgment.[23] The Supreme Court refused HVY's request for a transcript for just this reason—i.e., because the statements have no relevance. Ex. A ("Nor do we see, absent any specific reason, the relevance of verifying what the briefing justice has said and/or its relevance to the proceedings abroad. Pre-eminently and exclusively relevant in this respect is the text of the judgment as rendered and published by the Supreme Court last Friday.").

71. Third, even if the "press judge's" statements were verifiable by transcript and even if they had any legal effect, the statements do *not* purport to say that the District Court's judgment has been revived, and do *not* purport to say that the Awards have been set aside. Rather, all that the "press judge" is reported to have said is that "no payment obligation follows from this decision" [of the Supreme Court]. This is factually correct, as the Supreme Court decision does not mention a payment obligation. It, however, does not say anything about the status of the Awards or the

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21 Press Guidelines 2013 (*"Persrichtlijn 2013"*), available at: https://www.rechtspraak.nl/SiteCollectionDocuments/Press-Guidelines.pdf.

22 Explanatory notes to Articles 1.1 – 1.8 Press Guidelines 2013, (*"Toelichting bij 1.1 – 1.8 Persrichtlijn 2013"*): *"Het is in Nederland niet gebruikelijk dat rechters hun eigen vonnis tegenover journalisten toelichten of anderszins spreken over wat er in een zaak op de zitting is gebeurd. De rechter 'spreekt door zijn vonnis' zoals dat heet."* Also mentioned by the Advocate-General in its Opinion for Supreme Court of 6 March 2013, ECLI:NL:PHR:2013:BZ345, para. 6.2.

23 For the avoidance of doubt: Press Justice Du Perron was not a member of the panel of judges of the Supreme Court that gave the Supreme Court Judgment.

partial effect that the Supreme Court decision has. In the Supreme Court's written press release, which accompanied its decision, the Supreme Court stated that "the judgement of [] The Hague Court of Appeal"—and *not* the judgment of The Hague District Court—is now "final" as to all of the "reject[ed] grounds of [the cassation] appeal." Hogeraad.nl, 5 November 2021, *Supreme Court quashes Court of Appeal's Judgement in arbitration case Yukos*.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 17, 2021 in Amsterdam, Netherlands.

TOBIAS COHEN JEHORAM

EXHIBIT A

From: **Tjeerdema, mr. T.M. (Hoge Raad)** T.Tjeerdema@HogeRaad.NL
Subject: reactie op uw verzoek van gisteren
Date: 9 November 2021 at 11:27
To: Bart Fleuren Bart.Fleuren@debrauw.com

TT

You don't often get email from t.tjeerdema@hogeraad.nl. Learn why this is important

* EXTERNAL EMAIL *

Geachte heer Fleuren,

N.a.v. uw verzoek van maandag 8 november jl. om het perslogboek/een transcript van de persvragen en de gegeven antwoorden n.a.v. de Yukos-uitspraak te verkrijgen, bericht ik u als volgt.

Ik heb uw verzoek besproken met de dienstdoende persraadsheer van afgelopen vrijdag. Wij zien echter geen grondslag om het perslogboek/een transcript van de persvragen en antwoorden aan u te verstrekken. Ook zien wij niet, zonder concrete aanleiding, het belang van verificatie van wat door de persraadsheer is gezegd en/of het belang daarvan voor de procedures in het buitenland. Daarvoor geldt bij uitstek en alleen de tekst van de uitspraak zoals die door de Hoge Raad afgelopen vrijdag is gedaan en gepubliceerd.

Met vriendelijke groet,

Thea Tjeerdema
woordvoerder

HOGE RAAD DER NEDERLANDEN

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From: Tjeerdema, *mr.* T.M. (Supreme Court) <T.Tjeerdema@HogeRaad.NL>
Sent: Tuesday 9 November 2021 12:28
To: Bart Fleuren <Bart.Fleuren@debrauw.com>
Subject: response to your request of yesterday

Dear Mr Fleuren,

Further to your request of Monday 8 November 2021 to be provided with the press log/a transcript of the press questions and the answers provided in respect of the Yukos judgment, I inform you as follows.

I discussed your request with the duty briefing justice of last Friday. However, we see no grounds for providing you with the press log/a transcript of the press questions and the answers to those questions. Nor do we see, absent any specific reason, the relevance of verifying what the briefing justice has said and/or its relevance to the proceedings abroad. Pre-eminently and exclusively relevant in this respect is the text of the judgment as rendered and published by the Supreme Court last Friday.

Yours sincerely,

Thea Tjeerdema
spokesperson
Supreme Court of the Netherlands

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