PROCURATOR GENERAL

WITH THE

SUPREME COURT OF THE NETHERLANDS

Number 20/01892
Hearing 11 September 2020

OPINION

P. Vlas

In the matter of
The Russian Federation,
with its corporate seat in Moscow,

v

1. Hulley Enterprises Limited,
with its corporate seat in Nicosia, Cyprus,
(referred to hereinafter as “Hulley”),
2. Veteran Petroleum Limited,
with its corporate seat in Nicosia, Cyprus,
(referred to hereinafter as “VPL”),
3. Yukos Universal Limited
with its corporate seat in Douglas, Isle of Man,
(referred to hereinafter as “YUL”),
(respondents 1-3 are also referred to collectively hereinafter as “HVY”)

1. Introduction

1.1 This case regards the question of whether, pursuant to the former Article 1066 DCCP, the Supreme Court has jurisdiction to rule on an application by the Russian Federation seeking either a permanent or provisional suspension of the enforcement of several arbitral awards. In addition to this application for suspension, the Russian Federation's appeal in cassation in respect of the judgment rendered by Court of Appeal of The Hague on 18 February 2020 is also pending before the Supreme Court under case number 20/01595.[1] The main issue in that appeal in cassation is whether the arbitral awards must be set aside pursuant to the former Article 1065 DCCP.

1.2 In this opinion, I only address the question of whether the Supreme Court has jurisdiction to rule on the application for suspension. This refers to both the application for a permanent suspension and the application for a provisional suspension.

2. The facts and the course of the proceedings

2.1 The following information may, in short, serve as a premise for this case in cassation.[2]

2.2 HVY are, or were, shareholders in Yukos Oil Company (hereinafter “Yukos”). Yukos. In 2004, they initiated arbitration proceedings against the Russian Federation pursuant to Article 26 of the Energy Charter Treaty (Treaty Series 1995, 108, hereinafter “ECT”). They asserted that the Russian Federation had expropriated their investments in Yukos and failed to protect these investments. HVY claimed that the Russian Federation should be ordered to pay damages. The location of the arbitration proceedings was The Hague.

2.3 In three separate Interim Awards on Jurisdiction and Admissibility dated 30 November 2009 (hereinafter “the Interim Awards”), the tribunal ruled on a number of preliminary defences raised by the Russian Federation, including in relation to the tribunal's jurisdiction. In the Interim Awards, the Tribunal rejected several arguments on jurisdiction and admissibility and decided with regard to other preliminary defences that the opinion in this respect would be stayed until the merits phase of the proceedings.

2.4 In three separate Final Awards of 18 July 2014 (hereinafter “the Final Awards”), the tribunal rejected the remaining arguments on jurisdiction and/or admissibility advanced by the Russian Federation, ruled that the Russian Federation had violated its obligations under Article 13(1) ECT, and ordered the Russian Federation to pay HVY damages in the amounts of USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to Hulley), plus interest and costs.

2.5 In separate summonses of 10 November 2014, the Russian Federation summoned Hulley, VPL and YUL to appear before the District Court of The Hague and claimed that the District Court set aside the Interim Awards and Final Award (collectively referred to hereinafter as “the Yukos Awards”) which the tribunal had rendered in each of their cases. On the application of the Russian Federation, these three cases were joined by the District Court.

2.6 On 20 April 2016, the District Court set aside the Yukos Awards in a single judgment that was

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1 ECLI:NL:GHDHA:2020:234.

2 See paras. 2.2-2.6 of the Interim Judgment rendered by the Court of Appeal of The Hague on 25 September 2018, ECLI:NL:GHDHA:2018:2476.

rendered in the three joined cases due to a lack of a valid arbitration agreement.[3] HVY lodged an appeal against this judgment to with Court of Appeal in The Hague.

2.7 In an interim judgment rendered on 25 September 2018, the Court of Appeal assessed several preliminary objections raised by HVY in respect of the addressing of certain assertions put forth by the Russian Federation.

2.8 In its final judgment of 18 February 2020,[4] the Court of Appeal sustained some of HVY's grounds for appeal and held that the tribunal had jurisdiction to hear and adjudicate HVY's claims. According to the Court of Appeal, the other grounds raised by the Russian Federation could not lead to the setting aside of the Yukos Awards (para. 10.1). The Court of Appeal set aside the District Court's judgment and, in a new judgment, rejected the Russian Federation's claims seeking the setting aside of the Yukos Awards.

2.9 In its initiating document dated 15 May 2020, the Russian Federation initiated an appeal in cassation in respect of the interim judgment rendered on 25 September 2018 and the final judgment rendered on 18 February 2020. As stated, these proceedings are currently pending under case number 20/01595.

2.10 In addition, on 23 June 2020, the Russian Federation submitted an application to the Supreme Court pursuant to Article 1066 DCCP requesting the Supreme Court to – I quote from paragraph 7 of the application:

> 'A. by way of a provisional suspension measure:
>
> order HVY, collectively and individually, to suspend with immediate effect all current and future enforcement measures relating to the Yukos Awards until the Supreme Court has issued a ruling on the application for suspension pursuant to Article 1066(B) DCCP.
>
> *unless* HVY, collectively and individually, have already expressly and unambiguously undertaken, in writing in both English and in Dutch, to observe such provisional suspension and to refrain from continuing or initiating any enforcement measure until the Supreme Court has issued a ruling on the present application for suspension, as stated below under B;
>
> B. in the proceedings on the application to suspend pursuant to Article 1066 DCCP:
>
> (i) suspend enforcement of the Yukos Awards until the claim for setting aside has been irrevocably adjudicated, such with effect from the date on which the Dutch lawyers for HVY are notified of the Supreme Court's grant of this application for suspension, provided that that notification is followed, within five business days, by a bailiff's writ to be issued pursuant to the Russian Federation's request to these lawyers;
>
> (ii) order HVY, collectively and individually, to suspend all current enforcement measures and to refrain from initiating new enforcement measures relating to the Yukos Awards, as soon as the Supreme Court has granted this application for suspension and has notified HVY's lawyers of same, such subject to the same terms and conditions of a writ as laid down above at the end of B(i).
>
> Re A and B, order HVY, on pain of collectively and individually forfeiting a penalty of EUR 5 billion for each time and – in addition – EUR 5 billion for each day or part of a day which HVY remain, or one or more of them individually remains, in default of complying with the orders laid down above in A and B;
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> C. alternatively, if this application for suspension pursuant to Article 1066 DCCP were to be

[3] ECLI:NL:RBDHA:2016:4229.
[4] ECLI:NL:GHDHA:2020:234.

dismissed,

(i) order HVY, collectively and individually, such pursuant to the second sentence of Article 1066(5) DCCP, to furnish security in the form of a guarantee issued by a first-class international bank based on the criteria laid down in Article 6:51(2) DCC, to cover the recovery risk and additional losses of the Russian Federation, plus interest and costs if HVY continue, or one or more of them continues, to enforce the Yukos Awards, if the judgments of the Court of Appeal are later set aside, and/or if the Yukos Awards themselves are set aside, and

(ii) direct that HVY, collectively and individually, may not continue or begin, in any way whatsoever, with the enforcement of the Yukos Awards until the aforementioned security has been furnished to the Russian Federation, such on pain of collectively and individually forfeiting a penalty, to be paid to the Russian Federation, of EUR 5 billion for each time and – in addition – EUR 5 billion for each day or part of a day which HVY take, or one or more of them individually takes, any step to enforce the Yukos Awards without having first furnishing the Russian Federation with the security mentioned above under C(i).'

2.11 In a letter dated 3 July 2020, the Supreme Court notified the parties that, in the present case (20/01892), the Supreme Court saw reason to address first the jurisdiction/admissibility issue relating to both the application for a permanent suspension and the application for a provisional suspension. This same letter provided a time frame for handling this case, and noted that further coordination with the application for cassation in case 20/01595 did not currently seem necessary.

2.12 On 17 July 2020, in accordance with the time frame determined by the Supreme Court, HVY submitted a statement of defence, arguing that the Supreme Court lacked jurisdiction to rule on the Russian Federation's applications, or at least that the Russian Federation's applications had to be dismissed as inadmissible. On 24 July 2020, the Russian Federation responded to the jurisdiction- and admissibility-based defences. On 14 August 2020, HVY pled their case in writing, to which the Russian Federation responded in its memorandum of oral arguments dated 24 August 2020. The case was then submitted to the Procurator General at the Supreme Court for an opinion.

2.13 Since the Supreme Court notified the parties that it would first be ruling on the jurisdiction/admissibility issue, this opinion is also limited to that issue.

3. Discussion of the admissibility of the Russian Federation's application for suspension

3.1 The Russian Federation has applied, pursuant to the former Article 1066 DCCP, for a permanent or provisional suspension of the enforcement of the Yukos Awards. The following is relevant in this context. The Dutch arbitration law was modernised in the Act of 2 June 2014, which entered into effect on 1 January 2015.[5] Pursuant to the transitional law provided for in Article IV of that Act, the arbitration law that applied before 1 January 2015, laid down in the Fourth Book of the Dutch Code of Civil Procedure, continues to apply to the proceedings now before the Court.[6] The parties do not dispute that this matter is governed by arbitration law as that read prior to 1 January 2015. After all, the arbitration proceedings were initiated in 2004

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5 The Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Dutch Civil Code and the Fourth Book of the Dutch Code of Civil Procedure in connection with the modernisation of the Arbitration Law (*Bulletin of Acts and Decrees* 2014, 200), which entered into effect on 1 January 2015 (*Bulletin of Acts and Decrees* 2014, 254).

6 See Article IV(4), read in conjunction with Article IV(2), of the Act of 2 June 2014.

(see section 2.2, above).[7]

3.2 At the time, Article 1066 DCCP read as follows:

> 1. The claim for setting aside does not suspend the enforcement of the award.
>
> 2. However, the court that rules on the setting aside may suspend enforcement at the request of either party, if there are reasons to do so, until a final decision is made on the request for setting aside.
>
> 3. As soon as possible, the District Court clerk will send the opposing party a copy of the application for suspension.
>
> 4. The court will not rule on the application until the other party has been afforded the opportunity to respond to it.
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> 5. If the application is granted, the court may direct that the applicant provide security. If the application is denied, the court may order the other party to provide security.
>
> 6. Either party can request the lifting of an enforcement suspension. The third through fifth paragraphs apply *mutatis mutandis*.

3.3 The Act of 2 June 2014 modernising arbitration law led to a minor amendment to Article 1066 DCCP, in which respect the phrase "the clerk of the District Court" was replaced by the phrase "the clerk of the Court of Appeal". Under the former arbitration law, a claim to set aside an arbitral award must be initiated before the District Court (former Article 1064(2) DCCP), while the rule since 1 January 2015 has been that a claim to set aside must be initiated before the Court of Appeal within whose district the arbitration venue is located (Article 1064a DCCP). With this change, the legislature prevented a situation in which two fact-finding instances in the national court system have to adjudicate claims for setting aside.[8] This amendment meant that Article 1066 DCCP also had to be amended, which is why applications for suspension have been adjudicated in the first instance by the Court of Appeal instead of the District Court since 1 January 2015. Rulings on both setting aside claims (Article 1064a(5) DCCP) and applications for suspension (Article 426 DCCP) can be appealed in cassation.

3.4 I quote the full text of Article 1066 DCCP as this provision read as at 1 January 2015:

> 1. The claim for setting aside does not suspend the enforcement of the award.
>
> 2. However, the court that rules on the setting aside may suspend enforcement at the request of either party, if there are reasons to do so, until a final decision is made on the request for setting aside.
>
> 3. As soon as possible, the District Court clerk will send the opposing party a copy of the application for suspension.
>
> 4. The court will not rule on the application until the other party has been afforded the opportunity to respond to it.
>
> 5. If the application is granted, the court may direct that the applicant provide security. If the application is denied, the court may direct that the other party provide security.

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7 See also para. 2.7 of the interim judgment of the Court of Appeal rendered on 25 September 2018.

8 See the Explanatory Memorandum to the bill Modernising Arbitration Law, Dutch House of Representatives, year of session 2012-2013, 33 611, no. 3, p. 38.

> 6. Either party can request the lifting of an enforcement suspension. The third through fifth paragraphs apply *mutatis mutandis*.

3.5 The main issue in this case is whether, pursuant to the former Article 1066 DCCP, the Supreme Court has jurisdiction to suspend the enforcement of an arbitral award. This case thus does not involve an appeal in cassation in respect of the Court of Appeal's ruling on an application for suspension, but rather an application submitted directly to the Supreme Court pursuant to the former Article 1066 DCCP. Dutch jurisprudence has never dealt with a case precisely on this point. The Russian Federation contends that the Supreme Court has jurisdiction to rule on an application to suspend enforcement of the Yukos Awards, while HVY take the opposite position. I note the following with regard to this issue.

3.6 I note at the outset that neither the text of the former Article 1066 DCCP nor the text of the current Article 1066 contain specific provisions that confer jurisdiction on the Supreme Court to rule on applications to suspend. A literal interpretation of the text of the former Article 1066(2) DCCP supports the position of the Russian Federation, as the former Article 1066(2) DCCP provides that 'the court ruling on the setting aside...[can] suspend the enforcement'. Since the appeal in cassation initiated before the Supreme Court regards a Court of Appeal judgment in which it affirmed the Yukos Awards and set aside the judgment of the District Court, it can be tenably argued that the Supreme Court must be considered as 'the court ruling on the setting aside'. After all, the Supreme Court must rule on the appeal in cassation initiated in the setting aside proceedings and must decide whether or not the disputed judgment can be allowed to stand. That always involves issuing a ruling 'regarding the setting aside'.[9]

3.7 This literal interpretation can be opposed by arguing that it is not the Supreme Court itself that grants or denies the claim, but rather that it only assesses, within the boundaries of the appeal in cassation, whether the Court of Appeal's judgment can be allowed to stand. Also opposing this literal interpretation is the fact that the former Article 1066(3) DCCP only governed the proceedings before the District Court, in that it directed the clerk of the District Court to send the opposing party a copy of the application for suspension, while the current Article 1066(3) imposes the same obligation on the Court of Appeal.

3.8 The legislative history also provides no clear answer to the question now before the Court in cassation. The explanatory notes to the Act of 2 June 2014 say nothing about the Supreme Court's jurisdiction to suspend enforcement. The explanatory notes to Article 1066 DCCP are brief and merely indicate that the proposed changes to that statute were intended to amend Article 1064a DCCP.[10] The legislative history of the former Article 1066 DCCP is also silent on the question of whether the Supreme Court has jurisdiction to adjudicate an application for suspension.[11]

3.9 I do note that before the statutory amendment that entered into effect on 1 January 2015, the law did not expressly provide that a claim to set aside an arbitral award was open to appeal in

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9 Cf. the Van den Berg committee's explanation to Article 1064a DCCP: 'A key proposed amendment concerns the limitation of the number of judicial instances that can rule on the claim seeking the setting aside of an arbitral award. Under the current act, this can be up to three instances: the District Court, the Court of Appeal and the Supreme Court.' See TvA 2005 Special, p. 170

10 G.J. Meijer et al., *Parl. Gesch. Arbitragewet* 2015/I.78.3.

11 *Parliamentary Papers II*, 1983/1984, 18 464, no. 3 (Explanatory Memorandum), p. 30.

cassation. That has been the case, however, since the implementation of Article 1064a DCCP. As stated, the first paragraph of Article 1064a DCCP provides that a claim to set aside can be initiated before the Court of Appeal, while the fifth paragraph provides that an appeal in cassation can be initiated against an appellate judgment rendered pursuant to the first paragraph, and that the parties are free to agree that no appeal in cassation will be initiated. According to the Explanatory Memorandum, the fifth paragraph of Article 1064a DCCP confirms that a decision on a claim to set aside is open to appeal in cassation and codifies the parties' option to waive an appeal in cassation.[12] In other words, the implementation of Article 1064a DCCP clarified the Supreme Court's role in assessing applications for setting aside.[13]

3.10 The literature says little or nothing about the question which is the focus of this opinion. The literature I studied regarding setting aside and suspension under the Arbitration Act says nothing about the Supreme Court's jurisdiction to assess an application for suspension as such.[14] In his annotation to Article 1066 DCCP in *Tekst & Commentaar Burgerlijke Rechtsvordering*, G.J. Meijer writes:

> 'The regular court ruling on the setting aside has jurisdiction to hear the request for suspension of enforcement. In the first instance this is the Court of Appeal with territorial jurisdiction and in cassation it is the Supreme Court (Article 1064a(1) and (5)) (see also Article 1066(3), which only designates the Court of Appeal).'[15] 1 *T&C Burgerlijke Rechtsvordering* (2020), Article 1066 DCCP, note 2a (G.J. Meijer).

In an older edition of this publication dating to before 2015, this author wrote virtually the same thing about the former Article 1066 DCCP:

> 'The regular court ruling on the setting aside has jurisdiction to hear the request for suspension of enforcement. In the first instance, this is the District Court within whose district the venue of arbitration is situated. On appeal and in cassation, those are the Court of Appeal with territorial jurisdiction and the Supreme Court, respectively (Article 1064, note 3).'[16]

In their statement of defence, HVY noted that in the newest edition, this author's reference to 'in cassation...the Supreme Court' probably means that the Court of Appeal's ruling on an application for suspension is open to an appeal in cassation and not that the application for suspension itself can be submitted to the Supreme Court.[17] This interpretation is inconsistent

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12 *Parliamentary Papers II* 2012-2013, 33 611, no. 3 (Explanatory Memorandum), p. 39.

13 See G.J. Meijer et al., *Parl. Gesch. Arbitragewet* 2015/I.75.5.

14 See, in re Article 1066 DCCP: H.J. Snijders, Nederlands Arbitragerecht, 2018, nos. 9.5.1-9.5.5 (*Groene Serie Burgerlijke Rechtsvordering*, Article 1066 DCCP, notes 1-5); J.W. Bitter, H. Biesheuvel, Arbitrage - *Een beknopte inleiding*, 2018, section 8.6; *Sdu Commentaar Burgerlijk Procesrecht*, Article 1066 DCCP, note C2 (J.W. Bitter); N. ten Kate, *'Rechterlijke toetsing van arbitrale vonnissen - tenuitvoerlegging, vernietiging en herroeping'*, *Bedrijfsjuridische berichten* 2017, p. 65 et seq.; H.J. Snijders, C.J.M. Klaassen, G.J. Meijer, *Nederlands burgerlijk procesrecht*, 2017, nos. 395¬396; W. Hugenholtz/W.H. Heemskerk, *Hoofdlijnen van Nederlands Burgerlijk Procesrecht*, 2015, no. 2.11; P.A. Stein et al., *Compendium van het burgerlijk procesrecht*, 2018, no. 14.1.20; A.J. van den Berg, *Toelichting op Voorstellen tot wijziging van het Vierde Boek (Arbitrage), artikelen 1020-1076 Rv*, TvA 2005 Special, p. 173. In re the former Article 1066 DCCP: H.J. Snijders, *Nederlands Arbitragerecht*, 2011, pp. 360-363; H.J. Snijders, C.J.M. Klaassen, G.J. Meijer, *Nederlands burgerlijk procesrecht*, 2011, nos. 395-398; A.W. Jongbloed & A.L.H. Ernes (eds.), *Burgerlijk procesrecht praktisch belicht*, 2014, no. 17.3.9; P.A. Stein et al., *Compendium van het burgerlijk procesrecht*, 2013, no. 14.1.21

16 *T&C Burgerlijke Rechtsvordering* (2012), Article 1066 DCCP, note 2 (G.J. Meijer).

17 Statement of defence alleging lack of jurisdiction, p. 12.

with what Meijer wrote in respect of the former Article 1066 DCCP, which applies to this case. In addition, HVY are losing sight of the fact that Article 426 DCCP applies to an appeal in cassation in respect of the application for suspension, which means that neither the former nor current version of Article 1066 DCCP has anything to do with the matter.

3.11 In publication by other authors,[18] the following statement is made in their commentary on the former Article 1066 DCCP:

> 'Article 1066(1) DCCP provides that an application to set aside an award does not suspend the enforcement of the award. However, the court which decides on an application for setting aside may, at the request of either party, if it considers the request to be justified, suspend enforcement until a final decision is made on the application for setting aside (Article 1066(2) DCCP).'

This text is followed by a footnote (392) which states:

> 'The competent court may either be the District Court, the Court of Appeal or the Supreme Court, depending upon the stage of the proceedings to set aside an award'.

The above-cited footnote 392 shows that these author's position is that an application for suspension may also be submitted to the Supreme Court.

3.12 The Supreme Court has not previously studied the issue of whether it can adjudicate an application to suspend enforcement of an arbitral award. The application submitted by the Russian Federation may refer to two Supreme Court judgments,[19] but these judgments were rendered in response to an appeal in cassation of the Court of Appeal's denial of an application for suspension and regarded the standard on which that denial was based. These two judgments thus do not imply that the Supreme Court itself has jurisdiction to adjudicate an application for suspension pursuant to Article 1066 DCCP.

3.13 It is relevant, however, that in one of those judgments, the Supreme Court held as follows regarding the standard upon which the assessment of an application for suspension is premised:

> '3.5 A request such as that made in these proceedings is aimed at obtaining preliminary relief. When deciding on such request, the court will form a preliminary opinion on the claim for revocation in review and will also weigh the interests of the parties. (...)'.[20]

That case may have involved the suspension of the enforcement of an arbitral award pursuant to a claim seeking the revocation of that award (under the former and current versions of Article 1068 DCCP), but the Supreme Court's findings regarding the standard to be used also apply to the suspension of enforcement pending the outcome of setting aside proceedings. In that case,

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18 Bommel van der Bend, Marnix Leijten, Marc Ynzonides (eds.), *A Guide to the NAI Arbitration Rules, Including a Commentary on Dutch Arbitration Law*, 2009, p. 293.

19 Supreme Court 21 March 1997, ECLI:NL:HR:1997:ZC2314, NJ 1998/206, with annotation by H.J. Snijders to NJ 1998/207 (*Benetton International/Eco Swiss China Time en Bulova*) and Supreme Court 25 February 2000, ECLI:NL:HR:2000:AA4947, NJ 2000/508, with annotation by H.J. Snijders (*Benetton International/Eco Swiss China Time en Bulova* or *Benetton III*).

20 Supreme Court 21 March 1997, ECLI:NL:HR:1997:ZC2314, NJ 1998/206, with annotation by H.J. Snijders to NJ 1998/207 (*Benetton International/Eco Swiss China Time en Bulova*), para. 3.5.

the court ruling on the suspension must also make a provisional ruling on the claim for setting aside (and/or the chances of that claim's success) and must weigh the interests of the parties.[21]

3.14 In support of their position, HVY cite the Supreme Court's judgment in *CVA/State*[22], in which the Supreme Court held that it did not have jurisdiction to suspend the enforcement of national court judgments. In that case, the Supreme Court was requested to suspend the enforcement of a judgment rendered in preliminary relief proceedings that had been affirmed by the Court of Appeal. The Supreme Court held as follows:

> 'CVA's motion requests the Supreme Court to suspend the enforcement of a judgment rendered in preliminary relief proceedings that has been affirmed by the Court of Appeal. CVA's motion will have to be declared inadmissible. The law contains no provision that confers jurisdiction upon the Supreme Court to reinstate the suspensive effect of the appeal in cassation. The question of whether there is any reason to assume that such jurisdiction exists based on the *mutatis mutandis* application of Article 351 DCCP (or, when appropriate, Article 360(2) DCCP) in cassation must be answered in the negative. Article 406, which applied until 1 January 1992, conferred jurisdiction upon the Supreme Court to enjoin enforcement if the provisional enforcement order in question was granted despite falling outside the scope of that remedy as provided by statute. The legislature held that there was 'less need' for this provision, given that Article 54, which had been in effect since 1 January 1992, nearly always allowed a court to issue an enforcement order that is enforceable regardless of any appeal (see *Parl. Gesch. Wijziging Rv e.a.w. (Inv. 3, 5 en 6)*, p. 28) and which repealed both Article 406 and the former Article 352 with effect from the aforesaid date. The Act of 6 December 2001 (Bulletin of Orders and Decrees 2001, 580) revising the rules of civil procedure, and in particular the rules on litigation in the first instance, the former Article 352 was reincorporated into Article 351 with effect from 1 January 2002, but no similar provision was implemented for proceedings in cassation. All of this must imply that the legislature believed that there was no longer any place in the current legal system for a motion to suspend in cassation. Since suspension of enforcement of a court order that has been declared enforceable regardless of any appeal can only be justified if – briefly put – such enforcement would constitute an abuse of jurisdiction, an appeal judgment to that effect can only be rendered in extremely exceptional cases. In such a case, preliminary relief could be sought from the court in preliminary relief proceedings. This latter course also lends itself better than a motion in cassation to a rapid, and often partly factual, assessment of and a ruling on a claim for suspension. That is why, partly in light of the aforementioned repeal of Article 406, there is no legal ground for permitting a motion in cassation regarding the suspension of enforcement of a court order that has been declared enforceable regardless of any appeal, as the Supreme Court actually did in its rulings of 12 September 1997 and 21 November 1997, NJ 1998, 345 en 346.'[23]

In its ruling of 8 April 2005, the Supreme Court repeated this finding and held that the findings set forth in the judgment of 9 April 2004 also applied to the summons proceedings and the application proceedings.[24]

3.15 The *CVA/State* has been criticised in the literature. For example, Korthals Altes & Groen write:

> 'In our view, this is more likely to be an error on the part of the legislature. The legislature's ground for implementing the new Article 351 DCCP was that, with hindsight, the 1992 repeal of the former Article 352 DCCP had been rather unwise, because it was inefficient to compel parties who have initiated an appeal, or who intend to do so, to initiate a claim before the president of the District Court for the sole purpose of having the declaration of immediate enforceability suspended. It is impossible to see why this argument would not equally apply in the cassation. The partially factual nature of the

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21 See *T&C Burgerlijke Rechtsvordering*, Article 1066 DCCP, note 2b (G.J. Meijer); H.J. Snijders, Nederlands Arbitragerecht, 2018, nos. 9.5.2 (*Groene Serie Burgerlijke Rechtsvordering*, Article 1066, note 2).

22 Supreme Court 9 April 2004, ECLI:NL:HR:2004:A05123, NJ 2005/130 (*CVA/State*).

23 Supreme Court 9 April 2004 (*CVA/State*), para. 3.

24 Supreme Court 8 April 2005, ECLI:NL:HR:2005:AT3348, NJ 2005/529.

> assessment of such a claim does not give cause to charge the preliminary relief court with that assessment rather than the Supreme Court: when ruling on such motions, the Supreme Court is acting not as the court in cassation but as the fact-finding court.'[25]

3.16 Whatever else may be said in this discussion about the suspension of a judicial ruling, there is no indication at all that the legislature deliberately intended to preclude the Supreme Court from having jurisdiction to suspend enforcement of an *arbitral award*. Where the Supreme Court held in the judgment in *CVA/State* that there was no need for the Supreme Court to have jurisdiction to suspend because an application for suspension could be brought before the preliminary relief judge, the legislative history of the former Article 1066 DCCP notes that the suspension option laid down in that statute does not diminish the parties' option to seek a suspension order from the preliminary relief judge if there is an urgent need for same.[26]

3.17 In my opinion, the foregoing implies that there is no sound reason for concluding that the Supreme Court could *not* rule on an application for suspension pursuant to Article 1066 DCCP. There is nothing in either the legislative history of the former Article 1066 DCCP or that of the current Article 1066 DCCP that implies that this provision is intended to indicate that only the District Court and/or the Court of Appeal – and thus not the Supreme Court – have jurisdiction to adjudicate applications for suspension.

3.18 In my view, it would be extraordinarily impractical if the Supreme Court were to lack jurisdiction to adjudicate applications for suspension. The application for suspension would then have to be submitted to the Court of Appeal that adjudicated the claim for setting aside the arbitration awards. That Court of Appeal would then have to assess the chances of success of an appeal in cassation regarding its own judgment, and it would also have to weigh the parties' interests. In such a situation, the Court of Appeal would essentially have to channel Houdini, as it were, to wriggle out of the 'chains' of its own judgment. It would be much more obvious for the Supreme Court to assess the application for suspension, since the appeal in cassation in respect of the decision on the setting aside of the arbitral awards will be lodged with the Supreme Court. This also does justice to the rationale underlying the legislature's creation of the option to apply for the suspension of enforcement: namely, preventing a situation in which a judgment is enforced before a final and irrevocable ruling is issued on the setting aside of the challenged arbitral awards. The fact that the Supreme Court must, when deciding on an application for suspension, also assess the chances of success of an appeal in cassation and weigh the parties' interests – and in so doing act as the trier of fact – is not a decisive argument for considering the Supreme Court as lacking jurisdiction. There are certainly other situations in which the Supreme Court carries out such assessments while acting as the trier of fact, as is the case when a motion for an order to furnish security is made pursuant to Article 235, read in conjunction with Article 418a, DCCP.

3.19 HVY have pointed out that, in this case, suspension may also be sought in preliminary relief proceedings brought before the preliminary relief judge. In so doing, they cite the legislative history on how the former Article 1066 DCCP was drafted, which notes – as stated above – that the suspension option laid down in that statute does not diminish the parties' option to seek a

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25 Asser *Procesrecht/Korthals Altes & Groen* 7 2015/99. See also W.D.H. Asser, *Civiele Cassatie*, 2018, p. 75; B.T.M. van der Wiel, *Cassatie* (*Burgerlijk Proces & Praktijk* no. 20) 2019/230.

26 See the Explanatory Memorandum to the bill re-establishing the rules on arbitration in the Dutch Code of Civil Procedure, *Parliamentary Papers II* 1983-1984, 18 464, no. 3, p. 30.

suspension order from the preliminary relief judge if there is an urgent need for same.[27] That note does not justify deducing that relief must first be sought from the preliminary relief judge, or that this manner of obtaining relief is preferable. The legislature opted to leave both options open and have them co-exist with one another. It is up to the party seeking the suspension to choose between the two options available in this regard, in which context an urgent interest may be a relevant factor.[28]

3.20 I therefore conclude that, pursuant to the former Article 1066 DCCP, the Supreme Court has jurisdiction to adjudicate applications for both permanent and provisional suspensions.

3.21 At this stage of the proceedings, I have foregone conducting a substantive analysis of the application for suspension or the application to impose a suspensive measure on pain of a penalty.

4. Conclusion

This means that the Supreme Court will hold that it has jurisdiction to adjudicate the application for a suspension of the enforcement of the arbitral decisions at issue, as well as the application for a provisional suspension of the enforcement of the arbitral decisions at issue.

The Procurator General at the
Supreme Court of the Netherlands

AG

27 *Parliamentary Papers II*, 1983/1984, 18 464, no. 3 (Explanatory Memorandum), p. 30.

28 In a similar sense, see H.J. Snijders, *Nederlands Arbitragerecht*, 2018, nos. 9.5.2 (*Groene Serie Burgerlijke Rechtsvordering*, Article 1066, note 2).

Signed Opinion Procurator-General

Signatures

Vlas, Prof. P. (signature)