



PCA (PERMANENT COURT OF ARBITRATION)

PCA Case No. 2005-03/AA226

HULLEY ENTERPRISES LTD. V. RUSSIAN FEDERATION

DECISION OF THE SUPREME COURT OF THE NETHERLANDS

25 September 2020

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Decision of the Supreme Court of the Netherlands

1. Course of the proceedings

1. For the course of the proceedings before the triers of fact, the Supreme Court refers to:
 - a. the judgment in the cases C/09/477160 HA ZA 15-1, C/09/477162 HA ZA 15-2 and C/09/481619 HA ZA 15-112 of the District Court in The Hague of 20 April 2016;
 - b. the judgments in the case 200,197,079/01 of the Court of Appeal in The Hague of 25 September 2018, 18 December 2018 and 18 February 2020.

The Russian Federation lodged an appeal in cassation against the judgments of the Court of Appeal of 25 September 2018 and 18 February 2020. In addition, the Russian Federation submitted an application to the Supreme Court pursuant to Article 1066 of the Dutch Code of Civil Procedure ("DCCP"), requesting, inter alia, the suspension and provisional suspension of the enforcement of the arbitral awards. HVY submitted a statement of defence against that request, in which it concluded that the Supreme Court lacks jurisdiction to hear the application of the Russian Federation, or at least that the Russian Federation's application be declared inadmissible. The Russian Federation put forward a defence in the motion contesting jurisdiction. HVY pleaded their case in writing.

The Opinion of Advocate General P. Vlas entails 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.

HVY's counsel responded to that Opinion in writing.

2. Starting points and facts

- 2.1. This present decision concerns the question whether the Supreme Court has jurisdiction to hear an application based on the former Article 1066(2) DCCP to suspend the enforcement of an arbitral award, which application was filed pending an appeal in cassation to set aside the said arbitral award.
- 2.2. The Supreme Court starts from the following facts.
 - (i) HVY are, or were, shareholders in Yukos Oil Company (hereinafter "Yukos").
 - (ii) In 2004, VPL, YUL and Hulley each separately instituted arbitration proceedings against the Russian Federation. The location of the arbitration proceedings was The Hague. In said arbitration proceedings, HVY asserted - briefly put - that the Russian Federation expropriated their investments

in Yukos and has failed to protect those investments, and they claimed that the Russian Federation be ordered to pay damages.

(iii) After having rendered three separate Interim Awards, the Tribunal, in three separate Final Awards - dated 18 July 2014 - ordered the Russian Federation, among other things, to pay 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. The Interim Awards and the Final Awards will hereinafter be referred to collectively as the 'Yukos Awards'.

(iv) The Russian Federation claimed the setting aside of the Yukos Awards with the District Court on the basis of the former Article 1064(2) DCCP. The District Court set aside the Yukos Awards due to the lack of a valid arbitration agreement.¹ The Court of Appeal set aside the District Court's judgment and dismissed the Russian Federation's claim seeking the setting aside of the Yukos Awards.² The Russian Federation lodged an appeal in cassation against the judgments of the Court of Appeal.³ No decision has been rendered yet in these cassation proceedings.

2.3. Pending the appeal in cassation mentioned above at 2.2 (iv), the Russian Federation submitted an application to the Supreme Court on the basis of the former Article 1066 DCCP. In that application, the Russian Federation requests that the Supreme Court, briefly put:

- principally (i) order HVY to suspend all current and future enforcement measures relating to the Yukos Awards until the Supreme Court has issued a ruling on the application for suspension on the basis of the former Article 1066 DCCP (unless HVY have undertaken to observe such a provisional suspension), and (ii) to suspend the enforcement of the Yukos Awards until a final decision is made on the claim for setting aside; and

- alternatively, if the application for suspension were to be dismissed, to order HVY to provide security on the basis of the former Article 1066(5) DCCP.

2.4. In response to this, HVY have asserted that the Supreme Court lacks jurisdiction to hear the applications of the Russian Federation based on the former Article 1066(2) and 1066(5) DCCP.

3. Jurisdiction of the Supreme Court

3.1. The Fourth Book ('Arbitration') of the Dutch Code of Civil Procedure, as it applied until 1 January 2015, is applicable to these proceedings.⁴ The former Article 1066 DCCP that applied at that time provides the following:

¹ District Court in The Hague, 20 April 2016, ECLI:NL:RBDHA:2016:4229.

² Court of Appeal in The Hague, 25 September 2018, ECLI:NL:GHDHA:2018:2476 and Court of Appeal in The Hague, 18 February 2020, ECLI:NL:GHDHA:2020:234.

³ Said cassation proceedings are pending before the Supreme Court under case number 20/01595.

⁴ Article IV(4) in conjunction with Article IV(2) of the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Dutch Civil Code and the Fourth Book of the Dutch Code of Civil Procedure in connection with the modernisation of 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).

1. The claim for setting aside does not suspend the enforcement of the arbitral 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.
 6. Either party can request the lifting of an enforcement suspension. The third through fifth paragraphs apply *mutatis mutandis*.
- 3.2. The former Article 1066(2) DCCP confers the jurisdiction to suspend the enforcement of an arbitral award, pending setting aside proceedings, on "the court that rules on the setting aside". By extension, that also applies to the jurisdiction to hear an application, based on the former Article 1066(5) DCCP, to provide security. The question that is now at hand is whether the Supreme Court, pending cassation proceedings on the setting aside of an arbitral award, must be construed as "the court that rules on the setting aside" within the meaning of the former Article 1066(2) DCCP.
- 3.3.1. The text of the former Article 1066(2) DCCP does not provide that the Supreme Court, pending the appeal in cassation, should *not* be construed as "the court that rules on the setting aside". The wording rather shows the opposite, given that the former Article 1066(2) DCCP speaks of "the court" and this term in the Dutch Code of Civil Procedure as a rule is used as a general indication for judicial authorities. The wording "that rules on the setting aside" also entails the task of the Supreme Court to rule "on" a claimed setting aside in respect of which the Court of Appeal rendered judgment.
- The parliamentary history does not contain any indication that it was the legislature's intention to exclude the Supreme Court from the jurisdiction to hear an application, based on the former Article 1066(2) DCCP, to suspend the enforcement of an arbitral award that is the subject of setting aside proceedings pending before the Supreme Court.
- 3.3.2. Nor does a lack of jurisdiction of the Supreme Court to hear an application based on the former Article 1066(2) DCCP follow from the circumstance that the former Article 1066(3) DCCP provides that a copy of the application for suspension must be sent immediately to the other party by "the District Court clerk". It is not apparent from the text of the former Article 1066(3) DCCP and the parliamentary history pertaining to that provision that it was intended to further define or restrict the rules of jurisdiction of the former Article 1066(2) DCCP. The former Article 1066(3) DCCP is only intended to provide a regulation for the hearing of an application based on the former Article 1066(2) DCCP.⁵

- 3.3.3. The foregoing means that the former Article 1066 DCCP must be interpreted in such a way that if proceedings on the setting aside of an arbitral award are pending before the Supreme Court, the Supreme Court must be construed as "the court that rules on the setting aside", within the meaning of the former Article 1066(2) DCCP. All of the foregoing applies accordingly to the law applicable since 1 January 2015, on the understanding that the competent court in the setting aside proceedings in the first instance is the Court of Appeal.
- 3.4. Contrary to what HVY argue, all of this is not altered by the circumstance that it is also possible to claim suspension of the enforcement of an arbitral award at the preliminary relief court. The parliamentary history of both the former and current Article 1066 DCCP offers no point of reference for the opinion that, pending an appeal in cassation, the preliminary relief court would take the place of the possibility to direct an application to suspend the enforcement of the arbitral award based on the former Article 1066(2) DCCP to the court mentioned in Article 1066 DCCP.
- 3.5. The conclusion is that the Supreme Court has jurisdiction to hear the Russian Federation's application based on the former Article 1066(2) DCCP to suspend the enforcement of the Final Awards, and to hear the alternative application based on the former Article 1066(5) DCCP to provide security.

4 Decision

4. The Supreme Court:
in the motion contesting jurisdiction:

holds that it has jurisdiction to hear the Russian Federation's application based on the former Article 1066(2) DCCP and based on the former Article 1066(5) DCCP;

in the application stated at 2.3:

- directs that HVY have the opportunity to submit a defence to these applications until no later than Friday, 9 October 2020, at 4 p.m.;

- defers any other decision.

This decision was rendered by the vice-president E.J. Numann as chair, vice-president G. de Groot and justices A.M.J. van Buchem-Spapens, V. van den Brink and H.M. Wattendorff, and was pronounced in open court by justice M.J. Kroeze on 25 September 2020.

⁵ Parliamentary Papers II 1983/84, 18464, no. 3, p. 30.