# judgment

**The Hague Court of Appeal**
Civil law division
Case number: 200.197.079/01
Case/cause list numbers at the District Court :

C/09/477160/HA ZA 15-1; C/09/477162/HA ZA 15-2 and C/09/481619/HA ZA 15-112

**judgment of 25 September 2018**

in the matter of

1. the legal entity under the laws of Cyprus **VETERAN PETROLEUM LIMITED**, registered in Nicosia, Cyprus, hereinafter referred to as "**VPL**",

2. the legal entity under the laws of the Isle of Man **YUKOS UNIVERSAL LIMITED**, registered in Douglas, Isle of Man, hereinafter referred to as: **YUL**,

3. the legal entity under the laws of Cyprus **HULLEY ENTERPRISES LIMITED**, registered in Nicosia, Cyprus, hereinafter referred to as "**Hulley**",

appellants,
hereinafter also collectively referred to as **HVY** (plural), counsel: M.A. Leijten of Amsterdam,

versus

**The RUSSIAN FEDERATION**,
seated in Moscow, Russian Federation, hereinafter to be referred to as: the **Russian Federation**,
respondent,
counsel: J.A. Dullaart of Naaldwijk.

## 1. The proceedings

1.1 For the course of the proceedings leading up to the interim judgment of 11 October 2016, the Court of Appeal refers to that judgment. The hearing ordered by that judgment took place on 16 January 2017. The record of that hearing forms part of the case file. In response to the debate during this hearing, the Court of Appeal wrote to the parties on 23 January 2017, including the following message:

> **"As the Russian Federation is opposing a full or partial split of the proceedings on appeal, the customary procedure will be followed: one statement of grounds of appeal and one statement of defence on appeal. The fact that the Russian Federation submitted a large number of exhibits in the action before the district court at a late stage does not, also given the explanation advanced by counsel Van den Berg at the hearing, for now give the Court of Appeal occasion to deviate from the normal course of proceedings.**
>
> **This leaves standing that the Court of Appeal sees it as its duty to ensure that the principle of adversarial process is given full justice at all times. This will mean among other things that the Court of Appeal, after the statement of defence on appeal has been filed, with reference to the content of that statement and after parties have been given the opportunity to comment, will review whether due process implicates that HVY is to be given the opportunity to, separate to any response to the exhibits submitted with the statement of defence on appeal, respond to the content of that statement in a further brief.**

1.2 On 14 March 2017, HVY filed its Statement of Appeal (with exhibits). On 28 November

2017, the Russian Federation filed its Statement of Defence on Appeal (with exhibits). By letter of 18 December 2017, HVY wrote that the Defence on Appeal contains changes of claim which HVY wishes to object to. The Russian Federation responded to this by letter of 12 January 2018. In a letter to the parties dated 17 January 2018, the Court of Appeal stated the following, among other things:

> **"1. The Court of Appeal does not see any occasion to now deny HVY the right to submit a brief objecting to the (purported) increase of (the basis of the) claim as meant in article 130(1) DCCP. HVY will be given the opportunity to do so.**
>
> **2. The question of whether, as HVY assert, certain grounds for setting aside advanced by the Russian Federation should be left out of consideration because these were not advanced in the writ of summons is so closely connected with the assessment of the objection to the (purported) increase of (the basis of the) claim, that it is inconvenient to decide on both subjects separately. Accordingly, HVY will also be given the opportunity to set out their position with respect to the ground for setting aside in the brief referred to in point 1.**
>
> **3. The Court of Appeal sees no occasion to at this stage of the action to decide on the subject referred to in the letter from Van den Berg of 12 January 2018 in footnote 10. This is too remote from the objection to the increase of (the basis of the) claim. "**

1.3 HVY subsequently opened the present motion by filing a 'Deed containing objections to changes of claim pursuant to Article 130 DCCP, 1064(5), 1052(2) in conjunction with 1065(2) and 1068 DCCP (hereinafter: the Deed of Objection) on 13 February 2018. On 24 April 2018, the Russian Federation filed a 'Response Deed in respect of HVY's objections to (alleged) changes of claim' (hereinafter: the Response Deed).

1.4 On 19 June 2018 the parties argued their respective positions on HVY's objection before the Court of Appeal, HVY by Mr Leijten, aforementioned, and the Russian Federation by Prof A.J. van den Berg, each on the basis of pleading notes submitted to the Court of Appeal. A record was drawn up of this hearing, which forms part of the case file. Finally, a judgment in the motion was requested.

## 2. Introduction and background

2.1 In summary, and to the extent relevant at this stage of the proceedings, this case concerns the following.

2.2 HVY are, or were, shareholders in Yukos Oil Company (hereinafter: Yukos). They initiated arbitration proceedings against the Russian Federation in 2004 on the basis of Article 26 of the Energy Charter Treaty (Trb. 1995, 108, hereafter: ECT), claiming that the Russian Federation expropriated their investments in Yukos and failed to protect these investments. HVY claimed that the Russian Federation should be ordered to pay damages. The place of arbitration was The Hague.

2.3 In three separate Interim Awards on Jurisdiction and Admissibility of 30 November 2009 (hereinafter referred to as the "Interim Awards"), the Arbitral Tribunal ruled on a number of preliminary defences raised by the Russian Federation, including defences related to the jurisdiction of the Arbitral Tribunal. In the Interim Awards, the Arbitral Tribunal rejected certain jurisdicitional and admissibility defences and, in respect of other preliminary defences, decided that the decision would be reserved until the merits phase of the proceedings.

2.4 In three separate Final Awards of 18 July 2014 (hereinafter: the "Final Awards"), the Arbitral Tribunal rejected the remaining jurisdictional and/or admissibility defences of the Russian Federation, ruled that the Russian Federation has violated its obligations under Article 13(1)ECT and ordered the Russian Federation to pay HVY damages of respectively 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 By separate summonses of 10 November 2014, the Russian Federation served Hulley, VPL and YUL with notice to appear before the District Court of The Hague and sought that the

District Court set aside the Interim Awards and Final Awards rendered by the Arbitral Tribunal in each of their cases. These three cases were consolidated by the District Court at the request of the Russian Federation.

2.6 On 20 April 2016 the District Court set aside the Interim Awards and the Final Awards in a single judgment, rendered in the three joined cases, for reason of the absence of a valid arbitration agreement. HVY have appealed against this judgment.

2.7 Arbitration law has been revised by the Act of 2 June 2014 amending Book 3, Book 6 and Book 10 of the Civil Code and the Book 4 of the Code of Civil Procedure in connection with the modernisation of Arbitration Law (Bulletin of Acts and Decrees 2014, 200), which entered into force on 1 January 2015 (see Bulletin of Acts and Decrees 2014, 254). Pursuant to Article IV(4) in conjunction with (2) of this Act, Book 4 of the Dutch Code of Civil Procedure (*Wetboek van Burgerlijke Rechtsvordering,* ["DCCP"]) as it applied before the date of entry into force of the Act remains applicable to the present case. When reference is made in this judgment to provisions concerning the setting aside or revocation of arbitral awards, it concerns articles from Book IV of the Code of Civil Procedure in the version applicable until 1 January 2015.

2.8 Although the Arbitral Tribunal has given three separate Interim Awards and three separate Final Awards in the Hulley, VPL and YUL cases in three separate arbitrations, these awards do not differ substantially in terms of the issues at stake in these setting aside proceedings. For this reason, the Court of Appeal will also be referring to 'the' arbitration, 'the' Interim Award and 'the' Final Award. As the numbering of the paragraphs in the Interim Awards differs from each other, the Court of Appeal will reference the numbering of the Interim Award concerning Hulley. The Interim Awards and the Final Awards will also be collectively referred to as the 'Yukos Awards'.

**Assessment of HVY's objection**

3.1 In this motion, HVY has formulated objections against a number of assertions put forward by the Russian Federation in its Defence on Appeal. HVY's objections are directed against assertions which relate to the following subjects:

(I) unclean hands;

(II) fraud in the arbitration committed by HVY;

(III) Article 1(6) and (7) ECT and the question whether HVY's shares in Yukos can be regarded as an 'Investment' within the meaning of Article 1(6), and whether HVY can be regarded as 'Investor' within the meaning of Article 1(7).

In discussing HVY's objections, the Court of Appeal will follow this classification.

3.2 The Russian Federation takes the position that in this motion the Court of Appeal should not be allowed decide on the statements of HVY which in short amount to (i) that fraud committed in the arbitration does not constitute a ground for setting aside pursuant to Article 1065(1) of the Dutch Code of Civil Procedure but can only be raised by means of a claim for revocation on the basis of Article 1068 DCCP, (ii) that certain assertions were not put forward by the Russian Federation in the arbitration so that Articles. 1052(2) and 1065(2) prevent the Russian Federation from putting these assertions up for discussion in these setting aside proceedings, and (iii) that the Russian Federation has waived its right to claim setting aside on the basis of the unclean hands argument, or at least that it has forfeited this right. According to the Russian Federation, in its letter of 17 January 2018, the Court of Appeal only stated that it would decide on the question whether certain grounds for setting aside by the Russian Federation should be disregarded because these were not advanced in the writ of summons.

3.3 The Court of Appeal rejects this position of the Russian Federation. In the first place, it is not up to the Court of Appeal to prescribe to HVY what can and cannot be raised in an motion

such as the present one. HVY (like any litigant) is free to raise a motion at any stage of the proceedings, unless this is contrary to the law or due process or constitutes an abuse of rights. Moreover, the Russian Federation proceeds from too narrow a reading of the Court of Appeal's letter of 17 January 2018. The background to the decision of the Court of Appeal to - prior to the substantive proceedings - not only want to decide on HVY's objection on the basis of Article 130 DCCP, but also on HVY's objections derived from arbitration law, is that these two categories of objections are closely related, making it difficult to decide on them separately. The background was also to give clarity on the issue as to which assertions would and would not form part of the (substantive) debate. This does not only apply to HVY's objection that the Russian Federation did not invoke all grounds for setting aside in the summons in violation of Article 1064(5) DCCP, but also to HVY's reliance on Article 1068 and Article 1052(2) and Article 1065(2) DCCP, and the reliance on waiver/forfeiture with respect to the unclean hands argument. In all cases where HVY objects on the grounds of Article 1068 and Articles 1052(2) and 1065(2) DCCP, HVY also relies on Article 130 DCCP. It would be of little use to at this stage decide on, for example, the unclean hands argument on the basis of the objection based on Article 130 DCCP, but not insofar as it is based on Article 1052(2), Article 1065(2) DCCP or on the waiver or forfeiture of rights. The parties would still not yet know where they stand with regard to the admissibility of the unclean hands argument.
It must also have been clear to the Russian Federation that it was the intention of the Court of Appeal to clarify already at this stage of the proceedings what would and would not be part of the debate.

3.4 The Russian Federation has further argued that HVY waived its right to object to the unclean hands argument during the hearing on 16 January 2017. To the question of the Court of Appeal whether the parties were still planning to raise motions, counsel Ynzonides, at the time one of the lawyers of HVY, answered:

> **"We briefly considered whether to separately put to this court whether the argument of the unclean hands can still be discussed in these proceedings, but we decided not to do so."**

However, this communication does not imply a waiver of rights and the Russian Federation could not reasonably have inferred this. This communication, which apparently was made with a view to the state of affairs at the time, does not show that HVY waived its right to initiate a motion on this subject in the future. It appears that HVY, in response to the positions taken by the Russian Federation in the Defence on Appeal, have seen cause to as yet raise a motion. Moreover, it is not clear what interest the Russian Federation has in this argument. It does not argue that HVY has also waived its right to take the view in its written submissions that the unclean hands argument can no longer be addressed. The Court of Appeal further considers it important in connection with due process that a decision on this question is already taken at this point.

**4. (I) unclean hands**

<u>the assertions on unclean hands to which HVY are objecting</u>

4.1 Put briefly, the assertions to which HVY are objecting under the heading unclean hands amount to the fact that HVY, or at least legal/natural persons whose actions can be attributed to HVY, have themselves acted unlawfully, in particular when making and consolidating their investments in Yukos. As the Appeal Court understands it, HVY are objecting to the following assertions in the memorial of defence (reference is made to the chapter classification of the Defence on Appeal):

4.1.1 <u>Defence on Appeal III(B)</u>

Also referred to in the Defence on Appeal as: *<u>Part III</u> (Background: The Unlawful Acquisition, Exploitation, and Looting of Yukos Oil) <u>under B</u> (The unlawful conduct of the Russian Oligarchs and HVY).*

In this part of the Defence on Appeal, the Russian Federation discusses the twenty-eight cases of wrongful acts of HVY, as well as of the "Russian Oligarchs", also referred to in the arbitrations and specified in the Defence on Appeal in footnotes 760 to 763. The latter are described in the Defence on Appeal (paragraph 13) as the "Russian persons who founded, own and control HVY". The alleged unlawful acts are divided in the Defence on Appeal into four phases, which are described as follows: the Russian Oligarchs acquire the Yukos shares of HVY through fraud, bribery and conspiracy: bribes are paid by YUL (phase 1), the Russian Oligarchs established Hulley, YUL and VPL to conceal control of their Yukos shares and to evade dividend taxes (phase 2), the Russian Oligarchs misused shell companies to commit tax fraud in the low-tax regions of the Russian Federation (phase 3), the Russian Oligarchs hampered tax collection, while at the same time withdrawing billions of dollars from Yukos via HVY (phase 4).

4.1.2 Defence on Appeal IV (C)(b)

Also referred to in the Defence on Appeal as: *Part IV ( Ground for Setting Aside 1 (continued) - No Valid Arbitration Agreement under C (Jurisdictional Ground 2 - The Tribunal lacked jurisdiction because the ECT does not protect HVY nor HVY's shares in Yukos) sub b (The ECT Does Not Protect HVY's Yukos Shares Because They Are, At Bottom, Investments By Russian Nationals In Russia).*

The Russian Federation has further elaborated this statement in the Defence on Appeal with the following arguments: (i) HVY are sham companies that are beneficially owned and controlled by Russian citizens for illegal purposes - the Russian Federation is also relying on new documents that have been made public since 2015 in this respect; (ii) HVY are not "Investors" and did not make "Investments" in the sense of the ECT because the ECT does not offer protection for "U-turn" investments by citizens of a host country through sham companies; (iii) HVY have not made an "Investment" under the ECT because they have not made an economic contribution in the host country; and; (iv) the abuse by the Russian Oligarchs of HVY's corporate structure for illegal purposes justifies piercing the veil of corporate liability to reveal these Russian citizens behind HVY.

4.1.3 Defence on Appeal IV(C)(c)

Also referred to in the Defence on Appeal as: *Part IV ( Ground for Setting Aside 1 (continued) - No Valid Arbitration Agreement under C Jurisdictional Ground 2 - The Tribunal lacked jurisdiction because the ECT does not protect HVY nor HVY's shares in Yukos under c(The ECT Does Not Protect HVY's Investments Because They Were Made In Violation Of Law).*
In support of this assertion, the Russian Federation invokes the illegal nature of both the making and the execution of HVY's "alleged investment", including the fraudulent acquisition by the Russian Oligarchs of the Yukos shares. According to the Russian Federation, HVY acquired their investments in Yukos through widespread violations of the law, in which context the Russian Federation refers to chapter III of the Defence on Appeal (see 4.1.1 above). HVY were directly involved in the illegal acquisition of the Yukos shares, according to the Russian Federation. The Russian Federation further argues in this respect that: (i) the Russian Oligarchs through HVY and/or its predecessors obtained and retained beneficial ownership of, control of and power over Yukos through deception, corruption and fraud, (ii) HVY were created and used by the Russian Oligarchs to evade tax, to conceal the Russian Oligarchs from view and to be able to file claims under the ECT, and (iii) HVY are only sham companies that do not engage in any business activity.

4.1.4 Defence on Appeal VII(H)

Also referred to in the Defence on Appeal as: *Part VII (Ground for setting aside 5 - the Yukos Awards are contrary to the public policy) under H (Public Policy Ground 6 - Enforcement of the Yukos Awards would violate Public Policy regarding Fraud, Corruption, and other Serious Illegality).*

The Russian Federation argues in this respect that the outcome of the Awards amounts to a justification and maintenance of HVY's fraudulent, corrupt and illegal activities, which already independently - and certainly in connection with the way in which the arbitrations were conducted - is contrary to the fundamental principles of public policy and decency mentioned in Article 1065(1)(e) DCCP. For the alleged misconduct of HVY, the Russian Federation refers to Chapters III.B, III.C and IV.C(c). By "the manner in which the arbitrations were conducted", the Russian Federation is apparently referring to its assertion that the Arbitral Tribunal arrived at its findings in violation of the principle of the right to a fair hearing and the principle of equality of arms, as well as in a speculative, subjective and inconsistent manner.

HVY's objections relating to the unclean hands argument

4.15 HVY's objections to these assertions can be divided into the following categories:

(a) the assertions were not put forward in time in the arbitration as required by Article 1052(2) and Article 1065(2) DCCP;

(b) respectively, the relevant decision of the Arbitral Tribunal was not contested in the summons in accordance with SC 22 March 2013, ECLI:NL:HR:2013:BY8099 (Bursa v. Güris) or the assertions in question were not invoked in the initiating summons, as required in Article 1064(5) DCCP;

(c) the assertions are contrary to due process as referred to in Article 130 DCCP;

(d) the Russian Federation has waived its right to base its claim on the unclean hands argument, or has forfeited this right.

assessment of HVY's objections to the unclean hands argument

4.2 *(a) Article. 1052(2) DCCP*

4.2.1 HVY are arguing that the Russian Federation failed to put the unclean hands argument in good time in the arbitration, namely in its Statement of Defence. The Russian Federation may have put forward this argument in the Statement of Defence, but only as an argument about admissibility, not to contest the jurisdiction of the Arbitral Tribunal, according to HVY. According to HVY, this is in violation of Article 1052(2) DCCP, which stipulates that a reliance on a lack of jurisdiction of the Arbitral Tribunal on the ground that there is no valid arbitration agreement must be made by a party appearing in the arbitration before all defences, on pain of forfeiture of its right to rely on this absence later, in the arbitral proceedings or before the ordinary court. HVY are also arguing that the Russian Federation is not free to put forward the unclean hands argument in support of the proposition that HVY did not "Invest" within the meaning of Article 1(6) ECT and are not "Investors" within the meaning of Article 1(7) ECT, because the Russian Federation did not put forward the unclean hands argument for that purpose in the Statement of Defence either.

4.2.2 The Russian Federation used the unclean hands argument in the arbitration in the following context. In the Statement of Defence of 15 October 2005, the Russian Federation contested the jurisdiction of the Arbitral Tribunal on a number of grounds, but not with the unclean hands argument ("Claimant Does Not Come To The Tribunal With Clean Hands"), which it did put forward as an argument for the inadmissibility of HVY's claim under the ETC ("These unlawful acts preclude this claim under the Treaty"). In the First Memorial on Jurisdiction and Admissibility of 28 February 2006, the unclean hands argument was also (exclusively) put forward in the context of inadmissibility. Subsequently, the Arbitral Tribunal decided in its Procedural Order No. 3 that the parties" allegations regarding the unclean hands and the accusation of "criminal enterprise" will be decided in the "merits phase" of the proceedings. In that sense, see also the Interim Award under 20 and 435. In the Interim Award, the Arbitral Tribunal ruled as follows with regard to the unclean hands argument:

**"(c) CONFIRMS that its decision on the objections to jurisdiction and/or admissibility involving the**

> **Parties' contentions concerning "unclean hands" and Respondent's contention that "Claimant's personality must be disregarded because it is an instrumentality of a criminal enterprise" is deferred to the merits phase of the arbitration, consistent with Procedural Order No. 3;"**

In the "Respondent's Skeleton Argument" of 1 October 2012, the Russian Federation argued in point 96 of Chapter VIII ("The Tribunal Lacks Jurisdiction Over Claimants' Claims, Or Must Dismiss Them, Because They Are Based On Illegal Conduct By Claimants And The Yukos Managers They Installed And Controlled"):

> **"96. The history of repeated illegal conduct by Claimants (...) deprives the Tribunal of jurisdiction over Claimants' claims, because ECT protection does not extend to illegal investments, or requires that the Tribunal dismiss those claims under the principle of unclean hands. (..)"**

In the Final Award the Arbitral Tribunal dealt with the unclean hands argument as an argument that could result in one or more of the following determinations: "(a) the Tribunal does not have jurisdiction over Claimants' claims; (b) Claimants' claims are inadmissible; and/or Claimants should be deprived of the substantive protections of the ECT" (Final Award nos. 1273, 1280, 1313, 1349, 1373). The Arbitral Tribunal was of the opinion that it did not have to decide what legal consequence the award of the unclean hands argument would have (Final Award no. 1353). Finally, the Arbitral Tribunal ruled in the dispositive of the Final Award:

> **"(b) DISMISSES the objections to jurisdiction and/or admissibility, pertaining to Respondent's contentions concerning "unclean hands" and "illegal and bad faith conduct;"**

4.2.3 In summary, the proceedings show that the Russian Federation relied on the absence of a valid arbitration agreement in the arbitration before all defences, but that it first substantiated this claim with the unclean hands argument at a later stage of the proceedings. The unclean hands argument was put forward by the Russian Federation in arbitration before all defences, albeit as an argument within the limits of the inadmissibility advocated by it.

4.2.4 The Supreme Court (HR 27 March 2009, ECLI:NL:HR:2009:BG6443 on Smit v. Ruwa) ruled as follows on the question of whether and to what extent it is admissible for a party which has relied on the absence of a valid arbitration agreement in the arbitral proceedings before all defences to substantiate its reliance on this with new factual or legal arguments in the further course of the arbitral proceedings or in the setting aside proceedings:

> **"3.4.1 (....) This set of provisions [art. 1052(1) and (2), art. 1065(1) opening words and (a), art. 1065(2), Court of Appeal] is intended to ensure that, if a party wants to contest the jurisdiction of the Arbitral Tribunal because of the absence of a valid arbitration agreement, an arbitral decision can be taken by the Arbitral Tribunal at an early stage of the proceedings, thus avoiding as much as possible that unnecessary procedural steps would be taken if a later (in the arbitral proceedings or before the ordinary court) reliance on the absence of a valid arbitration agreement would nevertheless have to lead to the finding that the Arbitral Tribunal has no jurisdiction.**
>
> **3.4.2 (....) In view of the mutual interests at stake, it cannot be accepted as a general rule that there would never be scope to do so. For example, it is conceivable that a party which has relied on the absence of a valid arbitration agreement before all defences will only have reason to substantiate its reliance on this ground (later in the arbitration proceedings or before the ordinary court) with new factual or legal assertions in response to a defence put forward by the other party. On the other hand, it also cannot be accepted as a general rule that there is unlimited scope for completely new factual or legal assertions to be made subsequently in support of a ground put forward in a timely manner, because this could unduly undermine the statutory provisions.**
> **It will therefore always be necessary - also in view of the requirements of due process - to assess in a concrete case whether a new factual or legal assertion is in conflict with the aforementioned purport of the statutory regulation. Important aspects in this respect include the extent to which the new assertions are in line with the previous assertions (taken in the arbitral proceedings), what the reason is for not presenting the new assertions earlier, and whether or not the party concerned was assisted by a lawyer in the arbitral proceedings."**

4.2.5 Assessed against this criterion, the Russian Federation has remained within the limits of Article 1052(2) DCCP. When the Russian Federation relied on the unclean hands argument in arbitration as an argument in favour of the lack of jurisdiction of the Arbitral Tribunal, this was not a new argument. After all, it had already been put forward in the Statement of Defence in the context of admissibility/inadmissibility and was also contested as such by HVY. The unclean

hands argument put forward in the context of the jurisdiction corresponded to the same argument that had already been put forward in the context of admissibility/inadmissibility. It is also hard to see - and HVY are not arguing - that the unclean hands argument had to be contested in a substantially different way or with other arguments because it was also put forward in the context of the jurisdiction at a later stage of the arbitration. A conflict with due process has also not been shown. Article 1052(2) DCCP therefore does not prevent the Russian Federation from relying on the unclean hands argument later than in the Statement of Defence in the arbitration or in the present setting aside proceedings.

4.2.6 HVY are also objecting to the Russian Federation now putting forward the unclean hands argument in support of the assertion that HVY did not "Invest" within the meaning of Article 1(6) ECT and are not "Investors" within the meaning of Article 1(7) ECT, even though they did not put forward that argument in that connection in the Statement of Defence. The Court of Appeal dismisses this objection. In the Statement of Defence, the Russian Federation relied on both the unclean hands argument (no. 47) and the absence of an "Investment" in the sense of Article 1(6) ECT (no. 30-34). The Russian Federation also argued in the Statement of Defence that the Arbitral Tribunal "Lacks Jurisdiction *Ratione Personae*" (nos. 24-29), which argument can only be understood as a reliance on art. 1(7) ECT. HVY's Skeleton Argument (nos. 19-23) shows that HVY did indeed interpret this argument as a reliance on Article 1(7) ECT.

4.2.7 It is true that the Russian Federation did not put forward the unclean hands argument in the Statement of Defence in the context of its reliance on Article 1(6) or 1(7) ECT.
However, by combining these arguments, the Russian Federation has not gone beyond the limits set out in the Smit v. Ruwa judgment. After all, the unclean hands argument was certainly not a new defence. Nor do HVY make it clear in what way due process would oppose the combination of existing arguments, or to what extent this would unreasonably harm their defence.

4.2.8 HVY's reliance on violation of art. 1052(2) DCCP fails.

4.3 (*b) Article 1064(5) DCCP and the Bursa v. Güris judgment*

4.3.1 HVY further submits that the Arbitral Tribunal explicitly rejected the accusations of the Russian Federation based on the unclean hands argument in the dispositive of the Final Award and that the Russian Federation did not contest that decision with any ground for setting aside in the summons initiating these setting aside proceedings. According to HVY, the fact that the Russian Federation does this for the first time in the Defence on Appeal is contrary to the Supreme Court judgment HR 22 March. 2013, ECLI:NL:HR:2013:BY8099 (Bursa v. Güris). According to HVY, in that judgment the Supreme Court ruled that decisions of the Arbitral Tribunal that were not contested with a ground for setting aside in the summons cannot be contested later in the course of the setting aside proceedings.

4.3.2 In the initiating summons, the Russian Federation did argue as ground for setting aside that there is no valid arbitration agreement (Article 1065(1)(a)), but did not invoke the unclean hands argument in that respect. The Russian Federation did put forward the twenty-eight unlawful acts referred to in the Defence on Appeal (chapter III.B) in the summons (nos. 30 et seq.) as "background" and argued in that respect:

> **“.... that the legal infirmities surrounding Yukos’ founding are not one of the grounds on which the Russian Federation is seeking to have the Yukos Awards set aside.” (writ of Summons no. 27)**

4.3.3 In the Statement of Reply, the Russian Federation argued that the Arbitral Tribunal did not have jurisdiction, because HVY's investments were obtained in breach of the law and contrary to good faith and because it has been established that HVY were guilty of tax evasion on a large scale (unclean hands) and therefore not protected by Article 1(6) ECT. The Russian Federation also argued in the Statement of Reply that the illegality of HVY's investment on the basis of a fundamental principle of investment arbitration precludes protection on the basis of the ECT and that (also) for that reason the Arbitral Tribunal did not have jurisdiction. The Russian Federation

referred in this context to the 28 cases of illegal or mala fide behaviour (Reply 265). In the rejoinder HVY argued with a reliance on the Bursa v. Güris judgment that this appeal is out of time, because it is contrary to the provisions of Article 1064(5) DCCP now that the unclean hands argument is directed against decisions of the Arbitral Tribunal which the Russian Federation did not contest in the summons. The District Court did not reach an assessment of the unclean hands argument or of HVY's assertion that this argument was put forward too late.

4.3.4 Article 1064(5) DCCP stipulates that all grounds for setting aside must be put forward in the summons on pain of forfeiture of the right to do so. The Supreme Court ruled in its judgment HR 27 March 2009, ECLI:NL:HR:2009:BG4003 (Breeders v. Burshan) that the words "grounds for setting aside" used in Article 1064(5) DCCP refer to the grounds set out in Article 1065(1)(a) to (e) DCCP. A ground for setting aside included in the summons may be given further legal or factual effect later in the proceedings, provided this does not conflict with Article 130 DCCP or art. 1052(2) DCCP in connection with Article 1065(2) DCCP, according to the Supreme Court. It follows from this that the Russian Federation is in principle permitted to rely on the unclean hands argument later than in the summons to substantiate its reliance on the absence of a valid arbitration agreement, provided that this does not conflict with the proper procedural order or the provisions of Article 1052(2) in conjunction with Article 1065(2) DCCP.

4.3.5 The position of HVY, that it is allegedly decisive that the Russian Federation did not contest the decision of the Arbitral Tribunal (in the dispositive of the Final Award) about the unclean hands argument in the summons, is incorrect. The system of the law assumes that the setting aside of an arbitral award is requested on the basis of one or more of the grounds for setting aside referred to in Article 1065(1) DCCP. It is not required that the party requesting the setting aside of an arbitral award also (or instead) mentions in the summons the specific decisions it wishes to contest with the grounds for setting aside in Article 1065(1) DCCP. This is not affected by the fact that, in the Bursa v. Güris judgment, the Supreme Court ruled that, if a specific decision of the arbitral tribunal (in that case concerning the costs of the arbitration) was challenged in the summons with a specific ground for setting aside, it is not permitted at a later stage of the proceedings also to challenge that decision with another ground for setting aside, even if that other ground for setting aside was invoked in the summons to challenge another decision. That specific situation, in which context a new ground for setting aside within the meaning of Article 1064(5) DCCP was invoked later in the proceedings to contest an arbitration decision that had already been challenged in the summons with another ground for setting aside, does not arise in the present case. Nor can it be inferred from the Bursa v. Güris judgment, contrary to HVY's arguments, as a general rule that while a specific arbitral decision is not preceded by a ground for setting aside in so many words, no grounds for setting aside can be invoked against that decision at all in the course of the proceedings. In the summons, the Russian Federation contested the jurisdiction of the Arbitral Tribunal with the ground for setting aside of Article 1065(1)(a) DCCP. On the basis of the Breeders v. Burshan judgment, that ground may, within the limits set out above, be further substantiated with new factual or legal arguments, such as the unclean hands argument, at a later stage of the proceedings. Contrary to what HVY also argues, it cannot be inferred from that judgment that such further substantiation is only permitted in response to the defendant's defence or the judgment of the District Court.

4.3.6 Inasmuch as HVY are arguing that bringing the unclean hands argument later than in the summons exceeds the limits mentioned in the Breeders v. Burshan judgment, the Court of Appeal will return to this below inasmuch as it concerns the objection that HVY are basing on Article 130 DCCP. This shows that this objection does not hold. Insofar as HVY are arguing that there is a conflict with Article 1052(2) DCCP, that argument fails on the basis of what the Appeal Court has considered above.

4.3.7 HVY's reliance on Article 1064(5) DCCP is therefore unsuccessful.

4.4 *(c) Article 130 DCCP*

4.4.1 HVY have substantiated their assertion that it is contrary to due process to add the unclean hands argument to the arguments between the parties with the following arguments:

(i) the late change in the claim is of a very far-reaching nature because entirely new subjects have been put up for discussion; this is unacceptable, also because the Russian Federation is being assisted in this case by lawyers specialised in arbitration law;

(i) the admission of the unclean hands argument will lead to a very considerable and unreasonable delay to the proceedings; the admission of the unclean hands argument means the handling of 13 witness and expert statements with 554 associated exhibits, to which HVY would then have to respond, with the prospect of further debate about them;

(iii) by putting the unclean hands argument for the first time in its Defence on Appeal, the Russian Federation is depriving HVY of the right to a full assessment of the case in two instances and is trying to prevent HVY from being able to respond to that argument in a full written submission; *unclean hands*-

(iv) the Russian Federation is completely ignoring the safeguards applicable within criminal proceedings, such as the presumption of innocence;

(v) most of the actions on which the unclean hands argument is based were committed by third parties who are not parties to these proceedings;

(vi) the way in which the unclean hands argument is set out in the Defence on Appeal is flawed, because this argument is based on extensive references to "new" witness and expert statements which in turn refer to other material, while proper assertions in the Defence on Appeal itself are lacking.

4.4.2 The Court of Appeal states first and foremost that, contrary to HVY's assertion, the unclean hands argument was not put forward for the first time in the Defence on Appeal but in the Statement of Reply (see 4.3.3). It is therefore wrong that the Russian Federation deliberately omitted this issue from the debate in the first instance. In the first instance, HVY did not object to the introduction of the unclean hands argument on the basis of Article 130 DCCP. Article 130(1) DCCP stipulates that the appeal must be lodged with the relevant instance at the latest before the final judgment, failing which the court must base its decision on the amended claim. This means that HVY cannot, for the first time in an appeal, object to the unclean hands argument as such on the grounds of violation of due process. Whether or not HVY argued in the rejoinder that the unclean hands argument is contrary to the provisions of Article 1064(5) DCCP is irrelevant to this. After all, no (reasoned) objection on the grounds of due process referred to in Article 130 DCCP can be read there.

4.4.3 The following is also relevant. HVY's objection that they will not be able to respond adequately to the unclean hands argument fails. Since the unclean hands argument was first put forward by the Russian Federation in the Statement of Reply, HVY were able to respond to it substantively in the Statement of Rejoinder, in the oral pleadings in first instance and in the Defence on Appeal . They also made use of this option. This means that HVY had sufficient opportunity to respond to the unclean hands argument, as put forward by the Russian Federation in the Statement of Reply and further explained during the oral pleadings. In that respect, there is no conflict with due process.

4.4.4 The Court of Appeal understands HVY's assertions in such a way that they also, and in particular, are arguing that due process resists the *expansion* that the Russian Federation has given to the unclean hands argument in the Defence on Appeal, according to HVY. To the extent that HVY are relying on the introduction of "entirely new subjects" in this context, the Court of Appeal rejects that objection. After all, HVY did not indicate which new subjects they intended to raise. To the extent that HVY are relying on the submission of new exhibits with the Defence on Appeal, their objection apparently focuses on the following:

(i) the Russian Federation is relying on 13 witness and expert statements with 554 associated

exhibits, with the material in just four of these 13 statements already covering almost 10,000 pages;

(ii) the Russian Federation has announced its intention to bring new witnesses on this subject, will want to make use of an ongoing criminal investigation on Yukos, and will want to respond with a motion to the motion in which HVY will respond to the exhibits presented with the Defence on Appeal.

4.4.5 The Court of Appeal rejects this objection because HVY did not state (with sufficient reasoning) that the witness and expert statements and exhibits referred to in 4.4.4(i) do indeed constitute a change or increase of the claim or the grounds thereof as referred to in Article 130(1) DCCP. It has not been claimed or shown that these exhibits are anything other than written proof of assertions (including assertions with regard to international or foreign law) on the unclean hands argument that the Russian Federation has already put forward in the first instance. It should be borne in mind in this respect that the Russian Federation already in the first instance invoked several cases of unlawful conduct by HVY (Reply No 28) and made a (general) offer of evidence. Most of these assertions are suitable for a comprehensive factual and legal debate, and if necessary the provision of evidence. The parties were not able to provide evidence in the first instance, but that does not mean that the Russian Federation will increase its claim (in an impermissible manner) if it submits further written evidence of its assertions into the proceedings on appeal.

4.4.6 To the extent that the objection is directed against the circumstance that the Russian Federation has announced that it wishes to bring new witnesses on this subject, will want to make use of an ongoing criminal investigation concerning Yukos, and wishes to respond with a deed to the deed in which HVY will respond to the exhibits presented with the Defence on Appeal, this objection is premature. The Court of Appeal can hardly rule on procedural acts that the Russian Federation may or may not perform in the future. Incidentally, as announced in the letter of the Court of Appeal of 23 January 2017, the Court of Appeal will still decide on the further course of the proceedings after having heard the parties, in which context the requirements of due process will take the lead.

4.4.7 Nor is it likely that the submission of the said exhibits will lead to an unreasonable delay to the proceedings. Given the very large financial interests at stake in this dispute, the ten years of arbitration, the complexity of the issues that the parties are debating and the size of the procedural documents (even if the exhibits submitted with the Defence on Appeal are not taken into account), any delay does not outweigh the interest of the Russian Federation in bringing forward what it considers important in support of its claim. The fact that the Russian Federation is being assisted by lawyers specialised in arbitration law does not have sufficient weight in this respect. The introduction of the unclean hands argument in the reply also did not take place at an unreasonably late stage in the proceedings. It is also important in this respect that although the court has not been able to address the unclean hands argument, the devolutive effect of the appeal may mean that the Court of Appeal will still have to decide on this argument, in which context the submission of evidence may also be discussed. Against this background, it is not evident that there will ultimately be (unreasonable) delay to the proceedings if evidence is submitted and discussed already at this stage of the proceedings.

4.4.8 HVY are also arguing that, because the Russian Federation first invoked the unclean hands argument in its Defence on Appeal, HVY have been deprived of the right to a full assessment of the case in two instances. This argument does not hold because, as has been established above, the unclean hands argument had already been put forward in the reply. The District Court did not accept the unclean hands argument (and the objection filed by HVY against it), because the District Court already set aside the Yukos Awards on another ground. If the Court of Appeal were to consider the grounds of appeal against this judgment to be well-founded, in connection with the devolutive effect of the appeal, it will address the other grounds for setting aside put forward by the Russian Federation, including - since, as will be concluded below, HVY's objection against this does not apply - the unclean hands argument. The Court of Appeal will not be allowed to refer the decision on this argument back to the court. If HVY are thus deprived of the possibility to

litigate in two instances about the unclean hands argument (including the extension given to it according to HVY in the Defence on Appeal), this is the consequence of the devolutive effect of the appeal and the prohibition of referral back to the lower court, not of the fact that the Russian Federation has put forward this argument too late. The fact that, where appropriate, the prohibition on referral may result in certain points of dispute not being heard in two instances is a consequence of the appeal system accepted by the Supreme Court.

4.4.9 HVY's reliance on conflict with the presumption of innocence does not hold. The purpose of these proceedings is not to impose a punitive sanction on one of the parties. The Russian Federation is be free to put forward whatever it deems appropriate in advocating its position. The fact that the acts on which the unclean hands argument is based were committed by third parties does not mean that the Russian Federation would not be free to argue that those acts should be invoked against HVY. No conflict with due process obtains.

4.4.10 Finally, HVY argue that the way in which the unclean hands argument was presented in the Defence on Appeal is flawed. Apparently, HVY are mainly concerned in this respect with the way in which reference is made to witness and expert statements submitted with the Defence on Appeal, and the way in which these statements refer to other statements and sources. HVY give a few examples of this (Deed of Objection No 139 with footnotes 159-161). However, HVY did not succeed in demonstrating that the unclean hands argument was presented incomprehensibly in its entirety. Even if it is true that the Russian Federation may in a number of cases have presented its arguments in an unclear or faulty manner, that fact does not mean that the unclean hands argument as such is in conflict with due process. HVY will be able to point out the alleged ambiguities in their response to the exhibits and the Court of Appeal will be able to draw the consequences it deems appropriate from any lack of clarity or incomprehensibility.

4.4.11 The conclusion is that there is no conflict with due process within the meaning of Article 130 DCCP.

4.5 *d) waiver and forfeiture of rights*

4.5.1 Finally, HVY are arguing that the Russian Federation has waived its right to put forward the unclean hands argument in support of its claim for setting aside of the Yukos Awards, or that it has forfeited the right to do so.

4.5.2 Determinative for a waiver of rights is whether the relevant argument has been waived unambiguously. In the present case, the Russian Federation stated the following in nos. 26 and 27 of the initiating summons:

> **"II. BACKGROUND**
>
> **26. In part A of this Section, a brief description is given of (a) the circumstances surrounding the acquisition of the control of Yukos by the same Russian oligarchs - principally, Mikhail Khodorkovsky, Leonid Nevzlin, Vladimir Dubov and Platon Lebedev - who now control Claimants [HVY, Ct of Appeal], (b) the principal features of Yukos' tax evasion scheme, which lies at the heart of the parties' dispute, and (c) the Russian authorities' efforts to collect the corporate profit tax and VAT that was assessed against Yukos.**
>
> **27. In providing this summary, the Russian Federation is mindful that this Court does not sit as an appellate body in reviewing the Yukos Awards, and that the legal infirmities surrounding Yukos' founding are not one of the grounds on which the Russian Federation is seeking to have the Yukos Awards set aside. The Russian Federation nonetheless believes that this background may be helpful to the Court in understanding the actions taken by Claimants subsequent to the founding of Yukos."**
>
> (underlining by Court of Appeal).

4.5.3 The passage in question does not contain an unambiguous waiver of the unclean hands argument, and HVY could not reasonably infer this from that passage. That passage states that this argument is not one of the grounds on which the Russian Federation seeks the setting aside of

the arbitral awards. However, no wording is used from which it can reasonably be deduced that the Russian Federation also indicates that it will not use this argument at a later stage of the proceedings to substantiate its assertion that the arbitral awards should be set aside on one or more of the grounds mentioned in Article 1065(1) DCCP. The Court of Appeal also considers it important that within the limits indicated in the Breeders v. Burshan judgment (HR 27 March 2009, ECLI:NL:HR:2009:BG4003) it is permissible for a ground for setting aside cited in the summons to be elaborated later in the proceedings with new legal and factual assertions. HVY should have taken this possibility into account. Furthermore, the Court of Appeal does not consider it clear what is meant by "legal infirmities surrounding Yukos' founding" in the cited passage. After all, the unclean hands argument encompasses considerably more than "legal infirmities surrounding Yukos' founding" (see in particular the twenty-eight cases of unlawful conduct, summarised in the Final Award in 1281-1310 and the assertions in 30 et seq. of the initiating summons). In addition, the alleged unlawful conduct on which the unclean hands argument rests has been extensively explained in the summons as "background" that may be useful to the court. This means that HVY could not reasonably infer from this passage that the Russian Federation waived the unclean hands argument.

4.5.4 In essence, HVY did not substantiate its reliance on a forfeiture of rights in any other way than by reference to the passage from the initiating summons discussed above. That reliance therefore fails on the same grounds as the reliance on a waiver of rights. The underlined communication in question, cited above, of the Russian Federation in the initiating summons is in itself insufficient to assume that it is unacceptable according to standards of reasonableness and fairness that the Russian Federation still invokes the unclean hands argument in the Reply. It is important in this context that it cannot be assumed that HVY were disproportionately disadvantaged in their defence because the Russian Federation first invoked the unclean hands argument in its reply. The Court of Appeal refers to what it considered above in connection with HVY's reliance on Article 130 DCCP.

4.5.5 Also HVY's objection that is based on a waiver of rights and forfeiture of rights fails.

conclusion on the unclean hands argument

4.6. The conclusion is that the objection to the unclean hands argument is unfounded.

**5. (II) fraud in the arbitration committed by HVY**

the allegations regarding fraud on the tribunal to which HVY object

5.1 HVY object to the following assertions in the Defence on Appeal, all of which amount to HVY concealing in the arbitrations that the beneficiaries of the trusts (who ultimately hold the shares in HVY) have ownership and control of HVY. HVY's objection focuses on the following assertions made by the Russian Federation:

(i) the Yukos Awards are contrary to public policy because of fraud committed by HVY in the arbitration, consisting of making false statements and withholding documents (Defence on Appeal Chapter VII.G);

(ii) there is no valid arbitration agreement as HVY and their shares in Yukos are not within the scope of the ECT protection (the ECT does not protect HVY's investments as these are ultimately investments of Russian nationals in the Russian Federation), as (a) HVY are sham companies beneficially owned and controlled by Russian nationals for illegal purposes - in this connection the Russian Federation is also relying on new documents that were made public after 2015 and(b) the misuse by the Russian Oligarchs of HVY's corporate structure for illegal purposes justifies a piercing of liability to reveal these Russian nationals behind HVY (Defence on Appeal Chapter IV.C(b)(i) and (iv), respectively);

(iii) HVY have, contrary to the Procedural Order No. 12 of 16 September 2011 in the arbitration, failed to produce the documents referred to in the Defence on Appeal under 637(a) to (d), as well as the 2011 agreement between GML Limited, on the one hand, and

the directors of Stichting Administratiekantoor Yukos International and Stichting Administratiekantoor Financial Performance Holdings, on the other (described in the Defence on Appeal under 637 and 640), the further correspondence on that agreement, and the minutes of meetings of the organs of those Stichtings (mentioned in the Defence on Appeal under 640) (Defence on Appeal chapter III.C.)

5.2 The Russian Federation has further substantiated in chapter VII.G of the Defence on Appeal (see above under 5.1 (i)) its claim that HVY submitted false statements during the arbitration and withheld documents as follows:

(i) HVY lied to the Arbitral Tribunal by making false statements and withholding documents relevant to crucial points of dispute in the arbitration, in particular by asserting strongly that not the Russian Oligarchs but the trustees controlled HVY (Defence on Appeal No 1197);

(ii) HVY concealed their true relationship with the Russian Oligarchs and the widespread crime permeating their alleged investment in Yukos, and they violated the Document Production Orders of the Arbitral Tribunal (Defence on Appeal 1198 (a));

(iii) HVY failed to submit the letter of GML Limited of 2011 and 'responsive documents and communications which must presumably exist' concerning the participation of the Russian Oligarchs in the decision-making within HVY with regard to important business transactions, in violation of a Document Production Order of the Arbitral Tribunal (Defence on Appeal No 1198(b));

(iv) HVY withheld documents on the entire chain of transactions concerning the Yukos shares, concealing HVY's direct link with the Russian Oligarchs and the illegal acquisition of the Yukos shares by the Russian Oligarchs, contrary to a Document Production Order of the Arbitral Tribunal (Defence on Appeal No 1198 (c));

(v) HVY made incorrect statements in the documents they submitted to the Arbitral Tribunal, by arguing a separation between themselves and the Russian Oligarchs and stressing the legality of their acquisition of shares in Yukos, despite the fact that documents in their possession showed otherwise, because the acquisition of the shares was illegal, invalid and therefore void (Defence on Appeal No. 1198(d));

(vi) the Russian Oligarchs made secret payments to Andrei Illarionov, one of HVY's principal witnesses in the arbitration (Defence on Appeal No. 1198(e)).
‘

<u>HVY's objections concerning fraud in the arbitration</u>

5.3 HVY objects to the assertions referred to above under 5.1 under (i), (ii) and (iii) on the following three grounds:

(a) the change of claim is contrary to Article 1064(5) DCCP: the decisions of the Arbitral Tribunal regarding ownership and control of HVY were not challenged by the Russian Federation in the initiating summons and on the basis of the Bursa/Güris judgment (HR 22 March 2013, ECLI:NL:HR:2013:BY8099) this cannot be done as yet at a later stage of the action;

(b) the change of claim is contrary to Article 1068 DCCP: the Russian Federation should have instituted the revocation procedure of Article 1068 DCCP, or at least should have submitted its change of claim within three months after it became aware, or should have become aware, of the facts on which it bases its assertion that fraud was committed or documents were withheld;

(c) the change in claim is contrary to the requirements of due process (Article 130 DCCP).

assessment of HVY's objections regarding fraud in arbitration

5.4 The Court of Appeal sees reason to deal first with the objection referred to under (b) above.

5.5 Chapter IV.C(b)(i) of its Defence on Appeal, the Russian Federation did not raise any new cases of fraud, but only referred to 'new documents' (no. 665) which, in its opinion, should have been submitted by HVY in the arbitration, whereby the Russian Federation is apparently referring to the documents described above under 5.1(iii). In Chapter IV.C.(b)(iv) of the Defence on Appeal, the Russian Federation did not, as far as the Court of Appeal can discern, invoke fraud or fraud on the tribunal. This therefore concerns the assertions concerning fraud and the withholding of documents in the arbitration as referred to under 5.1 (i), as further elaborated under 5.2, and 5.1 (iii) above.

5.6 HVY rightly argue that all these arguments, if correct, could provide grounds for claiming the revocation of an arbitral award on the grounds of Article 1068(1) DCCP. The accusation that HVY omitted to submits certain documents in the proceedings that were of relevance to the decision of the tribunal falls under the under the revocation ground of Article 1068(1)(c) DCCP. The accusation that HVY - apparently the Russian Federation means intentionally - made false and/or incorrect statements, concealed the true state of affairs or influenced a witness in an improper manner, fall under the revocation ground of Article 1068(1)(c) DCCP)

5.7 HVY also rightly argue that these accusations can only be raised in revocation proceedings under Article 1068 DCCP and not in an action to set aside such as the present one. The legal consequence of setting aside on account of one of the grounds of Article 1065(1) DCCP and on account of revocation are the same (cf. Article 1068(3)): the jurisdiction of the ordinary court is revived, unless the parties have agreed otherwise. However, there are differences as to the time limits within which these remedies are to be lodged and as to the competent court. If more than three months have elapsed since the arbitral award attained binding authority, revocation may still be claimed within three months after the fraud or deceit has come to light or a party has acquired the new documents. There is no such an additional period for proceedings to set aside. Another difference in respect of setting aside proceedings is that the claim for revocation must be submitted to the court of appeal that would have jurisdiction to rule on the claim for setting aside referred to in Article 1064 DCCP, while setting aside proceedings (in this case, subject to the old law) must be submitted to the district court. Revocation proceedings are thus only tried in a single instance of fact. If it were be possible to claim the setting aside of the arbitral award on account of one or more of the grounds for setting aside of Article 1065(1) DCCP on the basis of the assertion that the other party committed fraud or withheld documents during the arbitration, it would be possible to achieve the same result as with a claim for revocation, but it would be possible to circumvent both the aforementioned period of three months and the exclusive jurisdiction of the court of appeal as the only trier of fact, for example by invoking by means of a change of claim, more than three months after the discovery of the fraud, fraud as a new argument for a reliance on Article 1065(1)(e) DCCP already made in the writ of summons in setting aside proceedings pending before the district court. Such an outcome is unacceptable.

conclusion regarding fraud in arbitration

5.8 The conclusion is therefore that HVY's objection to the claims of the Russian Federation under 5.1(i), further elaborated under 5.2, and 5.1(iii) above, is well-founded. The Court of Appeal need not detain itself with the objections of HVY under (a) and (c) (see 5.3 above).

**6. (iii) Article 1(6) and (7) ECT and the question as to whether HVY's shares in Yukos can be regarded as 'Investments' in the meaning of the 1(6) and whether HVY can be considered as 'Investor' in the sense of 1(7)**

the assertions of the Russian Federation regarding Article 1(6) and (7) of the ECT to which HVY objects

6.1 The Court of Appeal understands that HVY's objection is directed against the following assertions of the Russian Federation:

(i) the assertion in the Statement of Reply that HVY's shares in Yukos are not an 'Investment' within the meaning of Article 1(6) ECT;

(ii) the substantiation of the assertion (i) in the Defence on Appeal with the arguments (a) that an injection of foreign capital is required for qualification as 'Investment' within the meaning of the ECT and (b) that HVY did not make any 'economic contribution in the host country' (Defence on Appeal IV.C(b)(iii));

(iii) the assertion that HVY and the Russian Oligarchs are to be deemed identical (Defence on Appeal IV.C(b)(iv)) and that HVY are therefore not investors within the meaning of Article 1(7) ECT.

HVY's objections to the assertions relating to Article 1(6) and Article 1(7) ECT

6.2 HVY's objections to these assertions come down to the following:

(a) in the writ of summons the Russian Federation did not contest with reasons the decisions of the Arbitral Tribunal in so far as they related to Article 1(6)ECT, in particular the decision of the Arbitral Tribunal that an injection of foreign capital is not required in order to qualify as an Investment within the meaning of the ECT, which means that it is contrary to Article 1064(5) DCCP and the Bursa/Güris judgment for it to later challenge this decision as yet; moreover, this is contrary to the requirements of a proper due process as referred to in Article 130 DCCP;

(b) the argument that HVY did not make an 'economic contribution in the host country' is (a) inadmissible on the grounds of Article 1052(2) and Article 1065(2) DCCP, because the Russian Federation did not include this assertion in the arbitration in its Statement of Defence, (b) is contrary to Article1064(5) DCCP and the Bursa/Güris judgment, because this argument was not put forward in the initiating summons, and (c) contrary to the requirements of due process as referred to in Article 130 DCCP;

(c) The proposition that HVY and the Russian Oligarchs should be deemed identical is contrary to Article1064(5) DCCP and the Bursa/Güris judgment because this argument was not put forward in the initiating summons.

assessment of HVY's objections in relation to Article 1(6) and 1(7) ECT

6.3 In the initiating summons, the Russian Federation claimed the setting aside of the Yukos Awards, primarily by invoking Article 1065(1)(a) of the DCCP (lack of a valid arbitration agreement). In this context, the Russian Federation inter alia contested the Arbitral Tribunal's determination that HVY's shares were protected by the ECT (in the words of the Russian Federation:) 'solely' because HVY were incorporated in Cyprus and the Isle of Man and 'they nominally held the relevant Yukos shares' (Writ of Summons no. 255). Also in Writ of Summons No. 9, the Russian Federation asserts that the Arbitral Tribunal erroneously rejected the

jurisdictional defence of the Russian Federation based on Article 1(6) and (7) ECT, which determines which investors and which investment are protected by the ECT. According to the Russian Federation, the Arbitral Tribunal rejected this defence despite the fact that HVY are sham companies that act as a front for Russian nationals.

In this connection, the Russian Federation put forward the following further arguments in the writ of summons:

(a) The (Russian) Oligarchs have in particular tried to convert their domestic dispute with the Russian tax authorities into an international investment arbitration by having their claims brought by HVY, being three offshore sham companies set up specifically by the Oligarchs to hold the shares in Yukos (No. 5);

(b) the Arbitral Tribunal proceeded on the basis of an overly literal interpretation of the definition of 'Investment' in Article 1(6) ECT (Writ of Summons No. 256, 263); the Russian Federation has also argued at other places in the Writ of Summons that a valid arbitration agreement was lacking because HVY's shares are not protected by Article 1(6) ECT (No. 20(b) and No. 106(e));

(c) the Arbitral Tribunal does not have jurisdiction under Article 1(6) and (7) ECT because HVY's shares in Yukos are not protected by the ECT; the present case concerns an internal Russian dispute, HVY are sham companies,
The beneficial owners of HVY are Russian nationals, and this is not in fact an international case within the scope of the ECT, but an internal Russian dispute between Russian nationals and the Russian Federation; the Arbitral Tribunal therefore has no jurisdiction under Article 26 ECT in conjunction with Article
1(6) and (7) ECT (no. 248);

(d) HVY are mere sham companies that are beneficially owned and controlled by Russian nationals (heading at No 257);

(e) to the extent that HVY paid anything for their shares in Yukos, they did so with financial resources of Russian origin (No 258); HVY did not invest any foreign capital in the territory of the Russian Federation (No 220);

(f) the ECT does not protect investments made by HVY in Yukos because these investments were made by nationals of a Contracting State, in the territory of and with funds from the same Contracting State; investment treaties are purely aimed at promoting and protecting foreign rather than domestic investments (No 262).

6.5 It follows from the above that in the Writ of Summons the Russian Federation contested the decision of the Arbitral Tribunal with regard to its jurisdiction and the Arbitral Tribunal's interpretation of Article 1(6) and (7) ECT, that the Russian Federation, in support of the ground for setting aside of Article1065(1)(a) DCCP relied on the proposition that there was no 'Investment' or 'Investors' within the meaning of Article 1(6) or 1(7) ECT respectively, because the funds with which HVY made the investment were of domestic (Russian) origin and HVY were sham companies, so that this was essentially an investment by Russian nationals in the Russian Federation and not an international case falling within the scope of the ECT. These assertions all clearly imply the absence of an injection of foreign capital. The assertion that the Russian Federation for the first time relied on Article 1(6) and (7) ECT in its Defence on Appeal is therefore incorrect. It is also incorrect that the Russian Federation did not contest the decision of the arbitral tribunal regarding the meaning of Article 1(6) and (7) ECT, and it should be noted that HVY assumes an erroneous legal view where they take the position that it is always required for the party requesting the setting aside of an arbitral award to in its introductory summons contest the determinations of the arbitral tribunal in that award with specific grounds for setting aside (see above under 4.3.5).

6.6 HVY also argue that the Russian Federation's assertion that HVY did not make an 'economic contribution in the host country' is inadmissible on the grounds of Articles 1052(2) and 1065(2) DCCP, because the Russian Federation did not include this assertion in its Statement of Defence in the arbitration. The Court of Appeal will assume that the Russian Federation did not put forward this assertion (in these terms) in the arbitration, as the Russian Federation has not rebutted this. The question whether in that case the Russian Federation is free to advance that assertion for the first time in these setting aside proceedings must be answered on the basis of the criteria formulated in the Smit v. Ruwa judgment, cited above under 4.2.4. In essence, this assertion is encapsulated by, and in any case in line with, the assertion that the Russian Federation did put forward in the arbitration (and also in the Statement of Defence), namely that HVY did not make any foreign investment because any investment in Yukos originated from the Russian Federation. It is obvious that a foreign investment in the host country will generally also make a certain economic contribution to the economy of that host country. It is therefore not contrary to Article 1052(2) and Article 1065(2) DCCP for the Russian Federation to as yet advance this assertion in these proceedings.

6.7 HVY's argument that putting forward said assertion is contrary to the requirements of due process lacks substantiation and fails for that reason already. Moreover, it cannot be seen why putting raising this assertion, which as noted is close to what has already been put forward in the arbitration and in this action, would unreasonably prejudice HVY's procedural position or unreasonably delay the proceedings. This means that there is also no conflict with Article 1064(5) DCCP. After all, the Russian Federation is free to substantiate the ground for setting aside of Article 1065(1)(a) as invoked in the Writ of Summons with new legal or factual assertions at a later stage of the action (HR 27 March 2009, ECLI:NL:HR:2009:BG4003 in the matter of Breeders v. Burshan).
In any case, as made clear in the above, the limits on this freedom have not been transgressed in this case.

6.8 Finally, HVY argue that the assertion that HVY and the Russian Oligarchs should be deemed identical is in breach of Article 1064(5) DCCP and the Bursa/Güris judgment, as this assertion was not made in the initiating summons. This objection does not apply. After all, the statement in the Writ of Summons that HVY are only sham companies of which the beneficial ownership and control lies with Russian subjects (by which the Russian Federation is unmistakably referring to the Russian Oligarchs) can hardly imply anything other than that HVY and the Russian Oligarchs must be deemed identical, because HVY, as sham companies, must be taken out of the picture. Additionally, HVY's objection reveals a misapprehension of the scope of Article 1064(5) DCCP and the Bursa v Güris judgment. The Court of Appeal refers to what was considered on this point earlier.

conclusion with regard to Article 1(6) and (7) ECT

6.9 The conclusion is that the objections to the assertions of the Russian Federation referred to in 6.1 are unsuccessful.

**7. Conclusion; further course of the proceedings**

7.1 HVY's objection to the assertions of the Russian Federation referred to in 5.1(i), further elaborated under 5.2, and 5.1(iii) above, is well-founded.
For the remainder, the objection is unfounded. To the extent that these are appropriate within the framework of this motion, there is no interest in the declaratory judgments sought.

7.2 As announced by the Court of Appeal in its letter of 23 January 2017 and at the end of the hearing in the motion, the parties will now be given the opportunity to express their views on the further course of the action. The principle here, and this is not in dispute between the parties either, is that HVY will in any case still be allowed to respond by deed to the exhibits submitted with the Defence on Appeal. Parties will also be able to comment on the question of whether HVY should

also be given the opportunity to respond to (passages of) the Defence on Appeal.

7.3 The parties are requested to also submit their opinions on the question whether the Court of Appeal should, in order to avoid an unreasonable delay in the proceedings, determine that the parties may no longer submit exhibits in the proceedings during the exchange of written documents as from a certain point in time (without prejudice to their right to submit exhibits at an oral hearing).

7.4 The parties are also requested to comment on the question as to what is a reasonable time limit for the parties to observe for sending exhibits in advance of the final hearing.

7.5 Finally, the parties are requested to provide their proposals concerning the further course of the proceedings with an indicative timetable up to and including the final hearing. The Court of Appeal has a preference that the final hearing should be held no later than June 2019.

7.6 If the parties jointly submit a proposal for the further course of the proceedings, this is preferable, on the understanding that the Court of Appeal has its own responsibility and may, if necessary, deviate from such a proposal.

7.7 The case shall be referred to the cause list for submission of deeds, first on the part of HVY. The Russian Federation will then have the opportunity to respond. It is not permitted to submit exhibits with these deeds.

**Decision**

The Court:

- declares HVY's objection to the assertions made by the Russian Federation under 5.1(i), further elaborated under 5.2, and 5.1(iii) above to be well-founded;

- for the remainder dismisses the objection as unfounded and rejects the corresponding claims of HVY;

- Refers the case to the cause list of 23 October 2018 for submission of a deed as referred to under
7.7 of this judgment, first on the part of HVY;

- stays the decision on the costs of the motion until the final judgment;

- defers all further decisions.

This judgment was delivered by S.A. Boele, C.A. Joustra and J.J. van der Helm at the public hearing of 25 September 2018, in the presence of the Clerk.