ruling

THE HAGUE COURT OF APPEAL

Section for civil-law matters

Case number : 200.292.064/01

Case/cause-list number District Court : C/09/596260 / KG ZA 20-670

ruling of 28 June 2022

in the case of

1. **Hulley Enterprises Limited,**
with its registered office in Nicosia, Cyprus,
hereinafter 'Hulley',
2. **Veteran Petroleum Limited,**
with its registered office in Nicosia, Cyprus,
hereinafter 'Veteran',
3. **Yukos Universal Limited,**
with its registered office in Douglas, Isle of Man,
hereinafter 'Yukos',
appellants,
hereinafter also jointly referred to as 'HVY' (plural),
counsel: T.L. Claassens, lawyer practising in Rotterdam,

versus

1. **Russian State Enterprise FKP Sojuzplodoimport,**
with its registered office in Moscow, Russian Federation,
hereinafter 'FKP',
counsel: J.H.C. van Manen, lawyer practising in Amsterdam,
2. **Russian Federation,**
seated in Moscow, Russian Federation,
hereinafter the 'Russian Federation',
respondents,
counsel: R.S. Meijer, lawyer practising in Amsterdam.

1. Brief description of the case

In this enforcement dispute, FKP primarily seeks the lifting of an enforcement attachment by HVY on trademarks and copyrights and, in the alternative, the suspension of the enforcement of the

attachment. The attachment had been levied to recover claims awarded in arbitration against the Russian Federation. The questions at issue include whether the rights on which the attachment has been levied include recoverable assets of the Russian Federation and whether immunity from enforcement can be invoked. The Court awards the claim for lifting of the attachment as far as the attachment was levied against and under FKP and as far as it was levied on the copyrights on the design of the products that were produced and sold under the Trademarks. For the rest, the Court dismisses the claims.

2. Course of the proceedings

2.1 The course of the proceedings is evidenced by the following documents:
- the file of the proceedings before The Hague Preliminary Relief Court;
- the judgment rendered between the parties on 27 October 2020;
- the summons in the appeal proceedings of 20 November 2020;
- the statement of appeal of HVY, with exhibits;
- the defence on appeal of the Russian Federation;
- the defence on appeal of FKP;
- the submission of 20 January 2022 of the Russian Federation, with exhibits;
- the submission of 28 January 2022 of HVY, with exhibits;
- the submission of 31 January 2022 of FKP, with exhibits;
- the submission of 9 February 2022 of HVY, with exhibits.

2.2 The case was discussed during an oral hearing of the parties on 11 February 2022. The aforementioned counsel, FKP and HVY together with other lawyers, explained their positions during the hearing by means of written statements of the case submitted for that purpose. Subsequently, a ruling was requested and this Court gave a ruling.

3. Facts

In its judgment of 27 October 2020 under 2.1 through 2.15 the preliminary relief judge established certain facts that were undisputed on appeal. This Court will also base its decision on these facts. Briefly summarized, this case involves the following facts.

3.1 FKP is a Russian state enterprise whose activities include the exploitation of trademarks relating to Russian vodka.

3.2 HVY are three former shareholders of the Russian company OJSC Yukos Oil Company (hereafter: Yukos Oil Company), which has been liquidated.

3.3 On 7 May 2020, HVY levied an enforcement attachment against A) the Russian Federation and B) against and under FKP on:
"the Benelux trademark rights vested in the Russian Federation but held by FKP Soyuzplodoimport or registered in the name of FKP Soyuzplodoimport, including (...) ".
The following list mentions various Benelux word and figurative marks registered in the name of FKP

for class 32 and/or 33 (including for vodka and/or other drinks) and word and word/figurative marks with an international registration number insofar as the Benelux is designated (hereinafter also the ‘Trademarks’).

3.4 The attachment has also been levied on:
"all rights accruing to the Russian Federation under the Copyright Act 1912 relating to any of the visual elements of any of the aforementioned Trademarks (...) and all rights under the Copyright Act 1912 to the design of the products produced and sold under the Trademarks by or with the consent of FKP Soyuzplodoimport and/or the Russian Federation".

3.5 The attachment report includes the following notice:
"that the enforcing creditors are of the opinion that the rights hereby attached belong to the Russian Federation (...) and that FKP Soyuzplodoimport – to the extent that it is the holder of such rights – is only the administrator of such state property for the benefit of the Russian Federation. Notwithstanding this position, in order to comply with the legal provisions protecting the possible rights of "third parties", this attachment is/will also be notified to/served on FKP Soyuzplodoimport;".

3.6 The enforcement attachment is aimed at enforcing three arbitral awards rendered by the Permanent Court of Arbitration in The Hague on 18 July 2014, in which the Russian Federation was ordered to pay substantial amounts to HVY (hereinafter the ‘arbitral awards’). On 28 April 2020, The Hague Preliminary Relief Court granted leave to enforce the arbitral awards, which was served on the Russian Federation on 4 May 2020, with the request to comply with the arbitral awards.

3.7 On 10 November 2014, the Russian Federation summoned HVY to appear before The Hague District Court and requested that the arbitral awards be set aside. Those claims were awarded by the District Court. HVY appealed against that judgment. By final ruling of 18 February 2020, The Hague Court of Appeal set aside the judgment of the District Court and dismissed the claims of the Russian Federation. HVY appealed to the Supreme Court of the Netherlands against this ruling and the interlocutory ruling of 25 September 2018. By ruling of 5 November 2021, the Supreme Court set aside the rulings and referred the case to the Amsterdam Court of Appeal for further consideration and decision.

3.8 Part of the Trademarks were filed in the 1970s by a state enterprise of the Union of Soviet Socialist Republics (hereinafter the ‘USSR’), named 'VO Sojuzplodoimport and, after changing its legal form to a VVO in 1990, by VVO Sojuzplodoimport (hereinafter ‘VO/VVO’). The other Trademarks were registered by FKP. In 2006, the trademarks originally registered by VO/VVO were registered in the name of Spirits International N.V. (hereinafter ‘Spirits’). FKP and Spirits have been litigating in the Netherlands from 2006 to 2020 on the question of who is entitled to those trademarks. In these proceedings, Spirits contested FKP's right of action and argued that the Russian State had transferred the trademark rights to FKP in 2002 and FKP was entitled to initiate proceedings in its own name to claim these trademarks. Eventually, Spirits was ordered to register the trademarks filed by VO/VVO in the name of FKP. Those trademarks have been registered in the name of FKP since 7 July 2015. The relationship between FKP and the Russian State was decided by this Court in the aforementioned

proceedings in its interlocutory ruling of 24 July 2012:[1]
7. 16 First and foremost, this Court notes that this factually concerned a reallocation of (the administration of) state property of the Russian Federation..(...)

7. 19 In so far as Spirits also wished to raise the question for whom FKP is acting in the present proceedings, this Court considers as follows. In essence, FKP's assertions are that the VO trademark rights have always remained state property (...) and that the administration of this state property was vested in successive state enterprises (VO, VVO, FGUP and now FKP) (...) In short, the VO trademark rights are state property of the Russian Federation, which state property is managed by FKP (...).

3.9 An agreement was entered into between the Russian Federation and FKP on 15 May 2015 (hereinafter the '2015 Agreement') which stated that rights to, inter alia, the trademarks were transferred to FKP to the extent necessary.

4. The claims and the judgment under appeal

4.1 FKP claimed, principally, that the attachment be lifted and, in the alternative, that the enforcement of the attachment be suspended, with HVY being ordered to pay the legal costs.

4.2 At first instance, FKP based its claim on the following grounds:

- that the attachment is unlawful because both in the situation before the 2015 Agreement of operational management and in the situation after the conclusion of the 2015 Agreement, FKP is fully and exclusively entitled to the IP rights, from which creditors of the Russian Federation cannot seek recovery;
- that immunity from execution applies;
- that if the attachment is not lifted, a weighing of interests should lead to a suspension of the enforcement.

4.3 HVY put forward a reasoned defence. The Russian Federation, which had also been summoned, supported FKP's claims.

4.4 The preliminary relief judge lifted the attachment filed by HVY, ordering HVY to pay the legal costs. To this end, it considered that under the applicable law, the trademarks were already part of FKP's assets before the conclusion of the 2015 Agreement, from which claims against the Russian Federation could not be recovered. In doing so, the preliminary relief judge assumed that FKP had operational management of the trademarks during that period and that the resulting position of FKP and the relationship between FKP and the Russian Federation were as set out in grounds 4.10.1 to 4.10.9 of the judgment. Furthermore, the preliminary relief judge considered that no attachment had been levied on the copyrights as it is unclear which copyrighted works HVY had in mind when the notice of attachment was given.

5. The assessment

[1] ECLI:NL:GHSGR:2012:BX1515.

International jurisdiction

5.1 These proceedings concern an enforcement dispute between two parties based in the Russian Federation and parties based in Cyprus and the Isle of Man, respectively.[2] FKP's claim seeks the lifting of an enforcement attachment against both the Russian Federation and FKP. In view of the international nature of the case, this Court must determine of its own motion whether it has jurisdiction to hear the claims.

5.2 HVY are the defendants in this enforcement dispute. Hulley and Veteran are domiciled in Cyprus and therefore reside within the territory of the European Union. This means that to that extent the jurisdiction rules of the Brussels I-bis Regulation are (formally) applicable. Under Article 24(5) Brussels I-bis Regulation, the courts of the Member State of the place of enforcement have exclusive jurisdiction to enforce judgments. This provision covers both claims for lifting attachments and claims for suspension of enforcement, such as the ones at issue in this case. As the attachment has been levied in the Netherlands, the Dutch court has international jurisdiction to hear the claims. The latter also applies on the basis of Dutch general jurisdiction law as far as the case against Yukos, established on the Isle of Man, is concerned.

Urgent interest

5.3 It follows from FKP's assertions that also on appeal there is an urgent interest in its claims for lifting of the attachment or suspension of the enforcement.
HVY has also not, or at least not sufficiently, disputed the urgent interest in the claimed relief.

The consequences of the ruling of the Supreme Court in the setting aside proceedings for the attachment

5.4 In the setting aside proceedings instituted by the Russian Federation, the Supreme Court reversed the judgments of this Court of 25 September 2018 and 18 February 2020 on 5 November 2021 and referred the case to the Amsterdam Court of Appeal for further consideration and decision. According to FKP and the Russian Federation, this setting aside revives the operative part of the judgment of The Hague District Court of 20 April 2016 in which the arbitral awards were set aside. As a result, for the time being, HVY does not have leave to enforce those arbitral awards. Moreover, the leaves to enforce obtained on the basis of the final ruling of The Hague District Court have lapsed automatically by operation of law under Section 1062(4) Dutch Code of Civil Procedure, according to the Russian Federation and FKP. HVY have disputed the above.

5.5 The Court rejects the above argument of FKP and the Russian Federation. In the setting aside proceedings, The Hague District Court reversed the arbitral awards on the ground that there was no valid arbitration agreement (Section 1065(1)(a) (old) Dutch Code of Civil Procedure). On appeal, this Court ruled that no ground for setting aside existed in this respect and the grounds for cassation

[2] RF is a joined party on behalf of FKP.

directed against this were rejected by the Supreme Court. In its ruling of 5 November 2021, the Supreme Court only found ground for cassation I to be well-founded. According to this ground for cassation, this Court should not have rejected on formal grounds the argument that the arbitral awards are contrary to public policy (Section 1065(1)(d) (old) Dutch Code of Civil Procedure) because HVY is alleged to have acted fraudulently in the arbitration proceedings. After cassation and referral, only this assertion is still to be handled in the setting aside proceedings, which are now being conducted before the Amsterdam Court of Appeal. No court charged with the setting aside has yet ruled on the merits of this assertion. There are therefore pending setting aside proceedings, whereby the basic principle applies that these do not suspend enforcement (Section 1066(1) Dutch Code of Civil Procedure). The lapse of the leave for enforcement by operation of law on account of the setting aside of the arbitral award, as referred to in Section 1064(4) Dutch Code of Civil Procedure, is not at issue in this situation either.

Claim for lifting of attachments

5.6 **Grounds for appeal 1 to 8** of HVY challenge the admissibility of the claim for lifting of the attachment levied by HVY on the trademark rights and the copyrights. These grounds for appeal can be discussed together.

5.7 FKP[3] has based its claim for lifting of the attachment on the argument that FKP's assets, in which, according to FKP, the trademark and copyright rights are vested, are not eligible for recovery for third parties' claims against the Russian Federation. FKP is an independent entity with separate assets. In any case, after the 2015 Agreement, it is beyond doubt that the IP rights in question were transferred to FKP. Moreover, as the trademark owner, FKP is the holder of the trademark rights and is presumed to be the owner under Section 3:119 Dutch Civil Code. Therefore, according to FKP and the Russian Federation, HVY bears the burden of proof (in the sense of proof to the contrary) of its assertion that the Russian Federation is the right holder.

5.8 HVY has contested the above in their grounds for appeal. According to them, in its relationship with HVY, FKP cannot invoke the presumption of Section 3:119 Dutch Civil Code. Under Article 4.8bis(2) BCIP, the property law aspects of the trademark rights in question are governed by Dutch law. In order to determine whether the trademark rights form part of the assets of FKP or the Russian Federation, the relationship between the Russian Federation and FKP must be assimilated under Dutch law. Because the Russian Federation has retained far-reaching control over the trademark rights even after the 2015 Agreement, no legal concept can be considered within the Dutch numerus clausus of property rights. Also in the light of the content of FKP's charter, its position under property law in respect of the rights which it exploits cannot be equated with that of full owner under Dutch property law. The 2015 Agreement does not provide a legal basis for transfer because it is contrary to the *fiducia cum amico* prohibition. Consequently, FKP's position under Dutch law is only of a contractual nature. The trademark and copyright rights have always remained part of the assets of the Russian Federation and are therefore subject to recovery. In addition, according to HVY, the 2015 Agreement, which was never intended to be a real transfer of rights, is an invalid sham transaction

[3] To be on the safe side, the Russian Federation has not itself claimed lifting or suspension. Attachment has been levied against the Russian Federation and against/under FKP and only FKP is claiming lifting/suspension.

and/or FKP is abusing its rights by invoking its independent legal status.

Applicable law

5.9 This Court considers as follows. These preliminary relief proceedings are about the lifting of an enforcement attachment levied in the Netherlands on Benelux trademarks and Dutch copyrights for claims of three foreign parties. If recourse is had in the Netherlands against goods belonging to a debtor or a third party, Dutch attachment law is applicable. Under Section 3:276 Dutch Civil Code, creditors may, in principle, only recover their claim from the goods of their debtor. It has neither been stated nor has it become apparent that an exception to this rule applies. It is an established fact that only the Russian Federation is the debtor with respect to the claims for which the attachment has been levied. The dispute about the legitimacy of the attachment in question therefore focuses on whether or not the attached IP rights are part of the assets of the Russian Federation. This question should also be answered according to Dutch law.
In addition, also Article 4.8bis(2) BCIP[4] provides that the property law aspects of the Benelux trademark rights are governed by Dutch law.

5.10 Because the question regarding enforcement attachment levied in the Netherlands on goods belonging to the Russian Federation must be answered according to Dutch property law, the foreign legal relationship must, if necessary, be adapted to or assimilated with a comparable legal relationship under Dutch law. It must be assessed whether, with a view to the application of Section 3:276 Dutch Civil Code, the property law position of the Russian Federation with regard to the attached IP rights must be equated with that of a full rightholder under Dutch law in terms of content and scope.

Characteristics of the relationship between the Russian Federation and FKP

5.11 It is an established fact that FKP is one of many Federal Treasury Enterprises (FTEs) in the Russian Federation. This is a legal entity created by the Russian Federation. This legal form has its origins in the Soviet tradition of state ownership. FTEs hold state property allocated to them in 'operational management'. FKP is a 'legal entity' within the meaning of Article 48 Russian Civil Code (hereinafter the 'RCC') with its own separate assets. This Court further refers to the characteristics of an FTE as described in the judgment of the preliminary relief judge under grounds 4.10.1 to 4.10.9.

5.12 The Russian Federation and FKP entered into the 2015 Agreement on 15 May 2015. This agreement reads, inter alia, as follows:

"(...) Whereas (...) Party 1 (Russian Federation, Court) *was instructed to enter with Party 2* (FKP, Court) *into an agreement on transfer (alienation) of exclusive rights to the trademarks (...)*
1. "Party 1" transfers its entire exclusive and other rights to the assigned property to the extent such assigned property would not already lie with "Party 2" and "Party 2"accepts this property, which includes:
1.1. all rights to the trademarks originally registered in the name of the All-Union Association (...)

[4] Benelux Convention on Intellectual Property.

including but not limited to (...) Benelux, as well as international registrations of the trademarks (...)
1.3 all other intellectual property rights relating to the Trademarks held by "Party 1", *including but not limited to copyrights (...)*
2. The parties confirm that since its incorporation, "Party 2" had the rights to (i) use and dispose of the Assigned Property, (ii) register the Trademarks in its own name and (iii) bring suit to claim back any Assigned Property, cease infringements on the Assigned Property, recover for damages and compensation for infringement of the rights to the Assigned Property (...)".

5.13 The legal relationship between the Russian Federation and FKP is further determined by the charter of FKP, last amended in 2019 (hereinafter the '2019 Charter').
Article 14 of the charter reads: *The property of the Enterprise is in federal ownership and is held by the Enterprise under the right of operational management. The property complex of the Enterprise includes all types of property intended for its activities, as well as the rights to designations that individualise the Enterprise, its products, work, services (commercial designation, trademarks, service marks), and other exclusive rights. The Enterprise holds exclusive rights to the results of intellectual activity and means of individualization equated with them for which the Enterprise is registered as a right holder. (...)* In addition, under Article 24 opening words and subsection I of the 2019 Charter, FKP has the right *"with the approval of the Government of the Russian Federation to enter info transactions for the alienation of the exclusive rights to the results of intellectual activity and means of individualisation, including trademarks held by the Enterprise*".

5.14 FKP and the Russian Federation have not argued in a sufficiently concrete and substantiated manner that the circumstance that the alleged transfer took place in 2015 and that the current charter was not adopted until afterwards in 2019 is of importance in this sense under property law (in the sense that the 2015 Agreement should be assessed separately from the charter). Therefore, the assessment of whether under Dutch property law the position of the Russian Federation and FKP can be equated with that of the transferor or assignee, respectively, by virtue of transfer, will be made taking into account the combination of both arrangements.

5.15 Taken in isolation, the wording of the 2015 Agreement (*alienation, transfer, entire exclusive rights, assigned property, all rights to the trademarks*") indicates an overall transfer of the IP rights. Additionally, FKP has the full right of use and enjoyment over these rights and can enforce these rights against anyone. On the other hand, it is established between the parties that under the aforementioned provisions of the Charter, the Russian Federation has the right to seize the entirety of FKP's property complex, including all IP rights, and sell it to for example a newly created FTE, and also has the right to legally (with third-party effect) annul transactions on the disposal of IP or other rights concluded by FKP with third parties without the consent of the Russian Federation. The Russian Federation also had these powers under the previous situation of operational management.

5.16 In the opinion of this Court, the latter powers of the Russian Federation preclude equating the legal position of FKP in its relationship to the Russian Federation under Dutch property law with that of a full rightholder of the trademarks and copyrights. These are far-reaching restrictions on the power of disposal of FKP with third-party effect. If the Russian Federation makes use of its rights with regard to the property complex, FKP will lose its right to commercially exploit the trademarks and copyrights.

Under Dutch property law, a transfer in which the transferor reserves such property rights is not possible. An agreement to that effect cannot be a legal basis for transfer. This means that, under Dutch property law, the 2015 Agreement did not result in a legal transfer and FKP did not become the holder of the rights on the basis of that agreement. The fact that FKP is not or was not a full rightholder under property law also applies to the situation before the 2015 Agreement (of operational management) as the same restrictions applied in that situation. When judged according to Dutch property and attachment law, it must therefore be assumed in these preliminary relief proceedings that the rights form part of the assets of the Russian Federation which are eligible for recovery of the claims in question, and that FKP is not commercially exploiting these rights in its capacity as full rightholder.

5.17 In so far as FKP, as holder of the trademark rights, could invoke the presumption set out in Section 3:119(2) Dutch Civil Code – which is in dispute between the parties – it follows from the above that in these preliminary relief proceedings the contrary has become sufficiently plausible.

5.18 It follows from the above that no transfer of copyright has taken place and that, to that extent, FKP cannot be regarded as the full holder of any copyrights in the situation after and before the 2015 Agreement.
FKP cannot invoke Section 4 Copyright Act because, as a legal entity, it cannot be a creator (a legal entity has no personality which it can express by making creative choices), nor can it invoke Section 8 Copyright Act, since that section only governs the relationship between the legal entity making public works – which may be 'considered' as a creator – and the natural person/creator, but not the relationship between two legal entities which claim copyright. In so far as FKP – as the person who would have made the works public, for example with the trademark registrations – could nevertheless invoke the presumption set out in Sections 4 and/or 8 Copyright Act, this presumption is to be considered rebutted in light of the considerations mentioned in grounds 5.15 and 6.16.

5.19 The conclusion is that, assessed under Dutch property and attachment law, FKP does not commercially exploit (and filed as far as the Trademarks are concerned) the trademarks and copyrights as full rightholder and that these rights form part of the recoverable assets of the Russian Federation.

Abuse of rights and sham transaction

5.20 Because it must be assumed in these preliminary relief proceedings that the trademarks and copyrights form part of the recoverable assets of the Russian Federation, HVY's reliance on abuse of rights (the right to rely on the independent legal status of FKP under Russian law) no longer needs to be discussed. The same applies to HVY's argument that the 2015 Agreement should be disregarded because under Russian law it would be a void sham transaction. HVY put forward these defences in case it should be held that the 2015 Agreement had the effect of transferring trademarks and copyrights to the assets of FKP. However, as ruled above, under Dutch property law this is not the case.

Third-party attachment

5.21 In so far as the notification of attachment is fully or partly intended to levy enforcement third-party attachment under FKP, HVY, partly in the light of FKP's defence that not all the formalities prescribed in Section 475(1) Dutch Code of Civil Procedure for a third-party attachment on sanction of nullity (in particular the requirement set out in Section 475(1)(a) Dutch Code of Civil Procedure) have been complied with, have insufficiently explained how the attachment in question of intellectual property rights belonging to the Russian Federation held by FKP, which does not exploit these rights as the holder, could in this case be regarded as a legally valid third-party attachment.

Partial admissibility of the claim for lifting

5.22 Since the rights form part of the Russian Federation's recoverable assets, since it is an established fact that FKP is not a debtor in respect of claims for which the attachment has been levied, and since it has not been sufficiently argued or become evident that a legally valid third-party attachment has been levied, the claim to lift the attachment is allowable to the extent that it has been levied against and under FKP.

5.23 To the extent that FKP also claims lifting of the attachment of the rights (commercially exploited by FKP) which have been levied against the Russian Federation, FKP does so (according to the understanding of this Court) in its capacity as a material interested party. The considerations hereafter only relate to the lifting of the attachment levied against the Russian Federation, or the suspension of its enforcement.

Attachment of copyrights for the remainder

5.24 **Grounds for appeal 9** challenges the District Court's opinion that no legally valid attachment had been levied on the copyrights because it is unclear which copyrighted works HVY has in mind (ground 4.8 judgment).

5.25 This Court holds first and foremost that attachment on the copyright of a copyright holder established in the Russian Federation only relates to Dutch territorial copyright. HVY have not sufficiently disputed the latter. The notification of attachment also states that attachment has been levied on "all rights accruing to the Russian Federation under the 1912 Copyright Act (...)". Attachment can be levied on these copyrights in the Netherlands.

5.26 Under this ground for appeal, HVY argue that the preliminary relief judge wrongly considered that the copyrights were not validly attached because it was unclear which works HVY had in mind. The enforcement sale and further commercial exploitation of the trademark rights could be frustrated if the Russian Federation and FKP would retain their copyrights on the images on the vodka packaging and design of the products, according to HVY.
According to the Russian Federation and FKP, the notification of attachment does not contain the required precise description of the copyrights and no legally valid attachment has been levied on those rights.

5.27 This Court holds first and foremost that it has not been argued or become evident that the attachment exception set out in Section 2(4) Copyright Act applies, and the copyrights in question are therefore in principle subject to attachment. Copyrights may, in the cases in which it is susceptible of attachment, be executed under Section 474 bb Dutch Code of Civil Procedure in accordance with the rules for the execution sale of movable property (Sections 439 et seq. Dutch Code of Civil Procedure). Under Section 443(1) Dutch Code of Civil Procedure, the attachment will be levied by a bailiff's report containing an accurate description of the goods attached in accordance with their nature.

5.28 In the notification of attachment dated 7 May 2020 (Exhibit 1 to the summons), the copyrights on which attachment has been levied are described as follows:

"all rights under the 1912 Copyright Act accruing to the Russian Federation relating to any of the picture elements of any of the aforesaid Trademarks, including in particular the trademarks appearing on the labels of the Stolichnaya and Moskovskaya vodka, and all rights under the 1912 Copyright Act to the design of the products produced and sold under the Trademarks by or with the consent of FKP Soyuzplodoimport and/or the Russian Federation".

Preceding this text, the writ lists the Trademarks (with registration numbers) which have been attached and includes a picture of the figurative marks and word marks.

5.29 The description in the notification of attachment means that attachment has been levied on all copyrights on the visual elements of each of the aforementioned (registration numbers provided) figurative marks and word marks. To that extent, in the opinion of this Court, the notification of attachment contains a sufficiently accurate description of the copyrights on the visual elements of the trademarks depicted. However, in so far as the notification of attachment also contains the copyrights "to the design of the products that are produced and sold under the Trademarks by or with the consent of FKP Sojuzplodoimport and/or the Russian Federation", there is no sufficiently accurate description. On that basis, it is insufficiently clear, with a view to execution, which rights or works are covered by the attachment. Ground for appeal 9 succeeds in part.

Immunity from execution

5.30 In the event that the attached rights were to form part of the recoverable assets of the Russian Federation, FKP (supported by the Russian Federation) has invoked immunity from enforcement as set out in Article 19c of the UN Convention on Jurisdictional Immunities of States and their Property of 2 December 2004 (hereinafter the ‘UN Convention’).

5.31 The UN Convention has not yet been ratified by the Netherlands and has not yet entered into force, but the Netherlands is bound by its provisions insofar as these are considered customary international law. According to Article 19c of the UN Convention, assets of foreign states are not subject to attachment and therefore enjoy immunity from enforcement, unless and to the extent it is established that they are or were intended to be used by the State for other than non-commercial governmental purposes and are located in the forum area. Furthermore, Article 19c of the Convention provides that enforcement measures may only be taken against property related to the entity against

which the legal action was brought. The creditor seeking attachment has the obligation to furnish facts and evidence relating to whether the property is subject to attachment. Thus, the creditor will always have to provide information enabling it to be established that the property is being used, or intended, by the foreign State, in short, for purposes other than public purpose (Supreme Court 30 September 2016, ECLI:NL:HR:2016:2236). Immunity from enforcement is not limited to property whose immediate purpose is a public one. If proceeds from the attached property are intended to increase the national prosperity of a foreign state, this indicates in principle a public purpose (Supreme Court 18 December 2020, ECLI:NL:HR:2020: 2103).

5.32 According to HVY, the attached IP rights have a purpose other than a public purpose. The commercial nature of the attached property is evidenced by the fact that, unlike shares, no dividend is paid on the IP rights which flows into the public treasury. The trademarks and copyrights serve to distinguish the beverages sold under them and allow for enforcement action. That is the immediate and ultimate purpose of the IP Rights. The commercial character also follows from the commercial object of FKP as laid down in Articles 3 and 12 of the charter, according to HVY.

5.33 FKP and the Russian Federation have argued against this that it is not the content of the IP rights that is decisive, but the purpose of the (operating) income generated with them. That purpose is a public one because FKP pays at least part of its income to the Russian treasury.

5.34 In the opinion of this Court, FKP and the Russian Federation cannot successfully invoke immunity from enforcement in this case. The trademarks and copyrights concern property rights aimed at the commercial exploitation of alcoholic beverages. Trademarks and copyrights to the visual elements contained therein (which are covered by the attachment) are, by their very nature, intended for purposes other than a public one, namely to promote the commercial sale of goods bearing the marks. Furthermore, it is not disputed between the parties that under FKP's 2019 Charter, FKP must annually donate a portion of its net profits (25%) to the budget of the Russian Federation.[5] On request, FKP stated at the hearing that the remaining part (75%) of FKP's income is not surrendered to the Russian Federation but is used to cover the maintenance and costs of FKP. The Russian Federation and FKP have not sufficiently disputed that the proceeds to that extent – and thus for the most part – have a non-public purpose. Thus, the IP rights in question are assets that are particularly used or intended for use for other than non-commercial public purposes. In so far as the requirement of Article 19 UN Convention that the enforcement attachment must be directed against property "for the satisfaction of the claim that is the object of the proceedings" is a matter of customary international law, this requirement has also been met. The fact that there is a sufficient connection between the rights accruing to the Russian Federation and those exploited by FKP appears sufficiently from what has been considered above, in particular under 5.16. The reliance on immunity from enforcement therefore fails.

Claim for suspension of enforcement

5.35 Because the principal claim to lift the attachment against and under FKP is admissible, its

[5] See the defence on appeal of the Russian Federation under 17 (referring to Article 25d 2019 Charter). This percentage was confirmed by FKP at the hearing. See in detail the Muranov 1 report.

alternative claim to suspend the enforcement does not need to be assessed to that extent. This is different with regard to the claim for lifting the attachment levied against the Russian Federation. This Court considers the following in this respect.

5.36 In assessing this claim, this Court must weigh the interests in awarding or denying the claim for suspension of the enforcement of the attachment. It is true that, as also considered by the Supreme Court in its decision of 4 December 2020[6], for the time being it is sufficiently plausible that enforcement of the arbitral awards will entail a recovery risk. On the other hand, it cannot be expected that HVY will be able to collect a substantial part of the amounts awarded in the arbitral awards (by other means) during the course of the setting aside proceedings. Furthermore, an irrevocable final ruling in the setting aside proceedings may take some time. As far as FKP, in the context of the weighing of interests, still relies on its assertion that it is the holder of the attached rights and that there is immunity from enforcement, these assertions have already been rejected above. Also, the fact that FKP's position as the party commercially exploiting the attached trademarks and copyrights of the Russian Federation would be prejudiced if they were sold by execution does not outweigh HVY's interests in enforcement.

5.37 To the extent that for the assessment of the present application for suspension in preliminary relief proceedings the standard should be taken into account that applies to the application for suspension referred to in Section 1066(2) Dutch Code of Civil Procedure (in which the application for suspension, other than in this case, is submitted to the *court that rules on the setting aside*), the following applies. The starting point is that setting aside proceedings do not suspend enforcement of the arbitral award (Section 1066(1) Dutch Code of Civil Procedure). When deciding on the application for suspension, the court must form a preliminary opinion regarding the claim for setting aside the arbitral award and weigh the interests of the parties (Supreme Court 4 December 2020, ECLI:NL:HR:2020:1952).

5.38 In the setting aside proceedings, the Supreme Court, in its decision of 4 December 2020, rejected an application for suspension made at the time by the Russian Federation. In that regard, with regard to the reliance on Section 1065(1)(e) Dutch Code of Civil Procedure to be assessed in the setting aside proceedings, the Supreme Court considered that the chance that the relevant part of the ground for cassation would succeed – and that this would subsequently, after referral, lead to setting aside the 'Yukos awards' – does not justify a suspension of the enforcement. In its ruling of 21 November 2021, the Supreme Court subsequently decided, on formal grounds, that this Court should not have left these grounds for setting aside unassessed and referred the case to the Amsterdam Court of Appeal for further consideration and decision. This decision does not alter the provisional opinion given in the ruling that the chance that these grounds for setting aside will not lead to a setting aside of the arbitral award in the proceedings does not justify a suspension of enforcement. In the present proceedings, FKP has also not sufficiently explained or substantiated that a different view can or should be taken on this at present. For the rest, the grounds for cassation have been rejected by the Supreme Court. The grounds for setting aside the arbitral awards which, according to these grounds for cassation, were wrongly rejected by this Court, can therefore no longer lead to setting

[6] Ground 4.20 decision Supreme Court 4 December 2020, ECLI:NL:HR:2020:1952.

aside the arbitral awards.

Conclusion, declaration of provisional enforceability and legal costs

5.39 It follows from the foregoing that grounds for appeal 1 to 8 are well-founded, but that this only leads to setting aside the judgment in so far as it has lifted the attachment against the Russian Federation. The claim for lifting the attachment is partly admissible, namely to the extent that it has been levied against and under FKP. The claim for lifting the attachment levied against the Russian Federation is not admissible, except in so far as it has been levied on the copyrights on the design of the products produced and sold under the Trademarks by or with the consent of FKP and/or the Russian Federation, as ground for appeal 9 is successful to that extent. The claim for suspension of enforcement will be dismissed.

5.40 In the event that the judgment is not upheld or not entirely upheld, FKP has requested that the ruling not be declared provisionally enforceable. However, for this purpose it refers to arguments that have already been rejected above in connection with the application for suspension of enforcement. This Court therefore rejects this request.

5.41 Since both parties have been partly ruled against, the costs of both instances are set off as stated below.

6. The decision

This Court:

sets aside the judgment of The Hague District Court in preliminary proceedings and gives judgment again as follows:

lifts the attachment by HVY as far as it has been levied;
- against and under FKP;
- on the copyrights on the design of the products produced and sold under the Trademarks by or with the consent of FKP and/or the Russian Federation;

sets off the costs of both instances in such a way that each party bears its own costs;

declares this ruling provisionally enforceable,

rejects any additional or other applications;

This ruling was rendered by the Right Honourable judges A.D. Kiers-Becking, M.Y. Bonneur and B.J. Lenselink; and was pronounced in open court in the presence of the clerk of the court on 28 June 2022.

[signature] [signature]

Certified as a true copy
The registrar of The Hague Court of Appeal

[signature]