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Judgment

AMSTERDAM COURT OF APPEAL

civil law and tax law division, team I

case number	: 200.303.103/01
case/cause-list numbers District Court of The Hague	: C/09/477160 / HA ZA 15-1 C/09/477162 / HA ZA 15-2 C/09/481619 / HA ZA 15-112

judgment of the three-judge division for civil matters of 20 February 2024

in the matter of

1 **VETERAN PETROLEUM LIMITED,**
having its registered office in Nicosia, Cyprus,
2 **YUKOS UNIVERSAL LIMITED,**
having its registered office in Douglas, lsle of Man,
3 **HULLEY ENTERPRSES LIMITED,**
having its registered office in Nicosia, Cyprus,
appellants,
respondents to the claims on a procedural matter,
attorney: *mr*. E.R. Meerdink, practising in Amsterdam,

v.

RUSSIAN FEDERATION,
having its registered office in Moscow, Russia,
respondent,

attorney under section 13 Attorneys Act: *mr*. J.M.K.P. Cornegoor, practising in Haarlem.

The appellants are hereinafter referred to separately as VPL, YUL and HEL, and jointly as HVY.

1. The case in brief

In arbitral proceedings, the Russian Federation was ordered to pay damages to HVY as (former) Yukos Oil Company shareholders for breach by the Russian Federation of obligations under the *Energy Charter Treaty (*hereinafter: ECT). This case involves the question of whether the arbitral awards should be set aside for procedural fraud. The case was referred to this Court of Appeal in an appeal in cassation (Supreme Court *5* November 2021, ECLI:NL:HR:2021:1645). The Court of Appeal finds that the Russian Federation did not invoke fraud in good time. Superfluously, the Court of Appeal finds that a number of documents invoked by the Russian Federation should have been submitted to the proceedings earlier, that the subject matter to which certain documents relate was not relevant to the arbitrators' findings and that invocation of fraud would not have been successful, because it is not plausible that the arbitrators would have reached a different decision. The conclusion is that the arbitral awards are upheld.

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2. The proceedings on appeal after referral

By judgment of 5 November 2021 (number 20/01595, ECLI:NL:HR:2021:1645), the Supreme Court referred this case to this Court of Appeal in the appeal in cassation between the Russian Federation as claimant in cassation/respondent in the conditional cross-appeal in cassation and HVY as respondents in cassation/claimants in the conditional cross-appeal in cassation against the judgments of the Court of Appeal of The Hague of 25 September 2018 and 18 February 2020 (case number 200.197.079/01).
The Court of Appeal refers to the judgment of the Supreme Court for the proceedings until the date of that judgment.

The course of the proceedings after referral is evidenced by:
- the deeds in which HVY summoned the Russian Federation to continue litigation,
- HVY's Statement on Appeal after Referral, with Exhibits HVY-588 through HVY-623,
- HVY's [*sic*[1]] Defence on Appeal after Referral, with Annexes A through E and Exhibits RF-526, RF-527 and RF-528,
- HVY's Deed of 9 August 2022, with Exhibit HVY-624,
- the Russian Federation's Deed also Statement of Claim in the motion, with Exhibits RF-529, RF-530 and RF-531,
- HVY's Statement of Defence in the motion, with Exhibits HVY-625 and HVY-626,
- HVY's Deed of 24 October 2023, with Annex 1,
- HVY's (second) Deed of 24 October 2023, with Exhibits HVY-627 through HVY-632,
- the Russian Federation's Deed of 24 October 2023, with Exhibits RF-535 through RF-538,
- the Russian Federation's Deed of 21 November 2023 (submitted on 10 October 2023) to increase the claim in the motion, with Exhibits RF-532, RF-533 and RF-534,
- HVY's Deed of 21 November 2023 (submitted on 3 November 2023), with Exhibit HVY-633,
- HVY's Deed of 21 November 2023 (submitted on 6 November 2023), with regard to the increase of claim in the motion,
- the Russian Federation's Deed of 21 November 2023 (submitted on 10 November 2023), with Exhibits RF-539 through RF-553.

The oral hearing was held on 21 November 2023. HVY had its case pleaded by *mr*. Meerdink, *mr*. T. Cohen Jehoram and *mr*. R.F.C. Keijser, attorneys practising in Amsterdam, and the Russian Federation by *mr*. Cornegoor. Both parties submitted speaking notes.

Finally, a judgment was requested.

[1] Translation note: the Dutch original judgment also mentions that this is HVY's submission, whereas it was actually a submission by the Russian Federation, as is also evidenced by the exhibit numbers mentioned.

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3. The facts

3.1. In this appeal, the Court of Appeal takes as its point of departure the facts stated by the Supreme Court in Section 3 of its judgment, in so far as still relevant here:

(i) HVY are, or at least were, shareholders in Yukos Oil Company (hereinafter: Yukos), an oil company based in the Russian Federation. Yukos was declared bankrupt on 1 August 2006 and was removed from the Russian trade register on 21 November 2007.

(ii) In 2004, HVY initiated arbitral proceedings against the Russian Federation under Article 26 of the ECT (hereinafter: the arbitral proceedings). In the arbitral proceedings, HVY sought an order requiring the Russian Federation to pay them damages. They based this on the Russian Federation having expropriated their investments in Yukos in violation of the ECT and having failed to protect those investments. The seat of arbitration was The Hague.

(iii) The arbitral tribunal appointed pursuant to the UNCITRAL Arbitration Rules (hereinafter: the Tribunal) ruled in three separate *interim awards* (hereinafter: the Interim Awards) on a number of preliminary defences raised by the Russian Federation, including in relation to the Tribunal's jurisdiction. In the Interim Awards, the Tribunal rejected certain defences of jurisdiction and admissibility and ruled with respect to other preliminary defences that the decision thereon would be stayed until the merits phase of the proceedings.

(iv) In three separate final awards (hereinafter: the Final Awards), the Tribunal rejected the Russian Federation's remaining defences of jurisdiction and admissibility, found that the Russian Federation had breached its obligations under Article 13(1) ECT and ordered the Russian Federation to pay HVY damages in the amount of USD 8,203,032,751 (to VPL), USD 1,846,000,687 (to YUL) and USD 39,971,834,360 (to HEL). Briefly put, the Tribunal ruled that the Russian Federation, by taking a number of tax and recovery measures against Yukos, had aimed for the bankruptcy of Yukos for no other purpose than to eliminate M. Khodorkovsky (the *chairman* of Yukos and one of its shareholders) as a potential political opponent of president Putin and to acquire Yukos' assets.

4. The proceedings in the fact-finding instances

4.1. In the present proceedings, the Russian Federation is seeking the setting aside of the arbitral awards (the *Interim Awards* and *the Final Awards).* To that end, the Russian Federation relied on various grounds for setting aside, including the ground that the arbitral awards were rendered contrary to public policy (Article 1065(1), firsts sentence and subsection e, (old) DCCP). The District Court granted the claim due to the absence of a valid arbitration agreement. HVY appealed the District Court's judgment.

4.2. On appeal, the Russian Federation stated in its Statement on Appeal, among other things, that the arbitral awards were also contrary to public policy because HVY

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committed fraud in the arbitral proceedings, including by submitting false statements, by withholding documents relevant to crucial points of dispute in the arbitrations and by making secret payments to one of HVY's principal witnesses. HVY subsequently objected to the admission of these (new) statements. By interim judgment of 25 September 2018, the Court of Appeal of The Hague ruled that this objection was well-founded in so far as it pertained to the Russian Federation's statements regarding fraud allegedly committed by HVY in the arbitration proceedings.
4.3. In the final judgment of 18 February 2020, the Court of Appeal of The Hague set aside the District Court's judgments and denied the Russian Federation's claim.

5. The proceedings in cassation

5.1. The Russian Federation appealed the interim judgment and the final judgment of the Court of Appeal of The Hague at the Supreme Court.

5.2. In its ground for cassation I, the Russian Federation raised, inter alia, the question of whether, as ruled by the Court of Appeal of The Hague, fraud in the arbitration proceedings can only be raised in revocation proceedings.

5.3. In its judgment of 5 November 2021, the Supreme Court answered this question in the negative. Subsequently, the Supreme Court noted the following:

‘5.1.14 Pursuant to Article 1064(5) (old) DCCP, the grounds on which the claimant wishes to base the setting-aside claim must be included in the originating writ of summons, on pain of forfeiture of the right to do so. In the judgment in Breeders/Burshan, the Supreme Court decided that Article 1064(5) (old) DCCP does not in itself preclude that, in response to the defence conducted in the further course of the proceedings, or in response to the decision of the first court, a more detailed elaboration of the grounds put forward in the originating writ of summons is provided on appeal, and, if necessary, an omission is remedied. However, on appeal, the possibility of elaborating the grounds already put forward in the writ of summons in more detail or of advancing new factual statements is not unlimited. This possibility is limited, inter alia, by the ordinary rules applicable to appeal proceedings, such as Article 130 DCCP. In addition, this possibility is limited by specific provisions prescribing when a particular setting-aside ground must be invoked (for the first time), subject to forfeiture of the right to invoke it at any later juncture. If such a provision is at issue, it will always have to be determined in a specific case whether a new factual or legal statement put forward in the course of the setting-aside proceedings is contrary to the purport of such a provision, also in view of the requirements of due process.

5.1.15 It follows from the findings above in 5.1.7-5.1.10 that the revocation proceedings give the party that is of the opinion that the arbitral award is based on fraud an additional possibility to challenge the award at law on that ground, which is particularly relevant if the other legal remedies, such as the setting-aside claim, have already been exhausted

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or the time limits for presenting it have expired without having been used when the fraud is discovered.
The purport of the fact that this possibility is limited in time by the time limit of three months after the fraud has become known (Article 1068(2), first sentence, (old) DCCP) is that, after that time limit has expired without having been used, the other party may assume that the arbitral award is no longer liable to setting aside as a result of revocation. This time limit therefore serves legal certainty. If, however, setting-aside proceedings are already pending in which it was argued in the writ of summons that the award, or the manner in which it was made, violates public policy, the other party is able to take into account the possibility that the arbitral award will not be upheld on that ground, and the interest of legal certainty will not be harmed if the reliance on public policy is elaborated in more detail in the course of the setting-aside proceedings by invoking fraud.
The purport of Article 1068(2), first sentence, (old) DCCP therefore does not entail that in setting-aside proceedings, too, fraud must be invoked within the time limit mentioned in that provision, on pain of forfeiture of the right to still do so later. Whether fraud can still be invoked in setting-aside proceedings at a later stage must otherwise be assessed on the basis of the rules set out above in 5.1.14.

5.1.16 With regard to the application of Article 130(1) DCCP, it will always have to be determined in a specific case whether advancing a new factual statement to substantiate a setting-aside ground already put forward in the writ of summons is contrary to the requirements of due process. Among other things, the reason for not putting forward the new statement at an earlier stage may be relevant in this respect.
Contrariety to the requirements of due process as referred to in Article 130(1) DCCP may exist, inter alia, if, in a case such as the present one, in which it is stated that the arbitral award was made under the influence of fraud, the aforementioned detailed elaboration is provided later than in the next statement or deed after the fraud becoming known.'

5.4. The Supreme Court rejected the Russian Federation's other complaints. With regard to the interpretation of certain parts of the ECT, the Supreme Court held that there is no reasonable doubt in that respect in so far as the interpretation is relevant to the decisions given and that it therefore sees no need to refer questions for a preliminary ruling as referred to in Article 267 TFEU (para. 5.3.14).

5.5. The Supreme Court concluded that only part 1 of the Russian Federation's ground for cassation succeeds. The challenged judgments of the Court of Appeal of The Hague were quashed for that reason.

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6. The assessment on appeal after referral

The scope of the dispute after referral

6.1. It follows from the foregoing that the Court of Appeal only has to decide whether the arbitral awards should be set aside due to fraud committed by HVY in the arbitration proceedings.

The questions to be referred for a preliminary ruling

6.2. The Russian Federation requires that the Court of Appeal still refer questions to the Court of Justice of the European Union for a preliminary ruling regarding the interpretation of the ECT. According to the Russian Federation, the Supreme Court was obliged to refer these questions and the Court of Appeal still has the power to do so.

6.3. The questions the Russian Federation wishes to be referred for a preliminary ruling do not relate to what is at issue in the proceedings after referral. After all, the questions do not pertain to the alleged fraud perpetrated by HVY and the related question of whether the arbitral awards should be set aside as a consequence of such fraud. A preliminary ruling on the questions proposed by the Russian Federation is therefore not necessary for the decision to be taken by the Court of Appeal after referral.
It follows from Article 267 TFEU that, for that reason, the Court of Appeal has no jurisdiction to refer the questions for a preliminary ruling. The Court of Appeal denies the request for referring questions for a preliminary ruling.

Was the fraud invoked in good time?

6.4. The Russian Federation argued for the first time on appeal that HVY committed (procedural) fraud in the arbitration proceedings, with reference to new documents. This fraud allegation was raised in the context of the ground for setting aside of violation of public policy and was designated as a further elaboration thereof. After referral, the fraud allegation was further developed, again with new documents being submitted. HVY opposed this, both before and after referral.

6.5. From what the Supreme Court held in paras. 5.1.14, 5.1.15 and 5.1.16 of its judgment in this case, it appears that the Court of Appeal must determine whether the fraud allegation and the further elaboration given to it by the Russian Federation remained within the limits of the ordinary rules applicable to the appeal, including the two-statement rule and the requirements of due process (Article 130(1) DCCP). With regard to due process, it is important, among other things, whether the further elaboration was given later than in the earliest statement or deed after the fraud became known. The Court of Appeal finds that the Russian Federation's invocation of fraud is contrary to due process and will explain its reasons below.

6.6. According to the Russian Federation's statements, the alleged fraud consists of submitting false statements, withholding documents relevant to crucial points of dispute in the arbitrations and making secret payments to one of HVY's principal witnesses.

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6.7. According to its pleading notes, at the oral hearing before the District Court on 9 February 2016 the Russian Federation put forward, inter alia:

> '29. These Oligarchs unlawfully acquired the shares in Yukos via their Bank Menatep in 1995-1996. They then unlawfully consolidated and subsequently retained their control over Yukos and its subsidiaries. (...)
> 30. Since the date of acquisition in 1995-1996, the Oligarchs have continuously retained control of the shares in Yukos. This has been shown by Professor Kothari and others. The many successive share transactions are presented in three diagrams in his expert report. The Oligarchs directed the long series of transactions at all times.
> (...)
> 46. The Arbitration File shows that HVY were not honest about the true origin of their shares in Yukos. They thus gave the impression that there were never any direct ties between Menatep and the Oligarchs on the one hand and HVY on the other, which is now belied by the new statements. The details of all this are also evidenced by the exhibits submitted for this hearing. These include statements by former confidants of, inter alios, Khodorkovsky and Lebedev, who had recently blown the whistle (Mr Anilionis and Mr Zakharov). Similar statements from others have since become available. The Russian Federation offers to hear all these individuals as witnesses.'

The Russian Federation has submitted the aforementioned statements and the expert report of S.P. Kothari for the purpose of the oral hearing. Kothari's report dates from 20 October 2015 (Exhibit RF-202).

6.8. It follows from the Russian Federation's statements that it discovered the alleged fraud in the arbitrations in 2015 and/or 2016, during the proceedings in first instance. The Russian Federation confirmed this in its Statement of Defence on Appeal of 28 November 2017:

> '634. It is telling that the Russian Oligarchs transferred their GML shares to a group of trusts in Guernsey in 2003. After the start of the Arbitrations in 2005, HVY repeatedly emphasised this fact to the Tribunal. They acknowledged that the Russian Oligarchs were indeed the ultimate beneficial owners of both GML and HVY.
>
> 635. However, HVY categorically denied many times that the Russian Oligarchs had control of HVY. They assert that they should not be considered HVY's legal owners. The legal ownership and control of HVY allegedly vested in the trustees of the Guernsey and Jersey trusts. They repeated this assertion in the Statement of Appeal. These assertions are patently incorrect, as is particularly evident from documents that have emerged since 2015.
>
> *(b)(ii) The Russian Oligarchs withheld crucial documents demonstrating control of HVY from the Tribunal*
>
> 636. In 2015 and 2016, it emerged that HVY's statements regarding the trustees' legal control of GML and VPL were demonstrably false.

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This is evidenced by a series of recently published documents and statements. New evidence shows that the Russian Oligarchs retained control of all HVY's relevant business activities. The Russian Oligarchs make all the important decisions regarding HVY's multi-million dollar financial transactions. The trustees in Guernsey and Jersey do not play any significant role in this.

637. A lawsuit is pending in New York in which business partners and employees of the Russian Oligarchs have lodged reciprocal claims against each other for fraud and embezzlement. The following evidence first came to light in these proceedings:
(...)

641. If HVY had not intentionally violated the orders of the ECT arbitrators to provide access to these documents, the arbitrators would never have erroneously concluded that "*Bank Menatep and the Oligarchs*" were actually "*a legal entity and persons separate from [HVY]."* The fact that the Tribunal's conclusion that HVY *"were separate from"* the Russian Oligarchs is incorrect is furthermore evidenced by the documents discussed above that came to light in 2015 and 2016 (see § 637 above).
(...)

664. While HVY make telling concessions that confirm their sham arrangement, they have repeatedly pointed out that they are nevertheless *"separate from"* the Russian Oligarchs, because they are allegedly not *controlled by* the Russian Oligarchs. For example, HVY state in their Statement of Appeal that *"HVY are (ultimately) owned and controlled by trustees under the laws of the United Kingdom".* HVY also stated to the District Court that *"ownership and control of HVY* <u>*is not*</u> *vested in Russian individuals, but (ultimately) in the respective trustees. These trustees are citizens of the United Kingdom and not Russia"* and *"that it* [is] *the trustees, and not the* [Russian] *beneficiaries, who own and control the trusts' assets."* As explained above, HVY and their attorneys made the same statements many times in public and in the ten years of arbitration.

665. However, these statements were false - and this can now be proven. This is established, in particular, in numerous new documents disclosed since 2015 by HVY's and the Russian Oligarchs' associates. As explained in Chapter 111.C(b) above, most of this convincing new evidence has become known as a result of ongoing legal proceedings in New York, where the Russian Oligarchs' associates are currently bringing a number of fraud and embezzlement claims against each other. As this new evidence shows, the Russian Oligarchs have always exercised control and continue to do so on all meaningful aspects of HVY's business activities, while the Guernsey and Jersey trustees are excluded from making important decisions. The trustees' supposed control of HGVY is completely illusory, despite HVY's repeated false statements to the contrary before the Tribunal, the District Court and this Court of Appeal.'

6.9. The Court of Appeal can only conclude from the Russian Federation's own statements that the Russian Federation was or has already become aware of the alleged fraud during the first instance proceedings. This is not altered by whether the Russian Federation later obtained

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additional documents and statements that can support the claim that fraud has occurred. The Russian Federation nonetheless did not invoke this during the first instance proceedings when elaborating the grounds for setting aside it had put forward. The Russian Federation has not put forward anything that demonstrates that it was unable to do so or that otherwise constitutes a sufficient reason for not doing so. The Court of Appeal finds it is contrary to due process to not give this elaboration until in the Statement of Defence on Appeal, although this could already have been done - and thus required - during the first instance proceedings. The remedy function of appeal does not entail that an untimely invocation of fraud must still be considered timely. The invocation of fraud should therefore be disregarded.

6.10. The foregoing shows that the arbitral awards should not be set aside due to fraud. A final decision has already been taken on the other grounds for setting aside put forward and their elaboration. This entails that the Court of Appeal will render the same decision as the Court of Appeal of The Hague did in its final judgment of 18 February 2020.

Superfluously: additional documents insufficient for a successful invocation of fraud?

6.11. Superfluously, the Court of Appeal will discuss whether, if the invocation of fraud had been admissible on appeal, its further elaboration could have been taken into account and/or whether the invocation of fraud would have been successful.

6.12. The Court of Appeal takes the following as its point of departure in this respect. Pursuant to Article 1065(1) opening words and at (e) DCCP, a claim for setting aside an arbitral award may be presented on the ground that this award is in violation of public policy.
The starting point is that Article 1065(1) opening words and at (e) DCCP should, by its nature, be applied with reticence. The reticence required from the civil court is in part related to the fact that proceedings pursuant to Article 1065 DCCP may not be used as a disguised appeal, and that the state court, in view of the general interest in the effective administration of arbitral justice, may only intervene on the ground of violation of public policy in clear-cut cases. To the extent relevant here, violation of public policy within the meaning of Article 1065(1) opening words and at (e) DCCP only exists if the substance or enforcement of the arbitral award violates mandatory rules of law of such a fundamental nature that compliance with such rules may not be prevented by limitations of a procedural nature (Supreme Court 12 April 2019, ECLI:NL:HR:2019:565, para. 4.3.2, Supreme Court 4 December 2020, ECLI:NL:HR:2020:1952, para. 3.3.1).

6.13. The Supreme Court also confirmed this standard in the judgment in this case:

> '5.4.9 Under Article 1065(1)(e) (old) DCCP, an arbitral award may be set aside on the ground that the award, or the manner in which it was made, violates public policy. According to established case law, it is only possible to set aside an arbitral award on this ground if the content or execution of the award would be contrary to mandatory law of such a fundamental nature that compliance with such rules must never be allowed to be hindered by limitations of a procedural nature.
> In the assessment of the setting-aside claim, the court must apply reticence; except in so far as this claim is based on the absence of a valid arbitration agreement or that the right to be heard has been violated. Setting-aside proceedings may not be used as a covert

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> appeal, since the general interest in effective administration of justice in arbitration entails that the civil court should only intervene in arbitral decisions in clear-cut cases. The grounds – rightly – do not complain that the Court of Appeal failed to recognise the standard presented above.'

6.14. In general, if an arbitral award was made as a result of fraud or deceit by one of the parties to the proceedings, this manner of formation will be contrary to public policy. When answering the question of whether, if there is fraud or deceit, the arbitral award was made as a result of such fraud or deceit, it must be considered whether it is plausible that the arbitrators would have arrived at a different decision had they been aware of the true state of affairs. If this is not plausible, it cannot be said that the arbitral award is based on fraud.

6.15. The invocation of fraud and the further elaboration given to it by the Russian Federation are based in particular on various documents and statements claimed by the Russian Federation to have been obtained after the arbitrations. According to the Russian Federation, these documents and statements show (as summarised by the Russian Federation in its Deed of 24 October 2023 at 32) that HVY, contrary to the truth, claimed that they were not controlled by so-called Russian oligarchs (hereinafter: Khodorkovsky et al.) and that HVY secretly made payments to their crown witness Illarionov.

(i) Additional documents on control

6.16. The main documents relied on by the Russian Federation in these proceedings with regard to control of HVY are a shareholders' agreement *(Shareholders Agreement)* of 5 April 2000 between Khodorkovsky et al. as shareholders of Group Menatep Limited (GML) and a deed of accession *(Deed of Accession)* of 3 April 2003, in which Palmus Trust Company Limited (hereinafter: Palmus Trust) acceded to this shareholders' agreement. Palmus Trust had become the majority shareholder of GML in March 2003. The Court of Appeal finds that the Russian Federation submitted these documents too late and explains this as follows.

6.17. The Russian Federation first submitted these documents with its Reply Statement after Referral of 17 May 2022. The Russian Federation claims to have obtained the documents from a British journalist on 18 September 2018. Whether this is true has not been established and has not been made plausible. Only an uninformative letter of 25 April 2019 was submitted (Exhibit RF-527) from an employee of the Russian Federation ('Colonel of Justice S.A. Mikhailov'), stating that the Russian Federation

> 'obtained electronic documents relating to the so-called [redacted] archive", which was handed over to the Russian Federation by the English journalist [redacted]'.

6.18. Even if it is true that the Russian Federation obtained the documents (for the first time) on 18 September 2018, the appeal was pending on that date before the Court of Appeal of The Hague and the debate on the control of HVY played a significant role in that appeal. This debate was held, among other things, within the context of the *'unclean hands'* discussion. According to the Russian Federation, the control issue was relevant to both that discussion and its invocation of the ground for setting aside of violation of public policy, as the Russian Federation mentioned in, inter alia, its deed of 27 November 2018 (no. 9). In that deed, it also stated, inter alia (no. 24):

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'Of course, the Russian Federation acknowledges that its invocation of Article 1065(1)(e) DCCP (public policy ground 6) in connection with the unclean hands of HVY and its UBOs was 'new'. However, - briefly put - this is merely a new dogmatic label to its previous statements.'

6.19. The Russian Federation submitted new documents in the course of the appeal by means of various deeds. The documents submitted also pertained to the control of HVY. The Russian Federation even submitted an expert opinion by Martin Mann QC of 12 August 2019 into evidence (deed of 15 August 2019, Exhibit RF-D29) on Guernsey and Jersey trust law. The Russian Federation stated in this respect that said expert confirms that an analysis of the trust documentation is not sufficient in cases such as this. 'Courts in Guernsey and Jersey do not confine themselves to the paper reality, but also take account of circumstances and evidence showing who actually exercises control over a trust', the Russian Federation stated in its explanation thereto. This was therefore the perfect opportunity for the Russian Federation to enter all documents into evidence that it claimed to have 'discovered' and that showed that the actual control was different from the paper reality of the trusts. This also includes the shareholders' agreement and the deed of accession, in view of what the Russian Federation put forward in that respect after referral. These documents could then have been included in the debate on control and thus in the discussion of the unclean hands defence. Nevertheless, the Russian Federation chose not to submit these documents at that stage of the appeal.
The Russian Federation did not provide a proper explanation why it made that choice. In any event, the position taken by deed of 24 October 2023 that the Russian Federation could not 'immediately' invoke the documents received on 18 September 2018 because of the fact that proceedings were being conducted to assess the documents for confidentiality does not justify the conclusion that the Russian Federation was no longer able to submit the documents to the appeal before the Court of Appeal of The Hague.

6.20. The Court of Appeal finds that it is contrary to due process to subsequently submit these documents, for the first time, after cassation if the debate on control has been decided, solely for the purpose of the invocation of fraud. The documents should therefore be disregarded in the proceedings after referral. The Court of Appeal therefore leaves open the possibility that the conclusions attached by the Russian Federation to the documents are not as self-evident as the Russian Federation suggests. After all, according to its contents, the purpose of the shareholders' agreement is merely *'to avoid possible conflict of interest'* by transferring Khodorkovsky's voting rights relating to issues and shares in Yukos to Lebedev, taking into account that the shareholders, including Khodorkovsky, held all shares in GML and thus controlled Yukos, while Khodorkovsky was also director (CEO) of Yukos.

6.21. There is also another reason why the significance of the shareholders' agreement with the deed of accession need not be (further) examined. This is because the control issue was not relevant to the arbitrators' decision.

6.22. The arbitrators discussed the control issue in the Interim Awards. Below, the Court of Appeal will refer to and quote from the Interim Award in the arbitration between YUL and the Russian Federation. The Interim Awards in the cases of HEL and VPL and YUL contain (virtually) identical parts, insofar as relevant here.

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6.23. Firstly, the arbitrators discussed control in the decision on Article 1(7) ECT. The arbitrators ruled that HVY qualify as investors within the meaning of Article 1(7)(a)(ii) ECT, regardless of who is the owner or has control (YUL nos. 411-417). With regard to the definition of "investment" under Article 1(6) ECT, the arbitrators arrived at the same conclusion (YUL nos. 430-436).

6.24. Control also came up in the discussion of Article 17 ECT (denial of benefits clause). The arbitrators ruled that, as the application of Article 17 ECT requires prior notification and the Russian Federation did not make such notification, the Russian Federation cannot successfully invoke Article 17 ECT (YUL nos. 456-461). In view of this judgment, the arbitrators found, briefly put, that there is no need to discuss the Russian Federation's statements on ownership and control, and the Russian Federation as a 'third state'. However, the arbitrators decided to reason their analysis and conclusions in this regard *"since the Tribunal was briefed extensively on the issues"* (YUL no. 461). This shows that the control issue was not relevant to the arbitrators' decision. The arbitrators confirmed this after presenting the relevant facts and the parties' statements and arguments regarding control (YUL no. 500):

> 'As noted earlier, the Tribunal's decision concerning the notification requirement in Article 17 renders the "ownership/control" issue moot for purposes of the admissibility objection raised by Respondent on the basis of the denial-of-benefits provision. The Tribunal considers that it is nevertheless its duty to set out its decision on ownership/control of Claimant, not only because of the substantial effort and resources the Parties expended in order to present the relevant facts, arguments and expert opinions on this issue, but also because it recognizes that the Guernsey Trusts (and the ownership/control structure more generally) may well feature in Respondent's arguments and allegations in any merits phase of this arbitration.'

This finding shows that the arbitrators still held open the possibility that the control issue and their analysis and conclusions on this topic could become relevant in the merits phase of the arbitrations. After an analysis of the facts presented and on trust law, the arbitrators arrived at the decision that GML and/or the trusts own and control HVY (YUL no. 537).

6.25. Incidentally, the Court of Appeal notes that the Supreme Court confirmed in its judgment of 5 November 2021 (paras. 5.3.8-5.3.10) that the Russian Federation did not apply Article 17 ECT, and that the control issue was not relevant in that context:

> 'Article 17 ECT (denial of benefits clause) gives contracting states the right to deny the protection of Part III of the ECT to investors who are established in a contracting party on formal grounds, but are to a large extent materially linked to a non-contracting state. This provision allows the contracting states to limit the scope of application of the ECT and thus confirms the broad scope of application of the ECT if (as is the case with the Russian Federation) Article 17 ECT has not been applied.
> Not only the context, but also the purpose of the ECT – which (also) encompasses the promotion of international cooperation in the field of energy and the promotion and protection of international investments (see also above in 5.2.14) – indicates that no requirements must be imposed on the foreign character of an Investment other than the

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> requirements ensuing from the wording of Article 1(6) and 1(7) ECT. This purpose is indeed served by broad, easily applicable and predictable definitions of the terms 'Investment' and 'Investor'.
> (...)
> There is no evidence of other sources showing that there are internationally recognised principles of international investment law entailing that every investment treaty – thus including the ECT – provides protection only to investments making an economic contribution to the host state, regardless of whether the treaty contains a definition of the term 'investment', or entailing that investment treaties provide no protection to companies wholly controlled by nationals of the host state.'

6.26. The arbitrators did not return to the issue of control in their Final Awards. The Russian Federation explicitly confirmed this in its Defence on Appeal after Referral (no. 160). In any event, the arbitrators did not express in the Final Awards that their analysis and conclusions on the control issue were still relevant to their decision on the legal questions of the merits phase of the arbitrations. Apparently, following on from a (fourth) opinion by Professor Mark Pieth, submitted by deed of 24 October 2023 (Exhibit RF-538), it was not until the oral hearing after referral on 21 November 2023 that the Russian Federation concluded from the words *'an entity and persons separate from the Claimants'* in no. 1370 of the Final Awards that the arbitrators' decision on the control issue was still relevant to the arbitrators' decision on the unclean hands defence (speaking notes nos. 30-32). In that passage, the arbitrators held:

> 'On the other hand, the alleged illegalities connected to the acquisition of Yukos through the loans-for-shares program occurred in 1995 and 1996, at the time of Yukos' privatization. They involved Bank Menatep and the Oligarchs, an entity and persons separate from Claimants, one of which - Veteran - had not even come into existence.'

6.27. However, it cannot be discerned from this passage and the wording used that this interpretation by the Russian Federation, if not too late to begin with, is correct. The interpretation was already rejected by the Court of Appeal of The Hague (para. 9.8.8 of the final judgment):

> 'There is no factual basis for the complaint that the Tribunal erred in deciding that HVY are to be seen as "separate" from Khodorkovsky et al. and are not "controlled" by the trustees in Guernsey and Jersey. In this respect, the Tribunal only found that a number of the alleged illegal actions took place before HVY became a shareholder and that, as a result, these were carried out by 'other parties', such as Bank Menatep or Khodorkovsky et al. Thus, the Tribunal decided nothing more than that Bank Menatep and Khodorkovsky et al. are other (legal) entities than HVY, and that HVY cannot be held liable for actions carried out by others before HVY became a shareholder. That decision, in so far as it could be tested in the present setting-aside proceedings, was correct, and has not been challenged by the Russian Federation, or at least not with sufficient substantiation.'

This decision was not successfully challenged in cassation. After referral, the Russian Federation did not put forward anything that nevertheless warrants a different interpretation of this passage.

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6.28. The Court of Appeal adds that it also does not show that the control issue was relevant to the arbitrators' decision on contributory negligence on the part of HVY, contrary to what the Russian Federation argues. After all, in the *Final Awards* in nos. 1607 and 1608 with regard to the accusations made by the Russian Federation against HVY (and Yukos), the arbitrators held

> 'that most of these "actions or omissions" cannot be considered as having materially contributed to Yukos' demise'.

Of four accusations, the arbitrators ruled that these

> 'have contributed to the destruction of Yukos, for which the Tribunal has found Respondent responsible'.

It can be concluded from these passages that the arbitrators' decision on contributory negligence on the part of HVY (and Yukos) was about whether and to what extent HVY's (and Yukos') actions or omissions contributed to Yukos' demise. In light of this, it is unclear, nor has it been sufficiently explained, that the control issue was relevant to this decision.

6.29. The Court of Appeal's conclusion is that the control issue was not relevant to the outcome of the arbitrations. This entails that it is not plausible that the arbitrators would have arrived at a different outcome if they had been aware of the documents that the Russian Federation claims to have obtained after the arbitrations and which, according to the Russian Federation, show that the actual control of the trusts was vested in Khodorkovsky et al. Consequently, it cannot be said that the arbitral awards were rendered as a result of deceit or fraud on the part of HVY.

6.30. In this state of affairs, the Court of Appeal no longer has any reason to discuss the other documents on which the Russian Federation bases its position on control and regarding which the Russian Federation states that it acquired them after the arbitrations. This concerns in particular - but is not limited to - documents that, according to the Russian Federation, demonstrate that Nevzlin took decisions for GML and YUL and thus exercised de facto control over these companies. Incidentally, it is the Court of Appeal's ruling that it does not follow from these documents and Nevzlin's alleged role in such decisions that Nevzlin had control over HVY. After all, even if control over HVY was vested in the trustees, this does not rule out that for certain transactions, others were authorised or unauthorised to act on behalf of GML or YUL. The documents submitted by the Russian Federation by deed of 10 October 2023 - and regarding which it has not made clear why they could not and were not submitted earlier - also concern the control issue and therefore no longer need to be discussed by the Court of Appeal.

(ii) Additional documents about witness Illarionov

6.31. Statements by various witnesses were submitted in the arbitrations and witnesses were also heard. One of these witnesses is Dr. Andrei Illarionov. The Russian Federation stated that a statement by David Godfrey in American proceedings had made it clear that, after the arbitrations, 'the Russian Oligarchs' secretly made payments to Illarionov. This involves the undisputed fact that a payment of USD 200,000 was made in March 2013 by the so-called Yukos-foundations to the Cato Institute, to which Illarionov was affiliated at the time. According to the Russian Federation, Illarionov was a star witness of HVY and the arbitrators' decisions are largely based on his testimony. The Russian Federation calls Illarionov, among other things, a fantasist with extreme ideas.

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6.32. In the Final Awards, the arbitrators presented the statements of HVY's witnesses in part VI.A. Nos. 141-143 provide a summary of Illarionov's statements. Nos. 144-147 provide a record of the hearing of Illarionov as a witness. The record also mentions the Russian Federation's criticism of Illarionov. Illarionov's witness statements were not used as evidence here, but merely presented.

6.33. Nos. 503-516 include quotes from Illarionov's witness statements in the introduction to part VII.B *(The Tax Assessments Starting in December 2003).* This introduction mentions a number of factual findings and Illarionov's witness statements were cited in relation to the circumstances surrounding the arrests of Khodorkovsky and Lebedev. There is no evidence that these quotes had any substantive impact on decisions taken by the arbitrators.
The evidence considered by the arbitrators that was of crucial importance is set out in nos. 517 et seq., as evidenced by the arbitrators' findings in no. 516. Illarionov's statements are not part of that evidence.

6.34. The subject of Chapter VII.C is *'Harassment, Intimidation and Arrests'.* In nos. 767-768, reference was made to statements by Illarionov. There is no evidence that these references were the basis for the further decisions taken by the arbitrators. In no. 776, the arbitrators refer briefly to Illarionov's statement that he told Khodorkovsky that the latter was in danger. In no. 780, the arbitrators refer to answers Illarionov gave the arbitrators on questions about a conversation with Putin after Khodorkovsky's arrest.
The references are of minor significance in the greater whole of the facts described by the arbitrators. It is unclear how these references could have had any impact on the outcome of the arbitrations, nor did the Russian Federation sufficiently explain or specify this.

6.35. In nos. 796-797, the arbitrators stated that, according to the Russian Federation, HVY subscribe to a conspiracy theory and that HVY's witnesses have a financial interest in the outcome of the arbitrations. In no. 798, by way of example, the arbitrators describe the Russian Federation's criticism of Illarionov's statements and credibility. However, the arbitrators believe that he is credible and convincing (no. 799). This specifically concerns Illarionov's statement about a special unit allegedly set up by the Russian Federation to bring about the downfall of Yukos. The evidence discussed in this part of the Final Awards still concerns the campaign of harassment and intimidation. It can be concluded from the arbitrators' findings that Illarionov's statements are a piece of this evidence, but in view of the other evidence, it is unclear to the Court of Appeal how the arbitral award could have turned out differently without this piece, nor did the Russian Federation (sufficiently) explain this. This is all the more true as the arbitrators found in no. 811:

> 'The treatment of Yukos senior executives, mid-level employees, in-house counsel, external lawyers and related entities as described in this chapter support Claimants' centra! submission that the Russian authorities were conducting a "ruthless campaign to destroy Yukos, appropriate its assets and eliminate Mr. Khodorkovsky as a political opponent."'

This does show that the arbitrators certainly did not, or at least not to a major extent, rely on only Illarionov's statements about the special unit or otherwise.

6.36. In part VII.F, the arbitrators discussed the Yuganskneftegaz (YNG) auction in December 2004, Yukos' 'crown jewel'. The arbitrators first described the course of events

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(briefly put: preceding tax assessments that negatively impacted the price, an auction held in a Moscow suburb on a Sunday afternoon, with only two prospective buyers, one of which was Baikal, which company had been set up shortly beforehand and was designated the winner after ten minutes). This description is not based on Illarionov's statements.

6.37. In part VII.F.3.a, the arbitrators discussed the auction price. No. 1013 merely shows Illarionov's response to questions from the Russian Federation about his claim about the price. No. 1016 describes the day of the auction, Sunday, citing Illarionov's statement:

> 'highly unusual ... since the Russian Government agencies are closed on Saturdays and Sundays'.

The low turnout at the auction was discussed in no. 1019. It states the answer given by Illarionov to questions from the Russian Federation about HVY's media campaign surrounding the auction, namely

> 'he answered that Gazpromneft and Baikal probably "felt very well protected, maybe by the Russian Government".'

In no way can it be deduced from the arbitrators' findings that Illarionov's statements had any - let alone any substantive - impact on their decisions regarding the auction or the auction price. According to the findings in the Final Awards, the special circumstances of the auction and the decisions of other arbitral tribunals to which the arbitrators refer (RoslnvestCo and Quasar), as well as the conclusion drawn by the arbitrators that Baikal was a sham entity (part VII.F.3.b), carry much more weight.

6.38. At VII.F.3.c, the arbitrators then examined the question of what Yukos' chances of survival would be without YNG. In no. 1038, the arbitrators conclude that the loss of YNG

> 'was the point of no return for the survival of Yukos', '(o)n the basis of the totality of the evidence and, in particular, the testimony of Messrs. Misamore and Theede and Dr. lllarionov'.

This is then further elaborated. According to no. 1041, contribution to the proof of Illarionov's statement is no more than the fact that he

> 'described the confiscation of YNG as the "culminating point of th[e] attack" on Yukos, following which the Russian authorities took no further steps to satisfy Yukos' alleged tax debts. Such conduct was inconsistent with a genuine attempt to collect taxes.'

This contribution by Illarionov is little more than an opinion on facts that the arbitrators found to be true. The fact that the sale of YNG was the fatal blow to Yukos already became clear from the manner in which the loss of YNG in the relevant period was described (no. 1042 with footnote 1299) and was already mentioned in ECtHR judgments and rulings in the Quasar arbitration, to which the arbitrators refer (no. 1043). The reference to the quote from Illarionov's statements adds nothing to this, or at least nothing substantive.

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6.39. Lastly, the Final Awards do not show that Illarionov's statements were otherwise of any significance to the arbitrators' decisions.

6.40. Based on the arbitrators' findings in the arbitral awards, the Court of Appeal concludes that Illarionov's statements in the bigger picture of evidence and established facts are of such minor significance that it is not plausible that the outcome of the arbitrations would have been different without those statements. In light of this, insufficient arguments were put forward to justify the decision that the knowledge of payments by the Yukos-foundations to the Cato Institute in connection with Illarionov's appearance as a witness would have led the arbitrators to a different outcome of the arbitrations.

Conclusion

6.41. The conclusion is thus that even if the Russian Federation had relied on fraud in good time by way of elaborating the ground for setting aside of violation of public policy, the arbitral awards would not have been set aside.

Article 843a DCCP motion

6.42. After referral, the Russian Federation lodged, and later increased, by deed a motion, the purport of which is to order HVY to submit additional documents into the proceedings. According to the Russian Federation, these documents pertain to the shareholders' agreement, the deed of accession, an assumed shareholders' agreement concluded subsequently, and to the Palmus Trust, or at least to the control of HVY in general.

6.43. It follows from what the Court of Appeal found with regard to the late invocation of fraud, the shareholders' agreement with the deed of accession and control that the Russian Federation has no legitimate interest in obtaining the requested documents, in so far as they already exist and HVY have access to such documents.
The motion should therefore be denied. For that reason, the Court of Appeal does not need to discuss HVY's defence regarding the inadmissibility of the motion and its increase.

Conclusion

6.44. Given this state of affairs, the Court of Appeal no longer needs to discuss the other arguments put forward by the parties. The offer to provide further evidence made by the parties is also no longer relevant. They have not offered to prove any specific facts or circumstances that could lead to a different decision on the invocation of the alleged fraud.

Costs of the proceedings

6.45. As the unsuccessful party, the Russian Federation will be ordered to pay the costs of the proceedings of both instances.

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6.46. The Court of Appeal of The Hague estimated the costs of the first instance and the appeal before cassation, specifically:
- with regard to the first instance at € 11,592 for disbursements and at € 38,532 for attorney's fees,
- with regard to the appeal at € 795.75 for disbursements and at € 44,008 for attorney's fees.
The Court of Appeal has no reason to deviate from this and therefore adopts the estimate.

6.47. The Court of Appeal sets the costs of the appeal after referral as follows:

- costs of writ	€ 98,52
-attorney's fees main action	€ 24,236,- (rate VIII, 4 points)
-attorney's fees procedural claim	€ 1,774,50 (rate II, 1.5 points)
total	€ 26,109.02

7. Decision

The Court of Appeal:

in the main action:

7.1. sets aside the judgment of the Court of Appeal of 20 April 2016, and adjudicating anew:

7.2. denies the Russian Federation's claims;

in the motion:

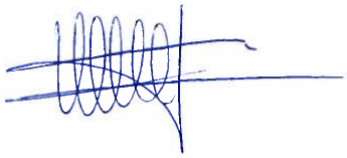
7.3. denies the Russian Federation's claims;

also in the main action and the motion:

7.4. orders the Russian Federation to pay the costs of the proceedings in both instances and in the procedural action after referral, set to this day on the part of HVY at:
- € 50,124,- for the first instance,
- € 44,803,75 for the appeal before cassation,
- € 26,109,02 for the appeal after referral,
- € 173,00 for additional fees,
plus € 90,00 in additional fees and the costs of the writ in the event of service of this judgment, plus statutory interest on all amounts if the costs order is not satisfied within fourteen days after this judgment is handed down or the subsequent costs become due;

7.5. declares this judgment immediately enforceable with regard to the costs order.

This judgment was rendered by *mr*. W.J.J. Los, *mr*. M.C. Bosch and *mr*. Y. Steeg-Tijms and pronounced in public court on 20 February 2024.



mr. L. Alwin