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The Hague Court of Appeal  
Hearing 24 September 2019  
Case-list number: 200.197.079/01

**ORAL ARGUMENT RE MORDOVIA**

**PROF. M.E. KOPPENOL-LAFORCE**

in the matter of:

the **Russian Federation**, respondent,  
originally claimant in the setting aside  
proceedings and defendant in the  
arbitrations

versus:

**Hulley Enterprises Limited, Veteran  
Petroleum Limited** and **Yukos Universal**

**Limited**, appellants, claimants in the  
arbitrations (hereinafter: “HVY”)

counsel: M.A. Leijten and A.W.P.

Marsman

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**Table of Contents**

**I. LACK OF REASONING; VIOLATION OF PUBLIC POLICY WITH REGARD TO  
THE MORDOVIA AWARD .....4**  
A. Reasoning Ground 2: Mordovia .....4

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**DISTINGUISHED MEMBERS OF THE COURT OF APPEAL,**

**I. LACK OF REASONING; VIOLATION OF PUBLIC POLICY WITH REGARD TO THE MORDOVIA DECISION**

**A. Reasoning Ground 2: Mordovia**

1. The Tribunal ruled that the tax assessments related to Yukos' Mordovian companies were not *bone fide*. According to the Tribunal, no evidence was put forward to prove that these companies were sham entities:

"The Tribunal has not found any evidence in the massive record that would support [the Russian Federation's] submission that there was a basis for the Russian authorities to conclude that the entities in Mordovia, for example, were shams."<sup>1</sup>

2. These annulment proceedings do **not** concern the question of whether the Russian Federation's assertions in the Arbitrations, that the Mordovian entities were sham entities, were factually correct. Nor does it concern the question of whether the evidence provided was sufficient to prove that the companies in Mordovia were sham entities. Obviously, the Russian Federation is of the opinion that both of these questions must be answered in the affirmative. It is therefore irrelevant that HVY attempt to debate on the substance of these questions.
3. This debate is about the fact that the Tribunal's decision that there was NO evidence is incomprehensible and unreasoned in light of all of the information that clearly had been put forward by the Russian Federation. Therefore, a (well-founded) reasoning for that decision is lacking.
4. The fact that evidence has been provided in the arbitration file of the functioning of sham companies ("*shams*") in Mordovia on behalf of and under the management of Yukos in the arbitration file cannot reasonably

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<sup>1</sup> Final Awards, § 639 (**Exhibit RF-2 = iPad-2.g**). [emphasis added]

be disputed by HVY, and HVY rightly refrain from doing so. That settles it.

5. I will provide a brief explanation of this. The Russian Federation had introduced a large amount of evidence relating to the sham nature of companies in three regions, Lesnoy, Trekghorny and Mordovia. The substance of the evidence was identical for all of these three regions and led the Tribunal to the decision that there was fraud with regards to two of the three regions. I refer to the overview in DoA, § 1130, from which I quote a few examples of evidence which had been submitted in the Arbitration with regard to Mordovia and Lesnoy and Trekghorny. Examples of evidence regarding strawmen (impotent directors) in Mordovia and Lesnoy & Trekghorny:

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G.K. Zhukowa, director of OOO Makro Trade (Mordovia) – She had never heard of the existence of Makro Trade and has never even been to Mordovia.

Varkentin, director of Investproekt (Lesnoy & Trekghorny) – was mentally insane and was a street sweeper by profession.

- Examples of evidence which had been submitted with regard to companies having no assets/employees:

Fargoil (Mordovia) made profit of USD 4 billion with no fixed assets and had only 2 to 11 employees.

Business Oil (Lesnoy) made profit of over USD 126 million with only four computers and four printers as fixed assets and 6 employees.

6. The evidence relating to the companies in Lesnoy and Trekghorny *was* in fact assessed by the Tribunal. This concerned in particular witness statements by straw men<sup>2</sup>, reports by tax authorities, annual accounts and

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<sup>2</sup> See for a further explanation of the concept of "straw men" the unclean hands defence of the Russian Federation in relation to Articles 1(6) and 1(7) ECT.

internal documents in which Yukos itself already did not have any faith in the lawfulness of the sham schemes. This evidence, as presented by the Russian Federation, also referred to Mordovia.<sup>3</sup> The Tribunal has considered that evidence in its assessment with regard to Lesnoy and Trekhornyy, but for inexplicable reasons apparently not for Mordovia.<sup>4</sup> It came to the conclusion that sham schemes were indeed used in Lesnoy and Trekhornyy.<sup>5</sup> While the same evidence was available with regard to Mordovia, the Tribunal, however, ruled that no evidence had been submitted, even though the Arbitration case file is voluminous (also) with regard to Mordovia.<sup>6</sup> By ruling that not a shred of evidence had been introduced with regard to the shams in Mordovia, the Tribunal did not even rule on that evidence. The Tribunal has also not provided any reason for this incomprehensible - ill-founded - distinction in treatment of the evidence presented and available to it for all three regions.

7. The Tribunal's opinion on the Mordovian sham companies furthermore diametrically opposes decisions about this from two separate chambers of the ECtHR, which were confirmed by the Grand Chamber.<sup>7</sup> The main ECtHR decision was entered into evidence in the Arbitrations and cited on several occasions.<sup>8</sup> The Arbitrators were therefore familiar with this, including the conclusion that Yukos operated through sham entities in Mordovia. The correctness of the ECtHR conclusion on the sham nature of the Mordovian sham companies was recently also confirmed by the

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<sup>3</sup> See DoA § 1130 for an overview with references to the underlying evidence.

<sup>4</sup> See Final Awards, § 379 et seq (**Exhibit RF-2 = iPad-2.g**).

<sup>5</sup> See Final Awards, for example, §§ 488 and 1611 (**Exhibit RF-2 = iPad-2.g**): *"since those companies were acting in conformity with the relevant legislation in form only and not in substance." "(...) breached the legislation and abused the low tax regimes as the Tribunal has found Yukos did through the sham-like nature of some elements of its operations in at least some of the low-tax regions notably in the ZATOs of Lesnoy and Trekhornyy."*

<sup>6</sup> In this context, see inter alia, Summons § 527, Reply §§ 672-676 and DoA § 1119.

<sup>7</sup> See Defence on Appeal § 1121.

<sup>8</sup> First ECtHR Decision (**RME-3328 = Exhibit RF-03.2.C-2.3328 = iPad-2.g**), as cited countless times in Resp. Rej. on the Merits, inter alia in §§ 14, 15, 39, 110 and 112 (**Exhibit RF-03.1.B-5**).

Amsterdam Court of Appeal.<sup>9</sup> One would expect that when a Tribunal ignores the conclusions of the ECtHR, it would provide reasons for that decision. Such reasoning has not been provided and HVY cannot refer to anything in that respect. Obviously, this Court of Appeal cannot accept an arbitral award that ignores the decision of the ECtHR about exactly the same subject matter without any reasoning.

8. HVY are attempting to repair the lack of any reasoning or well-founded reasoning for the "not any evidence" decision.<sup>10</sup> In their SoD, HVY created reasoning and try to pass it off as reasoning by the Tribunal itself.<sup>11</sup> They derive from their own fiction that the Tribunal allegedly 'therefore' weighed the evidence regarding Mordovia but found it unconvincing. In their next submission, the Rejoinder, HVY admit that the Tribunal itself did not consider 'weighing' the evidence regarding Mordovia.<sup>12</sup>
9. In their wishful thinking, HVY rely heavily on the Tribunal's considerations regarding the statement by Oligarch Dubov. Allegedly, he informed the authorities of the Yukos tax structures in Mordovia.<sup>13</sup> However, that did not mean that the authorities were familiar with the fact that it concerned sham companies and sham constructions. After all, Oligarch Dubov testified as a witness in the Arbitrations that he was **unaware** of all of the obscure aspects of these tax structures and therefore

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<sup>9</sup> See Defence on Appeal § 597, with reference to Amsterdam Court of Appeal, 9 May 2017, ECLI:NL:GHAMS:2017:1695, grounds 4.25-4.27, which opinion was upheld in cassation.

<sup>10</sup> This, of course, concerns any reasoning of the opinion in § 639 of the Final Awards (**Exhibit RF-2 = iPad-2.g**).

<sup>11</sup> See Statement of Defence § II.640.

<sup>12</sup> Statement of Rejoinder, footnote 629. *"HVY note that the Russian Federation argued in this regard that "the Arbitral Tribunal [did] not state that it 'took into account' evidence that Yukos' Mordovian trading shells were shams, and concluded that this evidence was 'unconvincing', as HVY now contend". (Reply, par. 669). This is misleading. HVY never argued that the Tribunal stated this. Rather, HVY presented a summary of the Tribunal's evidentiary findings, including its observation that the documentary record presented by the Russian Federation was "selective and unfortunately incomplete" based on which HVY drew the conclusion that the Tribunal had actually taken this evidence into account, but in respect of which they established that it was unconvincing (Statement of Defense, ¶ II.641)."*

<sup>13</sup> Final Awards §§ 330-332 and 329 (**Exhibit RF-2 = iPad-2.g**).

did not make any statements in this regard to the tax authorities. HVY themselves fully confirm this.<sup>14</sup> Such a statement - even if interpreted differently by the Tribunal - still cannot remove the essence of the complaint that a lot of evidence had been introduced about the sham companies in Mordovia and therefore it could not be concluded that there was no evidence whatsoever available in this respect. That decision is contrary to the duty to provide reasons laid down in Article 1065(1)(d) of the Code of Civil Procedure. After all, the Final Awards do not state that the Tribunal found the evidence unconvincing.

10. HVY's arguments based on statements by persons testifying on their behalf, regarding the Russian authorities' conclusions that HVY committed large-scale tax fraud, are misplaced and irrelevant.<sup>15</sup> That HVY are now, in vain, attempting to substantively refute the assertions about the use of sham schemes in fact confirms that the key complaint is founded: in view of the large amount of evidence in the file, the Tribunal under no circumstances could have concluded that there was NO EVIDENCE WHATSOEVER had been introduced by the Russian Federation regarding the existence of the sham companies of Yukos in Mordovia. The conclusion that the taxes imposed in relation to the Mordovian entities are not *bona fide*, is based on a decision, without any reasoning, or in any event without any valid reasoning.
11. This is all the more serious, because the same facts regarding the Lesnoy and Trekghorny sham entities *did* lead the Tribunal to the conclusion that tax fraud had been committed. The Tribunal even reduced the damages by 25%, due to HVY's contributory negligence. By deciding that the Mordovian entities were no sham entities, the Tribunal also gave itself a

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<sup>14</sup> Summons § 322. Rejoinder, footnote 642: "*After all, it ensues from the witness statement of Mr Dubov that he did not mention the aforementioned aspects in his conversations with the Russian authorities because he had no knowledge thereof.*"

<sup>15</sup> See, for example, RF's Defence Motion of 25 June 2019, §§ 215-238.

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foundation on which it could build its conclusion that there was an alleged unlawful expropriation. In short, the consequences of this unsubstantiated and inexplicable conclusion that there was NO evidence AT ALL regarding the Mordovian sham entities are extremely big.

12. The conclusion is therefore that the Final Awards have to be set aside on the basis of Article 1065(1)(d) DCCP, due to the lack of any reasoning, or well-founded reasoning, for the decision that there was no evidence for the existence of sham entities in Mordovia incorporated and managed by Yukos. HVY cannot alleviate this problem in any way.