IN THE NAME OF THE KING CL-0212

Judgment

THE HAGUE APPEAL COURT

Civil law division

Case number : 200.250.714/01

Judgment of 11 June 2019

in the matter of

the Russian Federation,
seated in Moscow, Russian Federation,
applicant,
below: "the Russian Federation"
counsel: [*mr.*] R.S. Meijer of Amsterdam,

v.

1. **Everest Estate LLC,**
registered atin Kyiv, Ukraine,
2. **Edelveis-2000 PE,** registered
in Kyiv, Ukraine,
3. **Fortuna CJSC,**
registered in Dnipro, Ukraine,
4. **UBK-Invest CJSC,** registered in
Dnipro, Ukraine,
5. Niva-Tour LLC, registered in
Kyiv, Ukraine,
6. **Imme LLC,**
registered in Kyiv, Ukraine,
7. **Planeta PE,**
registered in Dnipro, Ukraine,
8. **Krim Development LLC,**
registered in Dnipro, Ukraine,
9. **AerobudPJSC,** registered in
Kyiv, Ukraine,
10. **Privatoffice LLC,** registered in
Dnipro, Ukraine,
11. **Dayris LLC,**
registered in Dnipro, Ukraine,
12. **Diline Ltd, LLC,**
registered in Oliva, Yalta, Krim,
13. **Broadcasting Company Zhisa LLC,**
registered in Kyiv, Ukraine,
14. **Privatland LLC,** registered in
Dnipro, Ukraine,
15. **Dan-Panorama LLC,**
registered in Dnipro, Ukraine,

16. **Sanatorium Energetic LLC,** registered in Dnipro, Ukraine,
17. **AMC Finansovyy Kapital LLC,** registered in Dnipro, Ukraine,
18. **AMC Financial Vector LLC,** registered in Dnipro, Ukraine,
19. **Alexander Valerievich Dubilet,** residing in Dnipro, Ukraine,

defendants,
collectively: "Everest et al."
counsel: [*mr.*] M. van de Hel-Koedoot of Amsterdam.

1. The proceedings

1.1 In an application which the Clerk's Office of this Court received on 4 December 2018 the Russian Federation sought primarily the suspension of the enforcement of an interim award of 20 March 2017 and of a final award of 2 May 2018 pursuant to Article 1066 paragraph 2 DCCP until an irrevocable judgment had been rendered with respect to the application seeking the setting aside of these awards. In the alternative, the Russian Federation sought an Article 1066 paragraph 5 DCCP order directing Everest et al. to furnish security. A large number of exhibits were attached to the application, specifically the writ of summons of 29 August 2018 seeking the setting aside and recall of the awards.

1.2 The Clerk's Office received Everest et al's statement of defence on 8 March 2019. This statement of defence also came with a large number of exhibits. The statement of defence included a conditional counter-claim. If the Russian Federation's application seeking suspension was to be awarded, Everest et al. sought an Article 1066 paragraph 5 DCCP order directing the Russian Federation to furnish security for the entire amount of the interim and final awards.

1.3 In a statement of defence that was also a deed of submission of exhibits which the Clerk's Office received on 2 April 2019, the Russian Federation responded to the statement of defence and to the counter-claim. Following objections from Everest et al. the Russian Federation withdrew its response to the statement of defence, with the result that the statement of defence only includes the reaction to the counter-claim and the deed of submission of exhibits.

1.4 The oral hearing was held on 9 April 2019. Both parties pleaded their case, the Russian Federation by its litigation counsel and by the latter's colleagues, [*mrs.*] M.E. Koppenol-Laforce and R.R. Verkerk, Everest et al. by their then litigation counsel [*mr.*] G.J. Meijer and by their current litigation counsel, [*mr.*] M. van de Hel-Koedoot. Both parties submitted both pleading notes and a paper version of a PowerPoint presentation.

2. Some facts

i. On 27 November 1998 the Russian Federation concluded a bilateral investment treaty with Ukraine (the "BIT"). This treaty includes, among other things, the following provisions:

Article 1
Definitions

For the purposes of this Agreement:

1. The term "investments" means any kind of tangible and intangible assets [which are] invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its legislation, including (...).

Any alteration of the type of investments in which the assets are invested shall not affect their nature as investments, provided that such alteration is not contrary to legislation of a Contracting Party in the territory of which the investments were made.

2. The term "investor of a Contracting Party" means:

a) any natural person having the citizenship of the state of that Contracting Party and who is competent in accordance with its legislation to make investments in the territory of the other Contracting Party;

b) any legal entity constituted in accordance with the legislation in force in the territory of that Contracting Party, provided that the said legal entity is competent in accordance with legislation of that Contracting Party, to make investments in the territory of the other Contracting Party. (...)

4. The term "territory" means the territory of the Russian Federation or the territory of Ukraine as well as their respective exclusive economic zone and the continental shelf, defined in accordance with international law.

5. The term "legislation of the Contracting Party" means legislation of the Russian Federation or Ukraine, respectively.

Article 9
Resolution of Disputes between a Contracting Party and Investor of the Other Contracting Party

1. Any dispute between one Contracting Party and an investor of the other Contracting Party arising in connection with investments, including disputes concerning the amount, terms, and payment procedures of the compensation provided for by Article 5 hereof, or the payment transfer procedures provided for by Article 7 hereof, shall be subject to a written notice, accompanied by detailed comments, which the investor shall send to the Contracting Party involved in the dispute. The parties to the dispute shall endeavor to settle the dispute through negotiations if possible.

2. If the dispute cannot be resolved in this manner within six months after the date of the written notice mentioned in paragraph 1 of this article, it shall be referred to: (...)

c) an "ad hoc" arbitration tribunal, in accordance with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).

3. The arbitral award shall be final and binding upon both parties to the dispute. Each Contacting Party agrees to execute such award in conformity with its respective legislation.

Article 10
Resolution of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties as to the interpretation and application of this Agreement shall be resolved by way of negotiations.

2. If a dispute cannot be resolved through negotiations within six months after written notice that the dispute has arisen, then at the request of either Contracting Party it shall be referred to an arbitration tribunal for adjudication (...).

Article 12
Application of the Agreement

This Agreement shall apply to all investments made by investors of one Contracting Party in the territory of the other Contracting Party, on or after January 1, 1992.

Article 13
Amendments

By their mutual consent, the Contracting Parties may make necessary amendments and addenda to this Agreement, which shall be formalized as relevant Protocols and shall constitute an integral part of this Agreement after each of the Contracting Parties has notified the other that the national procedures necessary for the Protocol to take effect have been completed."

ii. At the time at which the BIT was concluded the Crimea was part of Ukraine. On 6 March 2014 the Supreme Court of the Crimea voted to join the Russian Federation and to hold a referendum. This referendum took place on 16 March 2014. On the following day the Crimea was declared an independent state. On 18 March 2014 the new authorities signed a treaty between the Crimea and the Russian Federation, whereby the Republic of the Crimea was permitted to enter the Russian Federation and to form a new part of this Federation (referred to as the 'Annexation Treaty'). On 21 March 2014 the Russian Parliament approved the treaty.

iii. On 30 April 2014 the Crimean Republic adopted a decree declaring that all state owned properties owned by the State of Ukraine and all properties abandoned on the Crimea were to be ranked as property of the Crimean Republic.

iv. According to their propositions Everest et al. had items of property on the Crimea which were expropriated without compensation after 21 March 2014.

v. On 19 June 2015, Everest et al. filed an application based on the BIT for arbitration before the Permanent Court of Arbitration (PCA).

vi. In a letter of 12 August 2015 and in an accompanying letter of 15 September 2015 the Russian Federation made it known to the PCA that it considered any tribunal, however constituted, to lack jurisdiction to rule on the claims made against it.

vii. The tribunal was then constituted as follows: [*dr.*] A.R. Sureda, Presiding Arbitrator and Professor W.M. Reisman and Professor [*dr.*] R. Knieper, arbitrators. It was established that the arbitration was to be seated in The Hague.

viii. The arbitral proceedings then took place and were broken up into one part examining the arbitrators' jurisdiction and another part on the merits. On 20 March 2017 the tribunal rendered its 'Decision on Jurisdiction and held that it enjoyed jurisdiction. On 2 May 2018 the tribunal substantially awarded Everest et al's claims in its Decision on the Merits. These decisions are referred to in what follows as, separately, the Interim Award and the Final Award and, collectively, as the Awards.

ix. On 29 August 2018 the Russian Federation summoned Everest et al. before this Court and filed an application seeking the setting aside and recall of the Awards.

x. Everest et al. have commenced enforcement of the Awards in Ukraine.

3. The applications and the defence

3.1 In this action founded on application the Russian Federation seeks suspension of the enforcement of the Awards; or, failing that, an order directing Everest et al. to furnish sufficient security. The basis that it gives for its applications are that its claims seeking annulment and recall of the Awards are highly likely to succeed because:

i. a valid arbitration agreement is lacking, for which it puts forward six different reasons; and
ii. Everest et al. obtained their investments through fraud and corruption.

3.2 Against this Everest et al. raise a defence. Prior to this, they contend that this Court lacks

jurisdiction to hear the application seeking suspension.

3.3 In addition, should the application seeking suspension be awarded, Everest et al. seek an order directing the Russian Federation to furnish security.

3.4 The Russian Federation raises objection to this counter-claim, specifically relying on its state immunity.

Adjudication of the application

4. This Court's jurisdiction:

4.1 The arbitration is seated in The Hague. A claim seeking set aside or recall must be filed before this Court: Articles 1064a and 1068 DCCP.

4.2 Pursuant to Article 1066 paragraph 2 DCCP the court ruling on set aside may suspend enforcement or direct that security be provided.

4.3 Everest et al. contend that this Court has no jurisdiction to suspend enforcement of the Awards because no steps have been taken in the Netherlands to levy the Awards for enforcement. Referring to Article 1062 paragraph 1 DCCP they contend that a Dutch court may only suspend enforcement in the Netherlands. They look for support for their approach in the New York Convention. They refer to Article VI that declares that the national court of the country where enforcement is sought enjoys jurisdiction to suspend enforcement.

4.4 The first point to be noted in this adjudication is that, inasmuch as the subject is not governed by treaty, convention or regulation (Article 10:3 DCC), Dutch procedural law applies to these proceedings. In addition, the position is that the Russian Federation is not applying for an order either directing Everest et al. to lift the attachments levied abroad or prohibiting them from levying attachments abroad (pleading notes Russian Federation under 6).

4.5 Everest et al's position finds no support either in the wording of Article 1066 DCCP or in the corresponding relevant explanatory materials. These lay no restriction on the jurisdiction of the court before which the application seeking set-aside has been filed barring it from ruling on an application seeking the suspension of enforcement and certainly not barring it from ruling on the application filed by Everest et al. seeking the levying of the Awards for enforcement in the Netherlands.

4.6 The following serves to illustrate this. The *Parlementaire Geschiedenis* relating to the Arbitration Act shows that when drafting the new law the legislator specifically drew inspiration from the Uncitral Model Law for Arbitration (*Parlementaire Geschiedenis*, General, Explanatory Notes (pp. 17 et seq.) and Note following the Concluding Report (pp. 26 et seq.)).

4.7 The provision material in this connection taken from the Uncitral Model Law on Arbitration 1985 (as amended in 2006) reads as follows:

> "Article 36 Grounds for refusing recognition or enforcement
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
> *(a)* at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
> (i)(•••)
> (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made;
> (b)(...)
> (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (l)(c/)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide

appropriate security."

4.8 The provision quoted is virtually identical to Articles V and VI of the New York Convention which read:

"Article V

(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a)(...)

(c) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

4.9 The articles draw a distinction between an award being "suspended" (Article 36(1)(a)(v) of the Model Law and Article (1)(e) of the New York Convention) and a decision on the enforcement of an award being "adjourned". The provisions presuppose that suspension of an arbitral decision is sought from the court of the country in which, or according to the law of which, the arbitral decision was rendered, while adjournment on the decision on the enforcement of an award is performed by the court of the country in which there is a desire to levy the arbitral decision for enforcement. No linkage is made between the two courts enjoying jurisdiction save that the court last referred to may adjourn the decision on enforcement if, at the time at which this enforcement is sought, an application seeking set-aside or suspension of the award has been made. There is nothing to show that the court enjoying jurisdiction with respect to suspension, which is the court of the country in which the arbitral decision was made, may only proceed to that decision if enforcement is sought in that same country. Neither in the applicable Dutch articles of law nor in the provisions which were the inspiration for these articles is a restriction to be found of the kind that Everest et al. uphold. Based upon the above, Everest et al's reliance on this Court's lack of jurisdiction is dismissed.

4.10 In the alternative Everest et al. contend that the Russian Federation does not have an interest in suspension of the enforcement because it could have applied for suspension of the enforcement in Ukraine while awaiting the set-aside proceedings in the Netherlands, but has not done so (statement of defence, paragraph 36). Countering this, the Russian Federation contended that Everest et al. can levy fresh attachments. Everest et al. have not presented any arguments, substantiated or otherwise, rebutting this. This means that the Russian Federation's interest in its application seeking suspension is given.

5. Analytical framework governing suspension

5.1 This Court notes first that the degree to which the application seeking set-aside or recall is likely to succeed is of great importance to the grant or dismissal of the application. In addition the parties' interests in suspending, or not suspending, the enforcement must be weighed up in the light of the length of the set-aside and recall proceedings, the irreversible consequences of enforcement and the risk of recovery.

5.2 When adjudicating on the likelihood that the set-aside proceedings will succeed the court seized of the suspension application must observe restraint given that no review on the fundaments of the reasons relied upon for set-aside has been made in the suspension proceedings. While in the set-aside proceedings a court may be under duty to perform a full examination of whether there existed a valid

arbitration agreement, in the suspension proceedings all that needs to be established is whether there exists a high likelihood that this ground for set-aside will be endorsed.

6. Likelihood of success of the set-aside application

6.1 The Russian Federation relies on the lack of a valid arbitration agreement. It puts forward six reasons supporting its position.

6.2 The first three reasons concern the construction of the BIT and the arbitration provision it contains. According to the Russian Federation, the BIT does not apply to this question because (1) this is not an investment in “the territory of the other Contracting Party”, as Article 1(1), BIT requires if it is to apply, because the investment was made prior to 2014, when the Crimea was still part of Ukraine. Furthermore (2) the Russian Federation is of the view that Everest et al. did not make any "investment" because this concerned a domestic investment and (3) Everest et al. were not an “investor” because an “investor” must be authorised to make investments on the territory of the other Contracting Party and, under Ukrainian law, it was and is not possible to make a foreign investment in the Crimea. Ukraine does not regard the Crimea as foreign, so the Russian Federation contends.

6.3 The following considerations apply with respect to the first three arguments. This, in the field of the BITs, concerns an exceptional situation for which there are few precedents. Both parties have inserted authoritative opinions into the case which plead in favour of contradictory results. In the main proceedings the Russian Federation applied for leave to furnish a statement of reply because this concerns an exceedingly complicated question. For this reason alone the application seeking set-aside cannot be ranked in advance as being likely to succeed. A further point is that in the meanwhile five different arbitral tribunals in seven separate cases as well as the Swiss Federal Supreme Court have examined the question of whether the arbitrators enjoy jurisdiction on the basis of the BIT and the first two have adjudicated on, and dismissed, the Russian Federation's reasons. All the tribunals came to the conclusion that the BIT applies. For this reason as well the likelihood that the claim seeking the setting aside of the Awards will succeed is not unduly great.

6.4 As fourth reason for set-aside on the grounds of the lack of an arbitration agreement the Russian Federation contends that the investments made by Everest et al. are not in accordance with legislation, as required under Article 1(1), BIT, because the investments were obtained through corruption, fraud and duress.

6.5 A large share of the cases of corruption, fraud or duress referred to by the Russian Federation do not concern Everest et al. or the items of property they obtained that are the subject of the arbitration and cannot therefore serve to support the proposition that there were not any investments in accordance with legislation. This means that insufficient light has been shed on this ground for set-aside with respect to a large number of the defendants. This may be otherwise with respect to the Lazurny Bereg resort, the Nautilus complex, in which the items of property belong to defendants 1, 2 and 19, Everest and Edelveis and Dubilet are located and the Tavria resort. But even were it to be the case that all items of property referred to had been obtained by corruption, fraud or duress this would not suffice to result in the complete setting aside of the award but at the most this would serve as a reason for partial invalidity in which context the possibility of “remission” (Article 1065a DCCP) remains present. All of this means that at this stage this basis does not provide a sufficient reason for suspension of enforcement.

6.6 As fifth ground for the tribunal's lack of jurisdiction the Russian Federation contends that, under Article 10 of the BIT, the dispute concerning the territorial status of the Crimea must be decided prior to the arbitration.

6.7 It is this Court's provisional judgment [Translator: *onderdeel* read as *oordeel*] that Article 10 does not engender the tribunal's lack of jurisdiction. Article 10 of the BIT applies where there is a dispute between the contracting parties, these being the Russian Federation and Ukraine. The dispute in question is a case opposing the Russian Federation and Everest et al. For this reason Article 10 of the BIT does not apply. The dispute between the Russian Federation and Everest et al. may be resolved without issuing a judgment on the Crimea's territorial status. The Awards do not incorporate any ruling on this territorial status. A further point is that Article 10 does not lay down that any proceedings to be conducted based on Article 10 must precede Article 9 arbitration proceedings. Even were Article 10 to

apply its application does not therefore of itself furnish any ground for the arbitrators' lack of jurisdiction.

6.8 As sixth ground for set-aside the Russian Federation relies on the argument that the tribunal had no jurisdiction to hear the applications of Everest et al. in one and the same proceedings. The arbitration agreement did not permit of this. In addition in so doing the tribunal acted in breach of its engagement, so the Russian Federation contends.

6.9 The Appeal Court provisionally endorses the view of Everest et al. that Article 9 BIT also permits several investors collectively to file a claim against a treaty state.
The circumstance that the provision uses the terms “investor” and “investment” in the singular cannot be understood as a bar on the possibility open to investors to file a collective claim, subject to the proviso that the arbitrators are free to split up these claims where this is needed for these to be heard properly. No sufficient rebuttal has been put forward that counters the frequently encountered phenomenon of multiple investors collectively filing a claim in cases, or BIT cases, that are comparable to the arbitration proceedings.

6.10 The conclusion of the foregoing is that for the time being the Russian Federation has not put forward a colourable case showing that its application seeking set-aside has a high likelihood of success. For this reason the question of whether the Russian Federation may put forward the grounds discussed above so as to set aside the Awards or that it, as Everest et al. argue, has already forfeited its right with respect to a number, or a large number, of these reasons (within the meaning of Article 1052 paragraph 2 DCCP) need not detain this Court.

7. ____ Other grounds for set-aside

7.1 In its writ of summons seeking set-aside and recall of the Awards, the Russian Federation, alongside the grounds for set-aside discussed above, also relies on the Article 1065 paragraph 1 under c and under e DCCP grounds for set-aside.

7.2 In the suspension proceedings these grounds are neither mentioned nor explained at all. In paragraph 17 of its application the Russian Federation, after stating that it was specifically relying on the lack of a valid arbitration and on the fact that the Awards incorporated evident mistakes, added that this Court, for the purposes of adjudicating on the suspension sought, would be obliged to immerse itself seriously in the grounds for set-aside put forward by the Russian Federation and to this effect referred to the summons attached to the application.

7.3 Contrary to the Russian Federation's view, the grounds for set-aside which have not been explained at all in the application seeking suspension may not be included by means of such a general reference to the proceedings founded on a summons in the suspension proceedings. For this reason these grounds are not reviewed.

8. Likelihood of success of the recall application

8.1 The Russian Federation also claims that its application seeking recall has a high chance of success. It claims that the award rests either entirely or in part on deceit and on the holding back of documents discovered after the decision (Article 1068 paragraph 1 under a and b DCCP). According to it, Everest et al. wilfully held back information which the tribunal needed in order to come to a decision as to the lawfulness of the investments and to determine its jurisdiction.

8.2 Countering this, as their first defence Everest et al. contend that the Russian Federation did not file its application seeking recall within the three month term following discovery of the deception or the utterance of false documents (Article 1068 paragraph 2 DCCP).

8.3 The tribunal found (Final Award, 187) that the Russian Federation, did not take part in the proceedings but had indeed been notified of every step in the proceedings and that it had received all documents which the tribunal had obtained and made, including the hearing transcripts. The Russian

Federation does not deny that it received all the documents but argues that it only began its investigation into the file when the final award had been rendered and that analysis and checking of the documents had taken up a certain amount of time.

8.4 In the light of the fact that, quite some time before the final award, the Russian Federation had received the documents on which it is now basing its propositions of deception and the holding back of documents, it cannot now be said without further substantiation (and this is lacking) that it could not reasonably discover the deception during the arbitration proceedings. Nor has it put forward a sufficient case showing that it was only after the end of the arbitration proceedings that it became apparent that the documents were false. The provisional finding is therefore that the application seeking recall has been filed out of time, with the result that it is implausible that this application has a high chance of success.

9. ___ Analysis of the interests at play and conclusion

9.1 It follows from the above findings that it cannot now be found that the application seeking set-aside or the application seeking recall have a high chance of success. The application seeking suspension cannot therefore be granted on the grounds.

9.2 An evaluation of the parties' interests does not lead to a different finding. It is not in dispute that the attachments levied have in part been lifted. It has not become apparent that Everest et al. have commenced another action in enforcement at this point in time. Nor has substantiation been provided showing that the Russian Federation is exposed to a risk of recovery given that, in the absence of rebuttal, it has been argued that it may sell the items of property of Everest et al. that are at its disposal.

9.3 The conclusion is that, within the meaning of Article 1066 paragraph 2 DCCP, there exists no conclusive arguments for the suspension of the enforcement of the Awards.

9.4 The arguments set out above also dictate the fate of an order directing the provision of security that is sought in the alternative. In addition, in an evaluation of the parties' interests, the paucity of the arguments going in the direction of the position championed by the Russian Federation points to this.

10. Counter-claim of Everest et al.

10.1 Everest filed its counter-claim subject to the precondition that the application seeking suspension would be granted.

10.2 This condition has not been met. The counter-claim need not therefore be examined.

11. Costs

11.1 Everest et al. seek an order directing the Russian Federation to bear the costs they actually incurred. To this end they argue that the Russian Federation breached Article 21 DCCP.

11.2 In the framework of the suspension proceedings there is no scope for a determination of whether there has been a breach of Article 21 DCCP. In the established circumstances no reason can be found for an actual order for costs.

11.3 No objections have been raised on the side of the Russian Federation against the subsequent costs sought and the statutory rate of interest sought. They will therefore be granted in line with the formulation set out below.

Judgment

The Appeal Court:

- dismisses the application for suspension of the enforcement of the Awards;

- dismisses the application for the furnishing of security;

- directs the Russian Federation to bear the costs of the proceedings that are estimated until the date of this judgment on Everest et al's side at € 714 for the clerk's fee and € 3,222 in counsel's fees and at € 157 in supplementary counsel's fees, such to be increased by € 82 where, within fourteen days after out-of-court notification of this judgment, there has been no compliance with it and, subsequently, service of this judgment took place and rules that the amounts are to have been paid within 14 days after the day of judgment or, as for the sum of € 82, after the date of service, in the absence of which the sums are to be increased by the statutory rate of interest within the meaning of Article 6:119 DCC from the end of the above 14 day term;

- declares this award of costs immediately enforceable.

This judgment has been rendered by M.M. Olthof, D.A. Schreuder and P. Glazener and was pronounced in open court on 11 June 2019 in the presence of the clerk.